



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-009

Rock Networks Inc.

v.

Department of Canadian Heritage

*Determination and reasons issued
Wednesday, August 7, 2019*

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IN THE MATTER OF a complaint filed by Rock Networks Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

ROCK NETWORKS INC.

Complainant

AND

THE DEPARTMENT OF CANADIAN HERITAGE

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

The Canadian International Trade Tribunal determines that it will not award costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member

Tribunal Panel: Serge Fréchette, Presiding Member

Support Staff: Courtney Fitzpatrick, Counsel

Complainant: Rock Networks Inc.

Government Institution: Department of Canadian Heritage

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STATEMENT OF REASONS

1. On May 9, 2019, Rock Networks Inc. (Rock Networks) filed a complaint with the Canadian International Trade Tribunal (the Tribunal), under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ concerning a Request for Standing Offer (solicitation No. 10182239) (RFSO) issued by the Department of Canadian Heritage (Canadian Heritage) for the rental of two-way radio equipment, accessories, a network, and related technical support services for use at various events within the National Capital Region (e.g. Canada Day).

2. The Tribunal accepted the complaint, in part, for inquiry on May 13, 2019, pursuant to subsection 30.13(1) of the *CITT Act* and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

3. The Tribunal conducted an inquiry into the validity of the ground of complaint that was accepted for inquiry as required by sections 30.13 to 30.15 of the *CITT Act*.

SUMMARY OF COMPLAINT

4. In its complaint, Rock Networks alleged that Canadian Heritage erred in declaring its bid non-compliant with mandatory requirement No. 5 (MR 5) of the RFSO. Rock Networks also questioned whether Canadian Heritage evaluated the winning bidder's financial proposal in accordance with the terms of the RFSO.

5. As a remedy Rock Networks requested that the contract awarded to Bearcom Canada Corporation (Bearcom) be set aside, that Rock Networks' proposal be re-evaluated for compliance with MR5, and that the financial proposals be re-evaluated in accordance with the terms of the RFSO. In the alternative, Rock Networks requested compensation.

PROCEDURAL BACKGROUND

6. Canadian Heritage issued the RFSO on February 15, 2019, with a closing date of March 27, 2019. The closing date was later changed to March 29, 2019. The RFSO contemplated the award of one standing offer for an initial period of two years, with two additional one-year option periods.

7. Canadian Heritage received bids from Rock Networks and Bearcom. Between April 2 and April 4, 2019, Canadian Heritage conducted technical evaluations of these two bids, finding Bearcom's bid to be fully compliant with the mandatory requirements of the RFSO and Rock Networks' bid to be non-compliant with MR 5. Following the technical evaluation Canadian Heritage conducted the financial evaluation of Bearcom's proposal (the only compliant bid).

8. On April 8, 2019, Canadian Heritage advised Bearcom that it submitted the responsive bid with the lowest evaluated price and would be awarded a standing offer pending certain pre-award requirements contemplated by the RFSO. The standing offer was executed on April 26, 2019.

9. On April 24, 2019, Rock Networks wrote to Canadian Heritage to request an update on the status of the RFSO. On April 25, 2019, Canadian Heritage responded that the process was not finished and that the results were expected to be announced the following week.

1. R.S.C. 1985, c. 47 (4th Supp.) [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

10. On April 29, 2019, Rock Networks again wrote to Canadian Heritage requesting an update on the status of the RFSO. On April 30, 2019, Canadian Heritage wrote to Rock Networks advising that a standing offer had been awarded to Bearcom, and that the price of the standing offer (to 31 July 2021) was \$17,151.30. Canadian Heritage also advised Rock Networks that its bid was determined to be non-compliant with MR 5 and was therefore deemed non-responsive to the terms of the RFSO and disqualified.

11. That same day, Rock Networks wrote to Canadian Heritage with a number of questions regarding the evaluation of its bid as well as the financial evaluation of both bids. Canadian Heritage responded on May 1, 2019, as follows:

The evaluators were unable to find detailed proof in Rock's bid that there was a capacity to respond to emergency technical services. For example, they were not able to find descriptions of response delays or time lines and they were unable to find references to these kinds of details in the bid despite looking through all of the documents in your bid.

Rock's financial bid was not evaluated. As per Section 4.1.1.1 in our Request for Approval, "Offers that do not comply with each and every mandatory requirement will be considered non-responsive and be disqualified".

The price of the awarded SO for the initial period of the contract (until 31 July 2021) is \$17,151.30. The calculations were done as per the table in the Basis of Payment (Attachment 1 to Annex B on page 31) in the Request for Standing Offer, not including Replacement Cost per Unit excluding applicable taxes.

12. Rock Networks filed a complaint with the Tribunal on May 9, 2019.³

13. On May 13, 2019, the Tribunal informed the parties that it had accepted the complaint, in part, for inquiry. The Tribunal limited its inquiry to whether Canadian Heritage failed to evaluate the winning bidder's financial proposal in accordance with the terms of the RFSO. The Tribunal did not inquire into Canadian Heritage's evaluation of MR 5 as it related to Rock Networks' bid, as the Tribunal found no reasonable indication of a breach of the trade agreements with respect to that ground of complaint. At that time, the Tribunal indicated that it would provide complete reasons for not accepting this ground of complaint at the conclusion of the inquiry. Those reasons are set out below.

14. On May 27, 2019, Bearcom requested intervener status in this inquiry. Neither Rock Networks nor Canadian Heritage objected to this request, and the Tribunal granted intervener status to Bearcom on June 3, 2019.

15. Canadian Heritage filed its Government Institution Report (GIR) on June 10, 2019. With leave of the Tribunal, Rock Networks filed its comments on the GIR on June 27, 2019. Bearcom did not file any submissions in this inquiry.

16. Given that the information on the record was sufficient to determine the merits of the complaint, the Tribunal decided that an oral hearing was not necessary and ruled on the complaint based on the written record.

3. Rock Networks initially filed a deficient complaint on May 6, 2019. On May 8 and 9, 2019, Rock Networks filed additional information further to requests made by the Tribunal on May 7, 2019, pursuant to subsection 30.12(2) of the *CITT Act*. Therefore, in accordance with rule 96(1)(b) of the *Canadian International Trade Tribunal Rules*, SOR/91-499, and subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed on May 9, 2019.

RELEVANT PROVISIONS OF THE RFSO

17. The relevant provisions of the RFSO are as follows:

Section 3.1 Offer Preparation Instructions

...

Section I: Technical Offer

In their technical offer, offerors should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.

Section II: Financial Offer

Offerors must submit their financial offer in accordance with Annex “B”, the Basis of Payment. The total amount of Applicable Taxes must be shown separately, if applicable. Offerors must submit rates for each of the items listed in the Basis of Payment at Annex “B”.

...

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

...

4.1.1.1 Mandatory Technical Criteria

Each offer will be reviewed to determine whether it meets the mandatory requirements of the Request for Standing Offer. Any element of the Request for Standing Offer that is identified specifically with the words “must” or “mandatory” is a mandatory requirement. Offers that do not comply with each and every mandatory requirement will be considered non-responsive and be disqualified. The Mandatory evaluation criteria are described in in Attachments 1 (Mandatory Evaluation Criteria) and 2 (Minimum Equipment) to Part 4

4.2 Basis of Selection**4.2.1 Basis of Selection – Lowest Evaluated Price**

(a) Comply with all the requirements of the Request for Standing Offer; and

(b) Meet the mandatory technical criteria in Attachments 1 (Mandatory Evaluation Criteria) and 2 (Minimum Equipment) to Part 4

(c) Offers not meeting (a) or (b) will be declared non-responsive. The offer with the lowest evaluated price will be recommended for issuance of a Standing Offer. The evaluated price will be made based on the lowest evaluated price, as described in Attachment 1 to Annex B – Calculation of Price for Purposes of the Financial Evaluation.

...

Attachment 1 to Part 4**MANDATORY EVALUATION CRITERIA****M5**

The Offeror must demonstrate its capacity to respond to both emergency and non-emergency technical services for all equipment, accessories and network covered by the resulting standing offer.

ATTACHMENT 1 TO ANNEX B**CALCULATION OF PRICE FOR PURPOSES OF THE FINANCIAL EVALUATION**

As indicated in Part 4 – Evaluation Procedures and Basis of Selection, Article 2. Basis of Selection – Lowest Evaluated Price, the Offer with the lowest evaluated price will be recommended for issuance

of a Standing Offer. The evaluated cost below is based on maximum equipment requirements for any given event, an estimated number of hours of technical support services as well as the cost of replacing one of each of the listed equipment in the event it is lost or damaged.

The following table⁴ will be completed by the Standing Offer Authority in order to determine the lowest total evaluated price. It will be completed using the unit prices provided by the Offeror in Annex B, Basis of Payment for each potential period of the resulting Standing Offer.

For example, the weekly cost of Line item 1 that will be inserted in column B will be the weekly cost of the initial period + the weekly cost of Option 1 + the weekly cost of Option 2.

Lowest Evaluated Price = Sum of Columns C, E, and G for each potential period of the resulting Standing Offer

TRADE AGREEMENT OBLIGATIONS

18. The *Canadian Free Trade Agreement*⁵ requires procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation.⁶ Similarly, the *North American Free Trade Agreement*⁷ provides that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and requires that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.⁸

19. When assessing whether these procedures were followed, the Tribunal shows deference to evaluators and interferes only if an evaluation is unreasonable, e.g., if the evaluators have not applied themselves in evaluating a bidder's proposal, wrongly interpreted the scope of a requirement, ignored vital information provided in a bid, based their evaluation on undisclosed criteria, or otherwise failed to conduct the evaluation in a procedurally unfair way.⁹

4. See total cost evaluation table at Exhibit PR-2019-009-13, Vol. 1 at 44.

5. Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

6. Article 509(7) of the *CFTA* requires that a procuring entity provide suppliers all information necessary to permit them to submit responsive tenders, including the evaluation criteria, and Article 515(4) indicates that, to be considered for award, a tender must, at the time of opening, comply with the essential requirements set out in the tender documentation.

7. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

8. Articles 1015(4)(a) and (d) of *NAFTA* provide as follows: "An entity shall award contracts in accordance with the following: (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."

9. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25, the government institution's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling." See also *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Northern Lights Aerobic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

GROUND OF COMPLAINT NOT ACCEPTED FOR INQUIRY**No reasonable indication that Canadian Heritage erred in its evaluation of Rock Networks' bid**

20. As noted above, one of the grounds of complaint submitted by Rock Networks was that Canadian Heritage erred in its evaluation of Rock Networks' proposal by finding it non-compliant with MR 5. As indicated in the Tribunal's letters of May 14, 2019, the Tribunal found no reasonable indication of a breach of the relevant provisions of the trade agreements and therefore did not inquire into this ground of complaint. The following are the Tribunal's reasons for that decision.

21. According to the denial of relief of May 1, 2019, Canadian Heritage determined that Rock Networks' proposal failed to demonstrate compliance with MR 5 because the evaluators "were unable to find detailed proof in [the proposal] that there was a capacity to respond to emergency technical services", "they were not able to find descriptions of response delays or time lines and they were unable to find references to these kinds of details in the bid despite looking through all of the documents"¹⁰

22. Rock Networks submitted that its bid contained "multiple references to the requirement for support" and its "ability to respond to Emergency and Non-Emergency technical services" and that it should have been found compliant with MR 5 on that basis. Further, Rock Networks noted that no one from Canadian Heritage sought clarification as part of the evaluation process.¹¹

23. It is well established that bidders bear the onus of establishing that all relevant criteria and requirements have been met in their proposals.¹² Simply restating the requirements of the solicitation document in a conclusory fashion is not sufficient to demonstrate compliance.¹³ As set out in the RFSO, bidders were responsible for *explaining and demonstrating* how they proposed to meet the requirements and how they would carry out the work.¹⁴ It is also well established that, while a procuring entity may in some circumstances seek clarification of a particular aspect of a proposal, it is not under any obligation to do so.¹⁵

24. Rock Networks' proposal included a number of references to technical support services. For example, Rock Networks' proposal referred to Answer365, an after-hours answering service with technician dispatch through Rock Networks on-call service.¹⁶ The proposal also included a commitment to provide access to its technical support team within 60 minutes of receiving an emergency call.¹⁷

25. Although these statements may partially respond to MR 5, the Tribunal sees nothing unreasonable in Canadian Heritage's conclusion that these statements did not sufficiently explain or demonstrate the capacity to respond to both emergency and non-emergency technical services for all equipment, accessories

10. Exhibit PR-2019-009-01, Vol. 1 at 77.

11. Exhibit PR-2019-009-01, Vol. 1 at 2-4.

12. *Samson & Associates v. Department of Public Works and Government Services* (16 July 2015), PR-2015-002 (CITT) at para. 49; *Valcom Consulting Group Inc. v. Department of Public Works and Government Services* (9 July 2014), PR-2013-044 (CITT) at para. 32.

13. *Deloitte Inc. v. Department of Fisheries and Oceans and Department of Public Works and Government Services* (25 July 2017), PR-2016-069 (CITT) at para. 26.

14. Section 3.1 of the RFSO.

15. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *IBM Canada Limited, PricewaterhouseCoopersLLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT) at 15.

16. Exhibit PR-2019-009-01A, Vol. 1 at 4.

17. Exhibit PR-2019-009-01A, Vol. 1 at 1.

and networks covered by the standing offer. These statements were largely conclusory and included little to no explanation as to how the requirements of MR 5 would be met.

26. In particular, Rock Networks' proposal included almost no information about the nature of the emergency technical services it could offer (e.g. telephone or in-person support), and/or the breadth of those services (e.g. whether the technical assistance could cover the equipment, accessories, and the network, as required by MR 5). Moreover, despite Rock Networks' stated commitment to provide access to its technical support team within 60 minutes of receiving an emergency call, its proposal included almost no detail as to how that would be achieved, other than providing the name of the account manager.¹⁸ It was not unreasonable for Canadian Heritage to expect more information about how emergencies would be handled.

27. Rock Networks' proposal also contained a document outlining its case processing steps.¹⁹ While this document included a fair bit of detail regarding Rock Networks' internal steps for resolving client issues, it contained no details about how quickly these processes could be implemented or the types of resolutions that may be proposed (including any differences in how emergency vs. non-emergency service issues may ultimately be resolved).

28. In addition to the lack of detail, the Tribunal also notes that some portions of Rock Networks' proposal were incomplete. For example, in response to MR 5, Rock Networks proposal stated "[p]lease refer to Technical Submission document Section _ on the Nova Communications support procedures" and in response to 6.2.2 of the Statement of Work, Rock Networks' proposal stated "Compliant. Dave would be good to include an example of things you do here."²⁰

29. In light of the foregoing, the Tribunal does not find it unreasonable for Canadian Heritage to have expected more complete and detailed information before determining compliance with the requirements of MR 5, particularly as the RFSO explicitly stated that bidders were responsible for *explaining and demonstrating how they proposed to meet the requirements and how they would carry out the work*. As such, the Tribunal finds that there is no reasonable indication of a breach of the trade agreements and the Tribunal will not inquire into this ground of complaint.

ANALYSIS: GROUND OF COMPLAINT ACCEPTED FOR INQUIRY

Bearcom's financial proposal was evaluated in accordance with the terms of the RFSO

30. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

31. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which in this case are the *CFTA* and *NAFTA*.

32. The Tribunal has conducted an inquiry into Rock Networks' complaint that Canadian Heritage failed to evaluate the winning bidder's financial proposal in accordance with the terms of the RFSO.

18. Exhibit PR-2019-009-01A, Vol. 1 at 1.

19. Exhibit PR-2019-009-01A, Vol. 1 at 8.

20. Exhibit PR-2019-009-01A, Vol. 1 at 1, 4.

33. As noted above, on April 30, 2019, Canadian Heritage wrote to Rock Networks advising that a standing offer had been awarded to Bearcom, and that the price of the standing offer (to 31 July 2021) was \$17,151.30. That same day, Rock Networks wrote to Canadian Heritage asking whether the pricing evaluation was done for the total period or just the initial period. Canadian Heritage responded on May 1, 2019, stating, in relevant part, that:

... the price of the awarded SO for the initial period of the contract (until 31 July 2021) is \$17,151.30. The calculations were done as per the table in the Basis of Payment (Attachment 1 to Annex B on page 31) in the Request for Standing Offer, not including Replacement Cost per Unit excluding applicable taxes.

34. On the basis of that response, Rock Networks questioned whether Bearcom's financial proposal was evaluated in accordance with the terms of the RFSO. In particular, Rock Networks noted that the RFSO required the financial evaluation to include the initial period and the two option periods, whereas the stated value of the contract awarded to Bearcom included only the initial period of the contract.

35. In the GIR, Canadian Heritage submitted that the financial evaluation of Bearcom's bid was conducted according to the formula set out in Attachment 1 to Annex B for the initial term of the standing offer and the two option periods, using the unit prices submitted by the successful bidder in its Annex B. It further submitted that the total evaluated bid price of the successful bidder properly included the total price for the initial standing offer term, plus the total price for the two option periods. In support of its submission, Canadian Heritage filed Bearcom's Annex B as well as a copy of the financial evaluation of Bearcom's bid.²¹

36. In its comments on the GIR, Rock Networks conceded that Bearcom's financial proposal was conducted in accordance with the terms of the RFSO.²²

37. Having examined Bearcom's financial proposal, and the evaluation done by Canadian Heritage, the Tribunal is satisfied that Bearcom's bid was evaluated reasonably and in accordance with the terms of the RFSO. According to the RFSO, the financial evaluation was to be based on the maximum equipment requirements for any given event, an estimated number of hours of technical support services, and the cost of replacing one of each of the listed equipment in the event it is lost or damaged. The confidential evaluation document submitted by Canadian Heritage demonstrates that this was done using the various unit prices submitted by Bearcom's in its financial proposal. The confidential evaluation document also shows that this was done for the initial period as well as the two option periods.²³

38. In light of the foregoing, the Tribunal finds the complaint not valid.

COSTS

39. Canadian Heritage requested its costs in responding to the complaint.

40. As indicated in the *Procurement Costs Guideline*, the Tribunal applies the principle that, in general, costs should be awarded to the successful party, whether it be the complainant or the government institution. The Tribunal may exercise its discretion to depart from this general principle on costs where the

21. Exhibit PR-2019-009-13A (protected), Vol. 2 at 4-10.

22. Exhibit PR-2019-009-15, Vol. 1.

23. Exhibit PR-2019-009-13A (protected), Vol. 2 at 4-10.

circumstances justify a departure.²⁴ The Tribunal finds that the circumstances of this case justify such a departure.

41. Although Canadian Heritage did not breach the applicable trade agreements, the Tribunal finds that Canadian Heritage could have been more forthcoming in responding to Rock Networks' queries. As acknowledged by Rock Networks, "[t]he Department could have actually resolved the issue in advance by providing the actual determination of the pricing submission in accordance with the requirements of the RFP."²⁵

42. Before complaining to the Tribunal, Rock Networks asked Canadian Heritage a straightforward question as to whether the evaluation of the financial proposals was done on the basis of the initial period or the total period. In the Tribunal's view, Canadian Heritage's response was unnecessarily vague and did not respond to the question posed. Had Canadian Heritage provided a more straightforward response, Rock Networks may not have felt the need to file a complaint with the Tribunal on that ground, or the Tribunal may not have initiated this inquiry.

43. For these reasons, the Tribunal's determination is that each party shall bear its own costs.

DETERMINATION OF THE TRIBUNAL

44. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

45. The Tribunal determines that it will not award costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member

24. *Procurement Costs Guideline* at para. 2.1; *Canada (Attorney General) v. M.D. Charlton Co. Ltd.*, 2017 FCA 179 (CanLII) at paras. 3-4.

25. Exhibit PR-2019-009-15, Vol. 1 at 1.