



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-039

HBI Office Plus Inc.

*Decision made
Thursday, October 17, 2019*

*Decision issued
Monday, October 21, 2019*

*Reasons issued
Tuesday, October 29, 2019*

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

BY

HBI OFFICE PLUS INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Georges Bujold

Georges Bujold
Presiding Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

SUMMARY OF COMPLAINT

[2] This complaint by HBI Office Plus Ltd. (HBI) relates to a Request For a Standing Offer (RFSO) (Solicitation No. E60PD-19OSFB/B) for the procurement of office supplies issued by the Department of Public Works and Government Services (PWGSC).

[3] HBI alleged that the procurement process was unfair because it required bidders to use the ePost Connect electronic system to submit their bids, and that technical problems with this system prevented it from submitting a complete bid. As a remedy, HBI requested that it be awarded the designated contract.

PROCUREMENT PROCESS

[4] The RFSO was issued on June 13, 2019, with a closing date of July 24, 2019. The closing date was subsequently extended to August 23, 2019.³ HBI submitted its bid on the bid closing date using the ePost Connect electronic system, as required by the terms of the RFSO.

[5] On September 6, 2019, PWGSC sent a clarification letter to HBI. In the letter, PWGSC indicated that it was unable to locate the response to mandatory technical criterion 4.1.1.1 in HBI's bid, and requested that HBI identify where in its bid that information could be found.

[6] On September 10, 2019, HBI replied by email, indicating that the information had been submitted via the ePost Connect system along with the rest of the bid. HBI also attached a copy of the information to its email.

[7] On September 11, 2019, PWGSC replied and indicated that the information contained in the document attached to HBI's email had not been included with the bid submitted through the ePost Connect system.

[8] On September 11, 2019, HBI telephoned PWGSC to request further clarification regarding the problems with its bid. HBI was told that PWGSC would contact it at a later date.

[9] On September 27, 2019, PWGSC sent a letter to HBI informing it that a Standing Offer would not be issued to it for the procurement at issue. In this letter, PWGSC indicated that the evaluators determined that HBI's bid did not comply with all the requirements of the RFSO because

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

² SOR/93-602 [*Regulations*].

³ Amendment 004 to the RFSO.

it did not include information addressing mandatory criterion 4.1.1.1, which provided, in relevant part, as follows:

4.1.1 Technical Evaluation

4.1.1.1 Mandatory Technical Criteria

The Offeror must submit the following with their offer:

- a. The Offeror must submit a company profile which demonstrates that they have the ability to perform the full scope of the work as described in the requirement.

Each of the elements below must be addressed:

- i. Company history;
- ii. Dealership status for the items offered;
- iii. Ability to honor manufacturer's warranty (as applicable) on items offered;
- iv. Delivery methods (ex: floor of vehicles or third party transportation);
- v. Inventory and warehousing infrastructure;
- vi. Order management and tracking system; and
- vii. Participation in, or certifications resulting from environmental programs/ initiatives, if any.

[10] Also on September 27, 2019, HBI telephoned PWGSC to enquire about other options for having their bid evaluated given the alleged "glitch" with the ePost Connect system. According to the evidence on the record, in this way, HBI verbally objected to the fact that it was required to use the ePost Connect system, claiming that technical problems with the system caused harm to its business. It stated that it was unfair that this was the only avenue it could use to submit its bid, as alleged problems with the system had caused its bid to be incomplete.

[11] On October 2, 2019, PWGSC advised HBI by telephone that HBI should file a complaint with the Tribunal in order to have this matter resolved. PWGSC confirmed this advice by email the same day.

[12] On October 8, 2019, HBI filed its complaint with the Tribunal. However, the complaint did not include all relevant information and documents that were in the complainant's possession, as required by subsection 30.11(2) of the *CITT Act*. On October 9, 2019, the Tribunal informed HBI that its complaint was deficient and requested that additional information be provided to correct the deficiencies.

[13] On October 10, 2019, HBI provided the Tribunal with additional information that substantially addressed the deficiencies in the complaint. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on October 10, 2019.

ANALYSIS

[14] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry into a complaint only if certain conditions are met. In particular, paragraph 7(1)(c) of the *Regulations* provides that the information provided must disclose a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements. In

this case, the Tribunal finds that the complaint does not disclose a reasonable indication that actions taken by PWGSC breached the relevant trade agreements.⁴

[15] Having reviewed the information and documents filed with the complaint, it is clear that, when the solicitation closed, PWGSC had not received a complete offer from the complainant. Specifically, PWGSC was unable to find substantiating information in the complainant's offer to demonstrate its compliance with mandatory technical criterion 4.1.1.1. This criterion made it mandatory for bidders to submit with their offer a company profile which demonstrated that they had the ability to perform the full scope of the work as described in the requirement.

[16] As a justification, HBI's claim is that it "strongly believes that there was a glitch with the ePost Connect submission system."⁵ It alleges that given that this service was the only avenue to submit bids, disqualifying its bid on the basis of a problem that was beyond its control is unfair.

[17] The Tribunal finds that PWGSC's conclusion that HBI's bid was non-responsive, and its subsequent determination that it could not proceed to its financial evaluation due to the bid being incomplete, are reasonable considering that HBI's offer did not include all of the required information. Indeed, Section 4.2 ("Basis of Selection") of the RFSO provided as follows:

To be declared responsive, an offer must:

- a. Comply with all the requirements of the Request for Standing Offers (RFSO);
- b. Meet all mandatory technical evaluation criteria;

...

[18] Moreover, Section 05 of the *Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements* from the *Standard Acquisition Clauses and Conditions Manual* (SACC), which were incorporated by reference into the RFSO in Section 2.1, made it clear that HBI was responsible for submitting a complete offer, including all requested particulars set out in mandatory criterion 4.1.1.1, by bid closing. The provision reads as follows:

05 (2018-05-22) Submission of offers

...

2. It is the Offeror's responsibility to:

...

- c. submit by the RFSO closing date and time a *complete offer*;

...

- f. provide a comprehensible and *sufficiently detailed* offer, including all requested pricing details, that will permit a *complete evaluation in accordance with the criteria set out in the RFSO*.

[Emphasis added]

[19] The information on the record, including PWGSC's correspondence, confirms that it requested HBI to indicate where, in its offer, it addressed mandatory criterion 4.1.1.1. However, HBI

⁴ Accordingly, it is not necessary for the Tribunal to examine whether the other conditions for inquiry have been met.

⁵ Exhibit PR-2019-039-01 at 7, Vol. 1.

could not prove that it submitted the missing information with its offer and, ultimately, PWGSC was correct in concluding that it did not have it by bid closing.

[20] In refusing to allow HBI to resubmit the page containing the required information that it claims was included in the package that it previously (i.e., before bid closing) transmitted via the ePost Connect service, it was reasonable for PWGSC to rely on Section 08 of the SACC, which reads as follows:

08 (2019-03-04) Transmission by facsimile or by epost Connect

...

2. epost Connect

...

g. For offers transmitted by epost Connect service, Canada will not be responsible for any failure attributable to the transmission or receipt of the offer including, but not limited to, the following:

- i. *receipt of a garbled, corrupted or incomplete offer;*
- ii. availability or condition of the epost Connect service;
- iii. incompatibility between the sending and receiving equipment;
- iv. delay in transmission or receipt of the offer;
- v. failure of the Offeror to properly identify the offer;
- vi. illegibility of the offer;
- vii. security of offer data; or,
- viii. inability to create an electronic conversation through the epost Connect service.

[Emphasis added]

[21] The Tribunal finds that Section 08 of the SACC squarely places on the bidder any responsibility for transmission or receipt of bids transmitted by the epost Connect service, including, among other things, the receipt of an incomplete offer. This interpretation is consistent with Tribunal's precedents.⁶

[22] The Tribunal also notes that there is no evidence substantiating the complainant's belief that there was a technical problem with the ePost Connect service that may have resulted in one crucial page not being included in the offer that it transmitted to PWGSC. The Tribunal cannot therefore rule out the possibility that the page in question was inadvertently omitted by HBI. In any event, by virtue of Section 08 of the SACC, per the solicitation documents, any such technical problems would not require PWGSC to re-evaluate HBI's offer taking into account the portion that was not submitted before bid closing. Accordingly, in refusing to do so, PWGSC appears to have acted in a manner consistent with the terms of the RFSO and, by extension, complied with the provisions of the relevant trade agreements.

⁶ *Parkland Fuel Corporation* (19 August 2019), PR-2019-027 (CITT) at para. 22; *Hoskin Scientific* (23 January 2014), PR-2013-034 (CITT) at para. 18. These decisions concern bids submitted by facsimile, which is covered in the first part of Section 08 of the SACC; however, the terms applicable to bids submitted by ePost Connect are the same in all relevant aspects.

[23] Finally, with respect to the allegation of unfairness resulting from the fact that the ePost Connect service was the only avenue for bidders to submit offers, the Tribunal notes that while the trade agreements require a government institution to include in the tender documentation all information necessary to permit potential suppliers to submit responsive tenders, they do not mandate any particular method for the transmission of offers. Accordingly, it is open to PWGSC, as part of its “Greening Initiative” to require that offers only be submitted via the ePost Connect service.

DECISION

[24] Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

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