



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2019-023

KUZMA Industrial Group Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Friday, October 4, 2019*

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IN THE MATTER OF a complaint filed by KUZMA Industrial Group 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**

**KUZMA INDUSTRIAL GROUP INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**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: Heidi Lee, Counsel

Complainant: KUZMA Industrial Group Inc.

Government Institution: Department of Public Works and Government Services

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## STATEMENT OF REASONS

1. This inquiry concerns a complaint filed by KUZMA Industrial Group Inc. (Kuzma) regarding a Request for Proposal (Solicitation No.W6369-18A019/b) (the RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) on February 4, 2019, with a closing date of April 1, 2019, for the provision of a deployable 128-slice computed tomography scanner (CT scanner).
2. The Tribunal accepted the complaint for inquiry in part, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>
3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *Act*. For the reasons that follow, the Tribunal finds that the complaint is not valid.

### SUMMARY OF THE COMPLAINT

4. Kuzma claimed that the winning bidder, Marshall Aerospace Canada, Inc. (MACI), did not meet mandatory criterion M20, and therefore PWGSC awarded the contract to a non-compliant bidder. Kuzma also claimed that PWGSC was biased in favour of MACI.
5. As a remedy, Kuzma sought award of the contract, or in the alternative, compensation.
6. The Tribunal did not accept a third ground of complaint, in which Kuzma claimed that PWGSC improperly rejected its bid.

### PROCEDURAL BACKGROUND

7. The RFP was issued on February 4, 2019, and, after several amendments, closed on April 1, 2019. Kuzma submitted its bid in a timely manner.
8. As set out in the RFP, bids were evaluated in three phases.<sup>3</sup> In Phase I, PWGSC examined each supplier's financial bids and provided bidders an opportunity to submit any missing required information. Only bids found responsive to the requirements of Phase I received a Phase II review. In Phase II, PWGSC examined each supplier's technical bid to assess whether it met all Eligible Mandatory Criteria. PWGSC issued a Compliance Assessment Report (CAR) for deficient bids, providing bidders with an opportunity to remedy their bids accordingly. Only bids that were found responsive to Phase II were evaluated under Phase III, in which PWGSC evaluated bids in accordance with the entire requirement of the solicitation.
9. On May 3, 2019, PWGSC issued a CAR to Kuzma. Kuzma submitted its response on May 9, 2019.
10. On June 21, 2019, PWGSC formally rejected Kuzma's bid on the basis that it failed to meet mandatory criteria M20, M27 and M17, and informed Kuzma that the contract had been awarded to MACI.<sup>4</sup>

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

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

3. For complete details on the evaluation methodology, see clauses 4.1.1.2, 4.1.1.3 and 4.1.1.4 of the RFP at Exhibit PR-2019-023-14 at p. 30-33, Vol. 1.

4. The Tribunal notes that PWGSC provided a written rejection in the form of a "Debriefing Letter" dated June 19, 2019, which was transmitted to Kuzma by email on June 21, 2019.

11. On June 27, 2019, Kuzma wrote to PWGSC to object the evaluation of its bid, arguing that it met criteria M17 and M27. Kuzma conceded that its bid did not meet mandatory criterion M20, which required a patient table with a minimum vertical range of 45 centimetres, as its proposed scanner had a patient table with a vertical range of 43 centimetres. However, Kuzma challenged the 45-centimetre requirement, arguing that the 2-centimetre difference was clinically insignificant. Noting that it was public knowledge that MACI was the only supplier of Philips CT scanners, Kuzma also claimed that the mandatory requirements were “copied from the Philips brochure”, so that MACI was the only bidder capable of meeting them.<sup>5</sup>

12. That same day, PWGSC responded to reject Kuzma’s objection and stated that it would not re-evaluate any proposals. PWGSC also noted that Kuzma did not raise its concerns with mandatory criterion M20 during the tender period.

13. After further correspondence, Kuzma emailed PWGSC on July 3, 2019, to indicate that it would formulate its complaint in writing to present to PWGSC, which would include information regarding its allegation that the specifications of the RFP favoured MACI.

14. On July 5, 2019, PWGSC responded to recommend that if Kuzma intended to pursue its complaint with PWGSC, Kuzma should not add any more information than it had already provided to PWGSC.<sup>6</sup> PWGSC also noted that Kuzma could pursue the complaint at the Tribunal.

15. On July 11, 2019, Kuzma filed the present complaint. In its submission to the Tribunal, Kuzma also admitted that its bid did not meet mandatory criterion M20.<sup>7</sup>

16. On July 17, 2019, the Tribunal informed the parties that it had accepted the complaint for inquiry in part. The Tribunal limited its inquiry to whether PWGSC failed to evaluate MACI’s bid in accordance with the terms of the RFP, and whether PWGSC was biased in favour of MACI.

17. The Tribunal declined to inquire into PWGSC’s evaluation of Kuzma’s bid. Based on Kuzma’s admission that its scanner did not meet the requirements set out in mandatory criterion M20, in the Tribunal’s view it was reasonable of PWGSC to determine that Kuzma’s bid did not meet the terms of the solicitation. Accordingly, the Tribunal found that there was no reasonable indication that PWGSC breached its trade agreement obligations in this regard.

## RELEVANT PROVISIONS

18. The relevant provision is as follows:

### **Annex “C”**

#### **Mandatory Technical Criteria**

...

M20: The patient table must be capable of being lowered to a minimum height of 60 cm with a minimum vertical range of 45 cm. . . .

19. At issue in this complaint is the requirement that the patient table have a minimum vertical range of 45 centimetres.

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5. The Tribunal also notes that prior to the close of the RFP, Kuzma was advised by Philips that Philips had partnered with another supplier to respond to this procurement. See Exhibit PR-2019-023-01 at p. 331, Vol. 1.

6. Exhibit PR-2019-023-14 at p. 166, Vol. 1.

7. Exhibit PR-2019-023-01 at p. 6, Vol. 1.

## TRADE AGREEMENT OBLIGATIONS

20. As the Tribunal summarized in *Rock Networks*,<sup>8</sup> the *Canadian Free Trade Agreement*<sup>9</sup> requires procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation.<sup>10</sup> Similarly, the *North American Free Trade Agreement*<sup>11</sup> 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.<sup>12</sup>

21. 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.<sup>13</sup>

22. Furthermore, the trade agreements require procuring entities to ensure that its tendering procedures are applied in an impartial and non-discriminatory manner.<sup>14</sup>

## ANALYSIS

### MACI's bid was evaluated in accordance with the terms of the RFP

23. Kuzma claimed that MACI's proposed good, a Philips CT scanner, was also not compliant with mandatory criterion M20 as its patient table has a maximum vertical range of 44.3 centimetres. Kuzma

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8. *Rock Networks Inc. v. Department of Canadian Heritage* (7 August 2019) PR-2019-009 (CITT) at paras. 18-19.

9. 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*].

10. 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.

11. *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*].

12. 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."

13. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Limited 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.

14. Article 502(1) of the *CFTA* provides that "[e]ach Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities." Article 515(1) of the *CFTA* provides that "a procuring entity shall . . . treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process." Article 1008(1)(a) of *NAFTA* provides that "[e]ach Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner".

relied on a product sheet for the Philips Ingenuity Core CT scanner (referenced in correspondence by Kuzma as the “brochure”) to support this allegation.

24. In response, PWGSC submitted that MACI did not propose the Core model, but in fact proposed the Elite model, which exceeds the requirement of M20. PWGSC relied on supporting documents submitted by MACI, which provided patient table specifications that when read together result in a vertical range that exceeds the minimum travel range of 45 centimetres.<sup>15</sup>

25. The Tribunal notes that MACI’s technical bid contains a patient table specification that differs from that set out in its supporting documents. However, as the alternate specification also results in a vertical travel range of at least 45 centimetres, in the Tribunal’s view this discrepancy does not affect MACI’s compliance with M20.

26. Based on the contents of MACI’s bid, the Tribunal finds that it was reasonable for PWGSC to conclude that MACI’s bid was compliant with the terms of the RFP, namely, mandatory criterion M20. Accordingly, the Tribunal finds this ground of complaint is not valid.

27. The Tribunal notes that PWGSC also submitted that Kuzma is out of time to raise this ground of complaint. In light of the Tribunal’s finding on the merits, it is not necessary for the Tribunal to consider this argument.

#### **No evidence of bias on the part of PWGSC**

28. Kuzma also alleged that PWGSC favoured MACI in this procurement.

29. As noted above, Kuzma argued that its own bid was disqualified for failure to meet the same mandatory criterion that, according to Kuzma, MACI also failed to meet. For the reasons set out above, the Tribunal has dismissed this allegation.

30. The Tribunal now turns to Kuzma’s remaining allegations with respect to this ground of complaint.

31. Kuzma also claimed that the terms of the RFP were such that they could only be met by MACI, as the sole supplier of Philips scanners.<sup>16</sup> Kuzma argued that there are only two suppliers in Canada capable of providing a 128-slice CT scanner – Philips, which was bid by MACI, and Siemens, which was bid by Kuzma – and that it is public knowledge that MACI and Philips are in a “partnership”. Kuzma alleged that PWGSC was aware of this supplier landscape and therefore aware that only MACI would be capable of meeting the terms of the RFP. Furthermore, Kuzma claimed that MACI’s bid price was unnaturally high, and therefore suggested that MACI was in some way assured of winning the contract. However, Kuzma conceded that this last allegation with respect to MACI’s bid price was speculation.

32. PWGSC submitted that the terms of the RFP reflect DND’s operational requirements and take into account the commercially available deployable CT scanners. It argued that it was incumbent on Kuzma to raise any concerns about the restrictiveness of the terms during the procurement process. Altogether,

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15. Confidential Exhibit PR-2019-023-14A at p. 85, Vol. 2.

16. Kuzma submitted that it did not raise this complaint during the procurement process as it had no reason to compare the terms of the RFP with the specifications of Philips scanners. The Tribunal notes that an allegation rooted in the terms of the RFP may raise questions of timeliness. Based on the Tribunal’s conclusion below, the Tribunal does not find it necessary to address this issue.



PWGSC submitted that this ground of complaint should be dismissed as it is based entirely on speculation and not supported by the evidence.

33. It is well established that a procuring entity is entitled to define its own procurement needs, provided it does so reasonably and in compliance with the applicable trade agreements.<sup>17</sup> Furthermore, the Tribunal has also previously held that a procuring entity may impose conditions that may restrict access to procurement to ensure that it obtains goods and services that meet its needs, and is under no obligation to compromise its legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs.<sup>18</sup> It is also well established that claims that a government institution attempted to avoid competition must be grounded in positive evidence that goes beyond mere stringent requirements.<sup>19</sup>

34. The Tribunal finds that Kuzma has not established that the terms of the RFP were not reasonable or otherwise in breach of the applicable trade agreements. The fact that PWGSC may be aware of the capacities of the small supplier community is insufficient to do so, and in any event, the Tribunal notes that Kuzma tendered no evidence to support this allegation.<sup>20</sup> The Tribunal also finds that there is no evidence on the record with regard to Kuzma's allegations that MACI was assured of winning the contract.

35. Altogether, the Tribunal finds that Kuzma has submitted no evidence to establish that PWGSC was biased in favour of MACI. In the Tribunal's view, there is no reasonable basis on which to conclude that PWGSC favoured MACI.

36. Accordingly, the Tribunal finds that this ground of complaint is not valid.

## COSTS

37. PWGSC requested its costs in responding to the complaint.

38. 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 circumstances justify such a departure.

39. The Tribunal finds that the circumstances of this case justify such a departure. Although PWGSC did not breach the applicable trade agreements, the Tribunal finds that PWGSC could have been more forthcoming in responding to Kuzma. Kuzma's objections to PWGSC regarding MACI were, from the start, plainly informed by "the Philips brochure", which ultimately concerned a different model of CT scanner and provided an incorrect basis for Kuzma's claims. In the Tribunal's view, this complaint could have been

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17. See *Autopos Marine Inc. dba AutoNav v. Department of Public Works and Government Services* (5 June 2019) PR-2018-057 (CITT) at para 40.

18. *FreeBalance Inc. v. Canada Revenue Agency* (24 January 2012) PR-2011-041 (CITT) at para. 49.

19. In *Canada (Attorney General) v. Trust Business Systems*, 2007 FCA 89, the Federal Court of Appeal considered the Tribunal's finding that the government institution relied on a requirement for a highly specific and branded good for the purpose of avoiding competition. It found that the Tribunal's decision was unreasonable for inferring, "with no evidence", a purpose of avoiding competition, and for ignoring evidence of legitimate operational objectives that precluded equivalent or alternative goods.

20. In addition, the Tribunal gave little weight to Kuzma's argument that mandatory criterion M1 appears to be directly copied from the Philips Core scanner product data sheet, which the Tribunal recalls is not the correct model bid by MACI, as Kuzma in fact met this requirement.

resolved, or the issues in dispute could have been narrowed, had PWGSC acknowledged the brochure and had not advised Kuzma to refrain from providing any additional information, which in the Tribunal's view could have reasonably included the brochure.

40. For these reasons, the Tribunal determines that each party should bear its own costs.

#### **DECISION**

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

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

Serge Fréchette  
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Serge Fréchette  
Presiding Member