



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-062

E-Safe Pest Control Inc.

*Decision made
Tuesday, March 3, 2020*

*Decision issued
Tuesday, March 3, 2020*

*Reasons issued
Friday, March 13, 2020*

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

E-SAFE PEST CONTROL 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.

Cheryl Beckett

Cheryl Beckett
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 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 THE COMPLAINT

[2] The complaint relates to a request for proposal (RFP) (Solicitation No. W6854-200191/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the implementation of a pest control program in support of all units located at CFB Borden.

[3] The complainant, E-Safe Pest Control Inc. (E-Safe), alleged that PWGSC improperly corrected its Extended Price, without seeking clarification. As a remedy, E-Safe requested that the designated contract be awarded to it as the lowest responsive bidder.

BACKGROUND

[4] On February 14, 2020, PWGSC informed E-Safe that it had not been awarded the contract and that the contract would be awarded to Environmental Pest Control as the lowest compliant bidder, with an evaluated price of \$266,776.50. PWGSC noted that, although E-Safe's bid was responsive to the mandatory requirements of the RFP, it did not have the lowest price with an evaluated price of \$12,034,500.

[5] The same day, E-Safe wrote to PWGSC to ask how its evaluated price was calculated, as it suspected there was an error in this calculation. E-Safe further indicated that, according to its own calculations, its evaluated price would have been lower than the winning bidder's price.

[6] PWGSC replied that E-Safe's evaluated price was a result of the high rates submitted in the Service Calls and the Additional Labour Hours tables in Annex B: Basis of Payment of the RFP (Tables 1.2 and 1.3). Annex B of the RFP provides as follows, in relevant parts:

ANNEX B: BASIS OF PAYMENT

All information in italics will be removed from any resultant contract. The number in (x) is the estimated usage for the respective price listing.

...

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

² SOR/93-602 [*Regulations*].

1.2 Service Calls Rates (On as and when required basis)

ID	Labourer	During regular Working Hours (Monday to Friday)	Outside regular Working Hours (Monday to Saturday)	Sunday & Stat. Holidays	Extended Price (price x Est. Usage)
A	Technician	\$_____/hour (120)	\$_____/hour (10)	\$_____/hour (15)	
B	Helper	\$_____/hour (120)	\$_____/hour (10)	\$_____/hour (15)	

Total Evaluated Price for Item 1.2

\$_____

1.3 Additional Labour Hours or Units (On as and when required basis)

...

ID	Labourer	During regular Working Hours (Monday to Friday)	Outside regular Working Hours (Monday to Saturday)	Sunday & Stat. Holidays	Extended Price (price x Est. Usage)
A	Technician	\$_____/hour (220)	\$_____/hour (40)	\$_____/hour (30)	
B	Helper	\$_____/hour (220)	\$_____/hour (40)	\$_____/hour (30)	

Total Evaluated Price for Item 1.3

\$_____

[7] PWGSC also reproduced section 16 of the 2003 (2019-03-04) *Standard Instructions – Goods or Services – Competitive Requirements* from the *Standard Acquisition Clauses and Conditions Manual* (SACC 2003) in its reply, which were incorporated by reference into the RFP in section 2.1. Section 16 of SACC 2003 provides as follows, in relevant parts:

1. In conducting its evaluation of the bids, Canada may, but will have no obligation to, do the following:
 - a. seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;

...

- e. correct any error in the extended pricing of bids by using unit pricing and any error in quantities in bids to reflect the quantities stated in the bid solicitation; in the case of error in the extension of prices, the unit price will govern.

[8] E-Safe responded that the prices in the two tables were extended prices, and that they contained no errors.

[9] The parties held a call that same day, during which PWGSC indicated that it used the numbers in the third, fourth and fifth columns of Tables 1.2 and 1.3 as hourly rates and recalculated the Extended Price columns by multiplying these hourly rates by the Estimated Usage in brackets. E-Safe explained that it put extended prices based on Estimated Usage in the third, fourth and fifth columns of the table, and that it made more mathematical sense to write the values as they did, as those values were being divided by the Estimated Usage number of hours according to the mathematical expressions in the tables.

[10] On February 18, 2020, E-Safe wrote to PWGSC to advise that they were initiating a formal dispute of the award, and to ask whether PWGSC wished to have a formal debriefing meeting. PWGSC replied that it would like to hold a formal debriefing teleconference on February 20, 2020.

[11] During the debriefing teleconference, E-Safe reiterated its position and asked PWGSC to revise its decision. PWGSC replied that its decision was correct, but indicated that it would improve the price form in the future.

[12] On February 26, 2020, E-Safe filed its complaint with the Tribunal.³

ANALYSIS

[13] 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 PWGSC breached the relevant trade agreements.⁴

[14] The applicable trade agreements provide that a bid must, at the time of opening, comply with the essential requirements set out in the tender documentation to be considered for award.⁵ In addition, a procuring entity must award contracts in accordance with the criteria and essential requirements specified in the tender documentation.⁶

³ E-Safe initially filed a deficient complaint on February 25, 2020. On February 26, 2020, E-Safe filed additional information further to a request made by the Tribunal on February 26, 2020, 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 February 26, 2020.

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

⁵ See e.g. Article 515(4) of the *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/03/CFTA-Consolidated-Text-Final-English_March-3-2020.pdf> (entered into force 1 July 2017) [*CFTA*].

⁶ See e.g. Article 515(5) of the *CFTA*.

[15] In assessing whether there has been a breach of these obligations, the Tribunal typically accords a large measure of deference to evaluators in their evaluation of bids. In general, the Tribunal will only interfere with an evaluation that is unreasonable⁷ and will substitute its judgment for that of the evaluators *only* when they have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria, or have otherwise not conducted the evaluation in a procedurally fair way.⁸

[16] Section 5 of SACC 2003 provides among others that it is up to the bidder to "prepare its bid in accordance with the instructions contained in the bid solicitation" and to "provide a comprehensible and sufficiently detailed bid, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the bid solicitation." The Tribunal has also been clear that bidders bear the responsibility of preparing their bids diligently in accordance with the instructions in the solicitation.⁹

[17] Sections 4.1.2.1 and 4.1.2.2 of the RFP provide as follows, in relevant parts:

4.1.2.1 The Offeror must complete and submit with its offer, Annex B: Basis of Payment, in Canadian funds. Pricing **must** be provided for **all** line items as listed in Annex B.

4.1.2.2 The price used in the evaluation will be the Total Evaluated Price which is calculated as follows:

- a. The Extended Price for line items is the Estimated Usage multiplied by the Firm Unit Price;
- b. The Total Evaluated Price is the sum of all the Extended Price for each Contract year;

...

[18] Similarly, the last column in each of Tables 1.2 and 1.3 indicates that the Extended Price is the price multiplied by the Estimated Usage, which is itself defined in Annex B as the number in parentheses, found below the price per hour.

⁷ 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."

⁸ *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) [*Samson*] at para. 26; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

⁹ *Gallason Industrial Cleaning Services Inc. v. Department of Public Works and Government Services* (15 August 2018), PR-2018-002 (CITT) [*Gallason*] at para. 32; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Samson* at para. 28; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

[19] As pricing had to be provided for all line items, and as the method of calculation for the Extended Price was imposed in the RFP, it was incumbent on E-Safe to ensure that the information in Annex B resulted in the proper calculations. In this case, E-Safe misunderstood the purpose of the numbers in parentheses in Tables 1.2 and 1.3 as dividing the price per hour to be inserted, which resulted in E-Safe inserting extended prices in the third, fourth and fifth columns of both rows A and B of those tables, rather than a price per hour as was required in order to calculate the Extended Price in the last column. E-Safe's financial bid therefore contained notable errors, as its unit prices in the third, fourth and fifth columns of Tables 1.2 and 1.3 did not correspond to the Extended Prices in the last column, as required by the RFP.

[20] As per section 16 of SACC 2003, PWGSC had the discretion to correct any error in *extended pricing only* based on the unit pricing provided.¹⁰ This is of particular importance since information in italics in Annex B was to be removed from the resultant contract as per the directions in the RFP. This would remove the Estimated Usage and the Extended Price used for the evaluation of E-Safe's bid. Once the Estimated Usage is removed, there is no longer a logical link between the price per hour and the Extended Price. Furthermore, the removal of the Estimated Usage and of the Extended Price in the resultant contract would only leave the prices per hour inserted by bidders in Tables 1.2 and 1.3. Considering that payment in the resultant contract as provided in section 7.7.1.2 of the RFP¹¹ is to be based on those prices per hour, it would make no sense for a bidder to insert extended prices rather than prices per hour in the third, fourth and fifth columns of Tables 1.2 and 1.3.

[21] Even though PWGSC's corrections resulted in a different Total Evaluated Price than intended by E-Safe, the recourse to its discretion to make those corrections does not amount to a breach of a trade agreement.¹² Indeed, as the Tribunal has previously stated, where a government institution has discretion under the provisions of an RFP, including the Standard Instructions incorporated by reference, it would not be appropriate for the Tribunal to directly or indirectly encroach upon this discretion.¹³ PWGSC was otherwise under no obligation to seek clarification from E-Safe.¹⁴

[22] The Tribunal also notes that, during the February 14, 2020, call with PWGSC, E-Safe explained that, if it provided a per-hour rate in Tables 1.2 and 1.3, those numbers would be divided by the Estimated Usage in parentheses, resulting in prices being less than \$0, which it considered illogical and challengeable. E-Safe stated to PWGSC "that in [Annex B] they should have put all columns to put extended calculations, so everything was clearer."

[23] The Tribunal has repeatedly stated that bidders bear the onus to "keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the

¹⁰ *Gallason* at paras. 40-41.

¹¹ This section provides that "[t]he Contractor will be paid for the Work specified in the authorized task authorization, in accordance with the Basis of payment at Annex B."

¹² However, the Tribunal notes that procuring entities do not have to take clear and patent errors on their face; this is why they are given discretion in the first place. In this case, the use of discretion has not resulted in the best outcome for PWGSC.

¹³ *Neopost Canada Limited v. Canada Revenue Agency* (29 December 2015), PR-2015-033 (CITT) at para. 29; *StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (24 July 2014), PR-2013-046 (CITT) at para. 51; *Supermex Inc.* (22 June 2011), PR-2011-012 (CITT) at para. 22.

¹⁴ *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 (CanLII) at para. 25; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

process.”¹⁵ It is up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

[24] In this case, the Tribunal is of the view that E-Safe should have been aware of such issues at the time the solicitation was published, or at the latest before it submitted its proposal. Considering the above, information was available to E-Safe at the time the solicitation was published that indicated that its interpretation of the requirement was problematic. Accordingly, it was incumbent upon E-Safe to raise any concern with respect to the instructions for the completion of Annex B with PWGSC and/or the Tribunal at that time, which it did not do.

DECISION

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

Cheryl Beckett

Cheryl Beckett

Presiding Member

¹⁵ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20. See also section 5 of SACC 2003, which provides as follows in relevant parts: “It is the Bidder’s responsibility to: a. obtain clarification of the requirements contained in the bid solicitation, if necessary, before submitting a bid”