Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-045

AJL Consulting

v.

Department of Agriculture and Agri-Food

Determination and reasons issued Wednesday, February 12, 2020

Canada

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IN THE MATTER OF a complaint filed by AJL Consulting 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

AJL CONSULTING	**Complainant**

AND

THE DEPARTMENT OF AGRICULTURE AND AGRI-FOOD	**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. Each party shall bear its own costs.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

Tribunal Panel:	Jean Bédard, Q.C., Presiding Member
Support Staff:	Peter Jarosz, Counsel
Complainant:	AJL Consulting
Counsel for the Complainant:	Art Lange
Government Institution:	Department of Agriculture and Agri-Food
Counsel for the Government Institution:	Susan Clarke Roy Chamoun Nick Howard Benjamin Hiemstra

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STATEMENT OF REASONS

[1] This inquiry concerns a complaint filed by AJL Consulting (AJL) on October 30, 2019, in relation to a procurement (Solicitation No. 01B68-19-0056) conducted by the Department of Agriculture and Agri-Food (AAFC) for financial services related to Farm Debt Mediation Services. AAFC awarded standing offers to five other bidders, which did not include the complainant.

[2] On November 5, 2019, the Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*[1] 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 complaint as required by sections 30.13 to 30.15 of the *CITT Act*. The Tribunal finds that the complaint is not valid.

BACKGROUND AND SUMMARY OF COMPLAINT

[4] The Request for Standing Offer (RFSO) was published on June 4, 2019. The total budget for the procurement was approximately $700,000; however, individual call-ups were limited to $10,000 and multiple call-ups to the same offeror were permitted.

[5] On the same day it received the regret email of October 15, 2019, AJL communicated with AAFC questioning the score it received for its bid submission. On October 16, 2019, an email from AAFC provided AJL with its correct score; it should be noted that, while AJL was initially told that its bid scored 53/80 (below the minimum score), this email response advised that its score was 63/80 (a sixth place score, *above* the minimum required). The Tribunal notes that AJL did not challenge its newly communicated score (i.e. the result of the evaluation of its bid by AAFC) before the Tribunal.

[6] AJL subsequently objected to the fact that there were only five bidders selected for issuance of standing offers, as it interpreted the terms of the RFSO to be ambiguous and to permit more than five bidders to be selected. This objection is the sole ground for its complaint.

ANALYSIS

[7] As the Tribunal summarized in *Rock Networks*, the *Canadian Free Trade Agreement* requires procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation.[3] Similarly, the *North American Free Trade Agreement* 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.[4]

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

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

3 *Rock Networks Inc. v. Department of Canadian Heritage* (7 August 2019), PR-2019-009 (CITT) at paras. 18-19; 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*], articles 509(7) and 515(4).

4 *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-

[8] When assessing whether procedures in a tender documentation were followed, the Tribunal shows deference to evaluators and interferes only if an evaluation is unreasonable.[5] As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services*,[6] 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."

[9] The Tribunal wishes to reiterate that these principles apply to the procuring entity's interpretation of the procurement document(s). As recently stated in *Heiltsuk Horizon Maritime Services Ltd. v. Department of Public Works and Government Services*:

> It is well established that *the Tribunal will review a procurement process on a reasonableness standard, showing deference to the evaluators' expertise and making recommendations only when a decision is unreasonable*. As the Tribunal has repeatedly stated, a procurement evaluation "is unreasonable where the evaluators 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 failed to conduct the evaluation in a procedurally fair manner".[7]
>
> [Footnotes omitted; emphasis added]

[10] With respect to the interpretation of terms in a procurement document such as in the present inquiry, the Tribunal has also consistently interpreted the phrase "wrongly interpreted" as "unreasonable" and, thus, such an interpretation is subject to the deferential "reasonableness" standard of review.[8] As stated in *Heiltsuk Horizon*:

> . . . the Tribunal does not accept Heiltsuk Horizon's request to adopt a less deferential standard of correctness. According to Heiltsuk Horizon, because the Supreme Court in *Ledcor Construction* has instructed appellate courts to use the correctness standard when reviewing trial courts' interpretations of standard form contracts, the Tribunal ought to use the correctness standard when reviewing evaluators' interpretation of an RFP.
>
> Heiltsuk Horizon's analogy between appellate-trial review and the Tribunal's procurement review is not an apt description of the Tribunal's mandate. The Tribunal is an administrative body which is tasked with a review of complex and often highly technical (as in this case) government procurements within the framework of its statutory mandate. Given this context,

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commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng> (entered into force 1 January 1994), articles 1015(4)(a) and (d)

5 *Kuzma Industrial Group Inc. v. Department of Public Works and Government Services* (4 October 2019), PR-2019-023 (CITT) at para. 21.

6 (5 November 2008), PR-2008-023 (CITT) at para. 25.

7 (18 October 2019), PR-2019-025 (CITT) [*Heiltsuk Horizon*] at para. 47.

8 *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) at para. 45; *Team Sunray and CAE Inc. v. Department of Public Works and Government Services* (25 October 2012), PR-2012-013 (CITT) at para. 41; *Falconry Concepts v. Department of Public Works and Government Services* (10 January 2011), PR-2010-046 (CITT) at para. 59; *C3 Polymeric Limited v. National Gallery of Canada* (21 February 2013), PR-2012-020 (CITT) at para. 39; *Pennecon Hydraulic Systems v. Department of Public Works and Government Services* (4 September 2019), PR-2019-007 (CITT) at para. 56.

> the Tribunal sees no reason to depart from its well-established jurisprudence applying the reasonableness standard . . . .[9]
>
> [Footnotes omitted]

[11] The practical methodology of a reasonableness review has been the subject of much judicial debate. In the recent *Vavilov* decision, the Supreme Court of Canada has summarized this concept:

> What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.[10]

[12] This type of analysis is applied in the Tribunal's procurement inquiries. The Tribunal has been granted the statutory powers to conduct an "inquiry" into complaints of administrative, procurement-related decisions by procuring entities, in the course of which it can receive new evidence and may conduct hearings. Its mandate for administrative oversight in this respect is a *de novo* hearing; however, even though the inquiry is not an appeal or judicial review in the strict sense, it has many similarities with these. Accordingly, the Tribunal is partially guided by the *Vavilov* decision, which noted the following regarding statutory interpretation in an administrative setting:

> Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[13] Likewise, the Tribunal recognizes the applicability of these considerations to interpretations made by procuring entities of the terms in their procurement documents.

[14] It is understood that the principles enunciated in *Vavilov* are not intended to and do not apply perfectly in the context of the Tribunal's review of decisions by procuring entities for the reasons stated in *Heiltsuk Horizon*, as set out above.

[15] The Tribunal also recognizes that many decisions by procuring entities are not accompanied by reasons *per se*; this is discussed by the Supreme Court in *Vavilov*, including where the Court states as follows:

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9 *Heiltsuk Horizon* at paras. 48-49.

10 *Canada (Minister of Citizenship and Immigration) v. Vavilov* (19 December 2019), 2019 SCC 65 at paras. 101 *et seq*.

> There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

[16] The Tribunal is guided by the important pronouncements on the standard of review in *Vavilov*, as well as its prior decisions on this issue, in its current inquiry. The above principles apply to a review of an award of a standing offer under the provisions of a procurement document, such as the RFSO in question.

[17] The Tribunal must therefore examine the relevant terms of this RFSO, which led to the award of the standing offers in question.

[18] Part 1, section 2.2 of the RFSO states as follows: "The total budget for the SOs will be approximately $700,000.00, based on a possibility of issuing *five* (5) standing offers"[11] [emphasis added].

[19] Part 4, section 2 of the RFSO states as follows: "AAFC's policy is to recommend the selection of the Offeror with the highest technical score, *up to* the required number of SO's, as described in section 2 of PART 1 of this RFSO" [emphasis added].

[20] Part 2, section 6 of the RFSO states that:

> 6.1. Canada reserves the right to:
>
> a. Accept any Offer in whole or in part, without prior negotiation;
>
> b. Reject any or all Offers received in response to this RFP;
>
> c. Cancel and/or re-issue this RFSO at any time;
>
> d. Ask the Bidder to substantiate any claim made in the Proposal;
>
> e. Enter into negotiations with one or more Offerors on any or all aspects of their offer;
>
> f. *Award one or more Standing Offers*;
>
> g. Retain all Offers submitted in response to this RFSO.
>
> [Emphasis added]

[21] The totality of these provisions indicates that the procuring entity had considerable discretion in the number of standing offers it could award. This is especially evident in the provisions of Part 2, where AAFC had the right to award "one or more" standing offers.

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[11] The French version is very similar and states that "[l]e budget total pour les offres à commandes sera approximativement de 700 000 $, avec la possibilité d'émettre cinq (5) offres à commandes." Exhibit PR-2019-045-07, Vol. 1 at 56.

[22] As well, the provisions show that the number of standing offers was limited "up to" the required number, identified as "five" in Part 1. While the provisions were stating a policy as opposed to a clear and unambiguous statement of AAFC's intentions, it was nonetheless a clear indication of AAFC's view on the subject.[12] There was no reason to believe that the stated policy would change.

[23] It would have been preferable for the number of standing offers ultimately issued to be expressed more clearly and definitively without a potential bidder having to parse through various parts of the whole document to find an answer to this question. For example, the use of the term "possibility of" could have been avoided, as in the following wording: "The total budget for the SOs will be approximately $700,000.00, based on a maximum of five (5) standing offers being issued".

[24] In arriving at a proper interpretation of section 2.2, Part 1 of the RFSO, one cannot focus only on that provision without looking at the document as a whole. Reading the provision in context, the Tribunal finds that it was reasonable for the procuring entity to award five standing offers based on the above terms of the RFSO. As an aside, an interpretation that more than five standing offers could be issued would be, at best, at the outside boundary of reasonable outcomes. The Tribunal therefore finds that this complaint is not valid.

COSTS

[25] Although the procuring entity sought costs of this inquiry, the Tribunal will not award costs in this instance, mainly as it is of the view that this dispute was partially caused by AAFC's own actions. Firstly, AAFC's regret email was factually incorrect (having advised the complainant that it had failed the evaluation and setting out the wrong scoring). Secondly, the key term of the RFSO was unnecessarily unclear, and clearer terms would have easily avoided this dispute. Additionally, the complainant is a small family-owned business. For these reasons, the Tribunal determines that each party should bear its own costs.

DECISION

[26] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. Each party shall bear its own costs.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

[12] This is supported by internal procurement approval documents (which predated the award of the SOs), produced on behalf of AAFC, which stated that "[t]he Farm Debt Mediation Service in Alberta is looking for 5 Financial Experts" and that "[t]his is based on an average file cost of $5,000 for the Financial Expert (including travel) and 40 files per year divided among 5 Experts". Exhibit PR-2010-045-09, Vol. 1 at 68.