Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-016

Smiths Detection Montreal Inc.

Decision made
Friday, July 31, 2020

Decision issued
Wednesday, August 5, 2020

Reasons issued
Friday, August 14, 2020

Corrigendum issued
Tuesday, February 2, 2021

Canada

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

SMITHS DETECTION MONTREAL 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.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

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

SMITHS DETECTION MONTREAL INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

CORRIGENDUM

The first sentence of paragraph 5 of the Statement of Reasons should read as follows:

PWGSC issued the RFSO on December 13, 2019.

The last sentence of paragraph 16 of the Statement of Reasons should read as follows:

The Tribunal therefore considers that Smiths became aware of the basis of this ground of complaint on December 13, 2019.

The first sentence of paragraph 17 of the Statement of Reasons should read as follows:

Smiths first raised its concerns about mandatory criterion 3.2.10 by asking a question to PWGSC on December 19, 2019, four working days after the publication of the solicitation.

By order of the Tribunal,

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

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] This complaint was filed by Smiths Detection Montreal Inc. (Smiths) on Tuesday, July 28, 2020, regarding a Request for a Standing Offer (Solicitation No. E60PV-20WTMD/A) (the RFSO) issued by the Department of Public Works and Government Services (PWGSC) for the procurement of security screening equipment.

[3] Smiths raised two grounds of complaint, alleging that:

i. mandatory requirement 3.2.10 was unreasonable on the basis that it was not technically necessary, was not an industry standard, and relied on a description that applied to a single supplier (the first ground of complaint); and

ii. the winning bidder engaged in predatory pricing and other unfair trade practices (the second ground of complaint).

[4] As a remedy, Smiths requested that a new solicitation be issued.

BACKGROUND

[5] PWGSC published the RFSO on December 1, 2019. The RFSO established two national master standing offers – Group 1 for conveyer x-ray machines and Group 2 for walk-through metal detectors.[3]

[6] During the bidding period, Smiths posed several questions to PWGSC, two of which concerned mandatory criterion 3.2.10. PWGSC provided responses in Question and Answer (Q&A) No. 2 in Amendment 001 and Q&A No. 55 in Amendment 006.

[7] Three additional questions regarding mandatory criterion 3.2.10 were asked and answered during the bidding period, ultimately resulting in a revision to the text of the criterion, which was published in Amendment 013. All five Q&As regarding this criterion are set out in Appendix 1 of these reasons.

[8] After a total of 14 amendments, the bidding period closed on April 3, 2020.

---

1 R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2 SOR/93-602 [*Regulations*].
3 This complaint concerned Group 1 only.

[9] On July 15, 2020, PWGSC awarded a contract to Nuctech Company Ltd. for Group 1 and to Rapiscan Systems, Inc. for Group 2. The award notices were published online on July 16, 2020.

[10] Smiths filed the present complaint, which only concerned the solicitation and contract in respect of Group 1, on July 28, 2020.

ANALYSIS

[11] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine whether the following four conditions are met before it launches an inquiry:

(i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;[4]

(ii) the complainant is a potential supplier;[5]

(iii) the complaint is in respect of a designated contract;[6] and

(iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.[7]

[12] For the following reasons, the Tribunal finds that the first ground of complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. The Tribunal also finds that the second ground of complaint does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

The first ground of complaint is late

[13] The first ground of complaint raised by Smiths is in respect of mandatory criterion 3.2.10, the final amended version of which provided as follows:

> The x-ray generators must perform as follows to facilitate different screening modes:
>
> **3.2.10** Software-driven generator seasoning, when the unit has been inactive for a minimum of six months.[8]

[14] Smiths alleges that the requirement was unreasonable because it was not technically necessary. According to Smiths, the requirement concerns a task that would normally be performed by technicians on installation and repair, and would only be required while the x-ray machine was in a dormant state, the likelihood of which was 0.0058 percent. Smiths also alleges that the requirement was not an industry standard feature, and references a specific description ("software-driven generator seasoning with automatic ramp up"[9]) used by only one supplier, Voti.

---

4 Subsection 6(1) of the *Regulations*.
5 Paragraph 7(1)(a) of the *Regulations*.
6 Paragraph 7(1)(b) of the *Regulations*.
7 Paragraph 7(1)(c) of the *Regulations*.
8 The final version of this mandatory requirement is set out in Amendment 013. Initially, the requirement provided for "software-driven generator seasoning *with automatic ramp-up, without opening of the unit or entry via access-panel*, when the unit has been inactive for a minimum of six (months)" [emphasis added].
9 On this point, the Tribunal notes that the phrase "with automatic ramp up" was removed by PWGSC in Amendment 013.

[15] Pursuant to section 6 of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.[10]

[16] When a ground of complaint concerns the terms of a solicitation, the Tribunal has previously considered the date on which a bidder obtains a copy of the solicitation documents to be the date on which the bidder becomes aware of a basis of that complaint.[11] Without evidence to the contrary, bidders are generally considered to have obtained a copy of the solicitation on the date of publication. There is no evidence in the present complaint to suggest a departure from this reasoning. The Tribunal therefore considers that Smiths became aware of the basis of this ground of complaint on December 1, 2019.

[17] Smiths first raised its concerns about mandatory criterion 3.2.10 by asking a question to PWGSC on December 12, 2019, nine working days after the publication of the solicitation. PWGSC answered this question in Amendment 001, published on January 3, 2020. Smiths asked a second question on January 31, 2020, which PWGSC answered in Amendment 006, published on February 10, 2020. In the second answer, PWGSC indicated that "the requirement remains unchanged".

[18] Where a bidder asks questions about a term of the solicitation during the procurement process, and that question is not answered in an amendment, the Tribunal has previously held that the bidder receives denial of relief when the bidding period closes.[12] It should be clear to bidders that no further changes will be made to the RFSO at that point.[13]

[19] In this case, PWGSC did answer the questions raised by Smiths in amendments to the RFSO. Accordingly, Smiths may have received a definitive answer in Amendment 006, published on February 10, 2020, which indicated that the requirement would not change and which could reasonably be considered as denial of relief for the purposes of subsection 6(2) of the *Regulations*. If so, Smiths would have been required to file this ground of complaint with the Tribunal within 10 working days of that date, i.e. by February 24, 2020.

[20] In any event, the Tribunal also notes that PWGSC continued to receive and answer questions about mandatory criterion 3.2.10 up until the publication of Amendment 013, which ultimately resulted in a revision to the requirement in question. If the Tribunal were to extend Smiths the benefit of the doubt and consider that it received denial of relief at the close of the bidding period, i.e. April 3, 2020, Smiths would have been required to file this ground of complaint with the Tribunal within 10 working days of that date, i.e. by April 20, 2020.

[21] Smiths did not file the present complaint until July 28, 2020. Even if the Tribunal were to take the most generous approach and consider that Smiths became aware of the basis of the ground of complaint on the close of the bidding period, Smiths still did not file this ground of complaint within the time limits of section 6 of the *Regulations*. As such, this ground of complaint was not filed on time and cannot be accepted for inquiry.

---

10 Subsections 6(1) and (2) of the *Regulations.*

11 See *Storeimage v. Canadian Museum of Nature* (18 January 2013) PR-2012-015 (CITT) at para 23; *Temprano and Young Architects Inc.* (26 February 2019) PR-2018-036 (CITT) at para 23.

12 *Boiler Inspection Company of Canada* (25 October 2005) PR-2005-030 (CITT) at para. 3.

13 *Ibid.*

Second ground of complaint does not raise a reasonable indication of a breach

[22] Smiths also alleged that the winning bidder of Group 1, Nuctech, engaged in predatory pricing and unfair trade practices. In support, Smiths simply claimed that the value of the contract awarded to Nuctech was too far below its own financial bid.

[23] The Tribunal is satisfied that this ground of complaint was filed in a timely manner. Smiths would have become aware of the ground of complaint when PWGSC announced the award of the standing offer to Nuctech, i.e. on July 15, 2020. Smiths filed the present complaint on July 28, 2020, which is within 10 working days of July 15, 2020.

[24] However, Smiths did not submit any evidence or further explanation to support its claims. Moreover, a lower financial bid – even one that is significantly lower – does not in and of itself indicate a failure of the procuring entity to follow the requirements of the trade agreements.

[25] For this reason, the Tribunal finds that this ground of complaint fails to meet reasonable threshold indication for inquiry. While paragraph 7(1)(c) of the *Regulations* does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim.[14] Mere allegations are insufficient to establish a reasonable indication of a breach of the trade agreements.[15]

DECISION

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

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

---

14 *K-Lor Contractors Services Ltd.* (23 November 2000) PR-2000-023 (CITT).

15 *Talmack Industries Inc.* (20 November 2018) PR-2018-040 (CITT) at para 13. See also *Manitex Liftking ULC* (19 March 2013), PR-2012-049 (CITT) at para. 22; *Vesseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (4 April 2014), PR-2013-048 (CITT) at para. 12.

APPENDIX 1

Amendment 001 – published January 3, 2020:

Q2	(3.2.10) Software-driven generator seasoning with automatic ramp-up, without opening up of the unit or entry via access panel, when the unit has been inactive for a minimum for 6 months. Is this automatic feature mandatory or a "nice to have"? If we can provide simple instructions for an operator/supervisor to perform this task without voiding the warranty, is that acceptable? Also, Section 7.7.2 references the offeror must provide regeneration procedure at time of install. This can be implied that a non-automatic procedure can be provided.
A2	This automatic feature is mandatory to ensure the task is performed automatically and not by an operator or supervisor.

Amendment 006 – published February 10, 2020:

Q55	3.2.10 Software-driven generator seasoning with automatic ramp-up, without opening of the unit or entry via access-panel, when the unit has been inactive for a minimum of six (months). Typically these units are shipped to the warehouse and then shipped to the Mission. Once these units are shipped, the installation process includes the seasoning of the generator. Since this is the case, why would automatic seasoning be required to meet the specification?
A55	In some instances, Global Affairs might ship the x-ray machine from its warehouse to a Canadian mission and have Global Affairs staff install the x-ray. In such instances, automatic seasoning is required. The requirement remains unchanged.

Amendment 009 – published February 25, 2020:

Q68	In Amendment 006, A55 states "In some instances, Global Affairs might ship the x-ray machine from its warehouse to a Canadian mission and have Global Affairs staff install the x-ray. In such instances, automatic seasoning is required. The requirement remains unchanged." We would request that the requirement "3.2.10 Software-driven generator seasoning with automatic ramp-up, without opening of the unit or entry via access-panel, when the unit has been inactive for a minimum of six (months)." be reconsidered. In support of this, please see the appropriate sections of the solicitation below with our comments. *GROUP 1 – CONVEYOR-STYLE PARCEL X-RAY MACHINE* *1.0 SCOPE* *1.1 Objective* *To provide one size of X-Ray machine including delivery, installation, operator training, a minimum 18 months warranty including software updates, programming, all required manuals for the operation and maintenance of the X-Ray machine (either in English, French or bilingual format) and all necessary cables, power cords, and accessories required to produce a fully functional X-Ray machine, on an as and when requested basis at Canadian Embassies and other Government of Canada (GoC) locations worldwide.* *1.2 Background Global Affairs Canada has the mandate to implement a Cyclical Replacement Program (CRP) that addresses a long-standing need regarding the effective operation, installation, and maintenance of parcel x-ray machines at Canadian Embassies worldwide. This is predominantly a lifecycle-based initiative that addresses the need for the replacement and upgrade of older xray machines currently in use globally.* As per the Annex A, Statement of Work, the installation of the X-Ray machine is clearly included in the Scope. Considering A55 above, nowhere in the Statement of Work or solicitation as a whole is the provision to have Global Affairs staff appropriated trained on the installation of an X Ray system. Most, if not all OEM's, require that properly trained and qualified staff conduct the installation of the

	X-Ray system in order to validate the warranty of the system. *5.0 TASKS PERFORMED BY CONTRACTOR The Offeror must perform the following tasks for each x-ray machine delivered:* - *installation;* - *programming;* - *testing;* - *operator training; and* - *maintenance and service.* *Note the installation is clearly included in the Tasks Performed by Contractor as a "must" activity.* *7.0 SUPPORT PROVIDED BY GLOBAL AFFAIRS CANADA* *7.7 GAC will make every attempt to ensure that the x-ray machine shipped to the Embassy will not require re-generating.* *7.7.1 Delays in the overall delivery to the Embassy (such as shipping or customs), may delay the installation and cause the x-ray to pass the six (6) month expiration date.* *7.7.2 If this occurs, the offeror must provide the required re-generation procedure at time of installation.* Note under Section 7.0 as a whole, Global Affairs are to act in a supporting and co-ordinating effort with the Contractor in the arranging of the tasks described in Section 5.0. Specifically, subsection 7.7.2 states that the offeror must provide the required re-generation. *ATTACHMENT 2 TO PART 4* *CALCULATION OF OFFER PRICE* The Installation of the X-Ray systems is included (20 per region per year) in Tables 14-19 and the subsequent Calculation of Offer Price. Considering the points listed above, the responsibility for any regeneration of the X-Ray generator (if required), is clearly the task of the Contractor. How this is done or the minimum time frame involved (eg. Inactive for 6 months) should therefore not be specified as it is up to the Contractor to perform these tasks under the installation procedure. We ask that this requirement be removed.
A68	Please note that the Objective section above was amended in Amendment 005 to remove reference to installation. Installation remains part of the scope of the requirement and will form part of the financial evaluation, but it is a separate line item (i.e. not included in the price of the machine). The Offeror will be required to provide installation only if a user orders that line item on a call-up. Canada recognizes that most, if not all, OEMs require that properly trained and qualified staff conduct the installation. However, it is mandatory that Canada have the ability to do its own installation if desired and the Offeror must honour the warranty if this is done.

Amendment 012 – published March 13, 2020:

Q71	We don't believe Answer 68 addressed the question being asked in Question 68. The reference information provided in the question was to provide the context that the installation of the equipment is the clear responsibility of the Offeror as laid out in several places throughout the solicitation (and referenced in Q68) . The installation may need to include the generation seasoning but as stated this function will be performed by the Offeror. How the generator seasoning (if required) is conducted during the installation should therefore not be stipulated as a mandatory requirement as this task will be performed by the Offeror. We reiterate that this is referenced and documented at numerous places throughout the solicitation.

	As such, we ask that the following requirement be removed: *3.2.10 Software-driven generator seasoning with automatic ramp-up, without opening of the unit or entry via access-panel, when the unit has been inactive for a minimum of six (months).* Additionally, A55 in Amendment #6 states that an X-Ray may be shipped from the GAC warehouse and that "Global Affairs staff install the x-ray". A68 in Amendment #9 also states that "it is mandatory that Canada have the ability to do its own installation if desired". We understand that GAC staff may be already trained on the installation procedures of X-Ray systems they currently have in use and may have a desire to perform their own installations. We do not believe this should be taken into consideration for this competitive solicitation as it is outside the scope of this solicitation and it places non-incumbent Offerors at a disadvantage.
A71	Canada does need to have the right to install. This does not mean that Canada will always install all x-ray machines, but rather that it reserves the right to do so in certain, exceptional situations. - Depending on geopolitical situations, political uncertainty or emergencies, the offeror might refuse to install a machine in certain areas. Given the ever changing state of affairs worldwide, such situations may arise at a moment's notice. At the time of the offer, the offeror might have indicated that they would travel to the region, but a few months later they change their corporate position. GAC must account for such instances and must be able to send its own staff to install the x-ray. - The fact that staff has already been trained to install a certain model of x-ray machines will not be a factor in assessing the offers received. Staff will be trained again based on the model provided by the winning offeror. - Canada did not include this specific training as part of this solicitation given that it would be offered only once to a small group of staff. GAC would establish a separate contract to cover this training. Software seasoning is also required. - These x-ray machines will be located in Canadian missions and embassies, some of which are in countries where geopolitical situations, political uncertainty or emergencies might force the shutdown of the said mission/embassy. As such, x-ray machines might go unused and be entirely shut down for extended periods of time. - When these missions/embassies are re-opened, ensuring the safety of staff is of utmost importance and the required security equipment must be up and running promptly. Waiting for a technician to come on site to do seasoning is not operationally feasible, especially if the cause of the mission/embassy's closure is limiting travel to the area. - As such, seasoning must be software driven to afford GAC the flexibility to get x-ray machines up and running promptly after an extended period of use.

Amendment 013 – published on March 19, 2020:

Q72	The explanation provided in A71 was informative and GAC's requirement for their staff to be able to re-season the X-Ray generator is understood. As stated in A71, GAC "Staff will be trained again based on the model provided by the winning offeror." and "GAC would establish a separate contract to cover this training." As GAC personnel require the ability to re-season the generator, the appropriate training can certainly be provided to GAC staff if and when requested under a separate contract.

	We request to have Item 3.2.10 modified to state the following to allow flexibility for this requirement: "3.2.10 Software-driven generator seasoning when the unit has been inactive for a minimum of six (months)."
A72	Canada is in agreement with the suggested change. Please see Modifications to RFSO at Section B herein.
B. MODIFICATIONS TO RFSO	
B1.	At ANNEX A – STATEMENT OF WORK, under Group 1, delete part 3.2.10 in its entirety and replace with the following: "3.2.10 Software-driven generator seasoning when the unit has been inactive for a minimum of six (months)."
B2.	At ATTACHMENT 1 TO PART 4 – TECHNICAL SUBMISSION DOCUMENT, under Group 1, delete part 3.2.10 in its entirety and replace with the following: "3.2.10 Software-driven generator seasoning when the unit has been inactive for a minimum of six (months)."