



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-018

Nur Construction Ltd.

*Decision made
Thursday, August 13, 2020*

*Decision issued
Friday, August 14, 2020*

*Reasons issued
Friday, August 28, 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

NUR CONSTRUCTION LTD.

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.

Peter Burn

Peter Burn

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 relates to a Request for Standing Offer (RFSO) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Canadian Forces Housing Agency (CFHA), for the provision of maintenance services for Canadian Forces housing at Borden, Ontario (Solicitation No. W3702-20BN01/A).

[3] Nur Construction Ltd. (Nur) claims that PWGSC failed to evaluate its bid in accordance with the terms of the solicitation. Specifically, Nur challenges PWGSC's conclusion that the bid did not meet mandatory technical criterion MT4 of the RFSO. As a remedy, Nur requests that the bids be re-evaluated, that the designated contract be awarded to the complainant, or that the complainant be compensated by an amount specified by the Tribunal.

[4] For the reasons that follow, the Tribunal has decided not to conduct an inquiry into the complaint.

BACKGROUND

[5] The RFSO was issued on December 18, 2019, with a bid closing date of February 3, 2020.

[6] On February 3, 2020, Nur submitted its bid.

[7] On March 2, 2020, in accordance with the Phased Bid Compliance Process set out in the RFSO, PWGSC sent a Compliance Assessment Report to Nur. PWGSC informed Nur that its bid was not yet compliant with MT2 and MT4 and that Nur was entitled to provide additional or different information for the purpose of demonstrating compliance with those mandatory requirements.

[8] MT4 provides as follows:

	Area of assessment	Mandatory Requirement	Method of Compliance
MT4	Qualified workforce	The Offeror must be able to provide qualified workers for each trade specified in para 3.1.1 of Annex A SOW.	The Offeror shall provide a list of a minimum of one resource to perform work for each trade specified in para 3.1.1 of Annex A SOW. The list may include Subcontractors.

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

² SOR/93-602 [*Regulations*].

		No Subcontractor who holds a restricted license under any provincial legislation can be included by the Offeror in its list.	<p>1. The list shall specify the names of individuals intended for the performance of the work and, as applicable, the firms they are employed by.</p> <p>Where compulsory by the provincial legislation, the bidder must provide proof of trade certification and/or licence; and/or registration certificates for each proposed resource.</p>
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[9] Nur provided responses to the Compliance Assessment Report. With respect to MT4, Nur submitted a list of the companies it would use as subcontractors and identified their owners. For some of the companies, the names of employees were also provided.³

[10] On July 9, 2020, PWGSC informed Nur that it would not be awarded a standing offer because it had not met mandatory technical criterion MT4. PWGSC provided the names of the winning bidders as well as information about the winning bid prices. The regret letter also included the following information on recourse mechanisms:

If you have any concerns relating to the procurement process, please refer to the Recourse Mechanisms page on the Buyandsell.gc.ca website. Please note that there are strict deadlines for filing complaints with the Canadian International Trade Tribunal (CITT) or the Office of the Procurement Ombudsman (OPO), where applicable.⁴

[11] On July 20, 2020, Nur filed a complaint regarding this procurement with OPO. On July 21, 2020, OPO informed Nur that it does not have jurisdiction over complaints related to standing offers. OPO suggested that Nur consider contacting the Tribunal and noted that, as the Tribunal has strict legislated deadlines, Nur should do so as soon as possible.

[12] On July 28, 2020, Nur 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 July 30, 2020, the Tribunal informed Nur that its complaint was deficient and requested that additional information be provided to correct the deficiencies.

[13] On July 31 and August 6, 2020, Nur 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 August 6, 2020.

[14] On August 13, 2020, the Tribunal decided not to conduct an inquiry into the complaint.

³ Exhibit PR-2020-018-01 at 30-34, Vol. 1.

⁴ Exhibit PR-2020-018-01 at 17, Vol. 1. The text "Recourse Mechanisms" was hyperlinked to the relevant page on the Buyandsell.gc.ca website.

ANALYSIS

[15] 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*;⁵
- (ii) the complainant is a potential supplier;⁶
- (iii) the complainant is in respect of a designated contract;⁷ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.⁸

[16] For the following reasons, the Tribunal finds that the complaint was not filed in accordance with the time limits set out in section 6 of the *Regulations*, and that the information provided with the complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the relevant trade agreements. As a result, the Tribunal has decided not to conduct an inquiry into this complaint.

Timeliness

[17] Pursuant to section 6 of the *Regulations*, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If it objects to the government institution within the designated time, it may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

[18] The Tribunal considers that Nur became aware of its ground of complaint on July 9, 2020, when it received the regret letter from PWGSC. As Nur did not file an objection with PWGSC,⁹ it was required to file its complaint with the Tribunal within 10 working days of receipt of the regret letter; in other words, no later than July 23, 2020. As noted above, Nur first filed its complaint with the Tribunal on July 28, 2020.

[19] In its complaint, Nur acknowledged that it had filed its complaint more than 10 working days after receipt of the regret letter from PWGSC. It attributed this delay to its interactions with OPO. In response to the Tribunal's request for additional details regarding this claim, Nur stated that it was unfamiliar with the process and, since PWGSC's statement on recourse mechanisms indicated that it could file with either the Tribunal or OPO, it chose to file with OPO first.

[20] This is not the first instance where a complainant has missed its deadline to file a complaint with the Tribunal due, at least in part, to its decision to file a complaint with OPO where OPO does not have jurisdiction. While bidders must ultimately bear the responsibility for ensuring that they file in the correct forum, the Tribunal acknowledges that determining which institution has jurisdiction

⁵ Subsection 6(1) of the *Regulations*.

⁶ Paragraph 7(1)(a) of the *Regulations*.

⁷ Paragraph 7(1)(b) of the *Regulations*.

⁸ Paragraph 7(1)(c) of the *Regulations*.

⁹ In its complaint, Nur stated that its complaint to OPO was an objection to the relevant government institution.

over a procurement process can be a confusing exercise, in particular for unrepresented suppliers, as exemplified by the circumstances of this case. PWGSC's practice of informing bidders that they may have recourse either to the Tribunal *or* OPO can only contribute to this confusion. The Tribunal considers that government institutions are better placed than potential suppliers to ascertain, at least on a *prima facie* basis, whether the Tribunal or OPO would have jurisdiction over any complaint arising from a procurement process.

[21] Consequently, the Tribunal requests that federal institutions, in this case PWGSC, give serious consideration to what means it could employ to better inform bidders of their avenues of recourse, in particular whether that recourse lies to the Tribunal or to OPO. PWGSC should also reconsider the means by which it makes bidders aware of the time limits for filing a complaint with the Tribunal, with a view to preventing the rejection of a complaint solely on the basis of non-compliance with the time limits. Accordingly, the Tribunal again requests that PWGSC include the following information in their regret letters to unsuccessful bidders:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) within 10 working days from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [PWGSC]; if [PWGSC] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal's Web site (www.citt-tcce.gc.ca) or by contacting the Registrar of the Tribunal at 613-993-3595.

Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).¹⁰

Reasonable indication of a breach of the trade agreements

[22] The trade agreements require procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation. The trade agreements also generally provide that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation, and that procuring entities must award contracts in accordance with the criteria and essential requirements specified in the tender documentation.¹¹

[23] 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

¹⁰ See, most recently, *Seignior Chemical Products Limited, trading as SCP Science v. Department of Public Works and Government Services* (6 December 2019), PR-2019-048 (CITT) at para. 35; *Kaméléons & cie Solutions Design inc.* (26 November 2019), PR-2019-047 (CITT) at para. 22. See also *R.H. MacFarlands (1996) Ltd.* (20 December 2013), PR-2013-029 (CITT) at para. 31.

¹¹ Article 509(7) of the *Canadian Free Trade Agreement* 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. Articles 1015(4)(a) and (d) of the *North American Free Trade Agreement* 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."

vital information provided in a bid, based their evaluation on undisclosed criteria, or otherwise failed to conduct the evaluation in a procedurally unfair way.¹²

[24] Finally, it is well established that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation.¹³ The Tribunal has also made it clear that bidders bear the responsibility of preparing their bids diligently in accordance with the instructions in the solicitation, taking care to ensure that the information provided clearly demonstrates compliance.¹⁴

[25] The Tribunal finds that it was reasonable for PWGSC to determine that Nur's bid was not compliant with the mandatory requirements of the solicitation. MT4 required that bidders "specify the names of individuals intended for the performance of the work and, as applicable, the firms they are employed by"¹⁵ [emphasis added]. Neither Nur's bid nor its response to the CAR for MT4 clearly identified the names of the individuals who would be performing the work.

[26] Specifically, Nur's technical bid did not identify any individuals who would be performing the work.¹⁶ While the response to the CAR identified the owners of all of the companies proposed as subcontractors, and provided names of employees for some of the companies, the response did not clearly indicate who among these were the individuals proposed as resources for performing the work.¹⁷

[27] As a result, the Tribunal finds that there is no reasonable indication that PWGSC breached the trade agreements in its evaluation of Nur's bid.

DECISION

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

Peter Burn
Peter Burn
Presiding Member

¹² 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 Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

¹³ *Accipiter Radar Technologies Inc. v. Department of Public Works and Government Services* (26 April 2019), PR-2018-049 (CITT) at para. 71; *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.

¹⁴ *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 150; *ADR Education v. Department of Public Works and Government Services* (18 October 2013), PR-2013-011 (CITT) at para. 59.

¹⁵ Exhibit PR-2020-018-01 at 1763, Vol. 1.

¹⁶ Exhibit PR-2020-018-01 at 47, Vol. 1.

¹⁷ Exhibit PR-2020-018-01 at 30-34, Vol. 1.