Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-058

Reach Technologies Inc.

Decision made
Wednesday, November 25, 2020

Decision issued
Thursday, November 26, 2020

Reasons issued
Friday, December 11, 2020

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

REACH TECHNOLOGIES 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.

Peter Burn

Peter Burn
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] This complaint relates to a Request for Proposals (RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence, for the provision of a software-defined sonobuoy receiver (SDSR) (Solicitation No. W7707-206762/A).

[3] Reach Technologies Inc. (RTI) claims that the tender documentation did not include all necessary information regarding the evaluation criteria, and that PWGSC applied undisclosed evaluation criteria in evaluating RTI's bid. RTI challenges PWGSC's conclusion that its bid did not meet mandatory criteria M1 and M4 of the RFP.

[4] As a remedy, RTI requests that the designated contract be terminated and that a new solicitation for the designated contract be issued.

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

BACKGROUND

[6] The RFP was issued on July 9, 2020, with a final bid closing date of September 15, 2020.[3]

[7] On September 15, 2020, RTI submitted its bid.[4]

[8] On October 27, 2020, PWGSC informed RTI that it would not be issued a contract.[5] RTI's bid was disqualified on the grounds that it had not provided the information necessary to demonstrate that it met mandatory criterion M1, which provides as follows: "M1 – Must provide evidence that the SDSR is capable of simultaneously demodulating 32 sonobuoy channels."[6]

[9] On October 28, 2020, RTI requested a debriefing meeting to discuss the reasons why its proposal was determined to be non-compliant with M1.[7]

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1 R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2 SOR/93-602 [*Regulations*].
3 Exhibit PR-2020-058-01B at 63 and 94.
4 Exhibit PR-2020-058-01B at 10.
5 Exhibit PR-2020-058-01B at 99.
6 Exhibit PR-2020-058-01B at 89.
7 Exhibit PR-2020-058-01B at 103.

[10] On November 5, 2020, the debriefing meeting was held via videoconference.[8]

[11] On November 9, 2020, RTI contacted PWGSC to reiterate its disagreement, expressed during the debriefing meeting of November 5, with its disqualification on the grounds that it had not met M1. RTI stated as follows:

> In our technical proposal, we fully documented our successful test results for simultaneous demodulation of 32 sonobuoy channels in section 3.5.1. In section 3.4.1.4, we documented that our proposed solution has a 32 channel receiver block capable of simultaneously channelizing and demodulating 32 of any of the 99 sonobuoy channels. We argue that setting all 32 channels of our receiver to a single modulated sonobuoy test signal, coupled with the intermodulation interference test in section 3.5.3, provides adequate test coverage of the performance of the simultaneous 32 channel receiver block. Moreover, this validates the merit of the mandatory requirement. In the absence of a specified test procedure within the RFP, we developed this test procedure, as we felt it was logical and reasonable.[9]

[12] On November 10, 2020, PWGSC responded to RTI. PWGSC stated that the technical authority found that "displaying the same signal 32 times" was not sufficient to meet the requirements of the RFP, and noted that RTI had confirmed that it did not have the proper equipment to demonstrate simultaneous demodulation of 32 channels.[10] PWGSC also informed RTI that the technical authority had found its bid non-compliant with M4, which provides as follows:

> Must provide evidence that the SDSR is a Commercial Off The Shelf System or Military Off the Shelf System that is production ready. This evidence must be in the form of proof of a sale of a Software Defined Sonobuoy Receiver.[11]

[13] PWGSC noted that RTI had provided an invoice for a 2-channel SDSR, which was not found to be proof of sale of a 32-channel SDSR.[12]

[14] On November 16, 2020, RTI 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 November 18, 2020, the Tribunal informed RTI that its complaint was deficient and requested that additional information be provided to correct the deficiencies.

[15] On November 18, 2020, RTI 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 November 18, 2020.

[16] On November 25, 2020, the Tribunal decided not to conduct an inquiry into the complaint.

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8 Exhibit PR-2020-058-01B at 137-8.
9 Exhibit PR-2020-058-01B at 139.
10 Exhibit PR-2020-058-01B at 145.
11 Exhibit PR-2020-058-01B at 89.
12 Exhibit PR-2020-058-01B at 145.

ANALYSIS

[17] 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*;[13]

ii) the complainant is a potential supplier;[14]

iii) the complainant is in respect of a designated contract;[15] and

iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.[16]

[18] 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 complaint discloses no reasonable indication of a breach of the trade agreements. As a result, the Tribunal has decided not to conduct an inquiry into this complaint.

Timeliness

[19] As noted above, one of RTI's grounds of complaint was that the tender documentation was not sufficiently clear, in violation of paragraph 7(a) of Article 509 of the Canadian Free Trade Agreement[17] (and equivalent provisions in other applicable trade agreements).[18] Specifically, with respect to M1, RTI argued that the RFP states that the bid must demonstrate that the SDSR is *capable* of simultaneously demodulating 32 channels, not that the evidence presented in the bid must demonstrate the *actual* demodulation of 32 channels simultaneously. RTI further argued that no test procedure was set out in the RFP and that therefore the RFP was unclear as to what evidence was required to demonstrate that the proposed SDSR was "capable" of simultaneously demodulating 32 sonobuoy channels.

[20] As set out above, RTI argued that its bid did demonstrate that its proposed SDSR was capable of simultaneously demodulating 32 different signals. Further, RTI submitted that, in order to demonstrate simultaneous decoding of different signals on 32 channels, it would have to have access to an expensive simulator, which it does not have. Accordingly, RTI developed its own test procedure, which it felt was "logical and reasonable".

[21] With respect to M4, RTI argued that M4 does not require proof of sale of a 32-channel SDSR, but only "*a* Software Defined Sonobuoy Receiver". According to RTI, at the debriefing

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13 Subsection 6(1) of the *Regulations*.
14 Paragraph 7(1)(a) of the *Regulations*.
15 Paragraph 7(1)(b) of the *Regulations*.
16 Paragraph 7(1)(c) of the *Regulations*.
17 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).
18 According to the Notice of Proposed Procurement, those are: the Canada-European Union Comprehensive Economic and Trade Agreement, the WTO Revised Agreement on Government Procurement, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

meeting on November 5, 2020, PWGSC explained that this wording was left deliberately open in order to not disqualify bidders who had not commercialized the exact unit that was being bid.[19] RTI argued that this is evidence that the wording of the requirement was unclear as PWGSC itself did not have a clear understanding of what it encompassed.

[22] Subsections 6(1) and 6(2) of the *Regulations* provide that a complainant has 10 working days from the date on which it first became aware, or reasonably should have become aware, of its ground of complaint to either file a complaint with the Tribunal or object to the government institution.

[23] The Tribunal and the Federal Court of Appeal have consistently held that bidders are expected to keep a constant vigil and react as soon as they become aware, or reasonably should have become aware, of a flaw in the procurement process.[20] The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected. In particular, complaints grounded on the interpretation of the terms of a solicitation should be made when the alleged problem with the term became or reasonably should have become apparent, which the Tribunal generally considers to be at the time when the bidder acquaints itself with the solicitation documents.[21]

[24] The Tribunal has also found that it is incumbent on a bidder, before submitting its bid, to seek clarification from the procuring entity to assure itself that it has not made incorrect assumptions regarding how the requirements ought to apply. The trade agreements do not shield a bidder when its interpretation of the requirement turns out to be incorrect.[22]

[25] The Tribunal considers that the problem with M1 was apparent or should reasonably have been apparent to RTI at the time it acquainted itself with the solicitation documents. The fact that there is no direction in the RFP on what type of evidence would be required to demonstrate that the proposed SDSR is capable of simultaneously demodulating 32 channels is evident on the face of the RFP. However, there is no evidence that RTI requested clarification from PWGSC regarding the wording of M1, or as to what test procedure should be employed to demonstrate compliance, prior to submitting its bid. These problems were only raised once RTI had been informed that its bid was disqualified. In other words, RTI assumed that the test procedure it adopted was sufficient and did not raise the alleged lack of clarity in the solicitation document with respect to how to provide evidence that the proposed SDSR was capable of simultaneously demodulating 32 channels until after its proposal had been rejected. The Tribunal finds that this issue should have been raised with PWGSC earlier in the process and that RTI's complaint is untimely.

[26] Similarly, with respect to M4, RTI assumed that the expression "a Software Defined Sonobuoy Receiver" meant a SDSR with any amount of channels. RTI now claims that this wording was ambiguous. Again, the ambiguity in this wording was apparent, or reasonably should have been apparent, to RTI at the time it acquainted itself with the solicitation documents, as the RFP specifically sought a 32-channel SDSR, but this was not specified in M4. It was incumbent on RTI to seek clarification from PWGSC about the ambiguity in the wording prior to submitting its proposal.

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19 Exhibit PR-2020-058-01B at 11 and 14.

20 *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

21 *Davco Welding Ltd.* (29 June 2017), PR-2017-018 (CITT) at para. 24; *Joli Distribution F. Hendel Inc.* (18 April 2017), PR-2016-067 (CITT) at para. 12.

22 *Accipiter Radar Technologies Inc. v. Department of Public Works and Government Services* (26 April 2019), PR-2018-049 (CITT) at para. 75.

Accordingly, the Tribunal finds that this issue also should have been raised with PWGSC earlier in the process, and not only once RTI's bid had been rejected.

Reasonable indication of a breach

[27] 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.[23]

[28] 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.[24]

[29] RTI submitted that PWGSC applied undisclosed evaluation criteria when evaluating RTI's bid. Specifically, RTI submitted that PWGSC had a preferred testing procedure for demonstrating compliance with M1, which as noted above would require use of an expensive simulator, that was not disclosed in the solicitation documents.

[30] Given that the Tribunal has accepted that the RFP did not provide details regarding the type of evidence that was required to meet M1, the Tribunal must ask itself whether this caused unfairness to RTI because it could not have expected from reading the tender documents that it would be evaluated in the manner employed by PWGSC.[25]

[31] The Federal Court of Appeal has held that, while an RFP must identify all major evaluation criteria, it is not required to identify all aspects of each criterion which might be taken into account in the evaluation, provided the unidentified aspects are reasonably related to, or encompassed by, the express criterion.[26] However, where the undisclosed criteria constitute a significant departure from the published criteria, the evaluation is unfair and unreasonable.[27]

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23 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.

24 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.

25 *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. 105.

26 *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) at para. 43.

27 *MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.* (6 March 2000), PR-99-034 (CITT) at 19-20; *Seprotech Systems Inc. v. Peacock Inc.*, 2003 FCA 71 (CanLII) at para. 32.

[32] RTI's argument that PWGSC employed undisclosed evaluation criteria is entwined with its argument that the use of the word "capable" in M1 meant that bidders did not have to provide evidence of actual demodulation of 32 channels, since RTI asserts that use of the simulator is the only way to demonstrate actual simultaneous demodulation of 32 channels. The Tribunal considers that this attempt to distinguish between "capable" and "actual" is a distinction without a difference. It seems reasonable for PWGSC to expect evidence that a good it is attempting to purchase is actually able to perform the task that it is being procured to perform, and therefore it seems reasonable to read "capable" as a synonym for "able" in this context. The evaluators found that the evidence presented by RTI did not demonstrate this ability. The Tribunal accordingly considers that it was not unfair that PWGSC would expect evidence that the SDSR could actually simultaneously demodulate 32 channels and that RTI could have reasonably expected from reading the tender documents that it would be evaluated in this way.

[33] In addition, it is unclear whether the use of the expensive simulator described was the only acceptable means of demonstrating this ability, or if PWGSC would have accepted other types of evidence that demonstrate the ability of the SDSR to simultaneously demodulate 32 channels. Again, the issue here is that RTI assumed that demonstrating "capability" would be sufficient.

[34] Accordingly, the Tribunal finds that PWGSC did not employ undisclosed evaluation criteria in evaluating RTI's bid.

DECISION

[35] 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