



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-055

Nur Construction Ltd.

*Decision made
Monday, October 26, 2020*

*Decision issued
Thursday, October 29, 2020*

*Reasons issued
Thursday, November 12, 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

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 Standing Offer (RFSO) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Canadian Forces Housing Agency, for the provision of maintenance services for Canadian Forces housing at Cold Lake, Alberta (Solicitation No. W3704-20CL01/A).

[3] This is the second complaint filed by the complainant, Nur Construction Ltd. (Nur), with respect to this solicitation.³ In the current complaint, 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.

[4] 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. Nur also requests reimbursement of its complaint and bid preparation costs.

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

BACKGROUND

[6] The RFSO was issued on December 18, 2019, with a bid closing date of February 3, 2020.⁴

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

[8] On March 25, 2020, in accordance with the Phased Bid Compliance Process set out in the RFSO, PWGSC sent a Compliance Assessment Report (CAR) to Nur. PWGSC informed Nur that its bid was not yet compliant with mandatory criteria MT2 and MT4 and that Nur was entitled to provide additional or different information for the purpose of demonstrating compliance with those mandatory requirements. The deadline to provide this information was April 1, 2020.⁵

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

² SOR/93-602 [*Regulations*].

³ The first complaint was the subject of the Tribunal's decision in *Nur Construction Ltd.* (10 August 2020), PR-2020-017 (CITT) [PR-2020-017].

⁴ Exhibit PR-2020-017-01 at 13.

⁵ Exhibit PR-2020-017-01A at 46; Exhibit PR-2020-055-01 at 3.

[9] Mandatory criterion MT4 (MT4) provides as follows:⁶

	Area of assessment	Mandatory Requirement	Method of Compliance
...			
MT4	Qualified workforce	<p>The Offeror must be able to provide qualified workers for each trade specified in para 3.1.1 of Annex A SOW.</p> <p>No Subcontractor who holds a restricted license under any provincial legislation can be included by the Offeror in its list.</p>	<p>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.</p> <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>

[10] On April 1, 2020, Nur provided responses to the CAR. With respect to MT4, Nur submitted the name of one of its own employees, as well as a list of the companies it would use as subcontractors, which identified their owners.⁷

[11] On June 24, 2020, PWGSC requested clarification of the information provided with respect to MT4 in Nur's response to the CAR. Specifically, PWGSC asked whether the names of the owners of the companies identified in the response were the names of the individuals who would perform the work.⁸

[12] On June 26, 2020, Nur provided lists of the names of individuals under each different trade identified in the Statement of Work and, where applicable, their trade certification or licence information. These names were different from the names of the owners of the companies provided in the response to the CAR.⁹

⁶ Exhibit PR-2020-017-01 at 36.

⁷ Exhibit PR-2020-017-01A at 46-49; Exhibit PR-2020-055-01 at 3.

⁸ Exhibit PR-2020-017-01A at 22.

⁹ *Ibid.* at 19-21.

[13] On July 17, 2020, PWGSC informed Nur that it would not be awarded a standing offer because it had not met MT4. PWGSC also provided the names of the winning bidders as well as information about the winning bid prices.¹⁰

[14] On the same day, Nur objected to its disqualification on the basis that its bid was non-compliant with MT4 and requested a further explanation.¹¹

[15] On July 31, 2020, Nur filed its first complaint with the Tribunal. On August 7, 2020, the Tribunal decided not to conduct an inquiry into Nur's first complaint on the grounds that it was premature, as PWGSC had not yet provided a response to Nur's objection of July 17, 2020.¹²

[16] On September 21, 2020, PWGSC provided Nur with a further explanation of why it had been disqualified under MT4. PWGSC explained that Nur's April 1, 2020, response to the CAR did not clearly specify the individuals intended for the performance of the various categories of work specified in the RFSO, and therefore did not remedy the deficiency in the response to MT4 provided in its technical bid. PWGSC further explained that it could not take into account the names of the individuals submitted by Nur on June 26, 2020, as these had been received after the April 1, 2020, deadline specified in the CAR to provide new information.¹³

[17] On October 2, 2020, Nur replied to PWGSC and stated that its response did provide the names of individuals intended for the performance of the work.¹⁴

[18] On October 20, 2020, Nur filed this complaint with the Tribunal. At Nur's request, the documents on the record of PR-2020-017 have been joined to this complaint.¹⁵

[19] On October 26, 2020, the Tribunal decided not to conduct an inquiry into the complaint.

ANALYSIS

[20] 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*;¹⁶
- (ii) the complainant is a potential supplier;¹⁷
- (iii) the complainant is in respect of a designated contract;¹⁸ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.¹⁹

¹⁰ *Ibid.* at 14-15.

¹¹ *Ibid.* at 14.

¹² PR-2020-017 at paras. 17, 24.

¹³ Exhibit PR-2020-055-01 at 3-4.

¹⁴ *Ibid.* at 1.

¹⁵ Exhibit PR-2020-055-01A at 26.

¹⁶ Subsection 6(1) of the *Regulations*.

¹⁷ Paragraph 7(1)(a) of the *Regulations*.

¹⁸ Paragraph 7(1)(b) of the *Regulations*.

¹⁹ Paragraph 7(1)(c) of the *Regulations*.

[21] 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

[22] 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.

[23] As noted above, Nur filed an objection with PWGSC on July 17, 2020, the same day as it received the letter notifying it that it had not been awarded a standing offer. The objection was timely as it was made within 10 days of the basis of the complaint becoming known to Nur.

[24] Nur received a response to its objection on September 21, 2020, and replied to it on October 2, 2020. Nur characterized this reply as a second objection, to which it had not yet received a response.²⁰ However, the Tribunal considers that this objection was fundamentally the same as its objection of July 17, 2020, i.e. that Nur disagreed with PWGSC that its bid was non-compliant with MT4. The Tribunal considers that PWGSC's response of September 21, 2020, constituted a complete denial of relief further to Nur's objection of July 17, 2020, in that it made it clear that PWGSC would not be reviewing its decision that Nur's bid was non-compliant with MT4. The Tribunal has previously determined that the filing of a second objection identical or similar to the first, as is the case here, in no way affects the time limits prescribed by subsection 6(2) of the *Regulations*.²¹ Accordingly, in order to be timely Nur's complaint would have to be filed within 10 working days of September 21, 2020, i.e. by October 5, 2020.

[25] Nur's complaint with the Tribunal was not filed until October 20, 2020. Although Nur submitted copies of the response to its objection and its reply to PWGSC to the Tribunal on October 2, 2020, these documents alone did not constitute a complete complaint in accordance with subsection 30.11(2) of the *CITT Act*. As a result, Nur's complaint was not filed within 10 working days of receipt of the denial of relief from PWGSC and does not comply with subsection 6(2) of the *Regulations*.

[26] However, even if Nur's complaint had been timely, the Tribunal could not accept it for inquiry as it does not disclose a reasonable indication of a breach of the applicable trade agreements.²²

²⁰ Exhibit PR-2020-055-01A at 7.

²¹ *Groupe Tehora* (3 October 2019), PR-2019-032 (CITT) at para. 31; *Nuvis Technologies Inc.* (11 July 2019), PR-2019-021 (CITT) at para. 20; *Groupe-conseil INTERALIA S.E.N.C.* (9 October 2009), PR-2009-052 (CITT) at para. 15.

²² The relevant trade agreement in this case is the *Canadian Free Trade Agreement*, 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*]. Other applicable trade agreements include the *World Trade Organization Agreement on Government Procurement* and the *North American Free Trade Agreement* [*NAFTA*].

Reasonable indication of a breach of the trade agreements

[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] Finally, it is well established that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation.²⁵ 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.²⁶

[30] The Tribunal finds that it was reasonable for PWGSC to determine that Nur's bid was non-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" [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.

[31] Specifically, Nur's technical bid did not identify any individuals who would be performing the work.²⁷ While the response to the CAR identified the owners of all of the companies proposed as

²³ Article 509(7) of the *CFTA* 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 *NAFTA* 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."

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 *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.

²⁶ *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.

²⁷ Exhibit PR-2020-017-01A at 114.

subcontractors, the response did not clearly indicate who among these were the individuals proposed as resources for performing the work.²⁸

[32] As noted above, on June 24, 2020, PWGSC requested that Nur clarify whether the owners of the companies proposed as subcontractors provided in the response to the CAR were the individuals intended for the performance of the work. In response, on June 26, 2020, Nur provided lists of names under certain categories that were different from the names of the owners provided in its April 1, 2020, response to the CAR.

[33] The provisions setting out the Phased Bid Compliance Process in the RFSO specifically provide that new information submitted after the deadline set out in the CAR (in this case, April 1, 2020), cannot be taken into consideration, except where the CAR itself allows for an exception:

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION

...

4.1.1 Phased Bid Compliance Process

...

4.1.1.3 (2018-03-13) Phase II: Technical Bid

...

(c) A Bidder shall have the period specified in the CAR (the “Remedy Period”) to remedy the failure to meet any Eligible Mandatory Criterion identified in the CAR by providing to Canada in writing additional or different information or clarification in response to the CAR. Responses received after the end of the Remedy Period will not be considered by Canada, except in circumstances and on terms expressly provided for in the CAR.²⁹

...

[34] As noted by PWGSC in its response to Nur, the acceptance of new information after bid closing that would amount to a substantial revision of the bid could constitute bid repair, which is not permitted under the trade agreements. In accordance with this principle and with the terms of the RFSO, PWGSC was entitled to disregard the new names submitted by Nur on June 26, 2020.

[35] In its complaint, Nur also stated that the reason initially given for its disqualification was inconsistent with the explanation provided by PWGSC on September 21, 2020. From statements Nur made in its complaint, it appears that Nur may have interpreted PWGSC’s original regret letter, which simply stated that Nur had been found non-compliant with “MT4 - Qualified workforce”, as meaning that PWGSC found some of the resources it had proposed to be unqualified based on their licences or other qualifications.³⁰ However, from the procedural history and the documents on file (i.e. the CAR and the subsequent clarification request), it is clear that the issue with Nur’s response

²⁸ *Ibid.* at 46-49.

²⁹ Exhibit PR-2020-017-01 at 30.

³⁰ Exhibit PR-2020-055-01A at 7, 9.

to MT4 has always been that it did not clearly identify the people who were actually going to be doing the work.

[36] 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

[37] 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