



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-086

ABTec Solutions Ltd.

*Decision made
Thursday, February 18, 2021*

*Decision and reasons issued
Wednesday, February 24, 2021*

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

ABTEC SOLUTIONS 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.

Frédéric Seppey

Frédéric Seppey
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 concerns a Notice of Proposed Procurement (NPP) for the purchase of a flatbed colour scanner (Solicitation No. 31029-210070/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the National Research Council of Canada. The NPP included, *inter alia*, a requirement to provide two sample images scanned behind a piece of glass or acrylic of at least 0.375-inch thickness (item 1.6 of the compliance matrix found in Annex A of the NPP).

[3] ABTec Solutions Ltd. (ABTec) claims that it had submitted a responsive bid in the solicitation at issue and that PWGSC erred in finding its bid unresponsive.

BACKGROUND

[4] The solicitation was issued on November 12, 2020, and closed on December 1, 2020, at 2:00 p.m. MST.

[5] On or before the bid submission deadline, ABTec submitted its bid.

[6] On December 18, 2020, the procurement officer from PWGSC contacted ABTec to confirm which sample images it had provided had been taken using glass or acrylic that was at least 0.375-inch (9.5 mm) thick, as required by mandatory requirement 1.6 of the NPP.

[7] On December 21, 2020, ABTec provided three additional photos.

[8] On December 22, 2020, PWGSC requested confirmation from ABTec whether the photos were new submissions and under what conditions the photos included in its submission were taken. The same day, ABTec confirmed that the original photos with its bid submission filed prior to December 1, 2020, were taken with 3 mm and 6 mm glass. The new photos emailed to PWGSC on December 22, 2020, used 9.0-9.2 mm glass.

[9] On February 8, 2021, PWGSC communicated the solicitation results to ABTec, finding that its bid had been non-compliant, including with respect to the sample images provided as per mandatory requirement 1.6. A contract was awarded to Nimble Information Strategies Inc. in the amount of \$71,324.26.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602 [*Regulations*].

[10] On February 9, 2021, ABTec submitted a complaint to the Office of the Procurement Ombudsman (OPO). OPO referred this complaint to the Tribunal. The Tribunal then contacted ABTec with information on filing a procurement complaint with the Tribunal.

[11] On February 10, 2021, the Tribunal received ABTec's complaint.

[12] On February 11, 2021, noting that the complaint was incomplete, the Tribunal sent ABTec a letter requesting additional information and identifying the deficiencies to be corrected for the complaint to be considered to have been filed.

[13] Following the submission of this requested information from ABTec on February 11, 2021, the Tribunal acknowledged receipt of the complaint on February 12, 2021.

ANALYSIS

[14] 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*;³
- (ii) the complainant is a potential supplier;⁴
- (iii) the complaint is in respect of a designated contract;⁵ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.⁶

[15] While ABTec's complaint has met the first three conditions, for the reasons that follow the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the applicable trade agreements.

No reasonable indication of breach

[16] ABTec's complaint centers on its view that PWGSC made an error in the evaluation of its bid and that it had submitted all the requested information. ABTec asserts that it has proof that it submitted all the required documents for the procurement and that it should have been awarded the contract.

[17] ABTec's correspondence, however, confirms that either ABTec, or its supplier, failed to scan the correct test document using the required minimum thickness of glass or acrylic as part of its bid submission.⁷ In its regret letter, PWGSC states as follows:

³ Subsection 6(1) of the *Regulations*.

⁴ Paragraph 7(1)(a) of the *Regulations*.

⁵ Paragraph 7(1)(b) of the *Regulations*.

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

⁷ Exhibit PR-2020-086-01 at 12.

Unfortunately, the evaluating team determined that your bid did not comply with all of the mandatory requirements of the solicitation . . . As a result of finding your bid to be non-responsive, your bid was disqualified and Canada did not proceed with the evaluation.

[18] In finding ABTec's bid non-compliant, PWGSC highlights that ABTec had failed to provide the two samples outlined in the mandatory requirements. One sample was to be taken using a focusing chart directly on the scanning surface, with a subsequent scan of the document made on top of a piece of glass or acrylic of at least 0.375-inch (9.5 mm) thickness.

[19] The trade agreements require procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation. The trade agreements also 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.⁸

[20] When assessing whether these procedures were followed, the Tribunal generally shows deference to evaluators and interferes only if an evaluation is unreasonable. Examples of such instances include occurrences when 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 fair way.⁹

[21] In the present case, ABTec has not provided the Tribunal with evidence that would suggest that the evaluation team had made an error or failed to conduct the procurement in a procedurally fair manner. If anything, the correspondence between ABTec and PWGSC shows that PWGSC gave ABTec a reasonable opportunity to clarify its bid when it received three sample photos in its bid rather than the two requested.

[22] It is well established that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation at the time of bid closing.¹⁰ In prior cases, the Tribunal has consistently held that bidders bear the responsibility of preparing their bids diligently, in accordance

⁸ For example, 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.

⁹ 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.

¹⁰ *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.

with the instructions in the solicitation and taking care to ensure that the information provided in their proposals clearly demonstrates compliance.¹¹

[23] Neither ABTec's initial nor follow-up image samples provided to PWGSC met the requirements of the solicitation. Mandatory requirement 1.6 required images taken behind a piece of glass or acrylic of at least 0.375-inch thickness in order to evaluate the scanner's depth of field. ABTec did not supply any samples at or above this depth. It should also be noted that any images that were provided by ABTec following the close of bids would not have been eligible for consideration in any event, as this information was supplied late.

[24] It was incumbent on ABTec to exercise due diligence in the preparation and delivery of its bid to ensure that it understood and was compliant with all the instructions in the NPP. Based on ABTec's own admission, it is evident that it had failed to meet this requirement.

[25] As a result, the Tribunal finds that ABTec's argument fails to disclose a reasonable indication that the procurement was conducted in a manner that is inconsistent with the relevant trade agreements.

DECISION

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

Frédéric Seppey

Frédéric Seppey
Presiding Member

¹¹ *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.