



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-026

MacGregor's Custom Machining
Ltd.

*Decision made
Tuesday, August 3, 2021*

*Decision issued
Thursday, August 5, 2021*

*Reasons issued
Wednesday, August 18, 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

MACGREGOR'S CUSTOM MACHINING 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.

Susan D. Beaubien

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Presiding Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

[1] MacGregor's Custom Machining Ltd. (MacGregor) has filed a complaint with the Tribunal concerning the outcome of a tender (Solicitation No. F6839-205060/A)¹ issued on May 13, 2021, by the Department of Public Works and Government Services (PWGSC).

[2] The Canadian Coast Guard has identified a need for a new lighthouse design to be used in the Atlantic provinces. As such, the RFP is for the procurement of modular lighthouses by PWGSC on behalf of Fisheries and Oceans Canada.

[3] The RFP describes the work as consisting of the design, fabrication, coating, delivery and offloading of three (3) lighthouse frames at Shearwater, Nova Scotia. The proposed modular lighthouses must conform to design constraints prescribed by the RFP, and the design of the successful bidder is subject to approval during design and prior to fabrication. The RFP included a conceptual drawing to serve as a basic guideline for prospective bidders.²

[4] The closing date for submission of bids to PWGSC was June 17, 2021.³ During the course of the tender, several amendments to the RFP were issued, including the provision of revised specifications, together with answers to questions posed by prospective bidders.⁴

[5] MacGregor submitted a timely bid to PWGSC, in response to the RFP.⁵

[6] On July 21, 2021, PWGSC informed MacGregor that its bid had been disqualified and that a contract had been awarded to another bidder in the amount of \$197,745.00. The following reasons were provided:

The evaluation team determined that your bid contained conditions in addition to the ones outlined in the solicitation document. Canada cannot accept others' terms and conditions as they could conflict with our own. As a result, your bid was found to be non-responsive and was therefore disqualified and we did not proceed with your evaluation.⁶

[7] MacGregor promptly sought clarification and received a debriefing from PWGSC concerning the disqualification of its bid. The debriefing session took place on July 22, 2021, but evidently did not provide MacGregor with any satisfactory recourse.⁷

[8] On July 22, 2021, MacGregor filed a complaint with the Tribunal, which was supplemented thereafter with additional materials. The Tribunal acknowledged MacGregor's complaint as being complete on July 28, 2021.⁸

¹ <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-HAL-104-6158> [RFP].

² Amendment No. 1 at p. 3-6.

³ Having been extended by Amendment No. 3 to the RFP.

⁴ See Amendments Nos. 1 through 5 to the RFP.

⁵ Exhibit PR-2021-026-01.B (Protected).

⁶ Exhibit PR-2021-026-01.A at p. 16-17.

⁷ *Ibid.* at p. 11-15.

⁸ Exhibit PR-2021-026-03.

[9] MacGregor asserts that it has an experienced track record for being awarded and delivering upon tendered projects for Fisheries and Oceans Canada, including the design and construction of modular lighthouses. It disputes PWGSC's finding that certain terms and conditions in MacGregor's bid were non-compliant with the RFP. MacGregor alleges that its bid is being unfairly penalized for demonstrating a full understanding of the scope of work and for providing a detailed plan to enable a competent realization of the project.⁹

[10] In addition, MacGregor contends that its bid represents better value for money because its bid price was approximately 20 percent lower than the price submitted by the winning bidder.¹⁰

[11] On August 4, 2021, the Tribunal decided not to commence an inquiry with respect to MacGregor's complaint.¹¹

ANALYSIS

[12] The Tribunal's authority to conduct inquiries concerning procurement matters arises from the *Canadian International Trade Tribunal Act*¹² and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.¹³

[13] According to subsection 6(1) of the *Regulations*, a complaint must be filed within 10 working days of the date when the complainant knew or should have reasonably known about the basis of a complaint. MacGregor's complaint satisfies this requirement as it was filed on July 22, 2021—one day after MacGregor was unable to obtain recourse by complaining directly to PWGSC.

[14] The Tribunal may decide to conduct an inquiry if it determines that the complaint has been filed by a potential supplier with respect to a "designated contract"¹⁴ and that there is a reasonable indication that the procurement has not been conducted in accordance with applicable trade agreements.¹⁵

[15] The RFP pertains to the supply of goods and is subject to the provisions of at least one trade agreement, namely the Canadian Free Trade Agreement.¹⁶ Accordingly, it relates to a designated contract within the meaning of the *CITT Act* and the *Regulations*. By submitting a bid, McGregor thus qualifies as a "potential supplier" of the modular lighthouses being procured.

[16] The Tribunal now turns to consider whether MacGregor's complaint discloses grounds for the possible conclusion that PWGSC did not conduct the procurement in accordance with the applicable trade agreements.

⁹ Exhibit PR-2021-026-01.A at p. 8.

¹⁰ *Ibid.*

¹¹ *McGregor's Custom Machining Ltd. v. Department of Public Works and Government Services* (3 August 2021), PR-2021-026 (CITT).

¹² R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

¹³ SOR/93-602 [*Regulations*].

¹⁴ As defined by s. 30.1 of the *CITT Act*.

¹⁵ *Regulations*, s. 7(1).

¹⁶ Canadian Free Trade Agreement, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2021/08/CFTA-Consolidated-Text-Final-English_August-10-2021.pdf> (entered into force 1 July 2017) [CFTA].

[17] In support of its complaint, MacGregor cited the WTO Agreement on Government Procurement, Article XIII, Section 4(b).¹⁷ However, there is no Section 4(b) within Article XIII which deals with “Limited Tendering”¹⁸ and is thus inapplicable to this RFP. Notwithstanding, the Tribunal has considered MacGregor’s complaint having regard to Article 515(5) of the CFTA. The provisions of Article 515(5) provide as follows and reflect the grounds for complaint, as alleged by MacGregor:

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

[18] The relevant provisions of the RFP pertaining to the disqualification of MacGregor’s bid are reproduced below:

6.4.2 Delivery Date

All the deliverables must be received within 18 weeks from the date of Contract Award.¹⁹

...

6.0 Work Schedule

6.1 All work on the project shall be completed within 18 weeks of award.²⁰

...

2.1 Standard Instructions, Clauses and Conditions

The 2003 (2020-05-28) Standard Instructions - Goods or Services - Competitive Requirements, are incorporated by reference into and form part of the bid solicitation.²¹

Standard Instructions - Goods or Services - Competitive Requirements

05 (2018-05-22) Submission of bids

- 4. Bids will remain open for acceptance for a period of not less than 60 days from the closing date of the bid solicitation, unless specified otherwise in the bid solicitation. Canada reserves the right to seek an extension of the bid validity period from all responsive bidders in writing, within a minimum of 3 days before the end of the bid validity period. If the extension is accepted by all responsive bidders, Canada will continue with the evaluation of the bids. If the extension is not accepted by all responsive bidders, Canada will, at its sole discretion, either

¹⁷ Exhibit PR-2021-026-01A at p. 7.

¹⁸ Revised Agreement on Government Procurement, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) at p. 32.

¹⁹ RFP at p. 10.

²⁰ RFP at p. 27.

²¹ RFP at p. 4.

continue with the evaluation of the bids of those who have accepted the extension or cancel the solicitation.²²

The Contractor will be paid a firm unit price in Canadian dollars, the Goods and Services Tax or Harmonized Sales Tax excluded.²³

[19] In its bid, MacGregor stated the following:

Anticipated duration of the project is 18-22 weeks following customer approvals of shop drawings.²⁴

Please note that this quote is valid for 30 days from date referenced above due to extreme volatility in the raw material market.²⁵

Preferred payment to be direct deposit or cheque, all Visa and Mastercard payments will be charged a 4% service fee.²⁶

[20] PWGSC found that the above aspects of MacGregor's bid were inconsistent with the requirements of the RFP and thus non-compliant. MacGregor takes the view that the terms of its bids supplemented, but did not contradict, the terms of the RFP.

[21] In reviewing the evaluation of bids in a procurement, a reasonableness standard applies.²⁷ Accordingly, the issue to be decided is whether PWGSC acted unreasonably in disqualifying MacGregor's bid.

[22] According to the terms of the RFP, bidders agree "to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract."²⁸

[23] Strict compliance is required with respect to mandatory requirements of the tender. It is incumbent upon bidders to exercise due diligence during the preparation of their proposals to ensure that the solicitation instructions are adhered to and that the bid clearly demonstrates compliance with the essential aspects of the solicitation. Compliance with all mandatory criteria cannot be abridged or left to inference.²⁹

²² Online: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/25#submission-of-bids>>.

²³ Annex B – Basis of Payment, RFP at p. 16.

²⁴ MacGregor Bid at p. 6.

²⁵ *Ibid.*

²⁶ *Ibid.* at p. 7.

²⁷ *Dynamic Engineering v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CITT) at para. 27; *Star Group International Trading Corporation v. Defence Construction (1951) Limited* (7 April 2014), PR-2013-032 (CITT) at para. 26; *Valley Associates Global Security Corporation v. Department of Public Works and Government Services*, 2020 CanLII 42819 (CA CITT) at paras. 75-76 [*Valley Associates*].

²⁸ Article 2.1 of the RFP at p. 4.

²⁹ *J.D. Irving, Limited d.b.a. Chandler Sales*, 2019 CanLII 116903 (CA CITT) at para 22; *Nova-BioRubber Green Technologies Inc.*, 2019 CanLII 134268 (CA CITT) at para 19; *Trans-Sol Aviation Service Inc. (Re)*, 2008 CanLII 35165 (CA CITT) at para. 11; *Bio-Rad Laboratories (Canada) Ltd. v. Department of Public Works and Government Services* (22 December 2017), PR-2017-044 (CITT) [*Bio-Rad Laboratories*] at para. 11.

[24] The RFP makes it clear that the winning bidder must deliver the modular lighthouses within eighteen (18) weeks of the contract award. This condition is expressed using language that is non-negotiable and thus mandatory.

[25] MacGregor's bid provided for delivery of the goods within 18-22 weeks after customer approval of the shop drawings.³⁰ In the usual course, it is to be expected that shop drawings would be prepared for approval *after* the contract has been awarded. As such, MacGregor's terms reset the project timeline to a later starting date (drawing approval) from the one prescribed by the RFP, where the 18-week timeline starts to run from the date of contract award. Even if delivery and approval of the drawings were assumed to be concurrent with the contract award, MacGregor still proposed a flexible project timeline spanning the range of 18 to 22 weeks, as opposed to a fixed deadline of 18 weeks.

[26] It appears that MacGregor, based on its past experience, believes that its project timeline is more practical and realistic. That supposition may or may not be well founded, and the Tribunal makes no finding in that regard. The role of the Tribunal is to ensure that the procurement process is conducted fairly and transparently in accordance with the procedures and requirements prescribed by the RFP and in compliance with the trade agreements.

[27] If PWGSC has defined a project timeline that is overly ambitious or impractical, the merits of that decision will be revealed during the course of the project. If the outcome is unsatisfactory for the purposes of Fisheries and Oceans Canada, PWGSC will be left to consider and invoke whatever remedial measures may be available to it at that time.

[28] The RFP requires bid pricing to be open for acceptance for a period of sixty (60) days after closing. In its bid, MacGregor capped the bid price as being available for thirty (30) days following the close of the tender. It explained this step as being attributable to volatilities in its supply chain.

[29] While the Tribunal has no reason to doubt MacGregor's concerns about price and supply chain volatility, this does not change the fact that the RFP explicitly required that the bid price remain fixed for sixty days following close of the tender.

[30] In some circumstances, there may be inherent variables and greater uncertainty in forecasting and fixing a price for a longer (i.e. 60 days) time frame as opposed to a shorter one (i.e. 30 days). Such circumstances will, in turn, affect the price that a bidder is prepared to offer. This seems to have been MacGregor's rationale in preparing its bid price. By submitting a price quote that was valid over a shorter time frame, MacGregor was likely able to quote a lower price as opposed to making allowances for contingency pricing over a longer term (i.e. 60 days).

[31] Pursuant to article 507(3)(b) of the CFTA, a procuring entity must evaluate competing bids "on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation". Article 515(4) of the CFTA mandates that a bid must comply with the essential requirements of the tender in order to be considered for an award.

³⁰ MacGregor Bid at p. 6. Read in the context of the Statement of Work in the RFP, the customer is presumably Fisheries and Oceans Canada.

[32] The Tribunal can review the bid evaluation process to ensure that a bid was not unfairly disqualified. However, it cannot redraft or second-guess the mandatory criteria defined by the bid documents that are used for that evaluation. Doing so would retroactively change the playing field as between the bidders. In this situation, the playing field would become uneven because bidders pricing over a 60-day period may be placed at a disadvantage over bidders who are pricing over a 30-day period. The same conclusion follows with respect to the project delivery timeline.

[33] The project delivery and pricing timeline are both mandatory requirements of the tender. MacGregor's bid varied those requirements by making its bid subject to the contingencies of a longer project schedule and a shorter term for fixed pricing.

[34] Accordingly, the Tribunal finds no basis to conclude that PWGSC acted unreasonably in disqualifying MacGregor's bid.

[35] In view of this conclusion, the Tribunal need not address the issue as to whether the addition of a service charge for credit card payments constitutes a variation to the RFP terms that would justify bid disqualification.

[36] MacGregor contends that the conditions that it attached to the project schedule, bid pricing and payment arrangements were accepted by PWGSC in prior tenders. The Tribunal has previously concluded³¹ that a bidder's previous practice of including its own terms and conditions when bidding does not create a precedent for the deemed acceptance of that bidder's terms with respect to future tenders. Each tender stands alone, and the fairness of bid evaluation must be premised on the terms of the specific RFP under consideration. Accordingly, it is irrelevant that previous bids submitted by MacGregor with the same contingent terms and conditions were not disqualified in the context of different solicitations. The procuring entity must assess each bid for compliance with the terms and conditions of the specific RFP at issue.

[37] The Tribunal has previously found that a bidder who includes an alternate or additional set of standard terms and condition introduces elements of uncertainty and ambiguity with respect to the compliance of its bid. As such, the procuring entity can reasonably disqualify such a bid.

[38] To the extent that MacGregor had practical concerns about the feasibility of the project parameters as defined by the RFP, it was free to pose questions to PWGSC during the tender and inquire whether PWGSC would entertain variation or modification of the tender requirements. It appears not to have done so. As noted above, the Tribunal can only assess whether bids have been evaluated fairly in accordance with the terms and conditions of the tender that were published in advance of the competition. In doing so, it cannot redraft or second-guess those terms and conditions on the basis of concerns or opinions raised by an unsuccessful bidder, post-competition, that the RFP, as drafted, will not lead to a successful or cost-effective outcome.³²

[39] For the above reasons, the Tribunal finds no reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

³¹ *Bio-Rad Laboratories* at paras. 14-16.

³² *Valley Associates* at paras. 71-75.

DECISION

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

Susan D. Beaubien

Susan D. Beaubien
Presiding Member