



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-039

SZM Promotions Inc. dba:
Promocenter International

*Decision made
Tuesday, August 31, 2021*

*Decision and reasons issued
Friday, September 10, 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

SZM PROMOTIONS INC. DBA: PROMOCENTER INTERNATIONAL

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] The complaint concerns a request for proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Canadian Heritage (PCH) for the provision of Platinum Jubilee lapel pins (Solicitation No. C1111-210134/A).

[3] The complainant, SZM Promotions Inc dba: Promocenter International (SZM), alleges that the RFP contains “multiple instances of contradictory and misleading details”³ and raises the following grounds of complaint:

1. The purpose of section A4.2 of the RFP is unclear. More precisely, SZM does not understand section A4.2, which states that “[t]he Project/Technical Authority requires high definition proofs of the pins requested prior to production”, if, in fact, a high-definition proof was required by bid closing.
2. The RFP does not mention that mandatory requirements are required at the time of bid closing.
3. It is impossible to create an accurate high definition proof without the vector artwork.⁴

[4] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

BACKGROUND

[5] On July 14, 2021, PWGSC issued the RFP on behalf of PCH.⁵ The RFP was published on buyandsell.gc.ca the next day, and the bid closing date was July 29, 2021.⁶

[6] According to the RFP, a bid must meet all the mandatory requirements of the bid solicitation to be considered responsive.⁷ In this regard, Mandatory Requirement 1 (M1) requires that an actual high-definition PDF proof sample of the item be provided at bid closing,⁸ and Mandatory Requirement 4 (M4) requires that a high-definition proof of the item be submitted.⁹

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2021-036-01 at 7.

⁴ Exhibit PR-2021-036-01C at 39-40.

⁵ *Ibid.* at 41.

⁶ Online at: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-CY-011-80196>>.

⁷ Exhibit PR-2021-036-01C at 50.

⁸ *Ibid.* at 67.

⁹ *Ibid.* at 69.

[7] PWGSC published Amendment 01, Amendment 02 and Amendment 03, respectively on July 20, 27 and 28, 2021.¹⁰ The second amendment extended the closing date for the solicitation from July 29, 2021,¹¹ to August 6, 2021, at 14:00 Eastern Daylight Time (EDT).¹²

[8] On August 13, 2021, PWGSC called SZM with respect to the information provided in its complaint. PWGSC asked where could be found the high-resolution proof of the pin required under M1 and M4 in SZM's bid, and advised that, without it, the bid could be considered non-responsive.¹³

[9] On August 17, 2021, SZM emailed PWGSC a high-resolution proof.¹⁴

[10] On August 18, 2021, SZM had a telephone meeting with three officials from PWGSC with respect to the RFP. In particular, the officials asked SZM why it did not provide the high-resolution proof, as prescribed by M1 and M4, to which SZM replied that it did not try to meet M1 and M4 because they were not "meetable".¹⁵

[11] On August 25, 2021, SZM received a regret letter from PWGSC, indicating that M1 and M4, which required bidders to provide a high definition proof, were not met, which rendered SZM's bid non-responsive to the mandatory requirements.¹⁶

[12] On August 25, 2021, SZM filed a complaint with the Tribunal.¹⁷

[13] On August 26, 2021, the Tribunal requested additional information pursuant to subsection 30.12(2) of the *CITT Act*.¹⁸

[14] On August 27, 2021, SZM filed the requested document and the complaint was considered complete and in compliance with subsection 30.11(2) of the *CITT Act*.¹⁹

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 that the following four conditions are met for it to conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

¹⁰ *Ibid.* at 73, 75 and 77.

¹¹ *Ibid.* at 41.

¹² *Ibid.* at 75.

¹³ *Ibid.* at 23 and 35.

¹⁴ *Ibid.* at 19.

¹⁵ *Ibid.* at 35.

¹⁶ *Ibid.* at 37-38.

¹⁷ *Ibid.* at 11.

¹⁸ Exhibit PR-2021-039-02.

¹⁹ Exhibit PR-2021-039-03.

[16] For the following reasons, the Tribunal finds that the complaint does not meet the above-noted conditions and has therefore decided not to conduct an inquiry.

The first and third grounds of complaint are time-barred

[17] As a first ground of complaint, SZM submitted that if, in fact, a high-definition proof was required by bid closing, it does not understand the purpose of section A4.2 of the RFP, which states the following:

The Project/Technical Authority requires high definition proofs of the pins requested *prior to production*.²⁰

[Emphasis added]

[18] As a third ground of complaint, SZM alleges that it is impossible to create an accurate high definition proof without the vector.²¹ The RFP indicates that a detailed graphic specification will be provided in Vector File format at contract award.²²

[19] Pursuant to subsection 6(1) of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.

[20] When a ground of complaint concerns the terms of a solicitation, the Tribunal has previously considered the date on which a bidder obtains a copy of the solicitation documents to be the date on which the bidder becomes aware of a basis of that complaint.²³ Without evidence to the contrary, bidders are generally considered to have obtained a copy of the solicitation on the date of publication.²⁴

[21] In this case, the RFP was published on July 14, 2021. In the absence of evidence to the contrary, the Tribunal considers that SZM obtained a copy and took cognizance of the RFP on that date. Furthermore, the Tribunal finds that the deficiencies alleged by SZM's first and third grounds of complaint would have, or reasonably should have, become apparent to it from the RFP criteria and, therefore, that these grounds of complaint became known or reasonably should have become known to SZM on July 14, 2021. In this regard, SZM mentions in its complaint form that the basic nature of its complaint was "multiple instances of contradictory and misleading details throughout the RFP that became most apparent after bid closing."²⁵ The Tribunal considers that this indeed confirms that SZM had a knowledge of these issues prior to the bid closing date.

[22] The Tribunal further notes that SZM did not submit an inquiry to PWGSC, mentioning that it was impossible to create an accurate high definition proof without the vector artwork or asking

²⁰ Exhibit PR-2021-039-01C at 39.

²¹ *Ibid.* at 40.

²² *Ibid.* at 72.

²³ *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) [*Smiths*] at para. 16. See also: *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at para. 23.

²⁴ *101199652 Saskatchewan Ltd. O/A Regina Dry Cleaners* (3 May 2021), PR-2021-004 (CITT) at para. 30. See also *Smiths* at para. 16.

²⁵ Exhibit PR-2021-039-01 at 7.

clarification with respect to section A4.2 of the RFP. If the RFP contained “inaccurate, contradictory and misleading details”,²⁶ as claimed by SZM, the latter could, and should, have sought clarification prior to bid closure, as per section 2.3 of the RFP,²⁷ but it did not. In fact, it appears from the evidence on file that SZM did not provide a high-definition proof of the item, as prescribed by M1 and M4, because the requirement was not “meetable”.²⁸

[23] As a result, having been filed outside the time limit set out in subsection 6(1) of the *Regulations*, the complaint does not meet one of the mandatory conditions for inquiry. In this regard, the Federal Court of Appeal, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, provided the following guidance:

In procurement matters, time is of the essence.

...

Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.

...

The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.²⁹

[24] Having found that the first and third grounds of complaint are time-barred by application of section 6 of the *Regulations*, the Tribunal will not examine the other applicable conditions set out in section 7.

[25] However, even if the first ground of complaint had been filed on time, the Tribunal would not have concluded, as required by paragraph 7(1)(c) of the *Regulations*, that it discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[26] Indeed, section A4.2, which is part of “Annex A – Statement of Work”, relates to the contractor (i.e. the contract awardee),³⁰ whereas M1, which is part of “Annex C – Technical Evaluation Criteria”, relates to the bidder.³¹ Hence, according to the RFP, the bidder must provide a high-definition PDF proof sample of the item at bid closing, and the contractor must provide high-

²⁶ *Ibid.* at 6.

²⁷ Exhibit PR-2021-039-01C at 46.

²⁸ *Ibid.* at 35.

²⁹ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18-20. See also: *FFG Flensburger Fahrzeugbau Gesellschaft mbH, RUAG Schweiz AG, in Joint Venture* (1 April 2021), PR-2020-095 (CITT) at para. 28; *Ascent Helicopters Ltd.* (18 January 2019), PR-2018-054 (CITT) at para. 15; *Terragon Environmental Technologies Inc.* (23 April 2019), PR-2019-004 at para. 15.

³⁰ Exhibit PR-2021-039-01C at 57-59.

³¹ *Ibid.* at 67-69.

definition proofs of the pins prior to production. As such, it is apparent that section A4.2 and M1 serve their own separate purposes.

The second ground of complaint does not disclose a reasonable indication of a breach of the relevant trade agreements

[27] According to PWGSC's regret letter dated August 25, 2021, SZM's bid was considered non-responsive since it did not meet all the mandatory requirements. As a second ground of complaint, SZM alleges that the RFP did not mention that the mandatory requirements are required at the time of bid closing.³²

[28] Pursuant to subsection 7(1)(c) of the *Regulations*, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement was not conducted in accordance with the relevant trade agreements. The Tribunal has previously described the "reasonable indication" threshold as follows:

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case. . . . However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.³³

[29] The relevant provisions of the RFP are the following:³⁴

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

4.1 Evaluation Procedures

(a) Bids will be assessed in accordance with the *entire requirement of the bid solicitation including the technical and financial evaluation criteria*.

(b) An evaluation team composed of representatives of Canada will evaluate the bids.

4.1.1 Technical Evaluation

Mandatory Technical Evaluation Criteria are fully described in Annex "C".

BIDS NOT MEETING ALL OF THE MANDATORY REQUIREMENTS WILL BE CONSIDERED NONRESPONSIVE AND GIVEN NO FURTHER CONSIDERATION.

³² *Ibid.* at 39.

³³ *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada v. Department of Foreign Affairs, Trade and Development* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6; *Terrapure Environmental v. Department of Public Works and Government Services* (22 June 2020), PR-2020-008 (CITT) at para. 28.

³⁴ Exhibit PR-2021-039-01C at 50 and 67-69.

4.2 Basis of Selection

4.2.1 To be considered responsive, a bid must:

- (a) *Meet all the mandatory requirements* of the bid solicitation;
- (b) Bids not meeting (a) above will be given no further consideration.

...

ANNEX C TECHNICAL EVALUATION CRITERIA

M1. MANDATORY REQUIREMENT 1:

The *Bidder* must provide the following for each item specified under this section:

- Supply all Materials;
- produce pins to like form, quality, fit and function, and material as specified in the statement of work and as per artwork provided;
- *Provide actual high definition pdf proof sample of the item at bid closing.*
- Submit with your bids 5 pre-production samples of the pins to the Project Authority for approval;
- Package and deliver the item as per packaging and delivery requirements.
- Return all components and working materials to Project / Technical Authority.

Bidder must meet all the mandatory requirements and be in accordance **with the specifications detailed in Annex “A” or equivalent.**

...

M4. Proofs

Submit High Definition Proof of the item.

[Emphasis added, bold in original]

[30] According to the RFP, M1 requires that bidders provide an actual high-definition PDF proof sample of the item at bid closing. Further, the RFP clearly specifies that all the mandatory requirements must be met. The following excerpts corroborate this assertion:

Bids will be assessed in accordance with *the entire requirements of the bid solicitation*, including the technical evaluation criteria.

...

Mandatory Technical Evaluation Criteria are fully described in Annex “C”.

BIDS NOT MEETING ALL THE MANDATORY REQUIREMENTS WILL BE CONSIDERED NON-RESPONSIVE AND GIVEN NO FURTHER CONSIDERATION.

...

*Meet all the mandatory requirements of the bid solicitation.*³⁵

[Emphasis added, bold in original]

[31] PWGSC advised SZM, in the regret letter sent on August 25, 2021, that its bid did not comply with M1 and M4, as these mandatory requirements required bidders to provide a high definition proof of the item. Therefore, SZM's bid was considered non-responsive.

[32] While SZM complains that the RFP does not mention that the mandatory requirements are required at the time of bid closing, M1 states that the high-definition PDF proof sample was required at bid closing. M4 reiterates that the bidder must submit "High Definition Proof of the item".

[33] As noted above for the first and third grounds of complaint, SZM also alleged that there was a contradiction with requirement A4 and that the high-definition proof requirement was "not meetable" at bid closing. The mandatory language of M1 and M4 to provide this proof was express and clear in the RFP, and it was not open to SZM to simply ignore it. As discussed in the previous section, if SZM considered such requirements to be contradictory or impossible to meet, it was incumbent on it to ensure that it understood the requirements of the RFP prior to submitting its bid and that it raised any perceived concerns at the earliest opportunity. There is Tribunal case law in this respect.³⁶

[34] For the foregoing reasons, the Tribunal finds that the second ground of complaint does not disclose a reasonable indication of a breach of the relevant trade agreements.

[35] Based on the foregoing, the Tribunal will not conduct an inquiry into this complaint.

DECISION

[36] 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

³⁵ *Ibid.* at 50.

³⁶ See footnote 29.