



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-050

Myers Automotive Group

Decision made
Thursday, November 25, 2021

Decision issued
Friday, November 26, 2021

Reasons issued
Thursday, December 9, 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

MYERS AUTOMOTIVE GROUP

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act* (CITT Act)¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (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.

[2] Myers Automotive Group (Myers) has complained to the Tribunal about the rejection of bids it submitted in response to a Request for Standing Offer (RSO) issued by the Department of National Defence (DND) as solicitation No. W6369-21-X029.³

[3] The RSO sought to establish up to 26 Regional Individual Standing Offers to provide maintenance, repair, paint, bodywork and collision repair services for commercial and Standard Military Pattern vehicles located at DND facilities in the Ottawa-Gatineau Region.⁴

[4] The solicitation was published on September 3, 2021, with a closing date of October 18, 2021. During the course of the tender, DND received and answered queries posed by prospective bidders, including Myers. These communications were effected by way of by email.⁵

[5] Myers provides its automotive services in the Ottawa area by way of several retail outlets. The names of these outlets are suggestive of specialization in the sale of particular brands or models of vehicles (e.g. Myers Cadillac Chev-Buick-GMC, Myers Barrhaven Hyundai, Myers Kanata Nissan and Myers Manotick Dodge).⁶

[6] On October 15, 2021, Myers sought to submit multiple bids on behalf of its retail outlets in response to the RSO. The bid delivery instructions prescribed by the RSO were as follows:⁷

**RETURN OFFERS TO:
RETOURNER LES OFFRES À:**

Director Services Contracting 4 (D Svcs C 4)
Attention: [Name of procurement officer redacted]
By e-mail to:
DSvcsC4Contracting-DCSvcs4Contrats@forces.gc.ca

[7] Unfortunately, when the email address DSvcsC4Contracting-DCSvcs4Contrats@forces.gc.ca was being inputted, the software used by Myers apparently defaulted to autocorrect mode and

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2021-050-01 at 15.

⁴ *Ibid.* at 34.

⁵ *Ibid.* at 15, 36–37.

⁶ Exhibit PR-2021-050-01G.

⁷ Exhibit PR-2021-050-01 at 15.

replaced the French word “*Contrats*” in the email address with its English language equivalent “Contracts”. As such, Myers’ bids were addressed and sent to the email address DSvcsC4Contracting-DCSvcs4Contracts@forces.gc.ca.⁸

[8] Myers received no bounceback message indicating that its emails were undeliverable or had not reached a deliverable email address. On November 4, 2021, Myers made telephone and email inquiries of DND to confirm the status of its bids, only to be informed that its bids had not been received by DND. At that point, the typographical error in the email address used by Myers to submit its bids appears to have been discovered.⁹

[9] Myers sought recourse from DND and asked that its bids be accepted for consideration notwithstanding the typographical error but received no remedy.¹⁰ Myers filed its complaint with the Tribunal on November 8, 2021,¹¹ and supplemented the complaint with additional documentation on November 10, 15 and 18, 2021.¹² The Tribunal found Myers’ complaint to be complete on November 18, 2021.¹³

[10] On November 25, 2021, the Tribunal decided not to commence an inquiry with respect to Myers’ complaint.¹⁴

ANALYSIS

[11] The Tribunal’s authority to conduct inquiries concerning procurement matters arises from the CITT Act and the Regulations.

[12] The CITT Act and the Regulations prescribe that certain conditions must be present before the Tribunal can commence an inquiry into a procurement complaint, namely:

- (a) The complaint must be timely. Subsection 6(1) of the Regulations prescribes that 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;
- (b) The complaint must pertain to a designated contract within the meaning of the CITT Act and the Regulations;
- (c) The complaint must be filed by a potential supplier of the goods and services being procured; and
- (d) There must be a reasonable indication that the procurement has not been conducted in accordance with applicable trade agreements.

[13] All of these conditions must be present.

⁸ Exhibit PR-2021-050-01 at 8.

⁹ *Ibid.*

¹⁰ *Ibid.* at 10.

¹¹ *Ibid.* at 13.

¹² Exhibit PR-2021-050-01D; Exhibit PR-2021-050-01F; Exhibit PR-2021-050-01G.

¹³ Exhibit PR-2021-050-04.

¹⁴ *Myers Automotive Group* (25 November 2021), PR-2021-050 (CITT).

[14] Myers's complaint satisfies the first requirement. The complaint is timely because it was filed on November 8, 2021, four days after Myers was unable to obtain recourse by complaining directly to DND.

[15] A complaint must also pertain to a designated contract.¹⁵ The RSO seeks to procure services and the value of the contract meets the threshold prescribed by the Regulations. As such, the Tribunal finds that the RSO relates to a designated contract within the meaning of the CITT Act and the Regulations.¹⁶

[16] As Myers submitted a bid in response to the RSO (or attempted to), it fulfills the requirement of being a potential supplier, and therefore has standing to bring this complaint.

[17] The Tribunal must consider whether there is a reasonable indication that the procurement has not been conducted in accordance with the trade agreements. Although Myers' complaint does not specifically identify a trade agreement that is alleged to have been contravened, the Tribunal considers the Canadian Free Trade Agreement (CFTA)¹⁷ to be applicable and has taken the relevant provisions of the CFTA into account in considering Myers' complaint.

[18] The CFTA requires a procurement to be conducted fairly, openly and transparently, in accordance with the terms prescribed by the tender documents.

[19] The Tribunal now turns to consider whether Myers' complaint discloses grounds for a possible conclusion that DND did not conduct the procurement in accordance with the applicable trade agreements.

[20] The relevant provisions of the RSO pertaining to the rejection of Myers' bids are reproduced below:

2.2 Submission of Offers

Unless specified otherwise in the offer or otherwise directed by the Contracting Authority, arrangements must be submitted only to the Department of National Defence organization by e-mail by the date and time indicated on page 1 of the Request for Standing Offer.

E-Mail Submissions: Individual e-mails that may include certain scripts, formats, embedded macros and/or links, or those that exceed five (5) megabytes may be rejected by Canada's e-mail system and/or firewall(s) without notice to the Bidder or Contracting Authority. Larger offers may be submitted through more than one e-mail. Canada will confirm receipt of documents. It is the offeror's responsibility to ensure that its entire submission has been received. Offerors should not assume that all documents have been received unless Canada confirms receipt of each document. In order to minimize the potential for technical issues to affect arrangements receipt, offerors are requested to include in the body of their e-mail(s) a list of all documents attached to the e-mail(s), and allow

¹⁵ As defined by s. 30.1 of the CITT Act.

¹⁶ Regulations, subs. 7(1).

¹⁷ Online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/uploads/2021/03/CFTA-Consolidated-Text-Final-English_March-23-2021.pdf > (entered into force July 1, 2017).

sufficient time before the closing date and time to confirm receipt. Canada will not accept any offers submitted after the closing date and time.

[21] It is undisputed that Myers did not submit its bids to the email address prescribed by the RSO due to a typographical error. As no bounceback message was received at the time of submission, Myers evidently considers that its bids, as submitted via email (albeit to a different email address), were still received by DND and therefore should be considered.

[22] The Tribunal is aware that it is technically possible for email accounts to be configured or linked so as to permit variations or look-alikes of an email address to be accepted into a common inbox. Notwithstanding, this does not mean that a procuring entity, such as DND, is required to take this IT step. Nor is a procuring entity obligated to configure its email servers to generate a bounceback message when an incoming email with a non-conforming email address reaches the server.

[23] Indeed, the wording of the RSO clearly shows that DND had turned its mind to these issues and drafted the tender requirements accordingly. Prospective bidders are explicitly cautioned that they bear sole responsibility to ensure timely delivery of a bid that is sought to be submitted, in accordance with the delivery instructions prescribed by the tender documents. In this case, the delivery instructions prescribed the use of the email address DSvcsC4Contracting-DCSvcs4Contrats@forces.gc.ca. The RSO also cautioned that a bid is not considered to have been received unless DND issues an explicit confirmation of receipt. It is undisputed that no such confirmation was sent by DND or received by Myers.

[24] During the course of the tender, prospective bidders sent inquiries to an individual at DND to obtain clarification concerning certain aspects of the tender requirements. Those bidder inquiries were transmitted to the work email address that was specific to the individual who was responsible for oversight of the tender process. Myers appears to view these events as being suggestive that more than one email route was acceptable for the purposes of the RSO.

[25] However, it was open to DND to use different email routing for the purpose of dealing with queries from prospective bidders. This does not contradict or override the explicit requirement that *bids* be submitted by using a specific, prescribed email address, even if it differs from the one used for dealing with bidder queries.

[26] In any event, Myers' bids were not sent to the email address that was used for bidder queries during the tender. Myers clearly intended to submit its bids via the email address prescribed by the RSO. Unfortunately, it did not do so, due to software error. At no time was this software operated by DND or otherwise under the control of DND.

[27] Although Myers did follow up with DND to check whether its bids had been received, it only did so after the deadline for submission of bids had expired. Unfortunately, this meant that there was no time left for Myers to resubmit its bids.

[28] In reviewing the evaluation of bids in a procurement, a reasonableness standard applies.¹⁸ Accordingly, the issue to be decided is whether DND acted unreasonably in rejecting or refusing to receive the bids sought to be submitted by Myers.

[29] 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.”¹⁹

[30] Strict compliance is required with respect to the mandatory requirements of a tender. It is incumbent upon bidders to exercise due diligence during preparation of their proposals to ensure adherence to the solicitation instructions. Compliance with all mandatory criteria cannot be abridged or left to inference.²⁰

[31] In this case, the RSO contains categorical wording with respect to the delivery email address to be used for submission and receipt of the RSO by a prescribed deadline. The framework allows no room for the exercise of discretion with respect to these submission requirements. In view of this, it is irrelevant that a different email address was used during the tender for the purpose of receiving and replying to bidder queries.

[32] Although the Tribunal has sympathy for Myers’ position, it is unable to provide a remedy.

[33] The Tribunal can review the procurement 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. Doing so would retroactively change the playing field as between the bidders.

[34] A finding that Myers’ bids should be deemed to have been received either at a non-prescribed alternative email address *before* the tender closed or, in the alternative, *after* the tender closed by way of resubmission to the correct email address would require the Tribunal to retroactively revise the submission requirements. The Tribunal cannot do this. It would amount to changing the rules of the competition after the fact and would be consequently unfair to other bidders.

[35] Accordingly, the Tribunal finds no basis to conclude that Myers’ complaint is underpinned by facts reasonably indicating that the procurement has not been conducted in accordance with the requirements of the CFTA.

¹⁸ *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.

¹⁹ CFTA Article 507 provides, in part, as follows: “3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall: . . . (b) base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation.”

²⁰ *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) at para. 11.

DECISION

[36] For the reasons above, and 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

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Presiding Member