



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-053

Rohde & Schwarz Canada Inc.

*Decision made
Tuesday, November 23, 2021*

*Decision and reasons issued
Monday, December 6, 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

ROHDE & SCHWARZ CANADA INC.

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 Request for Proposal (RFP) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of a constrained bandwidth messaging platform for the Canadian Armed Forces (Solicitation No. W6369-190155/B).

[3] Rohde & Schwarz Canada Inc. (RSC) claims that it submitted a responsive bid in the solicitation at issue and that PWGSC erred in finding its bid unresponsive.

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

BACKGROUND

[5] The RFP was issued on June 29, 2021, with an initial bid closing date of August 31, 2021.³ The bid closing date was subsequently extended to September 15, 2021,⁴ and further extended to October 15, 2021.⁵ Between July 2, 2021, and September 27, 2021, PWGSC issued nine amendments to the RFP.⁶

[6] On or before the bid closing date, RSC submitted its bid.⁷

[7] On October 21, 2021, PWGSC informed RSC that its bid was deemed non-responsive because its financial bid was not submitted in accordance with Annex B of the RFP entitled “Basis of Payment”. Specifically, PWGSC noted that RSC added the following sentence under every table of Annex B: “Annual escalation is 3% per year for each year of the contract.” As a result of finding RSC’s bid to be non-responsive, PWGSC advised RSC that its bid was disqualified.⁸

[8] On October 28, 2021, RSC made an objection to PWGSC on this matter. RSC argued that there were challenges for bidders to communicate bid prices accurately and completely, and that it

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

² SOR/93-602 [Regulations].

³ Exhibit PR-2021-053-01 at 32–88.

⁴ *Ibid.* at 94.

⁵ *Ibid.* at 104.

⁶ *Ibid.* at 89–132.

⁷ Exhibit PR-2021-053-01.A (protected) at 8–165.

⁸ Exhibit PR-2021-053-01 at 14–15.

felt its approach was accurate and clear. RSC also provided an alternate representation of its financial bid which did not refer to escalation. RSC requested that its bid be reinstated for consideration.⁹

[9] On November 8, 2021, PWGSC responded to RSC's objection. PWGSC maintained its decision to reject RSC's bid for being non-responsive and emphasized that if a bidder finds a statement in the RFP to be confusing, it should immediately seek clarification at that moment.¹⁰

[10] On November 11, 2021, RSC notified PWGSC that it intended to file a complaint with the Tribunal and requested that PWGSC provide further information with respect to why RSC's bid was deemed non-compliant.¹¹

[11] On November 12, 2021, PWGSC responded to RSC. PWGSC indicated that RSC's bid was not compliant with the mandatory requirements of the RFP, and more specifically with Annex B, because RSC changed the terms and conditions on which Canada would be paying RSC should RSC be awarded a contract. PWGSC stated that Canada has an obligation to reject non-compliant bids and noted that other bidders submitted their price in the compliant manner without price escalations. PWGSC further stated that "even if Canada were to accept the bid, Canada [did] not know the intent of the bidder in how to calculate the 3% escalation" and that "[w]ithout knowing the intent, there [was] no way for Canada to calculate the final financial bid."¹²

[12] On November 22, 2021, RSC filed a complaint with the Tribunal.¹³

ANALYSIS

[13] 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;¹⁴
- (ii) the complainant is a potential supplier;¹⁵
- (iii) the complaint is in respect of a designated contract;¹⁶ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.¹⁷

⁹ *Ibid.* at 16–22.

¹⁰ *Ibid.* at 23–24.

¹¹ *Ibid.* at 25–26.

¹² *Ibid.* at 27–30.

¹³ *Ibid.* at 1–12.

¹⁴ Subsection 6(1) of the Regulations.

¹⁵ Paragraph 7(1)(a) of the Regulations.

¹⁶ Paragraph 7(1)(b) of the Regulations.

¹⁷ Paragraph 7(1)(c) of the Regulations.

[14] While RSC'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 a breach of the applicable trade agreements

[15] According to paragraph 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 applicable trade agreements. The Tribunal has previously indicated that to meet the "reasonable indication" threshold, 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 does not mean 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, it does require that the complainant provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.¹⁸

[16] RSC alleges that its bid was wrongly disqualified for adding a statement concerning annual price escalation under every table of Annex B "Basis of Payment". RSC submits that it fulfilled the requirements of the RFP and, in particular, presented its pricing in accordance with the format and structure of the RFP. RSC argues that the pricing requested needed to account for a potential total of six years (i.e. three years, with an additional three option years) and that it is common practice for annual escalation of yearly prices to be quoted in multi-year projects. RSC argues that such an approach was already accounted for in Table 3, where separate rates were specifically requested for each of the relevant years and, as such, the statement it added under Table 3 was simply a statement of fact. RSC argues that Table 1 and Table 2 were different from Table 3 because they only provided one box for each line item and that, consequently, in order to be consistent with the pricing schema provided in Table 3, it was clear that Table 1 and Table 2 prices would need to be similarly escalated. To do so, RSC provided pricing for year 1 (i.e. 2021) and quoted the fixed escalation per year.

[17] RSC argues that its decision to include an escalation statement was influenced by Amendment No. 005, Question 1, Answer 1, which stated the following: "... DND expectation is bidders would provide or submit in a table format their pricing schema for per standalone unit pricing/per year."¹⁹ RSC argues that it understood this statement to mean that bidders should respect the RFP's table format and not provide their own table, but did not believe it precluded the possibility of providing annual escalation. RSC argues that the escalation statement was therefore added in order to submit pricing without modifying the table. RSC notes that it was confident that

¹⁸ See, for example, *SZM Promotions Inc. dba Promocenter International* (10 September 2021), PR-2021-039 (CITT) at para. 28; *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27; *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6.

¹⁹ Exhibit PR-2021-053-01 at 107.

annual escalation of unit prices was appropriate, so, in its view, no additional questions or clarifications were needed.²⁰

[18] RSC also argues that there was considerable debate over how bidders were required to present pricing and that despite nine amendments to the RFP, no approximate schedule was provided to assist bidders in calculating prices. RSC argues that without a clear schedule to inform bidders' quotes, it believed the best approach was to provide pricing for the first year, with an escalation rate.

[19] The relevant provisions of the RFP are the following:²¹

PART 3 - BID PREPARATION INSTRUCTIONS

3.1 Bid Preparation Instructions

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Section II: Financial Bid

3.1.1 Bidders must submit their financial bid in accordance with the Annex B.

...

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

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4.3 Evaluation Methodology

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4.3.2 Financial Evaluation

A Bidder's financial proposal will be evaluated based on the table shown in Annex B – Basis of Payment.

The totals at Annex B, paragraph 1 and 2 will be added to the hourly rates total. The hourly rates total dollar amount at Annex B 3 will be calculated by doing an average of the hourly rate for the 6 total years, multiplied by the Projected Acquisition Contract Hours. The addition of these 3 amounts will give the Total financial bid.

...

²⁰ RSC also argues that there are policies, published by the Treasury Board Secretariat and PWGSC, respectively, which provide that price escalation is permissible (see Exhibit PR-2021-053-01 at 134). The Tribunal notes that these policies refer to provisions that may allow for price escalation, but do not require that such provisions be included. The Tribunal further notes that, ultimately, it is the terms and conditions of what is published in the tender documentation that are relevant and that, in any event, the policies are guidelines that are administrative in nature and have no legal effect.

²¹ Exhibit PR-2021-053-01 at 38, 54, 124–127.

[ANNEX B]

...

BASIS OF PAYMENT**Table 1: Software Delivery**

The Contractor shall be paid, Fixed Prices (DDP included – Incoterms 2010) as shown in the table below for software deliveries, as outlined in Annex A - Statement of Work.

Item	Firm Fixed Price
BCMS Operational Licenses Deployed Asset, Location in Canada To Be Determined* (Unit price or price for unlimited license, please specify)	\$
BCMS Training and associated materials Deployed Asset, Location in Canada To Be Determined (Input price breakdown of training elements in table 1.1 below. The total of the 4 elements in table 1.1 must be the amount that is shown here) (Unit price)	\$
Systems Integration at each Point of Presence (Unit price)	\$
TOTAL	\$

***Please refer to Annex A, 5.2 for possible locations**

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Table 2: Integrated Logistics Support – Training and Documentation Delivery

The Contractor shall be paid, Fixed Prices as shown in the table below, for delivery of all Integrated Logistics Support training and documentation, as outlined in Annex A - Statement of Work.

Item	Firm Fixed Price
BCMS Installation Documentation per site (Unit price)	\$

BCMS Training (Input price breakdown of training elements in table 2.1 below. The total of the 4 elements in table 2.1 must be the amount that is shown here) (Unit price)	\$
Systems Integration (Unit price)	\$
TOTAL	\$

...

**** Travel expenses must not be part of the fixed price for neither Software Delivery not Integrated Logistics Support. Travel expenses will be calculated separately as per National Joint Council Travel Directives rates (see paragraph 4 below).**

Table 3: DND 626 Task Authorization Support – Hourly Rate

When authorized by DND 626 Task Authorization Form, the Contractor shall be paid, Fixed Prices (DDP included – Incoterms 2010) as shown in the table below for hourly rates associated with the performance of approved DND 626 Task Authorizations.

Acquisition Contract Year	Hourly Rate			
	Project Manager	Software Engineer	Technical Writer	Software Programmer
1	\$	\$	\$	\$
2	\$	\$	\$	\$
3	\$	\$	\$	\$
Option year 1	\$	\$	\$	\$
Option year 2	\$	\$	\$	\$
Option year 3	\$	\$	\$	\$
Projected Acquisition Contract Hours	750	750	750	7,500

[20] The trade agreements provide that, to be considered for contract award, a bid must conform to the essential requirements set out in the tender documentation.²²

[21] It is well established that bidders bear the onus to respond to and meet the criteria established in a solicitation. The Tribunal has stated that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder. The Tribunal has similarly stated that the bidder bears the responsibility of ensuring its bid is unambiguous and will be understood by the procuring entity.²³ It is also well established that the Tribunal will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.²⁴

[22] In its letter of November 12, 2021, PWGSC refers to a previous decision by the Tribunal which involved a situation where a bidder diverged from the term of a solicitation by submitting a bid that contained prices that were conditional on the cost of fuel.²⁵ In *DDI Group*, the Tribunal found that there was no reasonable indication that the evaluation of the bid by a government institution was not conducted in accordance with the mandatory criteria stated in the solicitation document. In that case, the Tribunal found that the Request for a Supply Arrangement in issue clearly required bidders to submit ceiling prices and that the complainant failed to meet this requirement.

[23] The Tribunal acknowledges RSC's submission that *DDI Group* is distinguishable from the present case because in this case the price escalation is clear (i.e. 3 percent), as opposed to being conditional on the changing price of fuel. However, in the Tribunal's view, the finding in *DDI Group* is relevant to the present case insofar as the key issue in both cases is that the complainant failed to follow how a financial bid was to be presented.

[24] Having considered the evidence, the Tribunal finds that there is no reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements. The RFP clearly required that bidders "submit their financial bid in accordance with the Annex B."²⁶ The RFP also set out how financial proposals would be evaluated based on the totals in Annex B.²⁷ Accordingly, by submitting a financial bid which included statements concerning annual price escalation, RSC failed to submit its financial bid in accordance with Annex B, and therefore did not

²² For example, Article 515(4) of the Canadian Free Trade Agreement 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.

²³ See, for example, *Falcon Environmental Inc.* (22 October 2020), PR-2020-009 and PR-2020-022 at para. 55; *Tri-Tech Forensics Inc.* (26 March 2018), PR-2017-064 (CITT) at para. 20; *Raymond Chabot Grant Thornton Consulting* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

²⁴ See, for example, *Marine Recycling Corporation and Canadian Maritime Engineering Ltd.* (22 February 2021), PR-2020-038, PR-2020-044 and PR-2020-056 (CITT) at para. 65; *Samson & Associates* (13 April 2015), PR-2014-050 (CITT) at para. 35; *Harris Corporation* (22 October 2018), PR-2018-016 (CITT) at para. 21.

²⁵ *DDI Group Ltd.* (3 December 2008), PR-2008-036 (CITT) [*DDI Group*] at para. 11.

²⁶ Exhibit PR-2021-053-01 at 38, clause 3.1.1.

²⁷ Exhibit PR-2021-053-01 at 54, clause 4.3.2.

meet the criteria established in the solicitation. Consequently, PWGSC was correct to find it non-responsive.²⁸

[25] It was incumbent on RSC to exercise due diligence in the preparation of its bid to ensure that it understood and was compliant with all the instructions in the RFP. If RSC considered any of the requirements of the RFP to be contradictory or not possible to meet, it should have sought clarification from PWGSC rather than making modifications to the required format for its financial bid.

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

DECISION

[27] 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

²⁸ The Tribunal notes that procuring entities have no obligation to seek clarification, as asserted by RSC. See, for example, *Rock Networks* (7 August 2019), PR-2019-009 (CITT) at para. 23; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13. The Tribunal further notes that even if PWGSC had sought clarification, the deletion of the statements concerning price escalation would have constituted bid repair, as would have the addition of a pricing scheme presented in a different format.