



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-007

Terra Services Inc.

*Decision made
Friday, April 29, 2022*

*Decision and reasons issued
Tuesday, May 10, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

BY

TERRA SERVICES INC.

AGAINST

THE DEPARTMENT OF FISHERIES AND OCEANS

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 (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations), 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] The complaint relates to a request for proposal (RFP) (solicitation 30001907) issued on January 24, 2022, by the Department of Fisheries and Oceans (DFO). The RFP invited proposals for the provision of salvage services for the in-situ disposal of a fishing vessel, the Hamilton Banker, located in Colliers, Newfoundland and Labrador.

[3] The complainant, Terra Services Inc. (Terra Services), alleges that it submitted the lowest-priced tender in response to the solicitation and should have been awarded the contract by DFO. Terra Services alleges that DFO instead improperly and prejudicially awarded the contract to another bidder.

BACKGROUND

[4] On March 6, 2022, a day before the bid closing date, Terra Services submitted a bid to DFO to provide the salvage services for the price of \$900,000 (applicable taxes extra).³ Bids from two other bidders were received by DFO.⁴

[5] On March 22, 2022, DFO sent an email to Terra Services informing it that the contract would be awarded to Marine Recycling Corp. for the price of \$1,214,400 (including taxes) and that the evaluation team had declared Terra Services' bid non-responsive because it had failed to meet three of the four mandatory technical criteria of the RFP.⁵ On the same day, DFO sent two subsequent emails correcting the value of the contract awarded.⁶ The final value of the contract awarded is \$1,810,595.65 (including taxes).

[6] On March 23, 2022, Terra Services called DFO's senior contracting officer, Mr. Richard Soulliere. During the call, Terra Services' informed DFO that, while certain key information was not included in its bid due to cost, it could be provided in the event that Terra Services was found to be the lowest bidder.⁷ In that regard, DFO informed Terra Services that issues prohibiting a bidder from providing the requested information should be brought to the attention of the contracting authority during the

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-007-01.B at 39.

⁴ Exhibit PR-2022-007-01 at 3.

⁵ Exhibit PR-2022-007-01.B at 49–50.

⁶ *Ibid.* at 49.

⁷ Exhibit PR-2022-007-01.C at 1–2.

solicitation period, but that no such issue had been reported by any bidder for the procurement in question.⁸

[7] On March 28, 2022, Terra Services made an objection to DFO, indicating that it “did not have the resources that [DFO was] asking for, but advised DFO that if [Terra Services] were the successful bidder, [it] would provide documentation needed with respect to key personnel and other information related to project requirements. That was the flag for [DFO] to address this.”⁹

[8] On April 1, 2022, Terra Services filed a first complaint with the Tribunal.¹⁰ At the time, DFO had not yet responded to Terra Services, and the Tribunal found the complaint to be premature.¹¹

[9] On April 21, 2022, Terra Services received a letter from DFO responding to its objection made on March 28, 2022.¹² In its letter, DFO confirmed that it would not award the contract to Terra Services, as its bid was declared non-responsive for failing to meet three of the mandatory requirements of the RFP, namely mandatory technical criteria M1 (experience), M2 (key personnel) and M3 (response plan).¹³ DFO provided detailed explanations as to why Terra Services failed on these three criteria.

[10] Consequently, on April 27, 2022, Terra Services filed a new complaint with the Tribunal on the same grounds as those raised in the initial complaint PR-2022-001.¹⁴

ANALYSIS

[11] 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 prescribed time limits;¹⁵
- (ii) the complainant is a potential supplier;¹⁶
- (iii) the complaint is in respect of a designated contract;¹⁷ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.¹⁸

⁸ *Ibid.*

⁹ Exhibit PR-2022-007-01.B at 51.

¹⁰ Exhibit PR-2022-007-01.A.

¹¹ *Terra Services Inc.* (7 April 2022), PR-2022-001 (CITT) at para. 4.

¹² Exhibit PR-2022-007-01 at 3–7.

¹³ *Ibid.* at 7.

¹⁴ *Ibid.* at 1; PR-2022-007-03 at 1.

¹⁵ Section 6 of the Regulations.

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

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

¹⁸ Paragraph 7(1)(c) of the Regulations.

[12] The complaint was filed on April 27, 2022, within 10 working days of receipt of the letter from DFO dated April 21, 2022, effectively providing a denial of relief. The complaint is therefore timely as it was filed within the time limits required under section 6 of the Regulations.

[13] Under 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, discloses a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements set out in that subsection. The Tribunal has previously described the 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.¹⁹

[14] In this case, the Tribunal has decided not to conduct an inquiry into Terra Services' complaint as the information provided does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements, which, in this case, include the Canadian Free Trade Agreement.²⁰ The Tribunal comes to this conclusion for the reasons that follow.

Terra Services failed to meet mandatory criteria M1, M2 and M3

Criterion M1

[15] Criterion M1 related to the experience of the bidder with regard to marine salvage and requested the bidder to:²¹

- a. have a minimum of **60** months (5 years) experience in the Marine Salvage or Marine Industry, within the last one hundred eighty months (**15** years) from the date of bid closing and
- b. Demonstrate that it has completed pollutant removal, dismantling and disposal / recycling operations on steel hulled vessels, on two (2) separate occasions within the last 120 months (10 years) together with references.

...

[16] In its bid, Terra Services provided only two projects as examples, both completed in 2020.²² There was also no mention of a "steel hulled vessel". For these reasons, DFO's bid evaluation team

¹⁹ *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (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.

²⁰ The solicitation description in the RFP indicates that several of Canada's trade agreements apply to this procurement, including, inter alia, the Canadian Free Trade Agreement. See Exhibit PR-2022-007-01.B at 5.

²¹ Exhibit PR-2022-007-01.B at 40.

²² *Ibid.* at 43.

found that Terra Services' bid did not meet criterion M1.²³ The Tribunal concurs with DFO's assessment.

Criterion M2

[17] Criterion M2 related to the identification of key personnel and requested the bidder to demonstrate that all of the following compulsory criteria were met:²⁴

The Bidder must identify key personnel* that **MUST** have a minimum of twenty four months (two (2) years' experience in pollutant removal, marine survey and stability assessments, steel hull vessel deconstruction and recycling operations completed in the last one hundred and twenty months (10 years) from the date of bid closing and provide specific details specified below.

Bidder **MUST** provide as a minimum the following information:

1. Details of the proposed management & organization for the project with a chain of command, positions, roles and responsibilities and linkages with the Canadian Coast Guard (CCG) and other agencies/entities on site.
2. Full details of key personnel proposed to undertake the operation, with summary CVs that must contain specific project information (no more than 2 pages), highlighting qualifications and experience removing pollutants, dismantling and disposal / recycling operations and deconstructing on steel hulled vessels.

Key personnel* is defined as a project manager or anyone that requires a certificate (**a copy to be supplied with the technical bid**) in their field i.e. Marine Chemist, Naval Arch, Tug operator, etc.

[18] In its bid, Terra Services provided the following sentence: "If we are the successful bidder, we will provide documentation with respect to key personnel and other information related to project requirements."²⁵

[19] In its reply of April 21, 2022, DFO explained that its evaluators found that Terra Services' bid had not met criterion M2 because, essentially, the information had not been provided and was required to be provided by bid closing time.²⁶

[20] The Tribunal agrees with the evaluation made by DFO. By its own admission, Terra Services did not provide the information on key personnel that was clearly required under criterion M2.

²³ Exhibit PR-2022-007-01 at 5.

²⁴ Exhibit PR-2022-007-01.B at 41.

²⁵ *Ibid.* at 44.

²⁶ Exhibit PR-2022-007-01 at 6.

Criterion M3

[21] Criterion M3 related to the response plan for the removal of the fishing vessel Hamilton Banker and read as follows:²⁷

The Bidder **MUST** provide a response plan that demonstrates how they will perform the removal of the **FV HAMILTON BANKER** in accordance with the Statement of Work (Annex A). The response plan must include all of the following items:

M3.1. ACCESSING THE VESSEL AND BULK POLLUTANT REMOVAL

3.1.1 Develop Bulk Pollutant Removal Plan

- 3.1.1.1 Accessing the vessel.
- 3.1.1.2 Necessary permits and approvals, identifying process and timeline to obtain upon award of contract
- 3.1.1.3 Assessment, inspection and pumping of compartments and/or tanks
- 3.1.1.4 Removal of all bulk and residual pollutants
- 3.1.1.5 Supply an organizational chart for the team who will be onsite and off-site to manage the project and perform the work.

M3.2. DISMANTLE AND RECYCLE VESSEL

- 3.2.1 Method statement to detail how the vessel will be dismantled and recycled in a safe environmental manner and in accordance with all applicable Canadian legislation.
- 3.2.2 Method statement to detail how all asbestos and HNS materials to be removed from the vessel and disposed.

M3.3. Timeline of Operations

- 3.3.1 The bidder must provide a timeline in the form of a Gantt Chart (or equivalent) that demonstrates how the operation will be completed within 4 months of award of contract. Minimum resources and personnel assigned to each step of the Gantt Chart or equivalent must be included. 7 day operational work week required subject to adequate weather conditions.

[22] DFO's evaluators found that items 3.1.1.3, 3.2.2, and 3.3.1 of criterion M3 were not met by Terra Services because the bid had no mention of assessment, had no mention of asbestos and hazardous and noxious substances, and did not provide any Gantt chart (or equivalent) with the bid.²⁸ The Tribunal finds that DFO's evaluation against this criterion is reasonable.

²⁷ Exhibit PR-2022-007-01.B at 41-42.

²⁸ Exhibit PR-2022-007-01 at 7.

The bidder has responsibility to ensure compliance with the terms of the solicitation

[23] Ultimately, it is the responsibility of bidders to ensure compliance with all the terms of the solicitation. In this case, even if the price offered by Terra Services in its bid was lower than that of other bidders, DFO could not award the contract to Terra Services as its bid did not meet the mandatory technical criteria requested.

[24] As explained above, in a procurement complaint, the complainant must provide facts or arguments to demonstrate that there is a reasonable indication that a breach of one of the trade agreements has taken place. For instance, in the present case, Terra Services would have needed to present arguments to show that DFO's evaluators somehow erred in its assessment of its bid or how its proposal met mandatory technical criteria M1, M2 and M3. Terra Services provided no such explanation.

[25] Terra Services seems to have considered that it would be possible to provide further information after bid closing time to supplement its bid. This is incorrect. It is a well-established principle that the modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed is prohibited.²⁹ This prohibition is to ensure that all bidders are given a fair and equal opportunity in the bid evaluation process. The Federal Court of Appeal described the rule as follows:³⁰

22. I agree that there is no doubt that bidders cannot make material corrections or amend their bids after the bid's closing date. The requirements found in an RFP must be met at the time of bid closing, and a procurement entity is not entitled to consider information submitted after that date. "Bid repair", as it has come to be known, is considered to be an indirect way of allowing a late bid. The rationale behind the rule against bid repair is easy to understand: allowing a bid to be modified or altered after the fact would undermine the bidding process itself, as it would allow a change to be made to a bid at a time when the bids of others are known or could be known

[26] For the above reasons, the Tribunal concludes that no reviewable error took place with respect to DFO's evaluation of Terra Services' bid.

[27] The Tribunal also notes the question raised by Terra Services regarding the alleged alteration of the bid-winning contract price.³¹ The Tribunal understands that this issue refers to the two subsequent emails sent by DFO on March 22, 2022, and which consisted of corrections to the value of the contract originally stated in the DFO's first email.³² There is no evidence on the record that these emails are anything but corrections of DFO's emails, and not an alteration of the winning bid.

[28] Accordingly, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

²⁹ See, for example, *10647802 Canada Limited (o/a Outland-Carillion Services) v. Department of Public Works and Government Services* (27 August 2018), PR-2018-007 (CITT) at para. 48.

³⁰ *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 (CanLII) at para. 22.

³¹ Exhibit PR-2022-007-01 at 1.

³² Exhibit PR-2022-007-01.B at 49-50.

DECISION

[29] 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