



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File PR-2022-038

Cistel Technology Inc.

v.

Department of Health

*Determination issued
Tuesday, January 3, 2023*

*Reasons issued
Monday, January 9, 2023*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

CISTEL TECHNOLOGY INC.

Complainant

AND

THE DEPARTMENT OF HEALTH

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act* (CITT Act), the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards Cistel Technology Inc. costs in the amount of \$1,150 for preparing and proceeding with the complaint, which costs are to be paid by the Department of Health.

The Tribunal directs the Department of Health to take appropriate action to ensure prompt payment.

Cheryl Beckett

Cheryl Beckett

Presiding Member

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

Tribunal Panel:	Cheryl Beckett, Presiding Member
Tribunal Secretariat Staff:	Yannick Trudel, Counsel Esther Song-Ledlow, Registrar Officer
Complainant:	Cistel Technology Inc.
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STATEMENT OF REASONS

OVERVIEW

[1] On August 17, 2022, Cistel Technology Inc. (Cistel) submitted a complaint with respect to a request for proposal (solicitation 1000228054) (RFP) issued by the Department of Health for the provision of services of database and information management modellers and information management architects under the framework of the Supply Arrangement for Task-Based Informatics Professional Services.¹ This procurement is for the provision of the services of two types of professionals: one database modeller/information management modeller and one information management architect. These are referred to in the RFP as “resources”.

[2] The contract was awarded by the Department of Health to Cistel on March 31, 2022. However, in July and August 2022, before the execution of the contract, the Department of Health informed Cistel that it had decided to cancel the contract and re-tender the solicitation.

[3] In its complaint, Cistel alleges that the Department of Health’s decision to cancel the RFP is improper and unfair to Cistel. Cistel also argues that it would be in a disadvantageous position if the solicitation were re-tendered. As a remedy, Cistel requests the following:

- (i) to recommend to the Department of Health to execute and keep the contract for the next 10 years; or
- (ii) to grant Cistel a 5 percent payment of the full value of the contract as specified by the terms of the contract.²

[4] For its part, the Department of Health submits that a mistake was made during the procurement process that resulted in the process being unfair. It argues that it is obligated to correct any error made during the solicitation process and that the cancellation is justified for public interest reasons and due to the unforeseen circumstances that arose. Essentially, the Department of Health submits that, while Cistel is rightfully disappointed, it is not entitled to be awarded the contract given that the process underlying the award was flawed. The Department of Health requests that the Tribunal dismiss the complaint. It also requests that the Tribunal recommend the cancellation of the awarded contract and the cancellation and re-tender of the solicitation.³

[5] For the reasons that follow, the Tribunal finds that the complaint is not valid.

PROCUREMENT PROCESS AND CIRCUMSTANCES OF THE DECISION TO CANCEL THE CONTRACT AND RE-TENDER THE SOLICITATION

[6] The RFP in question was issued on March 9, 2022, and closed on March 31, 2022.⁴ The Department of Health issued one amendment on March 24, 2022.

¹ Exhibit PR-2022-038-08.A at 17.

² Exhibit PR-2022-038-01.A at 5.

³ Exhibit PR-2022-038-08.A at 14.

⁴ *Ibid.* at 17.

[7] The RFP included directions to bidders to submit questions during the bidding period.⁵ The Department of Health indicates in the Government Institution Report (GIR) that it compiled questions from bidders and answered them together by email in two separate emails, dated March 24, 2022, and March 29, 2022, to all prequalified bidders.

[8] On March 16 and 17, 2022, Veritaaq Technology House Inc. operating as Experis (Experis) submitted one request and two questions regarding certain technical evaluation criteria and the bidding process in two separate emails to the Department of Health.⁶

[9] On March 23, 2022, Experis followed up on the questions it had raised on March 16 and 17, 2022, and asked the Department of Health to confirm that the questions were received by the Department of Health and indicate if a response would be provided.⁷

[10] On March 24 and 29, 2022, the Department of Health responded to questions received from bidders with the exception of one question raised by Experis on March 16, 2022, related to the technical evaluation criteria of the solicitation.⁸

[11] On March 31, 2022, the solicitation closed. The Department of Health had received two compliant bids. One of the bids was from Cistel and the other from Experis.⁹ Experis had not received a reply to one of its questions regarding certain technical evaluation criteria prior to bid closing.¹⁰

[12] On May 13, 2022, the Department of Health awarded the contract to Cistel after the evaluation team determined that its bid received the highest score.¹¹

[13] That same day, the Department of Health informed Experis by email that it had not been awarded the contract. In the regret letter sent to Experis, the Department of Health stated that, although Experis's bid had met the mandatory criteria of the requirement, it did not achieve the highest-ranked score under the evaluation methodology described in the RFP.¹² The regret letter also disclosed the price of the contract awarded to Cistel.¹³

[14] Experis requested further information about the evaluation.

[15] On May 16, 2022, Experis raised concerns to the Department of Health with aspects of the evaluation process, including the evaluation of certain RFP criteria. According to the Department of Health, it is only during the debriefing process with Experis (i.e. after awarding the contract to Cistel) that the Department of Health realized its mistake.¹⁴ Specifically, the Department of Health further explains in its GIR that it overlooked a question that Experis had asked during the solicitation

⁵ Section 2.3 of the RFP. Exhibit PR-2022-038-08.A at 23.

⁶ Exhibit PR-2022-038-08.B at 92.

⁷ *Ibid.*

⁸ Exhibit PR-2022-038-08.A at 6.

⁹ *Ibid.* at 5.

¹⁰ *Ibid.* at 6.

¹¹ Exhibit PR-2022-038-08.B at 86–87.

¹² Exhibit PR-2022-038-08.A at 5.

¹³ *Ibid.*

¹⁴ *Ibid.* at 6.

process. It further submits that it is uncertain why it overlooked the question asked by Experis and that this was an “unfortunate oversight”.¹⁵

[16] On May 27, 2022, Experis filed a complaint with the Tribunal regarding the Department of Health’s failure to respond to its question during the solicitation period.¹⁶

[17] On May 30, 2022, the Department of Health responded to Experis’s May 16, 2022, email to advise Experis that the Department of Health was looking into the matter and preparing a response.

[18] On May 31, 2022, the Tribunal determined Experis’s complaint to be premature because Experis filed its complaint before having received a denial of relief from the Department of Health.¹⁷

[19] On June 22, 2022, the Department of Health informed Experis that it had decided to re-tender the solicitation and, when the new solicitation documents were published, Experis would be invited to submit a new proposal, with the benefit of having had its question answered.

[20] Over a series of communications between July 16 and August 16, 2022, the Department of Health informed Cistel that it had become aware of a mistake made during the solicitation process, that, as a result, a new solicitation may be required, and that, in that case, the contract awarded to Cistel would need to be cancelled.¹⁸

[21] On July 29, 2022, the Department of Health informed Cistel that the work under the awarded contract could not commence until the results of a new RFP were determined and that the awarded contract needed to be terminated.¹⁹

[22] On August 11, 2022, the Department of Health confirmed to Cistel its decision to cancel the awarded contract.²⁰

PROCEDURAL HISTORY BEFORE THE TRIBUNAL

[23] On August 17 and 22, 2022, Cistel filed this complaint with the Tribunal.²¹

[24] On August 24, 2022, the Tribunal accepted the complaint for inquiry²² in accordance with subsection 30.13(1) of the *Canadian International Trade Tribunal Act* (CITT Act)²³ and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations).²⁴

¹⁵ *Ibid.* at paras. 21–26.

¹⁶ See *Veritaaq Technology House Inc. (o/a Experis)* (2 June 2022), PR-2022-013 (CITT) [*Veritaaq Technology*].

¹⁷ *Veritaaq Technology* at para. 15.

¹⁸ Exhibit PR-2022-038-08.A at 7–8.

¹⁹ *Ibid.* at 102.

²⁰ *Ibid.* at 105. Furthermore, the Department of Health explained to the Tribunal that it has not yet cancelled the contract and will not cancel the contract before the end of the current proceedings in order to preserve the status quo.

²¹ Exhibit PR-2022-038-01; Exhibit PR-2022-038-01.A.

²² Exhibit PR-2022-038-03.

²³ R.S.C., 1985, c. 47 (4th Supp.).

²⁴ SOR/93-602.

[25] On September 23, 2022, the Department of Health submitted the GIR.²⁵

[26] On October 4, 2022, Cistel submitted its comments on the GIR.²⁶

[27] On October 7, 2022, the Department of Health submitted additional unsolicited reply comments to Cistel's comments on the GIR.²⁷

[28] On October 12, 2022, the Tribunal accepted the additional comments on the record and granted Cistel leave to reply to the Department of Health's submission dated October 7, 2022.²⁸

[29] On October 17, 2022, Cistel submitted additional comments on the Department of Health's submission.²⁹

[30] The Tribunal received no request to intervene in these proceeding.

APPLICABLE TRADE AGREEMENTS

[31] The RFP provides that the solicitation is subject to the provisions of the World Trade Organization Agreement on Government Procurement, the Canada-Chile Free Trade Agreement, the Canada-Peru Free Trade Agreement, the Canada-Colombia Free Trade Agreement, the Canada-Panama Free Trade Agreement, the Canada-European Union Comprehensive Economic and Trade Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the Canadian Free Trade Agreement (CFTA), the Canada-Ukraine Free Trade Agreement and the Canada-Korea Free Trade Agreement.³⁰

[32] In its arguments, Cistel did not mention which section of which trade agreement it alleges the Department of Health breached. However, the Tribunal considers the following provisions of the CFTA to be relevant to this case:

Article 502: General Principles

1. Each Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.

...

Article 503: General Procurement Rules

...

2. A procuring entity shall not use options, cancel a procurement, or modify an awarded contract in a manner that circumvents the obligations of this Chapter.

...

²⁵ Exhibit PR-2022-038-08.A.

²⁶ Exhibit PR-2022-038-10.

²⁷ Exhibit PR-2022-038-11.

²⁸ Exhibit PR-2022-038-12.

²⁹ Exhibit PR-2022-038-13.

³⁰ Exhibit PR-2022-038-08.A at 21.

Article 515: Treatment of Tenders and Award of Contracts*Treatments of Tenders*

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.

...

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.

RELEVANT PROVISIONS OF THE REQUEST FOR PROPOSAL

[33] Section 2.3 of the RFP set out the process to submit enquiries to the contracting authority as follows:

2.3 ENQUIRIES – BID SOLICITATION

a. All enquiries must be submitted in writing to the Contracting Authority no later than five (5) calendar days before the bid closing date. Enquiries received after that time may not be answered.

...

[34] The RFP also incorporated by reference the Standard Acquisitions Clauses and Conditions Manual item 2003 (2020-05-28) “Standard Instructions – Goods or Services – Competitive Requirements” (Standard Instructions).³¹

[35] The Department of Health referred in its GIR to section 11 of the Standard Instructions, which provides for the right to cancel a bid solicitation:³²

... reserved for Canada the right to:

[...] *d. cancel the bid solicitation at any time;*

e. reissue the bid solicitation; [...]

[Italics in original]

³¹ Exhibit PR-2022-038-01.A at 23.

³² Exhibit PR-2022-038-08.A at 10.

POSITIONS OF THE PARTIES

Cistel

[36] Cistel argues that terminating the contract it was awarded following the solicitation process due to an error committed by the Department of Health would be unfair.³³

[37] Cistel further argues that, because its pricing for the bid is known by the other bidder—i.e. Experis—Cistel would be in a disadvantageous position if the solicitation were re-tendered.³⁴

Department of Health

[38] The Department of Health submits that it is obligated to correct any error made during the solicitation process.³⁵ The Department of Health argues that, by omitting to provide an answer to Experis' question, it denied Experis the opportunity to properly respond to the RFP.³⁶

[39] The Department of Health further submits that, in this case, the only way to correct the unfairness created to Experis is to cancel the contract and re-tender the solicitation.³⁷ The Department of Health argues that unforeseen circumstances arose that justify the cancellation and that cancelling the resulting contract and re-tendering the solicitation are in the public interest.

[40] According to the Department of Health, cancelling the contract and re-tendering the solicitation are a matter of fairness to the bidders. In doing so, the Department of Health seeks to correct the unfairness caused to Experis in the original solicitation. The re-tendered solicitation will provide Experis the opportunity to respond with a full understanding of the RFP's requirements.³⁸ The Department of Health submits that, in the circumstances, cancelling the solicitation is required to protect the integrity of the procurement process.

[41] The Department of Health argues that, because it was only made aware of the mistake after the bid evaluation process, and after awarding the contract, it was not possible to correct the error through a re-evaluation of the bids.³⁹ Therefore, according to the Department of Health, correcting the unfairness requires a cancellation of the solicitation and a new process.

[42] Finally, the Department of Health argues that re-tendering the solicitation will not unfairly impact Cistel. In this regard, the Department of Health also proposes to change the relative weighting of the technical and financial scores in order to mitigate the disclosure of Cistel's bidding price to Experis.⁴⁰

³³ Exhibit PR-2022-038-01.A at 3.

³⁴ *Ibid.*

³⁵ Exhibit PR-2022-038-08.A at 9.

³⁶ *Ibid.* at 10.

³⁷ *Ibid.*

³⁸ *Ibid.* at 11.

³⁹ *Ibid.* at 9, 12.

⁴⁰ Exhibit PR-2022-038-08.B at 12–13.

ANALYSIS

[43] In considering Cistel's complaint, the Tribunal is required by subsection 30.14(2) of the CITT Act to decide whether the Department of Health acted in accordance with the prescribed procedures and requirements found in the solicitation. The Tribunal must also determine, pursuant to section 11 of the Regulations, whether the procurement was conducted in accordance with the requirements of the applicable trade agreements, which in the present case includes the CFTA.

[44] The question before the Tribunal in this complaint is whether the Department of Health's decision to cancel the contract awarded to Cistel to re-tender the solicitation, in an effort to fix a mistake committed during the initial procurement process, constitutes a breach of the trade agreements.

[45] The CFTA includes the conduct of open and fair competitive procurement processes that allow for proper use of public resources in the public interest. It also includes in article 515(5) a requirement for a procuring entity to award the contract to the supplier that submitted the most advantageous tender based on the evaluation criteria specified in the tender documentation—unless a procuring entity determines that it is not in the public interest to award a contract.

[46] The Tribunal has recognized that a cancellation clause cannot be invoked in a totally arbitrary manner.⁴¹ On the other hand, the Tribunal and the Federal Court of Appeal have made clear that it is incumbent on government institutions to take appropriate steps to rectify mistakes in the procurement process, in keeping with the terms of the solicitation and in a manner that preserves the integrity of the competitive procurement system.⁴² However, in this regard, it should also be recognized that there may be various ways to do so, depending on the situation. Cancellation and re-tender are only one approach and should not be taken lightly if there are other options available.⁴³

[47] The Tribunal must therefore determine whether the Department of Health's decision to effectively revoke the award of the contract to Cistel and re-tender the solicitation is in keeping with these principles, in light of the circumstances of this case. In particular, in the present case, the Tribunal must consider whether the Department of Health's decision to cancel the contract awarded to Cistel and re-tender the solicitation is reasonable, having regard to the error made during the solicitation process and the entirety of the circumstances.⁴⁴

[48] In this case, the record indicates that, the Department of Health failed, apparently by oversight, to consistently follow the question-and-answer process it had set out for the solicitation.

⁴¹ *Agence Gravel Inc. v. Department of Public Works and Government Services* (26 January 2017), PR-2016-035 (CITT) at para. 89; *Lincoln Landscaping Inc. v. Department of Public Works and Government Services* (16 September 2016), PR-2016-018 (CITT) at para. 20.

⁴² See e.g. *Marine Recycling Corporation and Canadian Maritime Engineering Ltd. v. Department of Public Works and Government Services* (22 January 2021), PR-2020-038, PR-2020-044 and PR-2020-056 (CITT) [*Marine Recycling*] at para. 41; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 137; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 52; *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 at para. 33.

⁴³ *Marine Recycling* at paras. 50–51.

⁴⁴ *Marine Recycling* at para. 41.

This is the error in the procurement process discovered and admitted by the Department of Health following contract award.

[49] Furthermore, it is not contested by the parties, and it appears to the Tribunal from the record before it, that by failing to provide an answer to Experis's question, the Department of Health likely affected Experis's understanding of the evaluation criteria and potentially affected the contents and evaluation of its bid.

[50] The Tribunal agrees with the Department of Health that, in failing to answer Experis' question, the Department of Health denied Experis an opportunity to participate in the solicitation process on the same terms as other bidders. While it is not possible to determine how Experis would have actually responded if it had received an answer to its question, the procedural failure at issue had the potential of affecting the contents of its bid and the eventual outcome of the evaluation. As such, the procedural error at issue put into question the integrity of the procurement process. Indeed, in light of the circumstances, there is no way to know whether Cistel would have won the contract but for the Department of Health's breach. Although the situation arises through no fault of Cistel's, Cistel is not entitled to the award of a contract made pursuant to an unfair solicitation process.

[51] In the Tribunal's view, the Department of Health correctly identified that it created an unfair situation by failing to answer Experis' question prior to bid closing time. This required a corrective action. Because the Department of Health became aware of its mistake after the bids had already been received and evaluated, and after the contract had been awarded, the Tribunal is further satisfied that cancelling the contract and re-tendering are the only course of action available.

[52] Another key consideration is the impact that a re-tender will have on the ability of Cistel and Experis to fairly compete in the re-tendering process. In this regard, the Department of Health has indicated its intention to modify the scoring methodology by changing the relative weighting of the technical and financial scores, and implementing other changes to the RFP as described at paragraphs 58–66 of the public and confidential GIR, to ensure that Cistel and other potential bidders are able to participate fairly in a reissued solicitation process.⁴⁵ In the circumstances, the Tribunal is satisfied that Cistel, Experis and other potential bidders will not suffer harm or prejudice in a re-tender prepared as described by the Department of Health.

[53] Ultimately, the evidence before the Tribunal indicates that the Department of Health acted as soon as it became aware of its mistake and realized the unfairness caused by that mistake. The Department of Health also confirmed that the re-tendered solicitation would modify certain criteria to ensure that Cistel would not be disadvantaged by the divulgence of its total price for the contract period. As such, the Tribunal is satisfied that, in the current circumstances, the cancellation is the best course of action to preserve the integrity of the competitive procurement process. As such, the Tribunal agrees that the Department of Health should cancel the resulting contract awarded to Cistel and re-tender the solicitation with the modifications described in the GIR.

COSTS

[54] Despite the fact that it has found that the complaint is not valid, the Tribunal considers that it is appropriate to award costs to Cistel. In reaching its determination concerning costs, the Tribunal considered the particular circumstances of this case. First, the Tribunal considered that the

⁴⁵ Exhibit PR-2022-038-08.B at 13.

Department of Health did not try to provide any reason to explain why it failed to reply to Experis's question, despite the fact that Experis sent an email to follow up on its unanswered question.⁴⁶ Had it not failed to answer the questions, the Department of Health would have avoided the present complaint.

[55] Second, the Tribunal considered the Department of Health's own submission suggesting that the Tribunal should award Cistel complaint costs in the amount of \$1,150.⁴⁷ The Federal Court of Appeal has recognized that costs are not usually awarded when they are not requested because awarding costs in such circumstances, where the party against whom they are awarded had no notice that they may be liable for cost and no opportunity to respond, can amount to a breach of the duty of fairness.⁴⁸ However, in the present case, the Tribunal finds that these considerations are not applicable, as it is the Department of Health itself that proposed awarding costs to Cistel.⁴⁹

[56] Therefore, based on the considerations outlined above, the Tribunal exercises its discretion as a court of record to decide to award costs to Cistel.

DETERMINATION

[57] Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

[58] Pursuant to section 30.16 of the CITT Act, the Tribunal awards Cistel its costs in the amount of \$1,150 for preparing and proceeding with the complaint, which costs are to be paid by the Department of Health. The Tribunal directs the Department of Health to take appropriate action to ensure prompt payment.

Cheryl Beckett

Cheryl Beckett

Presiding Member

⁴⁶ Exhibit PR-2022-038-08.B; Exhibit PR-2022-038-08.A at 6.

⁴⁷ Exhibit PR-2022-038-08.A at 4.

⁴⁸ *Exeter v. Canada (Attorney General)*, 2013 FCA 134 (CanLII) at paras. 12, 17.

⁴⁹ Exhibit PR-2022-038-08.A at 4.