



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-044

HKK International

*Decision made
Thursday, September 15, 2022*

*Decision and reasons issued
Wednesday, September 28, 2022*

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

BY

HKK 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.

Peter Burn

Peter Burn
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.

SUMMARY OF THE COMPLAINT

[2] This complaint was submitted by HKK International (HKK) regarding a request for proposal (RFP) (solicitation 21120-224987/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Correctional Service of Canada for the procurement of inmate safety boots.

[3] HKK alleges that PWGSC did not evaluate HKK's bid in accordance with the solicitation's published evaluation criteria, which resulted in HKK's bid being deemed non-compliant with a mandatory requirement and being declared non-responsive.

[4] For the reasons that follow, the Tribunal has decided not to conduct an inquiry into the complaint.

BACKGROUND

[5] The RFP was issued on March 8, 2022, with an initial bid closing date of May 3, 2022. The bid closing date was extended to May 24, 2022.

[6] HKK submitted a bid on or before the closing date.³

[7] On July 14, 2022, PWGSC advised HKK that its bid was non-responsive because it did not comply with a mandatory requirement of the solicitation concerning the submission of pre-award samples. PWGSC indicated that the pre-award sample that HKK submitted was not cut in half lengthwise to enable the evaluation process.⁴

[8] The relevant provisions of the RFP are as follows:⁵

Part 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

...

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-044-01 at 112–129.

⁴ *Ibid.* at 154–155.

⁵ *Ibid.* at 61–62. The requirement to provide a pre-award sample was amended in amendment 1 to require a size 9 boot rather than a size 10 boot. See Exhibit PR-2022-044-01 at 94.

4.1.1.1 Mandatory Technical Criteria

Pre-Award Sample(s) and Supporting Documentation

As part of the technical evaluation, to confirm a Bidder's capability of meeting the technical requirements, one (1) preaward sample of the **safety boots**, test results and certificates of compliance must be submitted at time of bid closing at no charge to Canada.

- Safety Boots: One (1) pair of Size 9 is to consist of one full boot and the other must be cut in half lengthwise (toe to heel) to show the composition of the outsole, midsole and insole.
- Certificates of compliance (as specified in Annex C)

...

4.2.2 Selection Methodology

To be declared responsive a bid must:

- a) comply with all the requirements of the bid solicitation; and
- b) meet all mandatory technical criteria;

Bids not meeting (a), and (b) at the end of the Technical Bid Evaluation will be declared non-responsive, and receive no further consideration.

[9] On July 14, 18, 19 and 21, 2022, HKK sent emails to PWGSC objecting to PWGSC's decision and claiming that the pre-award sample it submitted was clearly cut in half lengthwise, enough to show the composition of the outsole, midsole and insole, as required.⁶

[10] On August 8, 2022, PWGSC replied to HKK and indicated that, "[a]lthough the shoe is cut, as shown in the [attached] pictures, it is not cut enough to show the composition of the midsole and the insole of the boot." PWGSC further noted that, "[m]ore importantly, it was impossible . . . to take measurements of the shoe components with the sample provided" and that, as a result, it was not possible to confirm that HKK's sample was technically compliant.⁷

[11] On August 8, 9 and 11, 2022, HKK sent further emails to PWGSC objecting to PWGSC's decision. In these emails, HKK argues that PWGSC had changed the reason given for HKK's non-compliance (from PWGSC's July 14, 2022, email) and suggests that PWGSC has applied undisclosed evaluation criteria.⁸ For example, HKK argues that nowhere in the solicitation documents is it written that, if the pre-award sample is "not cut enough or not cut up to this mm or cm depth", it will be declared non-compliant.⁹

⁶ Exhibit PR-2022-044-01 at 130–142.

⁷ *Ibid.* at 161–165.

⁸ *Ibid.* at 143–151.

⁹ *Ibid.* at 146.

[12] On August 12, 2022, HKK sent an email to PWGSC asking if PWGSC was working on the “HKK Response of August 08, 2022 and appealing request of August 09, 2022 + August 11, 2022 email”.¹⁰

[13] On August 19, 2022, HKK filed a first complaint with the Tribunal. At the time, dialogue between HKK and PWGSC was ongoing, and the Tribunal found the complaint to be premature.¹¹

[14] On August 24, 2022, PWGSC sent an email replying to HKK’s emails of August 8, 9, 11, and 12, 2022. In this email, PWGSC indicated that “[u]nder all previous procurement processes for these types of requirements, Canada has always requested that one boot be cut in half lengthwise (toe to heel), meaning having two pieces of the boot.”¹²

[15] On September 8, 2022, HKK filed the present complaint.

ANALYSIS

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

[17] For the following reasons, the Tribunal finds that the complaint discloses no reasonable indication that PWGSC breached its obligations under the applicable trade agreements.

No reasonable indication of breach

[18] Pursuant 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,

¹⁰ *Ibid.* at 152.

¹¹ *HKK International* (8 September 2022), PR-2022-041 (CITT) at para. 13.

¹² Exhibit PR-2022-044-01 at 153.

¹³ Subsection 6(1) of the Regulations.

¹⁴ Paragraph 7(1)(a) of the Regulations.

¹⁵ Paragraph 7(1)(b) of the Regulations. The tender notice on Buyandsell.gc.ca indicates that the procurement is subject to the Canadian Free Trade Agreement (CFTA) but exempt from international trade agreements due to purchase for prison. See Exhibit PR-2022-044-01 at 49. In this respect, the Tribunal is satisfied that the procurement is covered by the CFTA; as such, it is not necessary to determine whether it is covered by international trade agreements for the purpose of determining whether to initiate an inquiry.

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

discloses a reasonable indication that the procurement was not conducted in accordance with any trade agreement that may be relevant.

[19] The trade agreements require procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation. The trade agreements also generally provide that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and that procuring entities must award contracts in accordance with the criteria and essential requirements specified in the tender documentation.¹⁷

[20] The Tribunal has held that, when assessing whether procedures in a tender documentation were followed, the Tribunal will show deference to evaluators and interfere only if an evaluation is unreasonable, e.g. if the evaluators have not applied themselves in evaluating a bidder's proposal, wrongly interpreted the scope of a requirement, ignored vital information provided in a bid, based their evaluation on undisclosed criteria, or otherwise failed to conduct the evaluation in a procedurally unfair way.¹⁸ The Tribunal has also held that, where an evaluation is based on undisclosed criteria, procuring entities will comply with the trade agreements as long as the evaluation approach was logically consistent with, and could reasonably be anticipated or derived from, the methodology stated in the tender documents.¹⁹

[21] With respect to mandatory requirements, the Tribunal has held that strict compliance is required and that it is incumbent upon bidders to exercise due diligence during the preparation of their proposals to ensure adherence to the solicitation instructions.²⁰

[22] In its complaint, HKK asserts that PWGSC wrongly evaluated HKK's pre-award sample and, when HKK objected, PWGSC relied on undisclosed evaluation criteria to support its decision. HKK also makes allegations regarding PWGSC's "lack of adequate performance / poor work performance in regard to appropriately & professionally required skills . . .".²¹

[23] HKK argues that its pre-award sample was cut enough to show the composition of the outsole, midsole and outsole.²² HKK argues that PWGSC's decision to deem HKK's bid non-compliant because its pre-award sample was not cut enough to take measurements of the shoe

¹⁷ Article 509(7) of the CFTA requires that a procuring entity provide suppliers all information necessary to permit them to submit responsive tenders, including the evaluation criteria, and Article 515(4) 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.

¹⁸ See, for example, *Krav Maga Ottawa* (1 June 2022), PR-2022-010 (CITT) at para. 24; *Beonbrand Inc.* (26 January 2022), PR-2021-063 (CITT) at para. 22; *Excel Human Resources Inc. (operating as excellTR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10; *ACMG Management Inc.* (5 June 2002), PR-2001-056 (CITT) at 13.

¹⁹ *Marine Recycling Corporation* (23 December 2021), PR-2021-034 (CITT) at para. 18, citing *SL Ross Environmental Research Limited v. Department of Fisheries and Oceans* (9 April 2021), PR-2020-073 (CITT) at para. 48; *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) at 68; *Siemens Westinghouse Incorporated* (19 March 2001), PR-2000-039 (CITT), upheld in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241.

²⁰ See, for example, *Myers Automotive Group* (9 December 2021), PR-2021-050 (CITT) at para. 30; *J.D. Irving, Limited d.b.a. Chandler Sales* (16 October 2019), PR-2019-035 (CITT) at para. 22.

²¹ See, for example, Exhibit PR-2022-044-01 at 40.

²² This statement is made in the complaint several times. See, for example, Exhibit PR-2022-044-01 at 8, 40.

components amounts to undisclosed criteria. HKK argues that the solicitation documents refer to showing “composition”, not taking “measurement”. HKK similarly argues that nowhere is it provided that the requirement that one boot be cut in half lengthwise (toe to heel) means having two pieces of the boot. In this respect, HKK argues that the relevant terms do not require that the entire or half upper leather part of the boot also be cut in half.²³

[24] Having considered HKK’s allegations and the evidence placed on the record, the Tribunal finds that there is no reasonable indication that PWGSC’s evaluation of HKK’s bid was inconsistent with the stated RFP criteria. In the Tribunal’s view, PWGSC’s evaluation was logically consistent with and could reasonably be derived from the stated methodology in the RFP, notably section 4.1.1.1 of the RFP, which required “one full boot” and one other boot that “must be cut in half lengthwise (toe to heel) to show the composition of the outsole, midsole and insole.” Thus, it was incumbent on HKK to provide a pre-award sample which included one full boot, and one boot cut in half lengthwise (toe to heel) to show the composition of the outsole, midsole and insole. It was reasonable for evaluators to determine that a boot that was not cut in half (i.e. in two pieces), nor in a way that evaluators deemed would allow for measurement, did not meet this requirement.

[25] The Tribunal further notes that HKK should not have assumed, based on its past experience or otherwise, that submitting a pre-award sample which included one full boot not cut in half (i.e. in two pieces) lengthwise (toe to heel) would satisfy the above-mentioned requirement. As noted above, bidders are required to exercise due diligence during the preparation of their proposals to ensure adherence to the solicitation instructions. To the extent that bidders are unsure about the requirements of a solicitation, bidders should seek clarification early in the process and prior to submitting a bid.

[26] Accordingly, the Tribunal finds that this complaint does not disclose a reasonable indication of a breach of 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.

Peter Burn

Peter Burn
Presiding Member

²³ Exhibit PR-2022-044-01 at 33. In its correspondence with PWGSC, HKK makes the same argument and indicates that in previous years it has provided samples cut in the same way as this case that were accepted. Exhibit PR-2022-044-01 at 130. The Tribunal notes that no evidence was submitted to this effect.