



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-040

Allsalt Maritime Corporation

*Decision made
Tuesday, August 30, 2022*

*Decision and reasons issued
Monday, September 12, 2022*

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

BY

ALLSALT MARITIME CORPORATION

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.

Randolph W. Heggart

Randolph W. Heggart
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] The complaint relates to a request for proposal (RFP) (solicitation F7049-210159/A) issued on May 12, 2022, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO). This solicitation was for the provision of shock-mitigating helm chairs for the motor life boat (MLB) vessels as part of the MLB Vessel Life Extension (VLE) program.

[3] The complainant, Allsalt Maritime Corporation (Allsalt), alleged that PWGSC erroneously determined that its bid was not responsive to the solicitation and that there was a clear appearance of preferential treatment for the winning bidder, Professional Components Ltd. (PCL). In addition, Allsalt alleged that a response in Amendment 004 to the original MLB VLE solicitation (solicitation F7049-200038/B) could be used to the detriment of Canadian businesses, had the potential to cause future harm, and did nothing to support fair and open procurement.

BACKGROUND

[4] On June 7, 2021, the MLB VLE solicitation was issued by PWGSC for the inspection, repair, maintenance and alterations to Canadian Coast Guard (CCG) life boat vessels, with a closing date of August 26, 2021.³ This solicitation originally included the replacement of bridge shock seats with ShockWave seats made by PCL. Following an access to information and privacy (ATIP) request,⁴ a complaint to the Tribunal and escalation to PWGSC, DFO and/or CCG procurement officers by Allsalt, the requirement for the replacement of the seats was removed from the solicitation.

[5] On May 12, 2022, solicitation F7049-210159/A was issued for the provision of four shock-mitigating helm chairs for each of the 36 47-foot MLBs.⁵ On May 30, 2022, Amendment 002 was published to extend the bid closing date from June 7 to June 21, 2022, and to remove the requirement for swivel capability from article 3.24 of Annex A,⁶ among others.

[6] According to Allsalt, it left a message for PWGSC on June 2, 2022, to inquire into the cause of the deletion of the swivel requirement, but PWGSC did not call back.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Eighteen amendments were issued for this solicitation between June 11 and August 24, 2021.

⁴ The DFO responded to the ATIP request on September 29, 2021. See Exhibit PR-2022-040-01 at 2106–2339.

⁵ Four amendments were issued for this solicitation. Only amendment 002 is in issue in this case.

⁶ This article reads: “Seats must be equipped with swivel capability.”

[7] On or before the bid closing date, Allsalt and PCL each submitted a bid for the solicitation.

[8] PWGSC requested some clarifications from Allsalt on July 13, 2022, namely that Allsalt point out where in its bid documentation it showed compliance with a number of requirements of the statement of work (SOW).⁷ The same day, Allsalt sent PWGSC a compliance matrix providing information not found in its bid. PWGSC responded by noting that it needed to find the responses in the documents provided with Allsalt's bid, and again asked that Allsalt point out where in its bid the requested information could be found. Allsalt replied the next day with a new document purporting to show where the information could be found in its bid.

[9] On August 5, 2022, PWGSC sent a regret letter to Allsalt indicating that a contract had been awarded to PCL, and that Allsalt's bid was found to be non-responsive to the solicitation, as its technical bid did not explain and demonstrate how it would meet all the criteria in the SOW.

[10] On August 12, 2022, Allsalt sent a letter to PWGSC to object to its finding, arguing that its bid was compliant, and that PCL was being favoured. It stated that this was evidenced by the removal of the requirement for swivel seats in the RFP, the entire MLB procurement process and the MLB VLE solicitation, as well as the history of other solicitations with named specifications for PCL seats (i.e. ShockWave) with minimal competition or equivalence from other manufacturers.

[11] On August 16, 2022, PWGSC asked Allsalt whether it wished to have a debrief. Allsalt replied the next day agreeing to a meeting.

[12] A debrief was held on August 18, 2022. PWGSC stated that the compliance matrix and the clarifying document provided by Allsalt contained new information that could not be considered. According to Allsalt, PWGSC indicated that an item-by-item list with a blanket statement for each item would have met the requirements of the solicitation. During the meeting, Allsalt also inquired into the deletion of the swivel seat requirement in Amendment 002, which PWGSC believed was the result of a supplier question but had no further information available. Allsalt informed PWGSC that it was pursuing ATIP requests related to this change in the SOW, and PWGSC indicated that it would continue to look into this and advise Allsalt. Allsalt has not received any further information from PWGSC on this matter.

[13] On August 19, 2022, Allsalt filed an incomplete complaint with the Tribunal. Allsalt filed the required additional documentation on August 25 and 26, 2022. The Tribunal acknowledged receipt of Allsalt's complete complaint on August 29, 2022.

ANALYSIS

[14] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry into a complaint if the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6;⁸

⁷ The requirements of the SOW identified by PWGSC in its clarification request pertained to articles 3.1, 3.1.1.1, 3.1.1.2, 3.2, 3.12, 3.14, 3.15, 3.17, 3.18.1.1, 3.18.1.2, 3.18.1.3, 3.22, 3.23, 3.25, 3.31, 3.33, 3.34, 3.35, and 3.36.

⁸ Subsection 6(1) of the Regulations.

- ii. the complainant is a potential supplier;⁹
- iii. the complaint is in respect of a designated contract;¹⁰ and
- iv. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹¹

[15] For the reasons that follow, the Tribunal has decided not to conduct an inquiry into Allsalt's complaint.

There is no reasonable indication that PWGSC erred in declaring Allsalt's bid non-responsive to the solicitation

[16] As indicated above, PWGSC requested clarification from Allsalt for several requirements of the SOW. In response, Allsalt provided a compliance matrix followed by a clarification document pointing to certain information in its bid. Ultimately, PWGSC found that Allsalt's bid was non-responsive to the technical requirements of the solicitation, and that the compliance matrix and clarification document provided new information that could not be considered in the evaluation of the bid.

[17] In its complaint to the Tribunal, Allsalt submitted that its bid was responsive to the solicitation since, as stated in its proposal, the seats were designed specifically for the MLB programs in Canada and the United States. According to Allsalt, this and the seat drawings provided in its bid show that the proposed seats are compliant with the technical requirements of the SOW. Furthermore, Allsalt submitted that it has built and delivered seats to the CCG for on-vessel trials prior to this solicitation, and that its seats are currently being retrofitted into the U.S. Coast Guard MLB equivalent for their service life extension program.¹²

[18] The Tribunal finds that Allsalt's complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements, including the Canadian Free Trade Agreement (CFTA).¹³ Paragraph 515(4) of the CFTA provides that "[t]o be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation."¹⁴

[19] Article 3.1 of the RFP states that "[i]n their technical bid, Bidders should explain and demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability in a thorough, concise and clear manner for carrying out the work." The 2003 (2020-05-28) Standard Instructions – Goods or Services – Competitive Requirements of the Standard Acquisition Clauses and Conditions Manual

⁹ Paragraph 7(1)(a) of the Regulations.

¹⁰ Paragraph 7(1)(b) of the Regulations.

¹¹ Paragraph 7(1)(c) of the Regulations.

¹² Exhibit PR-2022-040-01 at 5, 2395, 2397.

¹³ The tender notice indicates that the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the World Trade Organization Agreement on Government Procurement (WTO AGP), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the CFTA, and the free trade agreements with Peru, Colombia, Panama, Korea and the United Kingdom apply to this solicitation.

¹⁴ See also e.g. art. 19.14(4) of the CETA; art. XV(4) of the WTO AGP.

(SACC Manual), included by reference in article 2.1 of the RFP, also state at paragraph 5 that it is the bidder's responsibility to "provide a comprehensible and sufficiently detailed bid, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the bid solicitation." Finally, article 4.1.1.1 of the RFP states that "[t]o be declared responsive, a Bid must (a) meet all the criteria in Annex A Statement of Work."

[20] The Tribunal's jurisprudence states that it is incumbent upon bidders to exercise due diligence in the preparation of their proposals to ensure that they are compliant with all of the essential elements of a solicitation and that the information provided clearly demonstrates compliance with the established requirements.¹⁵ It is also a well-established principle that the modification of a bid by the bidder or the procuring entity after the deadline for the receipt of bids has passed is prohibited.¹⁶ Bids must therefore be evaluated on the basis of the information included in a proposal at the time of bid closing. Finally, it is up to the complainant to show that the evaluation was conducted inconsistently with the applicable criteria of the RFP. The Tribunal only intervenes when an evaluation is considered to be unreasonable (i.e. one where the evaluators have ignored vital information, wrongly interpreted the scope of a requirement, acted in a procedurally unfair way or based their evaluation on undisclosed criteria).¹⁷

[21] Any information provided by Allsalt in its compliance matrix and clarification document which did not point to an answer in its bid could not have been considered by PWGSC in order to meet the requirements of the solicitation. The Tribunal notes that Allsalt agreed with PWGSC that its compliance matrix provided additional information not found in its bid, and therefore submitted the clarification document to point to answers in its bid in support of its compliance with the technical requirements in the SOW.¹⁸ However, even this document made statements seeking to clarify its responses.¹⁹ In fact, these statements go beyond clarification and add information not contained in the original bid. As such, statements seeking to clarify information contained in its bid were properly disregarded by PWGSC in both the compliance matrix and the clarification document.

[22] The Tribunal notes that the RFP was clear that bidders should provide detailed information demonstrating compliance with the requirements in a thorough, concise and clear manner. Allsalt did not do so. In response to several technical requirements in the SOW, Allsalt's clarification document pointed to broad statements in its bid such as the following:

¹⁵ *Eolyss Solutions Inc.* (24 March 2022), PR-2021-084 (CITT) at para. 30; *Pennecon Hydraulic Systems v. Department of Public Works and Government Services* (4 September 2019), PR-2019-007 (CITT) at para. 35; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

¹⁶ *Terra Services Inc.* (29 April 2022), PR-2022-007 (CITT) at para. 25; *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.

¹⁷ *Brains II Canada Inc.* (15 March 2012), PR-2011-056 (CITT) at para. 19.

¹⁸ Exhibit PR-2022-040-01B at 9–18.

¹⁹ For example, Allsalt made statements such as "We would like to clarify that this is the same plate that was successfully deployed in a trial on the Cape Kuper MLB with the proposed seats" in response to articles 3.1, 3.1.1.1, 3.1.1.2 and 3.2, "We would like to clarify that all of our COTS products are designed to meet this requirement" in response to articles 3.14, 3.17, 3.18.1.1, 3.18.1.2, 3.18.1.3, 3.23, 3.33 and 3.34, "We would like to clarify that all of our COTS products are designed to adjust without the use of tools" in response to article 3.23, "We would like to clarify that the indicated backrest height of 17.07", as shown on Appendix 1, page 1, is specifically designed to not impede rearward visibility or crew mobility" in response to article 3.25, etc.

The pedestal, seat and the mechanisms of the SHOXS 3200-X8 were designed specifically for the MLB program, many years ago when the CG's of both Canada and the US began discussions about the possible refit.

The seating options offered in this document are **all** COTS (Commercial Off the Shelf) seats already installed on multiple different vessels around the world including the US Coast Guard (Including the USCG version of the 47 MLB), US Navy Forces as well as many foreign military forces and numerous Law Enforcement vessels.²⁰

[23] Although some responses point back to the drawings provided in Allsalt's bid and it is not clear whether PWGSC considered them to provide sufficient information, Allsalt's responses for articles 3.14, 3.17, 3.18.1.1, 3.18.1.2, and 3.18.1.3 of the SOW rely only on broad statements and further clarifications. Even though PWGSC may have indicated during the debrief that a blanket statement for each item would have met the requirements of the SOW, the Tribunal is of the view that not just any statement would have done. The statements listed above were too general and, without more precise explanations in its bid, PWGSC would have been correct to determine that they do not meet Allsalt's obligations in responding to the RFP.

[24] Even if the Tribunal were to find that PWGSC should have determined that the drawings were compliant with some of the technical requirements of the solicitation, there is no reasonable indication of a breach of the trade agreements in relation to PWGSC's evaluation of the requirements listed above. As such, in light of article 4.1.1.1 of the RFP, the Tribunal finds that PWGSC did not violate the applicable trade agreements when it determined that Allsalt's bid was non-responsive.

There is no reasonable indication that the winning bidder received preferential treatment

[25] Allsalt submitted that there was a clear appearance of preferential treatment for PCL throughout the whole MLB procurement process and the MLB VLE solicitation, including through originally sole sourcing PCL's seats. Allsalt noted that there have also been a few other sole-sourced contracts to PCL totalling almost \$500,000, with the requirements allegedly not shared with the public.²¹ Allsalt submitted that the preferential treatment for PCL continued with the removal of the requirement for swivel seats without justification in Amendment 002 of the RFP, which significantly increased PCL's competitiveness. Allsalt argued that the origin of this change at a late stage of the procurement process, and which favours only one competitor, should be disclosed in the interest of a fair and open competition.

[26] The Tribunal finds that Allsalt has not demonstrated a reasonable indication that PCL received preferential treatment in the current solicitation through the removal of the swivel seats requirement. The Tribunal has previously stated that a ground of complaint must have some evidentiary basis to suggest that there was a breach of the relevant trade agreements.²² The Tribunal has also held that, as long as a procurement is not deliberately constructed to preclude certain suppliers from bidding or to direct the procurement to a favoured supplier, a government institution may choose to procure using a combination of specifications, even though this might have the effect

²⁰ Exhibit PR-2022-040-01 at 2394–2395, 2428–2431.

²¹ Exhibit PR-2022-040-01 at 6, 2433–2434.

²² *Toromont Cat* (22 January 2016), PR-2015-054 (CITT) at para. 20; *Flag Connection Inc.* (30 July 2013), PR-2013-010 (CITT) at paras. 23–24.

of excluding some suppliers.²³ In the current case, Allsalt has provided no evidence as to how the removal of the requirement for swivel seats favoured PCL or directed the procurement to it, or excluded any suppliers.

[27] With regard to PWGSC's alleged failure to provide justification for the removal of the swivel seats requirement, paragraph 510(1) of the CFTA states that "[a] procuring entity shall make available to all suppliers any new information or clarification of the original information set out in the tender documentation provided in response to questions from one or more suppliers, in an open, fair, and timely manner."²⁴ PWGSC was not obligated to provide a reason or justification for the change in requirements; its obligation was to distribute the change to all bidders.²⁵ The Tribunal therefore finds no reasonable indication that PWGSC acted contrary to its obligations under the trade agreements in regard to the modification to the swivel seat requirement as it did in Amendment 002.

Allsalt's ground of complaint regarding solicitation F7049-200039/B is late

[28] Question and Response 5 in Amendment 004 to the MLB VLE solicitation stated as follows:

Q5: In [regard] to Specification Item # H-21, can the technical authority provide seating requirements as specification instead of a single supplier's unique configuration number, to allow additional suppliers to show equivalency based on requirements?

Why is the replacement of the bridge shock seats (Spec. Item # H-21) sole sourced? The current specification excludes all other manufacturers from competing for the program.

R5: Canada has trialed multiple versions of shock mitigating seats from different manufacturers and conducted an acceleration study of the effects on vessel operators. In order to maintain commonality with seats fitted on other classes of vessels within the fleet, Canada will insist on the shockwave model as specified.

[29] Allsalt requested that this response be officially removed and retracted, as it can be used out of context to the detriment of Canadian businesses and has the potential to cause future harm. In addition, Allsalt submitted that this response does nothing to support fair and open procurement for the federal service.

[30] Section 6 of the Regulations states that potential suppliers must file their complaints not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. Amendment 004 to the MLB VLE solicitation was published more than a year ago on June 17, 2021. Allsalt should have known of its ground of complaint at that time and should therefore have filed its complaint within 10 working days of that date. As it only filed its complaint on August 26, 2022, the Tribunal finds that this ground of complaint is late.

²³ *Rampart International Corporation v. Department of Public Works and Government Services* (10 November 2021), PR-2021-023 and PR-2021-028 (CITT) at para. 107; *723186 Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at paras. 19–21.

²⁴ See also e.g. para. 19.9(11) of the CETA; para. X(11) of the WTO AGP.

²⁵ *Royal Indevco Properties Inc.* (12 May 2021), PR-2021-008 (CITT) at para. 49.

DECISION

[31] Pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to conduct an inquiry into the complaint.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member