



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-028

Steinert US, Inc.

*Decision made
Tuesday, August 2, 2022*

*Decision and reasons issued
Monday, August 15, 2022*

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

BY

STEINERT US, INC.

AGAINST

THE DEPARTMENT OF NATURAL RESOURCES

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.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

STATEMENT OF REASONS

[1] Steinert US, Inc. (Steinert), a United States-based entity, with a business address in Walton, Kentucky, filed a complaint¹ with the Tribunal concerning the outcome of a tender arising from a Request for Proposal (RFP) (solicitation 5000066565) by the Department of Natural Resources (NRCan). The RFP pertains to the procurement of services for sensor-based ore sorting for the pre-concentration of critical mineral samples.²

[2] The tender process commenced with publication of the RFP on May 9, 2022.³ The RFP content was divided into seven parts, as follows:⁴

Part 1 - General Information

Part 2 - Bidder Instructions

Part 3 - Bid Preparation Instructions

Part 4 - Evaluation Procedures and Basis of Selection

Part 5 - Certifications and Additional Information

Part 6 - Security and Other Requirements

Part 7 - Resulting Contract Clauses

[3] In addition, the RFP comprised three annexes (Statement of Work, Basis of Payment, and Task Authorization Form) and two appendices (Evaluation Criteria and Financial Proposal Form).⁵

[4] Bidders were informed that bids should be presented in a format comprising a technical section, a financial section, certifications and additional information.⁶

[5] Appendix 1 (Evaluation Criteria) of the RFP prescribes mandatory criteria to be assessed on a “Yes/No” or “Pass/Fail” basis and other technical criteria that are evaluated using the allocation of points.⁷

[6] Part 4 of the RFP describes the methodology for the evaluation of bids and the basis for the selection of a successful (winning) bid. In order to be responsive, a bid must comply with all requirements of the bid solicitation, meet all mandatory criteria prescribed by the RFP, and achieve a

¹ Exhibit PR-2022-028-01.E.

² More particularly, the services are summarily described at Clause 1.2 of the RFP as the performance of “comprehensive ore sortability studies on up to eight (8) ore samples from Canadian critical minerals projects (REE, lithium or others), to determine the feasibility of sensor-based sorting and provide design information for sorting systems on an as and when required basis.” Exhibit PR-2022-028-01 at 5.

³ Exhibit PR-2022-028-01 at 1–43.

⁴ *Ibid.* at 5.

⁵ *Ibid.*

⁶ *Ibid.* at 9.

⁷ *Ibid.* at 34–41.

minimum score for the point-rated technical criteria. Any bid that does not meet all these requirements will be deemed non-responsive. A responsive bid having the highest combined rating of technical merit and price will be selected as the winning bid for the award of a contract, using a ratio of 70 percent for technical merit and 30 percent for price.⁸

[7] During the tender, five amendments were issued. In at least some instances, the amendments were issued in response to questions or requests for clarification posed by prospective bidders.⁹

[8] The extended closing date for the submission of bids to NRCan was June 9, 2022.¹⁰

[9] Steinert submitted a timely bid on or about June 7, 2022.¹¹

[10] On July 12, 2022, NRCan informed Steinert that a contract for the solicitation had been awarded to another bidder (Corem) in the amount of \$1,469,491.55. Steinert asked for information concerning the evaluation of its bid.¹² NRCan provided Steinert with a copy of the Evaluation Consensus as prepared by the team at NRCan that had evaluated all the bids.¹³ From this disclosure, Steinert was informed that its bid was assessed as being non-compliant with the mandatory evaluation criteria, specifically M2, which reads as follows:¹⁴

1.1 Mandatory Evaluation Criteria

The Mandatory Criteria listed below will be evaluated on a simple pass/fail basis. Proposals which fail to meet the mandatory criteria will be deemed non-responsive.

...

M2 Bidder Proposed Resources' Experience

The Bidder **must** propose at least one (1) resource with research experience related specifically to sensor-based sorting.

- The proposed resource must have completed a minimum of two (2) sensor-based sorting projects within the last five (5) by the RFP closing date.
- To demonstrate the experience, a curriculum vitae (CV) for the proposed resource must be provided to clearly demonstrate their past sensor-based sorting experience.

[11] Steinert's bid was found non-compliant because no CVs were included for the resources (personnel) that Steinert proposed to supply to perform the work defined by the RFP. Although

⁸ *Ibid.* at 11–12.

⁹ Exhibit PR-2022-028-01 at 44–50; Exhibit PR-2022-028-01.B at 10–23.

¹⁰ Exhibit PR-2022-028-01.B at 19.

¹¹ Exhibit PR-2022-028-01.A (protected); Exhibit PR-2022-028-01.F.

¹² Exhibit PR-2022-028-01.C (protected) at 16–18; Exhibit PR-2022-028-01.G at 8–10.

¹³ Exhibit PR-2022-028-01.C (protected) at 1–8.

¹⁴ Exhibit PR-2022-028-01 at 35.

Steinert's bid was deemed non-responsive to the mandatory technical criteria, NRCan nonetheless continued with its evaluation of the point-rated technical criteria in Steinert's bid.

[12] Discussion ensued between Steinert and NRCan concerning various aspects of the bid evaluation. Steinert apparently conceded that its bid did not include CVs, in accordance with M2. However, Steinert's bid did include what Steinert characterized as "resumes" for each of its named resources although it was not presented in the format of a conventional CV.¹⁵

[13] As NRCan did not ask Steinert to provide additional information or CVs *per se*, Steinert formed the view that clause 5.2 of the RFP permitted the submission of CVs at a later time. Clause 5.2 reads as follows:¹⁶

5.2 Certifications Precedent to Contract Award and Additional Information

The certifications and additional information listed below should be submitted with the bid but may be submitted afterwards. If any of these required certifications or additional information is not completed and submitted as requested, the Contracting Authority will inform the Bidder of a time frame within which to provide the information. Failure to provide the certifications or the additional information listed below within the time frame specified will render the bid non-responsive.

...

5.2.4 Education and Experience

The Bidder certifies that all information provided in the résumés and supporting material submitted with its bid, particularly the information pertaining to education, achievements, experience and work history, has been verified by the Bidder to be true and accurate. Furthermore, the Bidder warrants that every individual proposed by the Bidder for the requirement is capable of performing the Work described in the resulting contract.

[14] Steinert requested reconsideration of its bid. NRCan maintained its position that the wording of the mandatory criteria was explicit in prescribing that CVs were required to be included as part of the bid documentation.¹⁷

[15] NRCan also pointed out that Steinert's bid included a copy of Steinert's own terms and conditions for commercial contracts, contrary to the terms of the RFP. Steinert offered the explanation that the inclusion of its terms and conditions was consistent with its standard practice, that they would not operate to override the terms of the RFP, and that Steinert retained the discretion to waive its own terms and conditions prior to finalization of a contract. Notwithstanding, NRCan asserted that the inclusion of the bidder's own terms and conditions as part of the bid would, in and of itself, be sufficient to disqualify the bid.¹⁸

¹⁵ Exhibit PR-2022-028-01.C (protected) at 9–18; Exhibit PR-2022-028-01.G at 1–10.

¹⁶ Exhibit PR-2022-028-01 at 13–15.

¹⁷ Exhibit PR-2022-028-01.C (protected) at 14–15; Exhibit PR-2022-028-01.G at 6–8.

¹⁸ Exhibit PR-2022-028-01.C (protected) at 9–11, 13; Exhibit PR-2022-028-01.G at 1–3, 5–6.

[16] As Steinert was unable to obtain redress from NRCan, it submitted a complaint with the Tribunal, which was considered filed on July 25, 2022.¹⁹

[17] The grounds for Steinert's complaint may be summarized as follows:²⁰

(a) In Part 3 (Bid Preparation Instructions) of the RFP, individual sections are listed with corresponding information required. Section I (Technical Bid) contains no mention of submissions of CVs, which can only mean that this requirement falls under Section III (Certifications) or Section IV (Additional Information);

(b) In Part 5 (Certifications and Additional Information) of the RFP, clause 5.2 (Certifications Precedent to Contract Award and Additional Information) allows for submission of certain types of information after bid submission and includes a sub-heading, "5.2.4 Education and Experience", which refers to resumes, not CVs;

(c) The RFP provides no guidance concerning how the "afterwards submission process" described in Part 5 (clause 5.2) will be handled;

(d) The Evaluation Criteria in Appendix 1 of the RFP do not provide information concerning whether mandatory criteria supersede point-rated criteria. Items to be assessed using points must be present in the bid package, but other information required as mandatory criteria (i.e. CVs) may be submitted later, per clause 5.2;

(e) The Evaluation Criteria in Appendix 1 of the RFP do not specifically prescribe whether mandatory criteria will be assessed at submission or post-submission;

(f) In Appendix 1 (Evaluation Criteria), clause 1.2 (Evaluation of rated criteria) states that CVs will be excluded from point-rated criteria. Further to this, in Amendment 2, NRCan provided an answer to Question #1, stating that CVs are not considered under Section I;

(g) As Steinert had provided information concerning its proposed resources in the "Personnel" section of its bid package, it was incumbent upon NRCan to request any additional information that was required by contacting Steinert directly;

(h) Later submission of CVs creates no unfairness, as CVs are excluded from being considered with respect to point-rated criteria; and

(i) It is Steinert's standard practice to issue terms and conditions when making a financial quote. As those terms could have been dropped in favour of the contracting authority, the inclusion of this material should not have resulted in automatic disqualification, without further communication with Steinert.

¹⁹ Exhibit PR-2022-028-01.E.

²⁰ Exhibit PR-2022-028-01.D at 2–3.

[18] With respect to remedy, Steinert asks for the re-evaluation of the bids or that a new solicitation be issued. Steinert made no requests for costs.²¹

ANALYSIS

[19] The Tribunal's authority to conduct inquiries concerning procurement matters arises from the *Canadian International Trade Tribunal Act*²² (CITT Act) and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*²³ (Regulations).

[20] These prescribe certain conditions that must be present before the Tribunal can commence an inquiry into a complaint, namely:

- (i) The complaint must be timely. Subsection 6(1) of the Regulations prescribes that a complaint must be filed within 10 working days of the date when the complainant knew or should have reasonably known about the basis of a complaint;
- (ii) The complaint must pertain to a "designated contract" within the meaning of the CITT Act and Regulations;
- (iii) The complaint must be filed by a "potential supplier" of the goods and services being procured; and
- (iv) There must be a reasonable indication that the procurement has not been conducted in accordance with applicable trade agreements.

[21] All these conditions must be present.

[22] Steinert's complaint was considered filed on July 25, 2022, or six working days after NRCan refused to provide Steinert with redress.²⁴ As such, the Tribunal finds that Steinert's complaint is timely.

[23] A complaint must also pertain to a "designated contract".²⁵ The RFP seeks to procure services, and the estimated value of the services meets the monetary threshold specified under the applicable trade agreement, which, in this case, as noted below, is the World Trade Organization's Revised Agreement on Government Procurement (WTO-AGP). As such, the Tribunal finds that the RFP relates to a "designated contract" within the meaning of the CITT Act and the Regulations.²⁶

[24] As Steinert submitted a bid, it qualifies as a "potential supplier" of the services being procured by NRCan and consequently has standing to file a complaint.

²¹ Exhibit PR-2022-028-01.E at 7–8.

²² R.S.C., 1985, c. 47 (4th Supp.).

²³ SOR/93-602.

²⁴ Exhibit PR-2022-028-01.C (protected) at 9; Exhibit PR-2022-028-01.G at 1.

²⁵ As defined by section 30.1 of the CITT Act.

²⁶ Subsection 7(1) of the Regulations.

[25] The Tribunal now turns to consider whether there is a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.²⁷

[26] In order for the Tribunal to find that there is a reasonable indication that a trade agreement may have been breached, the complaint should disclose grounds or argument having some reasonable prospect of success, should an inquiry be commenced.

[27] Although the complaint did not identify a specific trade agreement, the Tribunal considers that the WTO-AGP would be relevant and applicable.²⁸

[28] As all the relevant information has been placed before the Tribunal at the outset, this is not a situation where additional information that might be forthcoming in a Government Institution Report could assist in ascertaining whether there has been a breach of the WTO-AGP.

[29] In essence, Steinert's complaint rests on the premise that the procurement process was unfair, and therefore in contravention of the WTO-AGP, because the RFP includes provisions that are either contradictory or ambiguous.²⁹ More particularly, the issue is whether the general provisions of clause 5.2 conflict with, or override, the specific language of M2 with respect to the requirement to submit CVs and when those CVs could be provided.

[30] Steinert's arguments that the CV requirement is excluded from the Section I (Technical Bid) component and must therefore fall under the scope of "Additional Information" that may be submitted later does not bear scrutiny. The Bid Preparation Instructions of the RFP state the following:³⁰

The technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated.

[31] The evaluation criteria are described in Appendix 1, which defines Technical Criteria as comprising Mandatory Criteria (1.1) and Rated Criteria (1.2).³¹

[32] The wording of M2 is categorical. It clearly states that CVs are mandatory for evaluation of relevant work experience held by the resources being proposed by the bidder. Moreover, the terms of the RFP are likewise categorical in alerting bidders that "mandatory" requirements are just that—failure to meet those requirements will cause the bid to be evaluated as non-responsive and thus subject to disqualification.³²

²⁷ Subsection 7(1) of the Regulations.

²⁸ Steinert is domiciled in the United States. Canada is not a party to the government procurement chapter in the Canada-United States-Mexico Agreement. Therefore, the only potentially applicable trade agreement is the WTO-AGP.

²⁹ The WTO-AGP requires that procuring entities make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders, including any conditions for participation of suppliers and all evaluation criteria that the entity will apply in the awarding of the contract. See articles X(7)(b) and (c), online: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm>.

³⁰ Exhibit PR-2022-028-01 at 9.

³¹ *Ibid.* at 34–41.

³² *Ibid.* at 11, 34–35.

[33] Moreover, Appendix 1 further states that only proposals meeting mandatory criteria will be evaluated on point-rated criteria:³³

1.2 Evaluation of rated criteria

The criteria contained herein will be used by NRCan to evaluate each proposal that has met all of the mandatory criteria.

[34] As such, the RFP makes it clear that the bid evaluation was constructed to assess mandatory criteria in a first stage that would screen out or exclude non-compliant submissions. Proposals that met all mandatory requirements would then be evaluated on point-rated criteria. This is sufficient to dispose of Steinert's arguments that the RFP was structured in a way that categorized CVs as being excluded from the technical components of the bid that were required at the time of submission and categorizing CVs as additional information that could be submitted at a later date, post-bid submission.³⁴

[35] Steinert explained its omission of the CVs from its bid in its correspondence with NRCan by pointing to its corporate policy concerning the handling and external dissemination of employee CVs.³⁵ Steinert's purported reliance on clause 5.2 as permitting later submission of CVs could only create a disjointed procedure for bid evaluation. If clause 5.2 can be read as permitting Steinert to submit CVs at a later stage in the tender process, the same must be true for all other bidders. In that scenario, the procuring entity would be left to evaluate bids on a piecemeal basis, as some bidders would be submitting key documents pertaining to a mandatory requirement after the closing date of the tender.³⁶

[36] It is well established that a procuring entity can draft RFP terms that are tailored to its operational requirements, so long as that discretion is exercised reasonably.³⁷ As such, not every solicitation will necessarily impose the mandatory requirement for submission of CVs—this is entirely dependent on the nature of the goods and services being procured and whether specific skills and experience are prerequisite to meeting the needs of the procuring entity. In circumstances where the professional skills and experience of the bidder and its resources are not core requirements and thus categorized as being “mandatory”, CVs may be secondary, or even tertiary, information that the procuring entity may wish to have before finalizing selection of a bid or entering into a contract. In that scenario, clause 5.2 provides a route for the supply of that additional information or for the procuring entity to request further certification that information already provided is true and accurate. However, that is not the situation here.

³³ *Ibid.* at 36.

³⁴ See para. 18 of these reasons.

³⁵ Exhibit PR-2022-028-01.C (protected) at 15; Exhibit PR-2022-028-01.G at 7.

³⁶ The Tribunal further notes that the subclauses under clause 5.2 refer to either certification or the provision of additional information. Subclause 5.2.4 (Education and Experience) appears to concern only certification and does not provide for the submission of additional information.

³⁷ See, for example, *Nacris Inc.* (21 February 2022), PR-2021-072 (CITT) at para. 12, citing *Vaisala Oyj v. Department of Public Works and Government Services* (29 December 2017), PR-2017-022 (CITT) at para. 82; *2040077 Ontario Inc. o/a FDF Group* (2 September 2014), PR-2014-024 (CITT) at para. 19; *Accent on Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at paras. 60, 65, 70; *Bajai Inc.* (7 July 2003), PR-2003-001 (CITT); *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).

[37] As noted above, the wording of M2 and the terms of the RFP explaining the basis for bid evaluation clearly notified prospective bidders that CVs were mandatory and that failure to meet all mandatory requirements would disqualify the bid as non-responsive. To the extent that any conflict or ambiguity was created as between the wording of M2 and clause 5.2, the Tribunal is persuaded that it is solely attributable to Steinert's internal policy concerning CVs. In those circumstances, it was incumbent on Steinert to seek clarification or dispensation from NRCan.

[38] A bidder who does not seek clarification of language, or other aspects, of a tender document that is alleged to be ambiguous, and then proceeds to submit a bid, will be unable to make that complaint later if its bid turns out to be unsuccessful. Bidders cannot adopt a "wait and see" position in the context of tender requirements, especially where time is of the essence.³⁸ Indeed, the RFP cautioned prospective bidders to raise any concerns with NRCan directly during the tender.³⁹

[39] Although Steinert did provide an overview of the professional background of its proposed resources, this was limited to a short paragraph which identified the individual by name and provided summary information concerning education and employment experience. Steinert conceded in its correspondence with NRCan that this information was not presented in the format of a CV but submitted that this information was equivalent to a "resume".⁴⁰ As such, this raises the issue as to whether NRCan should have accepted the "resumes" as being equivalent to, or otherwise meeting, the requirement for a CV.

[40] In reviewing the evaluation of bids in a procurement, a reasonableness standard applies.⁴¹ The issue is whether the procuring entity has acted reasonably, not whether the Tribunal or another decision maker might have acted differently.

[41] The trade agreements require a procuring entity to evaluate competing bids on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation. A bid must comply with the essential requirements of the tender in order to be considered for an award.⁴² Strict compliance is required.

[42] As such, it is incumbent upon bidders to exercise due diligence during preparation of their proposals to ensure that the solicitation instructions are adhered to and that the bid clearly

³⁸ *Pacific Northwest Raptors Ltd. v. Department of Public Works and Government Services* (16 October 2019), PR-2019-017 (CITT) at para. 29; *Temprano and Young Architects Inc. v. National Capital Commission* (26 February 2019), PR-2018-036 (CITT) at paras. 21, 22; *Hewlett-Packard (Canada) Co. v. Shared Services Canada* (20 March 2017), PR-2016-043 (CITT) at para. 86.

³⁹ Exhibit PR-2022-028-01 at 4.

⁴⁰ Exhibit PR-2022-028-01.C (protected) at 11; Exhibit PR-2022-028-01.G at 3.

⁴¹ *Valley Associates Global Security Corporation v. Department of Public Works and Government Services* (29 June 2020), PR-2019-060 (CITT) [*Valley Associates*] at paras. 75–76; *Dynamic Engineering v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CITT) at para. 27; *Star Group International Trading Corporation v. Defence Construction (1951) Limited* (7 April 2014), PR-2013-032 (CITT) at para. 26.

⁴² The WTO-AGP provides that, to be considered for an award, a tender must, at the time of opening, comply with the essential requirements set out in the tender documentation. See Article XV(4).

demonstrates compliance with the essential aspects of the solicitation. Compliance with all mandatory evaluation criteria cannot be abridged or left to inference.⁴³

[43] The Tribunal can review the bid evaluation process to ensure that a bid was not unfairly disqualified. However, it cannot redraft or second-guess the mandatory criteria defined by the bid documents that are used for that evaluation. Doing so would retroactively change the playing field as between the bidders.⁴⁴

[44] As the RFP used wording that specifically required a “CV” as opposed to wording such as “CV or equivalent” or “confirmatory information that the resource has the requisite educational and/or work experience”, the Tribunal cannot find that NRCan was unreasonable in concluding that Steinert’s bid failed to comply with a mandatory requirement. The language of the RFP afforded no discretion to the evaluators to accept substitutes for a CV.

[45] Moreover, the wording of both M2 and the notes of the evaluation team disclose that the purpose of the CV requirement was to enable NRCan to confirm past project experience of the resource with respect to particular expertise. The Tribunal observes that the content of the “resumes” provided in Steinert’s bid appears to be too brief and general in nature to have enabled that verification, in any event.⁴⁵ As such, it was not unreasonable for NRCan to have refrained from undertaking that exercise.

[46] Moreover, it was not incumbent on NRCan to ask Steinert to supplement its bid, post-bid closing, by submitting documentation that was clearly highlighted as being mandatory. Had this been done, it could be viewed, from the standpoint of competing bidders, as a retroactive extension of the closing date that would favour one bidder (Steinert) to remedy a bid package that did not include documents required of all other bidders when the tender closed.

[47] In addition to the foregoing, NRCan advised Steinert during the debriefing discussion that Steinert’s bid would have been disqualified in any event because Steinert had included its own terms and conditions as part of its bid.

[48] The RFP clearly stated that, for any contract issued, the terms and conditions are those stated in the Standard Acquisition Clauses and Conditions Manual, a public document which is incorporated by reference into the RFP.⁴⁶ Bidders were prohibited from varying or supplanting the terms and conditions prescribed by the RFP. This was explicitly stated on page 4 of the RFP as follows:⁴⁷

The Articles contained in this document are mandatory in their entirety, unless otherwise indicated. Acceptance of these Articles, in their entirety, as they appear in this document, is a Mandatory requirement of this RFP.

⁴³ *J.D. Irving, Limited d.b.a. Chandler Sales* (16 October 2019), PR-2019-035 (CITT) at para. 22; *Nova-BioRubber Green Technologies Inc.* (10 January 2019), PR-2018-052 (CITT) at para. 19; *Bio-Rad Laboratories (Canada) Ltd.* (18 December 2017), PR-2017-044 (CITT) [*Bio-Rad*] at para. 11; *Trans-Sol Aviation Service Inc.* (13 May 2008), PR-2008-010 (CITT) at para. 11.

⁴⁴ *Valley Associates* at paras. 71–75.

⁴⁵ Exhibit PR-2022-028-01.A (protected) at 5–6.

⁴⁶ Exhibit PR-2022-028-01 at 6.

⁴⁷ *Ibid.* at 4.

Suppliers submitting a proposal containing statements implying that their proposal is conditional on modification of these clauses or containing terms and conditions that purport to supersede these clauses or derogate from them will be considered non-responsive.

Bidders with concerns regarding the provisions of the Bid Solicitation document (including the Resulting Contract Clauses) should raise such concerns in accordance with the Enquiries provision of this RFP.

[49] According to the terms of the RFP, bidders “agree to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract.”⁴⁸

[50] The Tribunal has previously found that a bidder who includes an alternate or additional set of standard terms and condition introduces elements of uncertainty and ambiguity with respect to the compliance of its bid. As such, the procuring entity can reasonably disqualify such a bid.⁴⁹ This is even more so where the RFP includes an explicit prohibition against doing so, as is the case here.

[51] Steinert’s subsequent explanation that it retained the discretion to drop or vary those terms and conditions does not assist Steinert’s position. Nothing in the bid suggested that Steinert’s terms and conditions were discretionary or optional. In essence, Steinert submits that NRCan should have been open to negotiating terms and conditions for any contract, notwithstanding the categorical prohibition expressed by the RFP with respect to terms and conditions inserted by a bidder.

[52] Given the wording of the RFP, NRCan was under no obligation to discuss or negotiate with Steinert concerning the terms and conditions that Steinert had included with its bid. Indeed, such an action, had it been taken, could have been contested as a retroactive modification of the RFP wording, creating an unlevel playing field for other bidders who had complied with the RFP’s direction to refrain from adding terms and conditions.

[53] As such, even if the argument that Steinert’s bid was unfairly disqualified because of omission of CVs could have been viewed as tenable, the bid would still have been validly disqualified because Steinert had varied the terms and conditions of the RFP by including its own terms and conditions.

[54] In such circumstances, the conduct of an inquiry would be a moot exercise, as the Tribunal would be unable to provide a remedy with respect to a bid that would have been disqualified in any event on different grounds.⁵⁰

[55] For the above reasons, the Tribunal finds no reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreement (WTO-AGP), and there is no basis to conclude that NRCan acted unreasonably in disqualifying Steinert’s bid.

⁴⁸ Article 2.1 of the RFP; see Exhibit PR-2022-028-01 at 6.

⁴⁹ See, for example, *MacGregor’s Custom Machining Ltd.* (5 August 2021), PR-2021-026 (CITT) at para. 37; *Bio-Rad* at para. 12.

⁵⁰ The Tribunal has in previous cases declined to conduct an inquiry where an inquiry would “amount to an exercise of limited theoretical value and of no practical impact.” See, for example, *MTM-2 Contracting Inc.* (15 March 2019), PR-2018-066 (CITT) at para. 21; *Hubs spoke Inc.* (29 June 2017), PR-2017-016 (CITT) at para. 29.

DECISION

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

Susan D. Beaubien

Susan D. Beaubien
Presiding Member