



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-048

Language Marketplace

*Decision made  
Friday, October 21, 2022*

*Decision and reasons issued  
Tuesday, November 1, 2022*

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

**BY**

**LANGUAGE MARKETPLACE**

**AGAINST**

**THE CANADA BORDER SERVICES AGENCY**

**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

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Randolph W. Heggart  
Presiding Member

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (Regulations), a potential supplier may file a complaint with the Canadian International Trade Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the CITT Act provides that, subject to the Regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the CITT Act, it shall decide whether to conduct an inquiry into the complaint.

[2] This complaint concerns a request for standing offer (RFSO) by the Canada Border Services Agency (CBSA) for English and French translation and editing services (solicitation 1000358054).

[3] The complainant, Language Marketplace (LM), alleges that its proposal was unfairly disqualified by the CBSA. Specifically, LM raises the following grounds of complaint:

- (i) mandatory criterion M.7 is not a reasonable requirement and constitutes an unnecessary obstacle to trade; and
- (ii) the RFSO was unclear that it was intending to request pricing for all three categories of services, as the purpose of the RFSO was “to provide translation AND/OR source text editing, AND/OR comparative editing”.

[4] As a remedy, LM requests the issuance of a new solicitation, the re-evaluation of the bids and the termination of the designated contract.

[5] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

## BACKGROUND

[6] On April 19, 2022, the solicitation in question was issued with a bid closing date of June 10, 2022.<sup>3</sup>

[7] On June 9, 2022, LM submitted its bid.<sup>4</sup>

[8] On September 22, 2022, the CBSA informed LM that its bid was deemed non-responsive, as it did not comply with all the mandatory criteria of the solicitation, including mandatory criterion M.7, because it failed to demonstrate that all the proposed resources have computer skills using Microsoft Office with Word, PowerPoint, Excel and Outlook.<sup>5</sup>

[9] On September 26, 2022, LM asked the CBSA, by email, if its proposal was disqualified for not providing examples of experience in Outlook, since it provided examples for Word, Excel and

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

<sup>3</sup> Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-00993167>>.

<sup>4</sup> Exhibit PR-2022-048-01.A at 51.

<sup>5</sup> *Ibid.* at 39.

PowerPoint.<sup>6</sup> The same day, the CBSA replied that LM's proposal did not comply with mandatory criterion M.7, as the evaluation team did not find that all resources proposed by LM had computer skills using Microsoft Office with Word, PowerPoint, Excel and Outlook. In addition, it indicated that pricing was missing in the financial proposal.<sup>7</sup>

[10] On September 29, 2022, LM made an objection to the CBSA, arguing that the purpose of the RFSO was "to provide translation AND/OR source text editing, AND/OR comparative editing", and therefore the type of editing services was optional, and that there was nothing in the solicitation requiring LM to bid on all three streams. LM further argued that it provided examples that demonstrated experience with all applications between all the translators, except Outlook, as providing an example of "experience with outlook" is quite a challenge.<sup>8</sup>

[11] On October 4, 2022, the CBSA answered that the price evaluation was based on all three categories of services and that all other bidders had provided a price for these three categories, except LM. The CBSA added that, if LM is unsure about a requirement, it can ask questions or get clarification during the solicitation period in the future.<sup>9</sup>

[12] On October 18, 2022, LM filed a complaint with the Tribunal.

## ANALYSIS

[13] Pursuant to section 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 can conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[14] For the following reasons, the Tribunal finds that the first ground of complaint was not filed within the time limits prescribed by section 6 of the Regulations and the second ground of complaint did not disclose a reasonable indication of a breach of the applicable trade agreements. Therefore, the Tribunal will not conduct an inquiry into this complaint.

### First ground of complaint: This ground is time-barred

[15] The first ground of complaint concerns the unreasonableness of a requirement set out in the RFSO. Specifically, LM alleges that its proposal should not have been disqualified for

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<sup>6</sup> *Ibid.* at 50.

<sup>7</sup> *Ibid.* at 45.

<sup>8</sup> *Ibid.* at 43.

<sup>9</sup> *Ibid.* at 41.

non-compliance with mandatory criterion M.7 on the basis that this requirement is unreasonable and constitutes an unnecessary obstacle to trade.

[16] Section 4.1.1.1 - Mandatory Technical Criteria states that mandatory requirements are evaluated on a simple pass or fail basis. Failure by an offeror to meet any one of the mandatory requirements will render the offeror's proposal non-responsive and will not be given further consideration.<sup>10</sup> Mandatory criterion M.7 reads as follows:

The Contractors **must** demonstrate that all the proposed resources possess computer skills using MS Office with Word, PowerPoint, Excel and Outlook.

Contractors **must** provide the following examples as to how the stated experience was met:

1. Project description and deliverables;
2. Project start and end date;
3. The role and responsibilities of the firm; and
4. The client organization including the industry and the name of the authorized client representative for whom the work was directly performed, along with their contact information.

Client contacts provided for referenced projects may be contacted by CBSA to validate the information provided by bidders.<sup>11</sup>

[Bold in original]

[17] Pursuant to section 6 of the Regulations, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or to file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time and the government institution denies it relief, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

[18] The Tribunal must therefore determine when LM first became aware, or reasonably should have become aware, of its ground of complaint with respect to mandatory criterion M.7.

[19] In this regard, when a ground of complaint relates to the terms of a solicitation, which is the case of LM's first ground of complaint, the Tribunal has previously considered the date on which a bidder obtains a copy of the solicitation documents to be the date on which the bidder becomes aware of the basis of that complaint.<sup>12</sup> Without evidence to the contrary, bidders are generally considered to have obtained a copy of the solicitation on the date of publication.<sup>13</sup>

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<sup>10</sup> *Ibid.* at 13.

<sup>11</sup> *Ibid.* at 14.

<sup>12</sup> *Denis Belanger v. Patented Medicine Prices Review Board* (7 March 2022), PR-2021-056 (CITT) [DB] at para. 30. See also *SZM Promotions Inc. dba: Promocenter International* (10 September 2021), PR-2021-039 (CITT) [SZM] at para. 20, *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) [Smiths] at para. 16; *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at para. 23.

<sup>13</sup> DB at para. 32. See also SZM at para. 20; Smiths at para. 16; *101199652 Saskatchewan Ltd. O/A Regina Dry Cleaners* (3 May 2021), PR-2021-004 (CITT) at para. 30; *CTS Defence Inc. v. Department of Public Works and Government Services* (11 August 2021), PR-2020-102 (CITT) at para. 37.

[20] Furthermore, the Tribunal has repeatedly held that, in keeping with the deadlines set out by section 6 of the Regulations, if a potential supplier believes that there is a flaw in the invitation to tender, it must file a complaint in a timely manner. Bidders cannot adopt a wait-and-see attitude and accumulate grievances only to present them after their bid is rejected.<sup>14</sup>

[21] In this case, without evidence to the contrary, the basis for LM's first ground of complaint—that mandatory criterion M.7 is unreasonable and constitutes an unnecessary obstacle to trade—reasonably became known to LM at the date of the publication of the RFSO on April 19, 2022. Therefore, LM should have either objected to the CBSA or filed a complaint with the Tribunal concerning the inclusion of that criterion in the RFSO within 10 working days of that date.

[22] Accordingly, LM's allegation on the unreasonableness of mandatory criterion M.7 was not filed within the time limits set out in section 6 of the Regulations.

**Second ground of complaint: No indication of a breach of the applicable trade agreements**

[23] As a second ground of complaint, LM alleges that its proposal should not have been found non-compliant for the failure to provide a price for all three categories of services. LM alleges that, since the purpose of the RFSO, as indicated at section 1.2.2, was “to provide translation AND/OR source text editing, AND/OR comparative editing”, it was unclear that it was requesting a price proposal for all three categories. As such, LM argues that it should not have been disqualified for bidding on only some of the categories of services.

[24] While LM's proposal was properly rejected as not meeting mandatory criterion M.7 and therefore the additional question of whether it bid on all required categories is moot, the Tribunal will address this second ground of the complaint for completeness, as it may be useful to LM in approaching future bids.

[25] LM seems to imply that the use of “and/or” at section 1.2.2 of the RFSO made bidding on each category optional. Section 1.2.2 of the RFSO reads as follows:

The purpose of this RFSO is to select a maximum of two (2) Suppliers to provide translation and/or source text editing and/or comparative editing services as and when requested as described in the Statement of Work in Annex A.<sup>15</sup>

[26] The Tribunal is of the opinion that LM's interpretation of the RFSO is not reasonable. The text above is putting context around the “as-and-when required” nature of the standing offer. When the RFSO is read in its entirety, it is not reasonable to conclude that this alone indicates that a bidder may bid on any or all of the three types of services being sought. Taken as a whole, the RFSO is clear that potential suppliers were expected to submit their bid with respect to all three categories of services.

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<sup>14</sup> *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284. See also *Testforce Systems Inc.* (19 April 2022), PR-2021-087 (CITT) at para. 28; *Eolyss Solutions Inc.* (4 April 2022), PR-2021-084 (CITT) at para. 43; *Commissionaires Kingston & Region Division* (5 July 2021), PR-2021-019 (CITT) at para. 18; *XTM International* (14 February 2019), PR-2018-063 (CITT); *ADR Education* (18 October 2013), PR-2013-011 (CITT) at para. 59.

<sup>15</sup> Exhibit PR-2022-048-01.A at 6.

[27] At section 3.1 of the RFSO, the offer preparation instructions for the financial offer reads as follows:

Offerors must submit their financial offer in accordance with the Basis of Payment detailed below in Annex “B”.<sup>16</sup>

[28] Annex B contains a table for each of the three categories with columns for each of three years and rows for regular and urgent requirements. While the instructions did not contain an explicit statement that each of the table cells must be filled in, the fact that the preparation instructions used the language that *offerors must submit their financial offer in accordance with* should have, at the very least, led bidders to understand that if they had been considering deviating from Annex B, they should have sought clarification as to the permissibility of doing so.

[29] In addition, Annex A describes the requirement of the RFSO as follows:<sup>17</sup>

The Contractor and its proposed resources will be required to provide accurate and thorough translation & editing services in both Canadian English and Canadian French languages for all types of documents ranging from UNCLASSIFIED up to and including PROTECT B. The volume of work and timelines may fluctuate, but the expectation will be timely delivery of accurately translated documentation.

The CBSA seeks to fulfill a need through as-and-when required for the provision of services pertaining to:

- **Translation**, i.e. rewriting a text in another language, while respecting the meaning, the tone, style and terminology used by the author and the grammar rules of the target language.
- **Source text editing**, i.e. reviewing a text in its original language to correct grammar, spelling, usage and typography, to make basic stylistic improvements, fix unclear or illogical sentences or paragraphs, and to check the accuracy and consistency of terminology.
- **Comparative editing**, i.e. comparing a translation with the original text to ensure consistency in content, terminology, tone and style, as well as to correct spelling, grammar, usage and typography of the translated text only.

[30] Therefore, with respect to the second ground of complaint, the Tribunal finds that there is no reasonable indication that the procuring entity failed to follow the applicable trade agreements.

[31] In light of all the above reasons, the Tribunal will not inquire into the complaint.

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<sup>16</sup> *Ibid.* at 11.

<sup>17</sup> *Ibid.* at 28.

**DECISION**

[32] 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  

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Randolph W. Heggart  
Presiding Member