



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-055

ERANUM solutions numériques
inc.

*Decision made
Friday, December 16, 2022*

*Decision and reasons issued
Thursday, December 29, 2022*

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

BY

ERANUM SOLUTIONS NUMÉRIQUES INC.

AGAINST

THE DEPARTMENT OF TRANSPORT

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.

Georges Bujold

Georges Bujold
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 must decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] This complaint concerns a request for proposal (RFP) issued on May 12, 2022, by Transport Canada (TC) under the Civil Aviation Medicine Digitalization Project for the provision of medical record digitization services (solicitation T8080-210560).³ Among other conditions, the RFP required that the bidder demonstrate in its proposal its ability to retain records for 60 days after their digitization.⁴

[3] The complainant, Eranum solutions numérique inc. (Eranum), argued that TC's rejection of its proposal on the basis that it had not demonstrated that it had the ability to retain records for 60 days after they were digitized was unwarranted. Eranum also appeared to argue that, in its evaluation, TC incorrectly interpreted and applied the French version of the mandatory criterion in question. It claimed that TC rejected its proposal based on its failure to demonstrate its ability to keep digital files instead of paper records after they are digitized. Eranum submitted that its proposal was thus unfairly rejected due to confusion over terms or to a drafting mistake made by TC.

[4] As a remedy, Eranum requested that the bids be re-evaluated and that it be compensated.⁵

[5] For the reasons that follow, the Tribunal has decided not to inquire into the complaint.

BACKGROUND

[6] On November 24, 2022, Eranum received a regret letter from TC indicating that its proposal was deemed non-responsive because it did not meet all the mandatory requirements of the RFP, including Mandatory Technical Criterion 6 (MT6), which required that the bidder demonstrate its ability to retain records for 60 days after digitization.⁶ TC's letter stated that "the proposal referred to the sending of files off-site for destruction but did not mention the retention period"⁷ [translation].

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-055-01.A at 31–134. Fourteen amendments were made to this RFP; Exhibit PR-2022-055-01.A at 81–134.

⁴ Exhibit PR-2022-055-01.A at 42.

⁵ Exhibit PR-2022-055-01 at 6.

⁶ Exhibit PR-2022-055-01.A at 135–136.

⁷ Exhibit PR-2022-055-01.A at 135.

[7] On the same day, Eranum filed a written objection with TC. In its email, Eranum stated that the second paragraph of its proposal mentioned that it had “a storage capacity of 16,750 boxes” [translation] and asked TC to review the proposal.⁸

[8] TC responded on November 29, 2022, stating that, “while Eranum mentioned in its proposal that it currently had the ability to keep 16,750 boxes, the evaluation team did not find where it was demonstrated that Eranum had the ability to keep the files for the 60-day period after the files were digitized. Can Eranum indicate where this was demonstrated in the proposal?”⁹ [translation].

[9] Eranum responded on the same day, reiterating that it had the required storage capacity but not mentioning where exactly this information is indicated in its proposal.¹⁰ Eranum also criticized TC for using the term “*fichier*” (file) in its correspondence dated November 29, 2022:

...

I would like to be told where files are mentioned in the requirements?

I am still very surprised that with this confusion over the names of the items, no representative asked for clarification if that was the case (I also urge you to review pages 30 and 31 of your requirements, which clearly speak of paper files and data/backup when it is in digital format).

In any case, Eranum has unlimited digital storage capacity because storage space is no longer an issue in 2022. For your information, 16,750 boxes represent a maximum of 34 TB, which is nothing in terms of disk space for a digitization company. We have over 1,000 TB of space for our digitization projects. Your project is for a total of 2,000 boxes, we are talking about 4 TB...

If digital storage space had been mentioned, the question would have been: What disk space does your company have to process and store a 2,000-box project for more than 60 days? ...

[Translation]

[10] A debrief meeting between the parties was held via videoconference on December 2, 2022, during which Eranum reiterated its ability to store boxes and host files. According to Eranum, TC representatives also attempted to explain, in imperfect French, the decision to declare its proposal non-responsive. It argued that TC supposedly changed the reason for this rejection from Eranum’s inability to host digital files to its inability to keep boxes of documents.¹¹ At the end of this meeting, TC indicated that the outcome of the evaluation would not change.

[11] On December 13, 2022, Eranum filed a complaint with the Tribunal.

⁸ Exhibit PR-2022-055-01.C at 107.

⁹ Exhibit PR-2022-055-01.C at 108.

¹⁰ Exhibit PR-2022-055-01.C at 109–110.

¹¹ Exhibit PR-2022-055-01.A at 137.

ANALYSIS

[12] 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 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;
- (iv) the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

[13] In this case, the first three conditions have been met.

[14] Regarding the fourth condition, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal, discloses a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements set out in that paragraph. The Tribunal has previously described the threshold as follows:

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case ... However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.¹²

[15] For the following reasons, the Tribunal determines that the complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements.¹³ In fact, the evidence instead indicates that TC evaluated Eranum's proposal against the clear criteria set out in the documentation related to the solicitation and did not make any errors that would warrant the Tribunal's intervention.

¹² *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6.

¹³ The Tribunal considers that the Canadian Free Trade Agreement (CFTA) applies, at a minimum, and has considered the relevant provisions in its review of the complaint, including articles 509(7), 515(1), and 515(4). In this regard, the CFTA requires that the government institution evaluate bids and award contracts according to the criteria set out in the solicitation documents. The CFTA also requires that all bids be open and processed in accordance with procedures that ensure fairness and impartiality.

First ground: TC's evaluation of Eranum's proposal with respect to MT6

[16] The RFP contains six mandatory technical criteria.¹⁴ The sixth, which is at issue in this case, relates to the ability to keep paper records after they are digitized:

MT6	The bidder must demonstrate the ability to retain files [dossiers] for 60 days after digitalization and then destroy files
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[17] Eranum alleges that it did in fact demonstrate in its proposal its ability to keep the records for 60 days after they have been digitized and that this demonstration was made on the first page of its proposal, where it is written that it has the ability to store 16,750 boxes.¹⁵ Eranum therefore submits that its proposal was compliant with MT6 of the RFP and that TC thus erred in declaring it non-responsive.

[18] It is well established that bidders bear the onus of clearly demonstrating that all mandatory criteria of a request for proposal have been met in their proposals. In *Falcon Environmental Inc. v. Department of Public Works and Government Services*,¹⁶ the Tribunal stated the following:

The Tribunal has also been clear that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation. In other words, bidders bear the responsibility of “connecting the dots”—they must take care to ensure that any and all supporting documentation in their bids clearly demonstrates compliance. As such, while the Tribunal has encouraged evaluators to resist making assumptions about a bid, ultimately, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood by the evaluators.

[Footnotes omitted]

[19] Further, the Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. Therefore, the Tribunal has repeatedly stated that it will interfere only with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.¹⁷

¹⁴ Exhibit PR-2022-055-01.A at 42; see also page 57, where the requirement is repeated in the job description.

¹⁵ Exhibit PR-2022-055-01 at 5.

¹⁶ (11 January 2021), PR-2020-034 (CITT) at para. 64; application for judicial review rejected, 2022 FCA 76.

¹⁷ *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 58; decision upheld by the Federal Court of Appeal, 2015 FCA 16.

[20] TC's RFP was specific and left no doubt as to how to demonstrate compliance with the evaluation criteria. It reads as follows:

In their technical bid, Bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability and describe their approach in a thorough, concise and clear manner for carrying out the work.

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. Simply repeating the statement contained in the bid solicitation is not sufficient. In order to facilitate the evaluation of the bid, Canada requests that Bidders address and present topics in the order of the evaluation criteria under the same headings. ...¹⁸

[Emphasis added]

[21] Based on the information on file, there is nothing before the Tribunal indicating that the evaluators unreasonably concluded that Eranum's proposal was non-compliant with MT6. In fact, in the Tribunal's view, Eranum clearly did not follow the instructions in the RFP in its proposal. The Tribunal notes that it did not submit the information in its bid according to the structure described in the RFP. There is no heading or section regarding MT6 in Eranum's proposal, nor is there any specific information on the file retention period that it is able to provide after the paper records have been digitized and prior to their destruction. In any event, with respect to MT6, the Tribunal considers that Eranum's proposal did not meet the requirement to "address clearly and in sufficient depth [one of] the points that are subject to the evaluation criteria against which the bid will be evaluated."

[22] Read as a whole, Eranum's technical proposal only *implicitly* deals, at best, with its ability to keep records. In many places,¹⁹ the proposal suggests that Eranum has the ability to store records prior to their destruction, depending on the client's needs. For example, on the first page of its proposal, it is written that it has the ability to store 16,750 boxes. However, nowhere is it *explicitly* indicated that Eranum has the ability to store paper records *for 60 days* after they have been digitized, as required by MT6 in the RFP. In the Tribunal's view, TC's conclusion that in Eranum's proposal it did not clearly establish its compliance with the requirement to demonstrate an ability to keep records during this period is therefore well founded.

¹⁸ Exhibit PR-2022-055-01.A at 39.

¹⁹ Eranum filed several documents in support of its complaint in which several paragraphs relevant to the Tribunal's analysis were designated as "confidential" [translation]. In the Tribunal's view, a confidential designation was not warranted with respect to certain subsections. The Tribunal would like to reiterate that unwarranted confidential designations of allegations and key facts that support a complaint may impair the Tribunal's ability to issue reasons for decisions that publicly disclose all relevant information upon which its decisions are based. Complete and well-documented public reasons are essential to the transparency of the Tribunal's decision-making process. Notwithstanding its reservations regarding their confidentiality, the Tribunal limited itself to a general discussion of these elements. Furthermore, the Tribunal wishes to clarify that nothing in these supposedly confidential elements explicitly or clearly demonstrates that Eranum can keep records *for 60 days* after digitization. Ultimately, the evidence indicates that the evaluators strove to evaluate Eranum's proposal and did not neglect to consider information provided in its proposal.

[23] As indicated above, bidders bear the responsibility of ensuring that any and all supporting documentation in their bids clearly demonstrates compliance with the mandatory criteria set out in an RFP, and it is not the role of evaluators to make assumptions or draw inferences to compensate for, in favour of bidders, the lack of clarity or deficiencies in a proposal. In this regard, the Tribunal has already indicated the following:

The standard for evaluating bids against mandatory criteria is not one of a balance of probabilities. As stated at the outset of this analysis, bids must be evaluated thoroughly and strictly for compliance. It is not enough that a bid “may have been” compliant or was “more likely than not” compliant. A bid is either compliant or it is not.

Thus, a conclusion that it is *not clear* whether a bid is compliant is a conclusion that the bid is *non-compliant*. The onus to show compliance rests on the bidder; it is not incumbent on, or permissible for, government institutions to give bidders the benefit of the doubt where compliance cannot be clearly established.²⁰

[Emphasis in original]

[24] The Tribunal is of the view that Eranum’s proposal was simply deficient and incomplete in terms of demonstrating its compliance with MT6. Despite the presence of general statements that suggest that the company can keep or store records or documents once they have been digitized, there is no clear and unambiguous evidence that this ability extends up to 60 days after they have been digitized, as required by MT6. In the absence of any mention and, especially, details on the file retention period in its proposal, Eranum did not meet the requirement of demonstrating the length of time of its retention capacity.²¹ For example, it could have provided specific examples of previous contracts in respect of which it had kept documents it had digitized for at least 60 days.

[25] In short, since it was unclear from the content of Eranum’s proposal if it was compliant with MT6, the evaluators’ conclusion that it was not compliant was justified and supported by a tenable explanation in the circumstances. Once again, evaluators are required to thoroughly and strictly evaluate bids and cannot give bidders the benefit of the doubt. The Tribunal finds that the evaluators complied with these principles in this case. Thus, it was reasonable for TC’s evaluators to conclude that Eranum’s proposal was non-responsive on this ground.

[26] Consequently, the first ground of complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

Second ground: the alleged ambiguity and unfairness with respect to the French version of MT6

[27] As noted above, Eranum appeared to allege that there was a drafting problem in the RFP that may have led to an interpretation problem by TC. Specifically, it alleged that there was confusion between the terms “physical files” and “digital files” [translation] in the French version of the RFP

²⁰ Valcom Consulting Group Inc. (14 June 2017), PR-2016-056 (CITT) at paras. 69–70.

²¹ Although the complaint mentions that a capacity to retain records for 60 days requires a capacity to store 2,000 boxes, which is well below 16,750 boxes, the Tribunal notes that this explanation is not included in Eranum’s proposal.

and subsequent correspondence. According to Eranum, it would have been fairer to bidders if TC had required that all proposals be completed in English only.

[28] Specifically, Eranum refers in particular to the use of the term “*dossier*” (record) in MT6, while the term “*fichier*” (file) is used in the regret letter. In its correspondence with TC, Eranum appears to take the position that, contrary to the explanations provided by TC to justify the rejection of its proposal, the RFP does not use the term “*fichier*” (file) to refer to physical files (i.e., paper records).²² Eranum seems to infer from TC’s use of the term “*fichier*” (file) that its proposal may have been rejected due to an inability to keep digital files, which was not the subject of MT6.

[29] For the following reasons, the Tribunal is of the view that the information on the record does not demonstrate, to a reasonable extent, that the French version of MT6 was ambiguous or unfair to the bidders who responded to the RFP in French. In addition, the Tribunal considers that TC’s use of the term “*fichier*” (file) instead of “*dossier*” (paper record) in the letter explaining the reason for rejecting Eranum’s proposal for non-compliance with MT6 is a minor, inconsequential mistake that does not indicate that TC misinterpreted MT6 or mistakenly rejected Eranum’s proposal based on deficiencies in its proposal regarding its ability to keep digital records.

[30] Considering the totality of the evidence and the terms of the RFP, the use of the word “*fichiers*” (files) by TC in the regret letter and in response to the objection clearly meant “*dossiers*” (paper records) in the context of the exchanges between the parties. In particular, it is clear that, when it used the term “*fichiers*” (files) throughout its correspondence and exchanges with Eranum, TC referred to Eranum’s failure to demonstrate its ability to keep paper records for 60 days, and did not call into question Eranum’s ability to digitize and keep digital files, as an explanation for the rejection of its proposal. In fact, even Eranum’s objection indicated that it understood that TC was referring to the paper records—the source documents to be digitized—to explain the basis for rejecting its proposal:

... we have a great deal of difficulty understanding how the government has reached the conclusion that we do not have the capacity to keep *documents* for 60 days when the second paragraph of our proposal states that we have a storage capacity of 16,750 boxes.

[Translation, emphasis added]

[31] In any event, it should be noted that the evidence indicates that at the meeting on December 2, 2022, TC representatives ultimately clarified that MT6 refers to physical records, i.e., paper documents to be digitized that were required to be kept by the winning bidder for 60 days, and that Eranum’s proposal with respect to this criterion was evaluated on this basis. This interpretation appears to be consistent with Eranum’s original understanding of MT6; as noted above, Eranum alleges that its bid demonstrates its ability to keep the physical records as required by MT6. Therefore, there is no possible confusion as to the (correct) interpretation by TC of MT6 and the basis for the rejection of its proposal. Contrary to Eranum’s allegation, there were no changes in the reason given by TC to declare its proposal non-responsive. It was never about Eranum’s ability to keep digital files.²³

²² See Exhibit PR-2022-055-01.C at 109–110, which appears at para. 9 of these reasons.

²³ For this reason, Eranum’s arguments regarding its “digital storage capacity” and “unlimited disk space” [translation] are not relevant.

[32] In addition, several elements in the RFP and subsequent amendments²⁴ establish that MT6 refers to paper records to be digitized and that they are sometimes referred to as “*fichiers*” (files) in the solicitation documents in French. Since the relevant documentation sometimes uses the term “*fichiers*” (files) to refer to paper records, the use of this term by TC in these exchanges with Eranum does not really create confusion and certainly does not mean that TC has changed the meaning of MT6, which deals with the retention of paper records, to make it a requirement to keep digital files, in order to reject Eranum’s proposal.

[33] In fact, and contrary to what was suggested by Eranum, the terms “*fichiers*” (files) and “*dossiers*” (records) were used interchangeably (or at least in the way they were translated into French) in the amendments to the request for proposal, both by TC and by the bidders who asked the contracting authority questions prior to the closing date of the RFP, to refer to the paper documents to be digitized.

[34] For example, question and answer 32 of Annex A to Amendment 9, published on July 25, 2022, provides as follows:

Question 32:

In terms of destruction (in Annex “B” at the top of page 33), will 100% of the documents have to be shredded? (i.e. does 750 boxes represent the entire 5.4 million pages)?

Answer 32:

We have increased the number of *files needing digitalization* to closer to 18.7 million pages. We may need to revise this based on price. We may for instance decide that we are only indeed going to digitalize *5.4 million pages*. Regardless of the number of pages digitalized 100% will need to be destroyed by the vendor after Civil Aviation Medicine receives and preforms quality assurance on the digitalized files. We will need a 60 day window to complete this. Please provide estimates for the digitalization (with OCR) and destruction of 5.4 million and 18.7 million pages.²⁵

[Emphasis added]

[35] It is clear from TC’s response that the use of the term “*fichiers*” (files) means “pages” or “paper file” to be digitized and that the contracting authority’s concern is that paper files are not destroyed before the expiry of the 60-day period to ensure quality control of the digitizing or “digitized files”.

[36] Furthermore, the Statement of Work attached to the RFP leaves no doubt as to the meaning of this criterion and why bidders were required to demonstrate their ability to keep paper records for 60 days after they were digitized. In fact, it is clearly stated that the objective of the retention period is quality control.²⁶

[37] This conclusion is also supported by the terminology used in question and answer 12 of Annex A-1 to Amendment 2, published on June 14, 2022,²⁷ as well as question and answer 43 of

²⁴ In the relevant documentation, the term “addendum” was used by TC to designate the amendments.

²⁵ Exhibit PR-2022-055-01.A at 104.

²⁶ Exhibit PR-2022-055-01.A at 57–58.

²⁷ Exhibit PR-2022-055-01.A at 86, which appears in Annex 1 of these reasons.

Annex A to Amendment 10, published on July 27, 2022,²⁸ and question and answer 77 of Annex A to Amendment 14, published on August 26, 2022.²⁹ These exchanges indicate that, as part of the procurement process, the terms “files”, “pages” and “documents” were sometimes used by either bidders or TC to refer to paper records to be digitized.

[38] Therefore, it is clear from the context, when all the RFP documentation is consulted, that there is no possible confusion: MT6 is a requirement for paper records to be retained after they are digitized for 60 days prior to their destruction. This is how the contracting authority defined, clarified and interpreted the criterion, as well as the only way that it could be understood by bidders, even though the terms “fichiers” (files) and “dossiers” (records) were sometimes used interchangeably in the documentation provided to bidders. The Tribunal is therefore not persuaded by Eranum’s arguments that its proposal was rejected because of ambiguity in the terms used in the French version of the RFP or a mistake in TC’s interpretation of MT6.

[39] Therefore, the Tribunal is of the opinion that the second ground of complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

DECISION

[40] Pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to inquire into the complaint.

Georges Bujold

Georges Bujold
Presiding Member

²⁸ Exhibit PR-2022-055-01.A at 108, which appears in Annex 1 of these reasons.

²⁹ Exhibit PR-2022-055-01.A at 134, which appears in Annex 1 of these reasons.

ANNEX 1: EXCERPTS FROM AMENDMENTS TO THE REQUEST FOR PROPOSAL**ADDENDUM 2**

...

Question 12:

Does Transport Canada intend to issue a formal authorization to dispose, or will the Bidder assume that the file destruction is authorized by default after a 60-day period of quality assurance?

Answer 12:

Yes, once Transport Canada completes the quality control process, (within 60 days of receipt of files), formal authorization to destroy files will be issued.

...

ADDENDUM 10

...

Question 43:

Addendum 4 Answer 15 – “Transport Canada’s priority is that 313,000 files can be digitalized between the award of this contract and the end of the contract March 31, 2023” (corrected to March 31, 2024 in addendum 6 answer 23) – and referencing Annex B – Basis of Payment – 5,400,000 “This is an estimate amount only and to be used for evaluation purposes and should not be construed as a commitment or expectation on part of Canada.”. Please clarify, what is the total volume of estimated pages that are required to be completed by expected end of contract (March 31, 2024) as well as on a monthly basis.

Response 43:

We would like to aim for 165,000 files by March 31st, 2023-this amounts to 5.4 million pages. By March 31st, 2024 we will request a maximum of 313,000 files, 18.7 million pages be digitalized.

...

ADDENDUM 14

...

Question 77:

With the changes to the pricing schedule in the latest addendum 12, may you please confirm that the 165,000 files includes 25 documents per file? This would bring the estimated total of images to the 4,097,000? If this is the case, we will need to update the pricing from 1-4 to be per image, and not per file. Please confirm, as below:

Quantity: 165,000 records (4,097,000 images)

Answer 77:

Figures provided for the amount of pages per file are estimates. 32 sheets per file is closer to a correct estimate.