



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File PR-2023-002

RollanTech Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, July 14, 2023*

*Reasons issued  
Thursday, July 27, 2023*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**ROLLANTECH INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid. Each party will bear its own costs.

Bree Jamieson-Holloway

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Bree Jamieson-Holloway

Presiding Member

The statement of reasons will be issued at a later date.

Tribunal Panel:	Bree Jamieson-Holloway, Presiding Member
Tribunal Secretariat Staff:	Isaac Turner, Counsel Badih Abboud, Registrar Officer Morgan Oda, Senior Registrar Officer
Complainant:	RollanTech Inc.
Government Institution:	Department of Public Works and Government Services
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## STATEMENT OF REASONS

### SUMMARY OF THE COMPLAINT

[1] RollanTech Inc. (RollanTech) filed a complaint with the Canadian International Trade Tribunal regarding a request for proposal (RFP) (solicitation WS3851704599) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of Fisheries and Oceans, for the supply of a new boiler coil assembly (coil) for the Clayton boiler on board the *Martha L. Black*, a vessel operated by the Canadian Coast Guard.

[2] RollanTech alleges that PWGSC wrongly awarded the contract to a bidder that did not comply with a mandatory requirement of the solicitation. Specifically, RollanTech argues that the successful bidder did not comply with mandatory technical criterion C03 in Annex “D” of the RFP because the coil it offered to supply is not certified. Mandatory technical criterion C03 provides as follows: “The coil supplied must be approved by the ABS classification society for a marine boiler: (ASME SE 178 or SA192) or equivalent. A certificate must be provided for this reason.”<sup>1</sup>

[3] RollanTech submits that the terms of the solicitation provide that any bid that does not meet the mandatory technical criteria will be declared non-responsive and that, since the successful bid did not meet the mandatory technical criteria, it should have been disqualified. As a remedy, RollanTech seeks the termination of the designated contract and the issuance of a new solicitation or the re-evaluation of the bids.

[4] Following its inquiry into the complaint, and for the reasons that follow, the Tribunal finds that the complaint is not valid.

### BACKGROUND

#### Procurement process

[5] On February 28, 2023, PWGSC published the RFP; the closing date was March 17, 2023.<sup>2</sup>

[6] RollanTech submitted a bid on or before the closing date.<sup>3</sup> PWGSC received one other bid from Ador Tech Inc.<sup>4</sup> Both bids were deemed compliant.

[7] On March 29, 2023, PWGSC sent a regret letter to RollanTech indicating that it would not be awarded the contract because it did not offer the lowest evaluated price.<sup>5</sup>

[8] On March 30, 2023, RollanTech sent an email to PWGSC requesting confirmation that the successful bidder could comply with certain mandatory requirements set out in the solicitation

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<sup>1</sup> Exhibit PR-2023-002-01.D at 16.

<sup>2</sup> *Ibid.* at 1–16.

<sup>3</sup> Exhibit PR-2023-002-01.C at 2–19; Exhibit PR-2023-002-01.B (protected) at 1–19.

<sup>4</sup> Exhibit PR-2023-002-13.B (protected) at 82–100.

<sup>5</sup> Exhibit PR-2023-002-01.C at 20.

documents.<sup>6</sup> RollanTech requested confirmation that the successful bidder could deliver the coil in six weeks<sup>7</sup> and that it would be delivered with ABS or class approval certification.

[9] On March 31, 2023, PWGSC replied to RollanTech.<sup>8</sup> PWGSC said that the successful bidder had confirmed that it would be able to deliver the coil in six weeks. Regarding certification, PWGSC said that the technical description provides that an equivalent coil must be approved by the ABS classification society but that, because the product offered by the successful bidder is an original Clayton boiler coil, it was not required to deliver the certification.

[10] On the same day, RollanTech responded to PWGSC.<sup>9</sup> RollanTech argued, as it does in this complaint, that the word “equivalent” in mandatory technical criterion C03 refers to the ABS certification, not the coil. RollanTech argued that the criterion requires that the coil be certified. It further stated that “[t]he standard Clayton coil is not type approved and required additional costs with much longer lead time to get the certification and approval.”

[11] On April 3, 2023, PWGSC replied to RollanTech.<sup>10</sup> In this email, PWGSC referred to section 3.1 at paragraph 3 of Annex “A” of the solicitation documents, which provides as follows: “the *equivalent* coil supplied must be approved by the ABS classification society for a marine boiler: (ASME SE 178 or SA192) or equivalent. A certificate must be provided for this reason”<sup>11</sup> [emphasis added].

[12] PWGSC said that Annex “A” is the document that describes exactly the requirement and has priority over the rest of the annexes, as per clause 6.10 (Priority of Documents) in Part 6 – Resulting Contract Clauses of the RFP.<sup>12</sup>

[13] On the same day, RollanTech responded to PWGSC.<sup>13</sup> In its response, RollanTech argued that, according to the terms of the solicitation documents, the technical evaluation should be conducted according to the mandatory technical criteria. RollanTech argued that the successful bidder did not comply with the mandatory technical criteria and that it is clearly written that any bidder that does not meet the mandatory technical criteria will be declared non-responsive.<sup>14</sup>

[14] Later that same day, PWGSC replied to RollanTech.<sup>15</sup> PWGSC said that it could not provide any information regarding other bids. PWGSC indicated, however, that all received bids, including RollanTech’s bid, were compliant with mandatory technical criterion C03 and that the contract was awarded to the lowest responsive bidder, consistent with the terms of the solicitation documents.

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<sup>6</sup> Exhibit PR-2023-002-01.A at 7.

<sup>7</sup> The original terms of the RFP required that the coil be delivered within three weeks after contract award. This was changed to six weeks after contract award in amendment 2 to the RFP. Exhibit PR-2023-002-01.D at 18.

<sup>8</sup> Exhibit PR-2023-002-01.A at 6–7.

<sup>9</sup> *Ibid.* at 5–6.

<sup>10</sup> *Ibid.* at 4–5.

<sup>11</sup> Exhibit PR-2023-002-01.D at 12.

<sup>12</sup> See Exhibit PR-2023-002-01.D at 10. The Tribunal notes that this argument was not advanced by PWGSC in these proceedings.

<sup>13</sup> Exhibit PR-2023-002-01.A at 4.

<sup>14</sup> See Exhibit PR-2023-002-01.D at 5.

<sup>15</sup> Exhibit PR-2023-002-01.A at 2–3.

[15] On April 4, 2023, RollanTech responded to PWGSC.<sup>16</sup> In this email, RollanTech said that there seemed to be a misunderstanding and reiterated that, in its view, the contract was awarded to a bidder that was not compliant with certain mandatory technical criteria set out in Annex “D”. RollanTech argued that, based on the price offered by the successful bidder, the proposed lead time and the confirmation provided by PWGSC on March 31, 2023, the successful bidder proposed a coil without class approval certification.

[16] On the same day, PWGSC replied to RollanTech.<sup>17</sup> In this email, PWGSC said that it had provided all the necessary information regarding the solicitation process and that, as mentioned in the regret letter, RollanTech could consult the Bid Challenge and Recourse Mechanisms page on the Buyandsell.gc.ca website.

### **Complaint proceedings**

[17] On April 17, 2023, RollanTech filed its complaint with the Tribunal.<sup>18</sup>

[18] On April 21, 2023, the Tribunal accepted the complaint for inquiry.<sup>19</sup>

[19] On May 23, 2023, the Tribunal received the Government Institution Report (GIR).<sup>20</sup>

[20] On May 24, 2023, the Tribunal received RollanTech’s comments on the GIR.<sup>21</sup>

## **POSITIONS OF THE PARTIES**

### **RollanTech**

[21] As described above, RollanTech contends that PWGSC unfairly awarded the contract to a bidder whose bid was non-compliant. Specifically, RollanTech argues that the successful bid did not comply with mandatory technical criterion C03 because the coil the bidder offered to supply is not certified by the ABS classification society.

[22] According to RollanTech, the word “equivalent” in mandatory technical criterion C03 refers to the ABS certification, not the coil. RollanTech submits that the criterion requires that the coil be certified. RollanTech further submits that the terms of the solicitation documents provide that any bid that does not meet the mandatory technical criteria will be declared non-responsive and that the successful bid did not meet the mandatory technical criteria.

[23] In its comments on the GIR, RollanTech essentially restates the position taken in its complaint, which is that the word “equivalent” in mandatory technical criterion C03 refers to the ABS certification, not the coil, and that the successful bid did not meet this mandatory technical criterion because the product the bidder proposed did not come with a classification certificate.

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<sup>16</sup> *Ibid.* at 3.

<sup>17</sup> *Ibid.* at 1–2.

<sup>18</sup> Exhibit PR-2023-002-01 at 1–10.

<sup>19</sup> Exhibit PR-2023-002-08.

<sup>20</sup> Exhibit PR-2023-002-13A; Exhibit PR-2023-002-13B (protected).

<sup>21</sup> Exhibit PR-2023-002-14. Subsequently, on June 1, 2023, RollanTech submitted identical comments in a PDF document.

## PWGSC

[24] PWGSC submits that RollanTech’s interpretation of mandatory criterion C03 is inconsistent with the requirement described throughout the rest of the RFP, including section 5.1.2 (Additional Certifications), clause 6.2 (Statement of Requirement) and Annex “A”.<sup>22</sup> In this respect, PWGSC submits that the Tribunal has previously held that the terms of an RFP should not be read in isolation but in harmony with the rest of the RFP.

[25] PWGSC acknowledges that the word “equivalent” ought to have appeared before the word “coil” in mandatory technical criterion C03 as it appears in the French version of the RFP<sup>23</sup> and recognizes that this omission may have caused RollanTech “some confusion”.<sup>24</sup> However, PWGSC submits that, when read as a whole, the RFP was clear that PWGSC required a certification only with respect to equivalent products.

[26] PWGSC submits that section 5.1.2 unambiguously states that only equivalent coils must be certified. This provision reads as follows:<sup>25</sup>

### 5.1.2 Additional Certifications

If the proposed product is **equivalent** to the item specified in the bid solicitation, it must be certified.

- An attestation issued by the ABS Classification Society is required that the proposed equivalent Coil is approved and compatible with an ASME SE 178 or SA192 marine boiler.

[Bold in original]

[27] PWGSC similarly submits that Annex “A” states that the contractor must supply and deliver one Clayton boiler coil “Part #CLUH32800 or equivalent”, and section 3.1 of Annex “A” goes on to state as follows: “the equivalent coil supplied must be approved by the ABS classification society for a marine boiler: (ASME SE 178 or SA192) or equivalent. A certificate must be provided for this reason.”<sup>26</sup>

[28] PWGSC submits that, when mandatory technical criterion C03 is read in conjunction with the above provisions, it is clear that a certification is only required for equivalent coils.

[29] PWGSC further submits that the RFP clearly states that bids will be assessed in accordance with the entire requirement.<sup>27</sup> In this regard, PWGSC submits that the appropriate standard of review

<sup>22</sup> See Exhibit PR-2023-002-09.A at 6–7, 12. PWGSC also notes in the GIR that amendment 3 “reiterated Canada’s requirement for an original Clayton coil or an equivalent coil and refers to the Statement of Requirement.” Exhibit PR-2023-002-13.B at 4 (para. 11). See Exhibit PR-2023-002-09.A at 19.

<sup>23</sup> The French version of mandatory technical criterion C03 reads as follows: “Le serpentin *équivalent* fourni doit être approuvé par la société de classification ABS pour une chaudière marine : (ASME SE 178 ou SA192) ou équivalent. Une attestation doit être fournie à cet effet” [emphasis added]. Exhibit PR-2023-002-09.A at 36.

<sup>24</sup> Exhibit PR-2023-002-13A at 15 (para. 74).

<sup>25</sup> See Exhibit PR-2023-002-09.A at 6.

<sup>26</sup> See Exhibit PR-2023-002-09.A at 12.

<sup>27</sup> Paragraph 4.1(a) of the RFP reads as follows: “Bids will be assessed in accordance with the entire requirement of the bid solicitation including technical, and financial evaluation criteria.” Exhibit PR-2023-002-09.A at 5.



is reasonableness and that the evaluators were reasonable in evaluating both bids as technically compliant because both bidders proposed Clayton boiler coils which, for reasons mentioned above, did not require certification under the RFP.

[30] PWGSC also submits that the onus is on the bidder to seek clarification if a requirement is unclear and that, if the omission of the word “equivalent” caused an actual discrepancy or interpretation issue for RollanTech, this should have been raised with PWGSC prior to bidding. PWGSC argues that RollanTech only raised the issue concerning the certification after the evaluation had taken place on March 30, 2023, and after receiving the regret letter from PWGSC dated March 29, 2023. PWGSC argues that the Tribunal’s jurisprudence is clear that potential suppliers are responsible for seeking clarification about the requirements of a bid solicitation if needed and that, if they fail to do so, they bear the risk. PWGSC submits that, at the time of the closing date, no question had been received regarding the omission of the word “equivalent” in the RFP. PWGSC argues that it can be inferred from the lack of questions or the lack of a request for clarification that the RFP requirements were “essentially clear”.<sup>28</sup> PWGSC argues that this is not a situation in which there was a latent ambiguity (i.e., an ambiguity that could have only been revealed after the evaluation).

## ANALYSIS

[31] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act*<sup>29</sup> (the CITT Act) requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

[32] Section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>30</sup> specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which, in this instance, is the Canadian Free Trade Agreement (CFTA).<sup>31</sup>

[33] Articles 515(4) and (5) of the CFTA provide that, to be considered for an award, tenders must comply with the essential requirements set out in the tender notices and tender documentation, and that procuring entities must award contracts in accordance with the evaluation criteria specified in the tender notices and tender documentation.<sup>32</sup>

[34] In assessing whether bids have been evaluated in accordance with the essential requirements set out in the tender documentation, the Tribunal applies the standard of reasonableness. It will generally accord a large measure of deference to evaluators in their evaluation of proposals. The Tribunal has indicated that it will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital

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<sup>28</sup> Exhibit PR-2023-002-13.A at 13.

<sup>29</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>30</sup> SOR/93-602.

<sup>31</sup> The Tribunal notes that the tender notice posted on the [canadabuys.canada.ca](https://canadabuys.canada.ca) website identifies the CFTA as the only applicable trade agreement. Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/ws3851704599-doc3877828535>>.

<sup>32</sup> Section 4.2 of the RFP also reads: “A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.” Exhibit PR-2023-002-09.A at 5.

information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have not conducted the evaluation in a procedurally fair way.<sup>33</sup>

[35] It is also well established that procuring entities must evaluate a bid's compliance with the mandatory requirements thoroughly and strictly and that bidders bear the onus to respond to and meet the criteria established in a solicitation.<sup>34</sup>

[36] Regarding the interpretation of solicitation documents, the Supreme Court of Canada confirmed in *Tercon Contractors Contractors Ltd. v. British Columbia (Transportation and Highways)* that "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and light of its purposes and commercial context".<sup>35</sup> This principle has been applied consistently by the Tribunal.<sup>36</sup>

[37] At issue here is whether the evaluators unreasonably applied mandatory technical criterion C03 and thus accepted a bid that did not comply with the essential requirements set out in the tender documentation.<sup>37</sup> To make this determination, the Tribunal must first determine the proper scope of the requirement by conducting a contextual analysis of the provision, having regard to, among other things, the overall purpose and objectives of the solicitation. In this respect, the issue is not one of interpretation *per se*, rather it is an issue of a discrepancy in the terms of the solicitation. Put another way, the issue is not about how to interpret a specific term but whether the solicitation documents as a whole are clear that certification is only required for equivalent products. Once the Tribunal makes this determination, it will then need to assess whether the evaluators correctly applied the requirement when they deemed the successful bidder's proposal to be compliant.

[38] As set out above, mandatory technical criterion C03 provides as follows: "The coil supplied must be approved by the ABS classification society for a marine boiler: (ASME SE 178 or SA192) or equivalent. A certificate must be provided for this reason."<sup>38</sup>

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<sup>33</sup> See, e.g., *Krav Maga Ottawa* (13 May 2022), PR-2022-010 (CITT) [*Krav Maga Ottawa*] at paras. 23–24, citing *Beonbrand Inc.* (26 January 2022), PR-2021-063 (CITT) at para. 22; *Excel Human Resources Inc. (operating as excellITR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10; *ACMG Management Inc.* (5 June 2002), PR-2001-056 (CITT) at 13.

<sup>34</sup> See *Krav Maga Ottawa* at para. 25, citing *Rohde & Schwarz Canada Inc.* (6 December 2021), PR-2021-053 (CITT) at para. 21; *Falcon Environmental Inc. v. Department of Public Works and Government Services* (11 January 2021), PR-2020-034 (CITT) at paras. 63–64; *Falcon Environmental Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 and PR-2020-022 (CITT) at para. 55.

<sup>35</sup> *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII) at para. 64.

<sup>36</sup> See, e.g., *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (20 May 2016), PR-2015-051 and PR-2015-067 (CITT) at para. 137, as cited by PWGSC. See, more recently, *Gregory Kerr Limited v. Department of Public Works and Government Services* (2 May 2022), PR-2021-058 (CITT) at para. 95; *CTS Defence Inc. v. Department of Public Works and Government Services* (11 August 2021), PR-2020-012 (CITT) at para. 61; *Kileel Developments Ltd. v. Department of Public Works and Government Services* (4 April 2019), PR-2018-042 (CITT) at para. 60, *aff'd Kileel Developments Ltd. v. Canada (Attorney General)*, 2020 FCA 163.

<sup>37</sup> As indicated above, the Tribunal has expressly said that it will substitute its judgment for evaluators when they have wrongly interpreted the scope of a mandatory requirement.

<sup>38</sup> Exhibit PR-2023-002-01.D at 16.

[39] Having considered the parties' submissions and the terms of the RFP, the Tribunal finds that, when mandatory technical criterion C03 is read in the context of the solicitation documents as a whole, it is clear that certification is only required for equivalent coils. In this regard, the Tribunal takes particular note of section 5.1.2 (Additional Certifications)<sup>39</sup> and section 3.1 of Annex "A",<sup>40</sup> which explicitly refer to the certification of equivalent coils.<sup>41</sup>

[40] As a bidder, it was RollanTech's responsibility to carefully read through the solicitation documents to ensure that it responded to and met the relevant criteria established in the solicitation. In the Tribunal's view, in doing so, it should have been clear that certification was only required for equivalent coils. However, even if that had not been the case, the Tribunal finds that the omission of the word "equivalent" in mandatory criterion C03 and the corresponding discrepancy in the terms of the RFP should have been readily apparent when the RFP was read as a whole. To the extent that RollanTech found mandatory technical criterion C03 unclear or ambiguous, this was a patent ambiguity (i.e., an ambiguity that is apparent on the face of the tender documentation), and RollanTech should have sought clarification from PWGSC no later than seven calendar days before the bid closing date, as provided for in the RFP.<sup>42</sup>

[41] Accordingly, the Tribunal finds that the evaluators correctly applied mandatory technical criterion C03 when they determined that certification was not required for Clayton boiler coils and deemed the successful bidder's proposal compliant. It is not in dispute that the successful bidder offered to supply a Clayton boiler coil.

[42] For the foregoing reasons, the Tribunal finds that RollanTech's complaint fails to establish that the procurement was not conducted in accordance with the requirements of the CFTA. As a result, the Tribunal finds that the complaint is not valid.

## **COSTS**

[43] Neither RollanTech nor PWGSC requested costs; therefore, none are granted. Each party shall bear its own costs.

## **DETERMINATION**

[44] Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

Bree Jamieson-Holloway

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Bree Jamieson-Holloway

Presiding Member

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<sup>39</sup> See para. 26 of these reasons. Exhibit PR-2023-002-09.A at 6.

<sup>40</sup> See para. 27 of these reasons. Exhibit PR-2023-002-09.A at 12.

<sup>41</sup> The Tribunal also notes that, as identified by PWGSC, the French version of mandatory technical criterion C03 includes the word "equivalent" before the word "coil" (when translated to English). In the Tribunal's view, this confirms that the omission of the word "equivalent" before the word "coil" in the English version of mandatory technical criterion C03 was a mistake and that the true intent was for certification to only be required for equivalent coils.

<sup>42</sup> Exhibit PR-2023-002-09.A at 3.