



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-022

PSPC Canada Systems Inc.

*Decision made
Monday, July 24, 2023*

*Decision issued
Tuesday, July 25, 2023*

*Reasons issued
Wednesday, August 2, 2023*

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

BY

PSPC CANADA SYSTEMS INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Bree Jamieson-Holloway

Bree Jamieson-Holloway

Presiding Member

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

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 Standing Offer (RFSO) (solicitation E60QD-233104/A) issued by the Department of Public Works and Government Services (PWGSC) for the establishment of up to four national standing offers for the supply of P25 subscriber units. The RFSO relates to four classes of products: single band radio units (Stream 1), dual band radio units (Stream 2), multi band radio units (Stream 3) and digital vehicular repeater systems (Stream 4).³

[3] The complainant, PSPC Canada Systems Inc. (Canada Systems), alleges that its bid was unfairly disqualified for certain errors in the specification sheet of its bid and for supplementary information provided in its bid which it alleges was misinterpreted by the evaluators. Canada Systems submits that PWGSC ought to have sought clarification on the foregoing matters before disqualifying its offer.⁴

[4] For the reasons below, the Tribunal is of the opinion that the information provided does not show a reasonable indication that obligations under the relevant trade agreements have been breached. Therefore, the Tribunal has decided not to conduct an inquiry into this complaint.

BACKGROUND

[5] On November 9, 2022, PWGSC published the RFSO in question.⁵ The closing date was extended several times, with the final date being April 4, 2023.⁶ Canada Systems submitted a bid on or before the closing date.⁷

[6] On June 30, 2023, Canada Systems was informed by way of regret letter that the RFSO was awarded to another bidder and that elements of Canada Systems' bid were determined to be non-compliant with mandatory requirements of the solicitation, resulting in Canada Systems' bid being disqualified from consideration.⁸

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2023-022-01.A at 1–7.

⁴ Exhibit PR-2023-022-01.D at 6–7.

⁵ Exhibit PR-2023-022-01.A at 2.

⁶ *Ibid.* at 73.

⁷ *Ibid.* at 88.

⁸ *Ibid.* at 2041–2042.

[7] On July 6, 2023, Canada Systems approached PWGSC for a debrief that would subsequently be scheduled for July 11, 2023, to discuss why elements of its bid were deemed non-compliant under the relevant mandatory criteria listed on the regret letter.⁹ Canada Systems has characterized this debrief as an objection to PWGSC's decision with respect to the RFSO.¹⁰

ANALYSIS

[8] According 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;¹¹
- (ii) the complainant is a potential supplier;¹²
- (iii) the complaint is in respect of a designated contract;¹³ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.¹⁴

[9] The Tribunal further observes that subsection 6(2) of the Regulations provides that a potential supplier who has made a timely objection to the procuring government institution and is denied relief may file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge of the denial of relief.

[10] In this case, the Tribunal notes that there is some ambiguity surrounding whether Canada Systems has been denied relief in connection to its objection. While PWGSC confirmed a willingness to discuss the elements of Canada Systems' bid which were found to be non-compliant with the RFSO,¹⁵ it is not clear from the information provided that their communication during the debrief can be labelled a denial of relief. This raises the possibility that Canada Systems' objections are still pending.

[11] However, even if the complaint had been submitted within the timelines established by the Regulations, the Tribunal would not have conducted an inquiry, as the complaint does not meet the fourth condition for inquiry listed above. Specifically, the Tribunal finds that the information provided does not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements pursuant to paragraph 7(1)(c) of the Regulations.

[12] In this complaint, the Tribunal has considered the relevant provisions of the Canadian Free Trade Agreement (CFTA), which sets out rules for government institutions and suppliers concerning the evaluation and award of contracts. These include rules which require procuring entities to set out

⁹ *Ibid.* at 2043–2044.

¹⁰ Exhibit PR-2023-022-01.D at 3.

¹¹ Subsections 6(1) and 6(2) of the Regulations.

¹² Paragraph 7(1)(a) of the Regulations.

¹³ Paragraph 7(1)(b) of the Regulations.

¹⁴ Paragraph 7(1)(c) of the Regulations.

¹⁵ Exhibit PR-2023-022-01.A at 2043–2044.

the evaluation criteria for tenders in a manner that permits suppliers to prepare and submit responsive bids.¹⁶ The Tribunal also considered rules that require bids to comply, at the time of opening, with the essential requirements set out in tender documentation and government institutions to award contracts solely on the evaluation criteria specified in that material.¹⁷

[13] Consistent with these provisions, at the evaluation stage, the Tribunal has held that procuring entities must evaluate a bid's conformance with mandatory requirements thoroughly and strictly.¹⁸ Evaluators are not allowed to apply requirements that are not plainly provided for, or do not arise by necessary implication from, a proper contextual reading of the solicitation documentation.¹⁹

[14] Similarly, it is well established within Tribunal case law that bidders bear the responsibility of demonstrating compliance with mandatory requirements,²⁰ and they are expected to exercise due diligence in the preparation of their bids.²¹ It has also been established that procuring entities do not have an obligation to seek clarifications or to verify bids once they have been submitted.²²

[15] In its complaint, Canada Systems has noted that the reasons for its disqualification from consideration for the RFSO relate to what it describes as errors within its bid and confusion arising from supplementary information it provided to PWGSC.²³ In the Tribunal's view, this falls short of providing a reasonable indication that PWGSC failed to evaluate Canada Systems' bid consistent with the requirements of the RFSO. On the contrary, this tends to show an awareness on the complainant's part that its bid did not clearly demonstrate compliance with the relevant RFSO criteria. The Tribunal notes that, in this case, the requirements for technical bids to be deemed responsive were made clear by PWGSC on the face of the RFSO;²⁴ thus, and consistent with the principles set out above, the Tribunal finds that the onus was on Canada Systems to ensure that its bid met this standard. Indeed, the Tribunal notes that, in the usual course, its approach has been to dismiss claims where the complainant acknowledges a deficiency in what it has proposed,²⁵ although the Tribunal makes no finding with respect to whether Canada Systems' statements might constitute an admission of a deficiency in this case.

[16] Finally, concerning Canada Systems' argument that PWGSC ought to have sought clarification on the erroneous and confusing elements of its bid, in the Tribunal's view, there is nothing in the information provided to suggest that it was incumbent on PWGSC to do so. Generally,

¹⁶ Article 509(7)(a) of the CFTA.

¹⁷ Articles 515(4) and 515(5) of the CFTA.

¹⁸ *Falcon Environmental Inc. v. Department of Public Works and Government Services* (11 January 2021), PR-2020-034 (CITT) at para. 63; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

¹⁹ *Accipiter Radar Technologies Inc. v. Department of Fisheries and Oceans* (17 February 2011), PR-2010-078 (CITT) at para. 50; *Unincorporated joint venture between BEVA Global management Inc. et al.* (21 June 2022), PR-2022-014 (CITT) [BEVA] at para. 33.

²⁰ BEVA at para. 42; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 54.

²¹ *C3 Polymeric Ltd.* (14 February 2013), PR-2012-020 (CITT) at para. 53.

²² *Arctus Inc. v. Department of Public Works and Government Services* (7 October 2015), PR-2015-011 (CITT) at para. 31; BEVA at para. 48.

²³ Exhibit PR-2023-022-01.D at 6–7.

²⁴ Exhibit PR-2023-022-01.A at 11–13.

²⁵ *ROI Resources Inc./Evans Consoles* (18 February 2011), PR-2010-085 (CITT) at para. 17; *ABTec Solutions Ltd.* (24 February 2021), PR-2020-086 (CITT) at paras. 17, 24.

a procuring entity will not have an obligation to seek clarification on submitted bids, and PWGSC made it clear within the RFSO document that it would be applying this principle. In addition to clearly setting out its mandatory requirements, the RFSO also established, through the incorporation of the 2006 (2022-03-29) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements by reference, that, in conducting its evaluation of the bids, PWGSC did not consider that it would be under an obligation to seek clarification or verification from bidders regarding any or all information provided by them with respect to the RFSO.²⁶

[17] Considering all the above, the Tribunal finds that the evidence fails to disclose a reasonable indication that PWGSC's evaluation of Canada Systems' bid was in breach of its obligations under the CFTA.

DECISION

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

Bree Jamieson-Holloway

Bree Jamieson-Holloway

Presiding Member

²⁶ Exhibit PR-2023-022-01.A at 9.