



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-030

Kyndryl Canada Limited; ISM
Information Systems Management
Corporation, in Joint Venture

*Decision made
Tuesday, August 29, 2023*

*Decision issued
Wednesday, August 30, 2023*

*Reasons issued
Tuesday, September 12, 2023*

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

BY

KYNDRYL CANADA LIMITED; ISM INFORMATION SYSTEMS MANAGEMENT CORPORATION, IN JOINT VENTURE

AGAINST

THE OFFICE OF THE CHIEF ELECTORAL OFFICER

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 procurement (solicitation ECGZ-RFP-2020-0716)³ conducted by the Office of the Chief Electoral Officer (EC) under the framework of the Task-Based Informatics Professional Services supply arrangement (TBIPS SA) (EN578-170432).⁴ The solicitation was for the provision of several services categorized under four streams covered within the TBIPS SA: Business Services, Project Management Services, Application Services and Information Management/Information Technology Services. EC intended to award up to two or three contracts per stream, with each contract applied to only one stream.

[3] The complainant, Kyndryl Canada Limited and ISM Information Systems Management Corporation in joint venture (Kyndryl/ISM), alleges that its bid was erroneously disqualified on the basis of undisclosed evaluation criteria. Specifically, it submits that, on its reading of the bid documentation, certain TBIPS SA holders (including Kyndryl/ISM) ought to have been eligible to submit a bid for the solicitation at issue, even where those holders were not prequalified in all categories within the streams that were the subject of the solicitation. It argues that EC's reliance on a contrasting interpretation of the solicitation documents, in which bidders were required to be prequalified in all categories within the stream, amounted to an evaluation based on undisclosed criteria.⁵

[4] For the reasons below, the Tribunal is of the opinion that the information provided by Kyndryl/ISM does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements. Therefore, the Tribunal has decided not to conduct an inquiry into this complaint.

BACKGROUND

[5] On October 31, 2022, EC published its request for proposal (RFP) under the framework of the TBIPS SA. The closing date was December 14, 2022.⁶ Kyndryl/ISM submitted a bid on the

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2023-030-01.B at 19-918.

⁴ *Ibid.* at 946-1080.

⁵ *Ibid.* at 1081-1084.

⁶ *Ibid.* at 12.

closing date for consideration under the Information Management/Information Technology Services stream.⁷

[6] On July 18, 2023, EC advised Kyndryl/ISM that its bid was non-responsive and that a contract had been issued to Veritaaq Technology House Inc. for the price of \$12,824,631.50.⁸ Specifically, EC noted that, at the time that its RFP was published, Kyndryl/ISM was not prequalified under the Database Analyst category required by the Information Management/Information Technology Services stream of the RFP, therefore disqualifying Kyndryl/ISM's bid from consideration.⁹

[7] On July 20 and 24, 2023, Kyndryl/ISM objected to the disqualification. Kyndryl/ISM was denied relief on August 10, 2023,¹⁰ and filed its complaint with the Tribunal on August 23, 2023.¹¹

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 prescribed time limits;¹²
- (ii) the complainant is a potential supplier;¹³
- (iii) the complaint is in respect of a designated contract;¹⁴ and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.¹⁵

[9] In this case, the Tribunal finds that the fourth condition has not been met.

[10] In reaching its decision, the Tribunal has considered, among other trade agreements, the relevant provisions of the Canadian Free Trade Agreement (CFTA), which sets out rules for government institutions and suppliers concerning the evaluation of contracts and conditions for participation.¹⁶ This includes Article 509(7)(a) which requires procuring entities to set out the evaluation criteria for tenders in a manner that permits suppliers to prepare and submit responsive bids,¹⁷ Article 515(4) which requires tenders be from a supplier that satisfies the conditions for

⁷ *Ibid.* at 942.

⁸ *Ibid.* at 1086–1087.

⁹ *Ibid.* at 1105–1110.

¹⁰ *Ibid.* at 1104–1112.

¹¹ *Ibid.* at 1.

¹² Subsections 6(1) and 6(2) of the Regulations.

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

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

¹⁵ Paragraph 7(1)(c) of the Regulations.

¹⁶ The following trade agreements, which set out similar disciplines to the CFTA discussed within this decision, also apply: World Trade Organization Agreement on Government Procurement, Canada-Panama Free Trade Agreement, Canada-Korea Free Trade Agreement, Canada-Honduras Free Trade Agreement, Canada-Chile Free Trade Agreement, Canada-Colombia Free Trade Agreement, and Canada-Peru Free Trade Agreement.

¹⁷ Article 509(7)(a) of the CFTA.

participation,¹⁸ and Article 507(3)(b) which requires procuring entities to evaluate whether a supplier satisfies the conditions for participation on the basis of the conditions specified in the procuring entity's tender documentation.¹⁹ Considering disciplines specifically directed at the prequalification of suppliers, the Tribunal took into account articles 508(1) and 508(4) which permit procuring entities to limit tenders to prequalified suppliers and to set certain criteria for limiting the number of prequalified suppliers that may be eligible to participate in a given tender, provided that those criteria are set out within the bid documents.²⁰

[11] Consistent with these provisions, the Tribunal has held that procuring entities are entitled to define their procurement needs, including those pertaining to the conditions of participation.²¹ The Tribunal has made clear that, where circumstances might warrant it, generally the bidder bears the onus to seek clarification before submitting an offer.²²

[12] In this case, as stated above, Kyndryl/ISM submits that, on its reading of the solicitation documents, and in contrast to the position taken by EC, all holders of a Tier 2 TBIPS SA (which included Kyndryl/ISM) should have been eligible to submit a bid for the solicitation at issue, even where those suppliers were not prequalified in all categories within the stream under consideration. Kyndryl/ISM bases its interpretation on its reading of clause 1.2.9 of the RFP, which states the following:

All TBIPS SA Holders currently holding a TBIPS SA for Tier 2 under the EN578-170432 series of [supply arrangements] are invited to bid on this requirement.²³

[13] Kyndryl/ISM argues that the foregoing provision should be read expansively to include suppliers that may not have been prequalified for all categories at the time the RFP was posted,²⁴ noting that no aspect of the RFP expressly required suppliers to certify that they were qualified under all categories of the stream at issue in order to submit a bid.²⁵ To the extent that its interpretation of clause 1.2.9 might conflict with aspects of the TBIPS SA which was incorporated into the RFP by reference,²⁶ Kyndryl/ISM submits that its interpretation should prevail based on a mixture of facts and law.²⁷

[14] Considering the evidence before it, and the legal principles which have been set out above, the Tribunal finds that there is no reasonable indication that EC's interpretation and application of

¹⁸ Article 515(4) of the CFTA.

¹⁹ Article 507(3)(b) of the CFTA.

²⁰ Articles 508(1) and 508 (4) of the CFTA.

²¹ *Autopos Marine Inc. d.b.a. AutoNav v. Department of Public Works and Government Services* (5 June 2019), PR-2018-057 (CITT) at para. 53.

²² *Unincorporated joint venture between BEVA Global Management Inc., Enterprise Information Systems, Inc., Franco-Expert Inc. and ABCE Language School Inc.* (21 June 2022), PR-2022-014 (CITT) at para. 41. See also *Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

²³ Exhibit PR-2023-030-01.B at 26.

²⁴ *Ibid.* at 1083, at clause 2.8.

²⁵ *Ibid.* at 1083, at clause 2.10.

²⁶ *Ibid.* at 26.

²⁷ See Kyndryl/ISM's submissions at Exhibit PR-2023-030-01.B at 1081, at clauses 2.5, 2.6, 2.7, 2.9, 2.11, 2.12.

clause 1.2.9 was contrary to the applicable trade agreements. To this end, in addition to clause 1.2.9, the Tribunal highlights clause 1.2.8 of the RFP and clause 1.5 of the TBIPS SA as follows:

1.2.8 The TBIPS Supply Arrangement EN578-170432/B is incorporated by reference and forms part of this bid solicitation, as though *expressly set out in it*, subject to any express terms and conditions contained in this bid solicitation. The capitalized terms not defined in this bid solicitation have the meaning given to them in the TBIPS SA.²⁸

1.5 All Invited to Bid:

For a requirement in either Tier, all Suppliers qualified *in each relevant Category, Region and Metropolitan Area* will be invited by e-mail or GETS to bid where any supplier has been provided with a request for information in respect of services that in whole or in part appear in the requirement to be solicited under this SA.²⁹

[Emphasis added]

[15] Taking the above into consideration, the terms of the RFP are, in the Tribunal's view, clear: the TBIPS SA was expressly incorporated by reference into the RFP by operation of clause 1.2.8. Further, by operation of RFP clauses 1.2.8 and 1.2.9, and TBIPS SA clause 1.5, it is clear that Tier 2 suppliers were required to be qualified in each relevant category to be eligible to submit a bid. This interpretative finding is further supported by clause 1.2.11 of the RFP which establishes that suppliers will be required to provide services for all listed categories on an as and when requested basis as part of the supply arrangement.³⁰ The Tribunal observes that this list included the Database Analyst category under which Kyndryl/ISM was not prequalified at the relevant time.

[16] While the Tribunal takes note of Kyndryl/ISM's submission that, consistent with its views on clause 1.2.9, TBIPS SA clause 1.5 does not amount to an RFP requirement that disallows prequalified suppliers from bidding on a category for which it has not been qualified at the supply arrangement level,³¹ the Tribunal, for reasons already set out above, is not persuaded by this interpretation. In the Tribunal's view, the relevant sections in the tender documentation are unambiguous concerning the criteria applied in relation to supplier eligibility, and this interpretation is supported by the context provided by the solicitation documents as a whole. It was incumbent on Kyndryl/ISM to thoroughly review the RFP and incorporated documents prior to submitting its bid when considering its eligibility for the tender. Further, if Kyndryl/ISM was uncertain about its eligibility, it ought to have sought clarification from EC in advance of the closing date.

[17] Considering all the above, the Tribunal finds that the evidence does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

²⁸ Exhibit PR-2023-030-01.B at 26.

²⁹ *Ibid.* at 954.

³⁰ *Ibid.* at 26–30.

³¹ *Ibid.* at 1083, at clause 2.12.

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