



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-008

NJB Soft, LLC

*Decision made
Tuesday, May 2, 2023*

*Decision issued
Thursday, May 4, 2023*

*Reasons issued
Tuesday, May 9, 2023*

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

BY

NJB SOFT, LLC

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.

Georges Bujold

Georges Bujold
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.

[2] This complaint concerns a request for proposal (RFP) (solicitation 1000429434) issued by the Canada Border Services Agency (CBSA) for the provision of a secure and bilingual Internet-based drinking water data management service to enable CBSA employees to manage facility information and water quality data for potable water systems in facilities where CBSA staff is employed.

BACKGROUND

[3] On December 12, 2022, the CBSA issued an advanced contract award notice (ACAN) stating its requirements and intention of awarding a contract to WaterTrax on the basis that it was the only firm capable of meeting these requirements.³ The ACAN listed the CBSA's minimum essential requirements⁴ and invited suppliers that considered themselves fully qualified to meet all these requirements to submit a statement of capabilities by December 28, 2022.⁵

[4] On December 23, 2022, the complainant NJB Soft, LLC (NJB) provided the CBSA with a statement of capabilities in response to the ACAN, indicating that it would be able to perform the work required by the contract.⁶ NJB, however, indicated that it could not comply with the following criterion⁷ because it did not have eight years of experience working with a Canadian Association for Laboratory Accreditation (CALA) certified laboratory:⁸

Establishing data transfer arrangements and configurations [**for a minimum of eight (8) years**] with public and private Canadian Association for Laboratory Accreditation (CALA) certified environmental laboratories throughout Canada. Five (5) data transfer arrangements and configurations must have been established in the last eight (8) years.

[5] On January 23, 2023, the CBSA notified NJB that, on the basis of the Statement of Capabilities that it provided, NJB did not meet the criteria of the solicitation and indicated that it intended to award a contract to WaterTrax.⁹

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2023-008-01 at 6.

⁴ *Ibid.* at 150–152.

⁵ Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01016868>>.

⁶ Exhibit PR-2023-008-01 at 153–167.

⁷ *Ibid.* at 150.

⁸ *Ibid.* at 160.

⁹ *Ibid.* at 8–9.

[6] On February 13, 2023, solicitation 1000429434 was, however, published on CanadaBuys.¹⁰ The mandatory technical criterion which NJB indicated not to be able to meet in its statement of capabilities was slightly modified by removing the requirement that bidders have a minimum of eight years of experience in establishing data transfer arrangements and configurations. NJB considered that it could now meet all the requirements of the solicitation.

[7] On March 8, 2023, NJB submitted a bid in response to the solicitation. On March 23, 2023, the CBSA asked, through the Policy on the Phased Bid Compliance Process, that NJB provide additional/modified information concerning aspects of its technical bid.¹¹ NJB provided a modified technical bid on March 27, 2023.¹²

[8] On April 24, 2023, the CBSA informed NJB that its bid was found to be non-compliant in that the bid did not provide details about five data transfer arrangements and configurations established in the last eight years and, accordingly, did not comply with mandatory technical criterion 3.¹³ On the same day, NJB wrote to the CBSA and indicated that it did not know why its bid was found to be non-compliant, that its solution was less expensive than that of the successful bidder, and that it was available to help should the successful bidder not be able to complete the work.¹⁴

[9] On April 28, 2023, NJB filed this complaint with the Tribunal.

[10] As its first ground of complaint, NJB alleges that its bid was subjectively disqualified and claims that it does not understand why. In its view, its bid clearly demonstrated that it met mandatory technical criterion 3. As its second ground of complaint, NJB raises concerns about the fact that the evaluation procedures did not provide for a demonstration of the software requested in the solicitation.¹⁵

ANALYSIS

[11] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry into a complaint if all the following conditions are met:

- i) the complaint has been filed within the prescribed time limits;¹⁶
- ii) the complainant is a potential supplier;¹⁷

¹⁰ Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-23-01025818>>.

¹¹ Exhibit PR-2023-008-01 at 140.

¹² *Ibid.* at 109–138.

¹³ *Ibid.* at 141.

¹⁴ *Ibid.* at 143. Although the CBSA has not answered NJB's email of April 24, 2023, the Tribunal does not consider this complaint to be premature. Indeed, it does not consider NJB's email to constitute an objection to the contracting authority given that the complainant did not ask for a corrective measure from the CBSA. At most, NJB reaffirmed that it had included sufficient information to demonstrate that it would have been able to provide the services required and offered its services if the successful bidder would not be able to do so within the tight deadlines. In the absence of an objection to the contracting authority, the potential bidder must directly file a complaint with the Tribunal within the time limit of subsection 6(1) of the Regulations.

¹⁵ Exhibit PR-2023-008-01 at 8–9.

¹⁶ Subsection 6(1) of the Regulations.

¹⁷ Paragraph 7(1)(a) of the Regulations.

iii) the complaint is in respect of a designated contract;¹⁸ and

iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.¹⁹

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

There is no reasonable indication of a breach with respect to the first ground of complaint

[13] With respect to the alleged improper disqualification of NJB's bid,²⁰ the Tribunal finds that the information provided does not disclose a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements. Specifically, the Tribunal finds no reasonable indication that the CBSA failed to evaluate the complainant's bid based on the disclosed criteria and sees no basis on which to interfere with the CBSA's evaluation of the complainant's proposal.

[14] At issue is NJB's response to mandatory technical criterion 3, which required bidders to demonstrate the following:

The Bidder must be able to establish data transfer arrangements and configurations with public and private Canadian Association for Laboratory Accreditation (CALA) certified environmental laboratories throughout Canada. The Bidder must provide a narrative that clearly demonstrates that they have previous experience with five (5) data transfer arrangements and configurations established in the last eight (8) years.

[15] NJB's bid included the following information in this regard:

SAMS²¹ has over 25 million water quality records imported daily from over 50 labs throughout North America, including API Labs, Eurofins, APL, ALS, SGS, Pace Analytical and many more. The table below presents a few examples of such relationships:²²

Name of Lab	Years of Relationship	Data Transfer Method
API Labs	4	Email accepted by SAMS
Eurofins	6	FTP file transfer to SAMS
APL	3	Email accepted by SAMS
ALS	2	Email accepted by SAMS
SGS	4	Email accepted by SAMS
Pace Analytical	10	Email accepted by SAMS
Henderson	8	API

¹⁸ Paragraph 7(1)(b) of the Regulations.

¹⁹ Paragraph 7(1)(c) of the Regulations.

²⁰ Exhibit PR-2023-008-01 at 8–9.

²¹ Scheduling, Analyzing and Management System (SAMS) is the name of NJB's software.

²² Exhibit PR-2023-008-01 at 116. The Tribunal notes that NJB's response to mandatory technical criterion 3 also contained additional information which related to the way it communicated with the laboratories.

[16] The CBSA determined that this response did not meet the mandatory requirement and disqualified NJB's bid on that basis.

[17] The applicable trade agreements require that the government institution evaluate and award bids according to the criteria specified in the tender documents.²³

[18] The Tribunal typically accords a broad measure of deference to evaluators in their evaluation of proposals. In *Excel Human Resources*, the Tribunal reiterated that it will only interfere with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when they 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.²⁴

[19] In other words, if the Tribunal considers that the evaluators have applied themselves to the task of evaluating the submission and have applied the evaluation requirements as per the terms of the solicitation, it will not substitute its opinion for that of the evaluators.

[20] It is also well established that there is an onus on bidders to demonstrate compliance with mandatory criteria. The Tribunal has stated that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.²⁵

[21] In this case, the Tribunal finds no indication that the CBSA's evaluation of NJB's bid and its conclusion that the bid did not comply with mandatory criteria 3 were unreasonable. In fact, the Tribunal agrees that, on its face, NJB's bid did not include sufficient information to demonstrate compliance with this requirement.

[22] The solicitation requested the provision of a narrative that clearly demonstrates that the bidder had previous experience with five data transfer arrangements and configurations established in the last eight years. However, NJB's table only indicates that it has worked with seven laboratories and has between two and ten years of experience with each of these laboratories. Therefore, its bid does not specifically demonstrate that any of this work occurred "in the last eight years", nor does it offer a detailed narrative of the type of work performed. Thus, there is no detailed information about NJB's experience establishing at least five data transfer arrangements and configurations in the requisite time period. Furthermore, NJB did not identify the certified Canadian laboratories in the list of seven laboratories provided, nor did it indicate the number of data transfer agreements it had with each laboratory. It is only possible to infer, based on the information provided by NJB in its complaint form, that NJB previously worked with three CALA-certified laboratories,²⁶ but not in what context the work was carried out. This is insufficient to demonstrate compliance with the published mandatory evaluation criteria.

²³ See, for example, Article XV(4) of the World Trade Organization Agreement on Government Procurement, one of the applicable trade agreements in this matter.

²⁴ *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel Human Resources*] at para. 33.

²⁵ For example, see *The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 (CITT); *Bell Canada* (26 September 2011), PR-2011-031 (CITT); *Legacy Products Corporation v. Department of Public Works and Government Services* (2 April 2014), PR-2013-031 (CITT).

²⁶ Exhibit PR-2023-008-01 at 9.

[23] As such, the Tribunal finds that the evaluators' conclusion that NJB's bid did not provide details about the required five data transfer arrangements and configurations established in the last eight years was in accordance with the criteria specified in the tender documents and, therefore, reasonable.

[24] The Tribunal further notes that the evaluation is not rendered unreasonable because NJB considers that the evaluators' conclusion does not faithfully reflect its real experience and the actual scope of the services that it can provide. The bidders must be evaluated only based on the contents of their proposals. Again, the Tribunal's jurisprudence emphasizes that the bidders bear the burden of demonstrating how they meet the stated evaluation criteria in their proposals. On the Tribunal's review, it was possible and, indeed, defensible, for the CBSA to declare NJB's bid non-responsive given the insufficiently detailed information that was provided.²⁷

The second ground of complaint is time-barred

[25] As for the allegation that the procurement process was unfair because bidders were not asked to perform a demonstration of their software solution,²⁸ the Tribunal notes that, to the extent that NJB considered that the absence of such a requirement amounted to a flaw in the procurement process, it would have been aware of the basis of its complaint on this issue at the latest on the closing date of the solicitation. By March 9, 2023, NJB knew or ought to have known that there would be no possibility to perform such a demonstration as part of the evaluation of the bidders' proposals.

[26] The Tribunal and the Federal Court of Appeal have consistently held that bidders are expected to keep a constant vigil and react as soon as they become aware, or reasonably should have become aware, of a flaw in the process. In other words, complaints grounded on the terms of a solicitation (or the absence of alleged necessary terms or conditions) should be made when the alleged problem with the terms of the solicitation became or reasonably should have become apparent. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected.²⁹

[27] Specifically, section 6 of the Regulations establishes strict time limits for filing a complaint. A potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than ten working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier. Where a potential supplier first raises an objection with the government institution and is unsuccessful, the supplier may then file a complaint with the Tribunal within ten working days of receiving denial of relief.

²⁷ Moreover, the Tribunal notes that, to the extent that NJB is arguing that mandatory technical criterion 3 is unfair, its complaint to the Tribunal would be time-barred for the same reasons provided below.

²⁸ Exhibit PR-2023-008-01 at 8–9.

²⁹ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.* 2002 FCA 284 (Can LII) at para. 20; See also, for example, *Kanter Marine Inc. v. Department of Public Works and Government Services* (7 March 2012), PR-2011-054 (CITT); *Gestion Exen inc. v. Department of Public Works and Government Services* (2 March 2022), PR-2021-078 (CITT); and *12363623 Canada Inc. v. Department of Employment and Social Development* (5 August 2022), PR-2022-025 and PR-2022-026 (CITT).

[28] Thus, if NJB was of the view that the solicitation did not provide for adequate or fair evaluation procedures or was lacking an important step, it was required to raise an objection with the CBSA or file a complaint with the Tribunal within ten working days of becoming aware of the terms of the solicitation, by March 23, 2023, that is, ten working days after the closing date of solicitation, which it failed to do.³⁰

[29] In any event, the Tribunal further notes that a government institution is entitled to establish the evaluation and selection criteria it deems appropriate, as long as the chosen criteria are reasonable, do not favour or discriminate particular suppliers, and do not otherwise violate the requirements of the trade agreements.³¹ The complaint did not contain any cogent information indicating that the fact that the solicitation did not allow bidders to demonstrate their proposed solution during the evaluation phase is inconsistent with this obligation.

DECISION

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

Georges Bujold

Georges Bujold
Presiding Member

³⁰ Moreover, the Tribunal notes that on this same basis, to the extent that NJB is arguing that mandatory technical criterion 3 is unfair, NJB was required to raise an objection with the CBSA or file a complaint with the Tribunal by March 23, 2023.

³¹ See, for example, *Davtair Industries Inc. v. Department of Public Works and Government Services* (22 February 2019), PR-2019-061 (CITT) at para. 29; *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT); *MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. v. Department of Public Works and Government Services* (5 August 2005), PR-2004-061 (CITT); and *ISE Inc. v. Department of Public Works and Government Services* (25 May 2009), PR-2008-049 (CITT).