



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-013

Military Travel Inc.

*Decision made
Tuesday, June 13, 2023*

*Decision issued
Thursday, June 15, 2023*

*Reasons issued
Monday, June 26, 2023*

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

BY

MILITARY TRAVEL INC.

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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 as it does not disclose a reasonable indication of a breach of a trade agreement.

Frédéric Seppey

Frédéric Seppey
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] The present complaint filed by Military Travel Inc. (MTI) arises from a request for proposal (RFP) (solicitation W8476-236619/B) issued by the Department of National Defence (DND) for the supply of one “engagement and attraction team trailer” (the trailer).³

[3] The complaint revolves around the allegation that DND improperly disqualified MTI’s bid on the basis that it did not meet mandatory technical criterion 3.32.1 set out in the RFP, which states that the “trailer must be provided with the manufacturer’s standard electric brake system.”⁴

[4] As the Tribunal understands the arguments that were raised in the complaint, MTI mainly argues that the RFP did not clearly indicate that “individual information” for mandatory technical criteria had to be provided.⁵ MTI further relies on the RFP’s technical evaluation matrix (TEM)⁶ to argue that the RFP “... lists the requirement of providing the information on the chart as a ‘should’ ...”.⁷ Finally, MTI argues that its general statement included in its bid⁸ as well as “the common sense understanding that brakes are required”⁹ should have been accepted for evaluation as it substantiates the criterion at issue.

[5] For the reasons that follow, the Tribunal has decided not to conduct an inquiry into the complaint, as it fails to disclose a reasonable indication of a breach of a trade agreement.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2023-013-01 at 12–65.

⁴ *Ibid.* at 52, 65.

⁵ *Ibid.* at 6.

⁶ The TEM can be found in Annex C to the RFP; Exhibit PR-2023-013-01 at 62–65.

⁷ *Ibid.* at 6. Specifically, MTI appears to refer to the following sentence provided in the TEM: “Bidder should indicate the document name/title and page number where the **Substantial Information** can be found.” [Emphasis in original]; Exhibit PR-2023-013-01 at 63.

⁸ MTI refers to what it identifies as being a “catch all statement” in its proposal, which reads as follows: “Along with meeting all the listed specifications in the solicitation package, we have also read the compliance matrix and for ease of evaluation against the mandatory criteria, we provide the following substantiations & attestations: ...”; Exhibit PR-2023-013-01.C at 2.

⁹ Exhibit PR-2023-013-01 at 7.

BACKGROUND

[6] On December 13, 2022, the RFP covered by this complaint was issued with a bid closing date of January 12, 2023.¹⁰ The bid closing date was subsequently extended through an amendment to January 24, 2023, the terms of the RFP having otherwise remained unchanged.¹¹ MTI submitted its bid on January 23, 2023.¹²

[7] On March 9, 2023, MTI received an email from DND including the following clarification request concerning mandatory technical criterion 3.32.1: “I have a question: Can you please show me in your bid where it has information on 3.32.1 in the RFP about the Brake System ...”.¹³

[8] MTI replied by email on the same day that given that the mandatory criterion in question was not listed on the TEM,¹⁴ it assumed that it was similar to the other mandatory criteria provided under the RFP and that it could be fulfilled and captured by its general statement contained in its bid.¹⁵ MTI further indicated the following: “There are over 100+ ‘must’ requirements while only 13 key items were listed on the compliance matrix; **so we only further clarified and explained those key items**”¹⁶ [emphasis added].

[9] On May 24, 2023, DND informed MTI, by way of regret letter, that a contract had been awarded to another bidder and that its proposal had been found to be non-responsive because it did not meet mandatory technical criterion 3.32.1.¹⁷ On the same day, MTI made an objection to DND by email, requesting a reconsideration of DND’s decision given that it “... provided a general substantiation statement that should have been considered for this element.”¹⁸ Having received no answer, MTI followed up with DND on May 26, 2023.¹⁹ On May 29, 2023, DND denied relief by responding that MTI “can make a complaint [to the Tribunal] if [it feels] it necessary”.²⁰

[10] On June 6 and 7, 2023, MTI submitted its complaint to the Tribunal with some supporting documents. On June 8, 2023, the Tribunal requested additional information pursuant to subsection 30.12(2) of the CITT Act, before the complaint could be considered filed.²¹ On June 9, 2023, MTI provided the requested information, and the complaint was considered filed.²²

¹⁰ Exhibit PR-2023-013-01 at 12–65.

¹¹ *Ibid.* at 69–71.

¹² Exhibit PR-2023-013-01.C at 1–9, 67-123, 128.

¹³ *Ibid.* at 132.

¹⁴ MTI’s reference to the “compliance matrix” is understood as referring to the RFP’s TEM.

¹⁵ Exhibit PR-2023-013-01.C at 131.

¹⁶ *Ibid.*

¹⁷ Exhibit PR-2023-013-01 at 75, 77.

¹⁸ *Ibid.* at 76–77.

¹⁹ *Ibid.* at 76.

²⁰ *Ibid.*

²¹ Exhibit PR-2023-013-02.

²² Exhibit PR-2023-013-01.C; Exhibit PR-2023-013-01.D (protected); Exhibit PR-2023-013-03.

ANALYSIS

[11] The Tribunal may conduct an inquiry if all prescribed conditions in respect of the complaint are met. Among such conditions, the Tribunal must determine whether the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.²³

[12] In this case, the Tribunal has taken into account the relevant provisions of the Canadian Free Trade Agreement²⁴ (CFTA) in considering MTI's complaint.²⁵ The CFTA provides that, to be considered for contract award, a bid must comply, at the time of opening, with the essential requirements set out in the tender documentation.²⁶ When considering whether bids are evaluated in keeping with this requirement, the Tribunal applies the standard of reasonableness, and it will generally accord a large measure of deference to evaluators in their evaluation of bids.²⁷

[13] Procuring entities must evaluate a bid's conformance with mandatory requirements thoroughly and strictly.²⁸ The Tribunal has been clear that bidders bear the onus of demonstrating that their proposals meet the mandatory criteria or requirements established in a solicitation. In other words, bidders bear the responsibility of "connecting the dots", and they must ensure that the supporting documentation in their bids clearly demonstrate compliance. Furthermore, the requirement for a bid to demonstrate compliance with all mandatory criteria cannot be abridged or left to inference.²⁹

[14] With these principles in mind, and having considered the evidence placed in the record, the Tribunal finds that the information provided with the complaint does not disclose a reasonable indication that the evaluation of MTI's bid was not conducted in accordance with the CFTA.

[15] The RFP in question listed the requirements that the trailer had to meet,³⁰ one of them being mandatory technical criterion 3.32.1.³¹

²³ Paragraph 7(1)(c) of the Regulations.

²⁴ Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2021/09/CFTA-Consolidated-Version-September-24-2021.pdf>> (entered into force July 1, 2017).

²⁵ The solicitation description on CanadaBuys.canada.ca, online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01017124>>, indicates that the CFTA applies to this procurement. See also Exhibit PR-2023-013-01 at 67.

²⁶ Article 515(4) of the CFTA.

²⁷ *Krav Maga Ottawa* (1 June 2022), PR-2022-010 (CITT) at para. 24; *Samson & Associates v. Department of Public Works and Government Services* (13 April 2015), PR-2014-050 (CITT) at para. 35.

²⁸ *Falcon Environmental Inc. v. Department of Public Works and Government Services* (11 January 2021), PR-2020-034 (CITT) [*Falcon Environmental*] at para. 63; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

²⁹ *Rohde & Schwarz Canada Inc.* (6 December 2021), PR-2021-053 (CITT) at para. 21; *Falcon Environmental* 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. See also *Madsen Power Systems Inc. v. Department of Public Works and Government Services* (29 April 2016), PR-2015-047 (CITT) at para. 41, specifically with respect to the principle that the requirement to demonstrate compliance cannot be left to inference.

³⁰ The requirements in question can be found in Annex A to the RFP, under a document titled Purchase Description for Trailer, Engagement and Attraction Team; Exhibit PR-2023-013-01 at 37, 39–61.

³¹ Exhibit PR-2023-013-01 at 52.

[16] Paragraph 3.1(C) of the RFP, which is particularly relevant in this case, states as follows:³²

Bidders **must** demonstrate their compliance with **the attachment 1 to Part 4 entitled Evaluation Criteria** of the bid solicitation by providing **substantial information** describing **completely and in detail** how the requirement is met or addressed. Bidders **must provide with their technical bid, a document indicating clearly where the substantial information** for each of the sections identified below can be found.

[Emphasis added]

[17] The “attachment 1 to Part 4 entitled Evaluation Criteria” refers to a document titled Technical Evaluation Matrix Trailer, Engagement and Attraction Team, or TEM as referred to above.³³

[18] Moreover, paragraph 4.1.1(A) of the RFP, which is also relevant in the matter at hand, states as follows: “Mandatory technical evaluation criteria are included in the attachment 1 to Part 4 entitled Evaluation Criteria.”³⁴

[19] As for paragraph 4.2(A) of the RFP, it states as follows: “A bid **must comply** with the requirements of the bid solicitation **and meet all mandatory technical evaluation criteria to be declared responsive**. The responsive bid with the lowest aggregate evaluated price will be recommended for award of a contract” [emphasis added].³⁵

[20] The Tribunal finds that, on a plain reading of the RFP terms highlighted above, bidders were required to submit substantial information demonstrating compliance with the technical criteria listed in the TEM at the time of bid closing, which included technical criterion 3.32.1.

[21] For reasons only known to itself, and by its own admission,³⁶ MTI provided in its technical bid a description of how it intended to meet *all* of the technical criteria listed in the TEM, *except* for technical criterion 3.32.1.³⁷ Although MTI contended, in its exchanges with DND, that mandatory technical criterion 3.32.1 was not listed in the TEM,³⁸ the Tribunal notes that MTI’s contention in this respect is incorrect. Mandatory technical criterion 3.32.1 was specifically listed in the TEM, albeit as the last one on the list and the only one that was listed on the third page of the TEM.³⁹ One can only assume that MTI either did not notice the criterion in question or forgot to substantiate it in its technical bid.

³² *Ibid.* at 19.

³³ *Ibid.* at 24 and 62-65.

³⁴ *Ibid.* at 23.

³⁵ *Ibid.*

³⁶ Exhibit PR-2023-013-01.C at 131.

³⁷ *Ibid.* at 1–4; Exhibit PR-2023-013-01.A (protected) at 52–54, 58–61.

³⁸ Exhibit PR-2023-013-01.C at 131.

³⁹ Exhibit PR-2023-013-01 at 65; Exhibit PR-2023-013-01.D (protected) at 52–54.

[22] As unfortunate as it may be, DND cannot be blamed for MTI's failure to have provided substantial information demonstrating compliance with mandatory technical criterion 3.32.1, given the very clear terms of the RFP. In the circumstances, DND had no other choice but to deem MTI's bid as non-responsive. Proceeding otherwise and allowing MTI to provide additional information after the bid closing date would have been unfair to the other bidders and amounted to impermissible bid repair.⁴⁰

[23] Based on the above, the Tribunal finds that DND's evaluation of MTI's bid under mandatory technical criteria 3.32.1. was reasonable.

DECISION

[24] Pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to conduct an inquiry into the complaint. The complaint does not disclose a reasonable indication of a breach of a trade agreement.

Frédéric Seppey

Frédéric Seppey

Presiding Member

⁴⁰ *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 (CanLII) at para. 22; *Madsen Power Systems Inc. v. Department of Public Works and Government Services* (29 April 2016), PR-2015-047 (CITT) at para. 52.