

PROMOTING FAIRNESS, OPENNESS & TRANSPARENCY IN FEDERAL PROCUREMENT

OFFICE OF THE PROCUREMENT OMBUDSMAN

REVIEW OF A COMPLAINT:
ACQUISITION OF
TRANSLATION SERVICES BY
THE ADMINISTRATIVE
TRIBUNALS SUPPORT
SERVICE OF CANADA

MARCH 2020



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Gouvernement
du Canada

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The Complaint

1. On October 10, 2019, the Office of the Procurement Ombudsman (OPO) received a written complaint from a supplier (the Complainant) regarding a contract awarded by the Administrative Tribunals Support Service of Canada (ATSSC). The contract was for the provision of French-to-English translation of legal documents. The contract, with a limitation of expenditure of \$17,100 (taxes excluded), was awarded on August 30, 2019.
2. Also on August 30, 2019, ATSSC advised the Complainant its bid was disqualified because it had included additional terms and conditions which, in accordance with the Request for Proposal (RFP), were not allowed. The Complainant claimed ATSSC should have contacted it to clarify its bid's contents. This report examines the following key issues raised by the complaint:
 - Was the Complainant's bid non-compliant?
 - Did ATSSC have an obligation to clarify the bid prior to determining compliance?
3. On October 11, 2019, OPO confirmed the complaint met the requirements of the *Procurement Ombudsman Regulations* (the Regulations) and it was considered filed.

Mandate

4. This review of complaint was conducted under the authority of paragraph 22.1(3)(b) of the *Department of Public Works and Government Services Act* and sections 7 to 14 inclusive of the Regulations.
5. The findings in this report are based on the records provided to OPO by the Complainant and ATSSC, as well as relevant publicly available information. Any relevant records or information not disclosed by either the Complainant or ATSSC could impact the findings of this report.

Background

6. On August 7, 2019, the ATSSC sent an RFP regarding French-to-English translation of legal documents on an as-and-when-requested basis to five suppliers. Bidders were required to meet four mandatory requirements and submit

two prices: a price-per-word for work between the contract award date and March 31, 2020, and a price-per-word for an option period from April 1 to June 30, 2020.

7. ATSSC received three bids, including the Complainant's, prior to the due date for the receipt of bids. The ATSSC Contracting Authority only sent two of those bids to the ATSSC Technical Authority for evaluation, as the Contracting Authority determined the Complainant's bid was non-compliant.
8. The Complainant's bid was submitted in four sections – (1) the Technical bid; (2) the Financial bid; (3) Certifications; and (4) Additional Information. The coversheet for each of the four sections of the Complainant's bid contained the following wording (disclaimer):

Terms and Conditions

Unless otherwise agreed to in writing by [the Complainant], all services provided by [the Complainant] and any purchase order issued are governed by [the Complainant's] standard terms and conditions of sale (available at [the Complainant's website]). Conflicting or additional terms on any purchase order or other customer document shall not apply unless agreed in a writing (sic) signed by both parties.

9. In the August 30, 2019 "regret letter" e-mail to the Complainant, ATSSC advised that, in accordance with the terms of the RFP, the inclusion of such wording rendered the bid non-compliant and that the bid would receive no further consideration. In response, the Complainant noted that in one part of its bid it had expressly agreed to the terms and conditions of the RFP. The Complainant asked that its bid be fully evaluated and considered for contract award. ATSSC denied the Complainant's request, at which time the Complainant contacted OPO.
10. In its complaint to OPO, the Complainant stated that contracting authorities must take certain steps before deeming a bid non-compliant. It stated that in the case where a supplier clearly failed to meet a mandatory requirement this would be acceptable, but in the present case, where a simple clarification was needed, the contracting authority is allowed to request clarification. The Complainant stated the whole matter could have and should have been resolved via an e-mail exchange.

Chronology of Events

11. The following chronology was developed by OPO based on the records provided by ATSSC and the Complainant, as well as relevant publicly available information. It outlines key events leading up to the filing of the complaint.
12. On August 7, 2019, ATSSC sent the RFP to five suppliers, with a due date for the receipt of bids of August 13, 2019. ATSSC received three bids: one from the

Complainant, one from the eventual winning bidder, as well as one from another supplier.¹

13. The ATSSC Contracting Authority sent two of the bids to the technical evaluators on August 15, 2019. The Contracting Authority did not send the Complainant's bid to the technical evaluators, having already deemed it non-compliant. The evaluators conducted their individual evaluations on August 15 and 16, 2019. On August 19, 2019, the technical evaluators provided their consensus evaluation results, along with their individual evaluation results, to the Contracting Authority.
14. On August 29, 2019, ATSSC advised the winning bidder it had submitted the winning bid in response to the RFP. A signed contract was sent to the winning bidder on August 30, 2019. The winning bidder acknowledged receipt of the signed contract on September 3, 2019.
15. Also on August 30, 2019, ATSSC advised the Complainant its bid had been disqualified because it had included additional information modifying the terms and conditions of the RFP, and that such modifications were not allowed. On September 3, 2019, the Complainant contacted ATSSC and explained that it believed its bid did respect the terms of the RFP, specifically noting where it had agreed to comply with every clause, term and condition of the RFP. The Complainant asked that its bid be fully evaluated and considered. On September 11, 2019, ATSSC denied the Complainant's request to reconsider the determination that its bid was non-compliant.
16. On September 11, 2019, the Complainant contacted OPO regarding OPO's complaint process. The Complainant gave OPO permission to contact ATSSC and to attempt to resolve the issue informally. Between September 11 and October 11, 2019, OPO contacted ATSSC regarding the complaint. However, OPO was unable to resolve the matter as ATSSC advised it would not evaluate the Complainant's bid. On October 10, 2019, the Complainant submitted its complaint to OPO. On October 11, 2019, OPO confirmed the complaint met the requirements of the Regulations and it was considered filed.

Issues and Analysis

Issue 1 - Was the Complainant's bid non-compliant?

17. The Complainant has stated, either directly to OPO or in correspondence and bid documents:
 - the cover page wording (disclaimer), which appeared on all its bids, was generic and clearly stated "[u]nless otherwise agreed to in writing by..." the Complainant.

¹ This third bidder did not agree to allow ATSSC to share any information about its bid with OPO.

- On page 4 of the Technical portion of its bid, it stated: “We hereby certify that we have read, understood and will comply with every clause, term and condition in RFP # 20190745”.
- Attachment 2 to Part 3 – Offer of Services, which all bidders had to provide, was signed by the Complainant, and stated, if the Complainant was awarded the contract, it would “...accept all terms and conditions set out in Part 6 – Resulting contract clauses, included in the bid solicitation”.
- The Complainant contacted other contracting authorities with which it had pending bids regarding this issue, and their responses were:
 “You are correct in that by submitting a signed bid, a supplier accepts Canada’s terms and conditions outlined in the RFP. This is understood as superseding any disclaimer.”

18. ATSSC’s response to OPO stated:

- It acknowledged the Complainant’s statement on page 4 of its bid and did not dispute that the Complainant agreed to comply with the clauses, terms and conditions set out in the RFP and applicable to any resultant contract.
- However, the RFP’s terms and conditions and the Complainant’s terms and conditions are not mutually exclusive and, while the Complainant did agree in writing to the RFP’s terms and conditions, it did not disqualify its own terms and conditions.
- The inclusion of the Complainant’s terms and conditions, without a clear statement in the bid that they do NOT apply, meant the Complainant’s terms and conditions were considered to be additional terms and conditions forming part of its bid.
- The wording of the Complainant’s cover pages added terms and conditions to its bid, which would form part of any resultant contract once a “your bid is accepted” contract is issued.
- It was the bidder’s responsibility to check with the ATSSC contracting officer before bid closing about the impact of adding such terms and conditions.
- What other contracting authorities said regarding this issue are of no relevance to the RFP in question.

19. Part 2 of the RFP, entitled “BIDDER INSTRUCTIONS” contained the following clause:

2.6 Terms and Conditions

By submitting a bid, the Bidder hereby certifies compliance with and acceptance of all the articles, clauses, terms and conditions contained or referenced in this Request for Proposal (RFP) and Statement of Work (SOW). **Any modifications or conditional pricing by the bidder, including deletions or additions to the articles, clauses, terms and conditions contained or referenced in this RFP and/or SOW**

document will render the bid non-responsive and the bid will receive no further consideration. [emphasis added]

20. The RFP also incorporated Standard Acquisition Clauses and Conditions (SACC) Manual 2003 (2019-03-04) Standard Instructions - Goods or Services - Competitive Requirements. The following provisions are relevant to this issue:

5.2 It is the Bidder's responsibility to:

...

(b) prepare its bid in accordance with the instructions contained in the bid solicitation;

...

(f) provide a comprehensible and sufficiently detailed bid, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the bid solicitation.

...

5.7 Unless specified otherwise in the bid solicitation, Canada will evaluate only the documentation provided with a bidder's bid. Canada will not evaluate information such as references to Web site addresses where additional information can be found, or technical manuals or brochures not submitted with the bid.

...

19 The bid solicitation documents contain all the requirements relating to the bid solicitation. Any other information or documentation provided to or obtained by a bidder from any source are not relevant. Bidders should not assume that practices used under previous contracts will continue, unless they are described in the bid solicitation. Bidders should also not assume that their existing capabilities meet the requirements of the bid solicitation simply because they have met previous requirements.

21. Part 6 of the RFP, entitled "Resulting Contract Clauses" contained the following clause:

6.11 Priority of Documents

If there is a discrepancy between the wording of any documents that appear on the list, the wording of the document that first appears on the list has priority over the wording of any document that subsequently appears on the list.

- (a) the Articles of Agreement;
- (b) the supplemental general conditions 4007 (2010-08-16), Canada to Own Intellectual Property Rights in Foreground Information;
- (c) the general conditions 2010B (2018-06-21), General Conditions – Professional services (medium complexity);
- (d) Annex A, Statement of Work;

- (e) Annex B, Pricing Tables;
- (f) the Contractor's bid dated _____ (insert date of bid)

Analysis of Issue 1

22. There are four considerations to assess before concluding whether the Complainant's bid modified the terms and conditions of the RFP and was, as a result, non-compliant. Each consideration is assessed below to determine its merit.
- i. The language of the Complainant's disclaimer neither added to nor modified the terms of the RFP, and was consistent with the RFP's terms and conditions. This would mean the Complainant's bid was compliant. To reach this conclusion, ATSSC would have had to review the Complainant's terms and conditions on the Complainant's website to determine if they were consistent with those set out in the RFP. However, this interpretation is not feasible because the Complainant's terms and conditions were not included as part of its bid, but rather were included only by reference to the Complainant's website. Section 5.7 of SACC Manual 2003 Standard Instructions, incorporated by reference into the RFP, specifically contemplates this circumstance where it states "...Canada **will not** evaluate information such as references to Web site addresses where additional information can be found" [emphasis added]. Therefore, ATSSC was prevented from accessing the Complainant's website to determine whether or not the Complainant's terms and conditions were consistent with, or modified, the RFP. Therefore, this first consideration is without merit.
 - ii. The Complainant agreed in writing to accept the terms and conditions of the RFP. The Complainant certified on page 4 of the Technical portion of its bid that: "We hereby certify that we have read, understood and will comply with every clause, term and condition in RFP # 20190745". This would mean there was no modification of the RFP and the Complainant's bid was compliant. However, the Complainant did not expressly disqualify its own terms and conditions cited in its disclaimer. The inclusion of the Complainant's terms and conditions, without a clear statement in the bid that they do not apply, meant the Complainant's terms and conditions were in addition to, and not instead of, the terms and conditions in the RFP. This would be a modification to the RFP. As stated in section 5.2 of the SACC Manual 2003 Standard Instructions, it is the bidder's responsibility to ensure that its bid is comprehensible. In this case, the Complainant did not remove its own disclaimer, and as a result, did not clearly demonstrate its agreement with the RFP's terms and conditions. Therefore, this second consideration is without merit.
 - iii. The Complainant agreed in writing to accept only the terms and conditions of the RFP, and not the Complainant's standard terms and conditions cited in

the disclaimer. The Complainant certified on Attachment 2 to Part 3 – Offer of Services, that if the Complainant was awarded the contract, it would accept all terms and conditions set out in Part 6 of the RFP – RESULTING CONTRACT CLAUSES. This would mean there was no modification of the RFP and the Complainant’s bid was compliant. However: as noted above, the Complainant did not expressly disqualify the language of its disclaimer; In addition, the Complainant expressly reaffirmed acceptance of its own disclaimer wording because its bid forms part of the RESULTING CONTRACT CLAUSES identified in Part 6 of the RFP, section 6.11; And lastly, there is a conditional aspect to the language of Attachment 2 to Part 3, i.e., “if the bidder was awarded the contract” [emphasis added]. This means the Complainant only agreed to accept the terms and conditions of the RFP if it becomes the successful bidder and is awarded the contract. However, compliance with the RFP’s terms and conditions must be tested at the time of bid closing, and not at the time of contract award. Therefore, at the time of bid closing, the Complainant had not accepted the terms and conditions of the RFP without modification. Therefore this third consideration is without merit.

- iv. The Complainant stated that other contracting authorities had advised that by submitting a signed bid, a supplier automatically accepts Canada’s terms and conditions outlined in the RFP. This is not founded on any specific rationale nor referenced in the SACC Manual 2003 Standard Instructions, but rather relies on the advice of others not involved in this specific procurement process. In accordance with paragraph 22.1(3)(b) of the *Department of Public Works and Government Services Act* and section 12(1)(a) of the Regulations, OPO’s reviews of complaints are limited to the circumstances of the specific contract at issue, i.e. the contract related to RFP # 20190745. As such, the fact that the Complainant had previously included similar disclaimers in other bids in other procurement processes is not relevant to this specific complaint. Rather, it is the actions of ATSSC in regard to this particular RFP which must be considered. In addition, section 19 of the SACC Manual 2003 Standard Instructions states, “... Bidders should not assume that practices used under previous contracts will continue, unless they are described in the bid solicitation.” Therefore this fourth consideration is without merit.

Finding – Issue 1

23. OPO finds the Complainant’s bid to have been non-compliant.
24. The responsibility is on the bidder to exercise due diligence in the preparation of its bids to ensure it demonstrates how the bidder meets the requirements of the RFP. In this case, in addition to technical and financial requirements, the RFP required bidders to meet specified administrative requirements. Clause 2.6 of the RFP spells out the consequence of not meeting that particular administrative requirement:

... Any modifications or conditional pricing by the bidder, including deletions or additions to the articles, clauses, terms and conditions contained or referenced in this RFP and/or SOW document will render the bid non-responsive and the bid will receive no further consideration.

25. The Complainant's bid included a disclaimer which modified the RFP's terms and conditions by including the Complainant's terms and conditions as part of its bid. ATSSC then rightly applied the mandatory language of the RFP to find the Complainant's bid non-compliant.

Issue 2 - Did ATSSC have an obligation to clarify the bid prior to determining compliance?

26. The Complainant stated if a bid clearly failed to meet a mandatory criterion, it was understandable for the contracting authority to declare the bid non-compliant. However "...in a case where simple clarification is needed, the contracting authority is allowed to request clarification. This whole matter could've (SHOULD'VE) been resolved in 5 minutes via an email exchange".
27. ATSSC's response to OPO stated it acted in good faith and respected its duty of fairness to bidders who followed the RFP instructions and submitted responsive bids. It also stated the revocation of terms and conditions after bid closing would be considered "bid repair".
28. Section 10.8.7 of the Treasury Board Contracting Policy (TBCP) states:

10.8.7 Bids or proposals that respond to the mandatory requirements but contain a minor aberration may be considered if, in the opinion of the contracting authority's management:
 - a) the aberration is trivial or negligible compared to the total cost or scope of the supplies or services being procured;
 - b) the presence of that aberration, its removal by negotiation, or its clarification with the bidder could not reasonably be considered prejudicial to the other bidders; and
 - c) the decision to accept such bids is fully justified on the contract file.
29. As noted above, the RFP incorporated the SACC Manual 2003 Standard Instructions, which include the following:

16.1 In conducting its evaluation of the bids, Canada **may, but will have no obligation to**, do the following: [emphasis added]
 - (a) seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;

Analysis of Issue 2

30. As noted in section 16.1 of the SACC Manual 2003 Standard Instructions, Canada may, but will have no obligation to, clarify the content of a bid. Therefore, there is no legal requirement for ATSSC to clarify ambiguous terms or language in a bidder's bid.
31. The TBCP requires a clarification to be about something "minor" or "trivial" and that its presence, or removal, could not reasonably be considered prejudicial to the other bidders.
32. The Canadian International Trade Tribunal (the quasi-judicial body which conducts inquiries into complaints by potential suppliers and considers issues such as whether bids were evaluated fairly and according to the stated terms of the procurement process) has defined the differences between bid repair and bid clarification as follows:

"Bid repair" is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the bid closing date. By contrast, a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.²

The impropriety of, and prohibition against, bid repair ensures all bidders are given a fair and equal opportunity in the bid evaluation process.

33. ATSSC was under no obligation to seek clarification regarding the Complainant's bid. It could have done so, but chose not to. OPO does not have the mandate to create new legal requirements such as an obligation to seek clarifications from bidders, but it can provide guidance to contracting authorities on when the discretion to seek clarification might be exercised. OPO believes federal organizations when deciding whether or not to seek clarification, should take the following into consideration:
 - a. Whether the bidder's response would improperly alter or modify any part of its bid, or add something to it, or delete something from it; or conversely, whether the bidder's response would merely explain a term of its bid which remains unaltered and unmodified;
 - b. Whether the need to clarify was caused by a bidder failing to provide a comprehensible and sufficiently detailed bid; and
 - c. Whether the lack of clarity could have been easily avoided by the department using different wording in its solicitation documents.

² Paragraph 28 of CITT decision "PR-2016-049 Stenotran Services Inc.": <https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/354645/index.do?q=%22PR-2016-049%22>.

Finding – Issue 2

34. The Complainant correctly asserted that ATSSC is allowed to request clarification in certain circumstances. However, there is no obligation or requirement on ATSSC to do so, and therefore the ATSSC did not have to clarify the bid prior to determining compliance.

Conclusion

35. The Procurement Ombudsman concludes neither of the issues raised by the Complainant had merit:
 - The terms of the RFP clearly advised bidders “[a]ny modifications ..., including deletions or additions to the articles, clauses, terms and conditions contained or referenced in this RFP and/or SOW document will render the bid non-responsive...”. The Complainant’s bid included a disclaimer which modified the RFP’s terms and conditions by including the Complainant’s terms and conditions as part of its bid. Therefore, to be fair to other bidders, and to maintain the integrity of the procurement process, ATSSC was required to deem the Complainant’s bid non-compliant due to the inclusion of the disclaimer.
 - The Complainant correctly asserted that ATSSC is allowed to request clarification in certain circumstances. However, there is no obligation or requirement on ATSSC to do so, and therefore, ATSSC did not have to clarify the bid prior to determining compliance.