

**OFFICE OF THE
PROCUREMENT
OMBUDSMAN**

REVIEW OF A COMPLAINT:

**ACQUISITION OF VESSEL
CHARTER SERVICES BY THE
DEPARTMENT OF FISHERIES
AND OCEANS**

APRIL 2020



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The complaint

1. On November 24, 2019, the Office of the Procurement Ombudsman (OPO) received a written complaint from a supplier (the Complainant) regarding a contract awarded by the Department of Fisheries and Oceans (DFO). The contract was for vessel charter services to conduct oceanographic and biological acoustic surveillance. The contract was valued at \$85,000 (taxes included) and was awarded on October 31, 2019.
2. DFO provided the Complainant the winning bidder's name/vessel. The Complainant advised DFO the winning bidder/vessel was foreign-flagged and the Complainant wanted to protest the award of the contract, believing preference should be given to Canadian companies for all Canadian Government contracts. In response, DFO provided the Complainant with OPO's contact information.
3. This report examines the following issue raised by the complaint:
 - Was DFO required to award the contract to a Canadian Supplier?
4. On November 25, 2019, OPO confirmed the complaint met the requirements of the *Procurement Ombudsman Regulations* (the Regulations) and it was considered filed.

Mandate

5. 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.
6. Pursuant to subsection 9(2) of the Regulations, the Procurement Ombudsman requested DFO provide documents and information necessary to conduct the review. The request was for all departmental records associated with the award of the contract in question, as well as DFO's procurement policies and guidelines in effect at the time of the solicitation. The Procurement Ombudsman also requested the Complainant provide any additional information not submitted as part of the complaint.
7. The findings in this report are based on the records provided by the Complainant and DFO, as well as relevant publicly available information. Any relevant records or information not disclosed by either the Complainant or DFO could, if disclosed later, impact the findings of this report.

Chronology of events

8. On October 1, 2019, DFO sent a Request for Proposal (RFP) for vessel charter services to three suppliers, one Canadian and two American. Bidders were required to meet twelve mandatory requirements and submit prices for two, 10-day trips. It was also a mandatory requirement that the price not exceed \$99,000.00 CAD. The due date for the receipt of bids was October 15, 2019.

9. DFO received two bids, including the Complainant's. Both bids were found technically compliant and the American bidder submitted the lower price. The contract was awarded on November 3, 2019, and, on November 6, 2019, DFO advised the Complainant it would not be awarded the contract. When advised of the name of the winning bidder/vessel, the Complainant informed DFO the vessel was foreign-flagged and that it would protest the award of the contract.
10. On November 7, 2019, the Complainant contacted OPO and submitted its complaint which was considered officially filed on November 25, 2019. On December 9, 2019, OPO advised DFO and the Complainant there would be a formal complaint review.

Analysis and findings

Issue: Was DFO required to award the contract to a Canadian supplier?

11. The Complainant stated the contract should not have been awarded to a non-Canadian supplier when a Canadian supplier was available with a qualifying bid.
12. DFO's response to OPO stated:
 - It invited one Canadian and two American suppliers because: (1) the value of the requirement was below the trade agreement monetary thresholds; and (2) there was no evidence additional Canadian suppliers could submit a bid in response to the solicitation process;
 - The bidders were evaluated fairly in accordance with the selection methodology;
 - The winning supplier was deemed the lowest responsive bid during the evaluation process; and
 - The contract was issued in accordance with the solicitation's selection methodology.
13. The Treasury Board Contracting Policy (TBCP) is the authoritative policy for government contracting activities and is applicable to federal departments and agencies, with few exceptions. It contains policy requirements and references applicable regulations, policies and requirements for bidding and contract award. It is the responsibility of most federal departments and agencies, including DFO, to follow the TBCP to ensure contracting and procurement activities are conducted properly. Specifically of note regarding this complaint, the TBCP contains the following:

Section 1. Policy Objective

The objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances **access, competition and fairness** and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. [emphasis added]

[...]

10. Bidding and selection

10.1 The Government Contracts Regulations

10.1.1 As required by Section 5 of the *Government Contracts Regulations*, the contracting authority is to solicit bids before any contract is entered into. **The competitive approach in determining a contractor should therefore be the norm.** Because it is not always possible, practical, or cost effective to seek bids for every proposed contract, Section 6 of the *Government Contracts Regulations* permits certain exceptions. [emphasis added]

[...]

10.2 Exceptions

10.2.1 Section 6 of the *Government Contracts Regulations* contains **four exceptions** that permit the contracting authority to set aside the requirement to solicit bids. [emphasis added] These are:

1. the need is one of **pressing emergency** in which delay would be injurious to the public interest; [emphasis added]
2. the estimated expenditure does not exceed
 - in the case of a goods contract, \$25,000,
 - in the case of a contract to be entered into by the Minister for International Development for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project, \$100,000,
 - in the case of a contract for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, \$100,000, and
 - in the case of any other contract to which these Regulations apply, **\$40,000**; [emphasis added]
3. the nature of the work to be contracted for is such that it would **not be in the public interest** to solicit bids; or [emphasis added]
4. only **one person or firm is capable** of performing the contract. [emphasis added]

[...]

16.7 Contracting with non-nationals

16.7.1 As stated in article 4.2, Related requirements, contracts for service are to reflect current federal policies on international relations. Where it is **not possible to satisfy the requirement with Canadian contractors**, foreign firms or individuals may be awarded contracts. Where it is proposed that a foreign contractor carry out the work within Canada, the requirements of federal immigration and health policies are to be observed. The contractor is responsible for satisfying these requirements. [emphasis added]

Analysis of TBCP Section 1, Section 10.1 and Section 16.7

14. At first glance, it appears that Sections 1, 10.1 and 16.7 of the TBCP may contain inconsistencies. As noted above, Section 1 references enhanced “access” and

“competition”, and Section 10.1 states that the “competitive approach” should be the norm. However, Section 16.7 states that foreign suppliers may be awarded contracts when it is *not possible* to award to a Canadian supplier, which could be interpreted as being inconsistent with the requirement to compete (i.e. solicit bids).

15. A preliminary interpretation of the above sections of the TBCP could be that where it *is* possible to satisfy a requirement with a Canadian supplier, foreign suppliers should not be considered. This would mean that in instances where only one qualified Canadian supplier is available, the contract should be awarded to that supplier without competition.
16. However, this preliminary interpretation gives rise to two significant obstacles: First, a “cost ceiling” would be required (e.g. DFO’s mandatory requirement that the price not exceed \$99,000.00 CAD), to prevent departments from paying exorbitant prices far above market value. Second, Section 10.2 of the TBCP (referencing Section 6 of the *Government Contracts Regulations*) sets forth the only *four exceptions* to the requirement to solicit bids.
17. In the case under review, none of the four exceptions to the requirement to solicit bids apply, because:
 - (1) DFO’s requirement was not an emergency;
 - (2) The expenditure was not less than \$40,000;
 - (3) It cannot be said that soliciting bids “would not be in the public interest” due to the nature of the work.
 - N.B. – This exception is normally reserved for dealing with security considerations or to alleviate a significant socio-economic disparity; and
 - (4) More than one company was capable of performing the contract.
 - N.B. – Section 10.2 of the TBCP does not distinguish between Canadian and non-Canadian companies, therefore the fact that only one Canadian company was available does enable DFO to invoke this exception to the requirement to solicit bids.
18. Therefore, in the case at hand, where only one Canadian supplier was available to do the work, and additional foreign suppliers were also available, DFO was not permitted to avoid the requirement to solicit bids and to contract directly with the Canadian supplier.
19. Since no exceptions under TBCP Section 10.2 applied, it appears that DFO correctly sought bids from the one known Canadian supplier and two known American suppliers, and awarded the contract to the responsive bidder with the lowest price, as per the selection methodology outlined in the RFP.
20. Before completing the review, however, the Ombudsman must consider whether DFO correctly determined that there was only one qualified Canadian supplier available to do the work.
21. Section 12(2) of the Regulations states “[t]he Procurement Ombudsman shall not substitute his or her opinion for the judgment of the persons involved in the acquisition process for the contract in relation to the assessment of any bid, unless there is insufficient written evidence to support that assessment or the assessment is unreasonable.” While this standard applies to the assessment of bids, it does provide a useful standard to assess the actions of DFO.

22. In its response to the complaint, DFO stated there was no evidence that additional Canadian suppliers could submit a proposal in response to the solicitation process. The only substantiation supporting this statement was in a “File Summary” attached to the DFO response, in which DFO’s Contracting Authority stated that the Technical Authority advised there were a limited number of available vessels, and that the Technical Authority had selected the three suppliers to be invited. There was no additional evidence of how that search was performed or how the three vessels were selected. Since no additional evidence was provided by DFO, it is necessary to see if evidence exists that other Canadian suppliers were capable of meeting DFO’s requirement. The Complainant’s submission contained no evidence to question the validity of the Technical Authority’s determination. Additionally no publicly available information was found that would question the judgement of the Technical Authority. Therefore, based on the evidence available to OPO, the Procurement Ombudsman cannot substitute his opinion for that of DFO regarding the number of Canadian suppliers that were available to perform the work.
23. Had DFO provided additional evidence regarding its determination that only one Canadian supplier was available, there would have been no need for OPO to further assess this issue. Section 12.3.1 of the TBCP requires procurement files to be structured to facilitate management oversight with a “complete audit trail that contains contracting details related to relevant communications and decisions”. In all instances, decisions related to determining the supplier pool should be documented on file to guard against challenges to the procurement process.
24. It could also be informative for both the Complainant and departments to understand how to proceed for future services contracts not covered by Free Trade Agreements in instances where two or more capable Canadian suppliers could perform the work. To interpret the language of Sections 1, 10.1, 10.2 and 16.7 of the TBCP in a cohesive manner, departments may solicit bids exclusively from Canadian suppliers when two or more of them are capable of delivering on the requirement. As noted above, departments should sufficiently substantiate and document their determination of the number of capable Canadian suppliers during the planning phase of the procurement process. This will facilitate compliance with their TBCP obligations.

Was DFO’s Request for Proposals (RFP) required to limit submissions to, or create a preference for, Canadian suppliers?

25. While the TBCP provides structure and guidance on how departments are to conduct contracting activities, it generally does not provide specifics such as exact wording of clauses or a checklist of items which every solicitation document must include. OPO noted that DFO copied some of these specifics from Public Services and Procurement Canada (PSPC) by incorporating PSPC’s Standard Acquisition Clauses and Conditions (SACC) Standard Instructions 2003, General Conditions 2010B and other individual SACC clauses into its RFP. In addition, DFO must consider Section 16.7 of the TBCP (Contracting with non-nationals) when determining what process to use when awarding a contract for services. As described above, this analysis must take place at the outset of the procurement planning process to determine the number of Canadian suppliers able to satisfy the requirement.
26. In the current circumstance, DFO determined that only one capable Canadian supplier existed, and then correctly solicited bids. Given these facts, DFO was not required to limit

eligible bidders to only Canadian suppliers (i.e. one Canadian company), as this would not have resulted in a competitive process as required by Sections 10.1 and 10.2 of the TBCP.

27. Lastly, the RFP made it clear to all prospective bidders that submissions would be considered from non-Canadian suppliers. The text of the RFP included several references to non-Canadian suppliers, including:

- Regarding insurance requirements, section 6.13 of the RFP stated: "...for Foreign-based Contractors, coverage must be placed with an Insurer with an A.M. Best Rating no less than 'A-'"
- Mandatory criterion M7 originally required the bidder to provide "...a copy of the vessel registration certificate from Transport Canada or the United States of America Homeland Security Department/Coast Guard"; this was changed by amendment 1 to read "The Bidder MUST provide a copy of the vessel registration form (Transport Canada or equivalent)";
- Mandatory criterion M9, as amended, allowed bidders to provide Small Vessel Operator Proficiency, Maritime Emergency Duties, 60 ton Master's certificate certifications from Transport Canada **or equivalent** [emphasis added]; and
- Question/answer 6 and 7 of the amendment both addressed the possibility of there being a non-Canadian supplier.

Question 6:

LICENSES AND CERTIFICATIONS

19) "The vessel must possess valid current Transport Canada certificates for the purpose for which it is to be used." Our vessel is licensed and documented by the United States Coast Guard, not Transport Canada. Are we required to obtain TC certification prior to the start date? Or is USCG documentation and inspection sufficient?

Answer 6:

Mandatory 7 States: The Bidder MUST provide a copy of the vessel registration certificate from Transport Canada or the United States of America Homeland Security Department/Coast Guard. The USCG documentation/registration is sufficient.

Question 7:

Taxes. Are we required to charge DFO any tax on the invoice? We are a USA based business and as such we do not charge our government tax on invoices.

Answer 7:

No you do not need to charge tax if you are a USA based Supplier.

28. As noted by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, potential suppliers are "expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process." The SAAC clauses referenced in the RFP state that is the bidder's responsibility to obtain clarification of the requirements before submitting a bid. In the case at hand, it was not until November 6, 2019 (when DFO advised the Complainant it would not be awarded the contract) that the Complainant raised concerns about the inclusion of non-Canadian suppliers. If the Complainant had concerns about the prospect of DFO accepting bids and ultimately awarding the contract to a non-Canadian supplier, these concerns should have been raised with DFO prior to bid closing.

Findings

29. DFO was neither required, nor permitted, to avoid soliciting bids and award the contract directly to the Complainant, as none of the exceptions in Section 10.2 of the TBCP (referencing Section 6 of the *Government Contracts Regulations*) permitting the contract authority to set aside the requirement to solicit bids were met.
30. DFO correctly sought bids from the one Canadian supplier, and additional foreign suppliers it deemed capable of performing the work.
31. DFO correctly awarded the contract to the responsive bidder with the lowest price, as per the selection methodology outlined in the RFP.
32. If the Complainant had concerns about foreign suppliers being invited to bid, it should have raised them with DFO prior to bid closing.

Conclusion

33. DFO was not required to award the contract in question to the Complainant, and rightfully solicited bids and awarded the contract to the responsive bidder with the lowest price, in accordance with the selection methodology outlined in the RFP.