

PROMOTING FAIRNESS, OPENNESS & TRANSPARENCY IN FEDERAL PROCUREMENT

OFFICE OF THE
PROCUREMENT
OMBUDSMAN

REVIEW OF A COMPLAINT:

ACQUISITION OF HOTEL
ACCOMMODATION SERVICES
BY THE DEPARTMENT OF
NATIONAL DEFENCE

AUGUST 2020



Government
of Canada

Gouvernement
du Canada

Canada

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The complaint

1. On February 25, 2020, the Office of the Procurement Ombudsman (OPO) received a written complaint from a supplier (the Complainant) regarding a contract awarded by the Department of National Defence (DND). The contract was for hotel accommodations for Canadian Armed Forces (CAF) personnel in Cologne, Germany. The contract, valued at €24,980.50 (CAD \$36,826.25), was awarded on December 3, 2019.
2. The Complainant contacted OPO because it believed the hotel proposed by the winning bidder did not meet one of the solicitation's mandatory requirements. Specifically, the Complainant alleged the hotel was 2300 metres from a particular location mentioned in the solicitation, but that the mandatory requirement was for the hotel to be within 1500 metres of that designated location. The Complainant also alleged it was entitled to a debriefing which should have included information about the winning bid, including the name of the winning bidder's hotel.
3. This report examines the following issues raised by the complaint:
 - Did DND wrongfully award the contract to the winning bidder based on an erroneous interpretation of one of the mandatory criteria in the solicitation?
 - Was DND obligated to provide the Complainant a debriefing and disclose key attributes of the winning bid?
4. On March 10, 2020, 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 DND provide documents and information necessary for the review. The request was for all departmental records associated with procurement and the award of the contract in question, as well as DND's procurement policies and guidelines in effect at the time of the solicitation. The Procurement Ombudsman also requested the Complainant provide 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 DND, as well as relevant publicly available information. Any relevant records or information not disclosed by either the Complainant or DND by the time the report was issued could, if disclosed later, impact the findings of this report.

Chronology

8. On November 21, 2019, DND sent a request for proposal (RFP) for hotel accommodations to 3 suppliers, including the Complainant. Bidders had to meet 3 listed mandatory requirements and submit a price for 41 rooms for 3 nights. The due date for the receipt of bids was December 3, 2019.
9. DND received 3 bids, including the Complainant's. 1 bid was found non-compliant. The remaining 2 bids, including the Complainant's, were found technically compliant with the Complainant submitting a higher-priced bid. The contract was awarded to the lower-priced bidder on December 3, 2019. Also on December 3, 2019, DND advised the Complainant it would not be awarded the contract. DND advised the Complainant of the name of the winning bidder as well as the bid price.
10. On December 4, 2019, the Complainant requested DND provide the name of the hotel the winning bidder had proposed. That same day, DND advised the Complainant it was not at liberty to disclose specifics of the winning proposal but that the Complainant could request a debriefing to discuss its own proposal. The Complainant did not respond to DND's correspondence until February 12, 2020, when it again requested the name of the hotel as well as how many bids had been received and where the Complainant's bid ranked. On February 19, 2020, the Complainant again requested the hotel name and advised DND that its legal counsel had said it was entitled to receive such information for all public tenders. On February 21, 2020, DND provided the name of the hotel and the number of bids it received in response to the RFP.
11. On February 25, 2020, the Complainant submitted its complaint to OPO. On March 11, 2020, OPO advised DND and the Complainant there would be a formal complaint review.

Analysis of issues and findings

Issue 1: Did the Department of National Defence wrongfully award the contract to the winning bidder based on an erroneous interpretation of one of the mandatory criteria in the solicitation?

12. The Complainant stated mandatory criterion MT1 required the proposed hotel to be "...located within 1500m of the Cologne Cathedral (Kölner Dom) and [w]est of the Rhein River" but that the Google Maps measurement tool states the hotel proposed by the winning bidder was 2,300 metres away. The Complainant stated when it brought this to the attention of DND, DND replied that the measurement was based on aerial distance. The Complainant claimed if it had been aware that this method of measuring distance was to be used, it would have been able to offer a very competitive rate because hotels outside the historic area around the Cologne Cathedral have much cheaper room rates.
13. DND's response to OPO stated this aspect of all bids was fairly evaluated in the same manner – in a straight line from Cologne Cathedral. It stated this is how DND measures distance for similar requirements as it is the most accurate; using street routes would introduce uncertainty in the evaluation process – e.g. differences between walking and driving, different possible routes. DND stated the winning bidder provided a Google Maps

screen shot showing the proposed hotel was within the MT1 specified distance, which the evaluation team confirmed during the evaluation period. DND submitted that, if the Complainant had concerns or questions regarding the methodology for MT1, it should have requested clarification during the bidding period, which it did not do.

14. 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 departments and agencies, including DND, to follow the TBCP to ensure contracting and procurement activities are conducted properly. Section 10.7.27 of the TBCP addresses how evaluation criteria are to be presented and used when soliciting bids:

Competing firms should be told the measurement criteria and the weighting assigned to them. [...] The courts have ruled that the factors and their weighting must be established beforehand and adhered to strictly. They are to be recorded along with the requirements of the contract and included in the bid solicitation. [...] Fairness to all prospective contractors and transparency in the award process are imperative.

15. The RFP that DND sent to the 3 suppliers on November 21, 2019 states the following regarding bid selection:

4.2 Basis of Selection

A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

16. The RFP contains 4 references to distance, 3 of which related to the evaluation of bids;

4.1.1.1 Mandatory Technical Criteria

MT 1	The hotel must be located within 1500m of the Cologne Cathedral (Kölner Dom) and west of the Rhein River.
MT 2	All bookings must be located in the same hotel.
MT 3	Conference rooms must be located on site.

...

4.2 Basis of Selection

...

In order to reflect the value of locating the CAF contingent in Cologne, Germany, the following calculation will apply to the room rates as bid, for evaluation purposes only, to establish the lowest evaluated price:

- a) Any hotel that is 1000m or less from the Cologne Cathedral will have its room rate discounted by 5%.
- b) Any hotel that is 500m or less from the Cologne Cathedral will have its room rate discounted by 10%.

17. The remaining reference was in the statement of work and related to hotel amenities:

2.2.5.3 Three (3) or more restaurants and/or cafes should be within walking distance (500 meters) of the hotel.

Analysis of issue 1

18. While DND claimed the “straight line” method is how it measures distance, the RFP did not include those words or any mention of such a methodology. DND stated it now adds more specific language in its solicitations, confirming that evaluation of the distance is based on “straight line” and “as the crow flies” measurements. The Complainant provided an example of a DND RFP dated 2 months after the RFP at issue, from January 31, 2020, in which the statement of work specifies:

The Contractor must ensure that facilities must be located within 1500 meters, **as the crow files, [sic]** of the Cologne Cathedral (Kölner Dom) and [w]est of the Rhein River, [n]orth of Richard-Wagner-Str., Pilgrim, Hahnerstr and Cacilien Str, (Extended road leading [w]est from Deuzter Brucke) and [s]outh of Eberplatz. [emphasis added]

19. Regardless of the wording used by DND in subsequent RFPs with respect to the evaluation of distance, OPO must limit this examination to the RFP under discussion where the manner of measuring was not specified in either the evaluation grid or statement of work. In this case, there is nothing in the RFP to suggest the “as the crow flies” method was to be used instead of the Complainant’s belief that a “walking distance” or “driving distance” metric should have been used.
20. That neither were specified means neither were explicitly excluded and OPO considers DND’s “straight line” or “as the crow flies” methodology to be as reasonable as the Complainant’s “walking or driving” methodology. OPO does not believe either methodology is more or less common in these circumstances and, therefore, could be considered the default interpretation of how the listed “...1500m...” distance was to be measured.
21. OPO notes that both departments and bidders have responsibilities regarding the clarity of evaluation criteria. It is the department’s responsibility to ensure the criteria are clear and allow for transparent evaluation. In addition, jurisprudence from the Canadian International Trade Tribunal (CITT), a procurement review body which, among other functions, hears procurement complaints about federal government opportunities covered by trade agreements, states bidders bear the onus to seek clarification of matters considered ambiguous or uncertain.¹
22. Departments must ensure the entire procurement document is unambiguous. The use of pre-established terms and conditions, like those found in the Public Services and Procurement Canada’s (PSPC) Standard Acquisitions Clauses and Conditions (SACC) Manual, helps lessen any uncertainty about the basic contractual construct of the RFP and any resulting contract(s). Regarding the technical requirements, normally drafted by the client department and found in a statement of work, ambiguities must be removed to provide: (a) bidders with a clear description of the operational requirement to be fulfilled; and (b) evaluators with an objective, robust and defensible evaluation process. In addition to possible complaints before OPO or the CITT, the lack of clarity could also

¹ E.g., Paragraph 20 – AZIMUTH CONSULTING GROUP PARTNERSHIP [PR-2015-056](#); Paragraph 49 – DOMINION DIVING LTD. [PR-2015-048](#)

have the effect of excluding what might be winning proposals – had the requirement been better defined.

23. Bidders are required to expend resources to prepare bids and, for this reason, evaluation criteria should be clear and unambiguous so that bidders can produce their best bid. As demonstrated in this case, ambiguity regarding the method to be used to evaluate distance likely led to the Complainant not submitting its most competitive bid.
24. The Complainant stated it would have proposed a very competitive price had it been aware hotels outside of Cologne's Historic District would have met criterion MT1. It is therefore possible DND deprived itself of a technically-compliant bid which could have been cheaper than the winning proposal.
25. The RFP contained an "Enquiries" clause stating bidders had up until 5 calendar days before bid closing to ask any questions about the RFP. According to DND, the Complainant did not ask any questions. In its complaint, the Complainant stated it would have proposed another hotel had it been aware the "as the crow flies" methodology was being used. It is clear that the manner by which distances were to be measured was a significant consideration when bidders were preparing their proposals. It is unclear, however, as to why the Complainant did not seek clarification from DND regarding this element of the RFP prior to submitting its bid.
26. Given the Complainant did not clarify what measuring method was contemplated by "...1500m within Cologne Cathedral", it submitted a bid based on its apparent assumption that the specified distance was either walking or driving distance. As has been stated by the CITT, as a general rule, bidders should not make assumptions or presumptions.² The consequence of doing so is on display in this case where the Complainant claims its bid would have been more competitive had it been aware of the method of measuring distance, because hotels outside of the historical area are much cheaper.
27. OPO agrees with DND's statement that it evaluated all proposals consistently using the same measuring style. The winning bid included statements and a map purporting to demonstrate how its proposed hotel was within the "as the crow flies" 1500 meters. By using the "as the crow flies" methodology, DND allowed for the greatest number of hotels to meet the mandatory criteria and resulted in no findings of non-compliance with MT1.
28. OPO also considered this issue from the perspective of a hypothetical bidder who used the "as the crow flies" method but was disqualified for exceeding the specified distance. Under the same circumstances as the RFP at issue, i.e. if the measuring methodology was not specified, a department could not support a decision to disqualify such a bid without having to add "walking distance" or "driving distance" to the criterion. Any disqualification of a bidder based on undisclosed criteria would be inconsistent with the requirements of section 10.7.27 of the TBCP by not strictly adhering to the evaluation factors contained in the RFP.
29. The RFP incorporated SACC Standard Instructions 2003 (19-03-04) which state, in part, that departments "may, but will have no obligation to...seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation". The Supreme Court of Canada stated, in *Double N Earthmovers Ltd. v.*

² E.g., Paragraph 30 - TRITECH GROUP LTD. [PR-2013-035](#)

Edmonton (City), that the buyer had the option, but not the obligation, to investigate statements made by bidders given that, by submitting a bid, bidders are legally obliged to comply if its bid is accepted. Despite not having to do so, DND claims its evaluators did verify the winning bidder's hotel location was within the "1500m" distance and, thus, met criterion MT1.

30. DND found the Complainant's hotel met criterion MT1, and the financial evaluation accurately reflected the listed discounts for proximity to the Cathedral for both compliant bids. There was nothing in the information provided to OPO by either party to suggest the contract was not awarded in accordance with the RFP.

Finding – Issue 1

31. OPO finds DND did not wrongfully award the contract to the winning bidder based on an erroneous interpretation of one of the mandatory criteria in the solicitation. All bids were evaluated consistently, in accordance with the RFP, using the same method of evaluating distance and resulted in no findings of non-compliance with MT1.
32. However, DND should have provided clear and unambiguous evaluation criteria with regard to how the distance from the Cologne Cathedral (Kölner Dom) would be measured. This deficiency could have been rectified had one of the bidders requested clarification, but none did. Therefore, the bids reflected the bidders' assumptions regarding the method of measurement, leaving the Complainant as the second-placed bidder.

Issue 2: Was the Department of National Defence obligated to provide the Complainant a debriefing and disclose key attributes of the winning bid?

33. The Complainant claimed the RFP stated it was entitled to a debriefing and that the debriefing was to include the tender results as well as information from the winning bidder's proposal.
34. DND's response to OPO stated:
 - In accordance with information found in PSPC's Supply Manual and located via the government's electronic tendering website – buyandsell.gc.ca – the information to be provided in a debriefing was what DND provided in its "regret letter" to the Complainant:
 - Company name of the successful and unsuccessful bidders/offerors/suppliers
 - Responsive and non-responsive
 - Total evaluated price of the successful bidder/offeror/supplier
 - Total score
 - In response to the Complainant's initial request, DND advised the Complainant it could request a debriefing to discuss its own proposal, but, if it was not satisfied, the Complainant could contact OPO or make an access to information and privacy request through the Treasury Board Secretariat.
 - The contracting authority subsequently received information from another contracting section within DND advising the general practice was that if a company

requested information which would be releasable in response to an access to information request, it was the best practice to provide the information, i.e. DND could provide the name of the hotel if requested.

- After being contacted by the Complainant 2 more times, on February 12 and 19, 2020, DND provided the Complainant the name of the hotel and the number of bidders on February 21, 2020.

35. The TBCP contains the following:

10.8.21 Debriefings

Debriefings **should** be provided to unsuccessful bidders on request and should normally include an outline of the factors and criteria used in the evaluation, while respecting each bidder's right to the confidentiality of specific information. [emphasis added]

36. The RFP also addressed debriefings, but without indicating what information would be provided:

1.2 Debriefings

Bidders may request a debriefing on the results of the bid solicitation process. Bidders should make the request to the Contracting Authority within 15 working days from receipt of the results of the bid solicitation process. The debriefing may be in writing, by telephone or in person.

37. In its response to OPO, DND referenced PSPC's Supply Manual, noting it believed its "regret" letters to the Complainant and the other unsuccessful bidder provided the information the Supply Manual authorized to be released. In this case, however, the Supply Manual was not referenced in the RFP and so, while it does provide general guidance on government contracting processes, it cannot be considered as a "rule" DND was obligated to follow. For the rules governing this procurement, OPO considered the TBCP and the contents of the RFP itself.

Analysis of issue 2

38. According to the TBCP, DND "should" provide unsuccessful bidders a debriefing, meaning, while encouraged, it is not a mandatory requirement for departments to provide debriefings. In this case, however, DND's RFP did include a section entitled "Debriefings" which stated "[b]idders may request a debriefing on the results of the bid solicitation process." While the language of this section does not itself create an affirmative obligation for DND to provide a debriefing, it certainly raises the expectation for bidders that, if a debriefing is requested, one will be provided.

39. DND announced the solicitation's results on December 3, 2019, when it sent its "regret letter" e-mail to the Complainant and the third bidder. In the email to the Complainant, DND provided the following information:

- a) The fact the Complainant met all mandatory requirements, but that its proposal was not the lowest cost-per-point compliant proposal
- b) The name of the winning supplier
- c) The value of the contract

- d) That “[i]f you have issues or concerns regarding the solicitation, you have the option of raising them with the department or with the Office of the Procurement Ombudsman...”
40. OPO notes there is an error in this letter; the contract was not awarded on a lowest “cost-per-point” basis, it was awarded on a “lowest priced responsive bid” basis. However, this error appears to have been merely clerical as it was not noted by either party in any ensuing correspondence, nor did it form part of the Complainant’s allegations to OPO.
41. Upon being advised of the results, the Complainant contacted DND and asked for the name of the hotel proposed by the winning bidder. In response, DND stated it would not divulge that information and offered to provide the Complainant with a debriefing to discuss the details of the Complainant’s unsuccessful bid. OPO notes the Complainant didn’t respond until over 2 months later, when it did not address the offer of the debriefing, but again requested the hotel’s name as well as the number of bids received and where it had placed in the competition.
42. Regarding the content of debriefings, the TBCP states what information should be divulged and cautions that there is an expectation of confidentiality regarding the contents of all bidders’ proposals. Thus, the information shared during a debriefing should not include any commercially confidential information from the other bids. For transparency, and as a best practice, OPO believes departments should release information requested by unsuccessful bidders if that same information would be released under an access to information request. Where there is uncertainty regarding the confidentiality of certain information, the contracting authority should consult the department’s Access to Information and Privacy (ATIP) group prior to that information’s release. Another important consideration involves the timeliness of the provision of the information. In this case, a delay transpired prior to DND releasing the additional, requested information. It is also clear the actions of both DND and the Complainant contributed to this delay.

Finding – Issue 2

43. In accordance with the TBCP, while debriefings should be provided to unsuccessful bidders upon request, there is no mandatory requirement on departments to do so. In this instance, the inclusion of language in the RFP inviting bidders to request a debriefing further raised expectations that a debriefing would be provided upon request. However, OPO finds that DND did provide a debriefing via its December 3, 2019 “regret” e-mail, which advised the Complainant: (a) its bid met the technical requirements; (b) its bid price was not the lowest DND had received; and (c) which company was awarded the contract and at what price. DND also subsequently disclosed the name of the hotel on February 21, 2020. OPO therefore concludes DND did provide the Complainant with an adequate debriefing.
44. OPO would like to emphasize that the main function of a debriefing is to provide transparency and an explanation as to the reasons for not selecting an unsuccessful bid, while respecting the confidential nature of the content of all bidders. It is then hoped the unsuccessful bidder will take this information and be better positioned to win future competitive opportunities.

Conclusion

45. OPO considers the contract in question to have been awarded in accordance with the RFP's basis of selection, i.e. to the responsive bidder with the lowest evaluated price. While the evaluation criteria in the RFP regarding the method of evaluating distance should have been more clearly presented, by not seeking clarification and relying on its assumptions, the Complainant restricted its own bid to more expensive hotels and placed itself at a disadvantage vis-à-vis the winning proposal.
46. OPO also considers DND to have provided the Complainant with an adequate debriefing regarding its own proposal and that of the winning supplier. While OPO would like to have seen the information provided to the Complainant in a timelier manner, the Complainant waited more than 2 months to respond after DND offered a more detailed debriefing about the Complainant's proposal.