



VETERAN CONTRACT OFFICER USES SLIPSHOD EVALUATION CRITERIA

Careless Wording Sinks Tender Process

Unclear wording in evaluation criteria can defeat a tendering process. Faced with ambiguities in the evaluation wording, some vendors will refuse to bid. Others will assume the worst-case scenario and raise their prices to cover risks. Even worse, an angry bidder who receives unfair treatment may resort to litigation or file a procurement complaint with the Canadian International Trade Tribunal (CITT).

As a quasi-judicial tribunal, the CITT has powers similar to those of the Canadian courts. In **PR-2007-079, A Complaint by Immeubles Yvan Dumais Inc.**, the CITT dealt with evaluation criteria for a \$1 million leasing contract for the Department of Public Works and Government Services (PWGSC).

PWGSC issued a tender call for a 10-year lease contract. In January 2008, it received three bids. After reviewing them, the government officer decided that a bid from Headway Corporation Ltd. met the lease requirements and was the most economical. Another bidder, Immeubles Yvan Dumais Inc., objected. When Headway received the 10-year contract, Dumais filed a complaint with the CITT.

Agreement on Internal Trade (AIT) Requires Clear Wording

Article 506(6) of the Agreement on Internal Trade (AIT) provides that, “tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

Dumais complained that PWGSC did not comply with Article 506 of the AIT, because it published a solicitation in which the evaluation and weighting criteria were not well defined. The ambiguities in the tender document were directly responsible for the contract being awarded to Headway, whose lease rate per square metre was higher than the Dumais lease rate.

Terms in the Tender Document

Bidders were required to provide “Basic office space: five hundred and sixty-two square metres (562 sq. m.) in a single block, divided over a maximum of two (2) consecutive floors ...”

Another section stated that, “Leased Premises requirements are set forth in terms of usable area; however, Offerors shall quote rental rates on the basis of rentable area as defined and determined in accordance with the Measurement Instructions. In completing an Offer, Offerors shall set forth both the usable area and rentable area of the Leased Premises offered.”

The evaluation section stated that, “For the purposes of the evaluation, the measurements quoted in the Offer will be utilized and all costs calculated or estimated by the Lessee shall be final.”

Another section stated that, “the amounts to be paid under the lease will be calculated based on the lesser area calculated by the lessee or the “rentable area” of the premises specified in the offer.”

The tender documents did not provide a written description of the formula for calculating overall annual lease costs, nor did the tender provide an illustrative example of this calculation. Bidders were required to use the two tables shown below.

Basic office space offered:

Floor Number		Area m ²	
Whole	Part	Rentable	Usable
Total			

Annual rental rates offered:

Leased Premises	Rate Per Rentable Square Metre			
	Basic Rent	Property Taxes (Municipal and School)	Basic Unit Operating Rate	All-inclusive Rate
Basic office space				

Dispute Between the Parties

In essence, the parties held differing opinions on the meaning to be given to “rentable area,” and on the calculation of the overall annual lease prices.

PWGSC Approach to Tender Evaluation

- After bid opening, PWGSC told bidders that it was going to multiply the unit cost by the area offered.
- Using this calculation, the bid from Headway was considered the lowest responsive bid. It offered a price of \$167.00/square metre (m²) and a rentable area of 562 m². So the total annual price in the winning bid was \$93,854.00 (i.e., 562 x \$167.00).
- Dumais’ bid offered a price of \$162.57/m². The total annual price in Dumais’ bid was \$97,867.14 (i.e., 602 x \$162.57).

Dumais' Approach to Tender Evaluation

- Dumais offered a lease area of 602 m². This area was 5% to 10% greater than the 562 m² required in the tender. Dumais thought that all bid prices would be calculated by unit cost, multiplied by area required. In effect, Dumais assumed that it could offer more rentable space, but that it would only get paid for the required area.
- If PWGSC had followed Dumais' assumptions, then the Dumais total annual price would have been \$91,364.34 (i.e., 562 x \$162.57).

CITT Determination

The Tribunal decided that there was ambiguity about the precise nature of the evaluation criteria, which arose from a lack of clarity in preparing the tender documents. Nowhere did the tender document tell bidders that the usable area provided by each bid would be used strictly for multiplication with the all-inclusive rate.

Considering that Dumais was proposing the lowest all-inclusive rental rate per unit, the CITT held that if Dumais' interpretation of the tender documents had been adopted by PWGSC, then Dumais would have been declared the winning bidder.

Bidders Get the Benefit of the Doubt

In the past, the CITT has determined that a lack of clarity relating to the requirements or criteria of a solicitation must be dealt with to give the bidders the benefit of the doubt. See, for example the CITT cases **PR-2003-067, A Complaint by IHS Solutions Limited** (March 8, 2004) and **PR-97-054, A Complaint by Bell Canada** (July 13, 1998) (www.citt.gc.ca/procure/index_e.asp).

Remedies Granted to Dumais

The CITT noted that Dumais was caused significant harm. Since the Headway contract award could not be rescinded (for reasons of public interest), the contract could not be redirected to Dumais. Therefore, the Tribunal recommended that PWGSC compensate Dumais for the profit it lost in being deprived of the contract. The CITT also awarded Dumais its reasonable costs incurred in proceeding with the complaint.

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