



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-016

Canyon Contracting

v.

Parks Canada Agency

*Determination and reasons issued
Tuesday, September 19, 2006*

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IN THE MATTER OF a complaint filed by Canyon Contracting under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

CANYON CONTRACTING

Complainant

AND

THE PARKS CANADA AGENCY

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Parks Canada Agency compensate Canyon Contracting for its lost opportunity by an amount equal to half of 10 percent of the value of the winning tender or \$6,050.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Canyon Contracting its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Parks Canada Agency. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On June 22, 2006, Canyon Contracting (Canyon) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. 5P404-16-08-05) by the Parks Canada Agency (Parks Canada) for the installation of signs in various locations throughout Riding Mountain National Park.
2. Canyon alleged that Parks Canada improperly made changes to the technical specifications after the contract was awarded. It requested, as a remedy, that the Tribunal recommend that Parks Canada compensate it for its lost profit, in the amount of 10 percent of its bid price. It also requested its bid preparation costs and its costs incurred in filing the complaint.
3. On June 30, 2006, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
4. On July 7, 2006, Parks Canada informed the Tribunal that a contract had been awarded to Colonial Custom Designs Corp.³ On July 25, 2006, Parks Canada filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On August 2, 2006, Canyon filed its comments on the GIR. On August 9, 2006, Parks Canada filed additional comments.
5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. On August 16, 2005, Parks Canada sent out a tender to four potential bidders with respect to the Solicitation at issue. A term of the solicitation was that the support posts for the signs would have to meet the specified standards for highway sign and roadway design. A bidders' conference was held on August 26, 2005, and the only supplier in attendance was Canyon. On September 2, 2005, after the bidders' conference, a written account of Canyon's questions and Parks Canada's answers was given to the potential bidders. Bid closing was September 12, 2005.
7. According to Parks Canada, two proposals were received; one from Canyon and one from Pattison Sign Group (Pattison), and both were determined to be compliant. On September 15, 2005, Parks Canada accepted Pattison's proposal, as it was the lowest-priced compliant bid. On September 26, 2005, Pattison submitted drawings to Parks Canada in respect of the requirement to demonstrate that the stated guidelines and standards were being met or exceeded. It appears that the drawings were also forwarded to an engineer with the Department of Public Works and Government Services (PWGSC) for his review. On October 5, 2005, Parks Canada sent a letter to Pattison to inform it that the drawings did not comply with the specifications of the contract; the letter stated the following "... namely, they do not indicate the use of

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Colonial Custom Designs Corp. is the subcontractor to Pattison Sign Group.
4. S.O.R./91-499.

I-beam aluminum support posts or relate to AASHTO [American Association of State Highway and Transportation Officials] guidelines and NCHRP [National Cooperative Highway Research Program] standards for crash safety/breakaway parameters”⁵ Instead, the drawings showed aluminum round poles in compacted gravel.⁶ On October 17, 2005, the PWGSC engineer informed Parks Canada that the drawings failed to demonstrate compliance with the specified standards for highway sign and roadside design. The engineer added that Parks Canada’s specifications for signs of aluminum posts embedded in concrete might themselves be problematic in terms of meeting the required standards.⁷ On December 6, 2005, after exchanges of correspondence between Parks Canada, Pattison and PWGSC, Pattison provided Parks Canada and the PWGSC engineer with a copy of a report from another jurisdiction that indicated that aluminum round poles with gravel backfill as a means of anchoring met the required guidelines and standards.⁸ On December 8, 2005, Parks Canada advised Pattison that work could proceed.

8. According to the complaint, Canyon filed an objection with Parks Canada on May 10, 2006, when it first noticed changes to the specifications of the work. Parks Canada responded to Canyon by letter dated May 11, 2006, but, according to Canyon, it received the letter by regular mail on May 15, 2006. Between May 15 and June 27, 2006, there were various exchanges of correspondence between Canyon and Parks Canada. On June 22, 2006, Canyon filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Canyon’s Position

9. Canyon submitted that, in accordance with clause 10.1 of the “Instructions to Tenderers”, if alternative materials were approved for the purposes of the tender, an addendum to the contract should have been issued. It submitted that no amendment was sent out with respect to changes to the specifications. It also contended that the reference to a “. . . contractor [being able to] use other posts . . .” in the minutes of the bidders’ conference⁹ could not be considered a contract amendment, since it only referred to the size of the posts.¹⁰

10. Canyon submitted that nowhere in the requirement does it state that the contractor must or should imbed the I-beam aluminum support posts in concrete. It also submitted that, according to Parks Canada, Pattison’s drawings do not comply with the specifications, as “they do not indicate the use of I-beam aluminum support posts or relate to AASHTO guidelines and NCHRP standards for crash safety/breakaway parameters”¹¹

Parks Canada’s Position

11. Parks Canada submitted that the decision to award Pattison the contract was based on the fact that Pattison’s bid fully met the requirements of the solicitation and was the lowest-priced tender. It further submitted that it was only *after* the contract was awarded to Pattison that necessary adjustments were made to the work specifications and that the adjustments were inconsequential and well within the scope of the administrative process of the contract.

5. GIR, exhibit 7.

6. GIR, exhibit 6.

7. GIR, exhibit 8.

8. GIR, confidential exhibit 9.

9. GIR, exhibit 2.

10. GIR, exhibit 12, letter dated May 15, 2006, para. 2.

11. GIR, exhibit 7.

12. Parks Canada contended that it is not a substantial change in nature to use round aluminum posts instead of I-beam aluminum support posts and that it had already been indicated in the answers provided to all bidders that any support posts could be used, as long as they were stamped for approval by an engineer. It submitted that the change from concrete anchoring to packed-gravel anchoring was required after Parks Canada was advised by PWGSC that aluminum corrodes when embedded in concrete. Such corrosion was unacceptable in the context of meeting the required guidelines and standards set out in the tender. Accordingly, Parks Canada allowed Pattison to use packed gravel, as certified by its engineers to the satisfaction of Parks Canada.

13. Parks Canada submitted that the procurement process is clearly defined in Article 514(2)(a) of the *Agreement on Internal Trade*¹² as beginning “. . . after an entity has decided on its procurement requirement and continues through to the awarding of the contract”. It submitted that the adjustments were made after the award of the contract and, in no way, related to the bid evaluation process itself. Parks Canada therefore submitted that the Tribunal has no jurisdiction. It referenced *Liftow Limited*¹³ in support of its case.

14. Finally, Parks Canada requested its costs incurred in responding to the complaint.

TRIBUNAL'S ANALYSIS

15. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.

16. Article 506(6) of the *AIT* provides the following: “. . . The 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.”

17. The original tender had the following technical requirement:

3. Sign Support Posts

The contractor shall provide two support posts options which meet or exceed the current AASHTO guidelines for sign supports and the current NCHRP standard for crash safety.

Option 1 will identify I beam aluminum support posts with concrete anchors.

Option 2 will identify Microllam LVL wooden posts.

18. In addition, the tender indicated that “. . . [t]he Contractor shall submit two fixed prices to complete the work. Fixed price “A” will identify all work using I beam aluminum beam support posts with concrete anchors. Fixed price “B” will identify all work using Microllam LVL wooden support posts”¹⁴

12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].

13. *Re Complaint Filed by Liftow Limited* (13 October 1999), PR-99-017 (CITT) at 4.

14. Section 12 of the tender specifications.

19. As a result of the bidders' conference, which was only attended by Canyon, the following questions and answers relating to posts and anchors were distributed by Parks Canada to all bidders:

...

Q3. Can different size posts be used for the signs?

A3. *The contractor can use other posts, however, all support posts used must have an engineer stamp of approval.*

Q6. Screw type anchors are usually steel. Will Parks Canada make the change to the contract from cement anchors to steel.

A6. *Yes, steel anchors can be used.*

...

20. The Tribunal finds that it was mandatory for bidders to submit two fixed prices to complete the work: one price for option 1, and another for option 2. The Tribunal notes that the type of post for each option was very specific and also mandatory. Canyon and Pattison both provided two fixed prices, one for each option, as required. On September 15, 2005, Parks Canada advised Pattison that its tender was accepted and referred to Pattison's quoted price for option 1.

21. The Tribunal is of the view that the questions and answers resulting from the bidders' conference did not change the mandatory specifications. Contrary to Parks Canada's assertion that "... any support posts could be used as long as they were stamped for approval by an engineer ...",¹⁵ the Tribunal is of the opinion that not just "any" post approved by an engineer, irrespective of its shape, composition or strength, could be used. The Tribunal is of the view that the answer to question no. 3 sent to all bidders cannot be read in isolation of the question itself. Specifically, the question only asked whether "different *size* posts" [emphasis added] could be used. Contemporaneous evidence suggests that Parks Canada and both bidders understood the requirement to be for either I-beam aluminum support posts or Microllam LVL posts.

22. Clause 10 of the "Instructions to Tenderers" reads as follows:

Approval of Alternative Materials

... During the tendering period, alternative materials will be considered provided full technical data [are] received in writing by the Project Manager at least seven (7) days prior to the date set for the closing of the tender. If the alternative materials are approved for the purposes of the tender an addendum to the contract documents will be issued.

The Tribunal notes that changes to the specifications were allowed pursuant to the above-noted clause. However, the clause is quite specific as to the procedure that must be followed when proposing an "alternative". It indicates that requests for alternative materials had to be received by the project manager at least seven days prior to the bid closing date. The clause also states that, if an alternative was approved, an addendum to the contract documents would be issued. The Tribunal notes that no alternatives were approved during the bid solicitation period and that no addendum was issued.

23. Parks Canada, as indicated in its correspondence to Pattison dated October 5, 2005, rejected Pattison's drawings, as they did not comply with the contract specifications, namely, they did not indicate the use of I-beam aluminum support posts or relate to AASHTO guidelines and NCHRP standards for crash safety/breakaway parameters.

15. GIR, section III, para. 7.

24. It is true that, after some exchanges between Pattison's and PWGSC's engineers, the latter agreed that hollow aluminum pipe inserted in compacted gravel would, under the right conditions, meet the applicable guidelines and standards. It is also true that PWGSC's engineer also pointed out a problem with Parks Canada's specifications that involved the use of concrete anchors. But neither of these facts relieved Parks Canada of its obligation to carry out the procurement in accordance with the terms of its tender documents. One of its mandatory terms was that each bidder must provide an option that indicated the use of I-beam aluminum support posts. Canyon had unwittingly resolved the conflict with regard to concrete anchors by asking, at the bidders' conference, if it could instead use steel anchors, a solution which Parks Canada found to be acceptable.¹⁶

25. In the end, the changes that were made to the requirement were substantial and they completely contradicted the original specifications. It is not a simple matter of contract administration if a mandatory term of a procurement is changed after bids are received or even after a contract is awarded. In effect, in this case, a new procurement was initiated after Parks Canada decided to accept, in lieu of I-beam aluminum support posts, aluminum round poles in compacted gravel. When it was discovered that the original specifications were not workable or that a much cheaper alternative could meet the desired standards (even though the alternative would not meet the mandatory specifications), Parks Canada should have terminated any awarded contract and re-tendered the requirement.

26. By proceeding in the manner that it did, Parks Canada effectively negotiated a sole source contract for a different requirement. Accordingly, the Tribunal finds that Parks Canada breached the *AIT* by not following the procedures for procurement contained in Article 506 of the *AIT*, which reads as follows:

...

1. Each Party shall ensure that procurement covered by this Chapter is conducted in accordance with the procedures set out in this Article.
2. A call for tenders shall be made through one or more of the following methods:
 - (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers;
 - (b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or
 - (c) the use of source lists

27. In light of the foregoing, the Tribunal determines that Canyon's complaint is valid.

Remedy

28. In recommending a remedy, the Tribunal is required, by subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the services to which the designated contract relates, including the following:

...

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;

16. GIR, Exhibit 2, question no. 6.

- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

29. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factors applicable to this case are that the conduct of Parks Canada created a significant degree of prejudice to the integrity of the procurement system when it effectively ignored its original requirement. However, a recommendation that the procurement be redone is not reasonable, since the work is already completed.

30. In view of the foregoing, the Tribunal considers that Canyon should be compensated for its lost opportunity to be awarded the contract and to profit therefrom. As stated above, Canyon estimated its profits to be 10 percent of its bid price. However, there is no guarantee that following proper procedures would have resulted in Canyon's bid being selected. The Tribunal believes that the only reliable number upon which to base the 10 percent figure is the winning bid itself. Given that there were two bidders, the Tribunal considers that Canyon should be compensated by an amount equal to half of 10 percent of the value of the winning tender or \$6,050.

31. As stated earlier, Canyon also requested its bid preparation costs. In the Tribunal's view, an award of bid preparation costs would ordinarily be incompatible with an award of lost profits. A potential supplier that is awarded a contract, whether or not it profits therefrom, will absorb its bid preparation costs as part of the cost of doing business. Having recommended that Canyon receive half of its lost profits, as calculated above, the Tribunal is of the view that Canyon should likewise absorb its bid preparation costs as part of the cost of doing business.

32. The Tribunal awards Canyon its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline* (Level 1). The procurement was of low complexity, as it involved the installation of 54 signs in various locations throughout Riding Mountain National Park. The complaint was of medium complexity, as it dealt with a matter concerning changes to the requirement between tender issuance and contract award. The complaint proceedings were straightforward, as the inquiry process followed the normal 90-day time frame, there were no interveners, and no motions were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

33. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

34. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that Parks Canada compensate Canyon for its lost opportunity by an amount equal to half of 10 percent of the value of the winning tender or \$6,050.

35. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Canyon its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Parks Canada. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary

indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member