



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-048

Tyco Electronics Canada ULC

*Decision made
Friday, March 21, 2014*

*Decision issued
Monday, March 24, 2014*

*Reasons issued
Friday, April 4, 2014*

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

BY

TYCO ELECTRONICS CANADA ULC

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.
2. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁸ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*⁹ applies. Only the *AIT* applies to the procurement at issue in this complaint.
3. The complaint relates to a procurement (Solicitation No. W8476-134421/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the National Defence (DND) for the provision of military-grade cable assemblies for DND's Land Command Support System (LCSS) in connection with the LCSS life extension project. The Request for Proposal (RFP) in connection with this procurement was issued by PWGSC on October 11, 2013. As discussed in further detail below, PWGSC made a number of amendments to the RFP subsequent to its initial issuance, including two of particular relevance to this complaint, issued on November 25, 2013 (amendment No. 5) and on November 29, 2013 (amendment No. 7).
4. The RFP contained a conditional limitation based on Canadian content certifications. In particular, section 2.2.1 of Part 5 of the RFP unequivocally stated that the procurement is conditionally limited to

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

9. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

Canadian goods, referring bidders to clause A3050T of PWGSC's Standard Acquisition Clauses and Conditions Manual (SACC Manual) in regard to the method for calculating Canadian content. Moreover, the "EVALUATION PROCEDURES" that are set out in Part 4 of the RFP specifically indicate the following:

- (c) The evaluation team will determine first if there are three (3) or more bids with a valid Canadian Content certification. In that event, the evaluation process will be limited to the bids with the certification; otherwise all bids will be evaluated. If some of the bids with valid certification are declared non-responsive, or are withdrawn, and fewer than three responsive bids with a valid certification remain, the evaluation will continue among those bids with a valid certification. If all bids with a valid certification are subsequently declared non-responsive, or are withdrawn, then all the other bids received will be evaluated.

5. Tyco Electronics Canada ULC (Tyco) submitted its tender in response to the RFP on December 11, 2013, the day on which the bid solicitation period closed. PWGSC awarded the contract on January 16, 2014, after which Tyco requested a debrief and clarification on the method used for calculating Canadian content. After receipt of some additional information from PWGSC, Tyco filed a complaint with the Tribunal on March 18, 2014, in regard to the aforementioned procurement.

IMPOSSIBILITY OF MEETING CANADIAN CONTENT REQUIREMENTS

6. Tyco's primary objection relates to Part 4 of the RFP which permitted PWGSC to evaluate only bids indicating that the goods contained 80 percent or more Canadian content, as long as PWGSC received three or more bids containing a Canadian content certification.

7. As PWGSC received three or more bids containing a Canadian content certification, and Tyco's bid contained no such certification, Tyco's bid was not evaluated.

8. Tyco argued that it was unreasonable for evaluators to have relied on the Canadian content certifications in the other bids received by PWGSC, in effect excluding Tyco's bid from consideration. In this respect, Tyco indicated that it is "commonly known" in the cable industry that the goods being procured could not meet a requirement that they contain 80 percent Canadian content. Moreover, Tyco alleged that PWGSC knew that the goods being procured could not contain 80 percent Canadian content, particularly considering that PWGSC required that the goods contain specific foreign-manufactured components, listed in a Technical Data Package Parts List (TDP Parts List), without any permissible substitutions.

9. In the procurement complaint process, an evidentiary burden rests on the complainant to provide the Tribunal with a reasonable indication that there has been a breach of an applicable agreement. In this case, Tyco alleges a breach of the *AIT*, in particular, Article 506(6) which provides as follows:

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.

10. In this case, it was incumbent upon Tyco to demonstrate to the Tribunal how the Canadian content requirement could not have been met by any of the entities involved in the bidding process as opposed to simply stating that, through "common knowledge", this requirement was somehow impossible to meet. Simple allegations are not sufficient, even at this preliminary stage of the complaint process.

11. The preliminary stage of the complaint process, in which the Tribunal decides whether or not to inquire into a complaint on the basis of subsection 7(1) of the *Regulations*, allows much deference and flexibility to the complainant. Yet, for the Tribunal to properly exercise its discretion, the Tribunal must be

satisfied that the allegations put forward have a factual, tangible foundation, such that it can conclude that the complaint discloses a reasonable indication of a breach.

12. In the present case, Tyco alleges that meeting the Canadian content requirement is not possible. Aside from invoking exchanges with PWGSC to this effect, Tyco has not demonstrated that the Canadian content requirement of the RFP could not be met by it or any other bidders.

13. Indeed, Tyco's position essentially amounts to an allegation that the bidders that submitted a Canadian content certification either misunderstood the requirement or were dishonest in the submission of their bids. Tyco, however, provides no evidence that this is the case. Moreover, there is insufficient evidence to support Tyco's allegation that the RFP was designed in such a way that the Canadian content requirements could not be met on the basis of Clause A3050T specifications, especially considering all and any transformation possible within Canada.

14. Although Tyco claims to be the sole source manufacturer of many of the components specified in the TDP Parts List, this fact does not, in and of itself, establish that Canadian content requirements could not potentially have been met by other bidders.

15. Tyco also claims that, prior to making the Canadian content determination, the evaluation team should have verified that the certifications were valid. The Tribunal has consistently held, however, that evaluators are under no such requirement and instead, when a certification is provided, may take it at face value.¹⁰

16. Without a reasonable indication as to the impossibility, as Tyco alleges, of meeting these requirements, the Tribunal is not willing to speculate or accept as "common knowledge" in the field of specialized cable electronics concerning the impossibility to source these goods without any further positive evidence hereto.

17. In the Tribunal's view, Tyco's complaint is akin to a request for the Tribunal to verify that the three or more bidders that provided Canadian content certifications did so appropriately. The Tribunal cannot initiate such an inquiry, as to do so would amount to nothing less than, at best, embarking into the realm of contract administration (which is outside of its jurisdiction), or worse, a "fishing expedition".

18. The Tribunal recognizes that the document contained in Appendix G.1 provides little in the way of guarantees from the bidder as to the formal respect of the Canadian content requirement contained in the RFP. The form itself is a simple "check the box" certificate without an oath or any other formalities. However, it is the document that PWGSC provided, as a specific annex to the bid documents, and it is not for the Tribunal to substitute its judgment for that of PWGSC in regard to what type of certification or guarantees ought to be acceptable. On this note, the Tribunal has repeatedly expressed the view that PWGSC, or other government departments for that matter, has the right to establish its own requirements and determine for itself whether these have been met.¹¹

19. As to whether or not the requirements of this contract can actually be met by the winning bidder in this case is an issue to be determined at the time that the goods are manufactured and delivered and, as such,

10. *Marathon Management Company v. Department of Public Works and Governments Services* (26 April 2007), PR-2006-041 (CITT) at para. 26; *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT).

11. See, for example, *IPSS Inc.* (1 October 2007), PR-2007-056 (CITT). See, also, *Novell Canada, Ltd.* (17 June 1999), PR-98-047 (CITT) at 11, in which the Tribunal held that "... entities, not the Tribunal, are the ones in the best position to determine their needs."

is a matter of contract administration.¹² As the Tribunal has held on many past occasions, issues of contract administration are beyond the scope of the Tribunal's jurisdiction.¹³

LACK OF CLARITY IN CANADIAN CONTENT CALCULATIONS

20. Tyco also claimed that PWGSC improperly evaluated its bid following a discrepancy in the interpretation of section 2.2.1 of the RFP which reflected the Canadian content requirement. Tyco alleges that either the tender documents were unclear to this effect or PWGSC evaluated the bids in a way that did not correspond to the requirements of the RFP, thus breaching the *AIT*.

21. At the outset, the Tribunal notes that this appears to have been a lengthy and rigorous tender process, with several amendments and question and answer exchanges between PWGSC and those intending to submit bids on the RFP. There were, in total, seven amendments to the tender documents, each with a corresponding question and answer exchange.

22. In amendment No. 5, PWGSC clarified that the award of the contract could be based on the aggregate of all line items within a cable family grouping, resulting in the potential for five different individual contracts to be granted on the basis of the RFP. Tyco alleges that this amendment caused confusion as to how the Canadian content rule was to be applied and subsequently led to an evaluation of the bids by PWGSC in a way that differed from the requirements of the RFP.

23. In order to properly address this question, the Tribunal must consider the way in which PWGSC specified the Canadian content rule at sections 2.2.1 and 2.2.2 of the RFP. It is reasonably clear from the tender documents that PWGSC understood the Canadian content rule to be applied in a way where the bidder would certify that a minimum of 80 percent of the total bid price consisted of Canadian goods.

24. Section 2.2.1 of the RFP, in particular, refers to clause A3050T of the SACC Manual to this end and more specifically to paragraph 1 of the clause, which provides as follows:

Canadian good: A good wholly manufactured or originating in Canada is considered a Canadian good. A product containing imported components may also be considered Canadian for the purpose of this policy when it has undergone sufficient change in Canada, in a manner that satisfies the definition specified under the *North American Free Trade Agreement* (NAFTA) Rules of Origin. For the purposes of this determination, the reference in the NAFTA Rules of Origin to "territory", is to be replaced with "Canada". (Consult Annex 3.6(9) of the *Supply Manual*.)

25. This paragraph clearly sets out how one is to interpret the Canadian content requirement.

26. Moreover, section 2.2.1 of Part 5 of the RFP makes reference to a "... a minimum of 80% of the total bid price ..." consisting of Canadian goods, in order to meet the Canadian content requirement of the RFP.

12. See, for example, *Flag Connection Inc.* (3 July 2009), PR-2009-018 (CITT) at para. 16, in which the Tribunal stated that "[a]ny discrepancy between the contract terms and the actual 'deliveries' thereunder becomes a matter of contract administration, which is beyond the Tribunal's jurisdiction."

13. See, for example, *Computer Talk Technology* (26 February 2001), PR-2000-037 (CITT) at 9, in which the Tribunal stated that "... it is HRDC, not a particular supplier or the supplier community, that is responsible for defining its requirements in a solicitation, as long as they are within the existing procurement rules." See, also, *Auto Light Atlantic Limited* (20 January 2010), PR-2009-073 (CITT) at para. 17; *Solartech Inc.* (16 October 2007), PR-2007-058 (CITT).

27. In amendment No. 7 to the RFP, dated November 29, 2013, one bidder specifically asked PWGSC the following question:

Q.34: The Canadian content Certification states that a minimum of 80% of the total bid price must consist of Canadian goods. All of our cable assemblies will be manufactured in Canada but the majority of the parts and material required to manufacture these cable assemblies, are of US origin. We are limited, on the purchase of these parts, to the manufacturer specified on the TDP, which for the most part are in the US or abroad. If these parts are purchased from the manufacturer's Canadian distributor, can they then be considered Canadian content?

28. In response, PWGSC stated as follows:

A.34. Per RFP, PART 5, sections 2.2.1 and 2.2.2: please refer to Annex 3.6(9) example 2 of the Supply Manual, and to SACC Manual Clause A3050T Canadian Content Definition.

29. As indicated above, PWGSC's response to this specific question is to direct bidders to example 2 in Annex 3.6(9) of the SACC Manual as guidance for the bidder in determining whether goods would meet the Canadian content requirements. In the Tribunal's view, at no time does this answer lead to an interpretation of the Canadian content requirements that is unclear or that moves away from the definition indicated in section 2.2.1 of the RFP. PWGSC attempts to guide potential bidders with examples that are provided for in specialized procurement documents that are consistent with the requirements provided for in section 2.2.1.

30. Further, had this explanation by PWGSC been in any way unclear or otherwise raised potential new issues as to how the Canadian content requirement would be interpreted, Tyco should have raised this concern earlier rather than taking a "wait and see" approach. The Tribunal has consistently held that, where there is a lack of clarity or ambiguity in the requirements of an RFP, it is incumbent on the bidder to seek clarification or object to the requirement.¹⁴

31. Had Tyco been able to meet the Canadian content rule on one or another of the five individualized contracts, but not on the whole, it had the option to bid on whichever of those individualized contracts where its goods met or could meet the Canadian content requirement. The opposite is also true. Had Tyco been able to meet the Canadian content requirement on the contract as a whole, it was open to structure its bid accordingly.

32. To perceive some form of ambiguity, following the various amendments to the RFP requirements and the clarifications provided by PWGSC, and yet proceed to bid on the contract as a whole, either being aware that some confusion exists or hoping that it would either succeed on an individual contract for one of the cable family groupings or obtain the contract as a whole, amounts to speculation on behalf of Tyco and cannot be sanctioned as a reasonable indication of a breach of a trade agreement.

33. Consequently, the Tribunal is of the view that nothing in the documents provided by Tyco indicates that the decision to exclude Tyco's bid from consideration on the basis of the Canadian content requirements or the method for calculating those content requirements, as indicated in the RFP and the amendments thereto, contravened Article 506(6) of the *AIT*.

34. As such, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

14. See, for example, *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

35. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

36. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Jason W. Downey

Jason W. Downey
Presiding Member