



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-012

GESFORM International

*Decision made
Monday, May 26, 2014*

*Decision issued
Tuesday, May 27, 2014*

*Reasons issued
Tuesday, June 10, 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

GESFORM INTERNATIONAL

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT

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.

Daniel Petit
Daniel Petit
Presiding Member

Gillian Burnett
Gillian Burnett
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.

SUMMARY OF COMPLAINT

2. GESFORM International's (GESFORM) complaint, filed on May 17, 2014, relates to a Standing Offer Arrangement Request (SOAR) (Solicitation No. 2012-PSU-001) by the Canadian International Development Agency (CIDA)³ for the provision of consultation services in support of the conversion initiative of programme support unit (PSU) projects under the following three work streams: procurement advisor for programme field support services (work stream 1); PSU projects conversion initiative (work stream 2); and PSU project manager (work stream 3).

3. In 2011, following the competitive process of the SOAR, standing offer arrangements (SOAs), which expired on December 31, 2013, were awarded to several winning bidders, including GESFORM. No work was allocated to GESFORM under the SOA that it held. GESFORM alleges "irregularities" [translation], including non-compliance with the "legal, administrative and regulatory provisions of the process"⁴ [translation] by CIDA and/or DFATD in the awarding of the SOAs. GESFORM also alleges that CIDA and/or DFATD engaged in "arbitrary and unfair practices"⁵ [translation].

4. The Tribunal has already examined a similar complaint filed by GESFORM on February 10, 2014 relating to the same procurement.⁶ GESFORM alleged that the award of SOAs under article 7 of the SOAR and article A13 of the SOA was biased and marred by "irregularities". However, GESFORM indicated that it did not then have any evidence in support of its suspicions or assumptions. On the other hand, GESFORM indicated that it was waiting for documents following an access to information request. The Tribunal found that the complaint was premature and informed GESFORM that it would be able to file a new complaint with the Tribunal if it were subsequently able to present to the Tribunal evidence demonstrating a reasonable indication of a breach of one or several obligations pursuant to the *Agreement on Internal Trade*.⁷

5. On May 8, 2014, GESFORM received documents from DFATD in response to its access to information request. Following that, GESFORM filed this complaint, considering that several of these documents supported its allegations of "irregularities" [translation]. In essence, GESFORM alleged that the suppliers selected under this SOAR should not have been selected because they previously held analogous

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

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

3. As of June 26, 2013, CIDA and the former Department of Foreign Affairs and International Trade now form the Department of Foreign Affairs, Trade and Development (DFATD).

4. Complaint at 1.

5. *Ibid.*

6. *GESFORM International* (17 February 2014), PR-2013-040 (CITT).

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

functions with CIDA in “cooperant” positions, which gave them an undue advantage, and that several of them would not have met the criterion of “availability”. GESFORM further alleged unfairness and/or bias in the award of the service contracts based on the reference list for work stream 3.⁸

LEGAL FRAMEWORK

6. In order to conduct an inquiry into the complaint, 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 the trade agreements. In this case, only the *AIT* applies.

7. Article 506(6) of the *AIT* provides that “[t]he 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.” Moreover, the courts have recognized that the Tribunal has jurisdiction to investigate allegations of bias and reasonable apprehension of bias in the process of awarding procurements governed by the trade agreements.⁹

8. Section 6 of the *Regulations* provides as follows:

6.(1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that

(a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) or (2); or

(b) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of . . . Chapter Five of the [*AIT*] . . .

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

8. In its complaint form, GESFORM invoked the Treasury Board’s procurement rules, the *Values and Ethics Code for the Public Sector*, financial rules, contract management rules, etc. The Tribunal has indicated previously that its jurisdiction is limited to the examination of alleged violations of trade agreements (even if these agreements indeed contain obligations similar to those contained in various other rules of the Government of Canada concerning procurement). See *Consortium Genivar – Centre for Asia-Pacific Initiatives* (10 November 2011), PR-2011-042 (CITT).

9. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA).

TRIBUNAL'S ANALYSIS

9. The SOAR provides as follows:

2.2 Conflict of Interest – Unfair Advantage

2.2.1 In order to protect the integrity of the procurement process, bidders are advised that CIDA may reject a proposal in the following circumstances:

- a. if the bidder, any of its proposed subcontractors, or any of its proposed contractors, including their respective employees or former employees, were involved in any manner in the preparation of the RFP;
- b. if the bidder, any of its proposed subcontractors, or any of its proposed contractors, including their respective employees or former employees, were involved in any manner in any other situation of conflict of interest or appearance of conflict of interest;

...

2.2.2 The experience acquired by a bidder who is providing or has provided the services described in the RFP (or similar services) will not, in itself, be considered by CIDA as conferring an unfair advantage or creating conflict of interest. The bidder remains, however, subject to the criteria set out above.

[Translation]

10. In the Tribunal's opinion, there is no evidence on the record demonstrating either a reasonable indication of violation of an obligation of the *AIT* or any indication of bias or reasonable apprehension of bias.

11. Indeed, GESFORM's complaint shows the experience of the individuals selected by CIDA, but article 2.2.2 of the SOAR specifically provides that this could not be held against them. At most, the evidence presented by GESFORM may raise doubts regarding the "availability" of the individuals selected, but this criterion is so closely reserved to the evaluators' judgment that the Tribunal cannot substitute its own judgment to control this aspect of the evaluation, at least not on the basis of the evidence on the record.

12. More fundamentally, while GESFORM states or claims that it based its complaint on what it alleges are "irregularities", the Tribunal is of the view that this is rather a late objection concerning the method of awarding the work set out in article 7 of the SOAR (repeated in section A13 of the SOAs). Ultimately, the very basis of GESFORM's complaint is the finding, undeniable but nonetheless late, that article 7 of the SOAR grants the evaluators almost complete leeway for the final selection of the consultants from the classification list.¹⁰

10. "CIDA's authorized representative (technical officer) will evaluate the CVs of the persons proposed by the Consultants who are part of the chosen classification list of SOA consultants and, following an analysis, will select the person he or she considers most appropriate. The analysis on which the selection is based will be documented in the record. The analysis to select the most appropriate person will consider the frame of reference specific to the request for services, the experience of the proposed person and any other factor determined by CIDA's authorized representative (technical officer)" [translation]. Ultimately, such an evaluation is left completely to the evaluator's judgment (apart from the obligation to document); the criteria are vague, the weighting of the criteria is unknown; unstated criteria are contemplated.

13. If GESFORM had wanted to call this evaluation method into question, it should have done so during the bidding phase or shortly after the closing of the SOAR, and within the time limits provided under section 6 of the *Regulations*. Within these time limits, which are now long past, GESFORM would have been right to raise the fact that section 7 of the SOAR does not provide for any method of weighting the criteria stated therein and leaves the door wide open for the introduction by the evaluators of criteria not stated in the SOAR (“... and any other factor determined by [the] authorized representative . . .”). Precisely because this method was set out by CIDA in the SOAR, this was the rule of the game that GESFORM accepted by submitting its proposal (which was, moreover, selected in the initial stage). It remains that such a ground of complaint should have been formulated no later than 10 or 30 days after the closing date of the SOAR as per the time limit provided under section 6 of the *Regulations*, and because GESFORM did not comply with this time limit, its complaint is therefore time-barred under the law.¹¹

14. The Tribunal adds the following remarks for GESFORM and DFATD.

15. Suppliers must show great and constant vigilance if they do not wish to accept a procurement tainted by an evaluation process based on poorly defined or undefined criteria, as is the case in this instance. At the same time, they should think twice before complaining about a situation that they probably would never invoke if they had been among the winning bidders, or at least should abstain from invoking assumptions that call into question the good faith or integrity of others in the absence of tangible proof to this effect. In this case, it is difficult for the Tribunal to conceive that GESFORM would have complained if it had been awarded the work that went to its competitors – and thus following the same evaluation, based on these same criteria, just as poorly defined, but which would have been favourable to it. If such had been the case, the Tribunal invites GESFORM to think about the stigma that it would have suffered if its competitors had raised the same reasons as those it invoked against them and against the evaluators relative to this complaint, even if, as in the present case, such allegations were ultimately held to be groundless.

16. Also, the Tribunal reiterates that it presumes the good faith and honesty both of the bidders and of the public servants mandated to evaluate their bid.

17. Finally, the Tribunal invites DFATD to do two things.

18. Firstly, DFATD should guard against putting its public service evaluators in an embarrassing situation by proscribing any method of awarding work that gives them too much leeway in evaluation – a situation that too easily gives rise to allegations such as those made in this case. In other words, the evaluators should, as much as possible, be provided with well-established evaluation criteria for which the weighting is known; objective evaluation criteria should be preferred to subjective criteria, whenever possible; moreover, the evaluators should not be authorized to introduce any unstated evaluation criteria whatsoever.

19. Secondly, noting that GESFORM’s complaint was filed outside the time limit, and as it has done regarding other government institutions in the past,¹² the Tribunal invites DFATD to see by what means it could better inform the bidders of their recourses to the Tribunal and, in particular, the means by which they could make them aware of the time limits for filing a complaint with the Tribunal, with a view to preventing

11. Indeed, under section 6 of the *Regulations*, it is presumed that GESFORM reasonably should have known the grounds of its complaint no later than on the date on which it submitted its proposal.

12. *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 63; *ADR Education* (16 July 2013), PR-2013-009 (TCCE) at para. 34; *R.H. MacFarlands (1996) Ltd.* (20 December 2013), PR-2013-029 (CITT) at para. 31.; *Alcohol Countermeasure Systems Corp.* (24 April 2014), PR-2013-041 (CITT) at para. 55.

that a complaint be rejected for inquiry solely on the basis of non-compliance with the time limits. DFATD should therefore consider the inclusion of the following paragraph in the main body of its solicitations and when informing bidders of the possibility of requesting a debriefing, as well as in all letters advising bidders that they are not successful:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) **within 10 working days** from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [DFATD]; if [DFATD] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal's Web site (www.citt-tcce.gc.ca) or by contacting the Secretary of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

20. In light of the above, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

DECISION

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

Daniel Petit

Daniel Petit
Presiding Member