



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-035

Primex Project Management Ltd.

*Decision made
Monday, October 20, 2014*

*Decision issued
Wednesday, October 22, 2014*

*Reasons issued
Thursday, October 30, 2014*

*Corrigendum issued
Friday, November 7, 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

PRIMEX PROJECT MANAGEMENT LTD.

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

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 THE COMPLAINT

2. This complaint relates to a Request for Proposal (RFP) (Solicitation No. W8486-140771/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for repair, overhaul, modification and calibration services for starters and alternators.

3. In its complaint, Primex Project Management Ltd. (Primex) alleged that mandatory requirement (MR) M6, which required bidders to demonstrate access to original equipment manufacturer (OEM) specification updates, service bulletins and engineering support for the work, favoured the incumbent supplier, Patlon Aircraft & Industries Limited (Patlon).

4. Specifically, Primex maintained that the RFP incorrectly identified the OEM of the two alternators for which the successful bidder must provide repair and overhaul services as Patlon and that PWGSC refused to identify the actual OEM when further requested to do so. Primex argued that, because the incumbent supplier was reluctant to share the required OEM information and that bidders could not have access to this information directly from the OEM without knowing the identity of the actual OEM, the RFP therefore provided an unfair advantage to the incumbent.

BACKGROUND INFORMATION

5. On March 31, 2014, PWGSC issued the RFP containing MR M6, which provided as follows:

The Bidder shall demonstrate that they have access to the Original Equipment Manufacturers (OEM) for the receipt of the specification(s) updates, service bulletins and engineering support for the work.

6. The RFP identified the following alternators on which bidders would be required to perform work:

[NATO stock number] 6115-21-906-7859 Generator, Alternating Current (Patlon p/n PA 1266 (80A) and

[NATO stock number] 2920-21-914-3621 Generator, Alternating Current (Patlon p/n PA 1428 (140A)³

7. In its complaint, Primex stated that it had indicated to PWGSC on April 29, 2014, that Patlon was not a manufacturer of alternators and that PWGSC had further refused to identify the actual OEM in its response on May 1, 2014.⁴

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

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

3. Complaint, Annex A, "Objections and Responses Chronology".

4. *Ibid.*

8. Primex claimed that it called PWGSC on or about June 13, 2014, regarding the status of the solicitation and was told that PWGSC would not allow the solicitation to close until DND provided appropriate answers to Primex's questions regarding the OEM and part numbers for the alternators listed in the RFP.⁵

9. During the period from May to July 2014, PWGSC issued a number of amendments to the RFP that delayed the closing date. On July 8, 2014, it issued amendment No. 7, which provides as follows:

Modifying M6 by deleting the clause in its entirety and inserting the following

The Bidder shall [demonstrate] that they have access to the Original Equipment Manufacturers (OEM) specification(s) updates, service bulletins and engineering support for the work either directly with the OEM or through third parties.

10. On July 10, 2014, Primex again objected to PWGSC, stating that this amendment did not answer its question regarding the actual identity of the OEM of the alternators and did not resolve its concern that, as a result, the RFP was designed in a way that only Patlon could submit a compliant bid.⁶

11. Primex did not receive a response from PWGSC before the bid closing on July 15, 2014.

12. Primex proceeded to submit a bid to PWGSC that included its continuing objection to MR M6 of the RFP and in which it requested that PWGSC withdraw the RFP, award the contract through a sole source to Patlon or have DND determine the identity of the manufacturer of the alternators.⁷

13. On August 12, 2014, PWGSC contacted Primex by e-mail and requested that it provide clarifications regarding its bid. In particular, PWGSC requested, with respect to MR M6, that Primex identify in its bid package whether it had access to the required OEM information either directly from the OEM or through third parties.

14. On August 13, 2014, Primex provided responses to PWGSC's request. With respect to MR M6, Primex simply pointed to paragraph 2.3, in which it sets out its objections with regard to this criterion. No further information as to the question put forward by PWGSC was provided.

15. Primex stated that it called PWGSC several times after the solicitation closed in order to determine the status of the solicitation. However, these calls were met with the statement that DND was evaluating.

16. On October 10, 2014, Primex received a notice indicating that its bid had not demonstrated compliance with MR M6 and that the contract had been awarded to Patlon.

17. On October 16, 2014, Primex filed its complaint with the Tribunal.

TRIBUNAL ANALYSIS

18. Upon receipt of a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the complaint meets certain conditions before conducting an inquiry. The first condition is that the complaint be filed within the time limits prescribed by section 6 of the *Regulations*.

5. Complaint, Attachment 2.

6. *Ibid.*, Attachment 5.

7. *Ibid.*, Technical Proposal at 15.

19. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... 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."

20. Subsection 6(2) of the *Regulations* states that a potential supplier who has made an objection 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."

21. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant makes a timely objection, it has 10 working days to file a complaint with the Tribunal after receiving actual or constructive knowledge of a denial of relief from the government institution.

22. As stated above, the RFP was issued on March 31, 2014. Although it is not clear when Primex first became aware of the basis of its complaint, it was clearly aware, on April 29, 2014, of MR M6 and the fact that the RFP may have incorrectly stated the OEM of the alternators for which work was being solicited when it made its first objection. Although not clear, the Tribunal will assume that Primex made its objection to PWGSC within the 10-day limit set out in subsection 6(1) of the *Regulations*.

23. The Tribunal must now determine whether Primex filed its complaint with the Tribunal within 10 working days after having received actual or constructive knowledge of a denial of relief from PWGSC.

24. In the Tribunal's view, it is not clear that PWGSC denied Primex relief until at least July 15, 2014, when the solicitation actually closed. Although PWGSC appears to have refused to provide the name of the OEM in its response to Primex's objection on May 1, 2014, it subsequently appears to have taken steps to address Primex's concerns before the solicitation closed. To that end, PWGSC amended the closing date numerous times and appears to have assured Primex that the bid would not close until appropriate responses were provided to its objection.

25. However, when the bid did close on July 15, 2014, Primex, at this point, had constructive knowledge that PWGSC had not addressed its grievances and, therefore, had denied it relief; after the closing date, PWGSC would no longer be in a position to amend MR M6 or any other part of the RFP. Therefore, in the Tribunal's view, Primex should have filed its complaint with the Tribunal within 10 working days of July 15, 2014. It did not do so; therefore, its complaint is late.

26. This being said, and in an effort to give Primex the most beneficial treatment in the face of a potentially ongoing situation marked by back and forth discussions with PWGSC and the possibility that there may have been a misunderstanding as to what was said and the expectations of the bidder, the Tribunal also considered the possibility of denial of relief as of August 12, 2014, when Primex received a request for additional information from PWGSC. In this case, the Tribunal would still consider Primex's complaint to be late.

27. On August 12, 2014, PWGSC essentially maintained its position in regard to MR M6, asking Primex to specify where, in its bid, it had met the said mandatory requirement. If denial of relief had not been clear to Primex before (which the Tribunal believes it was), this line of questioning by PWGSC should have made it abundantly clear to Primex that the situation regarding MR M6 was not going to change. In the

best of all scenarios, Primex would therefore have had to file its complaint with the Tribunal within 10 working days of August 12, 2014. It did not do so.

28. Primex filed the present complaint on October 16, 2014, which is far beyond the timelines set out in section 6 of the *Regulations*, considering either the July 15 or the August 12, 2014, scenario. The present complaint is therefore late and, according to subsection 6(1) of the *Regulations*, the Tribunal cannot initiate an inquiry.

DECISION

29. 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

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

PRIMEX PROJECT MANAGEMENT LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

CORRIGENDUM

The last sentence of paragraph 28 should have read as follows:

The present complaint is therefore late and, according to subsection 6(2) of the *Regulations*, the Tribunal cannot initiate an inquiry.

By order of the Tribunal,

Jason W. Downey

Jason W. Downey

Presiding Member