



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-062

HTS Engineering Ltd.

*Decision made
Thursday, March 5, 2015*

*Decision issued
Friday, March 6, 2015*

*Reasons issued
Tuesday, March 10, 2015*

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

HTS ENGINEERING 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.

Jean Bédard

Jean Bédard
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. The complaint relates to an Invitation to Tender (ITT) (Solicitation No. EP067-151357/A) issued on January 7, 2015, by the Department of Public Works and Government Services (PWGSC) for construction services to retrofit the first floor of the west tower of the CD Howe Building in Ottawa.

3. HTS Engineering Ltd. (HTS) alleged that the solicitation incorrectly named another company as the only designated contractor able to perform certain work on the Energy Monitoring and Control System (EMCS) in violation of the *Agreement on Internal Trade*.³ HTS submitted that it is the sole authorized dealer in good standing of the relevant EMCS in the province of Ontario and that it should have been included as an approved contractor for this work.

BACKGROUND

4. The ITT, at Part 1.8 of Section 25 05 01 of the EMCS General Requirements contains the following requirement for a designated contractor: "Hire the services of Airtron Canada to complete the work of all EMCS sections."

5. On February 2 and February 3, 2015, HTS wrote to PWGSC and asked to be added as an approved controls contractor in the ITT. On February 4, 2015, PWGSC responded to HTS advising that PWGSC could not provide HTS with an approval.

6. On February 6, 2015, HTS wrote again to PWGSC asking why another company was named as the designated contractor for the EMCS work when that company no longer had direct access to the product line which formed the base building solution.

7. On February 10, 2015, PWGSC responded to HTS stating that it had consulted with the technical authority and had determined that the plans and specifications of the ITT would not be revised.

8. On February 18, 2015, HTS filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

9. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have

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

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

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

been met before being able to conduct an inquiry: (i) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*; (ii) whether the complainant is a potential supplier; (iii) whether the complaint is in respect of a designated contract; and (iv) whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever trade agreement listed in paragraph 7(1)(c) of the *Regulations* applies, which in this case is Chapter Five of the *AIT*.

10. In order to be considered timely, a complaint must be filed with the Tribunal or an objection made to PWGSC within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

11. HTS filed an objection with PWGSC on February 2, 2015.⁴ As the nature of HTS's complaint related to a provision of the ITT, its basis became known or reasonably should have become known to HTS when it first read the ITT.⁵ Therefore, in order for HTS's objection to PWGSC to be considered timely, the date that HTS first read the ITT must have been *no earlier than* January 19, 2015, i.e. 10 working days prior to February 2, 2015.

12. On the basis of the information filed with the complaint, the Tribunal is unable to determine with certainty the date on which HTS first read the ITT. It may have been the date that the RFP was issued, i.e. January 7, 2015, in which case its objection was filed beyond the time limits prescribed by subsection 6(2) of the *Regulations*. On the other hand, HTS may have read the ITT at a later date, in which case its objection could have been timely, provided that this date was on or after January 19, 2015.

13. However, even giving the benefit of the doubt to the complainant with respect to the timeliness of its objection to PWGSC, the Tribunal cannot conduct an inquiry into this complaint because HTS is not a potential supplier.

14. Section 30.1 of the *CITT Act* defines a "potential supplier" as a "... bidder or prospective bidder on a designated contract." In order for HTS to be considered a potential supplier regarding Solicitation No. EP067-151357/A, it would have to be an actual or prospective bidder on the subject procurement.⁶ Neither the complaint nor the supporting material filed with the complaint show that HTS submitted a bid in response to this solicitation. Consequently, on the basis of its review of the complaint, the Tribunal finds that HTS is not a bidder.

15. The Tribunal, in *Flag Connection*,⁷ considered that a "prospective bidder" must (1) have the technical and financial capability of fulfilling the requirement that is the subject of the procurement; and (2) still have the capacity to submit a bid in response to the solicitation.

16. For the reasons that follow, the Tribunal finds that HTS fails to meet these criteria. With respect to the first criterion, there is no evidence that HTS has the technical or financial capability of fulfilling all of the

4. Procurement Complaint at 6, 15-17.

5. *Questcom Consulting Inc. v. Department of Public Works and Government Services* (14 April 2004), PR-2002-055 (CITT); *Fisher, Folta IRM Inc.* (21 November 2003), PR-2003-062 (CITT).

6. The Tribunal has previously stated that an alternative for complainants who are not potential suppliers is to file a Notice of Representation wherein an actual or prospective bidder would expressly authorize the complainant to act as its representative before the Tribunal. See, for example, *DJC Security Design* (29 September 2004), PR-2004-034 (CITT).

7. *Flag Connection Inc. v. Department of Public Works and Government Services* (3 September 2009), PR-2009-026 (CITT) at para. 20 and footnote 12.

requirements of the ITT, which include heating, air conditioning, mechanical and painting services as well as security and other requirements. Rather, the evidence shows that HTS is a potential subcontractor who would like to be included as an approved contractor for the EMCS portion of this project. With respect to the second criterion, HTS no longer has the capacity to submit a bid in response to this solicitation as the solicitation closed on February 10, 2015.

17. As part of its complaint, HTS filed an estimate that was provided to a general contractor for the performance of the required EMCS work.⁸ This estimate further supports the view that HTS's role in this procurement process was that of a potential subcontractor rather than a bidder or prospective bidder, and the Tribunal finds accordingly.

18. The Tribunal therefore finds that HTS is not a potential supplier in respect of the designated contract that is the subject of this inquiry (i.e. Solicitation No. EP067-151357/A) and that, for that reason, it does not have standing to file this complaint.

DECISION

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

Jean Bédard
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Presiding Member

8. Procurement Complaint at 45-49.