



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File Nos. PR-2014-054 and
PR-2014-056

Monroe Solutions Group Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Wednesday, June 10, 2015*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 SUMMARY 1

 PROCEDURAL HISTORY 1

 OVERVIEW OF THE PROCUREMENT AT ISSUE 1

 TRIBUNAL ANALYSIS..... 3

 ORDER..... 4

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

AND FURTHER TO a decision to conduct inquiries into the complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a notice of motion filed pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, by the Department of Public Works and Government Services requesting an order ceasing the inquiries.

BETWEEN

MONROE SOLUTIONS GROUP INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal orders the dismissal of the complaints because it has determined that the complaints have no valid basis.

Peter Burn
Peter Burn
Presiding Member

STATEMENT OF REASONS

SUMMARY

1. On February 12, 2015, Monroe Solutions Group Inc. (Monroe) filed two complaints with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Call for Proposals (CFP) under Solicitation No. W2207-12CSSP/E by the Department of Public Works and Government Services (PWGSC) on behalf of Defence Research and Development Canada, Centre for Security Science, for the provision of project proposals for investments under the Canadian Safety and Security Program (CSSP).

2. Monroe's grounds of complaint are that PWGSC relied on ambiguous evaluation criteria and misapplied the evaluation criteria set out in the CFP in evaluating Monroe's proposals.

3. For the reasons that follow, the Tribunal has determined that there is no valid basis to the grounds of complaint. Accordingly, the complaints are dismissed.

PROCEDURAL HISTORY

4. On September 9, 2014, PWGSC issued a CFP for projects requiring science and technology (S&T) investment funding. The bid closing date was October 8, 2014.

5. Monroe submitted two proposals, one for improved explosive ordnance disposal bomb detection robotics and one for a trauma stabilization platform. On December 3 and 4, 2014, Monroe was informed that its proposals had not been selected to continue to the next stage of the process. Monroe filed objections with PWGSC on December 10, 2014.

6. On December 16 and 17, 2014, Monroe filed its first complaints with respect to this solicitation process.² However, those complaints were found to be premature on the basis that Monroe had not yet received a response to its December 10, 2014, objections.

7. On February 12, 2015, Monroe filed the current complaints, which were accepted for inquiry on February 13, 2015.

8. On March 27, 2015, PWGSC filed a motion requesting an order ceasing the inquiries.

OVERVIEW OF THE PROCUREMENT AT ISSUE

9. Monroe's complaints concern the third CFP issued under the CSSP. According to the CSSP Bidder Guidebook (the Guidebook), which is incorporated by reference into the CFP, the CSSP's mission is to "... strengthen Canada's ability to anticipate, prevent/mitigate, prepare for, respond to, and recover from acts of terrorism, crime, natural disasters, and serious accidents through the convergence of science and technology with policy, operations and intelligence."³ It achieves this mission through investing in

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

2. (18 December 2014), PR-2014-044 (CITT); (22 December 2014), PR-2014-045 (CITT).

3. Guidebook at 1.

“... S&T solutions, support and advice to respond to Canada’s public safety and security imperatives.”⁴ These imperatives are reflected in the list of CSSP investment priorities in Annex A to the Guidebook.

10. More specifically, the objective of the CFP itself is to “... engage industry, academia and other levels of government in collaborative research projects with those government departments and agencies that have both the subject matter and project management expertise to contribute S&T solutions for Canadian public safety and security outcomes.”⁵

11. Four types of projects are considered for funding under the CSSP - “Studies”, “Research and Development”, “Technology Demonstration” and “Technology Pilots”. The amount and duration of funding vary in accordance with the type of project, with “Studies” attracting the least (maximum 12 months and \$100,000 in funding) and “Technology Pilots”, the most (maximum 36 months and \$2 million in funding).

12. All proposed projects must have a minimum of two partner organizations: one must be a Canadian government department (federal, provincial, municipal or territorial), and the other partner can be from the private, academic or public sector, either Canadian or international. However, if the second partner is an international organization, 50 percent of the work done on the project must be Canadian content.

13. The Guidebook sets out a three-stage screening process for inclusion in the CSSP. At the first stage, applicants must prepare a synopsis proposal, which is evaluated against a set of mandatory criteria and then against a set of point-rated criteria. The mandatory criteria are that the proposal must relate to one or more of the of the investment priority areas, be categorized by type, adhere to duration and funding caps for that type, indicate the level of co-investment contribution that the applicant is willing to make and include a “quad chart”. The point-rated criteria are the project’s alignment with and relevance to the priority area, its feasibility, its novelty, the value for money that it represents, and its potential to impact policy, operational or intelligence capabilities. Synopsis proposals must achieve a minimum of 70 percent on the point-rated criteria in order to advance to the next stage.

14. The authors of proposals that are successful at the synopsis stage will be invited to submit a full proposal. The full proposal must include a detailed description of the technical approach that will be taken to develop the S&T solution, the specific tasks and deliverables by phase, a schedule and cost estimate by phase, and transition planning. The full proposal must also include a draft statement of work (SOW), an updated quad chart, CVs, a list of previous projects completed by the authors of the proposals and letters of support. The full proposal is evaluated against similar point-rated criteria as the synopsis proposal and must also achieve an overall score of 70 percent to be recommended for funding.

15. The top-ranked proposals, by score, are placed in the pre-qualified pool of proposals until all the funding is exhausted. The proposals then enter the contracting stage of the process. At this stage, all details of the contract must be negotiated, such as the SOW, payment details, limitation of liability, and whether Canada will receive a report, demonstration and/or prototype at the end of the research project. In addition, Canada may request additional information to confirm that the entity has the technical, financial and managerial competence to discharge the contract. If all terms and conditions are not successfully negotiated, no contract is awarded, and no funding is provided.

4. Guidebook at 2.

5. Guidebook at 4.

16. For those proposals for which a contract is successfully negotiated, the government department identified as a partner receives funds from PWGSC and is responsible for disbursing those funds to the other partner in order to pay for the goods or services received.

TRIBUNAL ANALYSIS

17. PWGSC's motion raises two potential grounds for dismissal. PWGSC's primary argument is that Monroe's complaints are not in respect of a "designated contract", which is one of the conditions that complaints must meet in order for the Tribunal to conduct an inquiry, as set out in section 7 of the *Regulations*. PWGSC submits that the CSSP is a government assistance program and not a government procurement.

18. PWGSC relies on Article 518 of the *Agreement on Internal Trade*,⁶ which carves out "any form of government assistance" from the definition of "procurement", to support this argument, and which provides as follows:

procurement means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

- (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
- (b) government provision of goods and services to persons or other government organizations.

19. In the alternative, PWGSC argues that there is a designated contract formed at the end of the process described by the CFP, but it is not subject to the competitive disciplines of the trade agreements, on the basis that it is a sole-source contract.

20. The Tribunal cannot accept PWGSC's first argument. Ultimately, the process described above results in the award of contracts for the supply of goods or services to the government partner departments.⁷ This would appear to fit within the definition of "procurement" set out above and with the definition of "designated contract" set out in the *CITT Act* and the *Regulations*. The CSSP cannot be characterized as simply a government assistance program, because the government does derive a benefit from it. Traditionally, the types of "government assistance" enumerated in the definition are one-sided, with only the recipient of the assistance deriving any concrete benefit. Instead, the agreement entered into under the CFP most resembles a contract as commonly understood in law, i.e. a mutually beneficial arrangement where goods or services are acquired in return for valuable consideration.

21. However, the Tribunal accepts PWGSC's alternative argument. While there is a "designated contract" that is created, the circumstances of this process appear to fit within the terms of Article 506(12)(h) of the *AIT* which provides as follows:

12. Where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances:

...

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

7. The CFP and Guidebook do not contemplate a scenario whereby the government partner would be responsible for providing goods or services to the other, non-government partner, nor do they include a scenario where the non-government partner would be responsible for administering the funding.

- (h) for the procurement of a prototype or a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases.

22. The process described in the CFP has the rather unique result that the types of goods and services that are successful in the funding process are not *responding to* an already identified government requirement, but rather are *informing* that need. By definition, therefore, only one supplier, the non-government partner in a given proposal, will be “able to meet the requirements of a procurement”, and the condition set out in Article 506(12) is met.

23. The procurement of S&T goods or services for the purpose of helping companies test and evaluate them also seems to fit with the circumstance described in Article 506(12)(h) of the *AIT*. The requirement that the contract not concern any subsequent purchases is also met, as the CSSP does not guarantee the purchase of the products by the partner department, or any other branch of government, once they become commercially available.

24. Monroe’s grounds of complaint were that PWGSC relied on undisclosed evaluation criteria and misapplied the evaluation criteria when evaluating its proposals. Tribunal jurisprudence establishes that these grounds of complaint are based in Article 506(6) of the *AIT*, which provides that “. . . [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.”⁸

25. Since Article 506(12) of the *AIT* permits the use of “procurement procedures that are different from those described in paragraphs 1 through 10” of Article 506, it follows that PWGSC was not bound to respect the procedural requirement set out in Article 506(6) when evaluating proposals made in response to this CFP. As a result, Monroe’s complaints have no valid basis.

ORDER

26. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal orders the dismissal of the complaints because it has determined that the complaints have no valid basis.

Peter Burn
Peter Burn
Presiding Member

8. See, for example, *Team Sunray and CAE Inc. v. Department of Public Works and Government Services* (25 October 2012), PR-2012-013 (CITT); *Bell Canada* (26 September 2011), PR-2011-031 (CITT); *Excel Human Resources Inc. (operating as excellTR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT).