



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-020

Visiontec (2008) Limited

*Decision made
Monday, July 27, 2015*

*Decision and reasons issued
Tuesday, July 28, 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

VISIONTEC (2008) LIMITED

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.

Peter Burn _____
Peter Burn
Presiding Member

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. The complaint filed by Visiontec (2008) Limited (Visiontec) concerns a Request for Proposal, Solicitation No. W8476-112713/D, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of hazard detecting instruments and apparatus.

3. Visiontec alleged that PWGSC awarded the contract to a non-compliant bidder and that PWGSC materially altered the bid process by removing one of the mandatory criteria. Visiontec further submitted that, instead of amending the solicitation, PWGSC should have cancelled it and retendered the bid.

4. As a remedy, Visiontec requested the termination of the contract awarded and a retendering of the bid, along with its complaint costs.

PROCUREMENT PROCESS

5. On August 12, 2014, PWGSC issued Solicitation No. W8476-112713/D with a closing date of September 22, 2014.

6. On April 20, 2015, PWGSC notified bidders that it had decided to remove the mandatory laboratory testing phase from its criteria.

7. On May 5, 2015, PWGSC informed Visiontec and other potential suppliers that Patlon Aircraft and Industries Limited (Patlon) was the successful bidder.

8. On May 14, 2015, Visiontec wrote to PWGSC objecting to, and protesting, the award of the contract to Patlon.

9. On July 8, 2015, PWGSC responded to Visiontec's objection.

10. On July 22, 2015, Visiontec filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

11. 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."

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

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

12. Subsection 6(2) of the *Regulations* provides 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.”

13. In other words, 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 objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

14. Potential suppliers are therefore expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the procurement process.³ The process is meant to be expeditious; adopting a wait-and-see attitude is precisely what the process and the *Regulations* seek to discourage.⁴

15. Visiontec had actual knowledge of the amendment on April 20, 2015, when the amendment was sent to it for a signature. Ten working days after that date was May 4, 2015. The complaint was filed on July 22, 2015, only after the contract was awarded. The Tribunal therefore finds that the complaint was not filed within the time limit prescribed by subsection 6(2) of the *Regulations*.

16. That being said, the Tribunal believes that it is worthwhile to point out that Visiontec appears to have established a *prima facie* case that PWGSC may have acted in contravention of the *Agreement on Internal Trade*.⁵ PWGSC altered the evaluation methodology after bids closed and while evaluation was in fact ongoing, raising valid questions as to the procedural fairness of the tendering process. As a result, the complaint by Visiontec is one that would have been accepted for inquiry but for the fact that the complaint was not filed within the prescribed time limit.

17. The Tribunal notes that PWGSC did not notify Visiontec or the other potential suppliers that they were entitled to recourse with the Tribunal when the amendment was made on April 20, 2015. Given the tight timelines for filing a complaint with the Tribunal, PWGSC should consider the inclusion of the following paragraph in the main body of its solicitations, any substantive amendments, communications informing bidders of the possibility of requesting a debriefing and all letters informing bidders when they are not successful:

As a general rule, a complaint regarding any aspect of 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 [PWGSC]; if [PWGSC] 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 Registrar of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

3. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

4. *Ibid.* at para. 28; *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10.

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

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

DECISION

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

Peter Burn _____

Peter Burn

Presiding Member