



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-027

Coastal Hydropower
Corporation/Sawer-Douro Hydro
LP

*Decision made
Friday, September 11, 2015*

*Decision issued
Wednesday, September 16, 2015*

*Reasons issued
Monday, September 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

COASTAL HYDROPOWER CORPORATION/SAWER-DOURO HYDRO LP

AGAINST

PARKS CANADA AGENCY

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

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. This complaint by Coastal Hydropower Corporation (Coastal) and Sawyer-Douro Hydro LP (SDH) (together, Coastal/SDH) concerns a Request for Proposal (RFP) by Parks Canada Agency (Parks Canada) for water power development. The RFP required bidders to submit proposals that included “. . . the design, development, construction, occupation and operation of water power sites for the generation of hydroelectric power at locks 24 and 25 of the Trent Severn Waterway [National Historic Site of Canada] independently or in concert.”³ Bids closed on November 22, 2010.

3. Successful bidders were to be subsequently licensed pursuant to the *Dominion Water Power Act*⁴ and the *Dominion Water Power Regulations*.⁵

4. On January 21, 2011, Parks Canada informed Coastal that it was the successful bidder. Coastal was then invited to apply for a priority permit, as provided under sections 4 and 7 of the *DWPA*, in order to begin preliminary work on the project.⁶

5. On October 20, 2011, Coastal was granted a priority permit, valid for one year from the date of issuance.⁷ In October 2012, Parks Canada extended the validity of Coastal’s permit, allowing it to remain valid until October, 2013.⁸ On November 27, 2013, Coastal was informed that its permit had expired, as it had failed to submit a completed application for an interim licence within the required time frame.⁹

6. On November 21, 2014, through a project-specific limited partnership by the name of SDH, Coastal/SDH submitted a new application for a priority permit under sections 3 and 4 of the *DWPR*.¹⁰

7. On April 16, 2015, Parks Canada rejected SDH’s application on the basis that it did not meet the requirements of sections 3 and 7 of the *DWPR*.¹¹

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. RFP, amendment No. 2 dated November 12, 2010, at 5.
 4. R.S.C., 1985, c. W-4 [*DWPA*].
 5. C.R.C., c. 1603 [*DWPR*].
 6. Complaint, supporting document No. 2.
 7. *Ibid.* No. 4.
 8. *Ibid.* No. 7.
 9. *Ibid.* No. 13.
 10. *Ibid.* No. 18.
 11. *Ibid.* No. 21.

8. On August 18, 2015, Coastal/SDH addressed their concerns to the Office of the Procurement Ombudsman (OPO). On September 1, 2015, the OPO directed Coastal/SDH to the Tribunal.

9. The complaint was filed with the Tribunal on September 9, 2015. Coastal/SDH requested either (a) that a declaration by Parks Canada that Coastal has met the priority permit requirements, or (b) that Coastal is entitled to recover costs related to the project in the amount of \$1 million.

10. On September 11, 2015, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for that decision are as follows.

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.”

12. Subsection 6(2) of the *Regulations* provides that a potential supplier that 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. In the Tribunal’s view, Coastal/SDH became aware, or reasonably should have become aware, of its first ground of complaint, namely, that Parks Canada inappropriately withdrew its priority permit, when it was notified on November 27, 2013, that its permit has expired. The Tribunal determined that Coastal/SDH became aware, or reasonably should have become aware of its second ground of complaint when its re-application for a priority permit was rejected by Parks Canada on April 16, 2015.

15. At that time, Coastal/SDH would have had until April 30, 2015 (i.e. 10 working days after April 16, 2015) to either object to Parks Canada or file a complaint with the Tribunal.

16. The Tribunal, therefore, does not have jurisdiction to inquire into the complaint, as it was not filed in a timely fashion. Coastal/SDH neither objected to the rejection of its application by Parks Canada before April 30, 2015, nor did it file its complaint with the Tribunal before that date, as required by section 6 of the *Regulations*. The complaint was not filed with the Tribunal until September 9, 2015 (over 70 working days after April 16, 2015) and therefore was not filed in a timely manner.

17. The Tribunal also notes that, even if the complaint was not time-barred, it is unclear whether the solicitation at issue would be covered by the relevant trade agreements. Specifically, the trade agreements each indicate a minimum monetary threshold for a procurement to be covered.¹² The RFP, which involved

12. For example, the threshold under the *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>, is \$25,000 for the procurement of goods and \$100,000 for the procurement of services.

the granting of a licence to a licensee for the development of waterpower sites, did not provide a value for the procurement. It is therefore unclear whether this complaint would have met the monetary threshold requirements of the trade agreements.

18. Finally, the Tribunal's jurisdiction focusses more specifically on the solicitation process than on the issues raised by Coastal/SDH. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "... any aspect of the procurement process ..." which encompasses all elements of the procurement cycle up to and including contract award. Matters of contract administration¹³ or related regulatory approval issues are typically beyond the scope of the Tribunal's jurisdiction and, therefore, may more properly fall within the purview of the courts. Coastal/SDH may wish to consult legal counsel to ascertain what contractual or judicial review rights, if any, may be pursued.

19. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

DECISION

20. 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

13. See for example, *Sunny Jaura o/a Jaura Enterprises* (21 February 2013), PR 2012-043 (CITT) at para. 10; *Auto Light Atlantic Limited* (20 January 2010), PR-2009-073 (CITT) at para. 17; *Solartech Inc.* (16 October 2007), PR-2007-058 (CITT).