



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-054

Toromont Cat

*Decision made
Friday, January 22, 2016*

*Decision issued
Thursday, January 28, 2016*

*Reasons issued
Thursday, February 4, 2016*

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

TOROMONT CAT

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

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.

2. This complaint relates to a Request for Proposal (RFP) for diesel generator sets (Solicitation No. ET959-160116/001/B issued by the Department of Public Works and Government Services (PWGSC)).³ The contract was awarded to Cummins Est Du Canada SEC (Cummins).

3. Toromont Cat alleged that PWGSC improperly found Cummins' bid to be compliant, as some of the mandatory requirements were not commercially or technically viable. As a remedy, Toromont Cat requested that all bids be re-evaluated and, if no bid was found to be compliant with the RFP, that a new solicitation be issued.

4. The Tribunal has reviewed the complaint filed by Toromont Cat. The Tribunal finds that the complaint was not submitted within the time frames specified in subsection 6(1) of the *Regulations*. Moreover, as set out in the reasons below, the complaint does not disclose a reasonable indication of a breach of the any of the trade agreements listed at paragraph 7(1)(c). Consequently the Tribunal cannot conduct an inquiry into this complaint.

BACKGROUND

5. PWGSC issued the solicitation on October 15, 2015, and the solicitation closed on December 14, 2015.

6. On November 12, 2015, Toromont Cat wrote to PWGSC to request clarification on certain mandatory requirements contained in the RFP.

7. PWGSC responded to Toromont Cat's concerns in its e-mail of November 18, 2015, and also through the publication of amendment No. 001 to the RFP (issued on November 16, 2015), amendment No. 002 to the RFP (issued on November 30, 2015) and amendment No. 003 to the RFP (issued on December 2, 2015).

8. Toromont Cat submitted its bid to PWGSC on December 11, 2015.

9. On January 7, 2016, PWGSC informed Toromont Cat that its proposal was non-compliant because its bid did not meet certain mandatory requirements and that Cummins was the winning bidder.

10. On January 11, 2016, Toromont Cat wrote to PWGSC to challenge the award of the contract and to request confirmation and evidence demonstrating that Cummins had met all the mandatory requirements.

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

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

3. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services would be changed to Public Services and Procurement Canada.

11. On January 12, 2016, PWGSC responded to Toromont Cat and declined to provide the requested documentation.

12. On January 20, 2016, Toromont Cat filed this complaint with the Tribunal.

ANALYSIS

Timeliness

13. 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.” In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have been 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 its complaint, Toromont Cat did not contest PWGSC’s finding that its own bid did not meet all the mandatory requirements of the RFP. Rather, Toromont Cat asserted that mandatory requirements 6.3, 9.6, 9.8, 9.11 and 9.12 (the requirements in issue) were impossible to meet, as they were either commercially or technically not viable. As a result, Toromont Cat argued that Cummins could also not have met the requirements in issue and should not have been awarded the contract resulting from the RFP.

15. The requirements in issue which Toromont Cat now asserts were impossible to meet were made available to Toromont Cat on October 15, 2015, when the RFP was issued. It is well established that, if a potential supplier believes that the criteria set out in an invitation to tender is overly stringent or impossible to meet, it must file a complaint in a timely manner. A complainant may not accumulate grievances only to present them after its bid is rejected.⁴

16. The Tribunal notes that Toromont Cat did identify several potential issues with the RFP, and the mandatory criteria in particular, in an e-mail sent to PWGSC on November 12, 2015.⁵ However, PWGSC responded to those concerns in its reply of November 18, 2015, and through the publication of the amendments to the RFP on November 16, November 30 and December 2, 2015. Upon reviewing PWGSC’s reply and the responses in the relevant amendments, Toromont Cat should have been aware of any outstanding issues that it believed remained in the RFP and in the requirements in issue in particular.

17. Toromont Cat submitted its bid on December 11, 2015, prior to the deadline for the submission of proposals of December 14, 2015. It is assumed that Toromont Cat reviewed the amendments and PWGSC’s reply before submitting its bid. As such, the Tribunal finds that the last possible date on which Toromont Cat could have become aware of any outstanding problems with the requirements in issue, and PWGSC’s position with respect to its concerns, was December 11, 2015.

4. *APM Diesel 1992 Inc.* (15 February 2012), PR-2011-052 (CITT) at para. 15; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18-21.

5. See attachment to complaint.

18. It follows that Toromont Cat would have had to file the complaint no later than 10 working days following December 11, 2015, or by December 29, 2015.⁶ Given that the complaint was not filed until January 20, 2016, the Tribunal finds that it was not filed in accordance with the timelines specified in section 6 of the *Regulations* and that it will therefore not inquire into the complaint.

Reasonable Indication of a Breach

19. Even if the complaint were not time-barred, the information before the Tribunal does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements, as set out in paragraph 7(1)(c) of the *Regulations*, which are the *North American Free Trade Agreement*,⁷ the *Agreement on Internal Trade*,⁸ the *Agreement on Government Procurement*,⁹ the *Canada-Chile Free Trade Agreement*,¹⁰ the *Canada-Peru Free Trade Agreement*,¹¹ the *Canada-Colombia Free Trade Agreement*,¹² the *Canada-Panama Free Trade Agreement*¹³ and the *Canada-Korea Free Trade Agreement*.¹⁴

20. The Tribunal has previously stated that a ground of complaint must have some evidentiary basis to suggest that there was a breach of the relevant trade agreements.¹⁵ Beyond an assertion made in its complaint, Toromont Cat did not provide any documentation to substantiate its claim that PWGSC improperly evaluated Cummins' bid in finding that it met the requirements in issue. Moreover, while Toromont Cat insisted that it should be provided with documentary evidence to prove whether or not

6. As day 10 fell on December 25, 2015, which was a holiday, the complaint would have had to have been filed on the next working day, being December 29, 2015.

7. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994).

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

9. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014).

10. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en>> (entered into force 5 July 1997). Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

11. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng>> (entered into force 1 August 2009).

12. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng>> (entered into force 15 August 2011).

13. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

14. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-corea/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).

15. *Flag Connection Inc.* (30 July 2013), PR-2013-010 (CITT) at paras. 23-24; *The Powel Group – TPG Technology Consulting Ltd.* (28 November 2003), PR-2003-065 (CITT).

Cummins met the requirements in issue, the Tribunal has repeatedly held that the purpose of a complaint is not to allow complainants to engage in a “fishing expedition” to find evidence to use in a complaint.¹⁶

21. Therefore, the Tribunal finds this ground of complaint to be entirely speculative and does not consider that it reasonably indicates that PWGSC awarded the contract in a manner that was not in accordance with the applicable trade agreements.

DECISION

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

Peter Burn

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Presiding Member

16. *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP* (5 September 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 12; *Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (10 September 2010), PR-2010-004 to PR-2010-006 (CITT) at para. 70.