



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-066

Vanderbeken Enterprises Ltd.  
dba Drycake

*Decision made*  
*Wednesday, March 9, 2016*

*Decision issued*  
*Monday, March 14, 2016*

*Reasons issued*  
*Wednesday, March 16, 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**

**VANDEBKEN ENTERPRISES LTD. DBA DRYCAKE**

**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.

Daniel Petit \_\_\_\_\_  
Daniel Petit  
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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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) (Solicitation No. W8476-165399/A) for the supply of a deployable wastewater lagoon system (DWLS) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence.

3. Vanderbeken Enterprises Ltd. dba Drycake (Drycake) alleges that its proposal was improperly deemed non-compliant with the mandatory criteria of the RFP. It also alleges that the procurement process was biased in favour of the winning bidder.

### ANALYSIS

4. The Tribunal cannot initiate an inquiry unless all prescribed conditions in respect of the complaint are met. Among such conditions, the Tribunal must determine the following:

- whether the complaint discloses a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements, as set out in paragraph 7(1)(c) of the *Regulations*; and
- whether the complaint was filed within the deadlines prescribed by section 6 of the *Regulations*.

5. The complaint does not meet these conditions.

### No Reasonable Indication that PWGSC Rejected Drycake's Bid Inconsistent with the RFP Criteria

6. The two mandatory criteria on the basis of which Drycake's bid was rejected were set out in Annex C to the RFP and read as follows:

#### 2. MANDATORY CRITERIA

Responses to the mandatory requirements set forth in this section will be evaluated on a simple, stringent pass/fail basis. Proposals not meeting each and every one of the mandatory requirements identified in the tables below will be considered non-compliant and given no further consideration.

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

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

## 2.1 The Bidder must provide:

Description of Requirement	Cross-reference to bid documents (page/paragraph)
a) Submit a full Technical Proposal showing the company has an understanding of the requirement and demonstrating the approach they would take to produce the required Deployable Wastewater Lagoon System. This should include, but not necessarily be limited to, the requirements specified in Section 3.2.2 of the Statement of Work . . . .	
...	
c) Demonstrate history of directly related experience in the supply to any Canadian Government Entity [of] a minimum of five (5) CSC Certified ISO 20ft Containers in the last five (5) years from the date of bid closing.	
...	

7. The Tribunal finds no reasonable indication that Drycake's proposal was rejected unreasonably on the basis of these criteria, in violation of the trade agreements.

8. Regarding mandatory criterion 2.1c), Drycake *admits*, in its complaint, that the requirement to show "... supply of 5 x 20' containers is indeed not met . . ." However, Drycake argues that "[t]he spirit of this requirement is that [the] supplier is familiar with [the] supply of containers that comply with the International transport." Its position is essentially that PWGSC interpreted and applied this criterion too narrowly.

9. Drycake's interpretation finds no support in the language of the RFP. Mandatory criterion 2.1c) unambiguously refers to experience in the supply of "CSC Certified ISO 20ft Containers". Furthermore, Annex C to the RFP expressly indicated that compliance with the mandatory criteria would be evaluated stringently and that "[p]roposals not meeting each and every one of the mandatory requirements identified . . . will be considered non-compliant and given no further consideration."

10. Thus, and in light of Drycake's admission that its bid did *not* strictly meet mandatory criterion 2.1c), there is no reasonable indication that Drycake's proposal should have been deemed compliant with this criterion. Given this conclusion and the fact that *all* mandatory criteria had to be met, PWGSC was indeed required to reject Drycake's proposal on this basis, in and of itself.

11. The Tribunal will nevertheless briefly address Drycake's arguments regarding mandatory criterion 2.1a), for which its proposal also received a "fail" evaluation. The evaluators found that Drycake's bid had not demonstrated the approach that it would take to produce the DWLS.

12. As evidence that it had fully addressed mandatory criterion 2.1a), Drycake points to two brief paragraphs from its proposal, where it indicates, in sum, that it sources products previously evaluated and selected by the Canadian Armed Forces and that its bid includes the specifications for the components of the DWLS. It further submits that the RFP only related to the purchasing of the materials and components for the DWLS, not to the engineering or installation of the system.

13. Mandatory criterion 2.1a) required bidders to *demonstrate* their approach to producing the DWLS. In its ordinary meaning, the verb “demonstrate” means to “. . . describe and explain . . . with the help of examples, experiments, practical use, etc. . . . logically prove the truth of . . . be proof of the existence of . . . .”<sup>3</sup>

14. The passage from its bid to which Drycake refers appears to be a simple statement rather than a demonstration of its approach to producing the required DWLS. Furthermore, correspondence between the parties submitted with the complaint shows that PWGSC gave Drycake several opportunities to clarify where this requirement was addressed in its bid. PWGSC ultimately determined that Drycake had not demonstrated its approach as required by mandatory criterion 2.1a).

15. On the basis of the information included in the complaint, the Tribunal therefore finds no reasonable indication that PWGSC either wrongly interpreted the mandatory criteria of the RFP or failed to diligently consider relevant information included in Drycake’s bid.

16. Finally, Drycake also argues that it was unreasonable for PWGSC, in evaluating its proposal, to disregard certain additional information submitted by Drycake on November 18, 2015, in response to requests for clarification from PWGSC. There is again no reasonable indication that PWGSC treated such information improperly.

17. Bid repair involves “. . . the improper alteration or modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed.”<sup>4</sup> The prohibition against bid repair ensures that all bidders are given a fair and equal opportunity in the bid evaluation process.

18. The information submitted by Drycake on November 18, 2015, provided details and explanations not included in Drycake’s original bid, which could have been potentially relevant to the mandatory criteria. As such, this new information was akin to an attempt to supplement a key, substantive aspect of Drycake’s bid, namely, its compliance with the mandatory criteria of the RFP. Consequently, there is no indication that PWGSC inappropriately declined to consider such additional information.

19. In conclusion, the Tribunal finds no reasonable indication that Drycake’s bid was improperly deemed non-compliant in breach of the trade agreements.

### **No Reasonable Indication of Bias and Late Challenge of the Choice of Criteria for the RFP**

20. Drycake further argues that the procurement was biased in favour of the winning bidder, Dew Engineering. In addition, it argues, in its complaint, that the requirement in mandatory criterion 2.1c) to show experience in the supply of a specific *size* of container (“CSC Certified ISO 20ft Containers”) is evidence that the requirement was tailored to “. . . the sales record of an existing supplier . . . .”

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3. *Canadian Oxford Dictionary*, 2nd ed., s.v. “demonstrate”.

4. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 127; *Raymond Chabot Grant Thornton Consulting Inc. and PriceWaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 45, citing *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT) at para. 55.

21. Drycake has provided no documentation or other evidence in support of this allegation. As such, the Tribunal finds that this allegation is speculative<sup>5</sup> and discloses no reasonable indication of bias in breach of the trade agreements.

22. Furthermore, it is too late for Drycake to challenge the choice of the criteria for this RFP. As stated above, section 6 of the *Regulations* sets out strict deadlines within which potential suppliers may challenge aspects of a procurement process. Specifically, section 6 requires potential suppliers to file their complaints (or, alternatively, to object to the government institution) within 10 working days from the day on which the basis of the complaint became known or reasonably should have become known to them.

23. The RFP was issued on September 25, 2015, and the Tribunal considers that Drycake would reasonably have reviewed the RFP on or around that date. Any concerns about a potentially restrictive or unfair effect of mandatory criterion 2.1c) should also reasonably have become apparent to Drycake at such time.

24. In accordance with section 6 of the *Regulations*, Drycake then had 10 working days from approximately September 25, 2015, to voice any concerns regarding mandatory criterion 2.1c). A complaint filed on March 7, 2016, challenging the inclusion of this requirement in the RFP is therefore time-barred.

## DECISION

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

Daniel Petit  
Daniel Petit  
Presiding Member

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5. A ground of complaint must have some evidentiary basis to suggest that there was a breach of a relevant trade agreement. Furthermore, the purpose of a complaint before the Tribunal is not to allow complainants to engage in a “fishing expedition” to find evidence to use in a complaint. See, for example, *Toromont Cat* (22 January 2016), PR-2015-054 (CITT) at para. 20.