



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-039

Telecore

*Decision made
Thursday, October 27, 2016*

*Decision and reasons issued
Wednesday, November 2, 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

TELECORE

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. In this case, Telecore filed a complaint alleging that a multi-item Request for Proposal (RFP) for the supply of headsets and spare parts issued by the Department of Public Works and Government Services³ (PWGSC) on behalf of the Department of National Defence (DND) contained overly restrictive requirements that prevented Telecore from being the successful bidder on certain goods for which it was the lowest-priced bidder.

3. The Tribunal has determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*, for the reasons that follow.

SUMMARY OF RFP AND COMPLAINT

4. The complaint filed⁴ by Telecore relates to an RFP (Solicitation No. W8486-173317/A)⁵ issued on July 25, 2016. As a multi-item bid solicitation, the RFP permitted potential suppliers to bid on any number of 18 different goods being procured and provided that contracts would be awarded on the basis of the lowest-priced, compliant bid for each relevant item.⁶

5. Telecore bid on five items, described as “Headset-Microphone” (items 1, 2 and 17) and “Microphone-Dynamic” (items 7 and 8).⁷ For each of these items, the acceptable supplier was identified in the RFP as “Racal Acoustics Limited, GB” (Racal).

6. On August 24, 2016, Telecore e-mailed the designated contact at PWGSC to request the specifications for the microphones in items 7 and 8 and to confirm whether the same microphones were used in items 1 and 2.⁸

7. On September 13, 2016, PWGSC posted answers to these and other bidder questions via amendment No. 3 to the RFP⁹ and provided the following answer to bidder question 3 (requesting

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 will be changed to Public Services and Procurement Canada.

4. This complaint was filed in incomplete form on October 21, 2016, and then in complete form on October 27, 2016.

5. The RFP follows an earlier RFP for the provision of headsets and spare parts that PWGSC cancelled on May 27, 2016, prior to an award of contract, which was the subject of a previous complaint filed by Telecore. The Tribunal decided not to inquire into the previous complaint and does not consider the earlier RFP relevant to this decision. *Telecore* (15 June 2016), PR-2016-015 (CITT).

6. Complaint, Exhibit 8, RFP at 3-12.

7. Complaint, Exhibit 14, Telecore Submission dated September 20, 2016.

8. Complaint, Exhibit 10, e-mail from Mr. Joseph O'Regan to Mr. Louie Turner dated August 24, 2016.

9. Complaint, Exhibit 9, Amendment No. 3 to the RFP dated September 13, 2016.

specifications): “The microphones requested on line 7 & 8 used on the headset Slimgard II is proprietary right to RACAL acoustic and they own the IE. Therefore if a bidder requiring the specification they must ask RACAL and not DND.” The answer to bidder question 4 confirmed that the same microphones were used in items 1 and 2.

8. Amendment No. 3 to the RFP also contained bidder question 1, asking “. . . will the Government of Canada accept a bid for an equivalent or better product that can meet all of the same requirements as the parts listed on pages 4, 5 and 6 of the solicitation?”¹⁰ In answer, PWGSC responded as follows:

*Equivalent product will not be accepted. Canada has an immediate requirement to purchase the Slimgard headset in order to sustain current military operations. This procurement is raised only to meet an operational objective to keep the current military vehicles operational by providing headsets for military operations. Additionally there are safety concerns to military personnel in theatre where headset compatibility, interchangeability and functionality is of the utmost importance with Canada’s current tactical vehicle fleet.*¹¹

[Emphasis added]

9. On September 14, 2016, Telecore e-mailed PWGSC, objecting to the answers on the following basis:

. . . [in] the recent Canadian SOW [Statement of Work] for “HEADSET SPECIFICATIONS WITH ACTIVE NOISE REDUCTION SYSTEM” there is no reference to any proprietary items whatsoever in the build requirement.

As such, the microphone does not have Racal IE. *Ergo our question has not been answered properly.*

*We have issues to the manner in which this and the previous RFP for same materials have been tendered.*¹²

[Emphasis added]

10. On September 19, 2016, PWGSC replied as follows:

To reply to your questions/comments below from your email September 14, we feel amendment #3, *more specifically Questions and Answers # 1 and 3 fully explain the situation of this requirement* and are looking forward to working with potential bidders, like yourself, in the coming period for the new generation of headsets.¹³

[Emphasis added]

11. Between September 21 and 30, 2016, the parties exchanged further e-mails, wherein Telecore reiterated its objection that its proposed alternative goods, from a supplier other than Racal, should be acceptable to meet the requirement specifications and wherein PWGSC denied the objection.¹⁴

10. Amendment No. 3 to the RFP at 1.

11. Amendment No. 3 to the RFP at 1.

12. Complaint, Exhibit 10, e-mail from Mr. O’Regan to Mr. Turner dated September 14, 2016.

13. Complaint, Exhibit 10, e-mail from Mr. Turner to Mr. O’Regan dated September 19, 2016.

14. Complaint, Exhibit 10, e-mail from Mr. O’Regan to Mr. Turner dated September 21, 2016; e-mail from Mr. Turner to Mr. O’Regan dated September 27, 2016; e-mail from Mr. O’Regan to Mr. Turner dated September 29, 2016; e-mail from Mr. Turner to Mr. O’Regan dated September 30, 2016.

12. On October 11, 2016, PWGSC notified Telecore that its bid for items 1 and 2 was deemed non-compliant with the requirements of the solicitation.¹⁵ In its complaint to the Tribunal, Telecore argued that its bid for items 1 and 2 was improperly disqualified on the basis of the acceptable supplier requirement in the RFP, which effectively rendered the procurement a sole sourcing of those items. According to Telecore, the requirement was thus unfairly restrictive and unlawful under the applicable trade agreement, in this case, the *Agreement on Internal Trade*.¹⁶ Telecore also requested that the Tribunal investigate whether it was the lowest bidder on items 7, 8 and 17.

13. As a remedy, Telecore requested that the Tribunal rescind the awards regarding items 1 and 2 and find that Telecore's bid for those items should have been deemed compliant and, as the lowest bid, should have been successful. Telecore also requests the Tribunal grant similar relief in relation to its bid on items 7, 8 and 17, should the Tribunal determine that it was the lowest bidder on those items.¹⁷

ANALYSIS

14. To initiate an inquiry, the Tribunal must find that (a) the complainant is a potential supplier, (b) the complaint is in respect of a designated contract and (c) the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreement.¹⁸ The complaint must also be filed within the prescribed time limits.¹⁹

15. In the present case, the Tribunal finds that the complaint is untimely. Accordingly, it is unnecessary to address the other conditions.

16. 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".

17. Subsection 6(2) of the *Regulations* states 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."

18. 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 will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

19. Telecore's complaint is manifestly late. In essence, its allegation is that PWGSC unfairly restricted the requirements preventing it from bidding with headsets and microphones from a supplier other than Racal.

15. Complaint, Exhibit 10, e-mail from Mr. Turner to Mr. O'Regan dated October 11, 2016.

16. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

17. Complaint at paras. 86-89.

18. Subsection 7(1) of the *Regulations*.

19. Section 6 of the *Regulations*.

20. The Tribunal has previously held that, if a potential supplier believes that the criteria set out in an RFP are overly stringent or impossible to meet, it must file a complaint in a timely manner (i.e. within 10 working days). A complainant may not accumulate grievances only to present them after its bid is rejected.²⁰ In this regard, the Federal Court of Appeal states as follows:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are 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 process. . . .

[21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.²¹

21. The RFP clearly identified the “acceptable supplier information” as that of Racal. Further, the product specifications for items 1, 2 and 17 were part numbers of Racal. However, Telecore did not raise any issue with the requirements stated in the RFP until its questions to PWGSC e-mailed almost one month after issuance of the RFP. Therefore, by this reason alone, Telecore’s complaint is late.

22. In addition, Telecore’s complaint cannot be found timely even under any of the later applicable dates. PWGSC addressed Telecore’s questions in answers 3 and 4 of amendment No. 3 to the RFP, dated September 13, 2016. When Telecore objected to these answers in its e-mail dated September 14, 2016, PWGSC e-mailed Telecore on September 19, 2016, referring Telecore again to the answers 3 and 4, as well as “specifically” to answer 1 to explain why the requirements were selected.

23. At the latest, Telecore should have filed its complaint with the Tribunal within 10 working days of September 19, 2016, on which date it had a clear response from PWGSC unambiguously denying Telecore’s objection of September 14, 2016. Instead, Telecore reiterated its objection to PWGSC in its subsequent correspondence of September 21 and 29, 2016, which PWGSC continued to deny.

24. Re-engaging PWGSC to try to persuade it to change its decision did not restart the clock for Telecore. The Tribunal has repeatedly held that, where there has been a clear denial of relief in relation to an objection made by a complainant, it is not open to the complainant to keep the issue alive and delay final disposition of the matter through successive reiterations of essentially the same concerns.²²

25. In sum, after PWGSC conveyed its position on the requirements in amendment No. 3 to the RFP, Telecore objected and was denied relief by PWGSC on three separate occasions regarding the same grounds of complaint. Telecore did not file a complaint with the Tribunal until 10 *calendar days* after PWGSC notified Telecore of the results on October 11, 2016. Those results (i.e. Telecore’s bid being deemed non-compliant) were entirely predictable and in line with PWGSC’s consistent position made known to (and opposed by) Telecore at the latest on September 19, 2016.

20. *Genesis Security Inc.* (2 February 2016), PR-2015-055 (CITT) at para. 13; *Toromont Cat* (22 January 2016), PR-2015-054 (CITT) at para. 15; *2040077 Ontario Inc. o/a FDF Group* (27 August 2014), PR-2014-024 (CITT) at para. 14; *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) [*IBM Canada*].

21. *IBM Canada* at paras. 18, 20, 21.

22. *Flaman Management Partners Ltd.* (6 March 2013), PR-2012-045 (CITT) at para. 12.

26. Accordingly, Telecore's complaint is untimely.

DECISION

27. 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