



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2016-058

Le Groupe Conseil Bronson
Consulting Group

v.

Department of Public Works and
Government Services

*Order and reasons issued
Monday, July 24, 2017*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 BACKGROUND 1

 ANALYSIS 3

 Relief 1 and 2: Additional Data and Services Included in Financial Evaluation 3

 Relief 3: Extension of the Closing Date 4

 Relief 4 and 5: Consolidated RFP and Clarification Session 4

 Relief 6: Costs of this Proceeding 5

IN THE MATTER OF a complaint filed by Le Groupe Conseil Bronson Consulting Group pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

FURTHER TO the determination and reasons of the Canadian International Trade Tribunal issued on June 23, 2017, reserving the final decision regarding the award of costs in this matter;

AND FURTHER TO a request for decision or order filed on July 7, 2017, and July 17, 2017, by Le Groupe Conseil Bronson Consulting Group requesting relief regarding remedy recommended by the Canadian International Trade Tribunal in its determination and reasons issued on June 23, 2017.

BETWEEN

LE GROUPE CONSEIL BRONSON CONSULTING GROUP

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

The motion filed on July 7, 2017 and July 17, 2017, by Le Groupe Conseil Bronson Consulting Group (Bronson) for further relief regarding the recommendation of the Canadian International Trade Tribunal (the Tribunal) issued on June 23, 2017, in its complaint regarding Solicitation No. B8694-150140/D is denied.

The Tribunal finds that the various types of relief requested by Bronson either concern the enforcement of the implementation of the Tribunal's recommendations issued in its determination on June 23, 2017 (for which the Tribunal lacks jurisdiction), are untimely, or are otherwise without merit. Further, the Tribunal confirms that, contrary to Bronson's position, the Tribunal's postponement-of-contract-award order issued on February 20, 2017, expired on the issuance of the Tribunal's determination and reasons in this matter on June 23, 2017. As such, Bronson's requests for relief regarding the solicitation itself are denied.

With regard to the relief sought regarding the costs of this proceeding, the Tribunal revises its preliminary indication of no award of costs to costs in the amount of \$4,700, based on a Level 3 complexity under the *Procurement Costs Guideline*, to be awarded to Bronson payable by the Department of Public Works and Government Services.

Peter Burn
Peter Burn
Presiding Member

STATEMENT OF REASONS

1. This order and reasons concerns two letters (which the Canadian International Trade Tribunal (the Tribunal) treats collectively as a request for decision or order under Rule 23.1 of the *Canadian International Trade Tribunal Rules*¹) filed on July 7, 2017, and July 17, 2017, by Le Groupe Conseil Bronson Consulting Group (Bronson).

2. The letters request relief regarding a pending solicitation that was the subject of a complaint filed by Bronson on February 16, 2017. This complaint was adjudicated by the Tribunal by way of determination and reasons issued on June 23, 2017. Ultimately, the Tribunal found one ground of the complaint valid (insufficient disclosure of data) and made a recommendation to the Department of Public Works and Government Services (PWGSC) in that regard.

3. Following subsequent amendments to the solicitation issued by PWGSC, Bronson now requests the following additional relief:

- 1) additional data (beyond that already disclosed in amendments issued subsequent to the Tribunal's determination);
- 2) the reversal of recent amendments to the financial evaluation provisions of the solicitation;
- 3) the extension of the closing date for the submission of proposals;
- 4) the issuance of a comprehensive consolidated Request for Proposal incorporating all amendments to date;
- 5) the holding by PWGSC of a two-day clarification session with bidders; and
- 6) its costs in relation to its ongoing efforts to obtain data from PWGSC.

4. For the reasons provided below, requests 1 through 5 are denied. Regarding request 6 (which the Tribunal treats as supplementary submissions on the preliminary indication of costs issued by the Tribunal in its determination dated June 23, 2017), the Tribunal awards Bronson its costs in this proceeding (including Bronson's letter requests) in the amount of \$4,700 as detailed more fully below.

BACKGROUND

5. Bronson's complaint concerned a request for proposal (RFP) for services for Visa Application Centres (VAC) (Solicitation No. B8694-150140/D) issued by the PWGSC on behalf of the Department of Citizenship and Immigration (IRCC).

6. The Tribunal's determination found the complaint valid on one ground: disclosure of information relating to certain volume data for the pending procurement. Accordingly, the determination recommended, at paragraph 107, that

PWGSC provide further disclosure of the information identified by Bronson regarding Section 1.3, Summary of Part 1, General Information, of the current RFP, or provide an explanation as to why the data in issue is not available.

1. SOR/91-499.

7. Following the issuance of the determination, PWGSC issued Amendment 16 to the RFP on July 5, 2017, which provided additional data and also removed two value-added services (Assisted Service–Paper Applications and Assisted Service–Online Forms) from the financial evaluation because PWGSC represented that their associated data (which the Tribunal had recommended be disclosed in its determination of June 23, 2017) would not be available prior to the bid closing date.

8. On July 7, 2017, Bronson filed a letter with the Tribunal objecting to Amendment 16 and requesting further “directions” from the Tribunal ordering PWGSC to (1) provide further additional data; (2) reverse the amendments removing the two value-added services from the financial evaluation; and (3) extend the closing date from July 19, 2017, to an indeterminate date to be calculated as four weeks after all requested data has been provided to bidders.

9. On July 10, 2017, the Tribunal forwarded Bronson’s letter to PWGSC and ordered PWGSC to file its notice under section 30.18 of the *Canadian International Trade Tribunal Act*² advising the Tribunal of the extent to which PWGSC intends to implement the recommendations of the Tribunal. The Tribunal accorded PWGSC an opportunity to file submissions in response to Bronson’s letter by July 13, 2017, and accorded Bronson an opportunity to file a reply by July 17, 2017.

10. On July 13, 2017, PWGSC filed its section 30.18 notice, which represents that “PWGSC intends to implement the Tribunal’s recommendation to the greatest extent possible.” In its submissions, PWGSC stated that to implement the Tribunal’s recommendation it had issued three new amendments: Amendment 16, Amendment 17, and Amendment 18. In Amendment 16 issued on July 4, PWGSC advised bidders that Paper Application and Online Form services from Value-added Services would be removed from the financial evaluation due to lack of data for these services by the time of bid closing. Amendment 17 issued on July 7 extended the closing date to July 26, 2017. Subsequent to the release of Amendments 16 and 17, data for these two services became available. Accordingly, on July 14, PWGSC issued Amendment 18 providing said data, reinstating the two services as part of the financial evaluation, and extending the closing date to August 9, 2017. PWGSC submitted that the remainder of items regarding allegedly missing data identified in Bronson’s letter were addressed in prior amendments to the RFP. PWGSC also submitted that the Tribunal’s postponement-of-contract-award order expired by its own terms on the date the Tribunal issued its determination and reasons on June 23, 2017. PWGSC also cited case law holding that enforcement of recommendations is outside the Tribunal’s jurisdiction.

11. On July 17, 2017, Bronson filed a letter in response. Bronson maintained that there remain outstanding data questions and PWGSC’s credibility in averring otherwise is belied by prior disclosures following denials and because the incumbent must have the requested data. Bronson challenges the reinstatement of the two services to the financial evaluation as inadequate because (in an apparent drafting error) PWGSC has forgotten to reinsert the two services in the appropriate section of the RFP that provides that two of the following six services will be chosen at random for the financial evaluation (the provision then lists only four services). Bronson also raises two new requests: that the current RFP and its 18 amendments be consolidated in a single RFP and that PWGSC hold a two-day clarification session with bidders. Bronson also requests that the Tribunal award costs to it in relation to its ongoing efforts to obtain data from PWGSC, which it claims PWGSC has unjustifiably prolonged and made expensive. Finally, Bronson maintains that the postponement-of-contract-award order should not be lifted until PWGSC has complied with the Tribunal’s recommendation and a reasonable period of time has passed.

2. RSC 1985, c 47 [*CITT Act*].

ANALYSIS

Relief 1 and 2: Additional Data and Services Included in Financial Evaluation

12. The Tribunal finds that the relief requested in items 1 and 2 at paragraph 3 above concern the implementation of the Tribunal's recommendations issued in its determination.

13. With regard to item 1, Table 2 of Bronson's letter is a chart identifying six allegedly still-unresolved data-related questions.³ Bronson alleges that PWGSC has not provided "a satisfactory nor reasonable explanation for not providing the required data, as ordered by the Tribunal" and that Amendment 16 therefore "does not satisfy the Tribunal's determination". This quite clearly constitutes a request for enforcement of the Tribunal's recommendation.

14. With regard to item 2, Bronson alleges that PWGSC has attempted to avoid releasing data for two value-added services by modifying evaluation criteria such that the pricing bid for these services will be excluded from the financial evaluation. Bronson alleges that this is prejudicial to its "ability to submit appropriate and competitive pricing", because it "leaves the solicitation financial evaluation structurally worse for non-incumbent bidders than it was previously".⁴ As a preliminary matter, it appears this issue is moot, as PWGSC has reversed its removal of the two services from the financial evaluation through Amendment 18.⁵ Regardless, the Tribunal finds that this relief too concerns the implementation of the Tribunal's recommendation regarding provision of data. PWGSC represented in its answer to Question 209 in Amendment 16 that the services were removed due to unavailability of the related data prior to bid closing. The removal of the services from the financial evaluation thus constituted an attempt by PWGSC to, in the absence of the data and in light of the Tribunal's recommendation, minimize any prejudice to bidders. Bronson disputes the efficacy and fairness of this measure. The Tribunal makes no finding on the merits of the measure taken by PWGSC, but it remains the fact that the adequacy of the measure turns on the question of whether it sufficiently implemented the Tribunal's recommendation. In other words, it is a matter of enforcement of the implementation of the recommendation.

15. It is well settled law that the Tribunal lacks jurisdiction to enforce the implementation of its recommendations. The Tribunal has stated that "the Tribunal will not review the extent to which the directions of the Court and the recommendation of the Tribunal have been complied with or implemented, because they do not constitute an aspect of the procurement process."⁶ The Federal Court of Appeal has endorsed this understanding, writing that, "[g]iven that the CITT only possesses a recommendation power in respect of procurement complaints according to subsection 30.15(2), it is apparent that the enforcement of the Tribunal's recommendations is not within the CITT's jurisdiction."⁷

16. Instead, the enforcement of the Tribunal's recommendations is a matter in the jurisdiction of the Federal Courts. Per section 30.18 of the *CITT Act*, the proper course for identifying non-compliance begins with the government institution providing a report to the Tribunal on "the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so" (due in 20 days, per section 13 of the *Canadian International Trade Tribunal Procurement Inquiry*

3. Note that the sixth question, however, was made to PWGSC only on June 30, 2017.

4. Bronson's letter dated July 7, 2017, at 2-3.

5. The Tribunal expects PWGSC will clarify what appears to be a technical drafting oversight in Amendment 18 before bid closing.

6. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) [*Siemens*] at para. 34.

7. *Siemens* at para. 37.

Regulations),⁸ followed by a further report when it has implemented the recommendations (due in 60 days). If a complainant is unsatisfied with the government institution's response to the Tribunal's recommendations, the proper forum for seeking relief is the Federal Court by way of an application challenging the lawfulness of the government institution's section 30.18 notice⁹ or, if a judicial review of the Tribunal's decision has been filed, a motion in the Federal Court of Appeal.¹⁰

17. As items 1 and 2 request relief regarding the enforcement of the Tribunal's recommendation, the Tribunal concludes that it lacks jurisdiction to grant them. These requests for relief are therefore denied.

Relief 3: Extension of the Closing Date

18. The relief requested in item 3 (extension of the closing date for proposal submissions) is also outside the jurisdiction of the Tribunal.

19. As a preliminary matter, Bronson has framed this relief as necessary to implement the Tribunal's recommendation. That is, if the solicitation closes before the data is made available, the recommendation will not be effectively implemented. In this regard, the Tribunal finds that extension of the closing date also seeks relief relating to the enforcement of the Tribunal's recommendation and is, as such, outside the Tribunal's jurisdiction.

20. Separate and apart from that finding, however, the relief requested is simply beyond the power of the Tribunal as granted by its governing legislation. The authority of the Tribunal to postpone contract award is conferred via subsection 30.13(3) of the *CITT Act*, which limits the applicable period of such an order to only "until the Tribunal determines the validity of the complaint." Pursuant to that authority (and the terms of the order itself which mirror the wording of subsection 30.13(3)), the Tribunal's postponement-of-contract-award order issued on February 20, 2017, expired on June 23, 2017, the date of the release of the Tribunal's determination and reasons, which conclusively and finally *determined* the validity of all of the grounds of Bronson's complaint.

21. This request for relief is therefore also denied.

Relief 4 and 5: Consolidated RFP and Clarification Session

22. The relief requested in items 4 and 5 is unrelated to the Tribunal's recommendation, but is also untimely. Bronson could have requested these remedies during the Tribunal's inquiry, but it did not raise them in its original complaint, its response to the Government Institution Report, or even its first letter dated July 7, 2017. Further, the request in item 5 (a clarification session) is untimely under section 6 of the *Regulations*, given that PWGSC denied this request on June 21, 2017 – which is, as of Bronson's second letter dated July 17, well past the 10-business-day filing deadline.

23. Regardless, it is too late now to introduce new grounds or remedies. After issuing a decision, the decision maker has usually exhausted its authority and cannot revisit that decision. That rule is known as *functus officio* (literally: the officer has exhausted his or her function). Exceptions to that rule include where there is a "denial of natural justice, a jurisdictional error or a failure to address an issue fairly raised by the proceedings".¹¹

8. SOR/93-602 [*Regulations*].

9. *TPG Technology Consulting Ltd. v. Canada (Public Works and Government Services)*, 2007 FC 1089 at paras. 24-25.

10. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corporation*, 2007 FCA 336 at paras. 18-20.

11. *Chopra v. Canada (Attorney General)*, 2013 FC 644 at para. 65.

24. The Tribunal's determination of June 23, 2017, comprehensively adjudicated all of the grounds of Bronson's complaint. Bronson has not submitted that any exception to the doctrine of *functus officio* applies here. Further, finality and expedition in the Tribunal's inquiry process are central elements of the procurement challenge review process, as evidenced by the 10-day deadlines for filing a complaint, the limited term for which the Tribunal may issue a postponement-of-contract-award order, the legislated time frames for the Tribunal to complete its inquiry, and the intent for the Federal Courts to take over as the relevant forums for review after the inquiry process is exhausted. Given these factors, the Tribunal concludes that the doctrine of *functus officio* applies *a fortiori* where a complainant asserts new grounds of relief (without cause such as new evidence that could not have reasonably been discovered sooner) after a determination has already fully adjudicated its complaint.¹² Accordingly, the Tribunal is *functus officio* with regard to granting remedies under the original complaint.

25. Finally, even if not untimely, the relief sought lacks merit. The facts alleged in support of items 4 and 5 (consolidation) are not detailed with particularity or supported with reference to the single ground of complaint (withholding of data) that was earlier found valid by the Tribunal.

26. These requests for relief are therefore also denied.

Relief 6: Costs of this Proceeding

27. With regard to the costs of this proceeding, in its determination, the Tribunal preliminarily indicated its intent to award no costs to either party, based on their mixed success. Bronson argues that PWGSC's practice (throughout this procurement) of releasing data on an iterative, piecemeal basis only after repeated, insistent requests by bidders has unnecessarily increased the legal fees required to obtain the data Bronson believes is necessary for a fair competition.

28. The Tribunal does not find any reason to question the good faith of PWGSC in this proceeding or solicitation in its practice of releasing data. Nevertheless, a more proactive disclosure practice would have resulted in a less litigious outcome (as evidence by these very requests submitted by Bronson). PWGSC has also caused some confusion and delay in the amendments subsequent to the issuance of the Tribunal's determination – e.g., excluding services from the financial evaluation, then (presumably) adding them back in. This has resulted in increased costs that could have been avoided. Therefore, the Tribunal finds that exceptional circumstances exist justifying an award of costs to Bronson despite its divided success on the merits in the determination.¹³

29. Accordingly, the Tribunal hereby revises its preliminary indication in its determination of no award of costs to costs in the amount of \$4,700, based on a Level 3 complexity under the *Procurement Costs Guideline*, to be awarded to Bronson payable by PWGSC.

ORDER

30. For the reasons provided above, Bronson's requests for relief regarding the solicitation (requests 1-5) are denied.

12. Note too that Bronson does not suggest that the July 17, 2017, letter constitutes a fresh complaint for commencing a new proceeding.

13. See *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, [2003] 4 FCR 525, 2003 FCA 199 (CanLII) at para. 28: "Similarly, costs are not usually awarded where success is evenly divided *in the absence of some factor dictating a different result*" [emphasis added].

31. With regard to costs of this proceeding (relief 6), the Tribunal revises its preliminary indication of no award of costs to costs in the amount of \$4,700, based on a Level 3 complexity under the *Procurement Costs Guideline*, to be awarded to Bronson payable by PWGSC.

Peter Burn _____
Peter Burn
Presiding Member