



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2017-026

Soft dB Inc.

*Decision made  
Monday, October 4, 2017*

*Decision and reasons issued  
Friday, October 6, 2017*

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**

**SOFT DB INC.**

**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.

Jean Bédard

Jean Bédard, Q.C.

Presiding Member

## 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. The Tribunal has decided not to conduct an inquiry into the complaint because the complainant is not a “potential supplier” and, thus, lacks standing to bring a complaint to the Tribunal.

### SUMMARY OF THE COMPLAINT

3. The complaint relates to a Request for Quotation (RFQ) published by Brookfield Global Integrated Solutions (BGIS), a provider of facility management services, on behalf of the Department of Public Works and Government Services (PWGSC) on August 28, 2017. The RFQ is for the interior fit-up of Wing CARQ2 at the Main Statistics Building (a federal government office located at 150, Tunney’s Pasture Drive, Ottawa, ON) under Solicitation Nos. PWG788660-1, PWG788663-1 and PWG788664-1.

4. The complainant, Soft dB Inc. (Soft dB), alleges that the specifications of one component of the work for a sound masking system are narrowly worded to mirror a specific supplier’s equipment. Soft dB requests the that Tribunal replace the current specification with a performance-based specification not tailored for one manufacturer, include Soft dB as an approved supplier for the project, and ensure that PWGSC does not use a similar specification again in any future projects regarding sound masking.

### BACKGROUND

5. On August 28, 2017, BGIS published the RFQ on [brookfieldgis.merx.com](http://brookfieldgis.merx.com). It does not appear that the RFQ was published on the government’s official electronic tendering service, [buyandsell.gc.ca](http://buyandsell.gc.ca).

6. During the Question-and-Answer period, BGIS was asked if the sound masking system of Soft dB would be acceptable as an equivalent to the one required in the specification of the RFQ. It replied via Addendum 4 issued on September 11, 2017, that it would not be.

7. Soft dB objected to BGIS’s decision via a conference call with BGIS on September 12, 2017. On September 15, 2017, BGIS issued Addendum 8 confirming that the specification would remain unchanged. The bidding period closed on September 20, 2017, and the results of the competitive invitation were published on September 21, 2017.

8. On September 21, 2017, Soft dB filed its complaint with the Tribunal.

9. On September 26, 2017, the Tribunal requested further information and documents from Soft dB in order for its complaint to be considered complete under subsection 30.11(2) of the *CITT Act*. Soft dB provided the requested information and documents on September 29, 2017, and October 2, 2017.

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

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

## ANALYSIS

10. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before being able to conduct an inquiry:

- (i) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- (ii) whether the complainant is a potential supplier;
- (iii) whether the complaint is in respect of a designated contract; and
- (iv) whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreement.

11. As a preliminary matter, it is not clear whether the RFQ relates to a designated contract because the complaint and attachments do not reveal whether the RFQ was issued by BGIS as an agent of PWGSC or in its own right under a separate contract with PWGSC. Section 30.1 of the *CITT Act* defines “designated contract” as a “. . . contract for the supply of goods or services that has been or is proposed to be awarded by a *government institution* and that is designated or of a class of contracts designated by the regulations” [emphasis added]. Subsection 3(1) of the *Regulations*, in turn, provides that “. . . any contract or class of contract concerning the procurement of goods or services or any combination of goods or services, as described in [the trade agreements], that has been or is proposed to be awarded by a *government institution*, is a designated contract” [emphasis added]. Section 30.1 of the *CITT Act* defines “government institution” as “. . . any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations”. This includes the federal government entities (such as PWGSC) and enterprises set out in the relevant annexes of the applicable trade agreements, in accordance with subsection 3(2) of the *Regulations*.

12. BGIS is a private entity and, as such, cannot constitute a “government institution” for purposes of the trade agreements. When a government institution conducts public procurement via a private party as its mere agent, that procurement remains within the Tribunal’s jurisdiction.<sup>3</sup> However, in the present case, there is insufficient evidence to conclude that PWGSC directed BGIS to issue the RFQ on its behalf or to act as its agent in contracting for the goods and services. In addition, there is nothing in the complaint to suggest that PWGSC deliberately structured the procurement through the intermediary of a third-party private entity in order to avoid its obligations under the applicable trade agreements.<sup>4</sup>

13. Regardless, even assuming an agency relationship exists, the complaint still fails to justify initiating an inquiry because Soft dB is only a subcontractor—not a general contractor who did or could have bid on the RFQ—and, therefore, not a “potential supplier”. Section 30.1 of the *CITT Act* defines a “potential supplier” as a “. . . bidder or prospective bidder on a designated contract.” Soft dB writes in its email to the Tribunal dated September 29, 2017, that it did not submit a response itself to the solicitation but rather is “a subcontractor to multiple bidders for these projects”. The Tribunal has stated previously that a “prospective bidder” must (1) have the technical and financial capability of fulfilling the requirement that is the subject of

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3. See *Pomerleau Inc. v. Department of Public Works and Government Services* (21 May 2015), PR-2014-048 (CITT) at paras. 59-63.

4. See *Jastram Technologies Limited* (24 May 2016), PR-2016-008 (CITT) at para. 14.

the procurement; and (2) still have the capacity to submit a bid in response to the solicitation.<sup>5</sup> In the absence of a term in a solicitation document permitting them to bid for a part of the work directly in their own name, subcontractors who can only perform part of the work tendered cannot be considered “prospective bidders” because they do not meet either of these conditions.<sup>6</sup>

14. Accordingly, because the complainant is not a potential supplier, the conditions for initiating an inquiry have not been met.

## DECISION

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

Jean Bédard  
Jean Bédard, Q.C.  
Presiding Member

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5. *Shaw Industries Inc.* (26 February 2015), PR-2014-059 (CITT) at para. 11; *Flag Connection Inc.* (3 September 2009), PR-2009-026 (CITT) at para. 20 and footnote 12.

6. The Tribunal has previously stated that an alternative for complainants who are not potential suppliers is to file a notice of representation wherein an actual or prospective bidder would expressly authorize the complainant to act as its representative before the Tribunal. See, for example, *DJC Security Design* (29 September 2004), PR-2004-034 (CITT). Unfortunately, this was not done here. Further, the time for doing so has expired, as the complainant had 10 business days to bring its complaint to the Tribunal under section 6 of the *Regulations*. Even if the date of publication of Addendum 8 rather than Addendum 4 is used as the date by which Soft dB had knowledge of the denial of relief sought from BGIS, the 10-business-day period for filing a complaint (with such an authorization from an actual or prospective bidder) would have expired on September 29, 2017.