



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-020

Secure Energy (Onsite Services)
Inc.

*Decision made
Friday, July 21, 2017*

*Decision issued
Monday, July 24, 2017*

*Reasons issued
Thursday, August 3, 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

SECURE ENERGY (ONSITE SERVICES) INC.

AGAINST

DEFENCE CONSTRUCTION (1951) LIMITED

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.

Jason W. Downey _____
Jason W. Downey
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. The complaint relates to a procurement (Project No. ES145473) by Defence Construction (1951) Limited, or Defence Construction Canada (DCC), for the demolition of two buildings at CFB Esquimalt, British Columbia.

3. Secure Energy (Onsite Services) Inc. (Secure Energy) alleged that DCC improperly disqualified its proposal on the basis that it did not comply with DCC's instructions to tenderers prohibiting the submission of electronic bid bonds. Secure Energy argued that the manner in which it submitted its bid bond was a matter of form that did not affect the substance of its bid, which should have been awarded the contract given that it met all of the mandatory requirements of the tender and offered the lowest price. It alleged that the standard for legal bid compliance "does not require perfection, but rather material and substantial compliance".³

4. For the reasons that follow, the Tribunal finds that the complaint is time-barred and there is no reasonable indication of a breach of the applicable trade agreements.

ANALYSIS

5. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following four conditions are met:

- 1) the complaint has been filed within the time limits prescribed by section 6;
- 2) the complainant is a potential supplier;
- 3) the complaint is in respect of a designated contract; and
- 4) the information provided discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

6. The complaint meets the second and the third⁴ conditions. The two remaining conditions are addressed below.

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

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

3. Complaint at 5.

4. The third condition (designated contract) is only met with regard to the *Agreement on Internal Trade (AIT)*, and not the *WTO Agreement on Government Procurement (AGP)* or the *North American Free Trade Agreement (NAFTA)* as alleged in the complaint. The estimated value of the contract (see Protected Complaint at 3) is below the monetary threshold for construction services procured by crown corporations under *NAFTA* and the *AGP*. See <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2015-3.html>.

TIMELINESS

7. Pursuant to section 6 of the *Regulations*, a complainant has 10 working days from the day 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 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. The relevant provisions read as follows:

6 (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so 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.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract 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.

8. On November 18, 2016, DCC released the tender forms for Project No. ES145473.

9. On February 1, 2017, DCC released “Amendment No.: 1 To the Tender Documents” (Amendment 1), which provided the following at Item 12:

12. Reference DCL 193, Instructions to Tenderers, paragraph 5.2 – **INSERT** the following sentence at the end of the paragraph: “Electronic bid bonds or printed copies of such bonds will NOT be accepted.”

[Emphasis in original]

10. On March 2, 2017, bidding on Project No. ES145473 was closed.

11. On March 8, 2017, DCC informed Secure Energy that its tender could not be accepted due to non-compliance of its bid bond with Amendment 1, Item 12. Secure Energy alleged that its representative made a verbal complaint to DCC “shortly after” this notification, but received no response. There is no material evidence of this complaint, other than the statement itself.

12. On June 27, 2017, counsel for Secure Energy submitted a written complaint to DCC, objecting to its rejection of Secure Energy’s bid and requesting relief in the form of lost profits, bid preparation and legal costs.

13. On June 30, 2017, DCC responded to Secure Energy’s objection, maintaining its rejection of Secure Energy’s bid on the basis of non-compliance with the bid bond and denying the requested relief.

14. On July 17, 2017, Secure Energy filed its complaint with the Tribunal.

15. Secure Energy learned of the basis of its complaint on March 8, 2017, the day on which DCC advised it that its proposal had been declared non-compliant. Therefore, any objection to DCC or complaint filed with the Tribunal would have had to have been filed within 10 working days after March 8, 2017 (i.e. by March 22, 2017), in order to have been filed in a timely manner.

16. Secure Energy vaguely claims that it verbally objected to DCC's rejection "shortly after" it was advised that its bid had been rejected on March 8, 2017. However, Secure Energy provided no date for this alleged verbal objection, nor the context of its communication. Further, there is no evidence whatsoever to substantiate its assertion or that its grievances were otherwise raised with DCC by March 22, 2017. In fact, there is no indication in the complaint that Secure Energy ever took any further action to follow up with DCC regarding the matter until its objection letter of June 27, 2017.

17. Without any evidence as to the nature, timing and contents of Secure Energy's alleged verbal objection, the Tribunal cannot accept that Secure Energy made a valid objection within the time limits set out in subsection 6(2) of the *Regulations*.

18. Therefore, in the absence of a valid objection made pursuant to subsection 6(2) of the *Regulations*, Secure Energy's complaint would have had to have been filed with the Tribunal within 10 working days after March 8, 2017 (i.e. by March 22, 2017), in order to have been filed in a timely manner. As the complaint to the Tribunal was not filed until July 17, 2017, the Tribunal finds that it was made outside the prescribed time limits.

REASONABLE INDICATION OF A BREACH

19. Even if the complaint had been filed in a timely manner, the Tribunal would still have been unable to accept it for inquiry, since it failed to contain a reasonable indication that the applicable trade agreements were breached.

20. According to paragraph 7(1)(c) of the *Regulations*, to initiate an inquiry, the Tribunal must find that the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of the trade agreements listed in that section apply.

21. Secure Energy alleged that DCC improperly disqualified its proposal on the basis that it did not comply with DCC's instructions to tenderers prohibiting the submission of electronic bid bonds or paper copies of such. Secure Energy maintained that its bid substantially complied with the tender requirements, despite including a printed copy of an electronic bid bond, and that its rejection on that basis breached:

- 1) Articles 101 and 514 of the *AIT*;
- 2) Article 1014 of *NAFTA*;
- 3) Articles X and XVIII of the *WTO AGP*;
- 4) DCC's duties of good faith and fairness pursuant to the bid contract between DCC and Secure Energy ("Contract A").

22. Of the trade agreements listed above, only the *AIT* applies to the present complaint, as the estimated value of the contract is below the monetary threshold for construction services procured by crown corporations under *NAFTA* and the *AGP*.⁵

23. Article 506(6) of the *AIT* provides that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

5. *Supra* n 3.

24. Article 514(2) of the *AIT* provides that the federal government shall adopt and maintain bid protest procedures “[i]n order to promote fair, open and impartial procurement procedures”

25. Article 518 of the *AIT* defines “procurement procedures” as follows: “the processes by which suppliers are invited to submit a tender, a proposal, qualification information, or a response to a request for information and includes the ways in which those tenders, proposals or information submissions are treated.”

26. The tender documents incorporate by reference, at paragraph 1.2, DCC’s “Standard Construction Contract Documents 2012 Version”. These documents include, at paragraph 1.2.1, DCC’s “Instructions to Tenderers – Form DCL 193 (R2016-02)” (Form DCL 193).

27. Part 5 of Form DCL 193 is titled “Bid Security Requirements”. Paragraph 5.2 of this section lays out the approved form for bid bonds submitted by tenderers as follows:

5.2 A bid bond shall be in an approved form as described in DCL 32 - General Conditions that form part of the Standard Construction Contract Documents available on the Defence Construction Canada website at http://www.dcc-cdc.gc.ca/english/cc_procurement.html. The Bid Bond must also be issued by an approved company whose bonds are acceptable to the Government of Canada or that is listed on the Treasury Board Secretariat’s website at <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494§ion=text#appL>.

28. As stated above, Amendment 1 to the tender documents added to the above paragraph 5.2 by stipulating that electronic bid bonds or printed copies of such bonds are not an approved form of bid bond under the terms of the procurement procedures set out by DCC and, therefore, will not be accepted.

29. Part 3 of Form DCL 193 is titled “Completion of Tender”. Paragraph 3.2 of this section provides that “subject to the provisions of 8.5, failure to provide the information requested in the Tender Documents may render the tender invalid.”

30. Part 8 of Form DCL 193 is titled “Acceptance of Tender”. Paragraph 8.5 of this section provides as follows:

Defence Construction Canada may, at its sole discretion, waive or cause to be corrected minor irregularities in tenders if Defence Construction Canada determines at its sole discretion that the variation of the tender from the exact requirements set out in the Tender Documents can be corrected or waived without being prejudicial to other Tenderers.

[Emphasis in original]

31. Secure Energy’s submitted tender documents included the following provisions:

5. *We certify that Bid Security, if required, in one of the forms outlined in paragraph 5 of the Form DCL 193 – Instructions to Tenderers, accompanies this Tender.*

15. We certify that we are in possession of all the tender documents listed in this tender form.

19. We certify that our tender is inclusive of all obligations as required by this and the preceding pages of this tender form, without change.

[Emphasis added]

32. Form DCL 193, included in the tender documents as amended by DCC on February 1, 2017, expressly prohibits the submission of electronic bid bonds or printed copies thereof as part of a bidder's proposal. It also provides that failure to comply with the information requested in the tender documents, including the instructions contained in Form DCL 193, may render a tender invalid. The tender submitted by Secure Energy certified that Secure Energy was in possession of all the tender documents, that its tender complied with the obligations included in those documents, and specifically that its Bid Security (i.e. bid bond) was in an approved form as prescribed by Form DCL 193.

33. The Courts have held that irregularities rendering a submitted bid non-compliant with the terms of a tender may be considered substantial even where they do not affect the price of the bid, for example, where such non-compliance breaches terms explicitly or implicitly presented as essential to the tender.⁶ Given the imperative language used in Amendment 1 to paragraph 5.2 of the Instructions to Tenderers, DCC's treatment of the prohibition on electronic bid bonds as a mandatory requirement in evaluating bid compliance was reasonable.

34. Even if the inclusion of an electronic bid bond, contrary to the instructions to tenderers, could be argued to be a minor irregularity, or a matter of form as alleged by Secure Energy, it remained at DCC's discretion whether to waive or correct such an irregularity.⁷

35. Paragraph 8.5 of DCL 193 reserves to DCC the sole discretion to waive or correct minor irregularities, and only where doing so is not prejudicial to other tenderers. If anything, the acceptance of Secure Energy's bid over other fully compliant bids might be seen as undermining the principles of openness, good faith and fairness of the procurement process embodied in Article 514(2) of the *AIT* and alluded to in paragraph 8.5.⁸

36. In support of its argument that DCC should have accepted its electronic bid bond, Secure Energy included in its complaint a DCC news release from June 26, 2016, stating that DCC would begin accepting electronic bid bonds as an acceptable form of bid security in August 2016, through the service provider MERX.⁹ The news release directs readers to a document on the DCC website containing further instructions on submitting electronic bid security. Page 2 of this DCC website document instructs readers to "[r]efer to Section 5 of the Instructions to Tenderers for Electronic Bidding for requirements."¹⁰

37. The news release in fact directs readers to part 5 of DCC's Instructions to Tenderers for electronic bidding requirements. As discussed above, DCC's Amendment 1 to part 5, paragraph 5.2 of the tender documents for this procurement expressly prohibited the submission of electronic bid bonds or printed

6. See *Tapitec inc c. Ville de Blainville*, 2017 QCCA 317 [*Tapitec*] at paras 20, 29-32.

7. This is consistent with the recent jurisprudence of Canadian courts on the issues of substantial bid compliance and the contracting authority's discretion to waive minor bid irregularities. See, for example, *Rimouski (Ville de) c. Structures GB ltée*, 2010 QCCA 219, [2010] RJQ 475; *Entreprise TGC inc c. Municipalité de Val-Morin*, 2017 QCCS 2616 at paras 59-62; *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, 376 DLR (4th) 697 [*Rankin*] at para 44; *Demix Construction, division de Holcim (Canada) inc c. Québec (Procureur général)*, 2010 QCCA 1871, 195 ACWS (3d) 711, [2010] RJQ 2220 at para 34; *Ste-Euphémie-sur-Rivière-du-Sud (Municipalité de) c. Raby*, 2008 QCCA 1831, 54 MPLR (4th) 171, [2008] RJQ 2118 [*Ste-Euphémie*] at para 21. See also *Neopost Canada Limited v. Canada Revenue Agency* (20 December 2015), PR-2015-033 (CITT) at paras 28, 29.

8. See *Rankin*, *supra* n 5 at para 45. See also *Tapitec*, *supra* n 6 at paras 10, 18, 36; *Ste-Euphémie*, *supra* n 5 at paras 38-39.

9. "Defence Construction Canada announces launch of next phase of its e-procurement solution", submitted with procurement complaint documents on July 17, 2017.

10. See http://www.dcc-cdc.gc.ca/documents/forms/Bid_Security_Bidders_Guide.pdf.

copies thereof as part of a bidder's proposal. The news release does not provide for the submission of electronic bid bonds outside the framework of DCC's instructions to bidders. In any case, the contents of such a general news release do not supersede the specific instructions to bidders provided in the tender documents.

38. If Secure Energy objected to the prohibition of electronic bid bonds, the appropriate time to do so was between the release of the amendment announcing the prohibition on February 1, 2017, and the close of bidding on March 2, 2017.

39. Secure Energy chose not to object during this period. Instead, it submitted a bid purportedly in compliance with the requirements set out by DCC, including a certification that its bid bond was provided in the required form when, in fact, it was not. As the tender documents expressly stipulated that the submission of an electronic bid bond would render a bid unacceptable, the subsequent rejection of Secure Energy's bid on that basis was reasonable.

40. In light of the above, the Tribunal finds that the information in the complaint does not disclose a reasonable indication that DCC acted unfairly, in bad faith or in a manner that was inconsistent with the provisions of the tender documents or the applicable trade agreements.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member