



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2017-015

Aerospace Facilities Group, Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Thursday, October 12, 2017*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**AEROSPACE FACILITIES GROUP, INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**DETERMINATION**

Pursuant to section 10 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal determines that it does not have jurisdiction to inquire into Aerospace Facilities Group, Inc.'s complaint.

Serge Fréchette  
Serge Fréchette  
Presiding Member

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Complainant:	Aerospace Facilities Group, Inc.
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## STATEMENT OF REASONS

1. On June 16, 2017, Aerospace Facilities Group, Inc. (AFG) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a Request for Proposal (RFP) (Solicitation No. W8485-173733) issued by the Department of Public Works and Government Services (PWGSC)<sup>2</sup> on behalf of the Department of National Defence (DND) for the provision of dry media blasting cabinets.

2. The Tribunal accepted the complaint for inquiry on June 20, 2017, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup>

3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *CITT Act*.

4. For the reasons set out below, the Tribunal finds that it does not have jurisdiction to inquire into AFG's complaint.

### BACKGROUND

5. PWGSC issued the RFP on August 10, 2016.

6. The solicitation eventually closed on December 8, 2016. PWGSC received four bids, including two compliant bids, those of AFG and Pauli Systems, Ltd. (Pauli Systems). The evaluators determined that AFG's bid was the lowest-priced.<sup>4</sup>

7. On January 31, 2017, the contract was awarded to AFG. On February 1, 2017, a regret letter was sent to Pauli Systems, who responded the same day with concerns about the award.

8. On February 3, 2017, DND's Technical Authority contacted the complainant for an on-site meeting. That same day, PWGSC's Contracting Authority issued a "Stop Work Order" (SWO).

9. After several exchanges with the complainant, PWGSC, on instructions from DND, lifted the SWO on March 8, 2017.

10. On March 28, 2017, the Tribunal accepted a complaint from the other compliant bidder, Pauli Systems. The grounds for the Pauli complaint were that AFG was not supplying and could not supply the goods being specified in the RFP.

11. On April 18, 2017, PWGSC issued another SOW.

12. On May 1, 2017, PWGSC terminated the contract with AFG.

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

2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services was changed to Public Services and Procurement Canada. The procurement in question was conducted under the former name.

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

4. Exhibit PR-2017-015-9 at para. 39.

13. As stated above, AFG filed this complaint on June 16, 2017, and the Tribunal accepted it for inquiry on June 20, 2017. In its complaint, AFG argued that PWGSC made an unjustified and unfair decision by terminating the contract it was initially awarded as the successful bidder in the RFP process.

14. As a remedy, AFG requested that its contract be reinstated under the original terms and conditions or, in the alternative, that it be compensated for lost profits. AFG also requested reimbursement of its bid preparation costs.

15. On August 1, 2017, PWGSC filed its Government Institution Report (GIR) pursuant to Rule 103 of the *CITT Rules*. The GIR stated, in summary, that the cancellation was made for “valid and considered” reasons, including the lack of accuracy in the initial technical requirements of the solicitation, and therefore in the public interest.

16. On August 14, 2017, AFG filed its comments on the GIR in accordance with Rule 104 of the *CITT Rules*. Amongst other arguments, AFG submitted that the Tribunal had jurisdiction over the subject matter of its complaint.

17. Given that the parties were afforded multiple opportunities to file submissions and evidence, and given that no oral hearing was requested, the Tribunal disposed of the matter on the basis of the written record.

## TERMS OF THE PROCUREMENT

18. In the original version of the RFP of August 10, 2016, the only specifications for the goods being procured were set out in line 1 of the “Line Item Detail” table of the RFP (quantity and other information is omitted):

NSN - NNO: 4940-01-653-8032  
BLAST CLEANING CABINET  
Your offer:  
Part no. offer: \_\_\_\_\_  
NSCM/CAGE offer: \_\_\_\_\_  
NSCM/CAGE - COF/CAGE: O6UZ8  
Part No. – N<sup>o</sup> de la partie:  
RAM 35-ACGIH

19. On October 24, 2016, after an exchange between the Technical and the Contracting Authority, Amendment No. 4 to the RFP provided additional product specifications as follows:

Line item #1- . . . specifications have been added.

- i. Observation windows
- ii. Accu-flow computerized media mass flow valve
- iii. HEPA system
- iv. Fan blast nozzle.

20. With respect to the issue of equivalent products which was raised in the complaint, the Tribunal notes that Article 3.1.1 of the RFP stated the following:

### 3.1.1 Equivalent Products

1. Products that are equivalent in form, fit, function, quality and performance to the item(s) specified in the bid solicitation will be considered where the Bidder:
  - (a) designates the brand name and model and/or part number and NSCM/CAGE of the substitute product;
2. Products offered as equivalent in form, fit, function, quality and performance will not be considered if:
  - (a) the bid fails to provide all the information requested to allow the Contracting Authority to fully evaluate the equivalency of each substitute product; or
  - (b) the substitute product fails to meet or exceed the mandatory performance criteria specified in the bid solicitation for that item.
3. In conducting its evaluation of the bids, Canada may, but will have no obligation to, request bidders offering a substitute product to provide technical information demonstrating the equivalency (e.g. Drawing, specifications, engineering reports and/or test reports), or to demonstrate that the substitute product is equivalent to the item specified in the bid solicitation, at the sole cost of bidders, within three (3) business days (or other delay specified herein) of the request. If the bidder fails to provide the requested information within the specified delay, Canada may declare the bid non-responsive.

### 3.1.2 Substitute Products - Replaced Part Numbers from the OEM

1. Products that are replaced part number (superseded or obsolete) from the OEM must be equivalent in form, fit, function, quality and performance to the original item(s) specified in the bid solicitation and will be considered where the bidder provides upon request of the Contracting Authority:
    - a. proof by submitting a copy of a Certificate of Conformity from the Original Equipment Manufacturer (OEM) providing justification/explanation that the part numbers are a replacement of the OEM parts specified herein and are equivalent in form, fit, function, quality and performance to the OEM's parts specified herein; or
    - b. all required technical information (as detailed in Part 3, Section 1, 3.1.1 Equivalent Product) to demonstrate their technical compliance and to confirm form, fit, function, quality and performance of these replaced part numbers.
  2. In conducting its evaluation of the bids, Canada may, but will have no obligation to, request bidders offering a substitute product to demonstrate that the substitute product is equivalent to the item specified in the bid solicitation, at the sole cost of bidders, within three (3) business days (or other delay specified herein) of the request. If the bidder fails to provide the requested information within the specified delay, Canada may declare the bid non-responsive.
21. Additionally, after questions from bidders, Amendment No. 5 incorporated the following specification-related answers into the RFP:
- Q3- Can we quote micro-metering valves instead of computerized flow valve?
- A3- Computerized flow valve "or equivalent" in performance and specifications.

## ANALYSIS OF AFG'S COMPLAINT

22. As noted above, AFG argued that cancelling its contract was unjustified, as AFG was the lowest-priced compliant bidder and should therefore properly be awarded the contract.

23. Given that this matter largely concerns the cancellation of a contract resulting from a completed procurement process, the Tribunal must determine whether it has jurisdiction to undertake such an inquiry.

24. At the outset, the Tribunal wishes to express its considerable concern in respect of the events which led to the cancellation of AFG's contract. The evidence, including the multiple amendments and correspondence between the Technical and Procurement Authority, reveals a lack of attention to major specifications of the very important goods which were being procured for the Canadian military. The Tribunal struggles to understand how the procurement proceeded as far as it did with this level of confusion as to basic contractual matters, such as the precise specifications of the goods being procured.

25. However, as explained below, the Tribunal finds that it does not have jurisdiction to inquire into the matters raised in AFG's complaint.

### **The Tribunal's jurisdiction in this inquiry**

#### General principles

26. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. At the conclusion of the inquiry, the Tribunal must determine whether a complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

27. Subsection 30.11(1) of the *CITT Act* provides that the above jurisdiction is limited to "any aspect of the *procurement process* that relates to a designated contract" [emphasis added]. These aspects typically include the terms of the tender and the evaluations of the bids. In the cases where the Tribunal has jurisdiction to review the matters raised in a complaint, the following principles are set out in the trade agreements.

28. The trade agreements stipulate that, to be considered for contract award, a bid must conform to the essential requirements set out in the tender documentation and require that government institutions award contracts in accordance with the criteria and essential requirements specified in the tender documentation.

29. For instance, Articles 1015(4)(a) and (d) of *NAFTA* provide that, "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . ." and that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation." 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."

30. When considering whether bids are evaluated and contracts awarded in keeping with these provisions, the Tribunal applies the standard of reasonableness, typically according a great deal of deference to an evaluation panel with respect to its evaluation of proposals. The Tribunal does not, therefore, generally substitute its judgment for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>5</sup>

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5. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.



31. Matters subsequent to the award of a contract, i.e. matters of contract administration, are not within the above-described jurisdiction.<sup>6</sup> As the facts of this case demonstrate, the issues raised in the present complaint are ones of contract administration.

The Tribunal's jurisdiction with respect to contract cancellation

32. In several prior decisions, the Tribunal has found that cancellation of the contract in and of itself does not deprive the Tribunal of its jurisdiction. In these decisions, the Tribunal found that there were issues regarding the procurement process that raised questions of compliance with the trade agreements that could have affected the award or non-award of the contract.<sup>7</sup> Put otherwise, in these decisions cancellation of the contract was not relevant to jurisdiction – the events that gave rise to the Tribunal's jurisdiction either occurred prior to the cancellation or were post-award (re-)evaluations of the bids.

33. Tribunal decisions have also consistently found that, upon discovery of errors in the evaluation process, a contracting authority must take appropriate steps to correct such errors, in keeping with the terms of the solicitation and in a manner that preserves the integrity of the competitive procurement process.<sup>8</sup> Thus, where evaluators become aware of errors in their initial evaluation and take appropriate steps to correct them, they ensure that the procurement process is carried out in compliance with the trade agreements. A recent Federal Court of Appeal decision upholding a Tribunal determination encourages procuring entities to cancel awards if there is an error in the award as this may be the very remedy that the Tribunal would recommend.<sup>9</sup>

34. The Tribunal has recognized that circumstances where “the exercise of the right to cancel a procurement process would be *appropriate* normally include those where unforeseen circumstances arise, such as where it is belatedly discovered that the specifications are inadequate. In fact, in such situations, cancellation of the process is usually viewed as preserving the equality of bidders and the integrity of the process” [emphasis in original].<sup>10</sup>

35. In this regard, the Tribunal notes the complainant's reliance on the Tribunal's recent decision in *Valcom*, which recommended a (re-)award of a cancelled contract.<sup>11</sup>

36. In *Valcom*, where DND was also the procuring entity, the evaluators initially found three of the four bids to be non-compliant. All three of those bids were lower-priced than Valcom's bid. Valcom, the only compliant bidder, was awarded the contract. Upon learning that Valcom received the contract award, two of the unsuccessful bidders objected to DND, alleging that DND erred in its evaluation of their bids. During

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6. See, for example, *Valcom Consulting Group Inc.* (14 June 2017), PR-2016-056 (CITT) [*Valcom*] at para. 32; *HDP Group Inc.* (28 December 2016), PR-2016-047 (CITT) at para. 10; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36.

7. See generally *Valcom*; *Medi+Sure Canada Inc. v. Department of Public Works and Government Services* (19 January 2017), PR-2016-031 (CITT); *Lincoln Landscaping Inc. v. Department of Public Works and Government Services* (16 November 2016), PR-2016-018 (CITT).

8. *Francis H.V.A.C. Services Ltd. v. Department of Public Works and Government Services* (2 September 2016), PR-2016-003 (CITT) at paras. 36, 43, aff'd *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)* 2017 FCA 165 (CanLII) [*Francis* (FCA)].

9. *Francis* (FCA) at para. 33.

10. *Agence Gravel Inc. v. Department of Public Works and Government Services* (26 January 2017), PR-2016-035 (CITT) at para. 93, citing *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) at paras. 22-23.

11. *Valcom* at paras. 56-59, 105.

this process, these two parties provided DND with some further information. As a result, DND reviewed the non-responsive bids. Following its re-evaluation, and citing concerns with the procurement process, DND terminated the contract with Valcom and retendered the requirement.

37. In *Valcom* the Tribunal found that DND had no reasonable basis to change its initial assessment that the bids were non-compliant. Therefore, the evidence indicated that DND's re-evaluation of the two non-compliant bids was unreasonable. The re-evaluation neither corrected errors in the initial evaluation nor preserved the integrity of the competitive procurement process. Instead, the opposite was true: DND's re-evaluation of two bids led to an erroneous result, in that DND cancelled the contract that had been properly awarded to the only compliant bidder, Valcom. The evidence before the Tribunal revealed that, as per the original evaluation, Valcom was the only compliant bidder and, as such, should have been allowed to proceed with the work it was awarded on the basis of the terms of the RFP.

38. None of the decisions cited above change the long-standing principle that the Tribunal has no jurisdiction over contract administration issues, such as cancellation of the resulting contract.

The Tribunal has no jurisdiction in the present inquiry

39. It is evident to the Tribunal that the complaint about the exercise of the cancellation clause in the present case was not associated with the conduct of the procurement process per se. Indeed, this could not be the case since the complainant was the winning bidder.

40. It is uncontested that in this case an RFP was issued, and after some significant amendments to the specifications of the goods, two compliant bids were received. The complainant was evaluated to be the winning bidder and was awarded the resulting contract. The sole relevant subject matter of its complaint is the subsequent cancellation of the contract.

41. In the present case, the Tribunal is persuaded that the procuring entity has cancelled the award of the resulting contract in order to correct the terms of the RFP.<sup>12</sup> The evidence does not indicate that the cancellation of the contract resulting from the RFP had to do with the (re-)evaluation of any bids. Therefore, the matter of cancellation remains a matter of contract administration over which the Tribunal has no jurisdiction.

42. The actions that are the focus of AFG's complaint took place after the award of the contract and solely relate to the cancellation of the contract.

43. Further, the Tribunal is not persuaded that the cancellation of the contract had anything to do with an attempt to give preference to the losing bidder. Rather, the evidence indicates that the procuring entity realized post-award that it had committed fundamental errors in drafting the product requirements in question and could no longer proceed with the awarded contract.<sup>13</sup>

44. The Tribunal finds that the cancellation was a result of an examination, albeit post-award, of the technical needs of the procuring entity and ultimately of the legitimate concerns of Canadian military authorities.

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12. Exhibit PR-2017-015-09A (protected), Confidential Tabs 24-25, 27, 29, 32, 34, 37-38.

13. This was admitted by PWGSC: Exhibit PR-2017-015-09 at para. 70.

45. Contrary to the complainant's assertions that PWGSC was trying to skirt the Tribunal's inquiry process, the Tribunal finds that PWGSC was likely addressing the complaint by Pauli Systems, to the best of its ability. PWGSC then embarked on a process to revise the RFP to fairly reflect its needs and satisfy the concerns of both bidders.

46. The Tribunal does wish to make it clear that nothing in this decision prejudices the questions raised by the complainants in the context of any future procurement in respect of these goods, i.e. when the procuring entity retenders the RFP.

The provisions of *NAFTA* Article 1015(4)(c) are not applicable

47. The Tribunal is cognizant of Article 1015(4)(c) of *NAFTA*, which provides that, "unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lower-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation."

48. In this respect, the Tribunal is not convinced that *NAFTA* Article 1015(4)(c), relied on by the complainant, is applicable in these circumstances. The provision states that:

unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lower-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.

49. It is clear that a contract was awarded to a supplier and the goods were, and are still to be, procured.<sup>14</sup> Both bidders will presumably have the opportunity to bid for these goods.<sup>15</sup> Therefore, it is not that the procuring entity is engaging in any untoward behaviour, such as bid shopping or unreasonably or otherwise improperly delaying an award, but is rather attempting to ensure that it procures the goods that it needs.<sup>16</sup>

## Conclusion

50. On balance, the Tribunal finds that the matters raised in the complaint are matters of contract administration.

51. Given the above, the Tribunal finds that it has no jurisdiction to inquire into AFG's complaint. Therefore, the Tribunal dismisses AFG's complaint.

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14. Exhibit PR-2017-015-09 at paras. 39, 46, and Public Tab 28; Exhibit PR-2017-015-09A (protected), Confidential Tab 21.

15. The Tribunal notes with considerable sympathy that AFG may be at a strategic disadvantage in the renewed bidding as its pricing was publicly disclosed upon award as required by the trade agreements. However, publication of award pricing is required by the trade agreements result and is a feature of the long-established public tendering and award system: see, for example, *NAFTA*, Art. 1015(7).

16. A "public interest" explanation was provided to the Tribunal by PWGSC, which is consistent with the attempts to properly correct the procurement process and its outcome. The explanation was that the cancellation was made in the interest of DND obtaining the proper equipment and correcting the terms of a flawed solicitation.

**COSTS**

52. PWGSC did not request its costs incurred in responding to this complaint. It did not deny that the events leading to the cancellation of the contract were mainly of its own making, as discussed above. Therefore, each party will bear its own costs.

**DETERMINATION**

53. Pursuant to section 10 of the *Regulations*, the Tribunal dismisses the complaint for lack of jurisdiction.

Serge Fréchette  
Serge Fréchette  
Presiding Member