



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2017-021

Telecore

v.

Department of Public Works and
Government Services

*Order and reasons issued
Tuesday, October 10, 2017*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 COMPLAINT 1

 PROCEDURAL BACKGROUND 1

 ANALYSIS 1

 COSTS 3

 ORDER 3

IN THE MATTER OF a complaint filed by Telecore 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 of the Canadian International Trade Tribunal to inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

BETWEEN

TELECORE

Complainant

AND

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

**Government
Institution**

ORDER

Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings relating thereto. The Canadian International Trade Tribunal awards Telecore its costs in the amount of \$1,150 for preparing and proceeding with the complaint.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

1. This inquiry concerns a complaint filed with the Canadian International Trade Tribunal (the Tribunal) in relation to a Request for Proposal (RFP) (Solicitation No. W0001-185315/A) issued by the Department of Public Works and Government Services Canada (PWGSC), on behalf of the Department of National Defence (DND), for the provision of headset microphones and related electrical assemblies, cable assemblies and wiring harnesses. The complaint filed by Telecore was accepted for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.¹ However, for the reasons provided below, the Tribunal has decided to cease the inquiry. As a result, the complaint is dismissed.

COMPLAINT

2. Telecore alleged that the RFP unfairly restricted competition by requiring bidders to submit proposals on all four listed requirements in order for proposals to be deemed compliant. Telecore argued that a bidder should have been permitted to bid on a selection of the four requirements had it chosen to do so. As a remedy, Telecore requested its lost profits and costs in the amount of \$5,000.

PROCEDURAL BACKGROUND

3. On July 25, 2017, Telecore filed a complaint with the Tribunal pursuant to subsection 30.11(1) of the *CITT Act*.

4. On July 28, 2017, the Tribunal notified the parties that it had accepted the complaint for inquiry, 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*.² At the same time, the Tribunal issued a postponement of award of contract order with respect to the procurement.

5. On August 16, 2017, the RFP was cancelled.

6. On August 22, 2017, PWGSC filed its Government Institution Report (GIR) pursuant to Rule 103 of the *CITT Rules*.

7. On August 30, 2017, Telecore submitted its comments on the GIR, including a request for a remedy for lost profits and \$5,000 in unspecified costs.

ANALYSIS

8. In the GIR, PWGSC acknowledged that “the RFP had included an unintended mandatory requirement.”³ That is, according to PWGSC, the RFP was intended to permit bidders to submit proposals on any, or all, of the four listed line items. To remedy that error, PWGSC cancelled the solicitation with the intention to re-tender.

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

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

3. Exhibit PR-2017-021-11 at paras. 21 and 36, Vol. 1.

9. The Tribunal has found that cancellation of the procurement in and of itself does not deprive the Tribunal of its jurisdiction to conduct an inquiry into a complaint.⁴ 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.

10. At the time Telecore filed its complaint, it met all conditions necessary for the Tribunal to initiate and proceed with an inquiry. Indeed, the Tribunal was satisfied that Telecore was a potential supplier, that the complaint was timely, that a designated contract had been awarded and that there was a reasonable indication that the procurement had not been conducted in accordance with the applicable trade agreements. Accordingly, the conditions of subsection 7(1) of the *Regulations* were met.⁵

11. The cancellation of the solicitation process by PWGSC after the initiation of the inquiry did not affect the Tribunal's jurisdiction. Provided that a review of the grounds of complaint remains relevant, the purpose of the inquiry is not affected, irrespective of the cancellation. That purpose remains to determine whether the procurement process was followed in accordance with the relevant provisions of the applicable trade agreements.⁶

12. The Tribunal has 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.⁷ Thus, evaluators must be encouraged to correct errors that they discover during the procurement process.⁸ This preserves the integrity of the procurement framework and ensures that solicitations are carried out in compliance with the trade agreements.

13. 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”.⁹ In this case, PWGSC acknowledged that the RFP inadvertently contained a restrictive condition and upon being notified of that error, it rightly cancelled the procurement process.

14. Cancellation of the procurement process is one of the remedies that would have been open to the Tribunal to grant had the inquiry run its course. The effect of the cancellation by PWGSC, and the review of the mandatory requirements for the issuance of a new solicitation, will place all potential suppliers on an equal footing once again. Accordingly, the Tribunal finds that this is not a circumstance where compensation for lost profits is appropriate.

4. *Medi+Sure Canada Inc. v. Department of Public Works and Government Services* (19 January 2017), PR-2016-031 (CITT) at para. 11; *Adélarde Soucy (1975) Inc.* (24 June 2009), PR-2008-062 (CITT) [*Adélarde Soucy*]; *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) [*R.P.M. Tech*].

5. *Adélarde Soucy* at para. 7.

6. *R.P.M. Tech* at para. 9.

7. *Cifelli Systems Corporation* (21 June 2001), PR-2000-065 (CITT) at 5.

8. *CGI Information Management Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 137.

9. *Agence Gravel 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.

15. Pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal may at any time cease conducting an inquiry “[i]f it is of the opinion that the complaint is trivial . . .”. In the present case, the grounds of complaint are now fundamentally moot. The review of the grounds of complaint, closely related to the facts of the case, would have only limited theoretical value and little practical impact, if any.¹⁰ The Tribunal therefore finds it appropriate to cease the inquiry pursuant to subsection 30.13(5) of the *CITT Act*.

COSTS

16. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal can award costs of proceedings before it. This power is discretionary.

17. In the GIR, PWGSC acknowledges that “. . . the RFP was not properly worded and, as a result, the intention of DND was not clearly expressed, resulting in the erroneous inclusion of a mandatory requirement.”¹¹ This was an error in the procurement process. Telecore bore the effort and expense of pursuing a complaint which would have been unnecessary had PWGSC not made the error.

18. For this reason, and considering the Tribunal’s *Procurement Costs Guideline*, the Tribunal exercises its discretion by awarding Telecore \$1,150 for the costs associated with pursuing this complaint.

ORDER

19. Pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings relating thereto. The Tribunal awards Telecore its costs in the amount of \$1,150 for preparing and proceeding with the complaint.

Peter Burn

Peter Burn

Presiding Member

10. *R.P.M. Tech* at para. 11.

11. Exhibit PR-2017-021-11 at para. 36, Vol. 1.