



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-051

Groupe Hémisphères Inc.

*Decision made
Friday, February 9, 2018*

*Decision issued
Monday, February 12, 2018*

*Reasons issued
Friday, February 23, 2018*

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

GROUPE HÉMISPÈRES 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.

Serge Fréchette
Serge Fréchette
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.

SUMMARY OF COMPLAINT

2. Groupe Hémisphères Inc. (Groupe Hémisphères) filed a complaint with the Tribunal concerning a request for standing offers (RFSO) (Solicitation No. EE517-173360/A) issued by the Department of Public Works and Government Services (PWGSC) for the provision of environmental studies. Groupe Hémisphères first transmitted its complaint to the Tribunal on February 6, 2018, and completed it by filing additional information and documents on February 7 and 9, 2018.

3. The RFSO at issue was published on July 7, 2017, by PWGSC with a closing date of August 25, 2017, that was later extended to September 8, 2017. Groupe Hémisphères submitted a bid in response to the RFSO on August 25, 2017.

4. According to the information provided with the complaint, PWGSC sent an email on November 20, 2017, to Groupe Hémisphères and the other suppliers asking if they agreed to extend the period of validity of their offers by 30 days. PWGSC then asked potential suppliers whose proposals met the mandatory requirements of the RFSO if they agreed to extend the period of validity of their offers until January 19, 2018. The standing offers were awarded on January 12, 2018. On the same day, PWGSC informed Groupe Hémisphères that its bid was unsuccessful because it had not met a mandatory requirement. Also on January 12, 2018, Groupe Hémisphères asked PWGSC to reconsider its decision. On January 24, 2018, PWGSC provided additional explanations on the non-compliance of Groupe Hémisphères's bid in a telephone discussion.

5. Groupe Hémisphères challenges the procedure followed by PWGSC, particularly the fact that PWGSC, with regard to the second extension of the offer validity period, only contacted the bidders whose proposals had been considered responsive. Because its bid had been considered non-responsive, Groupe Hémisphères did not receive this extension request and was not informed of the second extension of the offer validity period. Groupe Hémisphères considers that PWGSC did not comply with the specified time limit to announce the results because it did not communicate the results to the unsuccessful bidders before the first extension period expired and did not inform them of the second extension request.

6. As a remedy, Groupe Hémisphères requests that a new RFSO be issued.

7. The Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

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

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

ANALYSIS

8. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry only if certain prescribed conditions are met. Amongst these conditions, the information provided by the complainant must disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

9. Groupe Hémisphères claims that the procurement process was flawed because PWGSC only asked bidders whose proposals had been considered responsive if they agreed to extend the offer validity period and did not inform other bidders, including Groupe Hémisphères, about this extension. The Tribunal notes that Groupe Hémisphères does not challenge in its complaint PWGSC's evaluation of its proposal or its conclusion that a mandatory requirement of the RFSO was not met.

10. The applicable trade agreements require federal entities to conduct the procurement process in accordance with the conditions stated in the solicitation documents.

11. In the present case, based on the information on the record and Groupe Hémisphères's allegations, PWGSC seems to have followed the procedure specified in the RFSO for extensions of the offer validity period. The relevant provision of the RFSO is paragraph 5.4 of the Standard Instructions.³ This provision is incorporated by reference and forms part of the RFSO. However, the RFSO modified paragraph 5.4 of the Standard Instructions by specifying an initial offer validity period of 90 days instead of 60 days.⁴ The paragraph, as modified by the RFSO, reads as follows:

Offers will remain open for acceptance for a period of not less than [90] days from the closing date of the RFSO, unless specified otherwise in the RFSO. *Canada reserves the right to seek an extension of the offer validity period from all responsive offerors in writing, within a minimum of three (3) days before the end of the offer validity period. If the extension is accepted by all responsive offerors, Canada will continue with the evaluation of the offers. If the extension is not accepted by all responsive offerors, Canada will, at its sole discretion, either continue with the evaluation of the offers of those who have accepted the extension or cancel the RFSO.*

[Emphasis added]

12. The initial offer validity period ran until December 7, 2017. On November 20, 2017, PWGSC asked bidders (including Groupe Hémisphères) if they agreed to extend the offer validity period for 30 days. Since the extension was accepted, PWGSC therefore considered the revised expiry date of the offer validity period to be January 6, 2018 (i.e. 30 days after December 7, 2017).⁵

13. On December 21, 2017, more than three days before the end of the offer validity period, PWGSC asked the bidders *whose proposals had been considered responsive* if they agreed to extend the offer validity period until January 19, 2018. PWGSC then awarded the contract on January 12, 2018, and informed Groupe Hémisphères of the award on the same day.

3. Document 2006 (version dated 2017-04-27) "Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements", available on line at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/21>.

4. See Part 2, Article 1 of the RFSO and Amendment No. 006 to the RFSO, published on August 30, 2017.

5. The Tribunal notes that Groupe Hémisphères alleges that the first extension of the offer validity period ended on December 20, i.e. 30 days after the date of the extension request made by PWGSC on November 20, 2017. In light of the wording of the relevant provision of the RFSO and of PWGSC's request for extension, the Tribunal is of the view that the extension of the offer validity period should be calculated as of the expiry date of the initial offer validity period, and not the date on which the request for extension was made or accepted.

14. The Tribunal finds no reasonable indication that this procurement process was compromised. It is apparent to the Tribunal that by only asking bidders whose proposals had been considered responsive if they agreed to extend the offer validity period and not informing other bidders of this extension, PWGSC acted in accordance with the procurement process provided for in the RFSO. Furthermore, nothing in the information contained in the complaint indicates that Groupe Hémisphères was in any way treated unfairly or suffered prejudice as a result of the process followed by PWGSC, or that PWGSC contravened in some other way the requirements of the trade agreements.⁶

15. Therefore, the complaint does not disclose a reasonable indication of a breach of the applicable trade agreements.

16. Finally, the Tribunal considers that the procedure concerning the extension of the offer validity period became known, or reasonably should have become known, to Groupe Hémisphères when it read paragraph 5.4 of the Standard Instructions incorporated by reference and modified by the RFSO. If Groupe Hémisphères considered that this procedure could infringe the trade agreements, it had 10 working days from the date on which the RFSO was published or, at the latest, after the last relevant amendment was issued, i.e., August 30, 2017, to file a complaint or make an objection to PWGSC in this respect.⁷ However, the information on the record indicates that Groupe Hémisphères did not make an objection to PWGSC in this respect before the contract award, and Groupe Hémisphères transmitted its complaint to the Tribunal only on February 6, 2018 (and completed it only on February 9, 2018). Any complaint concerning the procedure for extending the offer validity period itself is therefore late and, as a result, is inadmissible.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

6. The Tribunal notes that, among other things, the applicable trade agreements require that the contracting entities promptly inform participating suppliers of their *contract award* decisions (see for example Article 516(1) of the *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017)). As indicated, according to the information on the record, Groupe Hémisphères was indeed informed of the contract award on the same day the standing offers were issued: see PWGSC's emails dated January 12 and February 1, 2018.

7. See subsections 6(1) and 6(2) of the *Regulations*:

“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” [emphasis added].

“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” [emphasis added].