Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-039

Avalanche Mitigation Services

Decision made
Thursday, November 9, 2017

Decision and reasons issued
Friday, November 17, 2017

Canadä

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

AVALANCHE MITGATION SERVICES

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.

Ann Penner
Ann Penner
Presiding Member

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.

BACKGROUND

2. This complaint by Avalanche Mitigation Services (AMS) concerns a Request for Proposal (RFP) (Solicitation No. 5P423-170184/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of Parks Canada for the procurement of an "avalauncher" (a device that sets off avalanches).

3. The RFP was issued on August 24, 2017, with an initial bid closing date of October 4, 2017. The bid closing date was extended to October 10, 2017, and subsequently to October 12, 2017.

4. On October 2, 2017, AMS was contacted by another company, which asked whether the avalauncher it manufactures could meet the mandatory technical specifications set out at Annex A to the RFP, under heading 3.1.1, titled "Safety and Operational Features".[3] On October 3, 2017, AMS replied that the specifications appeared to have been drafted to correspond to those of a particular (but unspecified) avalauncher. AMS also stated that items (g) and (h) on the list of required Safety and Operational Features were actually dangerous.[4]

5. On October 3, 2017, AMS contacted Parks Canada to object to the manner in which the technical specifications appeared to be structured around the specifics of a particular product.[5] AMS also requested that Parks Canada put AMS in touch with the "Purchasing Agent Supervisor" in charge of the procurement. Also on October 3, AMS made the same objection directly to PWGSC.[6]

6. On October 4, 2017, PWGSC replied to AMS and stated that it would take up AMS's concerns with the technical authority.[7]

7. On October 11, 2017, PWGSC informed AMS that items (g) and (h) had been clarified with the technical authority and that an amendment to the RFP had been issued to revise these specifications

---

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Complaint, attachment 1 at 4.
4. *Ibid.* at 3.
5. AMS referred to this practice as "bid rigging" throughout the complaint. In its correspondence with AMS, PWGSC referred AMS to the definition of "bid rigging" in section 47 of the *Competition Act* and noted that this definition does not include bias in favour of a particular supplier on the part of the procuring entity; instead, it refers only to collusion among potential suppliers during the bidding process. Accordingly, the Tribunal will not use that term here.
6. Complaint, attachment 1 at 2-3.
7. *Ibid.* at 2.

(Amendment No. 003). PWGSC also informed AMS that it had extended the bid closing date to October 12, 2017.[8]

8. On October 11, 2017, AMS reiterated its objection that the "vast majority" of the specifications had been written to conform to the specifics of a particular product, namely the Avacaster, and requested that PWGSC provide AMS with the contact information for the "head of the Bid department" so that AMS could file a formal complaint.[9]

9. On October 12, 2017, AMS filed an objection with the Procurement Branch, Western Region, of PWGSC. AMS again alleged that PWGSC had crafted the technical specifications to conform to the specifics of one particular product. AMS also reiterated that, in its opinion, there were safety concerns with that particular product.[10]

10. On October 12, 2017, PWGSC replied that AMS's safety concerns with the technical specifications had been taken into account when it amended items (g) and (h) of the mandatory Safety and Operational Features, and that AMS had presented no other information that indicated that the technical requirements were biased in favour of a particular supplier. Accordingly, PWGSC refused to further amend the RFP or extend the bid closing date.[11]

11. Before filing its complaint with the Tribunal, AMS approached the Competition Bureau and the Office of the Procurement Ombudsman (OPO) with its grievances.[12]

12. On November 9, 2017, AMS filed its complaint with the Tribunal. AMS alleged that it was precluded from bidding as the terms of the solicitation were biased in favour of a particular supplier. As a remedy, AMS requested that the designated contract be cancelled, that a new solicitation be issued and that it be compensated for lost profits and lost opportunity. AMS also requested its bid and complaint preparation costs.

ANALYSIS

13. For the following reasons, the Tribunal has decided not to conduct an inquiry into this complaint.

14. Subsection 6(2) of the *Regulations* states that a potential supplier who has made an objection 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. *Ibid.* at 1.
9. *Ibid.*
10. Complaint, attachment 2 at 2.
11. *Ibid.* at 1-2.
12. Sometime between October 12 and October 23, 2017, AMS contacted the Competition Bureau with its complaint. On October 23, 2017, the Competition Bureau informed AMS that its complaint was outside of the Competition Bureau's mandate and directed AMS to the OPO (complaint, attachment 3). On or about November 3, 2017, AMS contacted the OPO with its complaint (complaint, attachment 4). On November 7, 2017, the OPO informed AMS by telephone that its complaint was outside the OPO's jurisdiction and directed AMS to contact this Tribunal (complaint at 6; e-mail accompanying additional information filed on November 9, 2017, at 1.)

15. The Tribunal notes that the RFP was issued on August 24, 2017, and that the basis of AMS's objection could therefore have become known to it as of that date. However, the Tribunal accepts that AMS only became aware of the basis of its objection on October 2, 2017, when it was contacted about the RFP by another company, and that therefore AMS's initial objection to PWGSC was made in a timely manner.

16. However, AMS did not file its complaint with the Tribunal within 10 working days of receiving its final response from PWGSC (i.e. October 12, 2017).

17. The Tribunal acknowledges that AMS may have been delayed in filing its complaint with the Tribunal because it may have had the impression that the Competition Bureau was the appropriate forum for its complaint. The Tribunal also recognizes that PWGSC should have directed AMS to the appropriate venue for filing its complaint in its final communication of October 12; in fact, by not setting out the proper bid challenge mechanism, PWGSC may have effectively contributed to AMS's mistaken impression as its correspondence explicitly referred to the *Competition Act*. Further delay was likely also caused by the fact that the Competition Bureau wrongly directed AMS to the OPO rather than to the Tribunal.

18. However, there is no evidence upon which the Tribunal can definitely state that AMS would have filed its complaint in a timely manner had it not been for these delays. As the Tribunal has stated before, the 10-working-day deadline of the *Regulations* is strict and cannot be extended. As a result, it has no choice but to find that AMS's complaint is not timely.

19. Nevertheless, the Tribunal could not have initiated an inquiry into AMS's complaint, even if it had been filed in a timely manner. The Tribunal notes that it may conduct an inquiry only where certain conditions are met.[13] One of those conditions requires that the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.[14]

20. Article 1007 of *NAFTA* deals with technical specifications of a procurement and provides, in relevant part, as follows:

> 1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.
>
> 2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:
>
> > (a) specified in terms of performance criteria rather than design or descriptive characteristics; . . .
>
> 3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement

13. Sections 6 and 7 of the *Regulations*.
14. AMS is a U.S.-based supplier; therefore, only the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng> (entered into force 1 January 1994) [*NAFTA*] and the *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*AGP*] are potentially applicable to this complaint. As the contract value is below the monetary threshold for the application of the *AGP*, only *NAFTA* is applicable.

requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

21. As noted above, AMS alleged that the technical specifications of the RFP were specific to one particular product, the Avacaster, to a degree that precluded all other potential suppliers from bidding. However, other than the alleged safety concerns with items (g) and (h), AMS's complaint provides no information regarding the nature of the alleged problems with the technical specifications. For example, AMS did not explain which technical specifications conform to those of the Avacaster, nor did it provide any evidence to support its claim that only the Avacaster could meet the specifications. In fact, AMS stated that its product could meet or exceed all of the technical specifications of the original RFP, other than items (g) and (h) which it considered unsafe.[15] As PWGSC later amended these items in response to AMS's safety concerns, the Tribunal cannot conclude on the basis of the evidence before it that AMS was effectively precluded from bidding due to a tailoring of the technical specifications.

22. Furthermore, an examination of the specifications themselves discloses no apparent breach of the above-cited terms of *NAFTA*: the specifications do not refer to a particular product or manufacturer by name, etc., and appear to be specified in terms of generic performance criteria. Accordingly, the Tribunal finds no basis on which to conclude that the complaint discloses a reasonable indication of a breach of *NAFTA*.

DECISION

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

Ann Penner
Ann Penner
Presiding Member

---

15. Complaint, attachment 1 at 3.