



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

Files No. PR-2017-056,
PR-2017-057, PR-2017-058 and
PR-2017-059

New Horizon Car and Truck
Rentals Ltd. o/a Discount Car and
Truck Rentals

*Decision made
Tuesday, February 27, 2018*

*Decision and reasons issued
Monday, March 5, 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

NEW HORIZON CAR AND TRUCK RENTALS LTD. O/A DISCOUNT CAR AND TRUCK RENTALS

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.

Jean Bédard

Jean Bédard
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.

SUMMARY OF RFSOS AND COMPLAINTS

2. On February 23, 2018, New Horizon Car and Truck Rentals Ltd. o/a Discount Car and Truck Rentals (New Horizon) filed four complaints with the Tribunal regarding four Requests for a Standing Offer (RFSO) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the supply of rental vehicles for a one-year term with two one-year option periods. The RFSOs are, for the purposes of these complaints, the same but for the client delivery locations:

- PR-2017-056 (Solicitation No. W3536-170031/A, issued on October 27, 2017): Canadian Division Support Base Toronto;
- PR-2017-057 (Solicitation No. W0113-17T006/A, issued on October 24, 2017): Canadian Forces Base (CFB) Borden;
- PR-2017-058 (Solicitation No. W0125-17T005/A, issued on October 27, 2017): CFB Trenton; and
- PR-2017-059 (Solicitation No. W0114-185494/A, issued on November 1, 2017): CFB Kingston.

3. The first RFSO had a closing date of December 5, 2017, while the others closed on December 11, 2017. However, the third amendment to the RFSOs (posted on December 7, 2017) delayed the closing dates to December 22, 2017, and the fourth amendment (posted on December 19, 2017) delayed them to December 28, 2017, at 2:00 p.m.

4. Each of the amendments required the signature of the vendor representative on the front page acknowledging receipt of the amendment and accepting the revision of the vendor's offer in accordance with the amendment. The fourth amendment left four business days during the holiday season for the bidders to obtain all required signatures. Furthermore, the RFSOs did not allow for electronic submission either by fax or otherwise. New Horizon alleges that it was unable to obtain the required new signature for the fourth amendment in time due to the holiday season; consequently, its bid arrived 21 minutes after bid closing.

5. On February 8, 2018, PWGSC informed New Horizon that its bid had been returned as late. By e-mail dated February 15, 2018, New Horizon requested a debriefing, which occurred by telephone interview the same day.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

6. At the debriefing, New Horizon objected that the fourth amendment had not provided it adequate time to obtain the required new signature due to office closures during the holiday season. According to the complaint, PWGSC responded that it would take account of holiday periods going forward but that it could not change its decision in this instance.

7. In its complaint, New Horizon submits that PWGSC should not have rejected its bid as late, and it should not have issued the fourth amendment so close to the closing date.

ANALYSIS

8. To initiate an inquiry, the Tribunal must find that (a) the complainant is a potential supplier, (b) the complaint is in respect of a designated contract and (c) the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements,³ which the RFSOs here acknowledge are the *North American Free Trade Agreement*,⁴ the *Revised Agreement on Government Procurement*⁵ and the *Canadian Free Trade Agreement*.⁶ The complaint must also be filed within the prescribed time limits.⁷

9. The first ground of complaint (rejection of a late bid) is timely but does not disclose a reasonable indication of a violation of any trade agreement. The second ground (late publication of an amendment) is untimely because New Horizon did not raise an objection when the amendment was published.

10. Regarding the first ground of complaint, the Tribunal has repeatedly held that the integrity of the procurement system depends, to an important degree, on the timely receipt of complete bids at the place specified, and in the precise manner stated, in solicitation documents.⁸ Moreover, the Tribunal has previously found that permitting one bidder to benefit from an extension to the bid closing deadline can be unfair to other bidders, which could just as easily give rise to even further complaints to the Tribunal.⁹ The

3. Subsection 7(1) of the *Regulations*.

4. *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*].

5. *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).

6. *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) [*CFTA*].

7. Section 6 of the *Regulations*.

8. *Promaxis Systems Inc.* (11 January 2006), PR-2005-045 (CITT) (difficulty with fax transmission); *GHK Group* (4 September 2007), PR-2007-031 (CITT) (delivery of bid to the then Canadian International Development Agency [CIDA] technical authority, instead of to PWGSC, which was conducting the procurement on CIDA's behalf); *Corbel Management Corp.* (25 May 2009), PR-2009-009 (CITT) [*Corbel*] (car accident delayed delivery of bid); *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT) (delivery of bid after bid closing time); *PA Consulting Group* (20 September 2011), PR-2011-030 (CITT) (delivery of bid to recipient of services' address rather than PWGSC); *Headwall Photonics, Inc.* (25 September 2012), PR-2012-017 (CITT) (no evidence of delay of bid receipt attributable to PWGSC's shipping/receiving department); *Falcon Environmental Services Inc.* (13 May 2015), PR-2014-061 (CITT) (delivery of bid to recipient of services' address rather than PWGSC); *Wheel Systems International, Inc.* (15 December 2015), PR-2015-044 (CITT) (delivery of bid to wrong fax number); *Keller Equipment Supply Ltd.* (20 October 2016), PR-2016-038 (CITT) (misunderstanding regarding availability of electronic submission, delivery of physical bid 14 minutes late).

9. *Corbel* at para. 8.

Tribunal therefore finds that PWGSC acted reasonably in not allowing New Horizon to submit its bid late when no extension had been previously granted or requested.

11. Regarding the second ground of complaint, subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “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.”

12. 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.”

13. In other words, a complainant has 10 working days from the date 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 will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

14. The fourth amendment was published on December 19, 2017. New Horizon asserts it did not have enough time to obtain the necessary signature for the amendment to finalize and submit its bid; however, it did not object to PWGSC at that time. It only objected on February 15, 2018, after it learned on February 8, 2018, that its bid was rejected as late. While February 15 is within 10 business days of the rejection of the late bid on February 8 (the first ground of complaint), it is well past the 10-day deadline based on when the amendment was published (the basis for the second ground of complaint) on December 19. The complainant had sufficient time before the 10-day deadline and even before bid closing to send a short and simple written objection to PWGSC by, for example, e-mail to preserve this ground of complaint.

15. As explained by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*:

[P]otential suppliers *are required not to wait for the attribution of a contract before filing any complaint* they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.¹⁰

[Emphasis added]

16. Accordingly, the second ground of complaint is untimely.

17. The Tribunal acknowledges the severity of the 10-working-day deadline on bidders—in particular, on first-time or small-business bidders—but that deadline is fixed by the *Regulations* and limited because time is of the essence in procurements, including the time frame for initiating and completing the challenge process at the Tribunal.¹¹

18. Because the Tribunal finds that the second ground of complaint is untimely, it need not consider whether it raises a reasonable indication of a violation of the trade agreements. However, the Tribunal

10. 2002 FCA 284 (Can LII) [*IBM Canada*] at para. 20.

11. See, for example, *Teledyne Webb Research, A Business Unit of Teledyne Benthos, Inc.* (20 October 2011), PR-2011-038 (CITT) at para. 17; *The Corporate Research Group Ltd., Operating as CRG Consulting* (26 January 2010), PR-2009-075 (CITT) at para. 24; *IBM Canada*.

wishes to make clear that the trade agreements do regulate the timing of closing. Article 1012 of *NAFTA* and Article 511 of the *CFTA* regulate time limits for submitting tenders. These provisions require the government institution to turn its mind to this issue, which PWGSC, according to the complainant, admits it did not do in this case.

19. The Tribunal notes favourably PWGSC's alleged statement to New Horizon during the debriefing that it will take into account holiday periods going forward. This highlights the importance of raising objections to the government institution at the moment they arise so that they can be, if valid, remedied in the first instance.

DECISION

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

Jean Bédard

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Presiding Member