



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2017-034

Eight Bells Consulting Services Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, February 8, 2018*

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IN THE MATTER OF a complaint filed by Eight Bells Consulting Services 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

EIGHT BELLS CONSULTING SERVICES INC.

Complainant

AND

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

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Ann Penner

Ann Penner

Presiding Member

Tribunal Panel: Ann Penner, Presiding Member

Support Staff: Elysia Van Zeyl, Counsel
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STATEMENT OF REASONS

1. On November 2, 2017, Eight Bells Consulting Services Inc. (EBCSI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerns a Request for Proposal (Solicitation No. EP737-181537/A) (hereinafter the “ESCP-P RFP”) issued by the Department of Public Works and Government Services (PWGSC) for the provision of fairness monitoring services in connection with the Department of National Defence’s (DND) Enhanced Satellite Communications Project – Polar.
2. For the reasons set out below, the Tribunal finds that the complaint is not valid.

CONTEXT OF THE COMPLAINT

3. The complaint is related to a separate solicitation process that PWGSC undertook in early 2017, i.e. the Request for Standing Offer No. EP737-150967/B (hereinafter the “RFSO-SA”). Completed in March of 2017, PWGSC used the RFSO-SA to qualify a pool of eight suppliers that would be invited to bid on the ESCP-P RFP. EBCSI did not participate in this process and, as such, was not invited to bid on the RFP at issue in this complaint.
4. On October 16, 2017, PWGSC issued a Notice of Proposed Procurement (NPP) to announce that it intended to proceed with the ESCP-P RFP. The NPP noted that the successful bidder would be awarded a contract to provide fairness monitoring services over a six-year period; however, the level of effort over the life of the contract was estimated to be 43 days of work in total. Bidding on the NPP closed on October 31, 2017.
5. Although the NPP was publicly available, the ESCP-P RFP, which contained the technical requirements, was not. Upon learning of the NPP, EBCSI asked PWGSC for a copy of the ESCP-P RFP on October 26, 2017, so that it could consider its technical requirements. PWGSC refused EBCSI’s request, noting that the ESCP-P RFP process was only open to the eight prequalified supply arrangement holders. EBCSI subsequently reiterated its request. On October 27, 2017, PWGSC refused the request once again, informing EBCSI that there was insufficient time to complete the qualification process and suggesting that EBCSI wait for another qualification period to begin in late fall of 2018.
6. EBCSI filed its complaint with the Tribunal on November 2, 2017. The Tribunal accepted the complaint for inquiry on November 9, 2017, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
7. EBCSI also requested that the Tribunal issue an order postponing the award of any contract until the Tribunal determined the validity of the complaint. Accordingly, on November 9, 2017, the Tribunal issued an order postponing the contract award. On November 20, 2017, the Tribunal received a letter from PWGSC requesting the rescission of the order. It characterized the ESCP-P RFP as urgent and indicated that a delay in awarding the contract would be contrary to the public interest. Accordingly, the Tribunal rescinded its order on November 21, 2017.

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

SUMMARY OF COMPLAINT

8. EBCSI's complaint is built on its request for access to the ESCP-P RFP and, in particular, its technical requirements. By virtue of PWGSC's refusals, EBCSI claimed that it had been denied its right to determine its interest in the procurement.³

9. EBCSI thereby alleged that PWGSC violated the following articles of the *North American Free Trade Agreement*:⁴ 1008(2)(b); 1009(2)(a) and (f); 1010(4); and 1011(3). It also claimed that PWGSC violated the terms of either the *Agreement on Internal Trade* or the *Canadian Free Trade Agreement*.⁵

10. As a remedy, EBCSI requested that it be given access to the ESCP-P RFP. It also requested that PWGSC cease the practice of limiting access to solicitation documents under selective tendering procedures in circumstances where the trade agreements apply to the procurement process as a whole.

ANALYSIS

11. Subsection 30.14(1) of the *CITT Act* requires that, in its inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Moreover, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract were observed.

12. In its complaint and again in the comments it submitted on the Government Institution Report (GIR), EBCSI took issue with PWGSC's use of selective tendering, even though this ground of complaint was not accepted for inquiry. The plain language of the RFSO-SA, published in December 2016, revealed that PWGSC would use selective tendering as the RFSO-SA would qualify a limited number of suppliers that would be invited to bid on the ESCP-P RFP. Accordingly, having not raised it with the Tribunal until November 2017, this ground of complaint by EBCSI is time-barred.

13. The Tribunal will, therefore, focus only on the ground of EBCSI's complaint that was accepted for inquiry, i.e. PWGSC's refusal to provide a copy of the ESCP-P RFP which EBCSI alleges denied it the opportunity to determine its interest in participating in the ESCP-P RFP.⁶

Was PWGSC's Refusal to Provide the ESCP-P RFP a Violation of NAFTA?

14. This complaint is all about access, and particularly the ability of a potential supplier to access solicitation documents to determine whether or not it might be interested in submitting a bid at a later date. As noted above, EBCSI simply asked PWGSC to provide it with the ESCP-P RFP, which sets out the

3. EBCSI also complained about PWGSC's procurement practices more generally (i.e. its practice of employing selective tendering procedures); however, this ground of complaint was not accepted for inquiry.

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. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-internal-trade/>> [AIT]. *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]. The Tribunal notes that the value of this procurement is below the monetary thresholds necessary to trigger the application of the AIT or the CFTA.

6. Exhibit PR-2017-034-03, Vol. 1.

technical requirements of the solicitation and was not made publicly available. The only publicly available document was the NPP, which seemed enough to pique EBCSI's curiosity in that it indicated that the ESCP-P RFP was "open to suppliers on a permanent list or able to meet qualification requirements".⁷

15. When considering EBCSI's request for access to the ESCP-P RFP, it appears that PWGSC presumed that EBCSI wanted either to become qualified under the RFSO SA and/or to submit a bid on the ESCP-P RFP. Likewise, in the GIR, PWGSC improperly characterized EBCSI's argument as that it ought to have been allowed to bid on the ESCP-P RFP.

16. However, the Tribunal finds, on the basis of the evidence before it, that such a presumption was wrong. EBCSI was consistent in all of its submissions to the Tribunal and communications with PWGSC that it simply wanted access to the technical documents in order to discern for itself whether or not it might have any interest in considering a bid at a later time. It neither sought qualification, nor took issue with the fact that PWGSC did not start the qualification process promptly, as would seem to be required by Articles 1009(2)(g) and (h) of *NAFTA*. Further, at no time did EBCSI suggest that it should have been permitted to actually bid on the ESCP-P RFP absent a qualification process under the RFSO-SA.

17. PWGSC also argued that the NPP was properly competed amongst qualified suppliers, of which EBCSI was not one. It justified moving forward quickly on the basis that the ESCP-P RFP was a legitimate operational requirement. It contended that the ESCP-P project was critical to satisfy a capability gap in satellite communications in the North and Arctic regions, and essential to address the Minister of National Defence's commitment to the North American Aerospace Defense Command, as indicated in the 2015 mandate letter from the Prime Minister.

18. The Tribunal does not have evidence to dispute either of these claims. Nevertheless, the Tribunal finds that neither is responsive to EBCSI's complaint and demand for access. Once again, PWGSC wrongly presumed that EBCSI's request for access to the ESCP-P RFP equated to a request for qualification and an expectation to be able to bid on the solicitation itself. In the Tribunal's view, PWGSC failed to show any reasonable connection between the provision of the ESCP-P RFP and its ability (or inability) to achieve departmental objectives. In other words, the Tribunal fails to see how the provision of a document could possibly have delayed or hindered the project. Furthermore, the Tribunal does not accept that moving forward with a project at a certain pace is necessarily a legitimate operational requirement simply by virtue of the fact that it is addressed in vague terms in a mandate letter. Were that the case, anything (and potentially everything) under a department's mandate could presumably be characterized as a legitimate operational requirement.

19. Notwithstanding the peripheral nature of PWGSC's arguments, the Tribunal is of the view that EBCSI's complaint must nonetheless be deemed invalid, as PWGSC's conduct as framed by the complaint does not amount to a breach of any specific obligation under *NAFTA*.

20. Article 1010(2) of *NAFTA* requires entities to publish "a statement of any economic or *technical requirements* and of any financial guarantees, information or documents required from suppliers" [emphasis added] in an NPP. The technical requirements for the ESCP-P RFP were not contained in the NPP. Instead, they were in separate documents to which only supply arrangement holders were granted access. Clearly, this failure to publish the technical requirements impacted EBCSI's ability to assess whether it wanted to participate in the procurement, thus necessitating its request for access to the RFP in the first place.

7. Exhibit PR-2017-034-01 at p. 85, Vol. 1.

21. Nevertheless, the failure to publish the technical requirements was not included as a ground of complaint, nor was this provision of *NAFTA* identified by EBCSI as having been potentially violated by PWGSC's actions. While the Tribunal strives to maintain a degree of flexibility, particularly in order to facilitate access to justice when complainants are unrepresented, it cannot reframe EBCSI's complaint as being on this basis.

22. There is no question that it would have been preferable for PWGSC to grant EBCSI access to the ESCP-P RFP and the technical requirements it included, particularly taking into consideration the principles of transparency, fairness, efficiency and integrity that underpin Canada's government procurement regime; however, the Tribunal cannot hold it accountable for failing to do so.

23. Had EBCSI alleged that it had been prohibited from being qualified as a supplier, however, the Tribunal must note that PWGSC's actions could have been found to be in violation of the trade agreements. Article 1009(2)(g) of *NAFTA* requires that when an entity maintains a permanent list of qualified suppliers, it shall ensure that suppliers may apply for qualification "*at any time*" [emphasis added]. It is arguable whether requiring potential suppliers to wait a full year (i.e. until the fall of 2018) for the next qualification process under the RFSO SA would comply with this obligation. Indeed, the Tribunal notes that PWGSC invited EBCSI to take part in an "early refresh [i.e. qualification] process" in the GIR, which might suggest that PWGSC recognized that its process was not in compliance with its obligations.⁸

COSTS

24. The Tribunal typically awards costs to the successful party in keeping with the Tribunal's *Procurement Costs Guideline*. In this case, however, the Tribunal will not award PWGSC its costs incurred in responding to the complaint. This is in keeping with the Tribunal's discretion as a court of record and master of its own procedure when awarding or not awarding costs.

25. It was PWGSC's unjustified refusal to provide access to the ESCP-P RFP which led to EBCSI's complaint. Had PWGSC simply provided the RFP, which it could easily have done and had no reason not to do, this inquiry could have been avoided.

26. It is on this basis that no costs will be awarded, despite the fact that EBCSI's complaint is not valid.

DETERMINATION OF THE TRIBUNAL

27. The Tribunal determines that the complaint is not valid. For the reasons discussed above, particularly on the basis that had PWGSC been more forthcoming it could have avoided this complaint, the Tribunal will not award costs to PWGSC.

Ann Penner
Ann Penner
Presiding Member

8. Exhibit PR-2017-034-14 at para. 49, Vol. 1A.