



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-003

Multilingual Community Interpreter
Services (Ontario) d.b.a. MCIS
Language Solutions

*Decision made
Wednesday, May 16, 2018*

*Decision issued
Friday, May 18, 2018*

*Reasons issued
Thursday, May 24, 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

**MULTILINGUAL COMMUNITY INTERPRETER SERVICES (ONTARIO) d.b.a.
MCIS LANGUAGE SOLUTIONS**

AGAINST

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

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.

Peter Burn
Peter Burn
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. This complaint by Multilingual Community Interpreter Services (Ontario) d.b.a. MCIS Language Solutions (MCIS) concerns a request for proposal (RFP) (Solicitation No. 100008756-1) for the provision of telephone interpretation services.

3. On November 13, 2017, Employment and Social Development Canada (ESDC) issued a first RFP (the original RFP), Solicitation No. 100008756, for those same services.

4. On January 25, 2018, ESDC advised MCIS that none of the bids received were compliant and that it would be issuing a new solicitation. ESDC then provided MCIS with its completed evaluation sheet, which included scoring for each of the RFP criteria.

5. The solicitation in issue (the retendered RFP) was released by ESDC on January 26, 2018.

6. On April 30, 2018, MCIS was advised that its bid was unsuccessful and that the successful bidder was CanTalk (Canada) Inc. On the same day, MCIS requested a debriefing from ESDC.

7. On May 7, 2018, ESDC provided a debriefing to MCIS.

8. MCIS filed a complaint with the Tribunal on May 11, 2018. MCIS contended that ESDC failed to guarantee a fair and impartial process in accordance with the *Canadian Free Trade Agreement*,³ the *Agreement on Government Procurement*⁴ and the *North American Free Trade Agreement*.⁵

ANALYSIS

9. On May 16, 2018, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

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

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

3. *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).

4. *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).

5. *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).

10. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;⁶
- the complainant is an actual or potential supplier;⁷
- the complaint is in respect of a designated contract;⁸ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁹

11. In this case, the Tribunal has determined that the information provided by MCIS does not disclose a reasonable indication of a breach of the applicable trade agreements by ESDC and, therefore, does not meet the fourth condition for inquiry.

12. MCIS claims that ESDC did not conduct a fair and impartial procurement process by relying on a subjective scoring system, which is evidenced by the different scores MCIS obtained to three criteria which were the same in the original RFP and the retendered RFP, and for which it provided identical answers.

13. These three criteria, R5.A, R6.A and R6.C, are set out below:

R5. TIMELY ACCESS TO SERVICES

A. Demonstrate the bidder's process to ensure the service standard of connecting with interpretive services is within 60 seconds:

- from the point of placing an initial call to the bidder's receptionist and connecting to an interpreter.

R6. QUALITY CONTROL & CONTINGENCY PLAN

A. Outline the mechanisms that the Bidder will put in place for sharing information and feedback between it and Service Canada over the course of the contract.

...

C. Should changes of personnel occur, outline a contingency plan to avoid disruption to the level of service and language availability.

14. MCIS received a score of "Excellent" (worth 25 points) for the answers to each of the above in the original RFP, for a total score of 75 points. Identical answers to the same three criteria in the retendered RFP produced scores of "Very Good" (15 points each) for the first two criteria and "Good" (10 points) for the last one, for a total score of 40 points.

15. The Tribunal notes that bidders must treat each solicitation independently and that the terms and conditions of a previous solicitation are not determinative of a new one.¹⁰ There is no requirement for evaluators of a retendered solicitation to rely on the results of the previous solicitation, nor was ESDC obliged to rely on the same evaluators.

6. Subsection 6(1) of the *Regulations*.

7. Paragraph 7(1)(a) of the *Regulations*.

8. Paragraph 7(1)(b) of the *Regulations*.

9. Paragraph 7(1)(c) of the *Regulations*.

10. *The Spallumcheen Band* (26 April 2001), PR-2000-042 (CITT).

16. In addition, the Tribunal cannot blindly accept that the previous score obtained by MCIS was correct, nor has MCIS provided arguments showing that its answers deserved the score previously attained rather than the new score, or that the current scores were unreasonable. The Tribunal will not substitute its judgment for that of the evaluators unless it finds that the evaluators “have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.”¹¹ MCIS has provided no evidence of any such situation.

17. As has been often affirmed by the Tribunal, the onus is on bidders to demonstrate that they meet the criteria in any solicitation.¹² This principle is no different in the case of a retender than it is in the case of a new solicitation. Regardless of the scoring information received by MCIS in the original solicitation, the onus was on it to ensure that its answers fully addressed the requirements of the retendered solicitation.

18. Wherever a criterion is not solely based on objective, quantitative data, its evaluation will inevitably involve some measure of subjectivity. There is no evidence in the present case that the evaluation was so unduly subjective as to be arbitrary and in breach of the trade agreements. The fact that the evaluation pursuant to the retendered RFP resulted in scores different from the original solicitation does not suffice to prove arbitrariness.

19. In accordance with subsections 6(1) and (2) of the *Regulations*, 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 MCIS was concerned about the subjectivity of the evaluation criteria in the retendered RFP, it should have raised its concerns with ESDC when it first learned of the evaluation criteria as they were published in the RFP. However, it was only after MCIS was advised that it was not the successful bidder that it challenged the procurement process. This was well past the 10-working-day deadline to challenge the terms of the RFP.

DECISION

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

Peter Burn
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Presiding Member

11. *Unisource Technology Inc.* (13 December 2013), PR-2013-27 (CITT) at para. 7.

12. See *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.