



BY FACSIMILE

October 27, 2005

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Re: Solicitation Number W8482-065706/A
International Infrared Camera Sales and Leasing Ltd (File No. PR-2005-031)

The Canadian International Trade Tribunal (the Tribunal) (Presiding Member: Zdenek Kvarda) has reviewed the complaint submitted on behalf of International Infrared Camera Sales and Leasing Ltd. (IICSL) on October 21, 2005, and has decided not to initiate an inquiry into the complaint.

Your complaint alleged that the Department of Public Works and Government Services (PWGSC) improperly dismissed your proposal and improperly awarded a contract to a bidder who submitted a higher-priced proposal.

In reviewing the evidence before it, the Tribunal determined that there were two issues that had to be addressed in deciding whether or not to accept this complaint for inquiry: First, did IICSL file its complaint in a timely manner; and, second, did PWGSC breach its obligations under the trade agreements by acting in the manner in which it did.

Regarding timeliness, subsection 6(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (the Regulations), requires that a complaint 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.” 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.”

In other words, a complainant must either object to the contracting authority or lodge a complaint with the Tribunal within 10 working days of discovering its ground of complaint. In the event that a complainant does object to the contracting authority in a timely manner, and is explicitly or implicitly denied relief, the complainant may then lodge a complaint with the Tribunal within 10 working days.

Subsection 30.11(2) of the *Canadian International Trade Tribunal Act* further requires in part that a complaint to the Tribunal include all relevant documents that are in the complainant's possession.

According to the evidence on the file, IICSL was informed, on October 6, 2005, that it had not been awarded the contract. IICSL then spoke with the PWGSC contracting authority who, according to the submitted complaint form, did not respond in a manner that IICSL felt was going to rectify the situation. IICSL subsequently submitted its complaint to the Tribunal, filing the last relevant document in its possession late in the afternoon of October 21, 2005 – or exactly 10 working days after October 6, 2005, and, therefore, in a timely manner.

However, if IICSL had concerns about the request for proposal (RFP) or the specification itself, e.g. that inclusion of a requirement for a -40° Celsius storage temperature is contrary to conducting a fair, open competition, then IICSL should have brought these concerns to the attention to the Tribunal within 10 working days of when it initially discovered the item – most likely when it first obtained the documents from MERX. The Tribunal has, in previous decisions, taken the view that the latest day that a bidder can read a specification and submit a proposal is the final day of the bidding period – i.e. the company obtains the documents in the morning, reads them and then submits its proposal by 2:00 p.m. that afternoon. In this case, IICSL submitted its proposal by September 7, 2005. In accordance with the provisions of subsection 6(1) of the Regulations, any complaint about the content of the specification would then have had to have been filed with the Tribunal by September 21, 2005. As the complaint was not filed until October 21, 2005, any grounds of the complaint relating to the specification was not timely and therefore can not be considered.

In order for the Tribunal to inquire into a complaint that has been filed in a timely manner, the conditions of subsection 7(1) of the Regulations must be met. Subsection 7(1)(c) of the Regulations reads, in part, that the Tribunal shall, within five working days after the day on which the complaint is filed, determine whether “the information provided by the complainant...discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, or the Agreement on Government Procurement applies”.

The Tribunal can not find any indication that PWGSC breached its obligations under these trade agreements. The Tribunal notes that the RFP states, “Failure to meet all mandatory equipment specifications will render your bid non-responsive and no further consideration will be given.” As the Mikron 7200V that you proposed did not meet all the mandatory specifications of the RFP, regardless of how insignificant these differences are in your opinion, the Tribunal finds that PWGSC acted properly in dismissing IICSL's proposal.

In light of the above, the Tribunal will not conduct an inquiry into this complaint and it hereby considers the matter closed.

Yours sincerely,

Hélène Nadeau
Secretary