



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-042

Raymond Arsenault Consultants Inc.

v.

Public Service Commission

*Decision issued
Tuesday, April 18, 2006*

*Reasons issued
Monday, May 15, 2006*

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IN THE MATTER OF a complaint filed by Raymond Arsenault Consultants Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

RAYMOND ARSENAULT CONSULTANTS INC.

Complainant

AND

THE PUBLIC SERVICE COMMISSION

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

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.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

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STATEMENT OF REASONS

COMPLAINT

1. On January 17, 2006, Raymond Arsenault Consultants Inc. (RAC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a procurement (Solicitation No. D1120-05-1104) by the Public Service Commission (PSC) for the provision of writing and editing services, including speech writing.
2. RAC alleged that the PSC had improperly declared non-compliant the two proposals submitted for Service Category Three (English Editing Services), since neither one provided the dates of birth of the proposed individuals. It argued that its service proposals contained the security clearance file numbers, which contained the dates of birth of these individuals. Consequently, since employees of the Department of Public Works and Government Services (PWGSC)² have access to the security clearance files, they have access to the dates of birth. In addition, according to RAC, it is inappropriate, and perhaps even illegal, to require information about an individual's age.
3. As a remedy, RAC requested that its proposals be accepted as submitted and did not seek a cost award.
4. On January 26, 2006, the Tribunal informed the parties that a part of the complaint had been accepted for inquiry, since that part met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ It will only inquire into the allegations regarding the first resource, Ms. Victoria Ralph, and not those regarding the second, Ms. Andrea Hughes. With regard to the latter allegations, after having reviewed the evidence submitted by RAC, the Tribunal can find no reference to a security clearance file number for Ms. Hughes. It therefore cannot conclude that the PSC breached its obligations under the relevant trade agreements, namely, the *Agreement on Internal Trade*⁴ and the *North American Free Trade Agreement*,⁵ when it declared non-compliant the proposal in respect of Ms. Hughes.
5. The PSC filed the Government Institution Report (GIR) on February 17, 2006. RAC did not file any comments on the GIR.
6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and, pursuant to paragraph 25(c) of the *Canadian International Trade Tribunal Rules*,⁶ disposed of the complaint on the basis of the information on the record.

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

2. RAC names PWGSC in its complaint, although this department did not intervene in the solicitation at issue.

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

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].

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 (entered into force 1 January 1994) [*NAFTA*].

6. S.O.R./91-499.

PROCUREMENT PROCESS

7. The Request for Proposal for the supply arrangement (RFP) was published on MERX⁷ on May 11, 2005, and indicated a closing date and time for receiving bids of June 20, 2005, 2:00 p.m., Eastern standard time.
8. The RFP stated that bidders could propose one or more individuals per service category for one or more of the service categories. It stated that the budget available for this project was not expected to exceed \$125,000 per year, excluding GST or HST.
9. According to the PSC, 23 service proposals were submitted for Service Category Three, and 5 companies were selected as successful bidders.
10. On January 4, 2006, the PSC informed RAC that its service proposals for Service Category Three had been declared non-compliant because the dates of birth of the proposed individuals, a mandatory criterion, had not been included.
11. RAC filed its complaint with the Tribunal on January 17, 2006.

POSITIONS OF THE PARTIES

PSC's Position

12. In the GIR, the PSC addressed RAC's two concerns regarding the RFP. First, with regard to the fact that the security clearance files contain the dates of birth of individuals, the PSC alleged the following:

Since the PSC does not have access to the security files of other federal departments (such as PWGSC) and agencies, we use the individual's date of birth to verify the identity of the individual and to ensure that the individual is indeed the one who holds the security clearance in question. This verification is done before the disclosure of information and the certification of the security clearance. Consequently, while we agree that a security file contains an individual's date of birth, this information was still required in connection with the bid.

[Translation]

13. Second, in response to RAC's concern about the appropriateness or illegality of requiring an individual's date of birth, the PSC submitted the following:

The date of birth was required for the sole purpose of certifying an individual's identity information for security clearance purposes and not to obtain information about the individual's age.

[Translation]

14. The PSC further submitted that, even if RAC's concerns had been taken into consideration, it upheld its decision to disqualify RAC's proposal, since mandatory information had not been provided.
15. The PSC did not request its costs.

RAC's Position

16. In its complaint, RAC submitted that, for two reasons, it strongly objected to the fact that its proposals had been declared non-compliant because it had not provided the dates of birth of the proposed individuals. First, its service proposals included the security clearance file numbers, which contained the

7. Canada's electronic tendering service.

dates of birth. Therefore, since PWGSC employees⁸ have access to the security clearance files, they have access to the dates of birth. Second, according to RAC, it was inappropriate, and perhaps even illegal, to require information about an individual's age.

TRIBUNAL'S ANALYSIS

17. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, 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 have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *AIT* and *NAFTA*.

18. Subsection 506(6) of the *AIT* reads as follows: "In evaluating tenders, a Party may take into account not only the submitted price but also the quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

19. Similarly, subsection 1015(4)(d) of *NAFTA* reads as follows: "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

20. First, RAC submitted that the service proposal included the security clearance file numbers, which contained the dates of birth. Therefore, since PWGSC employees⁹ have access to the security clearance files, they have access to the dates of birth. In the GIR, the PSC replied that, since it does not have access to the security files of other federal departments (such as PWGSC) and agencies, it relies on the individual's date of birth to verify the identity of the individual and to ensure that this individual is indeed the one who holds the security clearance in question. It added that this verification is done before the disclosure of information and the certification of the security clearance. Therefore, while the PSC acknowledges that a security file contains an individual's date of birth, this information was nevertheless required at the time that the bid was made.

21. The Tribunal must determine whether the PSC improperly declared non-compliant RAC's service proposal for Service Category Three submitted in response to the above-mentioned RFP.

22. The Tribunal notes that the RFP identifies criterion M3 as mandatory. The criterion provides the following:

The proposed individual MUST be in possession of a valid Reliability Status check at the time of proposal submission. To demonstrate compliance with this mandatory criterion, Bidders are required to provide the following security information with respect to the proposed individual:

1. Full name of individual;
2. Clearance level;
3. Origin of clearance (Department);
4. Effective date; and
5. Date of Birth.

8. *Supra*, note 2.

9. *Supra*, note 2.

23. The Tribunal also notes that paragraph 8.1 of the RFP, entitled “Mandatory Requirements”, explains what will happen if a proposed individual does not meet all the mandatory criteria. This paragraph states the following:

Each proposed individual MUST meet ALL of the following mandatory criteria to be considered for further evaluation. Failure on the part of the Bidder to meet these requirements will result in the proposed individual being deemed non-compliant and being given no further consideration by the PSC.

24. In an earlier case, the Tribunal determined:

... that compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system. Therefore, procuring entities must evaluate bidders’ conformance with mandatory requirements thoroughly and strictly¹⁰

In other words, the Tribunal determined that a mandatory requirement was just that, mandatory, and that if this mandatory requirement was not met, the proposal could be declared non-compliant or, at the very least, could be penalized, depending on what was stated in the RFP. It does not consider that there is such a thing as a mandatory requirement that is “flexible” or “optional.” In its view, a requirement that is not mandatory may be either “evaluated” or “clarified” in light of the RFP and, in all instances, such a requirement is not considered in the same way as a mandatory requirement. As mentioned earlier, the RFP specifically stated that, if a bidder did not provide the information required under a mandatory requirement, whatever the requirement, its proposal would be declared non-compliant.

25. During the bidding process, bidders were given the opportunity to ask questions to the PSC. If any bidder considered that a particular requirement, whether mandatory or not, was unfair, biased or unnecessary, it had the opportunity to express its concerns to the PSC. The Tribunal notes that, in this case, there were no questions about this mandatory criterion. In its opinion, once a bidding process is closed, the bidders must have understood and accepted the terms and conditions of the RFP. If a bidder had found, for whatever reason, that certain provisions did not serve its business interests, it had the option of not submitting a proposal. In the present case, the Tribunal notes that RAC submitted several proposals under the various service categories of the RFP, without objecting to the mandatory nature of the requirements.

26. The Tribunal considers that all bidders are entitled to have their proposals evaluated in a fair and transparent manner. When the contracting authority establishes the rules of a procurement by setting out the procedures and stating the terms and conditions pertaining to the contract award, the bidder must allow the contracting authority to evaluate the bids according to the procedure described in the solicitation documents. In this case, by providing all bidders with mandatory requirement M3 and by spelling out, in paragraph 8.1, the consequences of not meeting this mandatory requirement, the PSC did just that. According to the Tribunal, the PSC had no choice but to declare non-compliant RAC’s service proposal relating to Ms. Ralph, since RAC did not provide her date of birth, which was a mandatory criterion.

27. Second, according to RAC, it is inappropriate, and perhaps even illegal, to require information about an individual’s age in connection with a job or a commitment of services. To this assertion, the PSC replied, in its GIR, that the date of birth was required for the sole purpose of certifying the individual’s identity information for security clearance purposes and not to obtain information about the individual’s age.

10. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT).

28. The Tribunal accepts the PSC's unchallenged assertion that it was going to use the date of birth for the sole purpose of certifying Ms. Ralph's security information and not for information about her age. It notes that mandatory requirement M3 clearly states the following: ". . . To demonstrate compliance with this mandatory criterion, Bidders are required to provide the following security information with respect to the proposed individual: . . . 5. Date of Birth."

29. The Tribunal found no evidence on record that would suggest that the PSC needed the date of birth for any other reason, including that of knowing whether Ms. Ralph was too young or too old to accept her service proposal.

30. The Tribunal agrees with the PSC on all points. The mandatory requirements were fair, equitable and clear. RAC should have complied with all of them to avoid its service proposal being declared non-compliant.

31. Accordingly, the Tribunal determines that the complaint is not valid with regard to both grounds of complaint.

32. Since the PSC did not seek a cost award, the Tribunal will not award costs in this case.

TRIBUNAL'S DECISION

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

Pierre Gosselin
Pierre Gosselin
Presiding Member