



BY FACSIMILE

October 25, 2005

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Re: Solicitation Number EQ461-050002/A
Boiler Inspection Company of Canada (File No. PR-2005-030)

The Canadian International Trade Tribunal (the Tribunal) (Presiding Member: Pierre Gosselin) has reviewed the complaint submitted on behalf of Boiler Inspection and Insurance Company of Canada (BI&I) on October 17, 2005, and has decided not to initiate an inquiry into the complaint at this time.

Your complaint contained multiple grounds: that the request for proposal (RFP) was flawed due to several critical errors and omissions; that the evaluation process was flawed and subjective; that the RFP was inconsistent with other RFPs issued by PWGSC for similar services; that there was a breach of protocol in the inclusion of BI&I's name in amendment number 4; that BI&I was characterized as a non-qualified contractor; and that the contract was awarded to a "not-for-profit" regulatory body, calling the competitive process into question.

According to subsection 6(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (the Regulations), 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." 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.

With respect to any allegation involving the RFP and its contents, the Tribunal notes that the due date for the receipt of proposals, which BI&I met, was September 22, 2005. If BI&I had raised any concerns about the structure or content of the RFP, and they had not been addressed by way of an amendment, BI&I had to conclude that it received constructive denial of relief on September 22, 2005. It should have been clear to BI&I, on that date, that there would be no further changes to the RFP. Any concerns about the RFP and its content, including the evaluation criteria and the amendments to the RFP, would have to have been filed with the Tribunal within 10 working days of the September 22, 2005 due date, or by October 6, 2005. As the complaint was not filed with the Tribunal until October 17, 2005, the Tribunal will not inquire into any ground of complaint related to the content or structure of the RFP (i.e. that the RFP was flawed due to several critical errors and omissions; that the RFP was inconsistent with other RFPs issued by PWGSC for similar services; and that there was a breach of protocol in the inclusion of BI&I's name in amendment number 4).

In order for the Tribunal to inquire into the grounds of complaint for which the complaint 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 one of Chapter Ten of NAFTA, Chapter Five of the *Agreement on Internal Trade* or the *Agreement on Government Procurement* ...applies”.

BI&I alleged that the evaluation process was flawed and subjective. More specifically, it alleged, first, that the points system was flawed and opened to varying interpretations by the evaluators. BI&I alleged that it was advised that achieving the minimum (70%) mark on each of the four parts of the technical proposal would allow a proposal to proceed to the financial proposal phase. BI&I seemed to imply that this meant that a proposal that would not have achieved an overall mark of 80%, as required by the RFP, could still have been deemed compliant. However, BI&I did not allege that this effectively happened. Therefore, the Tribunal does not believe that there is a reasonable indication that PWGSC breached the applicable trade agreements.

Second and third, BI&I alleged that highly specific answers were being sought from general questions and that a range of different interpretations of the requirements by the reviewers was possible and, in fact, likely. The Tribunal notes that these allegations lack specificity. The complaint did not describe any instances where the evaluation was conducted in a manner that was not permitted by the terms of the RFP. Consequently, that aspect of the complaint does not disclose a reasonable indication that PWGSC breached the applicable trade agreements.

With respect to BI&I's allegation that it was improperly characterized as a non-qualified contractor, the Tribunal notes that the evidence on the file indicates that PWGSC informed BI&I on September 30, 2005, that its proposal was not deemed by the evaluation board to be the best suited to meet the PWGSC's requirements. In the Tribunal's view, there is no reasonable indication that PWGSC has, by making that statement or otherwise indicating to BI&I that it was not the winning bidder, breached the applicable trade agreements.

Finally, with respect to the allegation that the contract was improperly awarded to the Technical Standards and Services Authority, the Tribunal notes that PWGSC, by way of its fax dated October 12, 2005, has undertaken to respond to BI&I's objection of October 12, 2005. The Tribunal finds that BI&I has not yet received a denial of relief as contemplated by subsection 6(2) of the Regulations, as PWGSC has yet to respond to the objection, and therefore that this ground of complaint is premature. The Tribunal's decision at this time does not preclude any future complaint by BI&I on this ground once PWGSC has responded to its objection or, if PWGSC has failed to do so within a reasonable period of time, which, in the Tribunal's opinion, would be by November 2, 2005.

If BI&I wished to file a new complaint concerning that latter ground, it must do so within 10 working days after it receives actual denial of relief by PWGSC. However, if its objection is not addressed by November 2, 2005, BI&I should assume denial of relief and therefore any complaint must be filed within 10 working days of that date, i.e. by Thursday, November 17, 2005. In either circumstance, BI&I may request that the documentation already on file with the Tribunal be joined to the new complaint.

Yours sincerely,

Hélène Nadeau
Secretary