



BY FACSIMILE

July 23, 2007

_____:

Subject: Solicitation Number EN519-040123/A
1075773 Ontario Inc. operating as ctc TrainCanada (File No. PR-2007-026)

The Canadian International Trade Tribunal (the Tribunal) (Serge Fréchette, Presiding Member) has reviewed the complaint submitted on July 13, 2007, by 1075773 Ontario Inc. operating as ctc TrainCanada (CTC) and has decided not to initiate an inquiry into the complaint.

CTC alleged that there had been unfair business practices associated with the above-referenced solicitation. Page 6 of the Tribunal's Procurement Complaint Form filed by CTC contained a list of grounds of complaint that the Tribunal considered as forming the basis of the complaint.

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 has 10 working days from the date on which it first becomes aware of its ground of complaint to either object to the contracting authority or file a complaint with the Tribunal. If a complainant objects to the contracting authority in a timely manner and has actual or constructive knowledge of the denial of relief, the complainant may then file a complaint with the Tribunal within 10 working days.

Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal 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 the *North American Free Trade Agreement (NAFTA)*, Chapter Five of the *Agreement on Internal Trade(AIT)* or the *Agreement on Government Procurement* applies. In this case, the *AIT* and *NAFTA* apply.

The following grounds, listed on page 6 of the Procurement Complaint Form filed by CTC, are summarized by the Tribunal, as follows:

1. Since the common practice is to first evaluate the mandatory requirements and then give no further consideration to proposals that do not meet those requirements, CTC's proposal must have met the mandatory requirements because PWGSC requested clarification from CTC regarding its financial proposal on April 3, 2007.
2. The result of CTC's scoring of its own bid was well above the minimum requirement of 593. PWGSC reduced the minimum required score by a significant amount which, according to CTC, was done to facilitate the qualification of a supplier that would not otherwise have been able to make a submission. By so reducing the minimum required score, PWGSC changed the rules of the bid midstream, thereby breaching procedural fairness. (Combination of grounds 2, 3 and 4 of CTC's complaint.)
3. PWGSC did not properly evaluate CTC's proposal by declaring it non-compliant on the basis that 1 of the 22 required manuals would have been missing from its proposal; CTC contends that it included all the required documentation with its proposal including the purportedly missing manual.
4. The price indicated in PWGSC's letter dated June 20, 2007, is not consistent with the price indicated in CTC's bid, and no explanation for this discrepancy was provided by PWGSC.

With respect to item 1, the Tribunal finds that, although it considers that CTC learned of this ground of complaint on June 29, 2007, when it received the second rejection letter, there is nothing in the complaint to indicate that the methodology used by PWGSC was not consistent with that outlined in the Request for Proposal (RFP). PWGSC's letter received on June 29, 2007, indicates that the mandatory criteria were evaluated in the order in which they appeared in the RFP. As such, the Tribunal finds that there is no reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements, with respect to the evaluation procedure followed by PWGSC.

With respect to item 2, the Tribunal finds that, according to the complaint, as of the date of publication of Amendment No. 3, March 12, 2007, CTC should reasonably have become aware that the number of points required for the rated criteria section of the RFP had been reduced. CTC would therefore have had 10 working days from that date to object to this aspect of the procurement process, or to file a complaint with the Tribunal. However, because the complaint in relation to this ground was not filed until July 13, 2007, the Tribunal finds that it was filed beyond the time limit provided for in section 6 of the *Regulations*.

Regarding item 3, PWGSC found that 1 of 22 required manuals had not been submitted by CTC along with the rest of its proposal which was therefore found to be non-compliant. CTC claims that it submitted all the required manuals. In the absence of compelling evidence (other than a mere allegation) that could unequivocally demonstrate, on the balance of probabilities, that the proposal that CTC submitted was indeed complete rather than incomplete in the manner found by PWGSC, the Tribunal has no basis upon which it can reasonably call into question PWGSC's finding that it was presented with an incomplete proposal. Therefore, the Tribunal finds no reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

Regarding item 4, the Tribunal finds that CTC should reasonably have been aware of this ground at the latest on June 27, 2007, the date on which it received the first rejection letter from PWGSC dated June 20, 2007. CTC would therefore have had to have filed its complaint with the Tribunal no later than 10 working days later, or by July 12, 2007. However, because the complaint in relation to this ground was not filed until July 13, 2007, the Tribunal finds that it was filed beyond the time limit provided for in section 6 of the *Regulations*. The Tribunal also notes that, had this ground of complaint been filed on time, the Tribunal would have found that the evidence filed by CTC was insufficient to assess whether this ground could have given rise to a reasonable indication that the procurement had not been carried out in accordance with the applicable trade agreements. For future reference, evidence that may be useful to substantiate a complaint must be submitted, along with the complaint, within the strict deadlines set out in the *Regulations* and should include the RFP in issue, as well as the complainant's proposal.

Accordingly, the Tribunal finds that CTC's complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements. Therefore, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

Yours sincerely,

Hélène Nadeau
Secretary