



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-015

Barer Engineering International

*Decision made
Thursday, June 4, 2009*

*Decision and reasons issued
Monday, June 15, 2009*

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

BY

BARER ENGINEERING INTERNATIONAL

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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.

Ellen Fry

Ellen Fry

Presiding Member

Hélène Nadeau

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Secretary

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.

2. The complaint relates to a procurement (Solicitation No. W0113-08A118/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of milling machines.

3. Barer Engineering International (Barer) alleges that, while the tendering period was nominally in accordance with the requirements of the trade agreements, the need for bidders to attend a mandatory site visit on a specified date during the tendering period and PWGSC's refusal to schedule a second site visit or to accept proposals from bidders who had not attended the site visit resulted in an actual bidding period that was less than that required by the trade agreements.

4. 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*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies. Although the complaint did not give an estimate of the value of the procurement, the Tribunal notes that, in the Notice of Proposed Procurement⁷ (NPP) found on MERX,⁸ PWGSC identified the *AIT*, *NAFTA* and the *AGP* as the applicable trade agreements. Given that the goods in question are also included for coverage under the *CCFTA*, and that the monetary thresholds applicable under the *AGP* exceed those of the *CCFTA*, the Tribunal considers that there is a reasonable indication that all four trade agreements apply.

5. On April 21, 2009, PWGSC issued a Request for Proposal (RFP) for the supply, delivery, installation, set-up and on-site training of six universal milling machines at Canadian Forces Base (CFB) Borden. The due date for the receipt of bids was June 1, 2009. Both the NPP and RFP advised bidders that a mandatory site visit had been scheduled for May 6, 2009.

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

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

3. *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*].

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

5. 15 April 1994, online: World Trade Organization http://www.wto.org/english/docs_e/legal_e/final_e.htm [*AGP*].

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*].

7. Complaint, attachment 4.

8. Canada's electronic tendering service.

6. On May 24, 2009, Barer sent an e-mail to PWGSC in which it claimed that it had “. . . picked up [the] bid set [the previous week] and found that a mandatory site visit had to be made on May 6th.” It stated that this requirement was unfair and requested the opportunity to make a site visit or that the requirement be waived altogether. On May 27, 2009, PWGSC responded by stating that “[t]he timing of the site visit was scheduled to ensure that potential bidders had sufficient time after the site visit to research, prepare and submit their proposals” and that, since the site visit had already taken place and other bidders had attended, it could not give an alternative appointment for a site visit. On June 1, 2009, Barer filed its complaint with the Tribunal.

7. Article 506(5) of the *AIT* reads as follows:

Each Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement.

8. Article 1012(2)(a) of *NAFTA* reads as follows:

in open tendering procedures, the period for the receipt of tenders is no less than 40 days from the publication of a notice

9. Article XI(2)(a) of the *AGP* reads as follows:

in open procedures, the period for the receipt of tenders shall be not less than 40 days from the date of publication

10. Article Kbis-05(1) of the *CCFTA* reads as follows:

. . . An entity shall provide no less than 30 days between the date on which it publishes the notice of intended procurement and the deadline for submitting tenders.

11. Barer argued that the mandatory May 6, 2009, site visit effectively reduced the tendering period to only 14 days (April 21 to May 5, 2009) because potential bidders who became aware of the solicitation after May 5, 2009, would not have been able to attend the site visit and, therefore, would not have been able to submit a proposal. Barer further argued that PWGSC caused MERX to promote and sell the solicitation documents after May 5, 2009, under false pretences, as potential bidders could not determine in advance that they would be precluded from submitting a bid. Barer also noted that an amendment to the RFP was issued on May 14, 2009, “. . . to provide proponents with information emanating from [the] mandatory site visit”⁹ Barer argued that the matters discussed at the site visit were therefore made public to all potential bidders, thus obviating the need for all of them to attend the site visit.

12. The Tribunal is of the opinion that the NPP found on MERX was clear in advising all potential suppliers of the requirement for a site visit, as well as the repercussions of not attending it.

13. The NPP reads as follows:

3. Mandatory Site Visit

It is mandatory that the Bidder or a representative of the Bidder visit the work site.

Arrangements have been made for a site visit to be held on *Wednesday, May 6, 2009 at 10:00 a.m. at*

. . . .

CFB Borden

. . . .

9. Amendment 001 at 2.

The site visit will be conducted by the Project Authority. Bidders must communicate with . . . PWGSC . . . before the scheduled visit to confirm attendance and provide the names of the person(s) who will attend.

. . .

*Bidders who do not attend or send a representative will not be given an alternative appointment and their bids will be rejected as non-compliant.*¹⁰

14. The Tribunal therefore finds that bidders that would necessarily have viewed the NPP prior to ordering the RFP, were apprised by the NPP of the requirement for a site visit, the time and place of the site visit and of the effect that not attending the site visit would have on their ability to bid. Accordingly, all bidders that ordered the solicitation documents should reasonably have been aware of these conditions when they initially viewed the NPP on MERX, prior to ordering the solicitation documents.

15. Further, the information provided in the complaint did not provide a reasonable indication that PWGSC breached any of the trade agreements by requiring a site visit.

16. With regard to the length of the tendering period, the Tribunal notes that bidders were provided 41 days from the date the solicitation was first announced on MERX until the due date for the receipt of bids. The Tribunal considers that the tendering period requirements of the trade agreements must necessarily be interpreted to include the time required for potential suppliers to take notice of the opportunity as well as to prepare and submit a bid. If Barer's argument were accepted, it would mean that, in this case, PWGSC could only have held the mandatory site visit 40 days or more after the NPP was published in order to comply with Article 1012(2)(a) of *NAFTA* and Article XI(2)(a) of the *AGP*. The Tribunal is of the view that this is not what is intended by these agreements. Moreover, the Tribunal is of the view that the information provided in the complaint does not provide a reasonable indication that, in these particular circumstances, the length of the tendering period was not "reasonable" as required by Article 506(5) of the *AIT*.

17. Therefore, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

18. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Ellen Fry
Ellen Fry
Presiding Member

10. Complaint, attachment 4 at 2.