



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-036

Biorex inc.

*Decision made
Tuesday, August 11, 2009*

*Decision and reasons issued
Thursday, August 27, 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

BIOREX INC.

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.

André F. Scott
André F. Scott
Presiding Member

Hélène Nadeau
Hélène Nadeau
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 Request for a Supply Arrangement (RFSA) (Solicitation No. EE517-091150/A) by the Department of Public Works and Government Services (PWGSC) for the provision of environmental consultant services. The purpose of the RFSA was to establish a supply arrangement with a predetermined number of companies for the provision of six types of environmental consultant services, on an as-needed basis, to PWGSC's environmental services team, Quebec region.

3. The RFSA allowed bidders to submit up to six technical proposals for the types of services, called "areas of specialization", for which they wanted to be retained as suppliers under a supply arrangement. According to the terms of the RFSA, each bidder also had to submit a single financial proposal including an hourly rate applicable to each of the five position categories or resources listed in the RFSA.³ The submitted rates were for each area of specialization for which a bidder wanted to offer its services and could not exceed maximum rates for each category. Furthermore, the RFSA specified that those maximum rates would be the average of all hourly rates submitted in the technically responsive bids plus 20 percent.

4. Biorex inc. (Biorex) alleged that PWGSC improperly disqualified four of the five proposals that it submitted in response to the RFSA. The complaint indicates that Biorex's proposals were not accepted for a supply arrangement because PWGSC determined that Biorex's financial proposal did not meet one of the mandatory evaluation criteria. All submitted hourly rates had to be ". . . below the 'average of the submitted hourly rates + 20%' . . ." [translation] for each position category. On May 25, 2009, PWGSC informed Biorex in writing that its financial proposal did not meet the mandatory criteria since the hourly rate for the administrative assistant position submitted by Biorex was above ". . . the average hourly rate + 20% for that position"⁴ [translation].

5. First, Biorex alleged that the criterion according to which the submitted rates had to be below the average of the submitted hourly rates plus 20 percent is not clearly indicated in the RFSA as mandatory. Second, Biorex alleged that the application of this criterion was not clearly explained in the RFSA and that, furthermore, because it could potentially be applied in many ways and yield many different results, this criterion was, in any case, inapplicable. Third, Biorex alleged that the application of this criterion by PWGSC goes against the purpose of the RFSA, which, according to Biorex, is the selection of the lowest bidder. Finally, Biorex alleged that the application of this criterion breaches the provisions of the trade agreements according to which contracts must be awarded to the bidder that is fully capable of undertaking the mandate and which submitted the lowest bid. As a remedy, Biorex requested to be added to the list of supply arrangement holders for each area of specialization for which its technical proposal was responsive.

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

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

3. The categories were the following: Senior Biologist/Geographer, Junior Biologist/Geographer, Senior Technician, Junior Technician and Administrative Assistant.

4. PWGSC's letter dated May 25, 2009, complaint, exhibit PJ-8.

6. 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.”

7. 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.

8. Moreover, 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*,⁵ Chapter Five of the *Agreement on Internal Trade*,⁶ the *Agreement on Government Procurement*⁷ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁸ applies. In this case, Biorex alleged that PWGSC breached the provisions of the *AIT*, *NAFTA* and the *AGP*.

9. The Tribunal must therefore first determine the date on which the basis of the complaint became known or reasonably should have become known to Biorex. The Tribunal notes that Biorex’s two first grounds of complaint are that a mandatory evaluation criterion was not clearly indicated as such and explained in the RFSA. The complaint is primarily based on alleged ambiguities in the RFSA.

10. In this regard, the Tribunal’s jurisprudence establishes a distinction between two types of ambiguities, i.e. patent ambiguity and latent ambiguity. According to this jurisprudence, when an ambiguity is apparent on the face of the tender documentation, a potential supplier must not wait for the results of the evaluation before making an objection to the government institution or filing a complaint with the Tribunal.

11. In *Primex Project Management Ltd.*,⁹ the Tribunal explained the difference between the two types of ambiguities pertaining to the conditions of a Request for Proposal (RFP) and the different consequences that each can have:

. . . When there is latent ambiguity, the potential supplier will not likely become aware of the ambiguity before learning of the results of the evaluation. When there is patent ambiguity, it is (or should be) apparent on the face of the RFP article or amendment concerned, and the potential supplier must seek clarification of what is being required or otherwise file an objection or a complaint in a timely manner.

[Footnote omitted]

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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. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
 7. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
 8. *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). Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.
 9. (22 August 2002), PR-2002-001 (CITT) at 10.

12. The Tribunal also recalls *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*¹⁰ in which the Federal Court of Appeal confirmed the validity of the Tribunal's approach on this issue:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .

[21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

13. In this case, the RFSAs were published on March 13, 2009, and two amendments were issued on April 9 (amendment No. 1) and April 20 (amendment No. 2), 2009. The deadline for the submission of bids was April 22, 2009. According to the complaint, a total of nine bidders were retained under the RFSAs. On May 25, 2009, PWGSC informed Biorex that none of its proposals were accepted because one of the hourly rates included in its financial proposal exceeded the maximum allowable rate.

14. Following a number of e-mails, messages and telephone conversations between May 25 and June 4, 2009, Biorex made a written objection to PWGSC on June 5, 2009. Between June 5 and July 24, 2009, Biorex and PWGSC exchanged correspondence on the reasons for which Biorex was not retained as a supplier, including the grounds of its complaint filed with the Tribunal. In particular, in a letter dated July 22, 2009, but received by Biorex on July 24, 2009, PWGSC informed Biorex that it could not assent to Biorex's request to be added to the list of supply arrangement holders. On August 4, 2009, Biorex filed its complaint with the Tribunal.

15. The Tribunal notes that the RFSAs and amendment No. 2 to the RFSAs contained certain explanations about the "average of the submitted hourly rates + 20%" criterion for each position category and the way in which PWGSC would evaluate the hourly rates.

16. The terms of the RFSAs, as modified, read as follows:

1.2.2 Financial Bid Evaluation

. . .

For all technically responsive proposals, the financial proposal (Annex 3) will be considered responsive if the proponent bids in all of the following categories:

- Senior Biologist/Geographer
- Junior Biologist/Geographer
- Senior Technician
- Junior Technician
- Cartographer
- Administrative Assistant

and the submitted rates are below the "average of the submitted hourly rates + 20%" for each of these categories.

[Emphasis added, translation]

10. 2002 FCA 284 (Can LII) at paras. 18-21.

17. Amendment No. 2 to the RFSA reads as follows:

QUESTION 19) Can you clearly explain the meaning of “the average of the submitted hourly rates + 20%” on page 11 of 37?

ANSWER 19) The following example illustrates how it works. Ten financial proposals are evaluated. Starting with the “Senior Technician” position, the average rate for this position is calculated using the rates of the 10 financial proposals and adding 20%. The same operation will be done for each of the six positions. For the financial proposal to be responsive, each of the submitted rates for each of the positions must be equal to or below the calculated value (average + 20%) of each position.

[Translation]

18. The Tribunal is of the opinion that, considering the terms of the RFSA and the subsequent amendments, the ambiguities in the RFSA raised by Biorex constitute patent ambiguities. Indeed, after the publication of amendment No. 2 and bid closing on April 22, 2009, it became clear that neither the mandatory nature nor the application of the financial evaluation criteria would be further clarified by PWGSC. In this instance, it was Biorex’s responsibility to make an objection to PWGSC or to file a complaint with the Tribunal within the 10 subsequent working days and not wait for the results of the evaluation, the ambiguity being patent. The Tribunal is therefore satisfied that the basis of the first two grounds of complaint should have become known to Biorex as soon as it received all the documentation relating to the solicitation.

19. Indeed, the Tribunal finds that the ambiguities alleged by Biorex in the terms of the RFSA were or should have become apparent to Biorex as soon as Biorex became aware of answer 19, i.e. when amendment No. 2 was issued. At the latest, Biorex became aware of this amendment on the closing date of the RFSA, that is, on April 22, 2009. Thus, in the Tribunal’s opinion, if Biorex considered that the financial evaluation criteria were not clearly indicated and explained, it had 10 working days after that date, i.e. until May 6, 2009, to make an objection to PWGSC or file a complaint with the Tribunal. Since Biorex waited until June 5, 2009, to make an objection, the objection was not made within the time limit specified in subsection 6(2) of the *Regulations*. Therefore, with regard to the first two grounds of complaint filed by Biorex with the Tribunal on August 4, 2009, these grounds were not filed within the time limit set out in paragraph 6 of the *Regulations* and the Tribunal cannot accept them for inquiry.

20. Regarding the allegations that the application of the “average of the submitted hourly rates + 20%” criterion goes against the purpose of selecting the lowest bidder for the RFSA and, therefore, contravenes the provisions of *NAFTA* and the *AGP*, according to which contracts must be awarded to the bidder that is fully capable of undertaking the mandate and who submitted the lowest bid, the Tribunal is of the opinion that the complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements. In this respect, the Tribunal notes that the RFSA did not specify that its purpose was to find among the companies that were fully capable of performing the work relating to each area of specialization those that submitted the lowest bids. Moreover, contrary to Biorex’s claims, Article 1015(4) of *NAFTA* and Article XIII(4) of the *AGP* do not indicate that a procurement must necessarily be awarded to the “lowest bidder”. The provisions provide for an alternative, i.e. the award of the contract to the bidder whose proposal will have been determined or recognized as the most advantageous in terms of the specific evaluation criteria set out in the notices or the tender documentation.

21. For these reasons, the Tribunal has decided not to conduct an inquiry into the complaint.

DECISION

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

André F. Scott

André F. Scott
Presiding Member