



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-049

ImStrat Corporation Inc.

*Decision made
Monday, September 28, 2009*

*Decision and reasons issued
Friday, October 2, 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

IMSTRAT CORPORATION 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.

Stephen A. Leach
Stephen A. Leach
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 procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of an arctic surveillance operator.

3. ImStrat Corporation Inc. (ImStrat) alleges that PWGSC:

- (1) improperly awarded a contract to a non-compliant bidder, specifically that the bidder did not adhere to the *Code of Conduct for Procurement*³ as it applies to conflict of interest situations; and,
- (2) incorrectly evaluated ImStrat's proposal, specifically that PWGSC failed to reasonably consider the experience of its proposed human resources.

4. On July 20, 2009, PWGSC issued a Request for Proposal (RFP) (Solicitation No. W8474-06JS28/B) for the provision of an arctic surveillance operator. On September 1, 2009, PWGSC advised ImStrat that, while its bid met all the mandatory criteria and was deemed compliant, it was not the highest ranked bid and a contract was awarded to MDA Geospatial Services Incorporated (MDA). On September 2, 2009, ImStrat made an objection to PWGSC regarding the evaluation of its proposal and submitted its concerns regarding a conflict of interest situation involving MDA. On September 8, 2009, PWGSC provided ImStrat with a summary of its technical evaluation. On September 22, 2009, ImStrat filed its complaint with the Tribunal.

5. 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*,⁴ Chapter Five of the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*⁶ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁷ applies. In this case all four of the trade agreements apply.

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

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

3. Complaint, tab 11. The code is incorporated by reference into the solicitation via the "2003, Standard Instructions – Goods or Services – Competitive Requirements, (2008-12-12)" and can be found at the following Web site: <http://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/index-eng.html>.

4. *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).

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

7. *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.

GROUND 1

6. In its complaint, ImStrat stated that MDA owns the satellite RADARSAT-2 and has entered into licensing agreements with Canada for use of the satellite and the imagery it collects. It also stated that, in addition to the data that is accounted for in the licensing agreement, MDA offers value-added services and products related to the RADARSAT-2 imagery.

7. ImStrat alleged that awarding the contract to MDA gives rise to a conflict of interest as a result of MDA's ownership of RADARSAT-2 and the specific duties and responsibilities of the arctic surveillance operator. According to ImStrat, MDA cannot properly perform the contract because the resource person occupying that position would necessarily seek to generate value-added sales for MDA rather than limit services to DND's mission needs.

8. The Tribunal notes that the RFP contains a clause addressing specifically the issue of conflict of interest. Clause 17 of the "2003, Standard Instructions - Goods or Services - Competitive Requirements, (2008-12-12)" is incorporated by reference into the RFP, and reads as follows:

17 Conflict of Interest - Unfair Advantage

1. In order to protect the integrity of the procurement process, bidders are advised that Canada may reject a bid in the following circumstances:
 - (a) if the Bidder, any of its subcontractors, any of their respective employees or former employees was involved in any manner in the preparation of the bid solicitation;
 - (b) if the Bidder, any of its subcontractors, any of their respective employees or former employees had access to information related to the bid solicitation that was not available to other bidders and that would, in Canada's opinion, give the Bidder an unfair advantage.
2. The experience acquired by a bidder who is providing or has provided the goods and services described in the bid solicitation (or similar goods or services) will not, in itself, be considered by Canada as conferring an unfair advantage or creating a conflict of interest. This bidder remains however subject to the criteria established above.

9. The complaint contains no evidence to indicate that MDA was involved in the preparation of the bid solicitation, or that it had access to information related to the bid solicitation that was unavailable to other bidders. As such, the Tribunal sees no evidence of conflict of interest during the solicitation process. The evaluation ranked MDA first and it was awarded the contract accordingly. In the Tribunal's view, any allegations that MDA's resource person would use his or her position to sell unnecessary services is speculation about what may or may not occur subsequent to the contract award and as such is beyond the jurisdiction of the Tribunal.

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

GROUND 2

11. ImStrat submitted that the evaluators failed to evaluate its bid in accordance with the criteria stated in the RFP. In particular, it submitted that the evaluators did not reasonably apply the point rated technical criteria and unreasonably gave its proposal a score of zero with respect to certain of the rated criteria.

12. ImStrat submitted that in assessing the reasonableness of the scores attributable to its bid it must be remembered that all of the evaluators were DND employees who had worked with ImStrat's proposed human resources on other projects and/or contracts and would therefore know their experience.

13. The Tribunal is of the view that, in evaluating a bid, evaluators can only apply what is presented in a proposal against the evaluation criteria contained in the tender documents. Although they may need to apply their knowledge of both common and technical usage of pertinent vocabulary to interpret what is stated in the bid, it is inappropriate for evaluators to apply personally held knowledge that goes beyond the realm of general knowledge or to go outside the bid to supplement it with information that it may be missing. In other words, bids are to stand on their own, and evaluators are not permitted to substitute their personal knowledge for the information supplied by a bidder, however unclear or incomplete that information may be.

14. The RFP states that "[t]he Bidder is required to provide complete details as to . . . when - (beginning and end dates) . . . the stated qualifications and experience were obtained . . . Details on the experience, the name of the employer, description of duties and responsibilities and dates of employment (month/year to month/year) are to be provided . . . Bidders are advised that only listing experience without providing any supporting data to describe responsibilities, duties and relevance to the requirements will not be considered "demonstrated" for the purpose of this evaluation."

15. The Tribunal notes that the resumes of ImStrat's proposed resources generally do not list experience by the "month/year to month/year" format, but rather simply by a "year to year" format or a "year to present" format. As several of the rated criteria required proposed resources to have a certain number of months experience within a given time period,⁸ it was incumbent on ImStrat to demonstrate clearly in its proposal how each and every one of the individual rated criteria was met.

16. In its Technical Evaluation Summary Report,⁹ PWGSC stated that "[a]nywhere a score of 0 was given, there was missing information on current capabilities." When PWGSC gave ImStrat a score of 0 on such rated criteria, it noted that the experience was outside of the acceptable period or that the evaluators were unable to find the demonstrated experience within the referenced time period.

17. As it has stated in the past, the Tribunal is of the view that, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria, the Tribunal will generally not substitute its judgement for that of the evaluators.¹⁰ Based on a review of the evidence contained in the complaint, the Tribunal is of the view that none of the aforementioned conditions apply and that PWGSC was not unreasonable in its evaluation of ImStrat's proposal.

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

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

8. Complaint, tab 5 at 53.

9. Complaint, tab 3.

10. *Re Complaint Filed by K-W Leather Products Ltd.* (3 September 2002), PR-2002-012 (CITT).

DECISION

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

Stephen A. Leach

Stephen A. Leach
Presiding Member