



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-039

6979611 Canada Inc.

*Decision made
Tuesday, August 18, 2009*

*Decision and reasons issued
Monday, August 31, 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

6979611 CANADA 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 two solicitation processes, Project 5225-2-2007-5 (Project 1) and Project 5225-2-2009-2 (Project 2), by the Department of Public Works and Government Services (PWGSC) for lease accommodation in Gatineau, Quebec. The projects were divided into three phases. During the first phase, PWGSC issued a Request for Information (RFI), in which it sought responses from suppliers regarding the construction and leasing of buildings, in a particular area of Gatineau, and certain overall requirements. During the second phase, the Selection of Invitees to Tender (SOIT) stage, PWGSC provided suppliers with a much more comprehensive listing of requirements regarding the proposed lease space (i.e. architectural, mechanical, electrical and telecommunications specifications, as well as other logistic and construction requirements). Suppliers were then required to submit a Request for Qualification (RFQ) that included their detailed plans addressing all requirements at the SOIT stage. During the third phase, the Irrevocable Offer to Lease phase, those bidders that met or exceeded the mandatory evaluation criteria of the SOIT stage were invited to submit an Irrevocable Offer to Lease, which detailed, among other things, the pricing associated with the supplier's proposal. As discussed in greater detail below, the tendering process relating to Project 1, which had advanced to the third phase, was cancelled on November 28, 2008. Subsequently, PWGSC initiated a new tendering process (Project 2) when it issued an RFI on February 23, 2009, and commenced the second phase through the publication of an SOIT on July 2, 2009.

3. 6979611 Canada Inc.³ (GDC) alleged that it was treated unfairly when its Irrevocable Offer to Lease relating to Project 1 was not accepted and that the tendering process relating to Project 2 was structured in a manner that is directly biased against it. Specifically, GDC alleged that PWGSC failed to treat it fairly and violated various provisions of the trade agreements in:

1. rejecting GDC's Irrevocable Offer to Lease relating to Project 1 on the basis of a flawed "Market Survey Report" criterion that was not identified in the tender documentation;
2. rejecting GDC's Irrevocable Offer to Lease relating to Project 1 on the basis of technical specifications relating to the form rather than the substance and performance of an irrevocable standby letter of credit;
3. rejecting GDC's Irrevocable Offer to Lease relating to Project 1 on the basis of evaluation criteria not included in the tender documentation relating to the proof of authorization to proceed with the offer;

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

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

3. According to the complaint, 6979611 Canada Inc. is the successor corporation to GDC Gatineau Development Corporation/Corporation Développement GDC Gatineau, pursuant to a horizontal amalgamation, effective August 14, 2009. 6979611 Canada Inc.'s predecessor, GDC Gatineau Development Corporation/Corporation Développement GDC Gatineau, bid on Project 1 and submitted a response to the RFI relating to Project 2.

4. refusing to award GDC the contract for Project 1 when its Irrevocable Offer to Lease was deemed to be the most advantageous according to the evaluation criteria specified in the tender documentation;
5. disclosing GDC's lease offer for Project 1 on the public record of judicial review proceedings commenced by GDC in respect of the cancellation of that solicitation;
6. refusing to provide GDC with a debriefing on its scoring for Project 1 even though such a debriefing was provided to at least one of GDC's competitors; and
7. failing to treat GDC fairly and without bias by re-structuring Project 2 through the removal of a significant component on which GDC scored highest on the first solicitation.

4. The Tribunal notes that most of these allegations relate to Project 1. However, GDC contended that PWGSC put it at a significant competitive disadvantage in Project 2 as a result of the actions summarized in allegations 5, 6 and 7.

5. Given that Project 1 is now cancelled and that a contract will not result from that solicitation, an issue that arises with respect to the grounds of complaint that relate to this project is whether these grounds are in respect of a "designated contract" as required by section 7 of the *Regulations*. However, the Tribunal typically applies sections 6 and 7 consecutively.⁴ Accordingly, it will first determine whether the complaint was filed within the prescribed time limits found in section 6 prior to considering, if necessary, the additional prerequisite conditions for the initiation of an inquiry under section 7.

6. Subsection 6(1) of the *Regulations* provides that 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) provides that a potential supplier that 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 (or reasonably should have become aware) of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

8. According to the complaint, the RFI relating to Project 1 was published on MERX⁵ on June 1, 2007. GDC responded to the RFI. The SOIT relating to Project 1 was published on April 23, 2008, and GDC submitted its RFQ on June 26, 2008. On September 15, 2008, PWGSC advised GDC that its RFQ had obtained a rating of 83 percent, and it invited GDC to submit an Irrevocable Offer to Lease, which GDC did on September 30, 2008.

4. *Re Complaint Filed by Augusta Westland International Limited* (24 November 2004), PR-2004-041 (CITT).

5. Canada's electronic tendering service.

9. On November 28, 2008, PWGSC advised GDC that no proposal fully met the Crown's requirement and that the tendering process relating to Project 1 was cancelled. PWGSC also advised GDC that it expected to initiate a new tendering process in the future. On December 2, 2008, subsequent to GDC's request for a meeting, PWGSC advised GDC that it would not meet with GDC, but provided GDC with a letter detailing the areas where GDC's Irrevocable Offer to Lease did not meet PWGSC's requirements. The letter stated that GDC's Irrevocable Offer to Lease proposal:

- contained an annual rent that exceeded the rental range of the market survey report and was also in excess of PWGSC's budget;
- did not contain the required irrevocable standby letter of credit to August 31, 2012, but instead a year-to-year letter of credit that the issuing bank could elect not to renew;
- did not contain a letter of credit that was subject to the SOIT-requested Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce Publication No. 600; and
- did not contain a properly signed By-law #1 or resolution of the Board of Directors of GDC Gatineau Development Corporation/Corporation Développement GDC Gatineau.

10. On December 4, 2008, GDC responded to PWGSC's letter by stating that:

- there was nothing in the SOIT that referred to a market survey report. In addition, there was no information in any of the solicitation documents for Project 1 concerning PWGSC's budget or a requirement that the annual rent fall within a parameter;
- the standby letter of credit had the required expiration date of August 31, 2012, and was automatically renewable, unless the bank provided written notice, at which time PWGSC could draw upon the letter of credit up to the full amount;
- as reference was made to the International Chamber of Commerce Publication No. 590, its standby letter of credit exceeded PWGSC's requirements; and
- there was no requirement in the SOIT to have the resolution or by-law signed and that, given other documentation and information provided to PWGSC during the solicitation process, there was no issue with respect to the authority of the signatories of the offer to proceed with the project.

11. Finally, GDC requested that PWGSC immediately withdraw the cancellation of the tendering process relating to Project 1 and that the appropriate PWGSC officials meet with GDC to provide an opportunity to address the above issues with a view to proceeding with the project.

12. On December 11, 2008, PWGSC responded by citing clauses in the SOIT that allowed it to (a) not proceed with the tendering process and/or (b) reject any or all offers. It also quoted a passage from its September 15, 2008, letter to GDC which advised that "... this project will not be able to go forward if the rental rate offered [cannot] be supported by PWGSC. ..." It advised that it maintained its decision to cancel the tendering process and re-tender the requirement.

13. The Tribunal finds that grounds 1 through 4 of GDC's complaint exclusively concern Project 1 and specifically relate to the exchange noted above. It considers that GDC became aware of these grounds on December 2, 2008, when PWGSC advised it of the reasons for which GDC's Irrevocable Offer to Lease was not accepted. The Tribunal considers GDC's letter of December 4, 2008, to be its objection to PWGSC's reasons for its decision to cancel the tendering process. It is clear to the Tribunal that GDC

received the denial of relief contemplated by subsection 6(2) of the *Regulations* when, on December 11, 2008, PWGSC's letter stated that it maintained its decision to cancel the tendering process. In order for GDC's complaint to be considered to have been filed in a timely manner, it would have had to have been filed within 10 working days of receiving this denial of relief, or by December 29, 2008. As the complaint was not filed until August 17, 2009, the Tribunal finds these grounds of complaint have not been filed within the prescribed time limits and will not be accepted for inquiry.

14. With respect to the fifth ground, according to the complaint, GDC commenced an application for judicial review with the Federal Court of PWGSC's decision to cancel the solicitation process on December 29, 2008.⁶ On or about February 5, 2009, PWGSC submitted a number of documents to the Federal Court, including PWGSC's financial analysis of GDC's offer for Project 1. GDC alleged that this disclosure has, in effect, precluded it from fair and equal participation in the procurement process relating to Project 2, which began on February 23, 2009, with the issuance of the RFI for Solicitation No. 5225-2-2009-2. In view of these considerations, the Tribunal finds that GDC became aware or should reasonably have become aware of PWGSC's disclosure of its financial information and, thus, of the basis of this ground of complaint in February 2009 at the latest. However, it is only on July 15, 2009, that GDC objected to PWGSC about its release of the financial data as part of the proceeding before the Federal Court. Accordingly, this objection was not made within the 10 working days required by subsection 6(2) of the *Regulations*. As such, the Tribunal finds that the fifth ground of complaint has not been filed within the prescribed time limits and will not be accepted for inquiry.

15. With respect to the sixth ground, on February 10, 2009, GDC requested a debriefing from PWGSC for a breakdown of the scores that its RFQ had been awarded. It informed PWGSC that it was aware that its competitors had been debriefed and that it was requesting its own debriefing in preparation of the second solicitation. As discussed above, on February 23, 2009, PWGSC published an RFI for Project 2. On February 27, 2009, PWGSC advised GDC that, as the solicitation relating to Project 1 was in litigation before the Federal Court, its request for a debriefing could not be accommodated. It is clear to the Tribunal that GDC became aware that it would not be granted a debriefing on February 27, 2009. Given that the complaint was filed more than five months after that date, i.e. on August 17, 2009, and the lack of any indication of a timely objection to PWGSC, the Tribunal also finds the sixth ground of complaint to have been filed outside the prescribed time limits and, thus, will not be accepted for inquiry.

16. Regarding the final ground of complaint, that PWGSC failed to treat GDC fairly and without bias by re-structuring the procurement relating to Project 2 through the removal of a significant component on which GDC scored highest on the first solicitation, GDC argued that the removal of the property management component represents a direct loss to GDC and a corresponding direct gain to its competitors that, in the previous process, demonstrated a lack of experience in this aspect of the solicitation. GDC argued that PWGSC's actions violated Canada's obligations under the trade agreements.

17. On August 3, 2009, PWGSC responded to GDC by advising that the property management for the new leased space would be performed either by PWGSC itself or its current service provider. It advised that the removal of the property management component made the process accessible to more bidders and, thus, more competitive.

6. Complaint, tab 19, Court File No. T-1995-08.

18. The Tribunal notes that GDC submitted its response to the February 23, 2009, RFI by the required due date of March 26, 2009. On July 2, 2009, PWGSC published the second SOIT which, unlike the first one, did not include a property management component. On July 15, 2009, GDC wrote to PWGSC to object, *inter alia*, to the removal of this component in the new solicitation. Based on the foregoing, the Tribunal concludes that this ground of complaint became known or reasonably should have become known to GDC at the time when PWGSC published the second SOIT on July 2, 2009, and given GDC's objection on July 15, 2009, and PWGSC's denial of relief on August 3, 2007, the Tribunal finds that the complaint, as it relates to this ground, was filed within the prescribed time limits.

19. 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*,⁷ Chapter Five of the *Agreement on Internal Trade*,⁸ the *Agreement on Government Procurement*⁹ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*¹⁰ applies. In its complaint, GDC alleged that PWGSC violated the provisions of the *AIT*, *NAFTA* and the *AGP*. The Tribunal agrees that these are applicable trade agreements and further notes that the services in question are not excluded under the *CCFTA*. Thus, the Tribunal considers that all four trade agreements apply.

20. The Tribunal has no reason to doubt GDC's assertion that, without a property management component, its proposal in response to the second SOIT may not achieve as high a score as it did in the first solicitation process. However, in the Tribunal's opinion, a procuring entity has the right to define its own requirements and has no obligation, in preparing a solicitation, to incorporate the terms of a previous solicitation. Bidders should treat all solicitations as independent, and the terms of a previous solicitation are not determinative of those of a new one.¹¹

21. In the context of this complaint, as explained by PWGSC in its response to the objection, the Tribunal is of the view that the elimination of the property management component would have the effect of increasing competition and opening up the procurement to even more potential suppliers. The objectives of the trade agreements are about broadening, not restricting, competition. Furthermore, the Tribunal sees no evidence that the changes in the bidding structure were done specifically to place GDC at a disadvantage or to favour other specific suppliers. The Tribunal is not persuaded that these changes were introduced by PWGSC for any reason other than to relax a bidding structure that was judged to be unnecessarily restrictive in the circumstance or that did not correspond to its actual requirements. As such, the Tribunal finds that, in relation to this ground of complaint, the information does not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

7. *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*].

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

10. *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*]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

11. *Re Complaint Filed by The Spallumcheen Band* (26 April 2001), PR-2000-042 (CITT).

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

DECISION

23. 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