



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-051

A. F. Theriault & Son Ltd.

*Decision made
Tuesday, October 6, 2009*

*Decision and reasons issued
Wednesday, October 21, 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

A. F. THERIAULT & SON LTD.

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.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
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. F7013-090005/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans, Canadian Coast Guard, for the provision of five 47-foot motor lifeboats, as well as an option for the provision of spare parts.

3. A. F. Theriault & Son Ltd. (Theriault) alleged the following:

- (1) that PWGSC evaluated its proposal in relation to criteria that were not clearly identified in the solicitation documents; and
- (2) that PWGSC unjustifiably delayed notifying unsuccessful bidders that a contract had been awarded.

4. On May 21, 2009, PWGSC issued a Request for Proposal (RFP) for the provision of five 47-foot motor lifeboats, as well as an option for the provision of spare parts. The original bid closing date was July 3, 2009. However, as a result of an amendment to the RFP, the bid closing date was changed to July 6, 2009.

5. On June 25, 2009, Theriault submitted its proposal in response to the RFP, wherein it was stated that its subcontractor, Lengkeek Vessel Engineering (Lengkeek), would provide the design and engineering work in the event that Theriault was awarded the contract. On July 16, 2009, PWGSC sent an e-mail to Theriault requesting that it indicate where, in its proposal, evidence of a “binding commitment” with its subcontractor—a requirement of the solicitation—could be found. Later that day, Theriault provided its response to PWGSC indicating that it had stated several times throughout its proposal that Lengkeek would be the subcontractor for the design and engineering work and that its proposal included supporting documentation in respect of the personnel supplied by Lengkeek for this work. It added that, by signing the proposal, as was required by the terms of the RFP, it endorsed the contents of the proposal.

6. On August 31, 2009, PWGSC advised Theriault that a contract had been awarded to Victoria Shipyards Company Limited (Victoria) in the amount of \$19,626,337.50 (taxes included). According to the complaint, this amount is substantially more than Theriault’s total bid price. On the same day, Theriault sent an e-mail to PWGSC requesting clarification with respect to the bid evaluation process and the results of the solicitation. In subsequent correspondence between PWGSC and Theriault, arrangements were made for a debriefing by way of teleconference. On September 10, 2009, a contract award notice was published on MERX,³ which indicated that the contract had been awarded on August 4, 2009.

7. On September 15, 2009, Theriault sent a letter to PWGSC objecting to the contract award. It submitted that its proposal complied with all mandatory requirements set out in the RFP and that, since PWGSC’s letter of August 31, 2009, did not indicate otherwise, its lower total bid price meant that it should

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

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

3. Canada’s electronic tendering service.

have been awarded the contract. On September 17, 2009, PWGSC provided a written debriefing to Theriault, wherein it indicated that its proposal was declared non-compliant with the mandatory requirements, as it failed to provide evidence of a “binding commitment” with Lengkeek for all the design and engineering work. It also observed that, while Theriault’s proposal was declared non-compliant based on a failure to meet technical requirements and was therefore not subject to further consideration, the proposal did not meet the mandatory requirements in respect of contract financial security. According to the complaint, a further debriefing by way of teleconference was held on September 18, 2009.

8. On September 30, 2009, Theriault filed its complaint with the Tribunal.

9. 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 conducted 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.

10. The *AIT* applies in this case, and Article 506(6) provides as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

11. Theriault’s first ground of complaint was that PWGSC evaluated its proposal in relation to criteria that were not clearly identified in the solicitation documents. It submitted that it did comply with the requirement to provide evidence of a binding commitment with its subcontractor by confirming in its proposal that Lengkeek would perform the design and engineering work for the price outlined in the proposal. In particular, it submitted that it was directed by the terms of the RFP to provide pricing information (which it obtained from Lengkeek’s written quotation) in the form of the chart located at Annex “D” to the RFP, which it did, rather than provide the written quotation itself.

12. Appendix 1 to Annex “I” to the RFP, entitled “**MANDATORY REQUIREMENTS – TECHNICAL PROPOSAL**”, provides as follows:

... If an evaluation item expressly provides that it or any element of it may be met by a subcontractor to the Bidder, then the Bidder shall provide documented evidence of such compliance by its subcontractor. In that event, the Bidder shall also provide evidence that it has a binding commitment with that subcontractor under which the subcontractor will perform services under subcontract with the Bidder under any contract issued pursuant to this RFP, and that such services are of the same type as are specified in the relevant evaluation item.

...

[Emphasis added]

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> [AIT].

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.

13. In addition, Part 4 of the RFP, entitled “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, provides as follows:

4.1 Evaluation Procedures

...

The evaluation will include the mandatory criteria identified herein and at Appendix “1” to Annex “T”, Bid Evaluation Plan. To be considered responsive, a proposal must meet all the mandatory requirements of the RFP. Failure to meet any mandatory requirement will result in the Bidder’s Proposal being declared non-compliant. Non-compliant proposals will be given no further consideration.

...

14. The Tribunal finds that the above-noted RFP provisions clearly indicate that (1) bidders were required to provide evidence with their proposal that the bidder had a binding commitment with its subcontractor under which the subcontractor would perform the services detailed in the proposal and that (2) failure to meet any mandatory requirement would result in the bidder’s proposal being declared non-compliant and given no further consideration. Therefore, the Tribunal is of the view that, in order to comply with the terms of the RFP, Theriault was required to include with its proposal documentary evidence that it had a legally binding commitment from Lengkeek that it would perform the design and engineering work in the event that Theriault was awarded the contract. A mere assertion or statement to the effect that Lengkeek *would* perform the design and engineering work, the inclusion of documentation in respect of the personnel that would be supplied by Lengkeek for this work or a signature on behalf of Theriault endorsing the contents of the proposal does not, in the Tribunal’s opinion, constitute evidence of a “binding commitment” between Theriault and Lengkeek. As for Theriault’s argument that it was directed by the terms of the RFP to provide pricing information in a certain format, the Tribunal is of the view that this was a separate requirement which did not absolve bidders from having to comply with the requirement to provide evidence of a binding commitment.

15. As such, the Tribunal finds that PWGSC did evaluate Theriault’s proposal on the basis of criteria that were clearly identified in the solicitation documents and that it properly declared its proposal non-compliant. Consequently, the Tribunal finds that the complaint, on this ground, does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

16. Theriault’s second ground of complaint was that PWGSC unjustifiably delayed notifying unsuccessful bidders that a contract had been awarded. It submitted that the delay of about a month between the date on which the contract was awarded and the date on which it was informed that a contract had been awarded caused it to lose other commercial opportunities while it held its resources available for this solicitation. It submitted that there was no justifiable reason to delay notifying bidders promptly once a decision to award a contract had been made. Theriault suggested that the Government timed the announcement of the contract award for political reasons, to the detriment of unsuccessful bidders whose resources were tied up while awaiting the outcome of the evaluation.

17. 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.”

18. These provisions make it clear that 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.

19. Although PWGSC advised Theriault on August 31, 2009, that a contract had been awarded to Victoria, the evidence in the complaint indicates that the actual date of contract award was only disclosed by way of the contract award notice published by PWGSC on MERX on September 10, 2009. Therefore, Tribunal finds that Theriault became aware, or reasonably should have become aware, of its ground of complaint at that time. There is no evidence in the complaint that Theriault made an objection to PWGSC regarding this particular ground of complaint. According to the *Regulations*, Theriault then had 10 working days from September 10, 2009, to file a complaint with the Tribunal. As Theriault filed its complaint with the Tribunal on September 30, 2009, the Tribunal considers that the complaint on this ground has not been filed in a timely manner.

20. The Tribunal notes that the *AIT* contains no provisions with regard to notifying suppliers of decisions on contract awards or publishing contract award notices. Moreover, in this instance, the Tribunal is of the view that the delay in notifying Theriault of the contract award was not unreasonable. Consequently, even if Theriault's complaint on the ground that PWGSC unjustifiably delayed notifying unsuccessful bidders that a contract had been awarded had been filed on time, the Tribunal would have found that it did not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

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

DECISION

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

Diane Vincent
Diane Vincent
Presiding Member