Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-046

Linda Hershkovitz

Decision made
Tuesday, September 17, 2009

Decision and reasons issued
Monday, October 5, 2009

Canada

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

LINDA HERSHKOVITZ

AGAINST

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

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.

Jason W. Downey
Jason W. Downey
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 Request for a Standing Offer (RFSO) (Solicitation No. 2009-CC1015-GEIND) by the Canadian International Development Agency (CIDA) for the provision of senior gender equality specialist services. The purpose of the RFSO was to establish up to 35 standing offers for gender equality advice and consulting services in four language categories.

3. Mandatory criterion M1 of the RFSO required that bidders demonstrate that they had a minimum of 10 years of full-time work experience in the field of gender equality in relation to international development cooperation. Full-time work experience was defined in the RFSO as being at least 150 work days during a given calendar year.

4. Ms. Linda Hershkovitz, while acknowledging that, due to a "minor addition error", her proposal only provided evidence that she had worked 148 days for one of the 10 years of experience that she had submitted in response to mandatory criterion M1 of the RFSO, alleged the following grounds of complaint:

(1) CIDA should have the discretion, when faced with an obvious and minor error in the application, to give the applicant a reasonable opportunity to rectify the error;

(2) mandatory criterion M1 set an unreasonable and unfairly high standard for relevant work experience; and

(3) mandatory criterion M1 was open to different, inconsistent interpretations.

5. As a remedy, Ms. Hershkovitz requested that (a) she be allowed to correct the error; (b) that CIDA evaluate her proposal; and (c) that, if it found her proposal compliant with the requirements of the RFSO, she be issued a standing offer. Ms. Hershkovitz also requested the reimbursement of her complaint costs.

GROUNDS OF COMPLAINT (2) AND (3)

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) states 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.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

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 conducted 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 K*bis* of the *Canada-Chile Free Trade Agreement*[6] applies. In this case, the Tribunal finds that the *AIT*, *NAFTA* and the *CCFTA* apply.

9. The Tribunal must first determine the date on which the basis of the complaint became known or reasonably should have become known to Ms. Hershkovitz. The Tribunal notes that grounds of complaint (2) and (3) are that mandatory criterion M1 was unreasonable and that it was not clearly defined or explained in the RFSO.

10. In *Primex Project Management Ltd.*,[7] the Tribunal explained the difference between 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]

11. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,[8] 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.

---

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>.
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*]. Chapter K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
7. *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10.
8. 2002 FCA 284 (Can LII) at paras. 18, 20, 21.

12. According to the complaint, the RFSO was made available to bidders on December 8, 2008. There were eight addenda to the RFSO, and the deadline for the submission of bids was February 13, 2009. The Tribunal notes that, although there were questions from some bidders regarding mandatory criterion M1, there were no changes to the criterion. It therefore read as follows throughout the entire tendering period:

> The Consultant submitting a proposal must demonstrate that he or she has a minimum of **ten (10) years**[1] of full-time work experience in the field of gender equality in relation to international development co-operation, where his or her principal role was to provide advice and consulting services on gender equality . . . .
>
> [1] *A year of full-time experience is equivalent to at least 150 work days during the year*. This experience must be demonstrated in the format included in **Form E** . . . and must be relevant to the Scope of Work proposed in Appendix A . . . .

13. The Tribunal also notes that section 4.5 of the RFSO specifically advised bidders that the failure to meet any mandatory criteria, including M1, would "*. . . result in the automatic rejection of the Consultant's proposal*" [emphasis added]. The Tribunal considers that it was clear that it was very important for bidders to clear up any concerns with respect to the mandatory criteria *prior* to submitting proposals.

14. Regarding grounds of complaint (2) and (3), the Tribunal is of the view that the particular concerns expressed in the complaint regarding mandatory criterion M1 should have been evident after a review of the tender documents and the criterion itself. Since these grounds of complaint fall under the definition of "patent ambiguities" as described above, the Tribunal finds that the last possible date upon which Ms. Hershkovitz could have become aware of problems with mandatory criterion M1 would have been the deadline for the submission of proposals,[9] or by February 13, 2009. Therefore, Ms. Hershkovitz would have had to have filed the complaint, or made an objection to CIDA, by February 27, 2009.

15. There is no evidence on file that Ms. Hershkovitz objected to CIDA at that time or any time throughout the process. As the complaint was only filed on September 11, 2009, the Tribunal finds that it was not filed in accordance with the timelines specified in section 6 of the *Regulations*, and it will not therefore inquire into these two grounds of complaint.

GROUND OF COMPLAINT (1)

16. Ground of complaint (1) is that CIDA should have the discretion, when faced with an obvious and minor error in the application, to give the applicant a reasonable opportunity to rectify the error, the Tribunal notes that, according to the complaint, on February 18, 2009, CIDA advised Ms. Hershkovitz that her proposal had not met the 150-work-day requirement for one of the years that she submitted. Ms. Hershkovitz responded on the same day, acknowledging the error and offering CIDA either an alternate manner of calculating the experience regarding one of the submitted projects for that year or offering to submit another year in lieu of the one in her proposal. On February 19, 2009, CIDA advised Ms. Hershkovitz as follows: "I will not respond to your last email because you cannot change your proposal after the closing date." That same day, Ms. Hershkovitz asked CIDA what would become of her proposal. The next correspondence received by Ms. Hershkovitz from CIDA appears to be on July 6, 2009, when CIDA requested that Ms. Hershkovitz extend her bid validity date and confirm her security clearance. Ms. Hershkovitz provided the necessary information to CIDA on the same day.

17. On or about August 14, 2009, Ms. Hershkovitz was informed that her proposal had not complied with the mandatory requirements of the RFSO and that she would not be issued a standing offer. On August 18, 2009, Ms. Hershkovitz advised CIDA that she was considering an appeal of CIDA's decision

9. This assumes that a bidder became aware of the requirement, obtained the solicitation documents, produced a proposal and submitted it to the government institution all on the same day.

and requested a debriefing. On August 27, 2009, CIDA responded to Ms. Hershkovitz by reiterating that (1) she had not met the 150–work-day requirement and (2) that CIDA could not accept any additional information received after the due date for the receipt of bids. Ms. Hershkovitz filed her complaint with the Tribunal on September 11, 2009.

18. The complaint on this ground was properly filed according to subsections 6(1) and (2) of the *Regulations*. The last day open to Ms. Hershkovitz to file a complaint on this ground, by reason of her receiving the denial of relief following her objection to CIDA's response of August 27, 2009, was September 11, 2009. The complaint was filed on that day.

19. Ms. Hershkovitz argued that her error was extremely small, representing a 2-day shortfall over a 10-year period, or less than 0.1 percent of all the days experience that she had submitted. She argued that, given the latitude in the manner in which this criterion could be interpreted, this small margin of error could be discounted.

20. Article 506(6) of the *AIT* 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.

21. Article 1015(4) of *NAFTA* provides as follows:

> An entity shall award contracts in accordance with the following:
>
> a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

22. Article Kbis-10 of the *CCFTA* provides as follows:

> 1. An entity shall require that in order to be considered for award, a tender must be submitted in writing and must, at the time it is submitted:
>
> a. conform to the essential requirements of the tender documentation; and
>
> b. be submitted by a supplier that has satisfied the conditions for participation that the entity has provided to all participating suppliers.

23. The terms of the RFSO read as follows:

> **4.5 Technical Component: Mandatory Requirements**
>
> . . .
>
> The following requirements are mandatory and will not be rated. Failure to meet these mandatory requirements will result in the automatic rejection of the Consultant's proposal.
>
> **M1.** The Consultant submitting a proposal must demonstrate that he or she has a minimum **of ten (10) years**[1] of full-time work experience in the field of gender equality in relation to international development co-operation, where his or her principal role was to provide advice and consulting services on gender equality.
>
> [1] *A year experience is equivalent to at least 150 work days during the year*. This experience must be demonstrated in the format included in **Form E** - "*Description of Years of Experience*", and must be relevant to the Scope of Work proposed in Appendix A - *Terms of Reference*.
>
> [Underlining added for emphasis]

24. It is clear to the Tribunal that bidders were specifically advised, from the very beginning, that non-compliance with mandatory criterion M1 would result in the rejection of bidders' proposals. It is equally clear that a year of experience was defined as being equivalent to 150 work days and that Ms. Hershkovitz's proposal did not meet the 150-work-day requirement for a particular year. The Tribunal therefore considers that CIDA had no choice, in accordance with both the terms of the RFSO and the articles of the relevant trade agreements, but to reject the proposal.

25. The Tribunal has held such a position in the past in deciding not to initiate an inquiry into a complaint. In *Surespan Construction Ltd.*,[10] the Tribunal determined the following:

> Regarding Surespan's argument that the omission of the signed front page of the ITT was an insignificant omission of form and ought to have been waived by PWGSC, the Tribunal has reviewed Surespan's submission and finds no reasonable indication that the requirement was not mandatory or that Surespan met the substance of the obligation in another part of its proposal. The Tribunal is of the opinion that PWGSC properly followed the terms of the ITT when it declared Surespan's proposal non-compliant.

26. For these reasons, the Tribunal finds that this ground of complaint does not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements and, therefore, will not conduct an inquiry into the complaint.

DECISION

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

Jason W. Downey
Jason W. Downey
Presiding Member

10. *Re Complaint Filed by Surespan Construction Ltd.* (8 May 2007), PR-2007-011 (CITT) [*Surespan Construction Ltd.*].