



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2009-063

BMT Fleet Technology Limited

v.

Department of Public Works and
Government Services

*Order and reasons issued
Thursday, March 18, 2010*

TABLE OF CONTENTS

ORDERi

STATEMENT OF REASONS1

 COMPLAINT1

 PROCUREMENT PROCESS.....1

 TRIBUNAL’S ANALYSIS.....3

 COSTS.....3

IN THE MATTER OF a complaint filed by BMT Fleet Technology Limited pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

BMT FLEET TECHNOLOGY LIMITED

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

Pursuant to paragraph 10(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by BMT Fleet Technology Limited. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Stephen A. Leach

Stephen A. Leach

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

STATEMENT OF REASONS

COMPLAINT

1. On November 27, 2009, BMT Fleet Technology Limited (BMT) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. F7013-090024/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 development of bid design packages for offshore vessels.

2. BMT alleged that PWGSC (1) improperly rejected its proposal, citing unfair advantage concerns, (2) improperly applied the evaluation criteria and (3) failed to ensure equal access to the procurement. BMT requested, as a remedy, that the Tribunal recommend that PWGSC declare BMT's proposal compliant. BMT also requested that the Tribunal recommend that PWGSC not proceed to the next phase of the selection process until the Tribunal has dealt with the issues raised in the complaint. In the alternative, BMT requested that the Tribunal recommend that PWGSC compensate it for its lost profits associated with its improper exclusion from the selection process. BMT also requested its bid preparation costs and its costs incurred in the preparation and filing of its complaint.

3. On December 4, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

4. On January 5, 2010, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On January 18, 2010, BMT filed its comments on the GIR.

5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. On September 8, 2009, PWGSC issued a Solicitation of Interest and Qualification (SOIQ) for the development of bid design packages (Phase I) for two different types of offshore science vessels; one type is an offshore oceanographic science vessel (OOSV), and the other is an offshore fisheries science vessel.⁴ The bid closing date was October 26, 2009. BMT submitted a proposal for both types of vessels. The issue in the complaint relates to BMT's qualification relating only to the OOSV.

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

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

3. S.O.R./91-499.

4. The SOIQ is the first of three phases in the procurement for the bid design packages for the vessels. It is a qualification of suppliers in order to identify bidders that are capable of undertaking the ship designs and to establish two source lists, one for each vessel type. An earlier contract for the concept design study for the OOSV was awarded to BMT on February 24, 2009. This contract included terms regarding BMT's eligibility to participate in subsequent solicitations relating to the overall OOSV project.

7. The SOIQ at issue reads as follows (as amended by amendment Nos. 002 and 007):
- 4.12 **Conflict of Interest – Unfair Advantage**
- ...
- 4.12.1 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 for the RFP;
 - (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.
- 4.12.2 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.
- 4.12.3 Where Canada intends to reject a bid under this section, the Contracting Authority will inform the Bidder and provide the Bidder an opportunity to make representations before making a final decision. Bidders who are in doubt about a particular situation should contact the Contracting Authority before bid closing. By submitting a bid, the Bidder represents that it does not consider itself to be in conflict of interest nor to have an unfair advantage. The Bidder acknowledges that it is within Canada's sole discretion to determine whether a conflict of interest or an unfair advantage exists.
8. On October 30, 2009, PWGSC informed BMT that it intended to reject its bid with respect to the OOSV bid design package, citing unfair advantage concerns, and indicated that it would give BMT the opportunity to make representations regarding this decision.⁵
9. On November 2, 2009, BMT provided its submission to PWGSC and indicated that the grounds for disqualification cited by PWGSC related to the future OOVs construction solicitation, not the design phase.
10. On November 3, 2009, PWGSC informed BMT that it maintained its decision to reject BMT's bid and referred to its prerogative to reject any bidder that gained an unfair advantage. According to BMT, this correspondence included new grounds for disqualification. On November 4, 2009, BMT responded to PWGSC with further representations.
11. On November 13, 2009, PWGSC informed BMT that it would not reconsider its position on the OOSV requirement.⁶
12. On November 27, 2009, BMT filed its complaint with the Tribunal.

5. Complaint, confidential attachment 4.

6. Complaint, confidential attachment 5.

TRIBUNAL'S ANALYSIS

13. Subsection 6(2) of the *Regulations* 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."

14. PWGSC submitted that the complaint was filed outside of the 10-working-day deadline imposed by subsection 6(2) of the *Regulations*. It submitted that BMT had actual knowledge of the denial of relief on November 3, 2009, and that, as such, it had until November 17, 2009, to file its complaint.⁷

15. BMT submitted that, properly interpreted, clause 4.12.3 means that a bid will not be rejected until PWGSC has informed the bidder of its intent to reject the proposal and the bidder has had a chance to make representations. It contended that the act of disqualifying the bid does not occur until PWGSC has provided an initial notice and the bidder has had a chance to make representations.

16. BMT submitted that PWGSC's correspondence of November 3, 2009, cited new grounds for rejecting the bid, meaning that November 4, 2009, is the date on which BMT made its objection to PWGSC and that November 13, 2009, is the date on which it received its denial of relief.

17. In its e-mail of October 30, 2009, PWGSC advised BMT that, since it had performed previous work regarding the OOSV, it was of the view that BMT had an unfair advantage over other bidders and that, therefore, it was PWGSC's intention to reject BMT's bid. In its November 2, 2009, response to PWGSC, BMT was of the view that, in accordance with the terms of its previous contract, the restrictions on future work referred to construction work, not design work. In its reply of November 3, 2009, PWGSC acknowledged that there were restrictions in relation to the construction phase of the OOSV, but that, nevertheless, the conflict of interest clause was still valid and that, as a result, it had the prerogative to reject any bidder that gained an unfair advantage. PWGSC also reiterated that, having obtained knowledge in key areas and considering BMT's previous work on the OOSV project, it maintained its decision to restrict BMT from bidding. The Tribunal is of the view that PWGSC did not provide new grounds for rejecting BMT's bid; rather, it merely restated its original grounds for rejecting the bid. Therefore, the Tribunal finds that BMT had actual knowledge of its denial of relief on November 3, 2009, and that, therefore, it had until November 18, 2009, to file its complaint with the Tribunal. BMT filed its complaint on November 27, 2009, which was outside of the time limit established by subsection 6(2) of the *Regulations*. Consequently, the Tribunal does not have jurisdiction to continue its inquiry into the complaint.

18. Therefore, pursuant to paragraph 10(c) of the *Regulations*, the complaint is dismissed.

COSTS

19. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

20. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement,

7. The Tribunal notes that November 11, 2009, was a statutory holiday and would therefore not be considered as part of the 10-working-day period. Therefore, BMT would have had until November 18, 2009, to file its complaint.

the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary indication is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Annex A of the *Guideline* (Level 1). The complexity of the procurement was low, as it was an expression of interest intended to establish source lists for future procurements. The complexity of the complaint was medium, since the issue concerned whether a bidder had an unfair advantage over other bidders. Finally, the complexity of the proceedings was low, as there were no motions or interveners, a public hearing was not required, and the parties were not required to submit additional material beyond the normal scope of the proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

Stephen A. Leach
Stephen A. Leach
Presiding Member