



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-089

Airsolid inc.

*Decision made
Thursday, February 18, 2010*

*Decision and reasons issued
Friday, March 12, 2010*

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

BY

AIRSOLID 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.

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. K2C55-092755/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the Environment (Environment Canada) for the provision of a rigid hull inflatable boat.

3. Airsolid inc. (Airsolid) alleged that PWGSC awarded the contract to a company that had submitted a proposal that did not meet one of the mandatory requirements set out in the solicitation documents. Specifically, Airsolid alleged that the boat proposed by a competing bidder to whom the contract was awarded (Zodiac Marine's SRMN 600 model) was 10 cm shorter than the length requested in the mandatory requirement set out in Annex "A", "Statement of Requirements" [translation], to the Request for Proposal (RFP). This requirement stipulates that the boat must be at least 6 metres long.

4. 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 Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ or Chapter 14 of the *Canada-Peru Free Trade Agreement*⁷ applies. In this case, all trade agreements apply except the *AGP*, since the value of the procurement is below the applicable monetary threshold.

5. On November 11, 2009, PWGSC issued an RFP for the design, building, testing and delivery of a rigid hull inflatable boat for Environment Canada's office in Québec, Quebec. The bid closing date was December 8, 2009. According to the complaint, on December 20 2009, PWGSC informed Airsolid that the contract had been awarded to a competitor. On January 4, 2010, Airsolid requested certain information about the selected boat. On January 5, 2010, PWGSC informed Airsolid that the selected boat was Zodiac Marine's SRMN 600 model. On January 7, 2010, Airsolid informed PWGSC by e-mail that, in its opinion, that model

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

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

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> [*AGP*].

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 Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

did not meet the minimum length requirement set out in the Statement of Requirements attached to the RFP. Airsolid then provided PWGSC with a Zodiac Marine data sheet which stated that the model was 5.9 metres long. In the same e-mail, Airsolid also indicated that it had confirmed with Zodiac Marine's technical authority, in France, that the length was correct. In response to that e-mail, on January 11, 2010, PWGSC sent Airsolid an image (in PDF format), taken from Zodiac Marine's catalogue, that had been included with the winning bidder's proposal. That image indicated that Zodiac Marine's SRMN 600 model was 6.0 metres long, which, according to PWGSC, showed that the boat proposed by the winning bidder met the mandatory requirement of the RFP which stated that the boat was required to be at least 6.0 metres long. In that response, PWGSC also informed Airsolid that the end user of the boat, who was also the relevant technical authority for this procurement, had carefully reviewed the competitor's proposal and had determined that "... the bid as a whole, including the particulars, met the technical and mandatory criteria of the invitation to tender." [Translation]

6. Following a discussion on January 19, 2010, and receipt of another e-mail from Airsolid, there seems to have been a discussion between Airsolid and PWGSC regarding the length of Zodiac Marine's SRMN 600 model. On February 4, 2010, Airsolid requested that PWGSC confirm its final position with regard to the dimensions of the boat to be delivered by the winning bidder.

7. On February 5, 2010, a PWGSC official stated as follows:

Following our discussion of last January 19th and your warning with regard to the dimensions of the boat to be delivered to us, it is possible that the boat will be 10 cm shorter than the one that we requested Although this may be the case, we have decided to abide by the contract in force

[Translation]

8. 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.

9. Article 1015(4)(d) of *NAFTA*⁸ provides as follows:

[A]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

10. The Tribunal notes that, according to article 1.1 of Part 4, "EVALUATION PROCEDURES AND BASIS OF SELECTION" [translation], of the RFP, a potential supplier was required to, on the date and at the time of bid closing, "... provide the necessary documents to show that it met [the mandatory requirements]" [translation].⁹ In this regard, the document that PWGSC sent to Airsolid on January 11, 2010, indicates that the winning bidder had, in a timely manner, provided PWGSC with a document showing that its proposed boat met the mandatory minimum length requirement.

11. At the time of evaluating the proposals and awarding the contract, PWGSC was entitled to rely on the document that was, in all likelihood, taken from Zodiac Marine's catalogue, and there was no evidence that would have made it question the information provided by the winning bidder concerning the dimensions of Zodiac Marine's SRMN 600 model. Furthermore, there was no evidence to indicate that PWGSC knew, prior to contract award, about the allegation that Zodiac Marine's SRMN 600 model could have been shorter than 6 metres, as alleged by Airsolid in its complaint.

8. The *CCFTA* and the *CPFTA* have similar provisions.

9. Complaint at 7.

12. The Tribunal is of the view that the information in the complaint indicates that, at the time of contract award, PWGSC was correct in concluding that Zodiac Marine's SRMN 600 model met the mandatory requirements of the invitation to tender, since the document provided by the winning bidder clearly indicated that the model of boat at issue was 6 metres long. Consequently, the Tribunal is of the view that nothing in the documents provided by Airsolid indicates that the decision to award the contract to its competitor was not in accordance with the criteria and essential requirements specified in the tender documentation or contravened the provisions of the above-mentioned trade agreements, in particular, Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*, as well as the similar provisions in the *CCFTA* and the *CPFTA*.

13. The Tribunal also notes that, under subsection 30.11(1) of the *CITT Act*, a complaint that is filed with the Tribunal must concern the procurement process that relates to a designated contract. According to the Tribunal, that process, that is, the procurement process within its jurisdiction, begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract. The Tribunal notes that the relevant provisions of the trade agreements support this interpretation.

14. Article 514(2) of the *AIT* provides as follows:

2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures for procurement covered by this Chapter that:
 - a. allow suppliers to submit bid protests concerning any aspect of the *procurement process*, which for the purposes of this Article *begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract*

[Emphasis added]

15. Article 1017(1)(a) of *NAFTA*¹⁰ provides as follows:

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following:
 - a. each Party shall allow suppliers to submit bid challenges concerning any aspect of the *procurement process*, which for the purposes of this Article *begins after an entity has decided on its procurement requirement and continues through the contract award*.

[Emphasis added]

16. The Tribunal is of the view that, if it became known, *after* the awarding of the contract, upon delivery of the boat, the latter did not meet a mandatory requirement, the issue would then become one of contract administration or contract performance and it would therefore not fall within the Tribunal's jurisdiction.

17. As such, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

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

10. The *CCFTA* and the *CPFTA* have similar provisions.

DECISION

19. 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