



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-017

Esper Consulting Inc.

*Decision made
Tuesday, July 20, 2010*

*Decision and reasons issued
Thursday, July 29, 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

ESPER CONSULTING 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

Gillian Burnett
Gillian Burnett
Acting 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 Supply Arrangement (RFSAs) (Solicitation No. EN578-055605/C) by the Department of Public Works and Government Services (PWGSC) on behalf of various government departments for the provision of task-based informatics professional services.

3. Esper Consulting Inc. (Esper) alleged that PWGSC unfairly and arbitrarily disqualified its proposal using undisclosed and arbitrary evaluation criteria. In particular, Esper alleged that PWGSC refused to provide a definition of mandatory criterion M.1, “**Financial Strength and Stability**”, and provide the scoring criteria to allow bidders to assess their potential to qualify.

4. 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.”

5. On July 24, 2009, PWGSC issued an RFSAs for the provision of task-based informatics professional services. Mandatory criterion M.1, “**Financial Strength and Stability**”, states as follows: “The Offeror must have the financial capability to undertake this requirement.” Bidders were required to provide PWGSC with certain information to allow it to “. . . conduct a complete financial capability assessment of the Offeror.”³

6. On August 12, 2009, PWGSC issued amendment No. 2 to the RFSAs. In that amendment, in response to a question regarding how financial stability is defined, PWGSC responded as follows: “PWGSC Cost Analysts use a number of elements to determine a Supplier’s financial stability.”

7. On August 18, 2009, PWGSC issued amendment No. 3 to the RFSAs. In that amendment, in response to a question regarding what figures the Crown analyzes with respect to determining a potential supplier’s financial stability, PWGSC responded as follows:

The evaluation of M.1 Financial Strength and Stability through audited financial statements is based on a number of elements, including but not limited to, the size of the company, profitability, working capital, company trend, debt ratio, the company’s ability to finance. PWGSC Costs Analysts will conduct the evaluation.

8. On August 28, 2009, PWGSC issued amendment No. 5 to the RFSAs. In that amendment, question No. 114 reads as follows:

Amd 2 A.11 (part A) indicates that there is a formula for financial stability which is computed by PWGSC cost analysts, but I could not find the formula anywhere.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. RFSAs at 25.

9. The answer that was provided by PWGSC reads as follows:
There is no specific formula that the Cost Analysts use to determine financial stability/capability.
10. On October 26, 2009, PWGSC issued amendment No. 12 to the RFSA. In that amendment, in response to a question regarding how PWGSC would be able to determine whether a company is able to meet the thresholds specified in mandatory criterion M.1, PWGSC responded as follows:
. . . the PWGSC Cost Analyst will use information derived from a number of sources to provide an opinion regarding an Offeror's financial stability.
11. On October 30, 2009, Esper submitted its proposal, and bids closed that same day.
12. On July 8, 2010, in response to Esper's request to learn more about the evaluation of its proposal, PWGSC stated the following:
The evaluation of Esper Consulting Inc's bid resulted in the award of a TBIPS Standing Offer only. The mandatory criterion of M.1 Financial Strength and Stability was not met in order to be awarded a Supply Arrangement Tier 1.
The financial strength and stability evaluation was conducted by the PWGSC's Contract Cost Analysts, Audit and Policy Directorate who reviewed the financial documentation received. Based on the information and documentation received, it was established that the company does not have enough financial strength to support one or more contract(s) of up to \$2 millions (SA Tier 1). Again, as a result of the evaluation, Esper was only awarded a TBIPS Standing Offer.
13. In response to this information, Esper requested information regarding the criteria to establish a bidder's financial strength and stability and how it rated against each criterion.
14. On July 12, 2010, PWGSC responded to Esper as follows:
Regarding the results of the evaluation of Esper's financial strength and stability, there are no specific criteria used to evaluate the financial strength of a company. It is a professional opinion that is based upon the review and examination of various documents including, but not limited to, financial statements, Dun & Bradstreet reports, bank references, news reports, etc. The lack of sufficient revenues . . . were a major factor in determining that Esper was not financially capable of handling a contract with potential value of \$2M.
15. On July 13, 2010, Esper filed its complaint with the Tribunal.
16. In its complaint, Esper submitted that PWGSC relied on information that was not requested in the RFSA. It also submitted that PWGSC relied on a subjective analysis that cannot be supported by facts. It submitted that it appears that PWGSC's Cost Analysts considered only gross revenue and chose to ignore Esper's excellent credit history and access to operating credit lines.
17. As indicated by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,⁴ there is an onus on potential suppliers to challenge problems in the procurement process when they become aware of them (or when they reasonably should have become aware of them). Of particular relevance are the following excerpts from that decision:

[18] In procurement matters, time is of the essence. . . .

. . .

4. 2002 FCA 284 (CanLII).

[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. . . .

18. The evidence submitted by Esper in its complaint indicates that it knew, or reasonably should have known by bid closing, that the determination of a bidder's financial capability to undertake the requirement specified in mandatory criterion M.1 was to be conducted by PWGSC's cost analysts based on their opinion after reviewing a variety of different financial elements and documentation and that there was no "formula" to be used.

19. As bids closed on October 30, 2009, Esper had until 10 working days after October 30, 2009—November 16, 2009—to file its complaint with the Tribunal or at least make an objection to PWGSC in order to comply with section 6 of the *Regulations*.

20. Esper did not make an objection to PWGSC within the required time frame and filed its complaint with the Tribunal as late as July 13, 2010.

21. Accordingly, the Tribunal finds that the complaint was filed outside the time limit established in the *Regulations*.

22. Therefore, 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