



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-063

ABCO Industries Limited

*Decision made
Thursday, September 16, 2010*

*Decision and reasons issued
Tuesday, September 28, 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

ABCO INDUSTRIES LIMITED

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

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 procurements (Solicitation Nos. 5P033-090434/A [RFP/A] and 5P033-090434/B [RFP/B]) by the Department of Public Works and Government Services (PWGSC) on behalf of the Parks Canada Agency (Parks Canada) for the provision of a marine research boat (i.e. dive tender and survey boat) with a trailer. RFP/B was issued after all bids submitted in response to RFP/A had been found to be non-responsive.

3. With respect to RFP/A, ABCO Industries Limited (ABCO) alleged that PWGSC improperly declared its proposal non-compliant. With respect to RFP/B, ABCO alleged that, when the Request for Proposal (RFP) was re-issued, changes had been made to the specifications and that other bidders, which had also responded to RFP/A, were given an opportunity to lower their pricing.

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.” Subsection 6(2) states that “[a] potential supplier who 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.”

5. 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.

6. On March 5, 2010, PWGSC issued RFP/A, which had a bid closing date of April 15, 2010. On April 12, 2010, ABCO submitted its proposal.

7. On May 5, 2010, PWGSC advised ABCO that its proposal was non-compliant regarding two mandatory criteria and that, as no compliant bids had been submitted, the requirement would be re-tendered. That same day, ABCO objected to PWGSC, arguing that its proposal was compliant regarding the two mandatory criteria identified by PWGSC. It also stated that it had been advised that it had submitted the lowest-priced bid and that it expected to be awarded the contract. On May 7, 2010, PWGSC responded to ABCO and re-iterated that no compliant bids had been received and that the requirement would be re-tendered.

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

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

8. On May 14, 2010, PWGSC issued RFP/B, which had a bid closing date of June 23, 2010. RFP/B advised bidders as follows:

This bid solicitation cancels and supersedes previous bid solicitation number 5P033-090434/A dated March 5, 2010

9. On June 18, 2010, ABCO submitted its proposal. On July 23, 2010, PWGSC advised ABCO that, although its bid had been found to be compliant, a lower-priced bid had been submitted and that ABCO would therefore not be awarded the contract. On August 2, 2010, ABCO objected to PWGSC, arguing that its bid submitted in response to RFP/A was compliant, that the changes made to the specifications in RFP/B served to demonstrate that ABCO's original bid was compliant, that re-tendering the requirement could have given bidders that had responded to RFP/A an alert and an opportunity to lower their pricing and that the manner in which the entire process had been managed by PWGSC demonstrated significant disrespect toward ABCO. Although PWGSC acknowledged receipt of the objection on August 4, 2010, and advised ABCO on August 16, 2010, that it would get back to it shortly, there is no indication in the complaint that PWGSC has yet responded to the objection.

10. On September 13, 2010, ABCO filed its complaint with the Tribunal.

RFP/A

11. As indicated above, subsection 30.11(1) of the *CITT Act* provides that, “[s]ubject to the regulations, a potential supplier may file a complaint with 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.”

12. In deciding whether to initiate an inquiry, the Tribunal must first examine whether there is a “designated contract” as defined in section 30.1 of the *CITT Act*. This section defines such a contract as “. . . a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations”. Since RFP/A was effectively cancelled and replaced with RFP/B, there no longer exists a contract “. . . that has been or is proposed to be awarded by a government institution . . .” in relation to RFP/A. As a result, the complaint in respect of RFP/A does not relate to a “designated contract” and, consequently, the Tribunal does not have jurisdiction to conduct an inquiry.

13. The Tribunal notes that, even if it did have jurisdiction to conduct an inquiry, ABCO's complaint would have been found to have been filed outside the time limit prescribed by subsection 6(2) of the *Regulations*. The Tribunal considers that ABCO received its denial of relief, as contemplated by subsection 6(2), on May 7, 2010, when PWGSC responded to ABCO and re-iterated that no compliant bids had been received and that the requirement would be re-tendered. Therefore, a complaint would have had to have been filed with the Tribunal within 10 working days after May 7, 2010 (i.e. by May 21, 2010), in order to have been filed in a timely manner. As the complaint was not filed until September 13, 2010, it was filed outside the prescribed time limit.

RFP/B

14. Regarding RFP/B, the Tribunal considers that ABCO was aware, or reasonably should have become aware of the contents of RFP/B and its possible impact on other bidders' potential pricing strategies on May 14, 2010, when it was issued or, at the very latest, on June 18, 2010, when it submitted its bid to PWGSC. As such, ABCO would have had to either make an objection to PWGSC or file a complaint with

the Tribunal, at the very latest, within 10 working days after June 18, 2010 (i.e. by July 5, 2010). As the complaint was not filed until September 13, 2010, and there is no indication in the complaint of any objection being made to PWGSC prior to August 2, 2010, the Tribunal considers that the complaint was not filed within the time limit prescribed by the *Regulations*.

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

DECISION

16. 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