



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-076

d2k Communications

*Decision made
Friday, November 26, 2010*

*Decision and reasons issued
Tuesday, December 14, 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

D2K COMMUNICATIONS

AGAINST

THE DEPARTMENT OF PUBLICS 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.

Serge Fréchette
Serge Fréchette
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. EN578-092643/B) by the Department of Public Works and Government Services (PWGSC) for the provision of graphic design services.
3. According to d2k Communications (d2k), the financial evaluation method used by PWGSC does not comply with the position taken by the current government. More specifically, d2k alleged that imposing a floor price is not consistent with the government's current philosophy and that d2k should not be penalized for having offered the best price.
4. On March 24, 2010, PWGSC issued a Request for a Standing Offer (RFSO) for the provision of graphic design services. The bid closing date was April 22, 2010.
5. Section 1.2.2 of Part 4 (Evaluation Procedures and Basis of Selection) of the RFSO, which is relevant in this case, reads as follows:

1.2.2 Financial Evaluation Criteria – Standing Offers Only

Offers / arrangements declared fully responsive according to the criteria identified in article 2, Basis of Selection below will be evaluated based on the prices proposed in the Financial Offers / Arrangements, in accordance with Appendix "3" Pricing.

For each position within each Category of service, a mean plus one standard deviation and a mean minus one standard deviation calculation will be performed to determine the fully qualified offerors / suppliers and the fully qualified Aboriginal offerors / suppliers for the Category. The calculation will be performed as follows:

1. For each position within each Category of service, a 'MEAN' will be calculated. The 'MEAN' will be the sum of all rates proposed by all offerors / suppliers for the particular position, divided by the total number of offerors / suppliers for the particular position. There will be seven 'MEAN's calculated – one for each position within each Category of service.
2. For each 'MEAN', the mean plus one standard deviation and the mean minus one standard deviation will be calculated using the Microsoft Excel formula 'STDEV' plus/minus the 'MEAN'. The **Range of Acceptable Rates (RAR)** that may be charged for each position within each Category of Service are the rates equal to and falling within the rates determined using the 'STDEV' plus/minus the 'MEAN' calculation.
3. Steps one and two will be repeated for only the Aboriginal offers / arrangements, which will result in the establishment of an Aboriginal RAR for each position within each Category of service.

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

4. For each Category of service, all fully responsive offerors / suppliers who have proposed a rate for each position within the Category which falls within the respective position RAR, calculated in #2 above, will be considered for Standing Offer award. All fully responsive Aboriginal offerors / suppliers who have proposed a rate for each position within the Category which falls within the respective position Aboriginal RAR, calculated in #2 and #3 above, will be considered for Standing Offer award under the Set-Aside Program for Aboriginal Business.
6. On August 24, 2010, PWGSC advised d2k that it would not be issued a standing offer for Category of service 1 because the hourly rate that it had submitted for the position of artistic director was outside the RAR. More specifically, PWGSC informed d2k that the hourly rate was less than the floor price calculated according to the financial evaluation method set out in section 1.2.2 of Part 4 of the RFSO. However, PWGSC advised d2k that its supply arrangement had been accepted for category 1.
7. On September 2, 2010, d2k sent an e-mail to PWGSC in order to obtain clarification with regard to the evaluation of its proposal. During a telephone conversation held the same day, PWGSC allegedly told d2k that it could only send it a copy of the consensus evaluation grid and that any objection should be treated as an official complaint to a tribunal responsible for this kind of request. Also on September 2, 2010, PWGSC responded to d2k by e-mail that it would send it a copy of the consensus evaluation grid that same morning.
8. On October 4, 2010, d2k sent a letter to its Member of Parliament to find out how to appeal a PWGSC decision.
9. On November 12, 2010, still waiting for a response from its Member of Parliament, d2k contacted PWGSC again to ask officially how to proceed to file a complaint. On November 15, 2010, PWGSC advised d2k that the Tribunal was the designated bid challenge authority under the trade agreements.
10. On November 19, 2010, d2k filed its complaint with the Tribunal. On November 23, 2010, the Tribunal informed d2k that it needed additional information before its complaint could be considered filed. On November 24, 2010, d2k provided the Tribunal with the additional information.
11. 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."
12. These provisions make it clear that 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.
13. The Tribunal notes that d2k does not dispute the calculation of the RAR by PWGSC, but rather the principle that an hourly rate that is lower than the floor price can lead to its proposal being rejected. Under these circumstances, the Tribunal is of the opinion that d2k could not afford to wait for the results of the evaluation to make an objection to PWGSC or file a complaint with the Tribunal. Since the financial evaluation method used by PWGSC was clearly stated in the RFSO, the Tribunal is of the opinion that d2k should reasonably have become aware of its ground of complaint after obtaining knowledge of the RFSO

or, at the latest, on April 22, 2010. Therefore, if this financial evaluation method caused d2k a problem, the onus was on d2k to make an objection to PWGSC or file a complaint with the Tribunal at the latest on May 6, 2010 (that is, within 10 working days after April 22, 2010). Since d2k could not be deemed to have made an objection to PWGSC before September 2, 2010, and its complaint was only considered filed on November 24, 2010, the Tribunal is of the opinion that the complaint was not filed within the prescribed time limit.

14. Even if the complaint had been filed within the prescribed time limit, the Tribunal would not have found that, in accordance with paragraph 7(1)(c) of the *Regulations*, it disclosed a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements, which, in this case, is the *Agreement on Internal Trade*.³

15. In its complaint, d2k alleged that imposing a floor price is not consistent with the government's current philosophy. However, the Tribunal notes that grounds of complaint that are based upon the government's alleged non compliance with its public policy objectives are not, in and of themselves, grounds of complaint into which the Tribunal can inquire under the *Regulations*. Such grounds of complaint must be based on non compliance with a requirement set out in the applicable trade agreements. In this case, the Tribunal cannot find any indication that PWGSC did not comply with a requirement set out in the *AIT*.

16. Therefore, the Tribunal will not inquire into the complaint and considers the matter closed.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*]. The services in question are classified under category T005 "Arts/Graphic Services". In accordance with Section B of Annex 1001.1b-2 of the *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), Section B of Annex Kbis-01.1-4 of Chapter Kbis of the *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), and the *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), services under category "T" are not covered for Canada. Annex 4 of the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>, provides a list of the services that are offered for coverage; arts/graphic services are not included.