



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-067

CIDE Inc.

*Decision made
Tuesday, October 5, 2010*

*Decision and reasons issued
Wednesday, October 20, 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

CIDE INC.

AGAINST

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

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. 2009-A-032561-1) by the Canadian International Development Agency (CIDA) for the initial training and professional development of the Haitian National Police (HNP) officials.

3. CIDE Inc. (CIDE) alleges that the Request for Proposal was faulty, in that it failed to disclose that the HNP would not be responsible for costs relating to the determination of the suitability of the locations that were to be chosen by the HNP. Additionally, CIDE alleges that its bid was improperly assigned a score of zero for its financial proposal.

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. Subsection 6(2) of the *Regulations* 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.”

6. 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.

7. The bidding period for the solicitation at issue closed on June 12, 2009. On February 8, 2010, CIDE was advised by letter that its technical proposal ranked second and that CIDA was negotiating the terms of a contract with the successful bidder. This letter also requested that CIDE extend the validity period of its submission in the event that the ongoing negotiations with the successful bidder failed. CIDE agreed to this request.

8. On May 13, 2010, CIDE attended a debriefing session with CIDA. The Tribunal notes that, on the basis of the information contained in CIDE’s complaint, it was on this date that CIDE learned that it had received a score of zero for its financial proposal. On May 20, 2010, CIDE received an e-mail from CIDA, which outlined some of the reasons for which its financial proposal had been given a score of zero.

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

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

9. On May 27, 2010, CIDE received an e-mail, which does not reference the subject procurement, from a CIDA employee, whose title, function and involvement in the procurement process at issue, if any, are not indicated. This e-mail outlines some steps that a bidder should follow in order to appeal a decision from CIDA, in the event that it is not in agreement with the rejection of its proposal relating to a procurement. The e-mail indicates that, if a bidder is not satisfied after a debriefing session and wants to file a complaint, the initial step is to communicate, in writing, with the Vice-President of the CIDA program branch responsible for the solicitation at issue. Subsequently, according to this e-mail, if the question remained unresolved, the bidder was to file a written request with the Vice-President of CIDA's Human Resources and Corporate Services Branch, who is in charge of CIDA's internal appeal mechanism. The CIDA employee also stated as follows: "The Consultant must have recourse to this internal appeal mechanism before even approaching the Canadian International Trade Tribunal (CITT)" [translation]. However, the Tribunal notes that CIDE did not provide with its complaint information as to how and when it asked for advice, nor did it include evidence that the e-mail's author was a person in authority within CIDA regarding these matters. Moreover, it is not clear that the e-mail received from CIDA describes an internal appeal mechanism which actually applies in all cases. In this regard, the conclusion in the e-mail is that the appeal mechanism described above was the applicable policy within CIDA's Europe, Middle East and Maghreb Branch and that the author "presumed" that CIDA's other branches "functioned the same way" [translation].

10. Also on May 27, 2010, CIDE made an objection to CIDA contesting the score that it had received for its financial proposal. On June 28, 2010, CIDA replied to CIDE's letter of May 27, 2010. In its reply, CIDA indicates that it maintains its decision with respect to the evaluation of CIDE's proposal.

11. On August 24, 2010, 38 working days later, CIDE submitted another letter to CIDA objecting to the score that it had received for its financial proposal. On September 8, 2010, CIDA replied to CIDE. That letter reads as follows: "CIDA's final decision concerning your complaint was made by the Haiti and Dominican Republic Program on June 28, 2010, pursuant to CIDA's policy entitled 'Debriefing and Disclosure of Information to Bidders Following the Evaluation of Proposals'" [translation]. In its complaint, CIDE indicated that it received this letter on September 10, 2010.

12. On September 24, 2010, CIDE submitted a complaint to the Tribunal. However, the complaint was determined to be deficient, since it did not comply with subsection 30.11(2) of the *CITT Act*. On September 29, 2010, the Tribunal sent a letter informing CIDE of the Tribunal's determination that the complaint did not comply with the requirements of subsection 30.11(2) and identifying the additional information needed to correct the deficiencies of the complaint, including a complete copy of the solicitation document and a copy of all correspondence between CIDE and CIDA. On September 30, 2010, CIDE provided the additional information.

13. Under subsection 6(2) of the *Regulations*, in order to be timely, a complaint must be filed with the Tribunal within 10 working days after the day on which there is actual or constructive knowledge of the denial of relief by the relevant government institution, provided that the complainant made its objection within 10 working days after the day on which the basis of the complaint became known or reasonably should have become known. In this case, CIDE's initial objection of May 27, 2010, appears to have been made within the designated time. CIDE also appears to have received a denial of relief on or about June 28, 2010, that is, the date of CIDA's letter indicating that it maintained its decision with respect to the evaluation and rejection of CIDE's proposal. However, CIDE submits that the June 28, 2010, letter cannot be considered a final decision in the matter because CIDE had been advised by a CIDA employee that an appeal to the Vice-President of CIDA's Human Resources and Corporate Services Branch had to be filed before any steps could be taken before the Tribunal. Thus, according to CIDE, it is CIDA's

September 8, 2010, letter that should be considered as informing CIDE of the final decision regarding its objection. Since this letter was only received by CIDE on September 10, 2010, CIDE submits that the complaint was filed within the time limit prescribed by section 6 of the *Regulations*.

14. For the following reasons, the Tribunal considers that, even it were to accept CIDE's submission that CIDA's letter dated September 8, 2010, received by CIDE on September 10, 2010, was the document which informed it of CIDA's denial of relief, it would have to conclude that the complaint was not filed within the time limit prescribed by section 6 of the *Regulations*. Accordingly, it is not necessary to examine the issue of whether CIDA's June 28, 2010, letter actually amounted to CIDA's final decision and constituted a denial of relief in order to dispose of this complaint.³

15. Indeed, CIDE's interpretation means that a complaint which complied with subsection 30.11(2) of the *CITT Act* would have had to have been filed by September 24, 2010, at the latest, in order to be timely. However, in this case, in accordance with subrule 96(1) of the *Canadian International Trade Tribunal Rules*,⁴ the complaint shall be considered to have been filed on September 30, 2010, that is, the day on which the Tribunal received the additional information that corrected the deficiencies in the materials filed with the Tribunal on September 24, 2010.⁵ The Tribunal notes that, in view of the fact that the deficient complaint was filed with the Tribunal on September 24, 2010 (i.e. the tenth working day after CIDE received CIDA's September 8, 2010, letter), it was virtually impossible for CIDE to correct the deficiencies and file a complaint which complied with subsection 30.11(2) of the *CITT Act* within the prescribed time limit. Therefore, even assuming that CIDE had actual or constructive knowledge of the denial of relief on September 10, 2010, the Tribunal finds that the complaint has not been filed within the time limit prescribed by section 6 of the *Regulations*.

16. In light of the above, the Tribunal will not conduct an inquiry 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. In this regard, the Tribunal notes that, if it were to consider that CIDE received its denial of relief on or about June 28, 2010, then it would have to conclude that the complaint was not filed in a timely manner, since it was clearly not filed within 10 working days after CIDE received CIDA's June 28, 2010, letter.

4. S.O.R./91-499 [*Rules*].

5. Subrule 96(1) of the *Rules* reads as follows: "A complaint shall be considered to have been filed (a) on the day it was received by the Tribunal; or (b) in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection" [emphasis added].