



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-094

Cauffiel Technologies Corporation

*Decision made
Tuesday, April 5, 2011*

*Decision and reasons issued
Tuesday, April 12, 2011*

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

CAUFFIEL TECHNOLOGIES CORPORATION

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.

Pasquale Michael Saroli
Pasquale Michael Saroli
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. 23530-113175/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Natural Resources (NRCan) for the supply, installation and commissioning of a laboratory-scale hot and cold rolling mill.

3. Cauffiel Technologies Corporation (Cauffiel) alleged that PWGSC improperly disqualified its proposal. Specifically, it alleged that a bid delivery mix-up, the absence of key PWGSC employees and the value of the procurement warranted the consideration of its bid for technical review.

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 the agreements apply.

5. On November 29, 2010, PWGSC issued a Request for Proposal (RFP) for the design, fabrication, installation and commissioning of a rolling mill for the purpose of supporting NRCan's research program aimed at the development of new alloys. The due date for the receipt of bids was February 28, 2011.

6. Article 2 of Part 2 of the RFP, "**BIDDER INSTRUCTIONS**", reads as follows:

2. Submission of Bids

Bids must be submitted **ONLY TO PUBLIC WORKS AND GOVERNMENT SERVICES CANADA (PWGSC) BID RECEIVING UNIT** by the date, time and place indicated on page 1 of the bid solicitation.

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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).
 4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.
 5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.
 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). 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).

7. The first page of the RFP specifies the following address:

**RETURN BIDS TO:
RETOURNER LES SOUMISSIONS À:**
**Bid Receiving - PWGSC / Réception des
Soumission - TPSGC
11 Laurier St. / 11, rue Laurier
Place du Portage, Phase III
Core 0A1 / Noyau 0A1
Gatineau, Québec K1A 0S5**

8. The RFP also incorporated by reference PWGSC's standard acquisition clause 2003 (07/10/2010). The relevant part reads as follows:

05 **Submission of Bids**

...

2. It is the Bidder's responsibility to:

...

(b) prepare its bid in accordance with the instructions contained in the bid solicitation;

...

(d) send its bid only to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit specified on page 1 of the bid solicitation or to the address specified in the bid solicitation;

...

9. According to the complaint, on Friday, February 25, 2011, Cauffiel attempted to set up the shipment of its bid through the Web site of a commercial third-party shipper. According to Cauffiel, the postal code was rejected and the shipper confirmed, via telephone, that the postal code, K1A 0S5, listed in the RFP for bid delivery was incorrect. Cauffiel then attempted to contact PWGSC's contracting officer listed in the RFP, who, Cauffiel subsequently discovered, was away from the office for most of February 25, 2011, and all of February 28, 2011. However, Cauffiel was able, using the same third-party shipper, to deliver the bid to PWGSC's contracting officer.⁸ Cauffiel provided the Tribunal with evidence that the bid was received and signed for by another PWGSC employee at 10:57 a.m. on February 28, 2011.

10. The Tribunal finds that the RFP clearly specified that bids were to be returned to the "Bid Receiving Unit", PWGSC's unit specifically dedicated to taking delivery of bids, the full address of which was indicated on the first page of the RFP. The Tribunal notes that Cauffiel instead sent its bid to the following address:

[PWGSC Contracting Officer]
Public Works & Gov't Services Canada
7B3, Place du Portage, Phase III
11 Laurier St.
Gatineau, Quebec
Canada K1A 0S5

8. Page 10 of the RFP provided the contact information (address, telephone number, e-mail address, facsimile number) for the contracting officer.

11. The responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation, including its delivery to the appropriate receipt point, ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation and delivery of its proposal and to ensure that it is compliant with all essential elements of the solicitation.

12. The complaint does not explain how the same third-party shipper was able to deliver the bid to PWGSC's contracting officer, but not to the Bid Receiving Unit, both of which use the same postal code and are located in the same building, albeit in different sections.

13. Therefore, the Tribunal finds that PWGSC did not err in rejecting Cauffiel's proposal and that, on this basis, the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements. Indeed, had the procurement officer re-routed the proposal or had PWGSC accepted the proposal after the deadline for receipt, when it was addressed incorrectly, those actions might have been deemed contrary to the provisions of the RFP and, therefore, violations of the applicable trade agreements.

14. Even if the Tribunal had determined that there was an indication of a breach of the applicable trade agreements, 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) provides that a potential supplier that 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."

15. 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.

16. According to Cauffiel, on March 1, 2011, it was notified by PWGSC's contracting officer that its bid had been disqualified because it had not been delivered to the right desk.

17. On March 8, 2011, Cauffiel objected to PWGSC, stating that the bid had been delivered to the proper address and on the proper date and that, had the contracting officer replied to a voicemail message left by Cauffiel on February 25, 2011, Cauffiel would have ensured that the bid was delivered to the proper desk in the PWGSC building.

18. On March 11, 2011, PWGSC responded to Cauffiel's objection as follows:

The policy relating to the submission of bids is very explicit, and does not allow for the acceptance of your bid. . . . PWGSC received a high volume of bids; there must be strict and consistent application of the rules and regulations governing the receipt, custody and opening of bids. Your bid was not sent to PWGSC's Bid Receiving Unit, and to offer an exception to your firm would be unfair to other suppliers.

The circumstances that led to your bid not being sent to the Bid Receiving Unit are unfortunate and I understand your frustration. However, after having examined all of the circumstances, I have concluded that the department's initial determination was correct, and will remain.

19. On March 31, 2011, Cauffiel submitted its complaint to the Tribunal. After a review of the complaint, the Tribunal determined that it did not fully meet the requirements of subsection 30.11(2) of the *CITT Act*, which requires that a complaint include, among other things, all information and documents relevant to the complaint that are in the complainant's possession. On April 4, 2011, the Tribunal requested that Cauffiel clarify the precise address to which the proposal was sent and, in addition, that Cauffiel provide any supporting documents such as a copy of the waybill or a copy of the delivery receipt. Later that same day, Cauffiel provided the necessary information, and the complaint was considered filed.

20. The Tribunal considers that Cauffiel's letter of March 8, 2011, was an objection and that PWGSC's March 11, 2011, letter was a denial of relief, as contemplated by subsection 6(2) of the *Regulations*. As such, Cauffiel would have had to file its complaint with the Tribunal within 10 working days of March 11, 2011, or by March 25, 2011, at the latest. The complaint was not received until March 31, 2011, and was not considered filed until April 4, 2011, after the receipt of the precise address to which the proposal was sent. As such, the Tribunal considers the complaint to have been filed outside the time limit established in the *Regulations*.

DECISION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member