



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-085

ROI Resources Inc./Evans
Consoles

*Decision made
Thursday, February 3, 2011*

*Decision and reasons issued
Friday, February 18, 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

ROI RESOURCES INC./EVANS CONSOLES

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 a procurement (Solicitation No. W010C-10C749/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of two identical tri-pod console stations.
3. ROI Resources Inc./Evans Consoles (ROI) alleges that its bid was rejected due to a misinterpretation of the description of its proposed product. Specifically, ROI alleges that it provided an adjustable fixed shelf which met the requirements of a fixed shelf as indicated in the Request for Proposal (RFP).
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, *NAFTA*, the *AIT*, the *CCFTA* and the *CPFTA* apply.
5. On October 7, 2010, PWGSC issued an RFP for the provision of two identical tri-pod console stations. On December 1, 2010, bids closed.
6. Article 2.1 of Part 4 of the RFP provides that “[a] bid must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.”

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) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

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) [*CCFTA*]. 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) [*CPFTA*].

7. Article 1.2 of Annex A, “Requirement – Console Stations”, to the RFP provides that “[t]he successful bidder shall configure [its] system to conform as nearly as possible to the footprint and components as illustrated.”

8. Article 4.8 of Annex A to the RFP addresses tolerances and provides that “[u]nless otherwise specified, the tolerance for all layout dimensions in this document shall be ± 25.4 mm (± 1 in.).”

9. Article 5.3.2 of Annex A to the RFP provides that the “[t]ypical Console station *shall* have a depth of 940mm (37 inches)” [emphasis added].

10. Article 5.11.2 of Annex A to the RFP provides that “[t]he 120 degree storage cabinet unit must have a fixed shelf and solid bi-fold doors”

11. In an e-mail dated January 20, 2011, PWGSC advised ROI that it did not comply with article 5.3.2 of Annex A to the RFP, as it proposed a console with a depth of 1,078 mm (42.5 in.). PWGSC also advised ROI that its proposed adjustable shelf was non-compliant with article 5.11.2. That same day, ROI replied to PWGSC and advised it that it gave PWGSC an upgraded adjustable shelf instead of a fixed shelf and that, even though the console was 138 mm too big for PWGSC’s specifications, it was sure that the console would fit in the room. In an e-mail dated January 21, 2011, ROI further advised PWGSC that it used article 1.2 as the guiding principle for its bid response.

12. On January 26, 2011, PWGSC replied to ROI’s e-mails of January 20 and 21, 2011, and advised that the requirement for a fixed shelf was a mandatory requirement. Further, PWGSC advised that “[t]he RFP was clear and the storage shelf was not included on the illustration and therefore the language in the specifications could not have been interpreted differently.”⁸ That same day, ROI replied by e-mail that the item proposed was a fixed shelf that has the ability to be adjusted. PWGSC indicated that it would look into the matter further.

13. ROI submitted a complaint to the Tribunal on January 26, 2011. However, the complaint was found to be incomplete because it did not comply with subsection 30.11(2) of the *CITT Act*. On January 28, 2011, the Tribunal sent a letter informing ROI of the Tribunal’s determination that the complaint did not comply with the requirements of subsection 30.11(2) and requested additional information, including a copy of all correspondence between ROI and PWGSC. That same day, ROI provided the additional information. In accordance with paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*,⁹ the complaint was therefore considered to have been filed on January 28, 2011.¹⁰

14. Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

8. Complaint.

9. S.O.R./91-499 [Rules].

10. 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].

15. Article 1015(4) of *NAFTA* provides as follows:

An entity shall award contracts in accordance with the following:

- a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

- d. awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and

...

16. The *CCFTA* and the *CPFTA* contain provisions similar to those found in *NAFTA*.

17. The Tribunal notes that, in its e-mail to PWGSC dated January 20, 2011, ROI admitted that it provided a console that exceeded the required depth specifications by 138 mm and that it provided an "... upgraded adjustable shelf *instead* of a fixed shelf"¹¹ [emphasis added]. The Tribunal further notes that article 4.8 of Annex A to the RFP was clear in indicating that the tolerance for the proposed dimensions was ± 25.4 mm.

18. Notwithstanding the issue of whether ROI proposed a fixed shelf or an adjustable shelf, which, at the time of the complaint, was still being considered by PWGSC, the Tribunal is of the view that PWGSC was reasonable in declaring ROI's proposal non-compliant with article 5.3.2 of Annex A to the RFP. ROI's proposed console exceeded the depth specification by 138 mm, which is outside the tolerance permitted in article 4.8.

19. Article 2.1 of Part 4 of the RFP requires that a bidder meet all mandatory criteria of the RFP in order to be considered for contract award, as well as article 5.3.2 of Annex A to the RFP. As the Tribunal has determined that PWGSC was reasonable in declaring ROI's proposal non-compliant, the Tribunal will not examine ROI's allegations concerning the proposed shelf.

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

DECISION

21. 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

11. Complaint.