



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-089

3202488 Canada Inc. o/a Kinetic
Solutions

*Decision made
Friday, February 18, 2011*

*Decision and reasons issued
Thursday, March 3, 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

3202488 CANADA INC. O/A KINETIC SOLUTIONS

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. W0114-11Q013/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of athletic sporting equipment.

3. 3202488 Canada Inc. o/a Kinetic Solutions (Kinetic Solutions) alleges that PWGSC awarded a contract to a bidder whose proposed product did not meet all the specifications outlined 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* and the *AIT* apply.⁸

5. On December 13, 2010, PWGSC issued an RFP for the provision of athletic sporting equipment, including a recumbent bike.

6. Article 2.1 of Part 4, “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, of the RFP reads as follows:

2.1 A bid must comply with the requirements of the bid solicitation and meet all technical criteria to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of 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> [*AGP*].

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*].

8. The *AGP*, *CCFTA* and *CPFTA* do not apply, as the value of the procurement is below the applicable monetary thresholds under those agreements.

7. Article 1.2 of Part 5, “**CERTIFICATIONS**”, of the RFP reads as follows:

1.2 Equipment Literature

The Bidder must provide literature to prove that the equipment complies with the minimum requirements specified in the Statement of Requirement contained in Annex A.

Proof can be provided in the form of equipment literature, brochure, specification of the product or written narrative which clearly demonstrates how the proposed goods meet the minimum requirement.

The Bidder must reference the page number and section of the submitted literature which proves their proposal complies with each of the minimum requirement[s].

8. Annex A, “**STATEMENT OF REQUIREMENT**”, required the following in respect of the recumbent bike:

Self generating powered

Contact heart rate and telemetry

Display - Calories, MET, RPM, speed, level, distance

Walk through design

Work level resistance 20 watts or lower

Programs - quick start, timed

9. On January 24, 2011, bids closed. Kinetic Solutions submitted a proposal in response to the solicitation.

10. In an e-mail dated February 9, 2011, PWGSC advised Kinetic Solutions that its proposal had been deemed technically non-compliant with the requirements with regard to two pieces of fitness equipment. In respect of the recumbent bike, PWGSC noted that the proposed product “. . . did not meet the watts requirement.” The e-mail further advised that a contract had been awarded to Advantage Fitness Sales (Advantage Fitness), whose proposal had met all the mandatory requirements of the solicitation.

11. That same day, Kinetic Solutions sent an e-mail to PWGSC, wherein it stated that the Life Fitness commercial recumbent bikes, which, it claimed, are sold by Advantage Fitness, do not have a work-level resistance of 20 watts or lower, as required by the RFP. In fact, it stated that no commercial recumbent bike on the market meets this requirement.

12. On February 10, 2011, PWGSC provided Kinetic Solutions with a rationale for the requirement that the recumbent bike have a work-level resistance of 20 watts or lower. On the same day, Kinetic Solutions indicated to PWGSC that it had spoken to a technical support representative at Life Fitness, who confirmed that the work-level resistance of its products, at start-up, is 40 watts.

13. On February 11, 2011, PWGSC advised Kinetic Solutions that the “[m]aterial provided by Advantage Fitness quoted the Life Fitness 95R. The identified work level resistance is identified on the material provided by Advantage Fitness as 20 watts (Starting) - 500 watts.” Several other e-mails were exchanged between PWGSC and Kinetic Solutions on the same day.

14. On February 14, 2011, Kinetic Solutions filed its complaint with the Tribunal.

15. 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.”

16. 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

...

17. The Tribunal notes that, according to article 1.2 of Part 5, “**CERTIFICATIONS**”, of the RFP, a bidder was required to “. . . provide literature to prove that the equipment complies with the minimum requirements . . .” of the solicitation. In respect of the recumbent bike, PWGSC’s e-mail of February 11, 2011, to Kinetic Solutions clearly stated that the material provided by Advantage Fitness identified the starting work-level resistance of Life Fitness’s 95R model (i.e. the proposed product) as 20 watts and that it therefore met the minimum requirement set out in the RFP.

18. When PWGSC evaluated Advantage Fitness’s proposal and awarded the contract, it was entitled to rely on the certifications provided by Advantage Fitness. Furthermore, there is no evidence which indicates that, at that time, PWGSC was in possession of information which should have made it question the authenticity of these certifications. Therefore, the Tribunal is of the view that, at the time of contract award, PWGSC was correct in determining that Advantage Fitness’s proposal met the minimum requirements set out in the RFP in respect of the recumbent bike. There is nothing in the complaint which indicates that PWGSC’s decision to award the contract to Advantage Fitness was not made in accordance with the criteria and essential requirements specified in the tender documentation or that it contravened the aforementioned provisions of the trade agreements.

19. The Tribunal also notes that, under subsection 30.11(1) of the *CITT Act*, a complaint that is filed with the Tribunal must concern an aspect of the “procurement process” that relates to a designated contract. *NAFTA* and the *AIT* similarly provide that the “procurement process” begins after an entity has decided on its procurement requirement and continues through to, and including, contract award.⁹ Therefore, in the event that it becomes known to PWGSC, *after* the award of the contract, that Advantage Fitness’s proposed product does not meet the minimum requirements set out in the RFP, the issue would then become one of contract administration or contract performance and would not fall within the Tribunal’s jurisdiction.¹⁰

9. See Article 514(2)(a) of the *AIT* and Article 1017(1)(a) of *NAFTA*.

10. The Tribunal notes that article 8.1 of Part 6, “**RESULTING CONTRACT CLAUSES**”, of the RFP provides that “[c]ompliance with the certifications provided by the Contractor in its bid is a condition of the Contract and subject to verification by Canada during the term of the Contract. If the Contractor does not comply with any certification or it is determined that any certification made by the Contractor in its bid is untrue, whether made knowingly or unknowingly, Canada has the right, pursuant to the default provision of the Contract, to terminate the Contract for default.”

20. As such, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements. 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