



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File Nos. PR-2011-018 and
PR-2011-019

3775356 Canada Inc.

*Decision made
Monday, August 15, 2011*

*Decision and reasons issued
Friday, September 16, 2011*

IN THE MATTER OF complaints filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

3775356 CANADA INC.

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 complaints.

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 complaints relate to procurements (Solicitation Nos. E60ZN-110001/A, Request for a Standing Offer [RFSO], and E60ZN-090002/B, Request for a Supply Arrangement [RFSA]) by the Department of Public Works and Government Services (PWGSC) for the provision of task-based professional services, referred to as “Task and Solution Professional Services”. According to both solicitations, the services in question include the following classes of services: human resource services, business services and project management services.

3. 3775356 Canada Inc. alleges that both the RFSO and RFSA, which contain similar requirements, are overly restrictive. 3775356 Canada Inc. further alleges that certain terms of the RFSO and RFSA are unclear and potentially give rise to perceived conflicts of interest. As a remedy, 3775356 Canada Inc. requests, among other things, that the Tribunal direct PWGSC to remove from both solicitations at issue, and from any similar solicitations in the future, any references to requirements that would, without proper justification, prevent incorporated consultants from submitting a bid. 3775356 Canada Inc. also requests that any requirements that could allow consultants to conduct peer assessment and/or give them the responsibility to evaluate the work of consultants of competing firms also be removed from the solicitations at issue and from any similar solicitations in the future.

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 Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁷ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁸ applies. In this case, *NAFTA*, the *AIT*, the *CCFTA* and the *CPFTA* apply.⁹

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. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [*CCOFTA*].

9. Both the RFSO and RFSA were issued prior to the *CCOFTA* entering into force. Additionally, the complaints were filed prior to the *CCOFTA* entering into force. As such, the *CCOFTA* does not apply to the present complaint.

5. In other words, the Tribunal must examine the complaint to determine if there is a reasonable indication that the procuring entity conducted the procurement in a manner that violated one of the applicable trade agreements. The Tribunal may decide to conduct an inquiry only if it determines that this condition has been met.

6. On July 15, 2011, PWGSC issued the RFSO and RFSA. The closing date of the solicitations was August 30, 2011.

7. Both the RFSO and RFSA contain the following provision:

Annex A to Section B

Requirement

...

2.14 SUBJECT MATTER EXPERT

THIS CATEGORY CAN ONLY BE USE[D] AS PART OF A TEAM WHERE CATEGORY 2.12 EVALUATION SERVICES CONSULTANT OR 2.13 PERFORMANCE MEASUREMENT CONSULTANT IS USED.

...

The required services may include, but are not limited to the following:

...

11. *Participating on peer review or similar panels for evaluation or as [a] third-party reviewer of draft evaluation products;*

...

[Italics added]

8. On July 19, 2011, 3775356 Canada Inc. sent an e-mail to PWGSC concerning the requirement for a Subject Matter Expert (SME) in the RFSO. 3775356 Canada Inc. requested the deletion of the italicized portions of the requirement set out above. 3775356 Canada Inc. submitted to PWGSC that this requirement unfairly excluded small entrepreneurs (one-person businesses, i.e. certified experts in their area of expertise possessing the required know-how) from the possibility of being hired as an SME through a direct contract with the government. 3775356 Canada Inc. further submitted that a peer review should not be delegated to third-party SMEs on the grounds that assessing the work of project team members in this way may lead to perceived conflicts of interest between companies working for the same client. In 3775356 Canada Inc.'s view, individuals participating in peer reviews should belong to the same group, that is, they should be individuals getting paid by the same employer rather than employees of competing companies.

9. On July 25, 2011, 3775356 Canada Inc. sent another e-mail to PWGSC, again requesting the deletion of the italicized portions of the requirement set out above. On July 29, 2011, at the request of PWGSC, 3775356 Canada Inc. clarified its request to modify the SME category as per its July 25, 2011, e-mail and added that the question applied to both the RFSO and RFSA.

10. On July 29, 2011, PWGSC indicated, through Amendment No. 005 to the RFSO, that it would not consider deleting the following statement from the solicitation: "This category can only be use[d] as part of a team where category 2.12 Evaluation Service Consultant or 2.13 Performance Measurement Consultant is used", nor consider removing paragraph 11 under category 2.14 regarding the participation of SMEs on peer reviews. Thus, PWGSC clearly denied 3775356 Canada Inc. the relief that it had requested.

11. The Tribunal notes that on July 29 and August 1, 2011, 3775356 Canada Inc. sent additional e-mails to PWGSC asking that PWGSC provide an explanation for its decision and seeking clarifications as to the meaning of the terms “team” and “peer” in the requirement at issue. According to the information provided with the complaints, PWGSC did not reply to these e-mails. However, Amendment No. 005 to the RFSO made it clear that PWGSC would not modify or clarify this requirement.

12. On August 8, 2011, 3775356 Canada Inc. filed its complaints with the Tribunal.

13. Article 403 of the *AIT*, which applies to Chapter Five by virtue of Article 500, provides that, “[s]ubject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”

14. Article 506(6) of the *AIT* provides in part as follows: “The 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.”

15. Article 1007(1) of *NAFTA* provides that “[e]ach Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.”

16. With respect to the tender documentation, Article 1013(1) of *NAFTA* reads in part as follows:

1. . . . the documentation shall contain all information necessary to permit suppliers to submit responsive tenders The documentation shall also include:

. . .

(g) a complete description of the goods or services to be procured and any other requirements

17. The *AGP*, the *CCFTA* and the *CPFTA* contain similar provisions.

18. The Tribunal has stated in the past that, generally speaking, it is the prerogative of the procuring entity to define its own procurement needs.¹⁰ However, the Tribunal has also indicated that while a procuring entity has the right to establish the parameters of a procurement, it must do so reasonably. For example, procuring entities do not have licence to establish conditions that are impossible to meet.¹¹

19. 3775356 Canada Inc. submits that the requirement that an SME be part of a team prevents qualified incorporated experts (i.e. one-person businesses) from submitting offers in response to the solicitations. 3775356 Canada Inc. further submits that there is a lack of clarity in the solicitation since the terms “Team Composition” and “Peer assessment” are not defined in the requirements of the SME category. 3775356 Canada Inc. also submits that a consultant should not be given the responsibility to assess or audit the work of other consultants working for competitors because it could result in perceived conflicts of interest.

20. With respect to 3775356 Canada Inc.’s allegation that the solicitations are unclear in defining the terms “Team Composition” and “Peer assessment”, the Tribunal notes that neither the RFSO nor the RFSA contains these terms. In any event, the Tribunal finds that the terms of requirement 2.14 for SMEs, in both solicitations, are sufficiently clear to allow potential bidders to understand the nature and scope of the services that bidders had to offer.

10. See, for example, *Re Complaint Filed by FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT).

11. See, for example, *Re Complaint Filed by MTS Allstream Inc.* (5 August 2005), PR-2004-061 (CITT).

21. With respect to 3775356 Canada Inc.'s allegation that the solicitations unfairly exclude small businesses from the procurement processes at issue, the complaints do not include any information that would suggest that the requirement for bidders to propose a team of SMEs is not a legitimate operational requirement. The Tribunal is of the view that PWGSC was entitled to express any real and reasonable needs that it may have had and that the trade agreements do not impose on government institutions any obligations to compromise their legitimate operational requirements to accommodate a potential supplier's corporate circumstances. In this regard, the Tribunal notes that there are precedents for the proposition that a government institution may procure goods or services through a solicitation which may result in the exclusion of certain suppliers and the imposition of more demanding circumstances on a potential supplier.¹²

22. In view of the foregoing, the Tribunal finds that the allegations made by 3775356 Canada Inc. do not provide a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements. More specifically, the Tribunal finds that the requirement that the SME be part of a team does not appear to be unreasonably restrictive, and therefore the Tribunal defers to the procuring entity in establishing the parameters of the subject solicitations.

23. Finally, concerning 3775356 Canada Inc.'s allegation that the requirement that the SME be given the responsibility to assess or audit the work of other consultants that could be working for competitors such that it could give rise to a perceived conflict of interest, the Tribunal finds that the complaints do not provide a reasonable indication that the solicitations, as written, breach any provisions of the applicable trade agreements. In the Tribunal's opinion, this allegation is speculative. There is no indication, much less evidence, suggesting that the mere fact that SMEs proposed by successful bidders may be asked, in providing the required services, to participate in peer reviews or similar panels for evaluations or to act as third-party reviewers of evaluation products could result in perceived conflicts of interests. In any event, the Tribunal notes that if there were to be an issue of impropriety on the part of an SME in performing the work, it would be a matter of contract administration or contract performance, a matter that would not fall within the scope of the Tribunal's jurisdiction.¹³

24. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaints and considers the matter closed.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

12. See, for example, *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT); *Re Complaint filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Re Complaint filed by Bajai Inc.* (7 July 2003), PR-2003-001 (CITT).

13. 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*, for example, provide that the "procurement process" begins after an entity has decided on its procurement requirement and continues through to, and including, contract award.