



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-059

Intergage Consulting Group Inc.

*Decision made
Friday, March 16, 2012*

*Decision issued
Friday, March 16, 2012*

*Reasons issued
Wednesday, March 28, 2012*

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

INTERGAGE CONSULTING GROUP INC.

AGAINST

THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION

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 Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

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. 139186) by the Department of Citizenship and Immigration (CIC) for the services of a contractor to conduct an evaluation of CIC's Foreign Credential Referral Office.
3. Intergage Consulting Group Inc. (Intergage) alleges that CIC improperly disqualified its proposal by unfairly applying the conflict of interest provision³ of the Standard Acquisition Clauses and Conditions Manual,⁴ which had been incorporated by reference⁵ into CIC's Request for Proposal (RFP).
4. On September 13, 2011, CIC issued the RFP. On November 7, 2011, Intergage submitted a bid in response to the RFP.

TIMELINESS

5. 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."
6. Subsection 6(2) of the *Regulations* 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."
7. By letter dated January 27, 2012, CIC advised Intergage of its intention to reject Intergage's bid on the basis of an appearance of a conflict of interest on the part of one of Intergage's proposed team members.
8. According to the complaint, on February 2, 2012, Intergage made representations in a formal letter "... challenging the Conflict of Interest and identifying three options [that it] felt would eliminate any appearance of Conflict of Interest."⁶ In the Tribunal's view, this letter to CIC constituted an objection within the meaning of that term in subsection 6(2) of the *Regulations*. Moreover, by virtue of the fact that the objection was made within 10 working days of CIC's notice of intention to reject Intergage's bid, it constituted a timely objection under that provision.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. Section 18 (Conflict of Interest – Unfair Advantage)
 4. Standard Instructions – Goods or Services – Competitive Requirements (2003)
 5. Part 2, "BIDDER INSTRUCTIONS", of the RFP at para. 1 provides as follows: "The 2003 (2011-05-16) Standard Instructions – Goods or Services – Competitive Requirements, are incorporated by reference into and form part of the bid solicitation."
 6. Statement of Facts and Arguments at 3.

9. As indicated by Intergage in its complaint, “[o]n February 22, 2012, Intergage received a *final* notification from the Department indicating that the CIC had rejected Intergage’s bid based on an appearance of conflict of interest . . .”⁷ [emphasis added]. In the Tribunal’s view, the e-mail notification from CIC, which provided, in relevant part, as follows, constituted a clear and unequivocal denial of relief in response to Intergage’s objection:

In response to your letter dated February 2, 2012, CIC has rejected the bid submitted by Intergage Consulting Group Inc. on the grounds of Conflict of Interest, in accordance with the Standard Acquisition Clauses and Conditions (SACC) – Standard Instructions and Conditions (ID 2003 (Date-2011-05-16), Article 18, Conflict of Interest – Unfair Advantage

10. On the issue of when Intergage received actual or constructive knowledge of the denial of relief, Intergage ascribes considerable importance to subsequent correspondence with the Minister, Deputy Minister and Assistant Deputy Ministers of CIC, as well as to a meeting with senior government officials held on February 28, 2012. In this regard, Intergage states the following:

Given the senior level attention to this complaint, the Intergage team was of the belief that CIC may reverse its decision after reviewing the proposal review process followed by CIC.⁸

11. Intergage goes on to assert that it was only at the conclusion of the February 28, 2012, meeting, when the Assistant Deputy Minister of CIC confirmed CIC’s intention not to reverse its decision, that Intergage had reasonable grounds to believe that CIC would deny it relief.⁹

12. Leaving aside the issue of whether it was realistic for Intergage to assume that senior CIC officials might be willing to interfere in a competitive procurement process to cancel the February 22, 2012 contract award and alter the outcome in its favour, it was incumbent upon Intergage to file its complaint within 10 days of receiving a denial of relief from CIC in order to preserve its rights. In this regard, the Federal Court of Appeal has explained that potential suppliers “. . . are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.”¹⁰

13. As noted above, Intergage had actual knowledge of the denial of relief on February 22, 2012, when it received CIC’s reply to its February 2, 2012, objection which, following up on CIC’s January 27, 2012, notice of intent to reject its bid, confirmed that Intergage’s bid had indeed been rejected. Subsequent debriefings and discussions with senior CIC officials on the evaluation of its bid did not, in the Tribunal’s view, alter this reality. Accordingly, the complaint should have been filed by March 7, 2012.

14. The complaint in this case was received by the Tribunal on March 9, 2012, which is more than 10 working days after the date on which Intergage had actual knowledge of CIC’s denial of relief. Accordingly, the complaint was filed outside the time limit prescribed by subsection 6(2) of the *Regulations*.

15. Finally, the Tribunal is of the view that the complaint is not saved by subsection 6(3) of the *Regulations*, as there was nothing precluding Intergage from filing a timely complaint after its receipt of the denial of relief on February 22, 2012, and as the circumstances do not give rise to issues of a nature described in that provision.

7. Complaint at 6.

8. Statement of Facts and Arguments at 4.

9. Statement of Facts and Arguments at 5.

10. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

16. Accordingly, the Tribunal finds that the complaint was filed outside the time limit prescribed in subsection 6(2) of the *Regulations* and is therefore time-barred by operation of law.

DECISION

17. 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