



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-051

CORADIX Technology Consulting
Ltd.

*Decision made
Monday, February 20, 2012*

*Decision issued
Tuesday, February 21, 2012*

*Reasons issued
Thursday, March 8, 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

CORADIX TECHNOLOGY CONSULTING LTD.

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.

Serge Fréchette
Serge Fréchette
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. A0416-094200/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Indian Affairs and Northern Development (DIAND) for the provision of Web development services.

3. CORADIX Technology Consulting Ltd. (CORADIX) alleged that PWGSC improperly disqualified its proposal by misinterpreting the price support provisions of PWGSC's own Request for Proposal (RFP) and by unilaterally and arbitrarily relying on evaluation criteria that were not contained in the RFP.

TIMELINESS

4. For the reasons below, the Tribunal finds that the complaint was filed outside the time limit.

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." Subsection 6(2) provides that "[a] potential supplier who 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."

6. In other words, a complainant has 10 working days from the day 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.

7. On February 21, 2011, PWGSC issued an RFP for the provision of Web development services on behalf of DIAND. The RFP was issued under an "umbrella" supply arrangement.³ CORADIX bid on Stream C (other Web application support services).

8. With respect to the financial evaluation of bids, Article 4.3(c) of the RFP, "**Substantiation of Professional Services Rates**", provides as follows:

In Canada's experience, bidders will from time to time propose rates at the time of bidding for one or more categories of resources that they later refuse to honour, on the basis that these rates do not allow them to recover their own costs and/or make a profit. When evaluating the rates for professional

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. Task-based Informatics Professional Services Supply Arrangement EN578-055605/C.

services bid[s], Canada may, but will have no obligation to, require price support for any rates proposed (either for all or for specific resource categories). Examples of price support that Canada would consider satisfactory include:

- (i) documentation (such as billing records) that shows that the Bidder has recently provided and invoiced another customer (with whom the Bidder deals at arm's length) for services similar to the services that would be provided by the relevant resource category, where those services were provided for at least one month and the fees charged are equal to or less than the rate offered to Canada (to protect the privacy of the customer, the Bidder may black out the customer's name and personal information on the invoice submitted to Canada);
- (ii) a signed contract between the Bidder and an individual qualified (based on the qualifications described in this bid solicitation) to provide services under the relevant resource category, where the amount payable under that contract by the Bidder to the resource is equal to or less than the rate bid for that resource category;
- (iii) a signed contract with a subcontractor who will perform the work under any resulting contract, which provides that the required services will be provided at a rate that is equal to or less than the rate bid for the relevant resource category (and where the resource meets all the qualifications described in this bid solicitation); or
- (iv) details regarding the salary paid to and benefits provided to the individuals employed by the Bidder qualified (based on the qualifications described in this bid solicitation) to provide services under the relevant resource category, where the amount of compensation, when converted to a per diem or hourly rate (as applicable), is equal to or less than the rate bid for that resource category.

Once Canada requests substantiation of the rates bid for any resource category, it is the sole responsibility of the Bidder to submit information (either the information described in the examples above, or other information that demonstrates that it will be able to recover its own costs based on the rates it has proposed) that will allow Canada to determine whether it can rely, with confidence, on the Bidder's ability to provide the required services at the rates bid, while, at a minimum, recovering its own costs. Where Canada determines that the information provided by the Bidder does not demonstrate the Bidder's ability to recover its own costs in providing the relevant resource, Canada may declare the bid non-compliant, if the rate bid is at least 20% lower than the median price bid by compliant bidders for the first year of the resulting contract for the relevant resource(s).

9. On May 17, 2011, bids closed. CORADIX submitted a bid in response to the RFP that same day.
10. On September 16, 2011, PWGSC requested that CORADIX provide adequate substantiation of the rates proposed for several of its proposed resources in accordance with Article 4.3(c) of the RFP.
11. On September 23, 2011, CORADIX submitted information which, in its view, substantiated the rates contained in its bid and demonstrated that they were not unreasonably low.
12. On January 20, 2012, PWGSC advised CORADIX that its proposal was deemed non-responsive and therefore disqualified. The evaluation team determined that the proposal did not comply with the mandatory requirement for the bidder to demonstrate its ability to recover its own costs where the proposed rates were at least 20 percent lower than the median price proposed by compliant bidders for the first year of the resulting contract, as per Article 4.3(c) of the RFP. The evaluation team also determined that the experience of the proposed application/software architect or database administrator did not match what was required by the RFP.

13. On January 25, 2012, CORADIX met with PWGSC and objected to the disqualification of its proposal. The same day, PWGSC denied CORADIX's objection.

14. On February 10, 2012, CORADIX filed its complaint with the Tribunal. On the same day, the Tribunal wrote CORADIX, asking for further information, including copies of the RFP and CORADIX's proposal.

15. On February 13, 2012, CORADIX provided the requested information.

16. Subsection 6(2) of the *Regulations* provides as follows:

A potential supplier who has made an objection regarding a procurement relating to a designated contract 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.

17. CORADIX learned of the basis of its complaint on January 20, 2012, the day on which PWGSC advised it that its proposal had been declared non-compliant. CORADIX made its objection to PWGSC on January 25, 2012, well within the 10-working-day limit. The issue is whether CORADIX filed its complaint with the Tribunal within 10 working days after it learned of PWGSC's denial of relief, which was also on January 25, 2012.

18. Subsection 30.11(2) of the *CITT Act* lists the requirements for filing a complaint, one of which is that it must "...include all information and documents relevant to the complaint that are in the complainant's possession"

19. Subsection 30.12(2) of the *CITT Act* provides as follows:

Where the Tribunal determines that a complaint does not comply with subsection 30.11(2), it shall notify the complainant in writing and specify the deficiencies to be corrected, the corrective action required and the period within which the action must be taken.

20. Having received PWGSC's denial of relief on January 25, 2012, CORADIX had until February 8, 2012, to file its complaint. Although it attempted to do so by that date, the complaint that CORADIX filed with the Tribunal on February 8, 2012, was deficient, in that it did not include the RFP and CORADIX's proposal. The missing information was not filed until February 13, 2012, which became the filing date within the meaning of section 30.11 of the *CITT Act*. Therefore, the complaint was filed outside the legislative time limit, and the Tribunal does not have jurisdiction to accept it for inquiry.

REASONABLE INDICATION OF BREACH

21. Even if the complaint had been filed in a timely manner, the Tribunal would still have been unable to accept it for inquiry, since it failed to contain a reasonable indication that the applicable trade agreements were breached.

22. According to paragraph 7(1)(c) of the *Regulations*, to initiate an inquiry, the Tribunal must find that the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of the *North American Free Trade Agreement*,⁴ the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ the *Canada-Chile Free Trade Agreement*,⁷ the *Canada-Peru Free Trade Agreement*⁸ or the *Canada-Colombia Free Trade Agreement*⁹ applies.

23. Article 506(6) of the *AIT* provides 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.

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

[A]wards shall be made in accordance with the criteria and essential requirements specified in tender documentation

25. In applying the above provisions, the complainant bears the burden of proving that the evaluation of its bid was conducted incorrectly, i.e. not in accordance with the criteria stipulated in the tender documentation. The Tribunal will only interfere with an evaluation that is unreasonable, i.e. where the evaluators have ignored vital information, wrongly interpreted the scope of the requirement, acted in a procedurally unfair way or based their evaluation on undisclosed criteria.¹⁰

26. In its letter of January 20, 2012, PWGSC advised CORADIX that it had failed to demonstrate its ability to recover its own costs, given that its rates were 20 percent lower than the median price bid by compliant bidders.

27. The Tribunal is of the view that the wording of Article 4.3(c) of the RFP is clear and unambiguous. The upshot of CORADIX's complaint on this ground is that the RFP did not allow sufficient time (only five days) for it to gather the financial information that the provision required. A complaint on a particular term of an RFP must be filed within 10 working days after the day on which a potential supplier knew or reasonably ought to have known the basis of its complaint. In this case, there is no evidence as to when that was, but it obviously must have been before May 17, 2011, when bids closed. Therefore, a complaint on this ground would be severely time-barred.

4. *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*].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. *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.

8. *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*].

9. *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*].

10. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

28. On January 24, 2012, PWGSC provided CORADIX with evidence that its proposed rates were at least 20 percent below the median price bid by compliant bidders.

29. PWGSC's letter of January 20, 2012, also advised that the experience that CORADIX submitted for its application/software architect was not similar to what was required in the Statement of Work and that no experience required in the Statement of Work had been provided for the database administrator. Although CORADIX alleged that PWGSC misinterpreted Article 4.3(c) of the RFP, there is no evidence to support the allegation.

30. Although CORADIX alleged that PWGSC arbitrarily and unilaterally applied expectations that were not contained in the RFP to the evaluation of the two resources mentioned above, it does nothing more than make a bare reference to "past practices and expectations". No evidence was adduced in support of the allegation.

31. The Tribunal finds that there is nothing in the documents provided by CORADIX to indicate that the evaluator's assessment of the two proposed resources was contrary to the criteria and essential requirements specified in the tender documentation, thereby contravening the provisions of the above-mentioned trade agreements, in particular, Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*, as well as the similar provisions of the *AGP*, the *CCFTA* and the *CPFTA*.¹¹

32. 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.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

11. The procurement was conducted before the coming into force of the *CCOFTA*.