



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-031

Tetra Tech WEI Inc.

*Decision made
Wednesday, December 5, 2012*

*Decision issued
Thursday, December 6, 2012*

*Reasons issued
Monday, December 17, 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

TETRA TECH WEI 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 complaint.

Pasquale Michael Saroli
Pasquale Michael 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. EQ447-130640/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Natural Resources and Atomic Energy of Canada Limited for the provision of property contamination resurvey services for the Small Scale Sites component of the Port Hope Area Initiative.

3. The bid proposal of Tetra Tech WEI Inc. (Tetra Tech) was disqualified on the basis that it did not meet a mandatory requirement. In this regard, mandatory requirement 3(c) of Annex E, section 2.1 of the solicitation, provides as follows:

[o]ne of the . . . senior positions . . . must be certified by the National Environmental Health Association (NEHA), or the National Radon Safety Board (NRSB) or an equivalent international agency/association for radon monitoring, or have an extensive (minimum 10 years) experience conducting indoor radon surveys.

4. In its complaint, Tetra Tech alleged that it provided evidence of equivalent qualifications for a proposed candidate for one of the senior positions and that, therefore, its proposal was improperly disqualified. In addition, Tetra Tech argued that mandatory requirement 3(c) was ambiguous.

5. According to the complaint, the solicitation was published on MERX on August 15, 2012. Ten amendments were subsequently made to the solicitation, of which the tenth was published on October 2, 2012. The deadline for the receipt of bids was October 9, 2012. Tetra Tech's bid proposal, having been submitted on the deadline date, was timely.

6. On or about November 7, 2012, PWGSC advised Tetra Tech that its proposal had been disqualified, as it did not meet mandatory requirement 3(c), and informed it that a contract had been awarded to Senes Consulting Ltd. The complaint does not specify the exact date on which Tetra Tech objected to PWGSC, but it states that a debriefing session was held on November 14, 2012.

7. On December 5, 2012, Tetra Tech filed its complaint with the Tribunal.

8. 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), in turn, 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

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

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

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.”

9. In other words, a complainant has 10 working days from the date on which it first becomes aware, or should reasonably have become aware, of its grounds 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.

10. With respect to Tetra Tech’s argument that mandatory requirement 3(c) was ambiguous, the Tribunal considers that Tetra Tech became aware, or should have become aware, of this ground of complaint on October 9, 2012, at the latest, when it submitted its proposal. Although the complaint does not specify the date on which an objection to the government institution was made, a debriefing was held on November 14, 2012, at which time the government institution’s response also became known. As such, the Tribunal finds that Tetra Tech received its denial of relief, within the meaning of subsection 6(2) of the *Regulations*, on November 14, 2012.

11. Consequently, even assuming that Tetra Tech made its objection to the government institution in a timely manner, a fact of which the Tribunal is not convinced, pursuant to subsection 6(2) of the *Regulations*, Tetra Tech had 10 working days from November 14, 2012, to file a complaint with the Tribunal. Tetra Tech’s complaint, which was filed on December 5, 2012, therefore exceeded the statutory deadline.

12. Similarly, with respect to Tetra Tech’s argument that its proposal was improperly disqualified for failing to meet mandatory requirement 3(c), the Tribunal considers that Tetra Tech became aware of PWGSC’s denial of relief on November 14, 2012, and that, by filing its complaint on December 5, 2012, Tetra Tech exceeded the statutory 10-day deadline in subsection 6(2) of the *Regulations*.

13. The Tribunal therefore finds that the complaint, on both grounds, is time-barred by operation of law.

14. Although not necessary for the disposition of the present complaint, the Tribunal would also note that the complaint does not disclose a reasonable indication that PWGSC acted contrary to the applicable trade agreements in disqualifying Tetra Tech’s proposal. Therefore, even if the complaint had been filed in a timely manner, it would not have met the conditions, set out in section 7 of the *Regulations*, for the initiation of an inquiry on this ground.

15. Typically, the Tribunal accords a large measure of deference to evaluators in their evaluation of bid proposals. In this respect, the Tribunal, in File No. PR-2005-004,³ stated that it “. . . will interfere only with an evaluation that is *unreasonable*”⁴ and that it will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.⁵

3. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005) (CITT).

4. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005) (CITT) at para. 51.

5. (7 September 2005), PR-2005-004, at paras. 51-52 (CITT); *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT) at para. 40; *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

16. In this regard, the Tribunal is of the view that the complaint does not disclose a reasonable indication that PWGSC's determination that the certificate from the American Board of Health Physics provided by Tetra Tech did not meet mandatory requirement 3(c), was unreasonable. Indeed, the complaint does not provide the Tribunal with a basis to conclude that the American Board of Health Physics is an "... international agency/association for radon monitoring ... " or that it is equivalent to NEHA and the NRSB.

17. In addition, in File No. PR-2008-023,⁶ the Tribunal indicated that, in the case of a particular term that is not explicitly defined in the solicitation documentation, the term, when read in the context of its usage, would logically be connected to the tasks to be performed under the resulting contract.⁷ In this case, the Tribunal cannot find, on the basis of the complaint, any obvious connection between the American Board of Health Physics and the tasks to be performed under the resulting contract, which specifically relate to indoor radon gas surveying.

18. The Tribunal is of the further view that there is no reasonable basis upon which to conclude that PWGSC was unreasonable in determining that Tetra Tech's proposal failed to show that the experience of its proposed candidate for one of the senior positions constituted "an extensive (minimum 10 years) experience conducting indoor radon surveys," as required by mandatory requirement 3(c).

19. In this respect, the Tribunal does not accept Tetra Tech's assertion that PWGSC should have afforded it the opportunity to further explain the experience of its proposed candidate. It is well established in jurisprudence that responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder, which must exercise due diligence in the preparation of its proposal.⁸ In this regard, while a procuring entity may in some circumstances decide to seek clarification of a particular aspect of a proposal, it is not under any obligation to do so.⁹

20. In short, although the Tribunal disposed of the complaint in this case on other grounds, it is of the view that the complaint does not in any event disclose a sufficient basis upon which to conclude that PWGSC unreasonably disqualified Tetra Tech's proposal.

DECISION

21. 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

6. *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT).

7. *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 28.

8. See, for example, *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT); *Re Complaint Filed by BRC Business Enterprises Ltd.* (28 November 2011), PR-2011-017 (CITT) at para. 61.

9. *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.