



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-033

Napier-Reid Ltd.

*Decision made
Tuesday, December 11, 2012*

*Decision issued
Wednesday, December 12, 2012*

*Reasons issued
Friday, January 4, 2013*

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

NAPIER-REID 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. W8482-120869/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the repair and overhaul of shipboard reverse osmosis desalination (SROD) units aboard DND ships on an as and when requested basis.

3. Napier-Reid Ltd. (Napier-Reid) alleged the following:

- the combined inclusion of two particular mandatory requirements in the Request for Proposal (RFP) was unnecessary and biased in favour of the winning bidder; and
- PWGSC did not ensure that the winning bid complied with certain mandatory requirements of the RFP.

4. On September 10, 2012, PWGSC issued an RFP for the repair and overhaul of the aforementioned SROD units.

5. Annex “D” to the RFP, “**Bid Evaluation**”, provides as follows:

- Bids must meet all the mandatory requirements
- Any bid that fails to meet the **minimum** requirement of any mandatory criterion, the evaluation will be cease and no further review of the proposal will be done.
- Lowest cost, technically compliant bid will be awarded the contract.

...

#3 **Key Personnel CV**

The Contractor shall have on staff at the time of the Bid submission and throughout the length of the contract the following people on staff with the qualifications listed:

Senior Team Leader- Mandatory Criteria:

- i) Five (5) years experience managing project of similar size and scope;
- ii) Demonstrated experience working with project stakeholders in Repair and Overhaul using written and verbal communication;
- iii) Four (4) years experience working with Reverse Osmosis Desalination overhaul in the last (8) years; and
- iv) Hold a valid PMP [Project Management Professional] Certification.

6. On October 22, 2012, bids closed. Napier-Reid submitted a proposal in response to the solicitation.

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

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

7. On November 23, 2012, PWGSC advised Napier-Reid that its proposal had been found to be technically non-responsive, as it failed to demonstrate that two of the required “Key Personnel”, including the “Senior Team Leader”, possessed the qualifications listed under section 3 of Annex “D” to the RFP. PWGSC also advised Napier-Reid that a contract had been awarded to Seprotech Systems Inc. (Seprotech) of Ottawa, Ontario.

8. On November 26, 2012, Napier-Reid sent an e-mail to PWGSC in which it stated that it disagreed with the evaluation results and that it was in the process of preparing a formal response to PWGSC’s letter of November 23, 2012. It stated that it was of the opinion that the qualifications of its team members fully met or exceeded the requirements set out in the RFP. It also asked PWGSC how many proposals it had received and how many of those it had found to be technically compliant.

9. On the same day, PWGSC informed Napier-Reid that it had received proposals from Napier-Reid and Seprotech, the latter was found to be technically compliant and was awarded the contract.

10. On December 5, 2012, Napier-Reid sent another e-mail to PWGSC in which it made more detailed submissions as to why it believed the qualifications of its team members fully met or exceeded the requirements set out in the RFP. In particular, it submitted that two of the persons that it proposed, together, possessed all the qualifications required for the position of “Senior Team Leader”. It submitted that, in its view, this arrangement should have been fully satisfactory and, therefore, requested that PWGSC reconsider the evaluation results.

11. On December 7, 2012, Napier-Reid filed its complaint with the Tribunal.

GROUND 1

12. Napier-Reid’s first ground of complaint was that the requirement of combined PMP certification and reverse osmosis experience for the position of “Senior Team Leader” was unusual, unnecessary and biased in favour of Seprotech’s services. It submitted that PMP certification is not commonly required in the water industry and, in the present case, was not essential to the fulfillment of the contract work. It also noted that previous tenders for SROD units contained no such requirement. It therefore requested that the requirement for PMP certification be deleted from the RFP and that the solicitation be re-tendered.

13. 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.”

14. 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.”

15. These provisions make it clear that a complainant has 10 working days from the date 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.

16. As stated by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,³ “[i]n procurement matters, time is of the essence. . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They 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.”⁴

17. In the Tribunal’s view, Napier-Reid became aware, or reasonably should have become aware, of its first ground of complaint once it reviewed the solicitation documents or, at the very latest, on October 22, 2012, when it submitted its proposal in response to the RFP. The qualifications required for the position of “Senior Team Leader”, which were listed under section 3 of Annex “D” to the RFP, were clear and unambiguous. As such, Napier-Reid reasonably should have known, when it first read the RFP, that the requirement of combined PMP certification and reverse osmosis experience was, as it now suggests, unusual, unnecessary and possibly biased. This is made much more apparent by the fact that, when it submitted its proposal, it knew that it did not have a person on staff who possessed both qualifications.⁵

18. Therefore, Napier-Reid had, at the latest, until November 5, 2012 (i.e. 10 working days after October 22, 2012) to either make an objection to PWGSC or file a complaint with the Tribunal. As Napier-Reid only made an objection, which was unrelated to this particular ground of complaint, to PWGSC on November 26, 2012, and filed its complaint with the Tribunal on December 7, 2012, the Tribunal considers that the complaint on this ground has not been filed in a timely manner.

GROUND 2

19. Napier-Reid’s second ground of complaint was that PWGSC failed to ensure that Seprotech’s bid complied with certain mandatory requirements of the RFP. It submitted that, for example, to the best of its knowledge, Seprotech does not possess in-house welding and machining capabilities and that, as a result, it may not have met the requirement outlined at section 5 of Annex “D” to the RFP.

20. Section 5 of Annex “D” to the RFP provides as follows:

#5 Repair Facility (SOW 3.3)

The Bidder’s proposal shall contain a plan of the proposed Repair Facility identifying the location, special and general-purpose test equipment, fixtures and tooling that will be utilized to carry out the intended work. The Contractor shall supply all labour, material, repair parts, test equipment, tooling and facilities, engineering, technical and administrative services necessary to complete the work. The only work to be sub-contracted will be overhaul and testing of motors and shock certification as it is recognized that this is specialty work.

21. Napier-Reid submitted that it is only through an examination of Seprotech’s bid that it can satisfy itself on this issue and, more generally, that all requirements of the solicitation have been met by Seprotech.

22. Subsection 7(1) of the *Regulations* sets out three conditions which must be met before the Tribunal may conduct an inquiry in respect of a complaint. The third condition is that the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance

3. 2002 FCA 284 (CanLII).

4. *Ibid.* at paras. 18, 20.

5. See paragraph 1 of Napier-Reid’s e-mail of December 5, 2012, to PWGSC.

with whichever of Chapter Ten of the *North American Free Trade Agreement*,⁶ Chapter Five of the *Agreement on Internal Trade*,⁷ the *Agreement on Government Procurement*,⁸ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁹ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*¹⁰ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*¹¹ applies. In this case, only the *AIT* applies.¹²

23. Article 506(6) of the *AIT* provides as follows: “In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. 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. A procuring entity will meet its obligations under Article 506(6) of the *AIT* when it makes a reasonable evaluation, in good faith, of the competing bid documents.¹³ The Tribunal will not substitute its judgment for that of 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.¹⁴

25. The Tribunal is of the view that the evidence provided by Napier-Reid in support of its allegation is not sufficient to allow the Tribunal to conclude that there is a reasonable indication that PWGSC did not apply itself in evaluating Seprotech’s proposal or that it otherwise erred in concluding that the proposal complied with the mandatory requirements of the RFP. As the Tribunal has previously stated, complainants bear the onus of substantiating the allegations that they make, and allegations that are not substantiated are not sufficient for the Tribunal to proceed with an inquiry.¹⁵

6. *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).

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

9. *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). Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

10. *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).

11. *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).

12. The services being requested appear to be either specifically excluded from, or not included in, the coverage of the other trade agreements.

13. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at para. 51.

14. See, for example, *Re Complaint Filed by MTS Allstream Inc.* (3 February 2009), PR-2008-033 (CITT) at para. 26.

15. *Re Complaint Filed by Secure Computing LLC* (11 April 2012), PR-2012-001 (CITT) at para. 17; *Re Complaint Filed by Veseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9.

26. In the present case, Napier-Reid's evidence consists solely of its own statement that, to the *best of its knowledge*, Seprotech *may* not meet the mandatory requirement outlined at section 5 of Annex "D" to the RFP. No other information or details are provided regarding Seprotech's alleged inability to meet this requirement or any other mandatory requirement of the RFP. In the Tribunal's view, this clearly falls below the threshold of what it considers to be sufficient to proceed with an inquiry.

27. Consequently, the Tribunal finds that, in relation to this ground of complaint, the information provided by the complainant does not disclose a reasonable indication that the procurement has not been conducted in accordance with the *AIT*.

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

DECISION

29. 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