Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-016

Paul Pollack Personnel Ltd.
o/a The Pollack Group Canada

Decision made
Monday, September 23, 2013

Decision issued
Tuesday, September 24, 2013

Reasons issued
Monday, October 7, 2013

Canada

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

PAUL POLLACK PERSONNEL LTD. O/A THE POLLACK GROUP CANADA

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT

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.

SUMMARY OF THE COMPLAINT

2. The complaint relates to a Request for Services (RFS) (Solicitation No. 14-76801) by the Department of Foreign Affairs, Trade and Development (DFATD) for the provision of mail room services at the Distribution and Diplomatic Mail section of DFATD. The solicitation was issued under Temporary Help Services Supply Arrangement EN578-060502 (THS SA).

3. Paul Pollack Personnel Ltd. o/a The Pollack Group Canada (Pollack) alleged that DFATD awarded the contract to a non-compliant bidder. More specifically, it alleged that DFATD failed to follow mandatory criterion M5 by not making the required reference checks on the proposed resources provided by the winning bidder, Maplesoft Group (Maplesoft). As a remedy, Pollack is seeking compensation for loss of profit and the cancellation of the contract awarded to Maplesoft.

BACKGROUND TO THE COMPLAINT

4. On August 16, 2013, DFATD advertised an RFS for seven intermediate mailroom clerks. The requirement was sent to eight suppliers, including Pollack and Maplesoft. The due date for the receipt of bids was August 22, 2013.

5. On August 30, 2013, Pollack wrote an e-mail to DFATD requesting a debriefing regarding the award of the contract:

> I am under the impression that the DFATD contract for mail room services has not been awarded to The Pollack Group.
> I would respectfully like to request a time for a debriefing as soon as possible.

6. On September 3, 2013, DFATD informed Pollack of the award of the THS SA to Maplesoft.

7. On September 4, 2013, Pollack replied with another request for a debriefing and followed that request up with at least two additional and similar requests on September 5 and 9, 2013.

8. In its complaint, Pollack indicated that it learned on September 4, 2013, that "... one of its exclusively proposed resources was working on this mail room contract through the vendor Maplesoft."[3] It further indicated that it learned in subsequent days that a total of "6 out of 7" of its proposed resources were working on the THS SA through Maplesoft.[4]

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. See The Pollack Group Detailed Summary of Complaint at 1.
4. *Ibid.* at 2.

9. On September 9, 2013, Pollack wrote to DFATD as follows:

> I have been respectfully requesting a debriefing since August 30th with regards to the above noted solicitation and have not been granted one thus far. . . .
> The Pollack Group needs answers from your department and we do require a face to face meeting to discuss the following:
> ***How can the firm awarded the contract be found compliant if (as many as 6 out of 7) of its proposed resources were never able to work a day on this contract and reference checks were never completed to validate the experience of the proposed resources?***
>
> [Emphasis in original]

10. On September 10, 2013, DFATD replied to Pollack, indicating as follows:

> Could you provide some times/dates next week when you might be available for a debrief? We would be happy to discuss your [firm's] proposal in more detail. However, I should note that in accordance with the Privacy Act, we are unable to discuss specific elements of any submissions by other bidders beyond the names of the successful firm and their total evaluated price. Should you be seeking information regarding other submissions, we will have to refer you to our Access to Information and Privacy Office . . . .

11. On the same day, Pollack responded by indicating a number of possible meeting dates. On September 16, 2013, a meeting was scheduled for September 18, 2013.

12. On September 17, 2013, Pollack filed its complaint with the Tribunal.

TRIBUNAL ANALYSIS

13. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before being able to conduct an inquiry: (i) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations;* (ii) whether the complainant is a potential supplier; (iii) whether the complaint is in respect of a designated contract; and (iv) 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*,[5] Chapter Five of the *Agreement on Internal Trade*,[6] the *Agreement on Government Procurement*,[7] Chapter K*bis* of the *Canada-Chile Free Trade Agreement*,[8] Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,[9]

5. *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*].
6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
7. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
8. *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
9. *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*].

Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*[10] or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*[11] applies.

14. In its analysis, the Tribunal will address only whether the complaint has been filed within the prescribed time limits and whether the complaint discloses a reasonable indication of a breach of the above-mentioned trade agreements. It is clear to the Tribunal that the other two conditions have been met: Pollack is a potential supplier; and the complaint is in respect of a designated contract.[12]

Has the Complaint Been Filed Within the Time Limits Prescribed by Section 6 of the Regulations?

15. 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."

16. 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."

17. With regard to the facts at hand, the Tribunal recalls that Pollack first learned, on September 4, 2013, that its "exclusively proposed resources" were working on the THS SA through Maplesoft. Thus, the Tribunal considers September 4, 2013, as the date on which the basis of Pollack's objection and subsequent complaint became known or reasonably should have become known to it. In addition, the Tribunal notes that Pollack's e-mail of September 9, 2013, sent three working days after September 4, 2013, was sufficiently specific to constitute an objection. Further, DFATD's reply of September 10, 2013, although contemplative of a meeting, was sufficiently clear to give Pollack constructive if not actual knowledge of a denial of relief.

18. The Tribunal further recalls that Pollack filed its complaint with the Tribunal on September 17, 2013, within 10 working days of both September 4 and 10, 2013. Therefore, the Tribunal finds that the complaint, filed within the time limits prescribed by both subsections 6(1) and (2) of the *Regulations*, was filed in a timely manner.

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10. *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*].
11. Free Trade Agreement between Canada and the Republic of Panama, online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/chapter-chapitre-16.aspx> (entered into force 1 April 2013) [*CPAFTA*].
12. Annex 502.1B of the *AIT*, Annex 1001.1b-2 of *NAFTA*, Annex Kbis-01.1-4 of the *CCFTA*, Annex 1401.1-4 of the *CPFTA*, Annex 1401-4 of the *CCOFTA*, and Annex 5 of the *CPAFTA*, which all use the Common Classification System for classifying services, do not exclude Class R105 "Mailing and Distribution Services (Excluding Post Office Services)" of the "Professional, Administrative and Management Support Services" group. In addition, DFATD is the successor to the Department of Foreign Affairs and International Trade, and the Tribunal is satisfied that the contract value exceeds the thresholds stipulated in the above-mentioned trade agreements. Therefore, the procurement is covered by the trade agreements, except the *AGP*.

19. The Tribunal now turns to the question of whether the information provided by Pollack discloses a reasonable indication that the procurement was not conducted in accordance with applicable government procurement obligations.

Does the Information Provided by Pollack Disclose a Reasonable Indication That the Procurement was not Conducted in Accordance With Applicable Government Procurement Obligations?

20. As discussed in more detail below, Pollack's claim is essentially that DFATD, the procuring entity, did not properly evaluate the bids that it received either by failing to complete the required reference checks or by considering a fraudulent bid to be compliant.

21. The Tribunal has found that *NAFTA*, the *AIT*, the *CCFTA*, the *CPFTA*, the *CCOFTA* and the *CPAFTA* are applicable to the procurement that is the subject of this complaint. On the basis of Pollack's claim, the relevant obligation in each of these agreements is the requirement that the procuring entity award a contract in accordance with the essential requirements of the tender documentation.[13]

22. For example, Article 1015(4)(d) of *NAFTA* provides as follows:

> 4. An entity shall award contracts in accordance with the following:
>
> . . .
>
> (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; . . . .

23. Similarly, Article 506(6) of the *AIT* provides as follows:

> In evaluating tenders, a Party may take into account . . . 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. In this case, Part C, "Basis of Selection", of the RFS indicates that, to be declared responsive, a bid must comply with all the requirements of the RFS and meet all mandatory evaluation criteria, and reads as follows:

> **.1: Lowest-Priced Compliant Response**
>
> . . .
>
> i. comply with all the requirements of the RFS; and,
> ii. meet all mandatory evaluation criteria.
>
> Bids not meeting (i) or (ii) . . . will be declared non-responsive.
> [The] responsive bid with the lowest total evaluated price will be selected for award of the contract.
> [F]or an applicable resource, a bid must:
> i. comply with all the requirements of the RFS; and,
> ii. meet all mandatory technical evaluation criteria for the resource; and,
> iii. obtain the required minimum numbers of points specified in the point rated technical evaluation for the resource, if available.
>
> Bids not meeting (i) or (ii) or (iii) will be declared non-responsive for the applicable resource.

13. See Article 506(6) of the *AIT*, Article Kbis-10 of the *CCFTA*, Article 1410:4 of the *CPFTA*, Article 1410:4 of the *CCOFTA* and Article 16.11:4 of the *CPAFTA*.

> a) The responsive bid for a resource with the lowest evaluated price will be allocated the maximum number of available price points. The scores for all other responsive bids for the resource will be calculated on a prorated pricing basis. For example, if the proposed resource price of responsive bid X exceeds the lowest responsive proposed price (bid Y) by 10%, bid X will receive 90% of the available price points. However, if the proposed price of a responsive bid exceeds the lowest responsive proposed cost (bid Y) by 100% or more, the [bid] will receive zero (0) price points.
>
> b) The combined rating of technical merit and price for a resource will be determined by adding together the points for pricing and for technical merit for the resource.
>
> c) The responsive bid for a resource with the highest combined rating of technical merit and price will be recommended for award of a contract for the applicable resource.

25. The mandatory evaluation criterion at issue is found at M5 in Section 2, "Mandatory Technical Evaluation Criteria" of Part C, "Basis of Selection", of the RFS. It reads as follows:

> **M5** At least 2 references per submitted candidate **must** be provided with the evaluation in order to validate the resource's related experience.

26. In its complaint, Pollack asserted that "6 out of 7" of its "exclusively proposed resources" are "working on [the DFATD mailroom] contract through Maplesoft". Based on its reasoning that Maplesoft could not have also proposed the same resources, Pollack provided two alternative explanations for this result. First, it asserted that DFATD could not have checked the references that were required to be provided as part of mandatory criterion M5 ". . . as obviously the candidates from Maplesoft were not acceptable and would not have passed that [criterion]".[14] In the alternative, it asserted that, in its evaluation, DFATD failed to discover that Maplesoft fraudulently misrepresented itself by bidding candidates that it knew "were unavailable to work"[15] and then "replac[ing] them once [it] received the contract award"[16] and, thus, failed to deem Maplesoft's bid non-compliant.

27. The initial question before the Tribunal is whether Pollack's first assertion discloses a reasonable indication that DFATD did not award the contract on the basis of the essential criteria in the tender documentation. In order to show a reasonable indication of a breach, it is incumbent upon Pollack to establish a *prima facie* case by submitting facts disclosing a possible breach of an applicable trade agreement. In *K-Lor Contractors Services Ltd.*,[17] the Tribunal set out the requirement as follows:

> In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case. The wording of both the CITT Act and the Regulations provides the architecture for the bid dispute mechanism, and it is obvious, having regard to those enactments, that procurement complaints before the Tribunal are different from civil actions. However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.
>
> [Footnote omitted]

14. See The Pollack Group Detailed Summary of Complaint at 2.
15. *Ibid.*
16. *Ibid.*
17. (23 November 2000), PR-2000-023 (CITT) at 6. The Tribunal similarly stated the need for supportive proof in *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT).

28. In the complaint at hand, Pollack's first assertion is not supported by any proof whatsoever. Further, taken on its own, the assertion cannot support the conclusion that no reasonable explanation, other than a failure by DFATD to check references, could have resulted in the utilization by Maplesoft of the resources proposed by Pollack. The Tribunal is thus left with a complaint premised on mere speculation or conjecture. As a result, Pollack's first assertion does not demonstrate a reasonable indication that DFATD breached the applicable trade agreements by not evaluating Maplesoft's bid on the basis of the essential criteria in the tender documentation.

29. The other question before the Tribunal is whether Pollack's second assertion, that DFATD failed to discover an alleged fraud pertaining to the availability of the resources originally proposed by Maplesoft, discloses a reasonable indication of a breach of the applicable trade agreements. The Tribunal notes that, similar to its first assertion, Pollack has also not supported this second assertion with any proof whatsoever. In addition, the Tribunal finds it necessary to note that an unsupported assertion of fraud is inadequate to render other explanations that could result in the outcome at hand, that is, the utilization by Maplesoft of the resources proposed by Pollack, unreasonable.

30. Further, the Tribunal observes that the criteria and essential requirements specified in the RFS address matters such as the qualifications of resources, security clearance and price, but do not address the availability of resources. Adherence by DFATD to the requirements in the applicable trade agreements demands a process of evaluation based on pre-identified criteria. Pollack has provided no proof that DFATD did not utilize such criteria. Instead, Pollack's assertion introduces a new criterion, that of availability.

31. Even if the RFS required resources to be available, the Tribunal notes that, in the absence of any further indication in the RFS regarding how that criteria would be assessed or evaluated, DFATD would be entitled, at the point of bid evaluation and contract award, to rely on representations made by Maplesoft with regard to the availability of its proposed resources. Such an approach would be consistent with past decisions by the Tribunal in similar circumstances, such as the following:

> 18. When PWGSC evaluated Advantage Fitness's proposal and awarded the contract, it was entitled to rely on the certifications provided by Advantage Fitness. Furthermore, there is no evidence which indicates that, at that time, PWGSC was in possession of information which should have made it question the authenticity of these certifications. Therefore, the Tribunal is of the view that, at the time of contract award, PWGSC was correct in determining that Advantage Fitness's proposal met the minimum requirements set out in the RFP in respect of the recumbent bike. There is nothing in the complaint which indicates that PWGSC's decision to award the contract to Advantage Fitness was not made in accordance with the criteria and essential requirements specified in the tender documentation or that it contravened the aforementioned provisions of the trade agreements.[18]

32. Any matter that occurs beyond the point of bid evaluation and contract award falls outside of the procurement process and constitutes a matter of contract administration, regarding which the Tribunal does not possess jurisdiction. The trade agreements provide that the procurement process commences after an entity has decided on its procurement requirement and continues through to the award of the contract. Thus, Pollack's second assertion, pertaining to the alteration of the contents of a proposal by a winning bidder after

18. *3202488 Canada Inc. o/a Kinetic Solutions* (18 February 2011), PR-2010-089 (CITT). Similarly, reference can be made to the Tribunal's decision in *Airsolid inc.* (18 February 2010), PR-2009-089 (CITT).

being awarded the contract, falls outside of the procurement process and is a matter of contract administration.[19]

33. As a result of the reasons above, the Tribunal finds that Pollack's second assertion also does not disclose a reasonable indication that the procurement was not conducted in accordance with the relevant government procurement obligations.

34. In light of the above, the Tribunal will not conduct an inquiry into the complaint.

DECISION

35. 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

19. Reference can be made to the Tribunal's decision in *Reicore Technologies Inc.* (22 September 2009), PR-2009-047 (CITT).