Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-019

Tideland Signal Canada Ltd.

Decision made
Tuesday, October 29, 2013

Decision issued
Wednesday, October 30, 2013

Reasons issued
Wednesday, November 13, 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

TIDELAND SIGNAL CANADA 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

COMPLAINT

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 filed by Tideland Signal Canada Ltd. (Tideland) concerns a Request for a Standing Offer (RFSO) by the Department of Public Works and Government Services (PWGSC) on behalf of the Canadian Coast Guard (CCG), an agency of the Department of Fisheries and Oceans (DFO), for the supply of medium plastic coastal/harbour buoys for floating aids to navigation application for use in many parts of Canada.

3. Tideland alleged that the published performance specification in the RFSO "had several datapoints that specifically disallowed" its products from being compliant.[3] Tideland further alleged that the evaluation of tenders was "judged incorrectly" and that "minor technical divergence" was used to disqualify its proposal.[4]

4. As a remedy, Tideland requested the re-evaluation of tenders and the award of standing offers to compliant bidders, as per the evaluation procedures outlined in the RFSO.

PROCUREMENT PROCESS

5. On November 22, 2012, prior to the release of the RFSO, the CCG sent a market research questionnaire by e-mail to Tideland, and presumably to other potential suppliers, indicating a need to replace a very large number of steel buoys with plastic buoys and requesting that Tideland provide information regarding one of its buoys which could serve as a replacement for the steel buoys. The e-mail further indicated that only those that participated in answering an attached questionnaire "will be considered", presumably for the subsequent tender.[5]

6. Tideland indicated that it supplied information regarding two models of buoys in response to the above-noted questionnaire.

7. The RFSO was issued on July 22, 2013, and the bid closing date was September 3, 2013. A standing offer, with an estimated value of $2.5 million, was awarded on October 4, 2013.

8. On July 30, 2013, subsequent to the issuance of the RFSO, Tideland sent an e-mail to PWGSC indicating firstly that the CCG had an existing contract with Tideland that could meet the performance requirements of the RFSO and secondly that the specification in the RFSO appears to have been written to

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Complaint at tab 1, 001 Statement of Argument and Facts.
4. Complaint at sections 4D and 5A.
5. Complaint at tab 3.

exclude Tideland products. Tideland went on to ask two questions of PWGSC: first, Tideland asked whether it was the CCG's intention to prevent Tideland from providing a commercial off-the-shelf product for the tender; and, second, Tideland asked why the existing standing offer was not being utilized.

9. On the same day, PWGSC replied by indicating, with regard to Tideland's first question, that the CCG already makes use of Tideland products and will continue to do so and, with regard to Tideland's second question, that the replacement sought is one that best matches "the current 1.4 m steel buoy which has 2 lifting eyes and two mooring eyes such that a bridle can be attached".[6] PWGSC went on to further indicate that, if Tideland could modify its buoy to accommodate that stated need, as well as the other performance requirements, that product would be considered.

10. It is clear from Tideland's complaint submissions that it proceeded to bid on the RFSO.

11. On October 8, 2013, Tideland received an e-mail from the CCG, with the indication "Bid Loss Debriefing" in the subject line. It indicated that Tideland's bid had been rejected "as it did not meet all the mandatory criteria and was declared non-compliant".[7] The e-mail went on to list a number of areas of non-compliance.

12. On October 10, 2013, Tideland replied to the CCG, indicating that it would like to dispute the evaluation outcome. Tideland asserted in the e-mail that "the technical evaluation had significant oversights and gaps, and no clarifications were requested on items which are not disqualifiers".[8]

13. Choosing a specific mandatory criterion, the CCG inquired on the same day whether or not Tideland's "abrasion test" was done to the "ISO 9352" standard, requiring the cycling of plastic to 10,000 cycles.[9] A brief exchange of e-mails ensued between October 10 and 15, 2013, leading to the conclusion that Tideland had done its test to the "ASTM D4060" standard, with the cycling of plastic to 1,000 cycles. Tideland asserted in one of those e-mails that the two standards are identical and that, since the "wear rate" is constant, the figure for 10,000 cycles could be derived by way of a simple multiplication calculation. The CCG countered that other bidders also offered different abrasion tests as part of their bid packages and were similarly disqualified.[10]

14. On October 21, 2013, Tideland filed its complaint with the Tribunal. However, the complaint was deemed deficient, as it did not comply with the requirements of subsection 30.11(2) of the *CITT Act*. On October 22, 2013, the Tribunal received additional documents from Tideland, specifically, four amendments made to the RFSO. In accordance with subrule 96(1) of the *Canadian International Trade Tribunal Rules*,[11] the complaint was therefore considered to have been filed on October 22, 2013.[12]

TRIBUNAL ANALYSIS

15. 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

6. Complaint at tab 4.
7. Complaint at tab 5 at 6, 7.
8. Complaint at tab 5 at 6.
9. Complaint at tab 5 at 5.
10. Complaint at tab 5 at 1-3.
11. S.O.R./91-499 [*Rules*].
12. Subrule 96(1) of the Rules provides as follows: "A complaint shall be considered to have been filed (a) on the day it was received by the Tribunal; or (b) *in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection*" [emphasis added].

limits prescribed by section 6 of the *Regulations*; (ii) whether, pursuant to subsection 7(1) of the *Regulations*, the complainant is a potential supplier; (iii) whether, pursuant to subsection 7(1) of the *Regulations*, the complaint is in respect of a designated contract; and (iv) whether, pursuant to subsection 7(1) of the *Regulations*, 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*,[13] Chapter Five of the *Agreement on Internal Trade*,[14] the *Agreement on Government Procurement*,[15] Chapter Kbis of the *Canada-Chile Free Trade Agreement*,[16] Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,[17] Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*[18] or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*[19] applies.

16. 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: Tideland is a potential supplier; and the complaint is in respect of a designated contract.[20]

Timing

17. Section 6 of the *Regulations* stipulates time limits with regard to the filing of a procurement complaint.

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13. *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*].
14. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.
15. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.
16. *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
17. *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).
18. *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)].
19. *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/panama-toc-panama-tdm.aspx> (entered into force 1 April 2013).
20. Firstly, Annex 1001.1a-1 of Chapter Ten of *NAFTA* lists the DFO. Secondly, paragraph 1 of Annex 1001.1b-1 provides that the chapter ". . . applies to all goods, except to the extent set out in paragraphs 2 through 5 and Section B." Of the portions mentioned, paragraphs 3, 4 and 5 of Annex 1001.1b-1 do not pertain to Canada, and Section B lists certain goods. That listing does not include the goods that are in issue in this complaint. Paragraph 2 of Annex 1001.1b-1 pertains to Canada and provides as follows: "With respect to Canada, the goods listed in Section B purchased by the Department of National Defence and the Royal Canadian Mounted Police are included in the coverage of this Chapter, subject to Article 1018(1)." Article 1018(1) provides in essence that nothing in Chapter Ten shall be construed to prevent a Party to *NAFTA* from acting for the protection of its national security interests. Thus, in essence, paragraph 2 of Annex 1001.1b-1 includes goods listed in Section B within the ambit of Chapter Ten, but makes it possible for them to be restrictively procured if the Canadian Government decides to invoke Article 1018(1) for national security reasons. Since the goods that are in issue in this complaint are not listed in Section B, this possible national security "carve-out" does not apply to them; thus, the indication in paragraph 1 of Annex 1001.1b-1 that Chapter Ten ". . . applies to all goods . . ." rightly applies to them, and they are covered by *NAFTA*. Thirdly, the value of the contract at issue—estimated at $2.5 million—is larger than the threshold indicated for coverage by *NAFTA*. Lastly, Tideland, with its business location in Ontario, is a potential supplier.

18. Subsection 6(1) of the *Regulations* stipulates that ". . . a potential supplier who files a complaint with the Tribunal . . . shall do so 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."

19. Further, subsection 6(2) of the *Regulations* stipulates that "[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."

20. Thus, the question of whether subsection 6(1) or 6(2) of the *Regulations* applies with regard to a complaint turns on the prior question of whether or not an objection was made to the relevant government institution.

21. With regard to the facts at hand, the analysis under section 6 of the *Regulations* necessarily includes a brief examination of pertinent provisions of the trade agreements. Article 1007(1) of *NAFTA* provides that each party ". . . shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade." That article goes on to stipulate that any technical specification prescribed by its entities must be specified in terms of performance criteria rather than design or descriptive characteristics. Other trade agreements contain similar requirements regarding technical specifications.

22. Bearing in mind the contents of the CCG's e-mail of November 22, 2012, and the subsequent issuance of the RFSO on July 22, 2013, it can be concluded that Tideland's first ground of complaint, that the performance specification in the tender "had several datapoints that specifically disallowed"[21] its products from being compliant, is a complaint regarding the technical specifications of the RFSO. Further, in light of that same e-mail, followed by the issuance of the RFSO, the basis for that complaint became known to Tideland on the date the RFSO was issued, July 22, 2013. It is reasonable to conclude that Tideland's e-mail of July 30, 2013, sent six working days after the issuance of the RSO, was sufficiently specific to constitute an objection. However, subsequent to the CCG's response on the same day, which can reasonably be construed as a denial of relief, Tideland did not proceed with a complaint to the Tribunal until a few months later, on October 21, 2013. Thus, pursuant to subsection 6(2) of the *Regulations*, the Tribunal finds that Tideland's first ground of complaint was not filed in a timely manner.

23. Further, the trade agreements contain requirements regarding bid evaluation. Thus, for instance, Article 1015(4)(d) of *NAFTA* provides that an entity's contract award shall be made ". . . in accordance with the criteria and essential requirements specified in the tender documentation". Tideland's second ground of complaint, that the evaluation of tenders was "judged incorrectly" and that "minor technical divergence" was used to disqualify its bid, is essentially a complaint concerning bid evaluation.[22]

24. With regard to its second ground of complaint, it appears that the basis for Tideland's objection to the CCG regarding bid evaluation became known to Tideland on October 8, 2013. Tideland's e-mail of October 10, 2013, sent two working days later, was sufficiently specific to constitute an objection. Further, it is reasonable to conclude that subsequent e-mails by the CCG, culminating with an e-mail on October 15, 2013, were sufficiently clear as to constitute a denial of relief. Tideland filed its complaint with

21. Complaint at tab 1, 001 Statement of Argument and Facts.
22. Complaint at sections 4D and 5A.

the Tribunal on October 21, 2013, and due to the need to rectify a deficiency, that complaint was considered to have been filed on October 22, 2013, five working days after the CCG's last e-mail. Thus, pursuant to subsection 6(2) of the *Regulations*, the Tribunal finds that Tideland's second ground of complaint was filed in a timely manner.

Reasonable Indication of a Breach

Abrasion Test

25. The RFSO provides as follows in Annex B, pertaining to "Performance Specification", under section 2.3.3.4, "Abrasion Resistance":

> In general, the buoy shall be capable of withstanding abrasion loads generated from slow moving ice or river debris in all operational temperatures. The buoy's shell shall be abrasion tested in accordance with the standard test specification ISO 9532 '*Abrasion Resistance of Rigid Plastics*' (Taber Test) with Wheel CS 17, Load of 1 kg and be capable of resisting any wear when subjected to the conditions detailed in Annex A.[23]

26. The RFSO further provides as follows in Annex C, pertaining to "Evaluation Framework", under Chapter 3, "Mandatory Criteria":

> To demonstrate that they have met the mandatory technical criteria, bidders are required to provide, as a minimum, the following:
>
> . . .
>
> - A clear statement of compliance with the "shall", "will" and "must" statements in the Performance Specification;
>
> . . .

27. Thus, with regard to the question of an abrasion test, the RFSO established a clear criterion and an essential requirement and, further, from the documents filed by Tideland, it is clear that the evaluators adhered to that criterion in their evaluation. Thus, specifically with regard to the abrasion test, it appears that Tideland's complaint, concerning the usage of "minor technical divergence" to disqualify its bid, is essentially an assertion that the evaluators adhered too strictly to the established criterion.

28. The Tribunal has concluded on numerous occasions that it will not substitute its own judgment for that of the evaluators. Thus, for instance, in *IPSS Inc.*,[24] the Tribunal indicated the following:

> It should be noted that, as a matter of law, unless 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 or have based their evaluation on undisclosed criteria, the Tribunal will not substitute its judgment for that of the evaluators.

Safe Working Load

29. In Annex B to the RFSO, pertaining to performance specifications, under Table A.2.1 of Section A.2, pertaining to performance requirements, the RFSO indicates line item A.2.1.21 as "Lifting Eye

23. Amendment No. 4 to the RSO makes clear that the reference is to ISO 9352, making the initial reference to ISO 9532 a typographical error.
24. (1 October 2007), PR-2007-056 (CITT) at 1; *Valcom Consulting Group Inc.* (8 April 2013), PR-2013-001 (CITT) at para. 26.

Safe Working Load" and also indicates "See Section 2.3.3.1", which is in the portion relating to technical requirements of Annex B. That section, titled "Safe Working Load (SWL)", indicates that all ". . . lifting and mooring attachments and assemblies shall have a **minimum** safety factor of 5 for the life of the buoy."

30. In the e-mail of October 8, 2013, informing Tideland that its bid had been rejected "as it did not meet all the mandatory criteria and was declared non-compliant", the CCG provided a number of areas of non-compliance. The abrasion test referred to earlier was one, and another, concerning SWL, was as follows:[25]

> A.2.1.2.3 Lifting Eye Safe Working Load (SWL >=5) Although a drawing was provided indicating some of the loads asked for, there were no detailed engineering calculations.[26]

31. In its reply e-mail of October 10, 2013, Tideland indicated, with regard to SWL, as follows:

> A.2.1.23 SWL: Documentation required to satisfy this section is defined as "SD": Provide Engineering Drawings or Calculations to validate that this requirement has been met. The onus was placed on the tenderers to choose the appropriate method in which to demonstrate the requirements were met.[27]

32. Chapter 5 of Annex C, regarding rating ethodology, defines SD in the following manner:

> Submit Data (SD): Provide Engineering Drawings *or* Calculations to validate that this requirement has been met.
>
> [Emphasis added]

33. Thus, the aforementioned reply e-mail by Tideland points to a possible misinterpretation of the scope of a requirement by the evaluators, in that they appear to have assessed for detailed engineering calculations when the stated basis for fulfillment of the requirement appears to require either drawings or calculations but not necessarily both. Subsequent to that reply e-mail by Tideland, it appears that the CCG dropped the issue of SWL entirely and instead focussed solely on the issue of the abrasion test.

34. Thus, with regard to the second ground of Tideland's complaint, one head of complaint, concerning the evaluation of the abrasion test, is forestalled by settled jurisprudence, pursuant to which the Tribunal will not substitute its own judgment for that of the evaluators unless one or more of a number of factors are present; in this instance, they are absent.

35. The second head of complaint, concerning the evaluation of SWL, raises the possibility that the evaluators have wrongly interpreted the scope of a requirement and, as such, discloses a reasonable indication of a breach of the trade agreements.

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25. Complaint at tab 5 at 7.

26. As an aside, it should be noted that the tender documents refer to the SWL criterion in a number of ways. In Table A.2.1 of Annex B, it is referred to as item A.2.1.21, while, in Table A.2.2 of that same annex, it is referred to as item A.2.2.21. Further, in Table 1 of Chapter 4 of Annex C, it is referred to as item A.2.1.23, and the same reference is repeated in Table 1 of Chapter 5 of that annex. The CCG refers to it in the above-mentioned e-mail as item A.2.1.2.3. The extra period between the "2" and the "3" is likely a typographical error. In its reply to the CCG's e-mail on October 10, 2013, Tideland referred to it without that extra period, as item A.2.1.23. There is an overarching consistency in the fact that it is referred to either as "Lifting Eye Safe Working Load" or as "SWL".

27. Complaint at tab 5 at 5.

36. However, should the Tribunal proceed with an inquiry, it would be impossible for Tideland to emerge as a successful bidder since its non-compliance on the abrasion test requirement, which was rightly interpreted and rightly applied, would nonetheless stand.

37. Tideland's request from the Tribunal is for an award to the "correct winner". However, in light of the fact that no other bidders whose proposals may have been subjected to the same possible misinterpretation of the SWL requirement are known to the Tribunal, it would not be appropriate to allow Tideland to maintain complaints for theoretical parties that may exist, but that have not filed complaints.

38. Therefore, while the Tribunal finds that the complaint does disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements, it will not proceed with an inquiry since one would be of no practical effect, that is, it would not alter the outcome of the completed RFSO process. The Tribunal is guided in this reasoning by the jurisprudence in *E.H. Industries Ltd. v Canada (Minister of Public Works and Government Services)*,[28] wherein the Federal Court of Appeal indicated as follows:

> . . . the correct interpretation of subsections 7(1) and (2) must account for the fact that the functions to be performed are administrative in nature. That is, the decision of whether or not to investigate a complaint by conducting an inquiry is non-adjudicative and largely a matter of discretion to which CITT should be accorded a wide degree of deference. This is made abundantly clear in subsection 7(2) where even in the circumstance where the conditions set out in subsection (1) have been met, CITT may still decide not to conduct an inquiry.

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

DECISION

40. 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

28. 2001 FCA 48 (CanLII).