



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-029

R.H. MacFarlands (1996) Ltd.

*Decision made
Friday, December 20, 2013*

*Decision issued
Monday, December 23, 2013*

*Reasons issued
Monday, January 6, 2014*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

BY

R.H. MACFARLANDS (1996) 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.

Ann Penner
Ann Penner
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 COMPLAINT

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. W8476-144458/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the supply of five tracked line construction vehicles and ancillary items, including the provision of maintenance personnel training and operator training.

3. R.H. MacFarlands (1996) Ltd. (MacFarlands) alleged that PWGSC wrongly disqualified its proposal because it did not include a mandatory signature from a senior engineer as proof of compliance. MacFarlands complained that PWGSC's finding was unfair because its proposal complied with all the other mandatory technical evaluation criteria of the RFP and that the missing signature was a trivial issue that resulted from a relatively minor oversight.

4. As a remedy, MacFarlands requested that PWGSC reconsider its decision and award the contract to MacFarlands on the basis that its proposal met the mandatory technical evaluation criteria at the time of bid closing, notwithstanding the missing signature.

BACKGROUND INFORMATION

5. On August 26, 2013, PWGSC issued the RFP with a bid closing date of October 7, 2013. Several amendments were made, and the bid closing date was extended to October 31, 2013.

6. On December 5, 2013, PWGSC asked MacFarlands to confirm whether its proposal contained the necessary proof of compliance for the purposes of the evaluation process. Specifically, it asked whether the proposal was signed by a senior engineer representing the original equipment manufacturer (OEM), as per the proof of compliance definition in the purchase description of the RFP.

7. Between December 5 and 11, 2013,³ MacFarlands confirmed that the proof of compliance had been signed by the OEM's Director of Sales (not the Director of Engineering). It provided PWGSC with a copy of a signed letter from the OEM's Director of Engineering dated October 22, 2013, to supplement its proof of compliance.

8. On December 11, 2013, PWGSC informed MacFarlands by e-mail that its proposal was found to be non-complaint, as it did not meet all the mandatory criteria of the RFP. Specifically, the proposal lacked a signature from a senior engineer as proof of compliance at the time of bid closing. PWGSC also confirmed

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

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

3. The exact date is not entirely clear from the documents filed with the complaint, but it fell within this range.

that no contract had been awarded for this solicitation and that it would notify MacFarlands if the requirement was re-tendered.

9. That same day, MacFarlands e-mailed an objection to PWGSC, contesting the disqualification of its proposal.

10. On December 12, 2013, PWGSC replied to MacFarlands by e-mail, stating that it had no choice but to find MacFarlands' bid non-responsive, given that it did not meet all the mandatory technical evaluation criteria of the RFP.

11. MacFarlands and PWGSC exchanged additional e-mails between December 12 and 17, 2013. MacFarlands reiterated its objection and inquired about its options for appealing PWGSC's decision. PWGSC explained that MacFarlands was entitled to a debriefing and/or could file a complaint with the Office of the Procurement Ombudsman.

12. On December 18, 2013, a debriefing was held.

13. On December 19, 2013, MacFarlands filed its complaint with the Tribunal.

ANALYSIS

14. 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:

- whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- whether the complainant is an actual or potential supplier;
- whether the complaint is in respect of a designated contract; and
- 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*,⁴ Chapter Five of the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁸ Chapter Fourteen

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*].

of the *Canada-Colombia Free Trade Agreement*⁹ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹⁰ applies.

15. The Tribunal has determined that the first three conditions are met in this case: the complaint was filed within the prescribed time limits; the complainant is an actual bidder; and the complaint is in respect of a solicitation covered by the applicable trade agreements, including *NAFTA*, the *AIT* and the *AGP*. The analysis will therefore focus on the issue of whether the complaint discloses a reasonable indication of a breach of an applicable trade agreement, in accordance with paragraph 7(1)(c) of the *Regulations*.

16. Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the solicitation, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.” The *AGP*, *NAFTA*, the *CCFTA*, the *CPFTA*, the *CCOFTA* and the *CPAFTA* contain a similar obligation.¹¹

17. To apply that obligation to this complaint, the Tribunal must consider whether there is a reasonable indication that PWGSC did not evaluate MacFarlands’ bid in accordance with the mandatory technical evaluation criteria of the RFP.

18. Part 4, “Evaluation Procedures and Basis of Selection”, of the RFP specifically includes proof of compliance as one of the mandatory technical evaluation criteria of the RFP. It clearly states that “[b]idders must submit, with their bid, all proof of compliance required in the Purchase Description and the Technical Information Questionnaire.” Further, section 2, “Basis of Selection”, of Part 4 of the RFP states that “[a] bid must comply with the requirements of the bid solicitation and meet all mandatory technical and financial evaluation criteria to be declared responsive.”

19. Likewise, the DND “Technical Information Questionnaire”, which formed part of the tender documentation, stated as follows:

This questionnaire covers technical information, which *shall* be provided for evaluation of the configurations of the vehicle offered.

Where the specification paragraphs below indicate “*Proof of Compliance*”, the “*Proof of Compliance*” *shall* be provided for each performance requirement/specification.

Offerors should indicate the document name/title and page number where the *Proof of Compliance* can be found.

...

3.4 **Tracked Vehicle Performance – Proof of Compliance**

...

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. *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) [*CPAFTA*].

11. See Article 1015(4)(d) of *NAFTA*, Article XIII(4)(c) of the *AGP*, 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*.

20. “Proof of Compliance” was defined in the DND “Purchase Description for Tracked Line Construction Vehicle (40 ft)” dated April 2013, another part of the tender documentation, as follows:

“Proof of Compliance” – Is defined as an unaltered document, such as a brochure and/or technical literature and/or a third party test report provided by a nationally and/or internationally recognized testing facility and/or a report generated by a nationally and/or internationally recognized third party software. The document shall provide detailed information on each performance requirement and/or specification. *Where a document submitted as Proof of Compliance does not cover all the performance requirements and/or specifications or when no such document is available or when modifications to the original equipment or customization are required to achieve the performance requirements and/or specifications, a Certificate of Attestation (as a separate document) signed by a senior engineer representing the Original Equipment Manufacturer (OEM) detailing the modifications and how they meet the performance requirements and/or specifications shall be provided.* The certificate shall detail all performance requirements and/or specifications required to substantiate compliance. One certificate can be provided for one or all performance requirements and/or specifications.

[Emphasis added]

21. These provisions, all of which formed part of the RFP, clearly indicated that proof of compliance was a mandatory technical requirement that had to be met in order for a bid to be declared responsive. Most notably for this complaint, a signature from a senior engineer representing the OEM was required where a certificate of attestation was submitted as proof of compliance in response to paragraph 3.4 of the “Technical Information Questionnaire”.

22. The Tribunal recognizes the unfortunate circumstances that led to the disqualification of MacFarlands’ bid in this case. Indeed, the evidence indicates that MacFarlands’ proposal would have been found compliant with the RFP but for the missing signature.¹² Nevertheless, the Tribunal cannot intervene in cases where mandatory criteria are not met, regardless of how unfortunate the circumstances may be. Instead, the standard must remain one of strict compliance. Such a standard that *all* potential suppliers meet *every* mandatory requirement of *each* solicitation document is one of the cornerstones of the integrity of any tendering system.¹³ It ensures that all bidders are treated equitably and that all procurements are executed fairly and transparently.

23. Given that the signature of a senior engineer representing the OEM was required and necessary for MacFarlands’ bid to be declared responsive, PWGSC had a duty to ensure that the bid thoroughly and strictly complied with this requirement.

24. For its part, MacFarlands was fully responsible for demonstrating that it met all the mandatory requirements of the procurement.¹⁴ Put another way, it was incumbent on MacFarlands to ensure that its proposal clearly and strictly met the proof of compliance required in the “Purchase Description for Tracked Line Construction Vehicle (40 ft)” and the “Technical Information Questionnaire”.

12. An e-mail from PWGSC to MacFarlands dated December 16, 2013, stated that “. . . the only criterion for which your bid was found non-compliant was the lack of a signature from a senior engineer representing the Original Equipment Manufacturer (OEM) for the proof of compliance submitted”

13. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA). See, also, *Bell Canada* (26 September 2011), PR-2011-031 (CITT) at para. 27.

14. *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

25. While MacFarlands conceded that the proof of compliance submitted with its proposal lacked the signature of a senior engineer from the OEM, it argued that, nonetheless, it had been signed by the OEM's Director of Sales, on behalf of the company. Furthermore, MacFarlands subsequently provided the Director of Engineering's signature when PWGSC sought clarification during the evaluation process.

26. Nevertheless, the Tribunal finds that MacFarlands' proposal did not include the required signature of a senior engineer representing the OEM. Moreover, there is nothing to suggest that MacFarlands' proposal authorized the Director of Sales to sign on behalf of the Director of Engineering for the OEM. In fact, MacFarlands admitted that the submission of the wrong signature was an oversight. It was only after bid closing that MacFarlands provided a letter to PWGSC with the Director of Engineering's attestation in response to paragraph 3.4 of the "Technical Information Questionnaire".

27. In light of the mandatory technical criteria of the solicitation, the Tribunal finds the absence of the required signature of a senior engineer representing the OEM for the proof of compliance cannot be considered "trivial" or overlooked in this case. Rather, it was a substantive requirement of the solicitation with which MacFarlands failed to comply and the reason for which PWGSC justifiably declared the bid non-responsive.

28. Furthermore, the Tribunal finds that PWGSC had the right to seek clarification and request additional information to verify MacFarlands' satisfaction of the proof of compliance requirement during the bid evaluation period before award of a contract.¹⁵ However, as the Tribunal has indicated previously, a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.¹⁶ In the present case, MacFarlands' provision of the proof of compliance during the bid evaluation period constituted a substantive change to its bid that PWGSC could not accept at that stage.

29. Therefore, the complaint does not disclose a reasonable indication that PWGSC conducted the evaluation in a manner that violated the applicable trade agreements.

30. As a general comment, the Tribunal would continue to encourage PWGSC to be mindful of the importance of properly informing bidders of their recourse to the Tribunal, in appropriate circumstances. In this case, the exchange of e-mails between MacFarlands and PWGSC between December 12 and 17, 2013, shows that PWGSC, when asked about the options for appeal, referred MacFarlands to the Office of the Procurement Ombudsman with no mention of its recourse to the Tribunal. The next day, MacFarlands informed PWGSC that the Procurement Ombudsman had directed it to file its complaint with the Tribunal, in light of the monetary value of the procurement.

31. Although the present complaint was filed within the prescribed time limits under section 6 of the *Regulations*, it clearly took MacFarlands additional time to determine its appeal options, without having been fully informed by PWGSC, which could have easily resulted in its complaint not being accepted for inquiry on the basis of timeliness alone, given the tight timelines for filing a complaint with the Tribunal. In this regard, and as previously stated by the Tribunal,¹⁷ PWGSC should consider the inclusion of the

15. See Part 2 of the RFP, which incorporates by reference article 16, "Conduct of Evaluation", of PWGSC's 2003 "Standard Instructions – Goods or Services – Competitive Requirements" document.

16. *Mechron Energy Ltd.* (18 August 1995), PR-95-001 (CITT); *Bosik Vehicle Barriers Ltd. v. Department of Public Works and Government Services* (6 May 2004), PR-2003-082 (CITT).

17. *ADR Education* (16 July 2013), PR-2013-009 (CITT).

following paragraph in the main body of its solicitations and when informing bidders of the possibility of requesting a debriefing, as well as in all letters advising bidders when they are not successful:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) **within 10 working days** from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [PWGSC]; if [PWGSC] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal's Web site (www.citt-tcce.gc.ca) or by contacting the Secretary of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

DECISION

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

Ann Penner

Ann Penner

Presiding Member