



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-034

Hoskin Scientific

*Decision made
Thursday, January 23, 2014*

*Decision issued
Thursday, January 23, 2014*

*Reasons issued
Wednesday, January 29, 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

HOSKIN SCIENTIFIC

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 THE COMPLAINT

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. W7701-145785/A), which was issued on November 22, 2013, by the Department of Public Works and Government Services (PWGSC) on behalf of Defence Research and Development Canada (DRDC) – Valcartier, an agency of the Department of National Defence, for the provision of video cameras and related software.

3. Hoskin Scientific (Hoskin) complained that PWGSC improperly rejected its proposal on the basis that it was received after the deadline of January 2, 2014, at 2:00 p.m. Eastern Standard Time (hereafter, the deadline). As a remedy, Hoskin requested that its proposal be accepted by PWGSC for consideration.

BACKGROUND INFORMATION

4. On December 31, 2013, Hoskin sent its proposal to PWGSC's bid receiving office in Gatineau, Quebec, via Purolator Inc. (Purolator) for delivery by noon on January 2, 2014. The morning of January 2, 2014, Hoskin checked the status of its delivery with Purolator and was told that the package would not be delivered until January 3, 2014.

5. Upon learning this, Hoskin faxed its proposal to the fax number indicated in the tender documentation. It received a confirmation from its fax machine that all 28 pages had been successfully transmitted to PWGSC before the deadline.

6. Hoskin also tried to contact PWGSC's contracting officer to ensure that the fax had been received but was unable to reach her. It therefore sent her an e-mail advising that a fax had been sent and that she would receive another copy of the proposal by courier on January 3, 2014. Hoskin also attached a full copy of its proposal to the e-mail.

7. On or after January 6, 2014, PWGSC told Hoskin that it was unable to find the fax. On January 15, 2014, a PWGSC bid receiving manager told Hoskin that its proposal could not be considered because it had not been received before the deadline.

8. On January 20, 2014, Hoskin filed a complaint with the Tribunal.

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

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

TRIBUNAL ANALYSIS

9. Upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether four conditions have been met before an inquiry can be conducted:

- whether the complaint was 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*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁸ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*⁹ applies.

10. In the Tribunal's view, the first three conditions have been met: the complaint was filed within the prescribed time limits; the complainant is a potential supplier; and the complaint is in respect of a contract covered at least by *NAFTA*. The analysis will therefore focus on the last condition, namely, whether the complaint discloses a reasonable indication of a breach of an applicable trade agreement.

11. Article 1013(1) of the *NAFTA* provides as follows:

Article 1013: Tender Documentation

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h). The documentation shall also include:

- (a) the address of the entity to which tenders should be submitted;

...

3. *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*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

6. *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.

7. *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).

8. *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).

9. *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).

(d) the closing date and time for receipt of tenders and the length of time during which tenders should be open for acceptance;

...

12. Article 1015(1) of the *NAFTA* provides as follows:

Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts

...

2. No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.

...

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

13. In the Tribunal's view, the solicitation clearly indicated the date, time and place for the submission of proposals. The cover page of the RFP clearly stated that the solicitation closed at 2:00 p.m. Eastern Standard Time on January 2, 2014. It also provided an address and fax number to which proposals were to be sent.

14. Part 4 of the RFP, titled "**EVALUATION PROCEDURES AND BASIS OF SELECTION**", required proposals to "... comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive."

15. Part 2 of the RFP, titled "**BIDDER INSTRUCTIONS**", explicitly incorporated by reference the 2003 (2013-06-01) Standard Instructions – Goods or Services – Competitive Requirements (the Standard Instructions). The Standard Instructions provide as follows:

05 (2013-06-01) Submission of Bids

...

2. It is the Bidder's responsibility to:

...

c. submit by closing date and time a complete bid;

d. send its bid only to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit specified on page 1 of the bid solicitation or to the address specified in the bid solicitation. The facsimile number and related instructions for bids transmitted by facsimile are provided in section 08;

...

07 (2012-03-02) Delayed Bids

1. A bid delivered to the specified bid receiving unit after the closing date and time but before the contract award date may be considered, provided the bidder can prove the delay is due solely to a delay in delivery that can be attributed to the Canada Post Corporation (CPC)

(or national equivalent of a foreign country). Purolator Inc. is not considered to be part of CPC for the purposes of delayed bids. . . .

...

08 (2012-03-02) Transmission by Facsimile

1. Unless specified otherwise in the bid solicitation, bids may be submitted by facsimile. The only acceptable facsimile number for responses to bid solicitations issued by PWGSC headquarters is 819-997-9776 or, if applicable, the facsimile number identified in the bid solicitation. . . .
2. For bids transmitted by facsimile, Canada will not be responsible for any failure attributable to the transmission or receipt of the faxed bid including, but not limited to, the following:
 - a. Receipt of garbled or incomplete bid;
 - b. Availability or condition of the receiving facsimile equipment;
 - ...
 - d. Delay in transmission or receipt of the bid;

...

16. As noted above, Hoskin used Purolator to attempt to have its proposal delivered to PWGSC. Had all gone according to plan, Purolator was to have delivered the proposal by 10:30 a.m. on January 2, 2014, ahead of the deadline. Unfortunately, however, Purolator was unable to deliver the proposal until January 3, 2014. Nevertheless, the Tribunal is unable to do anything in this regard. Section 07 of the Standard Instructions is very clear: PWGSC may consider proposals delivered after the deadline only when the delay is due to some fault of CPC only, not Purolator.

17. Hoskin also attempted to deliver its proposal by fax. While it sent its proposal to the correct fax number, received a confirmation of successful transmission¹⁰ and attempted to contact the PWGSC contracting officer to confirm that the fax had been received, PWGSC claims that it did not receive the fax on time.

18. Once again, while this is unfortunate, the Tribunal cannot act. Section 08 of the Standard Instructions places the responsibility completely on the bidder to ensure that PWGSC receives a proposal sent by fax. It states that “Canada will not be responsible for any failure attributable to the transmission or receipt of the faxed bid” The Tribunal finds that, as Hoskin has not provided evidence confirming that PWGSC actually received the fax, it did not meet its responsibility as required in the Standard Instructions. PWGSC, therefore, acted within its authority to declare the proposal late.

19. There is no doubt that Hoskin did everything that it could in an attempt to ensure PWGSC received its proposal. Likewise, the deadline, which came just after a statutory holiday, surely added to the difficulties that Hoskin encountered. Nevertheless, the Tribunal cannot conclude from the evidence that there is a reasonable indication that an applicable trade agreement was breached.

20. In future, it would be helpful for PWGSC to ensure that a contracting officer is always available on the day on which solicitations are to be received to assist potential bidders if they need to confirm whether or not a proposal has been received. In Hoskin’s case, had it been able to reach PWGSC’s contracting officer on January 2, 2014, it would have known that its fax had not been received. It could have taken

10. Complaint at 42.

additional steps to ensure its proposal was submitted on time. Ensuring that a contracting officer is available for questions and concerns, especially on the day after a statutory holiday, will only improve the fairness, transparency and openness of the entire procurement system.

DECISION

21. 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