



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2018-033

Geodesy Group Inc.

*Decision made  
Tuesday, October 2, 2018*

*Decision issued  
Wednesday, October 3, 2018*

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**

**GEODESY GROUP INC.**

**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  
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Serge Fréchette  
Presiding Member

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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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] For the reasons provided below, the Tribunal has decided not to conduct an inquiry into this complaint.

## SUMMARY OF THE COMPLAINT

[3] This complaint relates to a Request for Proposal (RFP) (Solicitation No. F2470-180018/B) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans for the provision of colour digital aerial imagery for 60 small craft harbours located in Ontario, Manitoba, Saskatchewan, Alberta, the Northwest Territories and Nunavut. The RFP required that all imagery was to be obtained between September and October 2018 and that all deliverables were to be completed by November 30, 2018.

[4] The complainant, Geodesy Group Inc. (Geodesy), alleges that PWGSC erred in finding its proposal non-compliant with the requirements of the bid solicitation and the mandatory criteria. Geodesy also submits that the requirements of the RFP were flawed in that it would be difficult to guarantee project completion by the required date due to the limited time available and the variable autumn weather. Geodesy asks that a new solicitation be issued.

## BACKGROUND

[5] The RFP was issued on August 17, 2018, with a closing date of September 4, 2018. Geodesy submitted a bid in response to this RFP within the allotted time frame.

[6] On September 10, 2018, PWGSC wrote to Geodesy asking for clarification as to (1) why Geodesy states in its bid that it will “fly and photograph what we can”; (2) whether Geodesy is able to meet ALL the deliverable dates as specified in the statement of work; and (3) why Geodesy included its own terms and conditions in its bid and whether Geodesy agrees to all of Canada’s terms and conditions listed in the RFP.

[7] That same day Geodesy responded to PWGSC’s request indicating, among other things, that:

- “. . . to acquire suitable imagery for your purposes we require good weather conditions along with suitable ground conditions . . . I can in no way promise or guarantee we are able to fly all your sites especially given the days available. . . . 35 to 46 available days and weather in Canada in the fall will not make ALL those days suitable for photo acquisition. So Geodesy ‘will fly and photograph

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].  
2. S.O.R./93-602 [*Regulations*].

what we can' given the time afforded this project and when the weather is suitable for us to do the work"; and

- Geodesy agreed to the terms and conditions listed with the solicitation, and that it also had a "requirement to be paid for the work that does get completed and delivered under this contract."

[8] PWGSC awarded a contract to Harbour Aerial Photography on September 14, 2018. That same day, PWGSC notified Geodesy that it was not the successful bidder as it did not comply with all the requirements of the bid solicitation and the mandatory criteria. PWGSC's rejection letter indicated two reasons for declaring Geodesy's bid non-compliant:

- Geodesy's statement that it will fly and photograph what it can given the time afforded this project rendered its bid non-compliant.
- Geodesy's statement that it required payment "for the work that does get completed and delivered under this contract" rendered the bid non-compliant as Geodesy was applying its own terms and conditions and not agreeing to the terms and conditions in the RFP.

[9] On September 17, 2018, Geodesy emailed PWGSC to advise that it would be filing a complaint with the Tribunal. Geodesy submitted its complaint to the Tribunal on September 25, 2018. On September 26, 2018, the Tribunal advised Geodesy that additional information was required before its complaint could be considered filed and asked Geodesy to file a copy of its September 17 email to PWGSC. Geodesy filed a copy of the email that same day. As a result, Geodesy's complaint was considered filed as of September 26, 2018.

## **RELEVANT PROVISIONS OF THE RFP**

[10] The following requirements of the RFP are relevant to the complaint:

### **2.1 Standard Instructions, Clauses and Conditions**

...

Bidders who submit a bid agree to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract.

...

### **3.1 Bid Preparation Instructions**

... Canada requests that the Bidder submits its bid in separately bound sections as follows:

Section I: Technical Bid (2 hard cop[ies])

Section II: Financial Bid (1 hard copy)

Section III: Certifications (1 hard copy)

...

## **Section I: Technical Bid**

In their technical bid, Bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet the requirements. . . .

...

## **Section II: Financial Bid**

Bidders must submit their financial bid in accordance with the Basis of Payment . . . .

...

### **4.1.1.1 Mandatory Technical Criteria**

- a) Bidder must demonstrate ability to perform the full scope of work described in Annex A, Statement of Work.
- b) Provision of pricing as requested in Annex B, Basis of Payment.

...

### **4.2.1 Basis of Selection – Highest Combined Rating of Technical Merit and Price**

1. To be declared responsive a bid must:

- a. comply with all the requirements of the bid solicitation; and
- b. meet all mandatory criteria; and
- c. obtain the requirement minimum of “0” points overall for the technical evaluation criteria which are subject to point rating. . . .

...

### **6.4.1 Delivery Date**

All the deliverables must be received on or before November 30, 2018.

...

### **6.7.1 Basis of Payment**

In consideration of the Contractor satisfactorily completing all of its obligations under the Contract, the Contractor will be paid a firm unit prices as specified in Annex B for a cost of \$ **To be determined** (insert the amount at contract award). . . .

...

## **ANNEX “A”**

## STATEMENT OF WORK

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### 3.0 Objectives of the Requirement

Fisheries and Oceans Canada (DFO) – Small Craft Harbours (SCH) Branch requires a Contractor to provide colour digital aerial imagery of a large number of sites in Ontario (ON), Manitoba (MB), Saskatchewan (SK), Alberta (AB), Northwest Territories (NT) and Nunavut (NU). The purpose of the project is to obtain high quality, detailed, and accurate imagery coverage for 60 identified SCH harbours.

The large number of sites and a logistical acquisition window requires a focused and detailed acquisition plan in order to ensure project success. This imagery will be used by DFO for site assessment, mapping, planning, historical and future analysis and other activities

The general requirement entails colour imagery, Orthoimagery and ‘Single Strip’ imagery;

All imagery acquisition must be completed between September and October 2017 and all deliverables completed by November 30, 2018.

...

### 12.0 Time Schedule for Completion of Each Phase

Phase 1: To be completed prior to October 31, 2018.

Phase 2: To commence upon approval from the Project Authority and be completed by November 30, 2018.

## ANNEX “B”

### BASIS OF PAYMENT

#### Instructions

...

4. The Basis of Payment shall be a fixed lump sum price for each phase of the Contract.
5. There will be no additional payment for travel to and from the project site or for accommodations.
6. There will be no additional payment for any expenses incurred while waiting for acceptable environmental conditions.
7. There will be no payment for flights cancelled due to operational, weather, or other conditions experienced by the contractor.

...

## ANALYSIS

[11] 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 the applicable trade agreements.

[12] Geodesy has submitted two separate, but related, grounds of complaint. First, Geodesy alleges that PWGSC erred in finding its proposal non-compliant with the requirements of the bid solicitation and the mandatory criteria. Second, Geodesy alleges that the requirements of the RFP were flawed in that it would be difficult to guarantee project completion by the required date because of the limited time available and the variable autumn weather. In its view, no company could guarantee that it could fly all 60 sites by the deadline set out in the RFP.

[13] Regarding the first ground, the Tribunal has reviewed Geodesy's bid as well as its response to PWGSC's clarification questions, and finds that it was reasonable for PWGSC to conclude that Geodesy's bid was non-compliant. Regarding the second ground, the Tribunal finds that it is time-barred.

### **Ground 1: Geodesy's bid did not comply with the mandatory terms of the RFP**

[14] Geodesy clearly indicated to PWGSC that it "can in no way promise or guarantee that [it is] able to fly all your sites especially given the days available" and that it would "fly and photograph what [it] can" given the time afforded this project and the variable weather that is common in September and October. By making these statements Geodesy introduced elements of uncertainty and ambiguity regarding its acceptance of the mandatory requirements of the RFP, and ultimately the compliance of its bid. This runs counter to the principle that bidders must exercise due diligence when preparing a bid to ensure that their bids are unambiguous.<sup>3</sup>

[15] Moreover, the Tribunal finds that it was reasonable for PWGSC to conclude that Geodesy's statements conflicted with the requirement to provide the full scope of work described in the statement of work and to acquire all images prior to October 31, 2018. As these were mandatory requirements of the RFP, accepting Geodesy's bid as compliant would be contrary to the provision of the *Canadian Free Trade Agreement* that a tender must comply with the essential requirements of the tender documentation to be considered for award.<sup>4</sup>

[16] Further, Geodesy clearly indicated to PWGSC that it expected to be paid for the sites that it successfully completed and delivered. However, this statement is contrary to the requirements of the RFP. The RFP indicated that bidders who submit a bid agree to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract.

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3. *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013) PR-2013-005 and PR-2013-008 (CITT) at para. 37.

4. Article 515(4), *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

In addition, the basis of payment provisions clearly stated that payment would be in the form of a fixed lump sum price for the completion of each phase of the contract.<sup>5</sup> By stating that it intended to be paid for each site that was completed, Geodesy was effectively rejecting the basis of payment terms in the RFP. As such, PWGSC's conclusion that Geodesy did not agree to the terms and conditions in the RFP was also reasonable.

[17] On the basis of the foregoing, the Tribunal finds that it was reasonable for PWGSC to conclude that Geodesy did not meet the mandatory requirements of the RFP and was therefore non-compliant.

### **Ground 2: Geodesy's claim that the requirements of the RFP were flawed is late**

[18] As noted above, Geodesy also submits that the requirements in the RFP were flawed in that it would be difficult for any company to guarantee project completion by the required date due to the limited time available and the variable autumn weather. These concerns appear to be the very reason that Geodesy's bid included a number of qualifications in relation to the terms of the RFP. In the Tribunal's view, this demonstrates that Geodesy's concerns with the statement of work and the payment terms were apparent on the face of the RFP. As such, any objection or complaint about these requirements had to be made in a timely manner, that is, within 10 days from the moment that Geodesy became aware of these concerns (i.e. on August 17, 2018, when the RFP was issued, or when Geodesy obtained a copy of the RFP). In this regard, the Tribunal notes that bidders 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.<sup>6</sup> As this complaint was not filed with the Tribunal until September 26, 2018, the Tribunal finds this aspect of Geodesy's complaint to be late.

### **DECISION**

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

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Serge Fréchette  
Serge Fréchette  
Presiding Member

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5. Phase one of the contract was the imagery acquisition phase and was to be completed prior to October 31, 2018. Phase two of the contract was the delivery of various imagery and was to be completed by November 20, 2018.  
6. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 20-21.