



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2018-039

Textus inc.

*Decision made  
Wednesday, November 14, 2018*

*Decision issued  
Friday, November 16, 2018*

*Reasons issued  
Monday, November 26, 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**

**TEXTUS 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.

Jean Bédard

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Jean Bédard, Q.C.  
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] The Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

### SUMMARY OF COMPLAINT

[3] The complaint concerns a Request for a Standing Offer (RFSO) (Solicitation No. E60ZG-180493/A) issued by the Department of Public Works and Government Services (PWGSC)<sup>3</sup> for the provision of investigative services related to harassment complaints, disclosures of wrongdoing and workplace violence.

[4] In its complaint, Textus inc. contends that PWGSC erroneously or inconsistently applied the technical point-rated evaluation criteria of the RFSO when it evaluated its bid.

### BACKGROUND

[5] The RFSO was published on December 6, 2017.<sup>4</sup> The closing date was February 7, 2018. Textus inc. submitted a bid in response to the RFSO within the allotted time.

[6] On July 17, 2018, Textus inc. learned that its bid was unsuccessful. Between July 17 and August 10, 2018, Textus inc. and PWGSC, including the Office of the Assistant Deputy Minister, Procurement Branch, exchanged several emails. In those exchanges, PWGSC indicated that the Textus inc. file had been forwarded to the evaluation team for review, and the Office of the Assistant Deputy Minister at PWGSC indicated that PWGSC had “forwarded [Textus inc.’s] complaint to the Special Investigations and Internal Disclosure Branch of Public Services and Procurement Canada” [translation]. In both cases, PWGSC promised a follow-up.

[7] Textus inc. filed its first complaint with the Tribunal on August 14, 2018.

[8] 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

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

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

3. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.

4. Eleven amendments were published for this RFSO. Only amendments 004 and 009 pertain to this complaint and they are addressed below.

10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

[9] As Textus inc. had not yet received a denial of relief from PWGSC within the meaning of subsection 6(2) of the *Regulations*, the Tribunal decided not to conduct an inquiry into the complaint. However, the Tribunal indicated that that decision didn’t preclude Textus inc. from filing a new complaint within 10 working days of receiving a denial of relief from either authority at PWGSC.

[10] On November 7, 2018, Textus inc. received an email from the Assistant Deputy Minister, Departmental Oversight Branch (DOB). In that email, the Assistant Deputy Minister, DOB, indicated that the Special Investigations and Internal Disclosure (SIID) service had conducted a review of the allegations by Textus inc. According to the Assistant Deputy Minister, DOB, “SIID finds that the offer by Textus inc. was evaluated in a prompt, thorough, fair and transparent manner and in accordance with the requirements of the RFSO; as such, the DOB considers the allegation to be unfounded” [translation].

[11] On November 12, 2018, Textus inc. filed the present complaint with the Tribunal.

### RELEVANT PROVISIONS OF THE RFSO

[12] The point-rated technical evaluation criteria regarding relevant experience, i.e. criteria RTA1, RTB1 and RTC1, provided as follows:<sup>5</sup>

RTA1. RELEVANT EXPERIENCE	POINTS ALLOCATED	SCORE
The Offer should demonstrate that, <b>within the last ten (10) years</b> , each proposed resource has completed additional Investigative Services Projects as lead, sole investigator or as co-investigator relating to [the relevant stream].  These projects must be <u>over and above</u> those listed in <b>MTA1</b> .		
• Two projects	30	
• Three projects	40	
• Four projects	50	
• Five projects	70	
• Six or more projects	90	
In order for a project to be evaluated, the Offer should include as a minimum, the following information:  a) Duration of the Project (start date to completion date);		

5. This example is taken from criterion RTA1 (Stream 1 of the RFSO, regarding harassment complaints). The requirements for the other streams (for criteria RTB1 pertaining to disclosures of wrongdoing, and RTC1 pertaining to workplace violence) are identical.

b) Nature of the investigation (brief description); c) Description of the offeror's role (brief description of the responsibilities & duties involved in completing the project); and d) Name of the client (public or private sector entity) and project authority name.  The Offer should include current telephone number and/or e-mail address address of the project authority, if available.		
<b>Maximum points</b>	<b>90</b>	

[13] In the instructions pertaining to the point-rated technical criteria, the RFSO indicated that “[t]he Offer which fails to obtain the required minimum number of points specified will be declared non-responsive.” For each of the streams, the RFSO indicated the minimum amount of points required for the combined point-rated technical evaluation criteria in order for the offer to be considered responsive, that is, 60% or 113 points.<sup>6</sup>

[14] Moreover, the questions and answers during the bid process confirm that the minimum information indicated in the RFSO for each of the three streams – RTA1, RTB1 and RTC1 – was required for a project to be evaluated.<sup>7</sup>

[15] Finally, the RFSO included a reference to the provisions of the document entitled 2006 (2017-04-27) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements.<sup>8</sup> The relevant clauses that made up an integral part of the RFSO indicated the following:

**05 (2014-09-25) Submission of offers**

...

2. It is the Offeror's responsibility to:

...

b. prepare its offer in accordance with the instructions contained in the RFSO;

c. submit by closing date and time complete offer;

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6. See Attachment 1 to Part 4 of the RFSO, including the instructions and the table of technical evaluation criteria, the most recent version of which can be found in Amendment No. 004 of the RFSO.
7. See Amendment No. 004 of the RFSO, question and answer 021: “**QUESTION 021:** Several of our past cases have elements of harassment, workplace violence, and wrongdoing in them. Can they be used in all streams if there are elements of harassment, workplace violence, and wrongdoing in them? Or can they only be counted once? **ANSWER 021:** If a specific project is relevant to each of the three streams, it may be identified within each of the three streams MTA1, MTB1, MTC1 or RTA1, RTB1, RTC1. In order for a project to be evaluated, it must include the minimum information indicated in the RFSO.” See also Amendment No. 009, question and answer 037, in a similar vein.
8. PWGSC, *Standard Acquisition Clauses and Conditions (SACC) Manual*, 2006 (2017-04-27) Standard Instructions – Request for Standing Offers - Goods or Services – Competitive Requirements, on line: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/21>>.

...

f. provide a comprehensible and sufficiently detailed offer, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the RFSO.

7. Unless specified otherwise in the RFSO, Canada will evaluate only the documentation provided with an offeror's offer. . . .

#### **16 (2008-12-12) Conduct of evaluation**

1. In conducting its evaluation of the offers, Canada may, but will have no obligation to, do the following:

a. seek clarification or verification from offerors regarding any or all information provided by them with respect to the RFSO;

b. contact any or all references supplied by offerors to verify and validate any information submitted by them;

...

f. verify any information provided by offerors through independent research, use of any government resources or by contacting third parties;

...

### **ANALYSIS**

[16] On November 14, 2018, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

[17] Pursuant to section 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following four conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;
- the complainant is a potential supplier;
- the complaint is in respect of a designated contract; and
- the information provided discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.<sup>9</sup>

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9. The trade agreements that seem applicable to the services at issue are the following: *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) [*CFTA*]; *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the*

[18] In the case at hand, the Tribunal found that the information provided by Textus inc. did not reasonably show that PWGSC had breached the trade agreements applicable to the solicitation in question and, therefore, that the complaint does not meet the fourth condition for commencing an inquiry.

[19] The relevant provisions of the applicable trade agreements in this case stipulated that the procuring entity provide potential suppliers with all the information they need to prepare and submit a responsive bid, including the award criteria to be considered in the evaluation of bids and the awarding of the contract.<sup>10</sup>

[20] The trade agreements also stipulate that, to be considered for contract award, a tender must, at the time of opening, conform to the essential requirements set out in the tender documentation. They also stipulate that procurement entities award contracts in accordance with the evaluation criteria specified in the tender documentation.<sup>11</sup>

[21] Textus inc. asserts that PWGSC applied the point-rated technical evaluation criteria set out in the RFSO inconsistently or incorrectly by giving the candidate proposed by Textus inc. a rating of “0” for relevant experience, for all three streams (RTA1, RTB1 and RTC1) of the RFSO. Textus inc. also asserts that the evaluators did not exercise reasonable diligence in carrying out their work.

[22] Firstly, in its bid, Textus inc. answered criteria RTA1, RTB1 and RTC1 by providing lists of numerous investigations.<sup>12</sup> However, the information provided essentially only contained the name of the client organization and the date on which the investigation concluded. Textus inc. essentially acknowledges this situation in its complaint: “We responded with a list of investigations conducted by Mr. Robert Cantin (senior and sole investigator) over the last 10 years, including the date and the client department . . . . The rating of “0” was given because there were insufficient details for each investigation” [translation].

[23] Textus inc. maintains nonetheless that the information contained in its bid shows *prima facie* that there is no doubt regarding its candidate’s experience and that “only a few details were missing” [translation]. It also maintains that these “inadvertent minor errors or difficulties” [translation] could have been clarified or corrected, and that a careful and reasonable review by the evaluators should have led them to request additional information from the clients identified in the bid or from the

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*Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA]; *Canada-Colombia Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng>> (entered into force 15 August 2011) [CCOFTA]; *Canada-Peru Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009) [CPFTA]; *Canada-Panama Free trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>> (entered into force 1 April 2013) [CPAFTA].

10. See Article 509(7) of the *CFTA*; Article 1013(1) of *NAFTA*; Article 1407(6) of the *CCOFTA* and the *CPFTA*; Article 16.08(6) of the *CPAFTA*.

11. See Articles 515(4) and (5) of the *CFTA*; Articles 1015(4)(a) and (d) of *NAFTA*; Articles 1410(4) and (5) of the *CCOFTA* and the *CPFTA*; Articles 16.11(4) and (5) of the *CPAFTA*.

12. In particular, 44 investigations are listed for criterion RTA1 alone.

bidder. Textus inc. seems in fact to be arguing that, given the lengthy list of investigations provided in the bid, PWGSC should itself have sought verification and thus obtained the “details” that were missing in the bid. Textus inc. maintains that this would not have resulted in injustice for other bidders, and that the level of experience was not debatable or dubious.

[24] It seems that, contrary to what was expressly stipulated in the RFSO, Textus inc. did not fully address the relevant experience for the TCA1, TCB1 and TCC1 criteria in the documents it submitted. Moreover, it seems that Textus inc. expected PWGSC to request additional information as needed. However, there is no reasonable indication that such an approach was permitted under the process defined in the RFSO. Even considering that Canada may, but has no obligation to, request *clarifications* regarding information provided by the bidder,<sup>13</sup> under the rules set out in the RFSO and well-established procurement principles, PWGSC could not, under any circumstances, accept, after the RFSO closing date, any additional information that was not in the bid from Textus inc. In fact, doing so could have led to an impermissible bid repair, and as such breach the requirements of trade agreements.<sup>14</sup> For the same reason, PWGSC could not take into consideration the correspondence from references provided by Textus inc. *after* the RFSO closing date.

[25] Secondly, Textus inc. notes that its bid contained detailed information on 18 investigations listed under the mandatory technical criteria regarding experience (i.e. MTA1, MTB1 and MTC1), namely, six investigations per stream, whereas these criteria requested “at least five (5) projects”.

[26] However, the RFSO indicated, under criteria RTA1, RTB1 and RTC1, that, in order to demonstrate relevant experience, projects had to “be over and above those listed in” MTA1, MTB1 and MTC1. This information could therefore not be considered by PWGSC. Even assuming that PWGSC could have considered the fact that Textus inc. had provided six examples of projects for each stream of the RFSO as mandatory technical criteria, i.e. one more than the required minimum, and that the sixth example for each stream could then be counted as an additional project to be evaluated under the point-rated technical criteria, the point-rated technical criteria for each of the streams only assigned points based on a minimum of two relevant projects in the stream.

[27] In summary, there is no aspect of Textus inc.’s complaint that reasonably shows it should have been awarded a greater number of points. In its complaint, Textus inc. itself even acknowledged that some information required by the RFSO was missing from its bid.

[28] The Tribunal therefore finds that there is no reasonable indication that the procurement procedure was not followed in accordance with trade agreements.

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13. PWGSC, *Standard Acquisition Clauses and Conditions (SACC) Manual*, 2006 (2017-04-27) Standard Instructions – Request for Standing Offers - Goods or Services – Competitive Requirements, on line: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/21>>.

14. *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 (CanLII), at para. 22; *Maxxam Analytics Inc. v. Department of Public Works and Government Services* (20 September 2007), PR-2007-017 (CITT), at para. 37; *Bell Mobility v. Department of Public Works and Government Services* (16 July 2004), PR-2004-004 (CITT), at para. 36-37; *NOTRA Environmental Services Inc.* (16 December 1997), PR-97-027 (CITT).



**DECISION**

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

Jean Bédard  
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Jean Bédard, Q.C.  
Presiding Member