



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2018-066

MTM-2 Contracting Inc.

*Decision made  
Thursday, March 14, 2019*

*Decision issued  
Friday, March 15, 2019*

*Reasons issued  
Monday, March 25, 2019*

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**

**MTM-2 CONTRACTING INC.**

**AGAINST**

**THE PARKS CANADA AGENCY**

**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.

Rose Ann Ritcey  
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Rose Ann Ritcey  
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 that follow, the Tribunal has decided not to conduct an inquiry into the complaint.

## SUMMARY OF COMPLAINT

[3] On March 7, 2019, MTM-2 Contracting Inc. (MTM-2) filed a complaint with the Tribunal regarding an invitation to tender (ITT) (Solicitation No. 5P201-18-0092/B) issued on November 16, 2018, by the Parks Canada Agency (Parks Canada) for the replacement of Horseshoe Lake Dam and Twelve Mile Lake Dam.

[4] MTM-2 argued that it had submitted its bid as a joint venture with Chant Limited (Chant) and that Parks Canada had incorrectly rejected the experience of Chant in relation to a project proposed for dam contractor experience under Section 1.1.B.2.iii. In addition, MTM-2 alleged that Parks Canada had incorrectly applied a prorated value to one of the projects proposed for dam construction site superintendent experience under Section 2.1.A.2.iii. MTM-2 also made certain allegations regarding the winning bidder.

[5] MTM-2 asked that the award of the contract be postponed, that the bids be re-evaluated, and that Parks Canada open MTM-2's financial bid. In the alternative, MTM-2 asked that the solicitation be cancelled and that a new solicitation for the designated contract be issued.

## BACKGROUND

[6] On February 6, 2019, MTM-2 was informed that its bid was not successful and that a contract had been awarded to the lowest compliant bidder, Effiage Innovative Canada Inc.

[7] MTM-2 was provided a debriefing on February 14, 2019, during which MTM-2 discussed with Parks Canada its issues with the evaluation. Parks Canada stated that it would answer MTM-2 in the next few days.

[8] On February 19, 2019, Parks Canada sent an email to MTM-2, indicating that it had reviewed MTM-2's submission and concluded that the evaluation had been completed accurately and that the submission was still deemed non-responsive. The same day, MTM-2 replied to Parks Canada, noting that the issues it had raised at the debriefing had not been addressed by Parks Canada.

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

[9] On February 21, 2019, Parks Canada replied that, after reviewing the requirements and results of the evaluation, it determined that the results of the evaluation and debriefing were accurate and complete, and that there would be no further meetings.

## ANALYSIS

[10] On March 14, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

[11] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry into a complaint if *all* of the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;
- the complainant is an actual or potential supplier;
- the complaint is in respect of a designated contract; and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

[12] In this case, the Tribunal finds that the fourth condition has not been met: MTM-2's complaint does not disclose a reasonable indication that the applicable trade agreement, the *CFTA*,<sup>3</sup> was breached. In the circumstances, the Tribunal does not consider it necessary to determine whether the other conditions for inquiry are met.<sup>4</sup>

[13] The solicitation followed a "two-envelope" process where the first envelope, containing Appendix 3 – Qualification Form and any required associated documents, would be opened first to determine compliance with the submittal requirements on a pass or fail basis.<sup>5</sup> Section SI06(2) of the solicitation stated that "[f]ailure to meet any or all of the mandatory requirement(s) will render the bid non-compliant and no other consideration will be given to the bid. Envelope 2 will be returned to the bidder." Accordingly, Envelope 2, containing the Bid and Acceptance Form and Bid Security, would only be opened if the bidder passed the first step of the process.<sup>6</sup>

[14] The relevant criteria of the solicitation are set out in Appendix 3 – Qualification Form, as follows:

### DEFINITIONS:

#### Bidder:

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3. *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*].
  4. Although it is not clear whether MTM-2 submitted the complaint under its own name or that of the joint venture with Chant as the name of the joint venture is also "MTM-2 Contracting Inc.", it is not necessary for the Tribunal to consider the issue of who is the complainant for the reason stated above.
  5. Section SI04(3) and SI06(2) of the solicitation (Exhibit PR-2018-066-01A, Vol. 1 at 14-15 of 91).
  6. Section SI04(4) and SI06(3) of the solicitation (Exhibit PR-2018-066-01A, Vol. 1 at 14-15 of 91).

Means the person or entity (or in the case of a joint venture, the persons or entities) submitting a bid to perform a contract for goods, services or both. It does not include the parent, subsidiaries or other affiliates of the Bidder, or its subcontractors. The successful bidder will become the Contractor & Constructor.

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#### **MANDATORY REQUIREMENTS:**

**Submit all required information to complete the qualification submission in Envelope 1.**

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#### **2. Section 1.1.B Dam Contractor Experience**

##### **Table 1.1.C.1 Dam Contractor Experience – Project No. 1**

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#### **Section 1.1.B Dam Contractor Experience**

1. The dam contractor and their sub-trade team **must** have three (3) **Completed Projects** that meet all criteria listed in Section 1.1.B.2.

2. The following criteria must be demonstrated for the **Completed Projects**:

...

The **Completed Projects** must collectively demonstrate all of the Dam or other Hydraulic Structures (Hydro Power or Spillways) Construction criteria as listed in Section 1.1.B.3/Tables 1.1.C.1; .2 and .3.

One project of the three (3) **Completed Projects** shall have a minimum value (work completed by bidding contractor and their sub trades) of \$5M (Excluding tax) that is a Dam or Hydraulic Structure (Hydro Power or Spillway) and is not Bridge replacement work. The other two (2) **Completed Projects** are to have a minimum value (work completed by bidding contractor and their sub trades) of \$2M (Excluding tax) of which one (1) of them can be Bridge replacement work.

...

3. The dam contractor and their sub-trade team must demonstrate in Tables of 1.1.C.1; .2 and .3 that they have the required experience and that they will be performing [*sic*] the work related to their experience on these **Completed Projects**, for all of the following tasks collectively within Project #1, #2 and #3, one of the three **Completed Projects must** have utilized a cofferdam designed for flows greater than 30m<sup>3</sup>/s:

i. Cofferdam installation in a watercourse with design flows greater than

a. 20m<sup>3</sup>/s

or

b. 30m<sup>3</sup>/s;

ii. Diversion and management of flows;

iii. Dewatering;

iv. Rock excavation;

v. Mass concrete (reinforced elements of 1.0 m or more thick) construction.<sup>7</sup>

[15] The *CFTA* requires government institutions to clearly state the criteria for evaluating proposals in a procurement process and to evaluate these proposals in accordance with the criteria set forth.<sup>8</sup> It is well established that a procuring entity will comply with these obligations if it conducts an evaluation that is *reasonable*. As a result, the Tribunal will only interfere with an evaluation that is unreasonable<sup>9</sup> and will substitute its judgment for that of evaluators only when they 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, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>10</sup>

[16] It is also well established that the onus is on bidders to demonstrate compliance with mandatory criteria.<sup>11</sup> Accordingly, it is incumbent upon a bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant with all essential elements of a solicitation.<sup>12</sup>

[17] The bid partly relied on the experience of Chant to meet the mandatory requirements of Section 1.1.B.2.iii. in Envelope 1. The information provided in Envelope 1 does not indicate that it was provided on behalf of a joint venture named "MTM-2 Contracting Inc." or that the joint venture was comprised of MTM-2 Contracting Inc. and Chant, nor does it in otherwise explain the relationship between MTM-2 and Chant. Furthermore, since the joint venture has the same name as one of the other joint venture members, i.e. MTM-2 Contracting Inc., it was not evident that the bidder was a joint venture.

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7. Amendment 2, Appendix 3 – Qualification Form of the solicitation.

8. Articles 509(7) and 515(5) of the *CFTA*.

9. *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25.

10. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33, citing *Northern Lights Aerobic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

11. *TekTronix Canada Inc.* (15 December 2015), PR-2015-041 (CITT) [*TekTronix*] at para. 16; *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para 16; *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); Article 515(4) of the *CFTA*.

12. *TekTronix* at para. 16; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

[18] It was incumbent upon MTM-2 to clearly indicate in its bid that it was bidding as a joint venture with Chant, so that Chant would be included as the “Bidder” as defined in the solicitation. MTM-2 did not do so. Accordingly, the Tribunal finds no reasonable indication that Parks Canada conducted an unreasonable evaluation when it rejected Chant’s experience and concluded that MTM-2’s submission was not compliant with the mandatory criteria of the solicitation.<sup>13</sup>

[19] MTM-2 provided information on the joint venture in Appendix 2 – Integrity Provisions, which it included in Envelope 2. However, as indicated above, in accordance with the evaluation criteria set out in the solicitation documents, Envelope 2 would *only* be opened if MTM-2 met all mandatory requirements in Envelope 1. As such, Parks Canada did not, and could not, have access to information on the joint venture included in Envelope 2 at the time it evaluated the contents of Envelope 1.

[20] With respect to MTM-2’s argument that Parks Canada should have sought clarification from MTM-2 with regard to its relationship with Chant, the Tribunal notes that the solicitation only allowed Parks Canada to use the client references to confirm the information provided by bidders in the experience tables. There was no obligation for Parks Canada to seek clarifications from MTM-2 or Chant on their relationship.<sup>14</sup>

[21] The Tribunal believes there is reasonable indication that Parks Canada incorrectly applied a prorated value to the second project submitted to meet the requirements of Section 2.1.A.2.iii., as it seems the value of Project #2 was not required to be strictly related to dam or hydraulic structures.<sup>15</sup> However, the Tribunal is of the view, in the circumstances, that an inquiry into the complaint should not be initiated given that MTM-2’s submission did not comply with *all* mandatory requirements, as required in Section SI06(2) of the solicitation. As such, MTM-2’s proposal was properly disqualified on this basis alone and an inquiry by the Tribunal into other aspects of the evaluation would, in this case, amount to an exercise of limited theoretical value and of no practical impact.<sup>16</sup>

[22] Finally, with regard to MTM-2’s allegations regarding the winning bidder, MTM-2 submitted no detail of its allegations, nor any evidence in support. The Tribunal requires more than bold

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13. MTM-2 argued that a change in the Contractor Declaration form that was part of Appendix 3 meant that it was unable to provide information about its joint venture in Envelope 1. The Tribunal disagrees; the onus was still on MTM-2 to identify that it was bidding as a joint venture, which it could have done on the first page of the bid. Further, the Tribunal does not consider that the fact that the evaluation form itself had a typographical error (“or” instead of “and”) provides a reasonable indication that Parks Canada conducted an unreasonable evaluation. Finally, the Tribunal is not persuaded that the statement in the evaluation form that Parks Canada had “previously verified” with Chant what its role would be in the bid changes its assessment that the onus was on MTM-2 to clearly indicate that it was bidding as a joint venture with Chant.
  14. Amendment 2, Sections 1.1.B, 2.1.A, and 3.1.A, Tables 1.1.D.1, 1.1.D.2, and 1.1.D.3 of the solicitation.
  15. Section 2.1.A.2.iii. of the solicitation reads as follows: “One project of the three (3) **Completed Projects** shall have a minimum overseen value of \$5M (Excluding tax) that is a Dam or Hydraulic Structure (Hydro Power or Spillway) and is not Bridge replacement work. The other two (2) **Completed Projects** are to have a minimum overseen value of \$2M (Excluding tax) of which one (1) of them can be Bridge replacement work.” In addition, Table 2.1.C.2 indicates “Total value of work supervised on project #2” rather than “Total value of Dam/Hydraulic project supervised” as required for the first project.
  16. Pursuant to subsections 30.13(1) and 30.13(5) of the *CITT Act* and section 7 of the *Regulations*, the decision to initiate an inquiry, even where the prescribed conditions for initiation are met, remains within the Tribunal’s discretion. See *Hubspoke Inc.* (29 June 2017), PR-2017-016 (CITT) at para. 29; *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48 (CanLII).

allegations to proceed with an inquiry.<sup>17</sup> As such, MTM-2's complaint on this ground does not meet the reasonable indication threshold for inquiry.

## DECISION

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

Rose Ann Ritcey

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Rose Ann Ritcey

Presiding Member

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17. *Manitex Lifting ULC* (19 March 2013), PR-2012-049 (CITT) at para. 22; see also *Veseys Seeds Limited, Doing Business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (4 April 2014), PR-2013-048 (CITT) at para. 12.