



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-018

West Coast Tug & Barge Ltd.

*Decision made
Wednesday, June 12, 2019*

*Decision issued
Thursday, June 13, 2019*

*Reasons issued
Wednesday, June 19, 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

WEST COAST TUG & BARGE LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

With regard to West Coast Tug & Barge Ltd.'s first ground of complaint relating to tugboats, 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.

With regard to West Coast Tug & Barge Ltd.'s second ground of complaint relating to barges, 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 since the complainant has not yet received a definitive response to its objection to the government institution. This ground of complaint is therefore premature. West Coast Tug & Barge Ltd. can file a new complaint within 10 working days of receiving a denial of relief regarding this ground of complaint. If West Coast Tug & Barge Ltd. does not receive a response within 14 days following the date of issuance of this decision, the Tribunal could consider the Department of Public Works and Government Services' silence as an implicit denial of relief. West Coast Tug & Barge Ltd. could then file a complaint with the Tribunal within 10 working days of that deadline.

Rose Ritcey

Rose 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*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. This complaint by West Coast Tug & Barge Ltd. (WCTB) relates to an invitation to tender (ITT) (Solicitation No. F1705-190006/A) issued on April 1, 2019,³ by the Department of Public Works and Government Services (PWGSC)⁴ on behalf of the Canadian Coast Guard (CCG) for the provision of tug, barge, crane and heavy equipment chartering services.

3. WCTB alleges that (1) the winning bidder is using a non-compliant tugboat for towing, and (2) the winning bidder is using two non-compliant barges. WCTB asks to be compensated for its bid preparation costs, lost opportunity, out-of-pocket expenses for collecting evidence, and any other amount to be specified by the Tribunal.

BACKGROUND

4. On May 9, 2019, PWGSC advised WCTB that although its proposal met the mandatory requirements of the solicitation, it was not the lowest-priced. As a result, the contract was awarded to Horizon Maritime Services Ltd. (Horizon Maritime) based on its bid price of \$1,050,103.95. The same day, WCTB sent an email to PWGSC requesting a debrief and stating that it had concerns about Horizon Maritime meeting the requirements of the contract and asking if any amendments were made to the technical requirements during the technical review.

5. On May 10, 2019, PWGSC replied to WCTB that it had conducted the procurement in accordance with the terms of the ITT, that no revisions were made to the technical requirements in evaluating the proposals, and that the terms of the awarded contract were the same as those tendered in the ITT.

6. On May 21, 2019, WCTB left a voicemail to PWGSC's Team Leader, Acquisitions, Marine, and followed up on May 22, 2019, with an email to PWGSC's Manager, Marine, to discuss Horizon Maritime's use of a 425-horsepower (HP) tugboat and other concerns.

7. On May 23, 2019, PWGSC replied that Horizon Maritime is using a primary and a support (i.e. assist) tugboat as required in the ITT, and that the 425-HP tugboat meets the requirements of the ITT. In responding to WCTB's other concerns, PWGSC noted that the work schedule in the ITT was an anticipated

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

2. SOR/93-602 [*Regulations*].

3. The ITT was amended on April 12, 2019, to provide questions and answers (Q&A), as well as update Annex A – Statement of Work, Annex B – Financial Bid Presentation Sheet (Basis of Payment), and Annex E – Evaluation Plan – Proposed Vessel & Equipment List.

4. 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.

work schedule which was subject to change. Finally, PWGSC requested that WCTB provide details of its concerns regarding the conduct of the tow between Prince Rupert and Shearwater, and proposed setting up a teleconference as requested by WCTB.

8. On May 29, 2019, WCTB sent an email to PWGSC, stating that a 425-HP tugboat was being used to tow the barge to and from Prince Rupert in contravention of the solicitation parameters.

9. On May 30, 2019, the parties held a teleconference. WCTB reiterated its concern that a 425-HP tugboat was being used to complete work reserved for the primary tugboat. According to WCTB, PWGSC did not disclose what assets were being used to do the work during the call, but committed to confirm with them within 24 hours.

10. On June 3, 2019, WCTB sent an email to PWGSC stating that its helicopter had completed an on-site flyby that morning and found that the 425-HP tugboat was being used as a towing vessel; it also found that two barges were being used that did not meet the performance characteristics required in the ITT.

11. On June 4, 2019, PWGSC sent a letter to WCTB addressing its email of May 29, 2019.⁵ PWGSC confirmed that a 425-HP tugboat was being used as the assist tugboat and thus met the requirements of the solicitation, as only the primary tugboat was required to have a minimum of 800 HP. PWGSC stated that the Statement of Work (SOW) does not define the work to be performed by each tugboat and therefore disagreed that the assist tugboat was being used in contravention of the parameters of the solicitation. The letter did not address WCTB's concern with regard to the barges.

ANALYSIS

12. On June 12, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

13. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if 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.

Purported use of a non-compliant tugboat for towing

14. With regard to WCTB's first ground of complaint, the Tribunal finds that it does not disclose a reasonable indication that the applicable trade agreement, the *Canadian Free Trade Agreement*,⁶ was breached.⁷

5. Although PWGSC's letter only discusses WCTB's email of May 29 and the teleconference of May 30, WCTB's subsequent objections with regard to the first ground of complaint do not add to its arguments.

6. *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*].

7. In these circumstances, it is not necessary to consider whether the other aforementioned conditions of the *Regulations* are met.

15. The technical requirements for the tugboats read as follows, in relevant parts:

Section 35 10 00 TUG, BARGE, CRANE AND EXCAVATOR

1.4 PERFORMANCE REQUIREMENTS

...

- .2 The Contractor must provide tug services which meet, but not limited to, the following performance characteristics:

- .1 A primary tug capable of towing, maneuvering, and holding in position the barge fully loaded with all required construction equipment and materials to, from, and between all work sites.
- .2 An assist Tug capable of assisting the primary tug and barge in maneuvering and landing at work sites.
- .3 The Primary Tug must have a minimum of 800hp.

...

16. In addition, Q&A 17 of Amendment 1 to the ITT provided as follows:

Item	Reference	Question	Answer
17	Annex A	We feel that the HP requirements of the substitute tug are too excessive for the requirement. Would a 500 HP tug be an acceptable alternative?	No, the primary tug must meet the 800 hp requirement as stated.

17. Amended Annex E, section E1.1.1 Assist Tug Boat Information provided as follows:

The assist tug boat proposed must meet the requirements listed in the Annex A – Statement of Work. The Bidder must provide the following details for the assist tug boat vessel proposed to do the work.

Bidder section		Evaluator Section		
Description:	Bidder to fill this section	Meet	Not Meet	Comments
Official Number: (O.N)				
Horse Power (BHP):				
Vessel Name:				

18. Although there seems to be some confusion between primary and assist tug in Q&A 17, the performance requirements are clear that only the primary tug must meet the 800-HP requirement. It is unfortunate that the mandatory information required at bid close in Annex E suggests that the horsepower of the assist tug will also be rated as “meet” or “not meet”. However, no minimum horsepower requirements are provided for the assist tugboat in the solicitation documents.

19. Further, there is nothing in the SOW that would preclude the assist tugboat from being used to tow barges. Performance requirements 1.4.2.1 and 1.4.2.2 provide for the minimum capabilities of the tugboats, not for the work they are to accomplish. The solicitation documents do not otherwise provide for specific work to be completed by either the primary or the assist tugboat. Accordingly, nothing precluded Horizon Maritime from providing a 425-HP tugboat as its assist tugboat to tow barges.

20. Based on the above, the Tribunal finds that the first ground of complaint does not disclose a reasonable indication that the *CFTA* was breached.

Purported use of non-compliant barges

21. With regard to WCTB's second ground of complaint, the Tribunal finds that it is premature.

22. When WCTB discovered on June 3, 2019, that purportedly non-compliant barges were being used, it clearly raised a new ground of complaint, namely, that the winning bidder was using two barges which did not meet the minimum size it believes to be required in the solicitation documents. The performance requirements provide as follows, in relevant parts:

Section 35 10 00 TUG, BARGE, CRANE AND EXCAVATOR

1.4 PERFORMANCE REQUIREMENTS

.1 The Contractor must provide barge services which meet, but not limited to, the following performance characteristics:

...

.3 The barge deck platform must provide an adequate surface for work activities which includes, but not limited to, the following:

.1 A minimum deck size of 15.3m x 54.9m (50ft x 180ft), capable of storing Contractor and CCG supplied equipment and materials as detailed in Section 01 11 00 – Statement of Work. A sample barge layout drawing is provided in Appendix D Sample Barge Layout Drawing for contractor reference purposes.

...

23. Amended Annex E, section E1.3 Barge Information provided as follows:

The barge(s) proposed must meet the requirements listed in the Annex A – Statement of Work. The Bidder must provide the following details **for each** of its barges.

Bidder section		Evaluator Section		
Description:	Bidder to fill this section	Meet	Not Meet	Comments
Barge Name:				
Official Number: (O.N)				
Vessel length (m):				
Vessel Breadth (m):				

24. As indicated above, PWGSC's June 4 letter makes no mention of WCTB's email of June 3, 2019, and does not address the second ground of complaint. As a result, the Tribunal considers that PWGSC has not yet denied WCTB relief, and that this ground of complaint is therefore premature.

25. The Tribunal's decision does not preclude WCTB from filing a new complaint within 10 working days of receiving a denial of relief from PWGSC. Furthermore, if PWGSC fails to respond to WCTB's second ground of complaint within 14 days of the issuance of its decision, the Tribunal may construe PWGSC's silence as a constructive denial of relief. In that case, PWGSC would then be able to file a new complaint with the Tribunal within 10 working days of that date. In either case, WCTB may request that documents already filed with the Tribunal be joined to the new complaint.

26. If WCTB files a new complaint, the Tribunal will then decide whether to inquire into the complaint, having regard to the conditions of the *Regulations*.

DECISION

27. With regard to WCTB's first ground of complaint relating to tugboats, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry.

28. With regard to WCTB's second ground of complaint relating to barges, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry since WCTB has not yet received a definitive response to its objection to PWGSC. This ground of complaint is therefore premature. WCTB can file a new complaint within 10 working days of receiving a denial of relief regarding this ground of complaint. If WCTB does not receive a response within 14 days following the date of issuance of its decision, the Tribunal could consider PWGSC's silence as an implicit denial of relief. WCTB could then file a complaint with the Tribunal within 10 working days of that deadline.

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