



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2019-021

Nuvis Technologies Inc.

*Decision made  
Wednesday, July 10, 2019*

*Decision issued  
Thursday, July 11, 2019*

*Reasons issued  
Friday, July 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**

**NUVIS TECHNOLOGIES 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.

Georges Bujold  
Georges Bujold  
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 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 by Nuvis Technologies Inc. (Nuvis) relates to a Request for Proposal, Solicitation No. EN578-170003/22 (Challenge Notice), issued by Public Works and Government Services Canada (PWGSC) on behalf of Innovation, Science and Economic Development Canada (ISED) for a digital tracing system for the steel supply chain. The Challenge Notice was issued under a Request for Proposal, Solicitation No. EN578-170003/C, Innovative Solutions Canada Program Call for Proposals 002 (RFP), issued by PWGSC on behalf of ISED.

3. In this case, the ground of complaint is that PWGSC's evaluation was unreasonable resulting in an improper determination that the proposal submitted by Nuvis did not meet the relevant mandatory criteria set out in the RFP.

4. The Tribunal has decided not to conduct an inquiry into the complaint. For the reasons below, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

### BACKGROUND

5. On May 6, 2019, PWGSC informed Nuvis that its proposal submitted in response to the Challenge Notice was deemed non-responsive as it did not meet the mandatory criteria for Question 1a.<sup>3</sup> More specifically, as indicated in the Phase 1 Individual/Consensus Evaluation Grid, PWGSC determined that there was insufficient evidence showing how the proposed solution was likely to meet essential outcomes 3 and 4, as described in the Challenge Notice.<sup>4</sup> Generally, essential outcomes 3 and 4 referred to the required use of blockchain technology and artificial intelligence (AI) enabled data analytics, respectively, in the proposed solution.<sup>5</sup>

6. On May 10, 2019, Nuvis objected to PWGSC's evaluation requesting that it be reviewed.<sup>6</sup> Nuvis supplied PWGSC with information supporting its position that its proposal met the mandatory criteria for Question 1a. Nuvis provided PWGSC with further submissions on May 13, 2019, and May 20, 2019.<sup>7</sup>

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

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

3. Exhibit PR-2019-021-01A, Vol. 1 at 114-115.

4. Exhibit PR-2019-021-01A, Vol. 1 at 116.

5. Exhibit PR-2019-021-01A, Vol. 1 at 70.

6. Exhibit PR-2019-021-01A, Vol. 1 at 118.

7. Exhibit PR-2019-021-01A, Vol. 1 at 120-123.

7. On May 22, 2019, PWGSC confirmed the evaluation results. According to the lead evaluator, Nuvis discussed leveraging blockchain and AI/machine learning “at a very high level”, but did not provide enough detail regarding, among other things, how its proposed solution would work and what technologies would be leveraged to meet the essential outcomes.<sup>8</sup> On that basis, PWGSC indicated that “[t]he results of the evaluation remain unchanged. We thank you for your interest in the ISC Program and hope you will continue to submit applications in response to future challenges.”<sup>9</sup> On the same day, Nuvis responded to PWGSC, expressing its disagreement with the evaluation and inquiring as to how it could escalate the issue.<sup>10</sup>

8. On May 24, 2019, Nuvis submitted a complaint to Innovation Solutions Canada (ISC) and requested an independent review of the evaluation. Nuvis forwarded a copy of its complaint to PWGSC and requested that the procurement process be placed on hold until its complaint was resolved.<sup>11</sup>

9. PWGSC responded to Nuvis on May 24, 2019, stating that it would review the complaint, and on May 31, 2019, PWGSC sought clarification regarding some of the information contained therein.

10. On June 26, 2019, PWGSC’s procurement manager for the solicitation advised Nuvis that following his review of the complaint, the results of the evaluation remained unchanged. The procurement manager agreed with the assessment of the evaluation team with respect to the insufficiency of the details provided by Nuvis to demonstrate compliance with the relevant evaluation criteria.<sup>12</sup> In PWGSC’s correspondence, Nuvis was provided a link to available recourse mechanisms.

11. On July 2, 2019, Nuvis wrote to the Tribunal requesting a 10 day extension for submitting its complaint on the basis that it did not have adequate time to file. Nuvis contended that it was informed of the Procurement Recourse Mechanism on June 26, 2019, after which it contacted the Office of the Procurement Ombudsman. On July 3, 2019, the Tribunal advised Nuvis that as the deadlines for filing a complaint are prescribed by the *Regulations*, they could not be extended upon request.

12. On July 3, 2019, Nuvis submitted its complaint to the Tribunal.

## ANALYSIS

13. On July 10, 2019, pursuant to subsection 30.13(1) of the *CITTA Act*, the Tribunal decided not to conduct an inquiry into the complaint. In this case, the Tribunal has determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. The reasons for that decision are as follows.

14. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.” 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

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8. Exhibit PR-2019-021-01A, Vol. 1 at 120.

9. Exhibit PR-2019-021-01A, Vol. 1 at 120.

10. Exhibit PR-2019-021-01A, Vol. 1 at 120.

11. Exhibit PR-2019-021-01A, Vol. 1 at 126.

12. Exhibit PR-2019-021-01A, Vol. 1 at 142.

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

15. The *Regulations* make it clear that a complainant has 10 working days from the day on which the basis of the complaint becomes known, or should have been reasonably known, to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, it may afterwards file a complaint with the Tribunal within 10 working days after it gains actual or constructive knowledge of the denial of relief by the government institution.

16. The basis of the complaint became known to Nuvis on May 6, 2019, when PWGSC informed it of the results of the evaluation. In its correspondence, PWGSC advised Nuvis of its reason for finding its proposal non-responsive, i.e. it did not meet the mandatory criteria for Question 1a.

17. The request made by Nuvis on May 10, 2019, for a review of PWGSC’s determination, constituted an objection to the relevant government institution. The objection was timely as it was made within 10 days of the basis of the complaint becoming known to Nuvis.

18. The Tribunal finds that PWGSC’s response to Nuvis in its email sent on May 22, 2019, which confirmed the results of the evaluation, clearly and unequivocally denied Nuvis the relief that it requested on May 10, 2019. There is no indication that, at this time, PWGSC agreed to conduct a further review or reconsider its finding of non-compliance. Moreover, Nuvis had actual knowledge of PWGSC’s denial of relief. This was evidenced by its reply email to PWGSC sent on the same day.

19. The Tribunal has previously stated that when the response to an objection is an unambiguous denial of relief and does not suggest the possibility of the matter being reconsidered, the time limit for filing a complaint is calculated from the date of the response.<sup>13</sup> The fact that Nuvis continued to communicate with PWGSC and ISC regarding its complaint after having received a definitive denial of relief to its objection or filed a subsequent complaint, did not alleviate its onus to comply with the time limits prescribed by the *Regulations*.<sup>14</sup> As stated by the Federal Court of Appeal in *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*:

Short limitation periods for making an objection and filing a complaint help to ensure that delays in the supply of goods and services are minimized, and that the successful bidder’s need for certainty is met. Hence, the Tribunal is entirely justified in regarding these time limits as important aspects of the regulatory scheme . . .<sup>15</sup>

20. The Tribunal has also previously found that filing a second objection identical or similar to the first, as was the case here, in no way affects the deadline imposed by subsection 6(2) of the *Regulations*.<sup>16</sup> In this regard, the Tribunal’s position is in no way changed by the fact that, in addressing the request made by Nuvis on May 24, 2019, for an independent review of the evaluation, PWGSC conducted a subsequent review after having already denied the relief requested in the first objection made by Nuvis, which raised the same ground of complaint.

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13. *Dataintro Software Limited* (1 December 2010), PR-2010-077 (CITT) at para. 32.

14. *IT/net Ottawa Inc.* (6 July 2009), PR-2009-023 (CITT) at para. 11.

15. 2005 FCA 177 at para. 3.

16. *Groupe-conseil INTERALIA S.E.N.C.* (9 October 2009), PR-2009-052 (CITT) at para. 15.

21. As such, in order to meet the condition set out in paragraph 6(2) of the *Regulations*, Nuvis had until June 5, 2010 (10 working days after May 22, 2019) to file its complaint with the Tribunal. However, Nuvis provided the Tribunal with a complaint that complied with subsection 30.11(2) of the *CITT Act* four weeks later, on July 3, 2019. Given that the complaint was filed outside the prescribed time limits, the Tribunal cannot inquire into it. Accordingly, it is not necessary for the Tribunal to examine whether the other conditions for inquiry have been met.

## **DECISION**

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

Georges Bujold  
Georges Bujold  
Presiding Member