



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-013

Telecore

*Decision made
Wednesday, May 22, 2019*

*Decision issued
Thursday, May 23, 2019*

*Reasons issued
Friday, May 24, 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

TELECORE

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.

Rose Ann Ritcey
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*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 THE COMPLAINT

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. W8486-195946/A) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply of Slimguard headset parts.

3. The complainant, Telecore, alleged that PWGSC's refusal to provide it with design specifications for the headset parts identified in the RFP (i.e. headset parts of certain named manufacturers) prevents other suppliers or manufacturers who could propose equivalent products from participating in the solicitation and thus has the effect of creating unnecessary obstacles to trade. As a remedy, Telecore requested that the procurement process be put on hold until such time as the requested design specifications are provided or, alternatively, that it be compensated for its lost profits or lost opportunity to profit.

BACKGROUND

4. On March 1, 2019, PWGSC published the RFP on Buyandsell.gc.ca, which is the Government of Canada's official procurement information Web site. The original bid closing date was April 12, 2019. However, Amendments No. 1 and 2 extended the closing date to May 17, 2019.

5. As a multi-item bid solicitation, the RFP permitted bidders to quote a price on any number of six different goods being procured and provided that the lowest-priced compliant bid for each of the six goods would be recommended for the award of a contract.³ Although there were six goods being procured, 12 items were listed in the RFP (for various quantities) and required separate quotes as each good will be delivered to two different Canadian Forces Bases.

6. For each of the six goods listed in the RFP, a specific manufacturer⁴ and part number were identified. However, for each of these goods, the following notation was included: "Alternate or equivalent part numbers will be considered". In this regard, sections 3.1.1 and 3.1.2 of the RFP provide that substitute products or goods must be equivalent in form, fit, function and quality to the listed items and that the government reserves the right to request samples from bidders in order to determine equivalency.

7. On March 19, 2019, Telecore sent an email to PWGSC requesting a "build design or schematic" (i.e. design specifications) for the headset part identified in items 9 and 10 so that it could build an equivalent part.

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

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

3. See sections 3.2.1 and 4.2 of the RFP (Exhibit PR-2019-013-01A, Vol. 1 at 27, 29).

4. For items 1-4 and 7-12, the named manufacturer was Racal Acoustics Limited, and for items 5 and 6, it was Eylex Pty Ltd.

8. On April 1, 2019, Telecore sent another email to PWGSC requesting design specifications for the headset parts identified in items 1 through 12.

9. On April 9, 2019, Telecore sent a further email to PWGSC enquiring as to whether it would provide the requested design specifications. On the same day, PWGSC replied by stating that it was “working on it” and that it would let Telecore know as soon as they had an answer.

10. On April 29, 2019, PWGSC published Amendment No. 3 on Buyandsell.gc.ca, which provided the following response to Telecore’s requests:

It is the bidder’s responsibility to determine and demonstrate that a proposed part number is equivalent to the part numbers specified in the RFP. DND does not hold the drawings or design, as they are proprietary to the manufacturer.

11. On May 7, 2019, Telecore sent an email to PWGSC asking whether the headset part identified in items 1 and 2 (boom microphones) came with end fittings and, if so, requesting that PWGSC provide the design specifications related thereto.

12. On May 14, 2019, PWGSC advised Telecore that answers to its latest questions would be available on Buyandsell.gc.ca by the next day. On May 15, 2019, PWGSC published Amendment No. 4, which answered Telecore’s first question in the affirmative and provided the following response to the request for design specifications:

No we can Not. The design is proprietary of the manufactured of the Headset [sic].

13. On May 16, 2019, Telecore submitted its complaint to the Tribunal.

14. On May 17, 2019, the Tribunal, pursuant to subsection 30.12(2) of the *CITT Act*, notified Telecore that additional information was required before its complaint could be considered filed. The Tribunal received that information from Telecore on the same day and its complaint was therefore considered filed.⁵ Included as part of the additional information was Telecore’s bid that it had submitted to PWGSC that same day, i.e. the bid closing date.

ANALYSIS

15. On May 22, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The Tribunal determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

16. 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) 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 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

5. Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499) provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, it will be considered filed “on the day that the Tribunal receives the information that corrects the deficiencies”

17. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware, *or reasonably should have become aware*, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

18. In the present case, the Tribunal is of the view that Telecore first became aware, or reasonably should have become aware, of its ground of complaint on April 29, 2019, when PWGSC published Amendment No. 3 on Buyandsell.gc.ca. In that amendment, PWGSC made it clear that it would not accede to Telecore's requests to provide the design specifications.

19. Although the complaint does not indicate whether PWGSC advised Telecore of the publication of Amendment No. 3, the Tribunal is of the view that, in these particular circumstances and depending on what time of day the amendment was posted on Buyandsell.gc.ca, Telecore reasonably should have taken notice of its publication on the same day or, at the latest, by the next day (i.e. by April 30, 2019). The fact that Telecore obtained a copy of the RFP and communicated with PWGSC on three separate occasions prior to April 29, 2019, provides a measure of its interest in this solicitation and supports the view that it likely became aware of Amendment No. 3 at the time of its publication or shortly thereafter. Moreover, the Tribunal notes that, in its complaint, Telecore cited the response provided by PWGSC in Amendment No. 3 and referred to the amendment date of April 29, 2019.⁶ In any event, the Tribunal believes that it is incumbent upon suppliers to keep abreast of amendments to solicitations for which they have an interest.⁷

20. Therefore, the Tribunal considers that Telecore had, at the latest, until May 14, 2019 (i.e. 10 working days from April 30, 2019), to either object to PWGSC or file a complaint with the Tribunal. While Telecore did send an email to PWGSC on May 7, 2019, requesting that it provide design specifications for the headset part identified in items 1 and 2, this request was simply a reiteration of its previous requests—albeit in narrower terms—and thus cannot be considered as an objection. As Telecore's complaint was only considered filed on May 17, 2019, the Tribunal considers that it has not been filed in a timely manner.

21. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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
Presiding Member

6. See Exhibit PR-2019-013-01C, Vol. 1 at 1, 2. Telecore cites the text from Amendment No. 3 on page 2 of its complaint describing it as “per amendment 3 on May 14, 2019”. As noted above, Amendment No. 4 was published on May 14, 2019, and the text from that amendment was not cited by Telecore in its complaint.

7. Suppliers can choose to do this by regularly visiting Buyandsell.gc.ca or by registering to receive email notifications or Web feeds generated by Buyandsell.gc.ca (see <https://buyandsell.gc.ca/procurement-data/tenders/follow-opportunities>).