



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-034

Heiltsuk Horizon Maritime
Services Ltd. and Horizon Maritime
Services Ltd.

*Decision made
Thursday, September 19, 2019*

*Decision issued
Monday, September 23, 2019*

*Reasons issued
Wednesday, September 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

HEILTSUK HORIZON MARITIME SERVICES LTD. AND HORIZON MARITIME SERVICES LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn
Peter Burn
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 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(5) of the *CITT Act* provides that the Tribunal may decide not to conduct an inquiry into a complaint.

SUMMARY OF THE COMPLAINT

2. The present matter is the fourth complaint lodged by Heiltsuk Horizon Maritime Services and Horizon Maritime Services (Heiltsuk Horizon) concerning a procurement of two offshore emergency towing vessels (Solicitation No. F7017-160056/C). The procurement was conducted by the Department of Public Works and Government Services Canada (PWGSC) on behalf of Fisheries and Oceans Canada.

3. On January 2, 2019, the Tribunal determined that Heiltsuk Horizon's first complaint was valid in part, as PWGSC had unreasonably evaluated mandatory requirement No. 12 (MR 12), which related to bollard pull, of the Request for Proposals.³ When PWGSC re-evaluated MR 12, Atlantic Towing Ltd. (ATL) was found to be compliant and remained the successful bidder.

4. Heiltsuk Horizon has subsequently filed three complaints relating to PWGSC's re-evaluation of MR 12 (i.e. Files No. PR-2019-020, PR-2019-025 and now PR-2019-034).

5. In the Tribunal's view, this fourth complaint does not raise any new grounds that are not already before the Tribunal in the second and third complaints. Accordingly, the Tribunal has decided not to conduct an inquiry into the present complaint.

BACKGROUND

6. The solicitation was issued on February 5, 2018. After ATL was awarded the contract on August 9, 2018, Heiltsuk Horizon filed its first complaint (PR-2018-023) on August 20, 2018.

7. On January 2, 2019, the Tribunal found the first complaint valid in part and recommended the re-evaluation of MR 12 within 6 months.⁴

8. On May 27, 2019, PWGSC notified the Tribunal and Heiltsuk Horizon that it had re-evaluated MR 12 and that ATL remained the successful bidder.

9. Heiltsuk Horizon filed its second complaint (PR-2019-020) on June 7, 2019, alleging that PWGSC had unreasonably re-evaluated ATL's compliance with MR 12. PWGSC filed the second Government Institution Report (GIR) on July 16, 2019.

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

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

3. *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 (CITT) [*Heiltsuk Horizon I*].

4. *Heiltsuk Horizon I*.

10. On July 30, 2019, Heiltsuk Horizon filed its third complaint (PR-2019-025), alleging that new information disclosed in the GIR for the second complaint revealed that PWGSC had unreasonably evaluated *all* bidders' compliance with MR 12. The Tribunal accepted the third complaint for inquiry on August 6, 2019, and PWGSC filed the third GIR on September 3, 2019.

11. On September 17, 2019, Heiltsuk Horizon filed the present complaint, alleging that new information disclosed in the third GIR confirms that all other bidders are non-compliant, i.e. that Heiltsuk Horizon is the *only* bidder that complies with MR 12. On the same day, Heiltsuk Horizon filed submissions responding to the third GIR, which (as discussed below) raise the same arguments as the present complaint.

ANALYSIS

12. On September 19, 2019, pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

13. Heiltsuk Horizon submits that it filed the present complaint “out of an abundance of caution only”, in case the Tribunal considers that the grounds presently raised were not covered in the previous complaints.⁵

14. As Heiltsuk Horizon submits, in each of the three previous complaints it has “consistently and repeatedly maintained” that it “*could* have been the winning bidder”.⁶ In the fourth complaint, Heiltsuk Horizon has argued that it “*would* have been the winning bidder” based on new evidence disclosed in the third GIR.⁷

15. In the Tribunal’s view, this is not a new ground for complaint. Rather, it is an extension of arguments that Heiltsuk Horizon has already advanced in previous complaints. While the third GIR may have given rise to new evidence, that does not equate to grounds for a new complaint.

16. Heiltsuk Horizon has raised the same arguments in both the present complaint and the response to the third GIR in PR-2019-025. In both matters, Heiltsuk Horizon argues that:

- (a) all bids except Heiltsuk Horizon’s are non-compliant with MR 12;
- (b) there was no “consensus” interpretation of MR 12;
- (c) PWGSC made incorrect assumptions and other evaluative errors;
- (d) at least one other bidder interpreted MR 12 in the same way as Heiltsuk Horizon; and
- (e) the evaluator’s reliance on external information (i.e. classification society rules and procedures) constitutes impermissible bid repair.

17. Heiltsuk Horizon also requests the same remedies in both submissions, namely:

- (a) that PWGSC cancel the contract and award it to Heiltsuk Horizon;
- (b) that Heiltsuk Horizon be compensated for lost profits during the time that ATL held the contract;
- (c) that Heiltsuk Horizon be awarded its complaint costs; and
- (d) in the alternative, that Heiltsuk Horizon be awarded compensation for lost opportunity.

5. Exhibit PR-2019-034-01, Vol. 1 at 9.

6. *Ibid.*

7. *Ibid.*

18. The Tribunal will consider the above arguments and requests in its forthcoming decision on the second and third complaints. Therefore, the Tribunal considers the fourth complaint to be redundant.

DECISION

19. Pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn
Peter Burn
Presiding Member