



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-032

Groupe Tehora

*Decision made
Wednesday, October 2, 2019*

*Decision issued
Thursday, October 3, 2019*

*Reasons issued
Friday, October 11, 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

GROUPE TEHORA

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*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 a standing offer (RFSO) (Solicitation No. EA011-192494/A) issued by the Department of Public Works and Government Services (PWGSC) for two subsequent standing offers (SOs) to be awarded for the provision of technical inspection services for marine, building or heavy civil construction projects in various locations throughout Newfoundland and Labrador.

[3] The complainant, Groupe Tehora (Tehora), alleged that PWGSC improperly set aside its SO. It also alleges that two PWGSC employees acted improperly, accusing them of defamation and unprofessionalism.

[4] As a remedy, Tehora requested that the SO be re-awarded to it, that it be compensated for loss of profits and other damages, and that the two employees in question be terminated. It also requested the reimbursement of its complaint costs and bid preparation costs.

BACKGROUND

[5] On January 28, 2019, PWGSC published the RFSO on Buyandsell.gc.ca, the Government of Canada's official website for publishing tenders. The RFSO was for the award of two SOs with an estimated total value of \$4,470,740. One SO was for 90 percent of the total value, and the other, for the remaining 10 percent.

[6] Section 4.1.1.1 of the RFSO ("Mandatory Technical Criteria") as amended by Amendment 004, which is relevant in this case, reads as follows:

Bidders must meet the following mandatory requirements. Bidders who do not meet the mandatory requirements will be deemed non-responsive and will be given no further consideration.

...

Have at least one full-time staff capable of assessing the qualifications of candidates to meet job requirements and evaluating performance relevant to these requirements.

...

IMPORTANT NOTE TO BIDDERS: Bidders MUST demonstrate in their bid packages how they meet all mandatory criteria, including all requirements set out in the Statement of Work/Terms of Reference which forms part of Annex "A".

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

² SOR/93-602 [*Regulations*].

[7] In connection with the mandatory requirement above, the relevant part of section 5 of the terms of reference (“SCOPE OF WORK”) reads as follows:

- .2 In order to supply the quality of personnel required, the *Contractor* must have at least one full-time, supervisory staff member who will:
 - .1 Assess the experience and educational qualifications of the proposed inspection staff and ensure that they meet the requirements set out in these Terms of Reference,
 - .2 Make every effort to obtain qualified personnel from the area of the proposed work to reduce travel and/or lodging expenses,
 - .3 Assign the appropriate resources to each project to satisfy the technical requirements of that particular project,
 - .4 Provide direction, general supervision and administrative support and instruction to staff working under this contract, and
 - .5 Ensure that all occupational health and safety requirements are satisfied and that all assigned project personnel are adequately trained, knowledgeable, and familiar with and abide by the established Occupational Health & Safety requirements for the duration of the project.

[8] The solicitation closed on March 11, 2019.

[9] On April 11, 2019, PWGSC awarded one SO to Tehora for 90 percent of the estimated total value mentioned above. PWGSC awarded the second SO for the remaining 10 percent to AFN Engineering Inc.

[10] On May 10, 2019, PWGSC sent Tehora an email stating that its SO was being set aside because of its failure to meet the mandatory criterion set out in section 4.1.1.1 of the RFSO.

[11] On May 14, 2019, Tehora sent PWGSC an email requesting, among other things, that the setting aside of its SO be revoked.

[12] On May 23, 2019, PWGSC responded to Tehora by informing it that, having reviewed the documents on the record, PWGSC was upholding its decision to set aside its SO.

[13] On September 13, 2019, Tehora provided the Tribunal with documents, including the Tribunal’s Procurement Complaint Form, for the purpose of filing a formal complaint regarding the setting aside of its SO.

[14] On September 17, 2019, the Tribunal, pursuant to subsection 30.12(2) of the *CITT Act*, informed Tehora that its complaint did not meet the requirements set out in subsection 30.11(2) and that additional information was required before its complaint could be considered to have been filed.³ The Tribunal added that the information was to be provided as quickly as possible so that the complaint could be filed within the time limits prescribed by section 6 of the *Regulations*.

[15] On September 19, 2019, Tehora provided the Tribunal with additional information.

³ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499) [*CITT Rules*] provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed “on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.”

[16] On September 20, 2019, the Tribunal informed Tehora that its complaint still failed to meet the requirements set out in subsection 30.11(2) of the *CITT Act* because it had failed to provide certain information and documents to correct the deficiencies in order that the complaint comply with that subsection.

[17] On September 26, 2019, Tehora provided the Tribunal with the additional information requested, and its complaint was then considered to have been filed.

ANALYSIS

[18] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine whether the following four conditions are met before it launches an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[19] For the following reasons, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

[20] Subsection 6(1) of the *Regulations* provides that a potential supplier wishing to file a complaint with the Tribunal “shall do so 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 made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

[21] The *Regulations* 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 the basis of the complaint 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 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.

[22] The basis of the complaint became known to Tehora on May 10, 2019, when PWGSC informed it that it no longer held an SO. In its May 10 correspondence, PWGSC also advised Tehora of its reasons for deciding that the SO had to be set aside. In short, PWGSC informed Tehora of the following:

- On April 18, 2019, PWGSC had stated that, if the person proposed by Tehora did not meet the mandatory technical criterion set out in section 4.1.1.1 of the RFSO mentioned above, that is, if the person did not hold a full-time position at Tehora, Tehora would no longer hold an SO.
- It had been determined that the resource proposed by Tehora failed to meet this requirement, because her employment contract stated clearly that she was a part-time employee.

[23] On May 14, 2019, Tehora wrote to PWGSC requesting, among other things, that the facts be reanalyzed and that the decision to set aside its SO be revoked. Tehora's request for a review of PWGSC's determination constitutes an objection made 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 Tehora.

[24] On May 23, 2019, PWGSC responded to Tehora's objection, stating that the setting aside of the SO was justified and reasonable, and that it was therefore upholding its decision. The Tribunal finds that PWGSC's response in its email sent on May 23, 2019, which confirmed that Tehora no longer held an SO, clearly and unequivocally denied Tehora the relief it had requested on May 14, 2019. There is no indication that, at that time, PWGSC agreed to conduct a further review or reconsider its decision to end its business relationship with Tehora for the technical inspection services in question.

[25] On the contrary, PWGSC made it clear in the correspondence that, following its review of the record, it discovered that Tehora's proposal should have been deemed non-compliant during the evaluation process, since Tehora acknowledged in its objection dated May 14, 2019, that the person it had proposed in response to the mandatory technical criterion set out in section 4.1.1.1 of the RFSO was not a Tehora employee when the solicitation closed. Moreover, PWGSC reiterated its finding that the other people whom Tehora later proposed did not meet this requirement and that it was therefore appropriate to set aside the SO in accordance with the general conditions of the SO.⁴

[26] PWGSC concluded its letter by stating that its decision would not impact the complainant's record in terms of future procurements, encouraging the complainant to take every opportunity to bid on future requirements. The Tribunal is of the opinion that this letter left no doubt that PWGSC's decision was final. Moreover, Tehora gained direct knowledge of PWGSC's denial of relief no later than on May 24, 2019, as shown by the email response it sent to PWGSC on that day. In the email, Tehora again requested that PWGSC justify its decision.

[27] The Tribunal has already 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 that response.⁵ Consequently, the Tribunal finds that Tehora had until June 7, 2019, or 10 working days after May 24, 2019, to file its complaint with the Tribunal. However, it was not until many months later, on September 26, 2019, that a complaint meeting the requirements set out in subsection 30.11(2) of the *CITT Act* was filed.

⁴ Under sections 4.2.e and 13.1 of the 2005 General Conditions – Standing Offers – Goods or Services (2017-06-21) [*General Conditions*], which were referenced in the RFSO and the SO, the SO may be set aside by the contracting authority at any time and, in addition, if the offeror is in default in carrying out any of its obligations under the SO.

⁵ *Dataintro Software Limited* (1 December 2010), PR-2010-077 (CITT) at para. 32.

[28] The information provided with the complaint shows that, rather than raise its grievances with the Tribunal within the prescribed time limit once it had gained knowledge of PWGSC's denial of relief, Tehora requested the services of the Office of the Procurement Ombudsman and sought, still on May 24, 2019, a review of the contracting authority's decision by the Office of the Chief Audit Executive of PWGSC. At Tehora's request, the matter was then referred to PWGSC's Business Dispute Management (BDM) Program.

[29] Under this program, PWGSC and Tehora engaged in a mediation process between July 17, 2019 (when the mediation agreement was signed), and September 3, 2019, when the mediator informed Tehora that the mediation had failed. However, it should be noted that, on May 29, 2019, after being informed about Tehora's actions to engage in mediation, PWGSC's Director General for the Atlantic Region reiterated on behalf of the contracting authority the reasons for setting aside the SO and, although this email message indicated that PWGSC intended to co-operate with Tehora in the mediation process, there was nothing in the message to suggest that the contracting authority might reconsider its decision.

[30] The fact that Tehora continued to communicate with other bodies within PWGSC regarding its complaint after having received a definitive denial of relief from the contracting authority with regard to its objection does not alleviate it of the onus to comply with the time limits prescribed by the *Regulations*.⁶ As the Federal Court of Appeal noted in *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*, the Tribunal is justified in regarding these time limits as important aspects of the regulatory scheme.⁷

[31] Moreover, the Tribunal has previously determined that the filing of a second objection identical or similar to the first, as is the case here, in no way affects the time limits prescribed by subsection 6(2) of the *Regulations*.⁸ Consequently, the Tribunal's position is not changed by the fact that, as part of dealing with the request submitted by Tehora on May 24, 2019, for an independent review of the setting aside of the SO, PWGSC may have carried out a subsequent review as part of a mediation process under the BDM Program after having already denied the relief requested in Tehora's first objection, which raised the same ground of complaint. In other words, the use of PWGSC's BDM Program by a potential supplier cannot result in an extension of the time limits prescribed by the *Regulations*.

[32] As well, the information that PWGSC provided to Tehora on May 28, 2019, regarding the BDM Program⁹ states that the program provides neutral and confidential resources for contractors when they experience challenges with a contract where PWGSC is the contracting authority. The information indicates that the purpose of the BDM Program is to provide conflict prevention and alternative dispute resolution services to any party to a contract rather than to review the public procurement process.

[33] This raises the question of whether the setting aside of the SO on the ground that Tehora was unable to meet an obligation in the SO *subsequently* or *after* having been selected as the holder of an SO (that is, once the initial bid evaluation process had been completed) must be considered as a

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

⁷ 2005 FCA 177 at para. 3.

⁸ *Groupe-conseil INTERALIA S.E.N.C.* (9 October 2009), PR-2009-052 (CITT) at para. 15.

⁹ This information is available online at <https://tpsgc-pwgsc.gc.ca/gcc-bdm/index-eng.html>.

contract administration issue. Such matters are outside the scope of the procurement process and, therefore, outside the jurisdiction of the Tribunal.¹⁰

[34] In any event, the Tribunal need not rule on this issue since, even if it were to find that it had jurisdiction to conduct an inquiry into the complaint, it has already found that, in order to meet the condition set out in subsection 6(2) of the *Regulations*, Tehora had until June 7, 2019 (or 10 working days after May 24, 2019), to file a valid complaint with the Tribunal, which it failed to do. Moreover, even if the Tribunal gave Tehora the benefit of the doubt and found that it had not gained knowledge of PWGSC's denial of relief until September 3, 2019, when it was informed that the mediation had failed, the Tribunal would still find that the complaint was untimely.

[35] In fact, in this hypothetical scenario, Tehora would have had until September 17, 2019 (10 working days after September 3) to file a complaint under subsection 30.11(1) of the *CITT Act*. However, as stated above, it was not until September 26, 2019, that the Tribunal received a complaint that met the requirements set out in subsection 30.11(2) of the *CITT Act*.

[36] In that regard, although Tehora filed a complaint with the Tribunal on September 13, 2019,¹¹ that complaint was incomplete. On September 17, 2019, the Tribunal informed the complainant of the deficiencies and indicated the additional information and documents required for the complaint to be considered compliant. It was not until September 26, 2019, after the Tribunal had sent a second notice in accordance with subsection 30.12(2) of the *CITT Act* that all the information and documents in question were filed with the Tribunal, although the complainant had filed some of it on September 19, 2019.

[37] A complaint is not considered to have been filed until all the information and documents required under subsection 30.11(2) of the *CITT Act* have been filed with the Tribunal. This finding is consistent with the *CITT Rules*.¹²

[38] In short, since the complaint would have been untimely even if the date of PWGSC's denial of relief were postponed as far as possible, to September 2019, the Tribunal cannot conduct an inquiry into it. Consequently, the Tribunal is not required to examine the issue of whether the other conditions for initiating an inquiry were met.

[39] However, the Tribunal deems it is appropriate to comment briefly on whether the information provided with the complaint would have reasonably indicated that the procurement process had not been conducted in accordance with the relevant trade agreements¹³ if the complaint had been filed in a timely manner. In this regard, it is clear from the documents and correspondence on the record that PWGSC's decision to set aside Tehora's SO for the reason provided was reasonable.

¹⁰ Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "the procurement process", which includes all elements of the contracting cycle up to and including the awarding of the contract. See, for example, *Vidéotron Ltée v. Shared Services Canada* (5 October 2018), PR-2018-006 (CITT) at para. 16; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36.

¹¹ The Tribunal notes that the complaint was received by email at 11:59 p.m. on Friday, September 13, 2019. Therefore, the contents of the complaint were not reviewed until the following Monday, that is, on September 16, 2019.

¹² See paragraph 96(1)(b).

¹³ In this case, these include the *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>> (effective 1 July 2017). Section 1.2 of the RFSO lists the other trade agreements that apply.

[40] Indeed, even if the Tribunal agreed that the complainant's allegations were related to the procurement process, that is, the evaluation of Tehora's proposal as part of the RFSO, and was not a contract administration issue,¹⁴ the information on the record clearly indicates that at no time, including at the closing of the solicitation, was the complainant able to demonstrate compliance with the mandatory requirement of having at least "one full-time staff [employee] capable of assessing the qualifications of candidates to meet job requirements and evaluating performance relevant to these requirements".

[41] PWGSC's decision to set aside the SO initially awarded to the complainant is therefore consistent with the mandatory technical criteria that applied at the bid evaluation stage as well as the relevant clauses of the SO. The Tribunal is of the opinion that the mere fact that Tehora acknowledged that the person it had proposed in response to the mandatory technical criterion set out in section 4.1.1.1 of the RFSO was not a Tehora employee is sufficient to support a finding that its selection as an SO holder was improper and did not comply with the requirements of the solicitation. In these circumstances, it appears that PWGSC was entirely justified in setting aside Tehora's SO under sections 4.2.e and 13.1 of the *General Conditions* of the SO and, in so doing, it seems to have acted in accordance with the provisions of the relevant trade agreements.

[42] On this matter, in *Francis H.V.A.C. Services Ltd. v. Minister of Public Works and Government Services*, the Federal Court of Appeal stated that PWGSC had an obligation to rectify an error related to the evaluation of a proposal against the mandatory criteria of the solicitation, cancelling, if necessary, a contract awarded to a bidder that should not have obtained it.¹⁵ In such circumstances, the Tribunal agrees with the Court that the failure to take the necessary steps to correct a serious bid evaluation error would be antithetical to a fair procurement process.

[43] For these reasons, the Tribunal would have decided not to conduct an inquiry into the complaint in any event because it does not meet the condition set out in paragraph 7(1)(c) of the *Regulations*.

[44] As for Tehora's allegations regarding the conduct of two PWGSC employees, the Tribunal points out that this type of allegation is not covered by the provisions of the applicable trade agreements. Besides, Tehora did not refer to any in its complaint. In any event, the basis of these allegations became known to Tehora in April and May 2019, when PWGSC requested that it demonstrate compliance with the requirements of the solicitation and provide specific information on the proposed resources. Since the allegations were not raised in the objection made to PWGSC on May 14, 2019, they were not filed with the Tribunal within the time limits prescribed by section 6 of the *Regulations*. Consequently, the Tribunal cannot conduct an inquiry into these allegations because they were raised more than 10 days after their basis became known or reasonably should have become known to the complainant.

[45] In light of the foregoing, the Tribunal will not conduct an inquiry into this complaint and hereby considers the matter closed.

¹⁴ As stated above, it is not necessary for the Tribunal to decide this issue in order to dispose of the complaint.

¹⁵ 2017 FCA 165 at paras. 31–33.

DECISION

[46] 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