



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-037

MGIS Inc.

*Decision made
Tuesday, October 15, 2019*

*Decision issued
Thursday, October 17, 2019*

*Reasons issued
Monday, October 28, 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

MGIS 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.

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] This complaint concerns a Request for Proposal (No. M7594-192085) (the RFP) issued against supply arrangement No. E60ZT-16TSPS/D for various professional services, including a senior human resources consultant. The RFP was issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police and was only open to qualified bidders, including the complainant, MGIS Inc.

[3] MGIS's bid was rejected on the basis that a proposed resource for senior human resources consultant failed to meet the minimum point requirement as the certification submitted was not a "professional certification". MGIS claimed that the proposed resource did meet the minimum point requirement and that PWGSC's interpretation of the term "professional certification" was unreasonable.

[4] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

FACTS

[5] PWGSC issued the RFP on March 28, 2019. After several amendments, the RFP closed on May 22, 2019.

[6] The mandatory requirements of this procurement were set out, *inter alia*, in the Task and Solutions Profession Services (TSPS) flexible grids for each stream of service being procured. The flexible grids set out the minimum points required for each level of expertise. The minimum point requirement for a senior human resources consultant is 95 points.³ Points are awarded in relation to three criteria: education, professional certification and years of experience. The RFP also provided a link to Annex A of the Supply Arrangement, which provides in relevant part as follows: "The professional certification must be valid and relevant to the specific consultant category", and "it is incumbent upon the Offeror to demonstrate the relevance of professional certification(s) to the proposed work."

[7] In its bid, MGIS indicated that a proposed resource for the senior human resources consultant holds a certification in Authority Delegation Training for Managers (the ADT certification), which is provided by the Canadian School of Public Service (CSPS). As calculated by MGIS, the points for

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2019-037-01 at p. 43, Vol. 1.

the certification in conjunction with points for the proposed resource's education and years of experience enabled the resource to meet the minimum requirement of 95 points.

[8] On July 23, 2019, PWGSC asked MGIS to identify in its bid how this proposed resource met the relevant professional certification. MGIS responded with the relevant locations in its bid.

[9] By email on August 15, 2019, PWGSC rejected MGIS's bid on the basis that the ADT certification was not a professional "designation" and that therefore the proposed resource did not meet the minimum point requirements for a senior human resources consultant. MGIS immediately objected to the evaluation, arguing that the ADT certification had been accepted by another federal government department as a professional certification in the context of the TSPS flexible grid. By a second email on August 15, 2019, PWGSC responded to MGIS's objection to state that it had confirmed with CSPS that the ADT certification was not a professional certification.

[10] Between August 16, 2019, and September 3, 2019, MGIS corresponded with CSPS regarding the nature of the ADT certification. The Tribunal notes that CSPS maintained that it did not consider the ADT certification to be a professional certification.⁴

[11] Between September 4, 2019, and October 1, 2019, MGIS resumed correspondence with PWGSC regarding PWGSC's definition of a professional certification. However, MGIS did not correspond with the officer responsible for the procurement, but rather with other PWGSC officials.⁵

[12] On October 8, 2019, MGIS filed the present complaint.

ANALYSIS

[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;⁶
- The complainant is a potential supplier;⁷
- The complaint is in respect of a designated contract;⁸ and
- The information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁹

[14] For the reasons that follow, the Tribunal determines that the complaint does not meet all of these conditions.

⁴ Exhibit PR-2019-037-01 at p. 201-268, Vol. 1.

⁵ Exhibit PR-2019-037-01 at p. 15, 279-295, Vol. 1.

⁶ Subsection 6(1) of the *Regulations*.

⁷ Paragraph 7(1)(a) of the *Regulations*.

⁸ Paragraph 7(1)(b) of the *Regulations*.

⁹ Paragraph 7(1)(c) of the *Regulations*.

The complaint is late

[15] The time limits for the filing of a procurement complaint are rigid and strictly enforced.¹⁰ The onus is on potential suppliers to keep a constant vigil and react as soon as they become aware, or reasonably should have become aware, of a flaw in the process.¹¹

[16] Pursuant to section 6 of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no 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 supplier.¹² A potential supplier who has made a timely objection to the procuring government institution and is denied relief 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.¹³

[17] In this case, MGIS raised an objection with PWGSC on the same day that PWGSC rejected its bid and was therefore well within the 10-day deadline to raise an objection with the procuring government institution.

[18] As noted above, in its objection, MGIS disputed PWGSC's evaluation that the ADT certification was not a professional certification. In its final response on August 15, 2019, PWGSC stated that "Canada [had] verified the [ADT certification] with the Canada School of Public Service and it was confirmed that [it] was not a professional certification".

[19] In the Tribunal's view, the above response by PWGSC did not reasonably indicate that it would reconsider its evaluation, but rather reaffirmed its reason for rejecting MGIS's bid.¹⁴ Accordingly, the Tribunal finds that this response constitutes a "denial of relief" for the purposes of subsection 6(2) of the *Regulations*. MGIS was therefore required to file a complaint with the Tribunal no later than 10 working days after August 15, 2019, i.e. by August 29, 2019. However, MGIS did not file the present complaint until October 8, 2019.

[20] Accordingly, the Tribunal finds that this complaint is late.¹⁵

[21] The Tribunal acknowledges the severity of the 10-working-day deadline on bidders. However, time is of the essence in procurements; the time frames fixed by the *Regulations*, including those for initiating and completing the challenge process before the Tribunal, reflect this fact.

¹⁰ *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014) PR-2013-041 (CITT) at para 27. The Tribunal notes that the initial rejection letter from PWGSC directed MGIS to the Recourse Mechanisms page on the buyandsell.gc.ca website and stated that "there are strict deadlines for filing complaints with the Canadian International Trade Tribunal". Confidential Exhibit PR-2019-037-01A at p. 2, Vol.2 .

¹¹ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

¹² Subsections 6(1) and 6(2) of the *Regulations*.

¹³ Subsection 6(2) of the *Regulations*.

¹⁴ See *Aero Support Canada Inc.* (14 March 2016) PR-2015-065 (CITT) at para 15.

¹⁵ The Tribunal notes that the fact that a complainant continues to communicate with a government institution after receiving a *definitive* denial of relief does not suspend or alleviate the onus to comply with the time limits in section 6 of the *Regulations*. See *IT/net Ottawa Inc.* (6 July 2009) PR-2009-023 at para. 11; *Groupe-conseil INTERALIA S.E.N.C.* (9 October 2009) PR-2009-052 (CITT) at para 15; and *Dataintro Software Ltd.* (1 December 2010) PR-2010-077 (CITT) at para. 32. Further, in the present case, MGIS's subsequent communications with PWGSC were not with the officials responsible for the procurement, as noted above.

No reasonable indication of breach

[22] The Tribunal further notes that, even if it had been timely, the complaint did not establish a reasonable indication that PWGSC breached its trade agreement obligations.

[23] It is settled law that the Tribunal typically accords a broad measure of deference to evaluators in their evaluation of proposals and will only interfere with an evaluation that is unreasonable.¹⁶ In this regard, the Tribunal's role is to decide if the evaluation is supported by a tenable explanation.¹⁷

[24] In the present case, the Tribunal finds that PWGSC's evaluation of MGIS's bid is so supported. In the Tribunal's view, it was not unreasonable for PWGSC to rely on the advice of the provider of the ADT certification to determine that it was not a professional certification.

[25] As for MGIS's submission that the ADT certification had previously been accepted by another federal government department as a "professional certification", the Tribunal has established that solicitations are to be considered independently of each other and that the conclusions of a previous evaluation are not binding or determinative of subsequent evaluation procedures. In short, the alleged acceptance of the ADT certification in another procurement process is not sufficient to demonstrate that the decision of the evaluators was unreasonable in this instance.¹⁸

[26] Altogether, the Tribunal finds that there is no reasonable indication that PWGSC's evaluation of MGIS's bid was unreasonable.

DECISION

[27] 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

Rose Ann Ritcey
Presiding Member

¹⁶ See *Davtair Industries Inc.* (13 February 2019) PR-2018-061 (CITT) at paras. 16-17.

¹⁷ In *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 58, the Tribunal explained that "it will interfere only with an evaluation that is *unreasonable* and will substitute its judgment for that of the evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way. In addition, the Tribunal has previously indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling." *Saskatchewan Polytechnic Institute v. Attorney General of Canada (Department of Foreign Affairs, Trade and Development) and Agriteam Canada Consulting Ltd., College of the North Atlantic*, 2015 FCA 16 at para 7.

¹⁸ *Samson & Associates v. Department of Public Works and Government Services* (13 April 2015) PR-2014-050 (CITT) at para 41.