



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-061

Davtair Industries Inc.

*Decision made
Wednesday, February 13, 2019*

*Decision issued
Thursday, February 14, 2019*

*Reasons issued
Friday, February 22, 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

DAVTAIR INDUSTRIES 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*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 (RFP) (Solicitation No. W0138-18A041/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) on November 13, 2018, with a closing date of December 19, 2018, for the provision of one (1) mobile fitness and exercise container.

3. On December 19, 2018, the complainant, Davtair Industries Inc. (Davitair), submitted a bid in response to the solicitation. On January 22, 2019, PWGSC informed Davtair that its bid was found to be non-compliant in that it did not meet Mandatory Criterion No. 1. PWGSC also noted that the solicitation had been cancelled as it had received no compliant bids and that it was likely to be retendered in April 2019.

4. On January 24, 2019, Davtair objected to PWGSC on the grounds that it submitted a compliant bid, and it also sought a debriefing from PWGSC. In response, PWGSC maintained that Davtair had failed to meet the mandatory requirement.

5. On January 28, 2019, PWGSC held a debriefing call with Davtair, in which Davtair learned that it was the sole bidder on the RFP. According to Davtair's submission, PWGSC also reiterated that the solicitation was likely to be retendered and acknowledged that the mandatory requirement may have been too restrictive.

6. On February 6, 2019, Davtair filed this complaint with the Tribunal.

ANALYSIS

7. 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;³
- the complainant is a potential supplier;⁴
- the complaint is in respect of a designated contract;⁵ and

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

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

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

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

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

- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁶

8. The applicable trade agreements in this case include the *North American Free Trade Agreement*⁷ and the *Canadian Free Trade Agreement*.⁸

9. The Tribunal has decided not to conduct an inquiry into the complaint, for the reasons set out below.

Ground 1: Is there a reasonable indication that PWGSC improperly determined that Davtair's bid was non-compliant?

10. Davtair claims that, contrary to PWGSC's evaluation, it submitted a bid that was compliant with the terms of the RFP. Davtair seeks a re-evaluation of its proposal.

11. At issue is Davtair's response to Mandatory Criterion No. 1, which requires bidders to have completed at least one project "of similar size in the same line as the current project":

ANNEX D – MANDATORY CRITERIA

...

D.1 Mandatory Criterion #1 – Bidders' Experience

Bidders must have completed at least one (1) project of similar size in the same line as the current project. The relevant project must meet the following requirements:

...

2. the project will be considered in the same line if it was for the supply of one mobile fitness and exercise container;

12. Davtair's bid referred to a project for diving support vehicles for the Royal Canadian Navy, "kitted to perform as per specs".

13. PWGSC determined that this response did not meet the mandatory requirement and disqualified Davtair's bid on that basis.

14. Davtair appears to claim that for PWGSC to identify suppliers that are technically qualified to provide the customization and transportability needs for the project described in the RFP, the expression "in the same line as" found in mandatory criterion No. 1 should be interpreted to mean "similar to". Davtair claims that the diving support vehicle project it provided in response to mandatory criterion No. 1 is "more complex in scope and size" than the project being tendered and, thus, clearly demonstrates that Davtair is able to deliver the required goods.

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

7. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

8. *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>> (entered into force 1 July 2017) [*CFTA*].

15. The applicable trade agreements require the government institution to evaluate and award bids according to the criteria specified in the tender documents.⁹

16. The Tribunal typically accords a broad measure of deference to evaluators in their evaluation of proposals. In *Excel Human Resources Inc.*, the Tribunal reiterated that it will only interfere 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.¹⁰

17. In other words, if the Tribunal considers that the evaluators have applied themselves to the task of evaluating the submission and have applied the evaluation requirements as per the terms of the solicitation, it will not substitute its opinion for that of the evaluators.

18. It is also well established that there is an onus on bidders to demonstrate compliance with mandatory criteria. The Tribunal has stated that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.¹¹

19. In this case, the Tribunal finds no reasonable indication that PWGSC's interpretation of the meaning and scope of Mandatory Criterion No. 1 was unreasonable, in view of the definition of the phrase "in the same line as the current project" as provided in line item 2 of section D.1 of Annex D to the RFP.

20. The RFP required the bidder to demonstrate that it had previously completed at least one project for the supply of one mobile fitness and exercise container. On its face, the complainant's bid does not demonstrate compliance with this requirement, as it referred to a project for a different type of good. The terms of the RFP indicated what type of project would be considered "to be in the same line as", and, in the absence of ambiguity, there was no basis for the complainant or PWGSC to interpret the requirement as meaning a project merely "similar to" a mobile fitness and exercise container.

21. The Tribunal therefore finds no reasonable indication that PWGSC failed to evaluate the complainant's bid on the basis of the disclosed criteria and sees no basis on which to interfere with PWGSC's evaluation of the complainant's proposal.

Ground 2: Did the RFP impose a mandatory requirement not essential to fulfill the contract?

22. This second ground was not expressly raised in Davtair's complaint to the Tribunal. However, the Tribunal took note that in its correspondence with PWGSC, Davtair also appears to claim that Mandatory Criterion No. 1, as a result of the definition provided in line item 2, is a condition of participation that is not essential to ensure the fulfillment of the contract at issue.

23. To the extent that Davtair intended to raise this argument as a separate ground of complaint before the Tribunal, its complaint in this regard was not filed within the time limits prescribed by section 6 of the *Regulations*.

9. See Articles 1013(1)(h) and 1015(4)(d) of *NAFTA*, and Articles 509(7) and 515(4) of the *CFTA*.

10. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33.

11. For example, see *The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 (CITT); *Bell Canada* (26 September 2011), PR-2011-031 (CITT); *Legacy Products Corporation v. Department of Public Works and Government Services* (2 April 2014), PR-2013-031 (CITT).

24. The Tribunal and the Federal Court of Appeal have consistently held that bidders are expected 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.¹² In other words, complaints grounded on the interpretation of the terms of a solicitation should be made when the alleged problem with the term became or reasonably should have become apparent. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected.

25. Specifically, section 6 of the *Regulations* establishes strict time limits for filing a complaint. 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.¹³ Where a potential supplier first raises an objection with the government institution and is unsuccessful, the supplier may then file a complaint with the Tribunal within 10 working days of receiving denial of relief.¹⁴

26. Thus, if Davtair was of the view that this mandatory requirement, as defined, was a non-essential condition of participation or overly stringent, it was required to raise an objection with PWGSC or file a complaint with the Tribunal within 10 working days of becoming aware of this ground of complaint (i.e. the terms of the RFP).

27. The Tribunal notes that, in this case, the complainant submitted its bid closing date of the solicitation, that is, on December 19, 2018. Even if the Tribunal were to give Davtair the benefit of the doubt and find that it first became aware of the terms of the RFP only on December 19, 2018, Davtair would have been required to file a complaint with the Tribunal or make an objection to PWGSC by no later than January 7, 2019.¹⁵

28. As noted above, Davtair did not raise an objection with PWGSC until January 24, 2019. As such, Davtair is time-barred from raising this ground of complaint.

29. Additionally, the Tribunal notes that a government institution is entitled to establish the evaluation and selection criteria it deems appropriate, as long as the chosen criteria are reasonable, do not favour or discriminate particular suppliers, and do not otherwise violate the requirements of the trade agreements.¹⁶ The complaint did not contain any information indicating that the mandatory requirement at issue is inconsistent with these obligations.

12. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

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

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

15. While there is no doubt that Davtair had knowledge of the terms of the RFP and, therefore, of the mandatory requirement at issue when it submitted its bid on the closing date of the solicitation, there is authority for the Tribunal to find that the basis of the complaint became known to Davtair *before* that date. For example, in *Re Brent Moore & Associates* (4 May 2000), PR-99-040 (CITT), the Tribunal found that, in the absence of evidence to the contrary, a potential bidder becomes aware, or reasonably should become aware, of the terms of a solicitation on the date of its publication. Applying this reasoning in this case would mean that Davtair would have had to object to PWGSC or file its complaint with the Tribunal no later than 10 working days after November 13, 2018.

16. See *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT); *MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. v. Department of Public Works and Government Services* (5 August 2005), PR-2004-061 (CITT); and *ISE Inc. v. Department of Public Works and Government Services* (25 May 2009), PR-2008-049 (CITT).

30. As a final comment, the Tribunal notes the following. PWGSC cancelled the solicitation at issue because it did not receive any compliant bids. PWGSC also indicated that it intends to retender this solicitation in the near future, and in its correspondence with the complainant, PWGSC suggested that it was open to discussing the possibility of modifying the mandatory requirement at issue. In these circumstances, an inquiry into this complaint would have only limited theoretical value and little practical impact. The cancellation and subsequent retender of the procurement, including the review of the mandatory requirement, will give Davtair another opportunity to submit a proposal for evaluation by PWGSC.

31. In other words, the evidence filed on the record indicates that the circumstances have evolved to essentially provide to the complainant the remedy that it seeks from the Tribunal, which is a re-evaluation of its bid. As such, even if the Tribunal had determined that the complaint met the conditions for inquiry, it would have found that it was trivial within the meaning of subsection 30.13(5) of the *CITT Act* and would have decided not to conduct an inquiry on that basis.

DECISION

32. 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