



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-052

Nova-BioRubber Green
Technologies Inc.

*Decision made
Monday, January 7, 2019*

*Decision issued
Thursday, January 10, 2019*

*Reasons issued
Friday, January 18, 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

NOVA-BIORUBBER GREEN TECHNOLOGIES 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 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 concerns a Call for Proposals (CFP) (Solicitation No. W7714-186568) issued by the Department of Public Works and Government Services (PWGSC)³ on behalf of the Department of National Defence (DND) on April 8, 2018, for the Innovation for Defence Excellence and Security (IDEaS) program, to provide the knowledge and technological advantages needed to address Canada's defence and security interests.

3. Nova-BioRubber Green Technologies Inc. (Nova) submitted a bid in response to the solicitation and on December 10, 2018, was informed that it had been deemed non-compliant in that it did not meet the required minimum overall score for the point-rated criteria. On December 12 and 18, 2018, Nova wrote to PWGSC objecting to the decision and requesting that its proposal be reviewed by other evaluators.

4. On December 27, 2018, PWGSC responded to Nova's request and stated that "[a]ll proposals were evaluated in accordance with the evaluation procedures detailed in the Call for Proposals document." In response to one of Nova's objections, PWGSC provided Nova with further clarification on January 2, 2019, explaining that Nova's bid had been reviewed by three reviewers, including a scientific reviewer.

5. This matter was the subject of a previous Tribunal decision⁴ finding that that the initial complaint filed by Nova concerning the CFP at issue was premature, as Nova had not received a definitive response to its objection to PWGSC at the time. The Tribunal finds that Nova received a denial of relief within the meaning of subsection 6(2) of the *Regulations* on December 27, 2018, when PWGSC stated that all proposals were evaluated in accordance with the applicable procedures and thereby confirmed that it would not re-evaluate Nova's proposal. The present complaint was filed on December 30, 2018—within 10 working days of the receipt of this denial of relief—and was therefore filed within the time limits prescribed by section 6 of the *Regulations*.

6. In its complaint, Nova submits that PWGSC provided little comment in its evaluation of Nova's proposal; that only one person evaluated Nova's proposal; that the evaluator did not understand the meaning of "innovation"; and that the evaluator ignored the information provided in the proposal.

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

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

3. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.

4. *Nova-Bio-Rubber Green Technologies Inc.* (21 December 2018), PR-2018-050 (CITT).

ANALYSIS

7. On January 7, 2019, the Tribunal decided not to conduct an inquiry into the complaint, pursuant to subsection 30.13(1) of the *CITT Act*.

8. 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;⁵
- the complainant is a potential supplier;⁶
- the complaint is in respect of a designated contract;⁷ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁸

9. In this case, the applicable trade agreements are the *North American Free Trade Agreement*;⁹ the *Canada-Chile Free Trade Agreement*;¹⁰ the *Canada-Peru Free Trade Agreement*;¹¹ the *Canada-Colombia Free Trade Agreement*;¹² the *Canada-Panama Free Trade Agreement*;¹³ the *Canada-Honduras Free Trade Agreement*;¹⁴ the *Canada-Korea Free Trade Agreement*¹⁵ and the *Canadian Free Trade Agreement*.¹⁶ The applicable trade agreements require that, to be considered for an award, a tender must, at the time of

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

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

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

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

9. *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*].

10. *Canada-Chile Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>> (entered into force 5 July 1997) [*CCFTA*]. Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

11. *Canada-Peru Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009) [*CPFTA*].

12. *Canada-Colombia Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng>> (entered into force 15 August 2011) [*CCOFTA*].

13. *Canada-Panama Free trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>> (entered into force 1 April 2013) [*CPAFTA*].

14. *Canada-Honduras Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng>> (entered into force 1 October 2014) [*CHFTA*].

15. *Canada-Korea Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 2015) [*CKFTA*].

16. *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*].

opening, comply with the essential requirements set out in the tender documentation, and that procuring entities must award contracts in accordance with the evaluation criteria specified in the tender documentation.¹⁷

10. For the following reasons, the Tribunal finds that the information provided by Nova does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant requirements of the applicable trade agreements. Therefore, the complaint does not meet the fourth condition for the initiation of an inquiry.

11. Nova's allegations can be summarized as follows:

- The proposal was evaluated by only one non-professional reviewer
- The evaluation was inadequate

Evaluation of the proposal by only one non-professional reviewer

12. With respect to the first ground of complaint, the CFP provided that "an evaluation team composed of representatives of Canada will evaluate the bids."¹⁸ It did not provide for a specific number of evaluators. The CFP allowed for the use of subject matter experts to evaluate proposals, and amendments to the CFP clarified that subject matter experts from both scientific and operational communities would be conducting the evaluation.

13. Nova does not provide any evidence that discloses a reasonable indication that PWGSC failed to meet this requirement. The evaluation results are set out in a "consensus form", which includes fields for three different reviewers (lead reviewer, military reviewer and scientific reviewer). The "consensus form" suggests that the results communicated to the complainant were derived from a consensus reached by more than one evaluator. The fact that the individuals who performed the evaluation are not expressly identified and that their individual comments are not indicated on the consensus form setting out the scores of the complainant's bid (which might have caused Nova to believe that there was only one reviewer) does not mean that only one person reviewed Nova's bid. The Tribunal also notes that on January 2, 2019 (subsequent to the date of the filing of the complaint), PWGSC confirmed to Nova that its proposal had been reviewed by a total of three evaluators, including a scientific reviewer.

14. As for the allegation that the evaluator who reviewed the bid was a non-professional, Nova has not provided any supporting evidence in this regard. There is no information on the record that would allow the Tribunal to assess, much less question, the professional credentials of the evaluators. The Tribunal is unable to accept Nova's apparent view that the brief comments made by the evaluators on its proposal entail that the evaluation was not conducted by professional and qualified evaluators.

15. Moreover, as mentioned above, PWGSC indicated its January 2, 2019, email to Nova that both a military and a scientific reviewer participated in the evaluation. Accordingly, the information provided by Nova does not disclose a reasonable indication that the evaluation was not conducted by subject matter experts, as required by the CFP.

17. See Article 1015(4) of *NAFTA*; Article Kbis-10(1) of the *CCFTA*; Article 1410(4) of the *CPFTA*; Article 1410(4) of the *CCOFTA*; Article 16.11(4) of the *CPAFTA*; Article 17.12(1) of the *CHFTA*; Article 14.3(1) of the *CKFTA* (incorporating Articles XV(4) and (5) of the *Agreement on Government Procurement*); and Articles 515(4) and (5) of the *CFTA*.

18. RFP, section 4.1.2.

Inadequate evaluation

16. With respect to the second ground, Nova alleges that the evaluator did not apply himself or herself in evaluating the proposal. More specifically, it claims that the evaluator did not understand the meaning of “innovation”, ignored the information provided in the proposal and provided little comment explaining the evaluation and Nova’s results.

17. The Tribunal notes that Nova lost points for all point-rated criteria set out in the CFP. It obtained 20 out of the 40 points required to be declared responsive, as set out in section 4.2.2 of the CFP.¹⁹ The issue is whether the information provided by the complainant discloses a reasonable indication that the evaluation was unreasonable.

18. The Tribunal notes that it typically accords a broad measure of deference to evaluators in their evaluation of proposals. The Tribunal has often confirmed 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.²⁰

19. In other words, if the Tribunal considers that the evaluators have applied themselves adequately to the task of evaluating a bid and applied the evaluation requirements as per the terms of the solicitation document, it will not substitute its opinion for that of the evaluators. 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.²¹ Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential respects.

20. In this case, the Tribunal finds that there is insufficient information that could provide a basis to interfere with the evaluators’ assessment. Contrary to Nova’s allegation, the reviewers’ comments do not simply state that there is insufficient information in the proposal. The comments note which criteria were not adequately addressed. For example, criterion PRC-1 included three sub-criteria, and the reviewers’ comments indicated that sub-criteria 1 and 3 were not sufficiently addressed. Nova’s proposal lost points for all point-rated criteria for lack of scientific evidence included in the proposal,²² with the reviewers noting that Nova provided “insufficient information that is supported by science of the feasibility of biorubber working as actual textile for the human to wear in extreme conditions.” Nova’s complaint does not point to where in its proposal—or how—the lacking areas noted by the reviewer might have been addressed.

21. Nova alleges that the reviewer stated that biorubber is not used in extreme climates, which led it to believe and allege that the reviewer “does not know about innovation”. However, as noted above, the evaluation notes refer to the fact that Nova did not, in its bid, provide sufficient information or scientific evidence that its claims regarding the substance proposed are supported by science. Nova offers no substantiation or evidence that there was a lack of knowledge about “innovation” other than it disagreed with the conclusions of the evaluation.

19. The CFP reads as follows: “Each proposal that meets all of the mandatory criteria will be evaluated and scored in accordance with the point rated evaluation criteria in Part 4, Attachment 1, Table 2. Proposals must obtain a minimum score of 40 to be declared responsive.”

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

21. *Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CITT).

22. As noted above, Nova obtained 20 of the mandatory 40 points for these criteria.

22. Having reviewed Nova's proposal, the Tribunal finds that it is far from clear that it included the required scientific support to obtain higher scores in respect of the relevant point-rated criteria. On its face, the proposal does not contain much information to substantiate the assertions made about the properties of the proposed substance and its eventual performance in extreme climatic environment, nor does it include scientific evidence in this regard. Moreover, with respect to PRC-1 ("Scientific and/or Technical Merit"), according to the CFP, bidders had to address scenarios taking into account factors relevant to a "GBA+" analysis, and Nova lost points for its failure to mention such factors or stating that they are not relevant. The Tribunal notes that this issue is not considered in Nova's proposal, as stated by the evaluators.

23. The Tribunal also finds that there is little evidence that the evaluators ignored any information that was provided in the proposal. Again, Nova's complaint does not indicate where in its proposal it clearly articulated how it met the point-rated criteria for which PWGSC deducted points. On this issue, the Tribunal notes that the standard instructions incorporated by reference into the CFP include a clause that requires bidders to provide a sufficiently detailed bid that will permit an evaluation in accordance with the criteria set out in the solicitation documents. These standard instructions also indicate that the contracting authority will evaluate only the information and documentation provided with a bid and not references to Web site addresses where additional information could be found.²³

24. Therefore, PWGSC's decision to reject Nova's bid is supported by a tenable explanation. In summary, the information provided by Nova does not disclose a reasonable indication that PWGSC's evaluation of Nova's proposal was unreasonable or contrary to the criteria specified in the CFP.

25. As such, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the trade agreements.

DECISION

26. 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

23. *Competitive Projects - Call for Proposals – Component 1a*, section 2.2m which incorporates by reference the 2003 (2017-04-27) *Standard Instructions – Goods or Services – Competitive Requirements*, section 05 (2014-09-25) - Submission of Bids.