



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2019-001

Co-entreprise K2-Chaac-Triox

*Decision made  
Friday, April 12, 2019*

*Decision issued  
Monday, April 15, 2019*

*Reasons issued  
Friday, April 26, 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**

**CO-ENTREPRISE K2-CHAAC-TRIOX**

**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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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.

2. For the reasons below, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. Therefore, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

### SUMMARY OF THE COMPLAINT

3. The complaint relates to a Request for Proposal (RFP) (Solicitation No. T8840-180119/A) issued on August 29, 2018, by the Department of Public Works and Government Services (PWGSC) on behalf of Transport Canada for the provision of a Geographic Information System solution to enhance Maritime situational awareness in 10 selected coastal communities. This procurement falls under the national Oceans Protection Plan to improve marine safety and responsible shipping, protecting Canada's marine environment.

4. The RFP indicated that the procurement was subject to the World Trade Organization *Agreement on Government Procurement*, the *North American Free Trade Agreement*, the *Canada-European Union Comprehensive Economic and Trade Agreement* and the *Canadian Free Trade Agreement*.

5. The RFP involved a three-phase selection process. The third phase consisted of a demonstration of the technical solution proposed by each bidder to an evaluation team made up of representatives of each of the 10 coastal communities.

6. The complainant alleges that the evaluation of its proposal in Phase 3 of the procurement process did not comply with the procedures and criteria set out in the RFP. More specifically, it argues the following:

- (1) The presentation of its proposed technical solution was interrupted by the evaluators, preventing it from making a thorough and orderly demonstration of its solution.
- (2) The evaluation procedure for the demonstration of the technical solution, set out in Part 4.5 of the RFP, was not applied for the rated technical criteria set out in Part 4.5.2 of the RFP, in several respects.

The complainant is seeking a full review of the evaluation of Phase 3 and to have the contract awarded to it.

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

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

## BACKGROUND

7. The complainant submitted a bid in response to the RFP and passed the first two phases of the selection process. It was then invited to participate in Phase 3 of the evaluation process, the demonstration of its solution to the evaluators. The complainant presented its technical solution to the evaluators on February 7, 2019. The evaluators had to evaluate the bid based on a series of mandatory criteria and rated criteria.

8. On February 22, 2019, PWGSC informed the complainant that, although its bid satisfied the mandatory criteria of the RFP, it had not received the highest overall score based on the evaluation method set out in the RFP. Therefore, the contract was awarded to another bidder, Fujitsu Consulting (Canada) Ltd., which had received a higher overall score.

9. On February 28, 2019, the complainant sent an email to PWGSC seeking additional information about the evaluation of its proposal. In its email, the complainant asked PWGSC nine questions concerning the manner in which the evaluation was conducted, some of which sought more specific information about PWGSC's comments on the final results of the evaluation in its letter of February 22, 2019. The complainant also asked for clarifications as to why it had obtained less than the maximum score for some of the rated criteria and indicated its intention to appeal PWGSC's decision.

10. On March 21, 2019, PWGSC replied to the complainant, indicating, among other clarifications, the information that had been shared with the evaluators during Phase 3 of the evaluation of the proposals. PWGSC also explained to the complainant why it had not received the maximum score for some of the rated criteria. According to PWGSC, the evaluation in Phase 3 of the process was based on a sliding scale. The bidders had an opportunity to demonstrate how their solutions met the rated criteria by including elements connected with the criteria that went beyond what was asked. According to PWGSC, this sliding scale (0 = criterion not met; 0.5 = criterion minimally met; 1.5 = criterion adequately met; 2.5 = criterion met very well) ensured equality of opportunity and allowed the evaluators to award points for innovative additions. Therefore, a perfect score of 2.5 corresponded to a situation in which the information demonstrated by a bidder exceeded what was required by the RFP. For example, PWGSC told the complainant what it could have done to obtain a score of 2.5 for one of the rated evaluation criteria relating to weather and sea conditions (item c)):

To obtain a higher score, you could have demonstrated an element connected with weather and sea conditions beyond the examples provided (e.g. precipitation, wind, currents). For example, the following illustrative list provides examples of weather and sea conditions that could have contributed positively to your score:

- dynamic weather models such as raster data that change over time
- ice thickness or ice cover over water
- the direction, speed, height and undulation of waves

...

You were not limited [to the examples provided]. If you had included other elements relevant to a marine environment, you could have obtained a perfect score of 2.5 points. The scoring method was sufficiently subjective to allow for this difference to be established.

[Translation]

11. On April 3, 2019, the complainant transmitted its complaint to the Tribunal. In support of the above-mentioned allegations, K2-Chaac-Triox argues that PWGSC's replies indicate that the evaluation of the demonstration was not conducted objectively or in accordance with the terms of the RFP. In particular, the complainant argues that nowhere in the RFP is it mentioned that there is an opportunity to exceed the required elements and add innovative elements for extra points. In addition, the complainant argues that the elements evaluated in Phase 3 represented a subset of the elements evaluated in Phase 2, in which it had received a perfect score, which makes the wide gap between the scores in Phases 2 and 3 difficult to understand. The complainant also claims that the evaluators did not receive the necessary instructions or background to evaluate its proposal fairly, in particular a user guide prepared by the complainant for the purposes of the evaluation of its bid during the preceding phase of the selection process.

12. However, the complaint did not meet the requirements of subsection 30.11(2) of the *CITT Act*, and additional information and documents were required before it could be considered filed. On April 3, 2019, in accordance with subsection 30.12(2), the Tribunal asked the complainant to provide the information necessary to bring the complaint into compliance with the requirements of subsection 30.11(2). This included documents relating to the solicitation, the complainant's bid, and any correspondence relating to the RFP that had not already been submitted with the complaint.

13. Having received no response, on April 8, 2019, the Tribunal contacted the complainant again to remind it that the documents mentioned in the letter of April 3, 2019, had to be provided as soon as possible for the complaint to be considered filed.

14. On April 9 and 10, 2019, the complainant submitted to the Tribunal the information and documents required to complete the initial complaint.

## ANALYSIS

15. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before being able to conduct an inquiry: (i) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*; (ii) whether the complainant is a potential supplier; (iii) whether the complaint is in respect of a designated contract; and (iv) whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

16. In this case, the complaint does not satisfy the first condition as the two allegations or grounds for complaint were filed outside the time limit prescribed by the *Regulations*.

17. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "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) provides that a potential supplier who 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."

18. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of a ground of 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, the complainant will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution

19. Regarding the allegation that the presentation of the technical solution it was proposing was interrupted by the evaluators, which allegedly prevented it from making an orderly and thorough demonstration of its solution, the Tribunal notes that, according to the information in the complaint, this presentation took place on February 7, 2019. Consequently, the complainant became aware of the basis of this ground of complaint on February 7, 2019. It is true that the complainant was unaware at that time that PWGSC would reject its proposal.

20. However, the procurement review process does not allow potential suppliers to accumulate grievances and to file these when their proposal is rejected. In this regard, the Federal Court of Appeal held as follows in *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .<sup>3</sup>

21. The Court added that a bidder must not adopt a “wait and see attitude” and make its challenge once the procurement process is over. It stated that this “is precisely the type of attitude that the procurement process and *Regulations* seek to discourage.”<sup>4</sup>

22. In accordance with the Federal Court of Appeal’s interpretation, the Tribunal is of the view that the complainant could not wait for the outcome of the evaluation before objecting to the federal institution or filing a complaint with the Tribunal regarding its grievances concerning the procedure followed when it presented its solution on February 7, 2019. Given that the complainant submits that the evaluators did not allow it to make a proper presentation, it became aware of the alleged procedural error giving rise to this ground of complaint on February 7. In order to comply with the time limits provided for in section 6 of the *Regulations*, it therefore had until February 21, 2019, to raise the issue with PWGSC by objecting or filing a complaint directly with the Tribunal. However, it was not until April 2019 that the complainant raised this ground of complaint for the first time, in its complaint to the Tribunal. Consequently, K2-Chaac-Triox’s complaint regarding this factor was clearly not filed on time.

23. Regarding the allegations involving PWGSC’s alleged breaches in evaluating the complainant’s proposal, the Tribunal finds that the complainant only became aware of the factual basis of this ground of complaint on March 21, 2019, when PWGSC provided it with additional information on the instructions and documents provided to the members of the communities that evaluated the presentations, and explanations on the rating scale and the reasons why it was not given the maximum points for certain rated criteria. Indeed, the complainant did not and could not have reasonably become aware of these facts concerning the manner in which its presentation was evaluated and rated until the complainant asked PWGSC for clarifications (which it did on February 28, 2019) and received a reply (which it did on March 21, 2019).

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3. *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII), at paras. 18 and 20.

4. *Ibid.* at para. 28.

24. In order to comply with the time limits set out in section 6 of the *Regulations*, the complainant therefore had until April 4, 2019, to raise the issue with PWGSC through an objection or directly with the Tribunal by filing a complaint. In its complaint form, the complainant stated that it made an objection to PWGSC on March 22, 2019, and April 2, 2019. However a review of the emails sent by the complainant on these dates reveal that they do not amount to an objection within the meaning of section 6. Indeed, the email dated March 22 merely informs PWGSC that the complainant contemplated or intended to appeal PWGSC's decision upon conclusion of the tendering process, without requesting any remedy from the contracting authority. In turn, the April 2, 2019, email merely informs PWGSC, for transparency reasons, that the complainant was going to file a complaint with the Tribunal.

25. The very next day, on April 3, 2019, the complainant did send the Tribunal its complaint. However, as previously mentioned, this complaint was incomplete and failed to meet the requirements of subsection 30.11(2) of the *CITT Act*. On April 3, the Tribunal notified the complainant of the deficiencies and indicated which additional information and documents it would need to submit for the complaint to be compliant. As there was no response from the complainant, the Tribunal sent the complainant a second notice under subsection 30.12(2) on April 8, 2019, reminding it that its complaint would not be considered to have been duly filed until the requested information had been received.

26. It was not until April 10, 2019, that all of the information and documents in question were filed with the Tribunal, even though the complainant filed most of the information and documents on April 9, 2019.

27. These documents included the tender documentation, which, in this case, constitutes “information and documents relevant to the complaint that are in the complainant's possession” that must be filed with the complaint under subsection 30.11(2) of the *CITT Act*. In this respect, the Tribunal notes that the consideration of the second ground of complaint requires a review of the evaluation procedures and methods set out in the tendering documentation. Indeed, this aspect of the complaint is largely based on the following allegation: “Nowhere does the tendering documentation state that bidders may exceed the required elements or add innovative elements for extra points” [translation]. The Tribunal therefore finds that the complainant had this documentation in its possession.

28. A complaint is not considered to be filed duly until all the information and documents required under section 30.11 of the *CITT Act* have been filed with the Tribunal.<sup>5</sup> This conclusion is consistent with the *Canadian International Trade Tribunal Rules*,<sup>6</sup> which provide as follows in paragraph 96(1)(b):

A complaint shall be considered to be filed . . . in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the date that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.

29. In this case, this date is April 10, 2019—or, at best, April 9, 2019—i.e., in both cases, outside the time limit prescribed by section 6 of the *Regulations* (within 10 working days after March 21, 2019, i.e. April 4, 2019). Consequently, K2-Chaac-Triox's ground of complaint regarding the allegations pertaining to the improper evaluation of its proposal was also not filed on time.

30. For these reasons, given that the complaint was filed outside the prescribed time limits, the Tribunal cannot inquire into it.

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5. *CORADIX Technology Consulting Ltd.* (21 February 2012), PR-2011-051 (CITT) at para. 20.

6. S.O.R./91-499.

**DECISION**

31. 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