



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-003

Falcon Environmental Services Inc.

*Decision made
Thursday, April 18, 2019*

*Decision issued
Tuesday, April 23, 2019*

*Reasons issued
Wednesday, May 1, 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

FALCON ENVIRONMENTAL SERVICES 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. Since the complainant has not yet received a response to its objection to the government institution, the complaint is premature.

Cheryl Beckett
Cheryl Beckett
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 COMPLAINT

2. This complaint by Falcon Environmental Services Inc. (Falcon) concerns a request for proposal (RFP) (Solicitation No. W0133-19H014/A) for the provision of wildlife control services issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND).

3. Falcon alleged that 1) the technical evaluation criteria were designed to favour local suppliers, contrary to Article 503(3)(b) of the *Canadian Free Trade Agreement*,³ and 2) Falcon had not been provided the explanation it requested of the reasons its tender had not been selected, contrary to Article 516(1) of the *CFTA*. As a remedy, Falcon requested that a new solicitation be issued or that the bids be re-evaluated.

PROCUREMENT PROCESS

4. On January 21, 2019, the RFP was issued. The deadline for the submission of bids was March 4, 2019. Falcon submitted its bid on the deadline.

5. On March 15, 2019, Falcon contacted PWGSC to find out when the contract would be awarded and received no response. On March 20, 2019, the contract was awarded to West Coast Wildlife Control Services Ltd. The contract award notice was posted on buyandsell.gc.ca on March 22, 2019.

6. On March 26, 2019, Falcon contacted PWGSC to state that it had been made aware that the contract award notice had been posted on buyandsell.gc.ca and that it had not been awarded the contract. Falcon requested an explanation of how it was scored on the evaluation criteria in relation to the winning bidder. On April 1, 2019, PWGSC officially notified Falcon that it had not been awarded the contract and provided Falcon with its overall evaluation as compared to the winning bidder.

7. On April 5, 2019, Falcon requested further information regarding its evaluation from PWGSC, in particular its scores for each of the point-rated technical evaluation criteria. Falcon also informed PWGSC of an apparent error in the weighting of the technical evaluation scores.

8. On April 10, 2019, Falcon filed its complaint with the Tribunal. However, the complaint did not include all relevant information and documents that were in the complainant's possession, as required by

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

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

3. *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*].

subsection 30.11(2) of the *CITT Act*. On that same date, the Tribunal informed Falcon that its complaint was deficient and requested that additional information be provided to correct the deficiencies.

9. On April 11, 2019, Falcon provided the Tribunal with additional information that substantially addressed the deficiencies in the complaint. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*,⁴ the complaint was considered to have been filed on April 11, 2019.

ANALYSIS

10. On April 18, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

Falcon's complaint regarding the technical evaluation criteria is not timely

11. Falcon's first ground of complaint is that the technical evaluation criteria were designed to favour local suppliers, contrary to Article 503(3)(b) of the *CFTA*.

12. Subsection 6(1) of the *Regulations* provides that “. . . a potential supplier who files 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.”

13. 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.”

14. In short, in order to meet these prescribed deadlines, a complainant has 10 working days from the date on which it first became aware, or reasonably should have become aware, of its ground of complaint to either file a complaint with the Tribunal or object to the government institution.

15. The RFP allowed for potential suppliers to ask questions, and responses to these questions were published as amendments to the RFP.⁵ There is no evidence that Falcon raised its concerns regarding the wording of the evaluation criteria with PWGSC as part of this process. Further, Falcon did not raise this issue with PWGSC in any of the correspondence filed with the Tribunal.⁶

16. The prescribed deadlines require that potential suppliers “. . . keep a constant vigil and . . . react as soon as they become aware or reasonably should have become aware of a flaw in the process”.⁷ The procurement review process does *not* provide for perceived grievances to be accumulated and then presented only when the contract is awarded.

17. To the extent that this ground of Falcon's complaint relates to the wording of the technical evaluation criteria themselves, this ground of complaint was known or reasonably should have become known to Falcon at the time that it acquainted itself with the solicitation documents during the bidding period. This ground of complaint is therefore late.

4. SOR/91-499.

5. Exhibit PR-2019-003-01D, Vol. 1 at 120, 170-174.

6. Exhibit PR-2019-003-01B, Vol. 1 at 11-13.

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

18. This does not preclude Falcon from filing a new complaint should it become aware of any potential deficiencies in the evaluation process once it receives the additional information regarding its evaluation that it has requested.

Falcon’s complaint regarding the failure to provide additional information concerning its evaluation is premature

19. Falcon’s second ground of complaint is that it has not been provided with the further information regarding its evaluation, including a response to its question regarding the apparent error in the weighting of the technical evaluation scores, that it requested on April 5, 2019, contrary to the requirements of Article 516(1) of the *CFTA*.

20. The Tribunal considers that Falcon’s request for further information regarding its evaluation, particularly with respect to the apparent error in the scoring, is an objection,⁸ and that this objection was made in a timely manner. However, according to the information on the record, PWGSC has not yet responded to Falcon’s request. As a result, the Tribunal considers that PWGSC has not yet denied Falcon relief and that this ground of complaint is therefore premature.

21. The Tribunal’s decision does not preclude Falcon from filing a new complaint within 10 working days of receiving a denial of relief from PWGSC. Furthermore, if PWGSC fails to respond to Falcon’s objection within 30 days of the issuance of these reasons, the Tribunal could construe PWGSC’s silence as a constructive denial of relief. In that case, Falcon would then be able to file a new complaint with the Tribunal within 10 working days of that date. In either case, Falcon may request that documents already filed with the Tribunal be joined to the new complaint.

22. If Falcon files a new complaint, the Tribunal will decide whether to inquire into the complaint, having regard particularly to the conditions of the *Regulations*.

DECISION

23. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Cheryl Beckett
Cheryl Beckett
Presiding Member

8. The term “objection” is not defined in the *Regulations*. The Tribunal does not prescribe the form or content of objections, and has repeatedly held that it should not be formalistic in considering what constitutes an objection: see, for example, *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at paras. 61-63.