Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-004

Terragon Envrionmental Technologies Inc.

Decision made
Thursday, April 18, 2019

Decision issued
Monday, April 23, 2019

Reasons issued
Tuesday, April 30, 2019

Canada

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

TERRAGON ENVIRONMENTAL TECHNOLOGIES INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNEMENT 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 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, filed by Terragon Envrionmental Technologies Inc. (Terragon), relates to a Request for Proposal (RFP) (Solicitation No. W8482-178586/A) issued on August 28, 2018, by Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of thirteen Solid Waste Processing Systems including engineering support and training for maintenance personnel and operators, with an option to purchase four additional Solid Waste Processing Systems.

3. The complainant's allegations can be summarized as such:

1. The "grading scheme" was inadequate in that the rated requirements disproportionally "considers and heavily weighs negative aspects of thermal treatment technologies"; there was no consideration of greenhouse gas reduction or carbon sequestration; and there was no consideration or weight applied to the safety of the residual output of the systems.
2. The winning bidder is an unknown entity and it does not have the qualifications to fulfil the contract; on the basis of its balance sheet, its technology is neither tested nor proven; the winning bidder has not done work on commercial ships and "the solicitation did not evaluate any form of bidder qualification or commercial expertise".
3. The procuring entity did not follow the guidelines of the *Canadian Free Trade Agreement* (*CFTA*) at Articles 102(b), 601 and 603.
4. The solicitation documents had no evaluation criteria for environmental protection, greenhouse gas emissions or potential sequestration of CO2 and remained silent on climate change mitigation measures, in breach of Canada's climate change goals and Canada's ratification of the *Paris Agreement*.
5. The technology selected by the evaluation process is not the correct one.

BACKGROUND

4. The RFP was published on August 28, 2018, and was followed by several amendments, the last of which was published on October 24, 2018, which extended the closing date of the solicitation process to November 8, 2018.

5. On April 3, 2019, the contract was awarded to WPT s.r.l.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

6. On April 4, 2019, Terragon was advised by PWGSC that while its bid was found to be responsive to the mandatory criteria of the solicitation, it "did not achieve the highest score under the evaluation methodology described in the solicitation".[3] On the same day, Terragon wrote to DND and various ministers that it would "challenge the decision in any legal and political means available to [it]".[4]

7. On April 12, 2019, Terragon submitted its complaint to the Tribunal, with additional information filed on April 16, 2019. Pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*,[5] the complaint was considered filed on April 16, 2019.

ANALYSIS

8. Pursuant to section 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 conditions have been met before conducting 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.

9. On April 18, 2019, the Tribunal decided not to conduct an inquiry into this complaint, pursuant to subsection 30.13(1) of the *CITT Act*. The Tribunal determined that the allegations were either untimely or did not disclose a reasonable indication of a breach of the applicable trade agreements. The reasons for the decision are as follows.

First and second allegations

10. Terragon alleges that the "grading scheme" set out in the RFP was inadequate in that the rated requirements disproportionally "consider[ed] and heavily weigh[ed] negative aspects of thermal treatment technologies . . .". Terragon further alleges that the RFP gave no consideration to greenhouse gas reduction or carbon sequestration and that no consideration or weight was applied to the safety of the residual output of systems.

11. Furthermore, Terragon alleges that "the solicitation did not evaluate any form of bidder qualification or commercial expertise."

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3. Exhibit PR-2019-004-01, Vol. 1, Letter of Regret, April 4, 2019.
4. Exhibit PR-2019-004-01, Vol. 1. The Tribunal did not consider Terragon's letter as an "objection" within the meaning of the *Regulations*. Although the letter explained why Terragon thought the decision to award the contract to another company was wrong, it did not contain "sufficient specificity" to enable DND to respond and to begin an informal dispute-resolution process. Indeed, the language of Terragon's letter could be read such that it was not expecting DND to respond. See *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at paras. 46-51 and 59.
5. SOR/91-499.

12. 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) of the *Regulations*, in turn, 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."

13. 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 its 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 may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

14. With respect to the allegations that the "grading scheme" was inadequate or that the solicitation ought to have evaluated bidder qualification or commercial expertise, the Tribunal finds that the evaluation criteria and their weight were clearly laid out in the RFP and, thus, Terragon should reasonably have become aware of them upon reading the RFP, which would have occurred, at the latest, at the bid closing date. As such, if Terragon believed that that the structure or criteria of the RFP were in some way inconsistent with the requirements of the trade agreements, it had 10 working days from becoming aware of the structure or criteria of the RFP to file an objection or a complaint in that respect.

15. Indeed, if a potential supplier believes that there is a flaw in the invitation to tender, it must file a complaint in a timely manner. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected. In this regard, in *IBM Canada Ltd v. Hewlett Packard (Canada) Ltd.*,[6] the Federal Court of Appeal stated the following:

> [18] In procurement matters, time is of the essence. . . .
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> . . .
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> [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. . . .
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> [21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of a [Request for Proposal] should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

16. 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."

17. Since Terragon's first two allegations relate to the evaluation procedures set out in the RFP itself, it should not have waited for the rejection of its proposal before making an objection to the relevant government institution, or filing a complaint with the Tribunal. Rather, it was incumbent on Terragon to do so within 10 working days after the day it became aware or reasonably should have become aware of the process set out in the RFP.

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

18. As such, the Tribunal finds that these two allegations were not filed within the limits prescribed by the *Regulations*.

19. Terragon's second allegation also states that the winning bidder is an unknown entity and that it does not have the qualifications to fulfil the contract, that its technology is neither tested nor proven and that the winning bidder has not done work on commercial ships. To the extent that Terragon is arguing that the winning bidder failed to comply with any of the evaluation criteria as set out in the RFP, the Tribunal finds that such allegations do not meet the threshold of a reasonable indication of a breach of the applicable trade agreements and, therefore, do not meet the fourth condition of inquiry pursuant to section 7 of the *Regulations*. The Tribunal finds that Terragon's allegations in this respect are purely speculative, given that the information provided with the complaint does not include any evidence to support these statements.

Third allegation

20. Terragon complains that the procuring entity did not follow the guidelines of the *CFTA* at Articles 102(b), 601 and 603.

21. Article 102(2)(b) states as follows:

> In applying the principles set out in paragraph 1, the Parties recognize:
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> the need to preserve flexibility in order to achieve public policy objectives, such as public health, safety, social policy, environmental or consumer protection, or the promotion and protection of cultural diversity;

22. Further, Terragon refers to Chapter Six: Environmental Protection, at Articles 601 and 603:

> The Parties recognize that environmental protection and trade can be mutually supportive and that sustainable development should be part of an overall approach to trade. Environmental protection includes climate change mitigation and adaptation, and ensuring the sustainability of natural resources such as fish, forests, clean air, and water.
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> . . .
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> Each Party shall, in dealing with trade, investment, and labour mobility, take into account the need to restore, maintain, and enhance the environment.
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> Each Party shall pay special attention to facilitating the removal of barriers to trade and investment concerning goods and services of particular relevance for environmental protection.

23. As set out above, one of the conditions that must be met in order for the Tribunal to initiate an inquiry is that the complaint must disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant chapter of the applicable trade agreements. More specifically, section 7 of the *Regulations* provides as follows*:*

> [T]he information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of NAFTA, the Agreement on Government Procurement, Chapter Kbis of the CCFTA, Chapter Fourteen of the CPFTA, Chapter Fourteen of the CCOFTA, Chapter Sixteen of the CPAFTA, Chapter Seventeen of the CHFTA, Chapter Fourteen of the CKFTA, Chapter Nineteen of CETA, *Chapter Five of the CFTA*, Chapter Ten of CUFTA or Chapter Fifteen of the TPP applies.
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> [Emphasis added]

24. In other words, section 7 of the *Regulations* specifically provides that a complaint must disclose a reasonable indication that a procurement process has not been conducted in accordance with specific chapters of certain trade agreements, in this case Chapter Five of the *CFTA*.

25. Terragon alleges that PWGSC breached Articles 102(b), 601 and 603 of the *CFTA* (found in Chapters One and Six, respectively). Neither Chapter One nor Chapter Six of the *CFTA* fall within the scope of the Tribunal's review. As such, the Tribunal finds that this allegation fails to meet the threshold of a reasonable indication of a breach of the applicable trade agreements and, therefore, does not meet the fourth condition of inquiry pursuant to section 7 of the *Regulations.*

Fourth and fifth allegations

26. Terragon complains that the solicitation documents had no evaluation criteria for environmental protection, greenhouse gas emissions or potential sequestration of CO2 and that it remained silent on climate change mitigation measures, in breach of Canada's climate change goals and Canada's ratification of the *Paris Agreement*. It also believes that the technology it offers for the purposes of the solicitation is a better technology and that, comparatively, the selected technology is "more damaging to the environment".

27. As mentioned previously, the role of the Tribunal in matters of government procurement is limited to those trade agreements mentioned in the *CITT Act* and the *Regulations.* Neither the *Paris Agreement* nor "Canada's climate change goals" fall under the purview of this tribunal.

28. Furthermore, while Terragon believes its technology best suited for the purposes outlined in the RFP, it remains that Terragon offers no evidence to demonstrate how the winning bidder selected by PWGSC breached the relevant provisions of the applicable trade agreements mentioned in section 7 of the *Regulations.*

29. As such, the Tribunal finds that these allegations fail to meet the threshold of a reasonable indication of a breach of the applicable trade agreements and, therefore, do not meet the fourth condition of inquiry pursuant to section 7 of the *Regulations*.

DECISION

30. 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