



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-045

Nova-BioRubber Green
Technologies

*Decision made
Monday, December 3, 2018*

*Decision issued
Thursday, December 6, 2018*

*Reasons issued
Tuesday, December 18, 2018*

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 relates to a Call for Proposals (CFP) (Solicitation No. EN578-120003/B) issued on February 19, 2018, by the Department of Public Works and Government Services (PWGSC) on behalf of Innovation, Science and Economic Development Canada (ISED). The CFP called for the supply of innovative solutions to address a wide range of challenges facing federal departments and agencies. Specifically, the challenge addressed by the procurement at issue is the identification and development of innovative solutions and technologies for materials and coatings to enhance personal protective ensembles to counter chemical, biological or radiological threats.

3. The complainant, Nova-BioRubber Green Technologies (Nova), alleged that PWGSC improperly evaluated the content of its bid by having it reviewed by a non-professional evaluator who ignored key information contained in Nova's project proposal.

BACKGROUND

4. On September 4, 2018, Nova was advised by PWGSC that its proposal had not been retained. On September 10, 2018, Nova e-mailed PWGSC stating that the reviewer's comments regarding Nova's failure to satisfy the CFP's technical requirements were inappropriate and indicated that the proposal had not been evaluated by a professional evaluator. It also requested that its proposal be sent to other reviewers.

5. On September 18, 2018, PWGSC responded by providing additional information regarding the evaluation of Nova's proposal to "provide more clarity on [Nova's] results". It also indicated that the evaluation team consisted of a "subject matter expert from the Department of National Defence and the Industrial Research Assistance Program (National Research Council)".

6. On September 25, 2018, Nova responded to PWGSC and provided more detailed information on the grounds upon which it disagreed with the evaluators' assessment. Moreover, it stated that important information contained in its proposal was ignored during the evaluation and that the evaluator made contradictory statements. Nova also requested that its proposal be reconsidered.

7. PWGSC responded on October 3, 2018, providing additional clarifications and highlighting the necessity for bidders to respond to each criterion under the Technical Proposal in a "thorough, concise

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

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

and clear manner”. It also informed Nova that the “evaluation team maintains the scores provided for this proposal”.

8. On October 4, 2018, Nova replied to PWGSC’s October 3, 2018, e-mail and stated once again that its proposal should be re-evaluated. Nova also asked by which means it could appeal PWGSC’s decision.

9. On November 26, 2018, Nova 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 subsection 30.11(2) of the *CITT Act*. On that same date, the Tribunal informed Nova that its complaint was deficient and requested that additional information be provided to correct the deficiencies.

10. On November 28, 2018, Nova provided the Tribunal with additional information that substantially addressed the deficiencies in the complaint. It also filed additional materials on November 30, 2018. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on November 28, 2018.

ANALYSIS

11. On December 3, 2018, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The Tribunal determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. The reasons for that decision are as follows.

12. 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.”

13. The *Regulations* make it clear that a complainant has 10 working days from the day on which the basis of the complaint becomes known, or should have been reasonably known, to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within those 10 days, it may afterwards file a complaint with the Tribunal within 10 working days after it gains actual or constructive knowledge of the denial of relief by the government institution.

14. In view of the background information above, Nova’s complaint with the Tribunal was not timely. Nova became aware of its ground of complaint at the latest by September 18, 2018, when PWGSC provided detailed comments explaining the results of the evaluation and information on the composition of the evaluation team. Nova then chose to respond to PWGSC’s September 18, 2018, e-mail by disputing the evaluation results and requesting that PWGSC reconsider its proposal on September 25, 2018. The Tribunal finds that Nova’s e-mail dated September 25, 2018, was an objection to PWGSC and that it was validly made (that is, made within 10 working days from the day on which the basis of the complaint became known).

15. However, PWGSC unequivocally informed Nova, on October 3, 2018, that the results of the evaluation would be maintained and, by implication, that its proposal would not be re-evaluated. As such, the Tribunal finds that PWGSC's e-mail dated October 3, 2018, constituted a denial of relief, as contemplated by subsection 6(2) of the *Regulations*.

16. Thus, Nova would have had to file its complaint with the Tribunal by October 17, 2018, at the latest, to comply with subsection 6(2) of the *Regulations*. However, the complaint was not received by the Tribunal until November 26, 2018, and was not considered filed until November 28, 2018, when certain information to correct the deficiencies in the complaint was received. The complaint was therefore filed outside the time limit established in the *Regulations*.

17. Accordingly, it is not necessary for the Tribunal to examine whether the other conditions for inquiry have been met. By application of section 6 of the *Regulations*, the Tribunal considers this matter closed.

DECISION

18. 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