



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-008

Terrapure Environmental

*Decision made
Monday, June 15, 2020*

*Decision issued
Tuesday, June 16, 2020*

*Reasons issued
Monday, June 22, 2020*

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

TERRAPURE ENVIRONMENTAL

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.

Cheryl Beckett

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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] This complaint relates to a Request for Standing Offers (RFSO) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defense, for the provision of all labour, materials, tools, equipment, transportation and supervision required to perform Shipboard Generated Hazardous Waste Removal Services in HMC Dockyard and onboard HMC Ships/Submarines within the Halifax Region Municipality (Solicitation No. W3554-206280/A).

[3] Terrapure Environmental (Terrapure) challenged the evaluation of its bid in respect of the requirements of the solicitation for a quality management system and a risk management plan. Terrapure also argued that PWGSC should have requested clarification on its bid and that the winning bid was non-compliant with the terms of the solicitation. Terrapure requested that it be awarded the designated contract.

[4] For the reasons that follow, the Tribunal finds that the complaint does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements. As such, the Tribunal has decided not to conduct an inquiry into the complaint.

BACKGROUND

[5] On April 30, 2020, PWGSC informed Terrapure that it would not be issued a standing offer because it had not met the mandatory technical criterion requiring proof of a quality management system.

[6] On May 11, 2020, Terrapure requested a debriefing meeting with PWGSC and highlighted the reasons for which it believed its bid was compliant with the mandatory criterion at issue.

[7] Terrapure filed its initial complaint, File No. PR-2019-006, on May 15, 2020. On May 19, 2020, the Tribunal decided not to conduct an inquiry into the complaint because Terrapure had scheduled a debriefing meeting with PWGSC and the complaint was therefore premature.³

[8] On May 26, 2020, Terrapure and PWGSC held a debriefing meeting, in which PWGSC reiterated that Terrapure's bid did not comply with the mandatory technical criterion requiring proof of a quality management system.

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

² SOR/93-602 [*Regulations*].

³ *Terrapure Environmental* (20 May 2020), PR-2020-006 (CITT).

[9] On June 8, 2020, Terrapure filed the present complaint. Terrapure requested that all documents filed under the first complaint be transferred to the second complaint.

[10] On June 15, 2020, the Tribunal decided not to conduct an inquiry into the complaint.

ANALYSIS

[11] In order to accept a complaint for inquiry, the Tribunal must be satisfied that the information provided in the complaint discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.⁴

[12] Terrapure is located in Nova Scotia; therefore the *Canadian Free Trade Agreement* applies.⁵ The *CFTA* requires that procuring entities base their evaluations on the requirements of tender notices or documentation and that only bidders who comply with those requirements be considered for an award.⁶

[13] Terrapure challenged the evaluation of its quality management system and its risk management plan. It also argued that PWGSC should have requested clarification on its bid and that the winning bidder did not meet the requirements of the RFSO.

[14] In the Tribunal's view, the evidence and arguments presented by Terrapure do not give rise to a reasonable indication that the procurement has breached the *CFTA*.⁷

(1) The evaluation of Terrapure's quality management system was reasonable

[15] In its regret letter, PWGSC indicated that Terrapure's bid did not meet the quality management system requirements of the RFSO: "Proof of a quality management system was provided, however it was found to be lacking in detail as to how it met each point located in section 1.5 of the Statement of Contractor Requirements (SOCR) contained within the Statement of Work (SOW) at Annex A of the solicitation."⁸

[16] According to Terrapure, PWGSC's conclusion was based on a section of the RFSO that "is not part of the required technical submission, but refers to resulting contract clauses only."⁹ Terrapure argued that the "Statement of Contractor Requirements cited [by PWGSC] are found in section 7B of the RFSO . . . [which] specifically refers to RESULTING CONTRACT CLAUSES".¹⁰ However, the Tribunal's review of the RFSO indicates that these requirements are in fact found in Annex A, the Statement of Work, which contains extensive instructions on what must be included in a bid and forms part of the requirements for the solicitation.¹¹

⁴ Paragraph 7(1)(c) of the *Regulations*.

⁵ Online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> (entered into force 1 July 2017) [*CFTA*].

⁶ See articles 507(3) and 515(4) of the *CFTA*.

⁷ Given this finding, it is not necessary for the Tribunal to consider the other conditions for inquiry found in sections 6 and 7 of the *Regulations*.

⁸ Exhibit PR-2020-008-01A, Vol. 1 at 55.

⁹ Exhibit PR-2020-008-01, Vol. 1 at 11.

¹⁰ *Ibid.*

¹¹ Exhibit PR-2020-008-01A, Vol. 1 at 175-182.

[17] Section 23 of Annex A of the RFSO reads as follows:

MANDATORY REQUIREMENTS:

...

23b) Proof of registration to ISO quality management system or quality management system approved by FMFCS

Quality Management Section, (*ISO certificate or copy of quality management system required with bid*)¹²

[Emphasis added]

[18] In addition, section 1.5 of the Statement of Contractor Requirements of the RFSO sets out a list of processes that must be included in the bidder's quality management system.¹³

[19] Terrapure submitted that it "was and is capable of implementing the requisite quality system as a result of any call up against a standing offer."¹⁴ However, Terrapure's bid only states that it has implemented programs "based on the applicable requirements of ISO 9001:2004 International Standard for Quality Management Systems."¹⁵ The bid does not provide an ISO certificate, nor does it provide details on the quality management system.

[20] In the Tribunal's view, Terrapure did not fulfil its responsibility to show in its bid that its quality management system would meet the criteria of the RFSO, which requires either a certificate or a copy of the system itself.

[21] Finally, Terrapure argued that its risk management plan refers to "detailed procedure for Monitoring, Measuring, Investigation and Corrective Action Procedures", suggesting that these procedures would fulfil the requirement of the RFSO for a quality management system.¹⁶ However,

¹² *Ibid* at 178.

¹³ *Ibid* at 179-180. This requirement reads as follows:

"Item 1.5:

The Contractor's Quality Management System should include, at a minimum, processes to:

- identify when work they perform or material they produce does not conform to their/our standards;
- Ensure that any nonconformance is recorded and is corrected;
- Maintain a method for analyzing nonconformance data and initiating corrective and preventive action;
- Ensure all corrective action is recorded and effectively implemented to improve their practices;
- Control all documentation related to their practices;
- Continually review and audit their practices to ensure they adhere with accepted standards;
- Manage and monitor the performance of their sub-contractors;
- Ensure their management reviews the findings of any evaluation or audit to assist with continuous improvement, including the findings of any evaluation conducted by FMF Cape Scott;
- Manage employee awareness and competence through certification and training as part of process management."

¹⁴ Exhibit PR-2020-008-01, Vol. 1 at 11.

¹⁵ Exhibit PR-2020-006-01A, Vol. 2 at 1.

¹⁶ Exhibit PR-2020-008-01B, Vol. 2 at 33.

Terrapure included in its bid only the table of contents of the risk management plan, rather than the entire document.¹⁷ Again, Terrapure did not fulfil its responsibility to ensure that its bid was sufficiently detailed to meet the requirements of the RFSO.

(2) The evaluation of Terrapure’s risk management plan was reasonable

[22] Terrapure submitted that although its bid included only the table of contents of its risk management plan rather than the entire document, PWGSC should have found its bid compliant, because “Canada has accepted this approach in the past”.¹⁸

[23] The conduct of government institutions in past solicitations does not set any precedent for future solicitations. Each solicitation is governed by its own terms. Therefore, in assessing whether the evaluation of Terrapure’s bid was reasonable, the Tribunal must look to the terms of the solicitation at issue. The RFSO is clear that “[t]he Offeror must provide a copy of the Risk Management Plan with their bid submission.”¹⁹ This is a straightforward requirement, and Terrapure simply did not comply.

(3) PWGSC had no obligation to seek clarifications on the bid

[24] Terrapure submitted an email in which PWGSC had previously requested clarification on a bid for an earlier solicitation.²⁰ Terrapure argued that this request for clarification set a precedent and that PWGSC should have made a similar request in the solicitation at issue.

[25] Again, the Tribunal must assess each solicitation by its own terms. The RFSO incorporates standard instructions indicating that although PWGSC *may* seek clarifications from bidders, it has no obligation to do so.²¹ Therefore, although PWGSC may have sought clarifications in the past, it had no obligation to do so in the solicitation at issue.

(4) Terrapure has not established a reasonable indication that the winning bidder was non-compliant

[26] Terrapure submits that the winning bidder did not meet the mandatory experience requirements of the RFSO,²² because it “has not been engaged as a firm in containerized hazardous waste removal services, which forms a sizeable portion of the scope of work.”²³

¹⁷ Exhibit PR-2020-008-01, Vol. 1 at 11.

¹⁸ *Ibid.*

¹⁹ Exhibit PR-2020-008-01A, Vol. 1 at 209.

²⁰ Exhibit PR-2020-008-01, Vol. 1 at 13.

²¹ The RFSO indicates that “[t]he 2006 (2019-03-04) Standard Instructions - Request for Standing Offers - Goods or Services - Competitive Requirements, are incorporated by reference into and form part of the RFSO” (see Exhibit PR-2020-008-01A, Vol. 1 at 15.) These standard instructions provide that “Canada may, but will have no obligation to . . . seek clarification or verification from offerors regarding any or all information provided by them with respect to the RFSO” (see online: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/23>>).

²² Subsection 4.1.1.1(a) of the RFSO requires that “Offerors shall provide detailed examples of their firms experience in providing Shipboard Generated Hazardous Waste Removal/Disposal Services in the last four (4) years, of similar size, scope, and complexity with their bid submission. (two (2) in number required)” (see Exhibit PR-2020-008-01A, Vol. 1 at 19).

²³ Exhibit PR-2020-008-01, Vol. 1 at 11.

[27] The Tribunal has previously found that “there is an onus on complainants to substantiate the allegations that they make.”²⁴ In particular, where it is alleged that the winning bidder failed to meet essential requirements, “the Tribunal will not conduct an inquiry unless there is some evidence indicating that the procuring entity could have erred in its assessment of the information contained in the proposals.”²⁵

[28] Although the threshold of evidence to initiate a complaint is low, the complainant must provide some minimal evidence to support an allegation that the winning bidder was non-compliant. The Tribunal has previously explained this threshold as follows:

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case... However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.²⁶

[29] Beyond a mere statement that the winning bidder was non-compliant, Terrapure has not provided any evidence or additional information that would support this contention. Therefore, the Tribunal finds that there is simply no evidence that would reasonably indicate a breach of a trade agreement in this respect.

DECISION

[30] 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

²⁴ *Sepha Catering Ltd.* (13 November 2014), PR-2014-038 (CITT) at para. 28.

²⁵ *Ibid.* The Tribunal also considered a similar situation in *Terragon Environmental Technologies Inc.* (18 April 2019), PR-2019-004 (CITT) at para. 19.

²⁶ *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6.