



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-059

Accruent | VFA Canada
Corporation

*Decision made
Thursday, November 19, 2020*

*Decision and reasons issued
Tuesday, December 15, 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

ACCRUENT | VFA CANADA CORPORATION

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.

Serge Fréchette

Serge Fréchette
Presiding Member

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 NOTICE OF PROPOSED PROCUREMENT AND COMPLAINT

[2] On July 31, 2020, the Department of Public Works and Government Services (PWGSC) published a Notice of Proposed Procurement (Solicitation No. K4A22-200728/A) for the procurement of a Capital planning and management off-premise software solution (CPMOSS) on behalf of the Department of the Environment.

[3] The bid closing date for the solicitation was August 26, 2020, at 2:00 p.m. EDT. The closing date was extended to September 4, 2020, following an amendment to the solicitation.

[4] On or before September 4, 2020, Accruent | VFA Canada Corporation (Accruent) submitted a bid in the solicitation at issue.

[5] On October 2, 2020, Accruent was informed by PWGSC that it was not the successful bidder, with Nadine International having been awarded the contract on October 1, 2020, in the amount of \$451 928.81.

[6] On October 5, 2020, Accruent requested a debriefing of its bid.

[7] On October 6, 2020, PWGSC indicated that it couldn't provide much in the way of useful feedback as Accruent had met all of the mandatory criteria and that the contract had been awarded based on price.

[8] On November 6, 2020, Accruent brought its complaint to the Office of the Procurement Ombudsman (OPO).

[9] On the same day, the OPO contacted Accruent to discuss the complaint. The OPO provided Accruent with a summary of what had been discussed and a general outline of the key details of the complaint. OPO also stated that the complaint was likely outside of its mandate and suggested contacting the Tribunal, the Competition Bureau and/or PWGSC's Business Dispute Management Group, if Accruent wished to address some of the issues that had been identified in their discussion.

[10] On November 17, 2020, Accruent filed its complaint with the Tribunal. Accruent alleges that the procurement suffered from the following deficiencies:

- (a) The mandatory criteria evaluated were insufficient to determine whether the software solution selected met the requirements contained in the resulting contract clauses; and

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

² SOR/93-602 [*Regulations*].

- (b) The technical evaluators for the procurement did not have the necessary skills and experience to properly evaluate the winning bidder's submission.

ANALYSIS

[11] On November 19, 2020, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

[12] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;³
- the complainant is an actual or potential supplier;⁴
- the complaint is in respect of a designated contract;⁵ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁶

[13] Accruent's complaint appears to meet the second and third conditions; however, the timeliness requirement of the *Regulations* has not been met in this case because Accruent did not object to PWGSC or file a complaint to the Tribunal within 10 working days of knowing the basis of its complaint, which would have become known upon reading the solicitation documents. Moreover, with respect to the fourth condition, Accruent's complaint does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements.

The complaint is untimely

[14] 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".

[15] 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".

[16] 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.

³ Subsection 6(1) of the *Regulations*.

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

⁵ Paragraph 7(1)(b) of the *Regulations*.

⁶ Paragraph 7(1)(c) of the *Regulations*.

[17] Accruent would have become aware of the mandatory criteria PWGSC used in its tender at some time during the bidding period, but not later than the bid closing date of September 4, 2020. Accordingly, the 10-working-day deadline to object to the contents of the RFP would have been September 21, 2020, at the latest.

[18] Accruent did not raise its concerns about the mandatory evaluation criteria until November 6, 2020. As the Tribunal stated in *Hewlett-Packard (Canada) Co.*, bidders must bring forward complaints in a timely manner, rather than adopting a “‘wait and see’ approach”.⁷ As Accruent did not object to or file a complaint within the timelines stipulated in the *Regulations*, its complaint should not be accepted for inquiry.

There is no reasonable indication of a breach

[19] Even if the complaint had not been found late, as examined above, Accruent’s two grounds of complaint do not provide sufficient evidence to disclose a reasonable indication of a breach of the applicable trade agreements. According to paragraph 7(1)(c) of the *Regulations*, the Tribunal may conduct an inquiry into a complaint only if it discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

[20] In its first ground of complaint, Accruent suggested that the mandatory criteria in the RFP did not adequately capture PWGSC’s stated requirements for its CPMOSS. Accruent contrasted the six mandatory criteria in the solicitation at issue with the 47 mandatory requirements that were contained in a related Advance Contract Award Notice published approximately 18 months prior to the solicitation at issue.⁸ However, the Tribunal cannot independently establish any relevant nexus between one solicitation and the other, and Accruent did not establish that one was relevant. Furthermore, a government institution is free to change requirements from one solicitation to the other. And here we come full circle to the timeliness issues raised in the previous section: had Accruent wanted to take issue with the requirements of the solicitation at issue, it had to do so in accordance with the time frames examined above.⁹

[21] Accruent’s second ground of complaint pertains to the evaluators’ technical abilities and is supported by bald allegations for which no evidence was provided, and is therefore also unfounded.¹⁰

[22] The Tribunal gives no credence to allegations based on purported “market intelligence” alone, as was advanced here by Accruent.¹¹ A complainant must provide more before the Tribunal can act; that was not done here, and as such, the Tribunal finds no material basis to commence an inquiry into this matter.¹²

⁷ *Hewlett-Packard (Canada) Co. v. Shared Services Canada* (20 April 2017), PR-2016-043 (CITT).

⁸ *Capital Planning Software (KW405-190650/A)*, Buyandsell.gc.ca, Public Works and Government Services Canada.

⁹ *MD Charlton Co. Ltd. v. Royal Canadian Mounted Police* (13 June 2016), PR-2016-007 (CITT) at para. 18; *R.P.M. Tech. Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT); *Inforex Inc.* (24 May 2007), PR-2007-019 (CITT); *FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT); *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

¹⁰ Exhibit PR-2020-059-01 at 21.

¹¹ Exhibit PR-2020-059-01 at 10.

¹² *SoftSim Technologies Inc. v. Department of Public Works and Government Services* (4 November 2020), PR-2020-032 (CITT) at para. 14; *Vesey's Seeds Limited, doing business as Club Car Atlantic v. Department of Public Works and Government Services* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc. v. Department of Public Works and Government Services* (25 January 2013), PR-2012-040 (CITT) at para. 35.

[23] The Tribunal reiterates that, unless presented with concrete and cogent evidence to the contrary, it “presumes the good faith and honesty both of the bidders and of the public servants mandated to evaluate their bid”.¹³

[24] Accordingly, the Tribunal finds that the present complaint does not disclose a reasonable indication of a breach of the applicable trade agreements.

DECISION

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

Serge Fréchette

Serge Fréchette
Presiding Member

¹³ *MasterBedroom Inc. v. Department of Public Works and Government Services* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at para. 16.