



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-066

Cyber Defence QCD Corporation

*Decision made
Tuesday, December 29, 2020*

*Decision and reasons issued
Monday, January 4, 2021*

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

CYBER DEFENCE QCD 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.

Georges Bujold

Georges Bujold
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 THE CFP AND COMPLAINT

[2] On October 28, 2020, the Department of Public Works and Government Services (PWGSC) published a Call for Proposals (CFP) (Solicitation No. W7714-207317/A) on buyandsell.gc.ca. The CFP was issued on behalf of the Department of National Defence for the Innovation for Defence Excellence and Security (IDEaS) Program, a program seeking to fund innovative solutions to identified defence and security challenges. The challenge titled “Knot vulnerable – Locking Down Cybersecurity on Naval Vessels” sought proposals to improve cybersecurity on naval vessels. The closing date for these proposals was December 10, 2020, at 2:00 p.m. EST.

[3] On December 13, 2020, Cyber Defence QCD Corporation (Cyber Defence) submitted its bid, via email, to the IDEaS unit at PWGSC.

[4] On December 14, 2020, PWGSC replied to Cyber Defence, stating that it could not accept Cyber Defence’s bid, as it was late and had not been submitted by epost Connect, the required method for submitting bids.

[5] The same day, Cyber Defence communicated its disagreement with the rejection of its bid to PWGSC, stating that the COVID-19 pandemic had presented unique challenges to the firm and its employees and requested that PWGSC consider its submission to be timely, in spite of its acknowledgment that it missed the submission deadline.

[6] PWGSC replied the same day stating that it was unable to accept late bids and encouraged Cyber Defence to submit bids in future calls for proposals.

[7] On December 15, 2020, the Tribunal received a procurement complaint from Cyber Defence. In its complaint, Cyber Defence stated that it found the denial of an extension in the context of the present pandemic unconscionable.

[8] On December 16, 2020, noting that the complaint was incomplete, the Tribunal sent Cyber Defence a letter requesting additional information and identifying the deficiencies to be corrected for the complaint to be considered to have been filed.

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

² SOR/93-602 [*Regulations*].

[9] Following the submission of this requested information from Cyber Defence on December 22, 2020, the Tribunal acknowledged receipt of the complaint the same day.³

ANALYSIS

[10] On December 29, 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.

No reasonable indication of a breach

[11] Pursuant to section 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine whether, among others, the following condition is met before initiating an inquiry: the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.⁴ In this case, the Tribunal finds that the complaint discloses no reasonable indication of a breach of the applicable trade agreement.⁵

[12] The Tribunal has consistently held that a central pillar of the procurement system is the timely receipt of complete bids at the place specified, and in the precise manner stated, in the solicitation documents.⁶ In particular, the Tribunal has previously found that permitting one bidder to benefit from an extension to the bid closing deadline can be unfair to other bidders, which could just as easily give rise to even further complaints to the Tribunal.⁷

[13] The CFP set out clear instructions in respect of the date, time and manner in which proposals were to be submitted to the bid receiving unit.

[14] Section 3.1.4 states that “[d]ue to the nature of the CFP, proposals transmitted by facsimile and email will not be accepted.” Section 3.1.7 of the CFP states that “[b]idders must submit their proposal by downloading and completing the Electronic Proposal Submission Form from the Challenge tender notice page, and uploading it using the epost instructions detailed in Part 2.”⁸

[15] Additionally, section 3.1.8 of the CFP states that “[b]idders are solely responsible for ensuring their proposal is received on time by the individual Challenge Notice closing date and time. Late submissions will not be accepted.”⁹

³ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499) provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed “. . . on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection”.

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

⁵ According to the CFP, only the Canadian Free Trade Agreement applies to this procurement.

⁶ *New Horizon Car and Truck Rentals Ltd. o/a Discount Car and Truck Rentals* (5 March 2018), PR-2017-058 (CITT) [*New Horizon Car and Truck Rentals*]; *Keller Equipment Supply Ltd.* (20 October 2016), PR-2016-038 (CITT); *Headwall Photonics, Inc.* (25 September 2012), PR-2012-017 (CITT); *Corbel Management Corp.* (25 May 2009), PR-2009-009 (CITT); *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT); *Coco Paving (1990) Inc. v. Ontario (Transportation)*, 2009 ONCA 503 at paras. 13-14.

⁷ *New Horizon Car and Truck Rentals* at para. 10.

⁸ Buyandsell.gc.ca, Innovation for Defence Excellence and Security (IDEaS) Program – Competitive Projects – Call for Proposals 004 (W7714-207317/A), *Solicitation Documents*, 28 October 2020 at 14.

⁹ *Ibid.*

[16] It is well established that the onus is on the bidder to demonstrate that it meets all essential requirements of a procurement, which includes the requirements regarding bid submission.¹⁰ In this case, bids were required to be submitted no later than 2:00 p.m. EST on December 10, 2020. Further, the CFP clearly indicated that bids were required to be submitted by epost Connect. There was no indication that bids were permitted to be submitted by any other means.

[17] It was incumbent on Cyber Defence to exercise due diligence in the preparation and delivery of its bid to ensure that it understood and was compliant with all the instructions in the CFP.¹¹ Based on Cyber Defence's own admission, it is evident that Cyber Defence missed the submission deadline by almost three days. Accordingly, Tribunal finds that PWGSC acted consistently with the express terms of the CFP and the relevant trade agreement in not allowing Cyber Defence to submit its bid late.

[18] In this regard, while Cyber Defence has alleged that the COVID-19 pandemic has created challenges for its employees, if it considered that the procurement procedures established for the CFP were inadequate in the circumstances, it was open to raise any perceived issues in a timely manner with the procuring entity (i.e. prior to bid closing).

[19] As a result, the Tribunal finds that Cyber Defence's argument fails to disclose a reasonable indication that the procurement was conducted in a manner that is inconsistent with the relevant trade agreement.

[20] In light of the above, the Tribunal has decided not to conduct an inquiry into the complaint.

DECISION

[21] 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

¹⁰ *Otec Solutions Inc. v. Department of Foreign Affairs, Trade and Development* (5 October 2016), PR-2016-012 (CITT) at para. 28.

¹¹ *Ibid.* at para. 29.