



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-087

Custom Power Generation

*Decision made
Thursday, February 11, 2021*

*Decision and reasons issued
Tuesday, February 23, 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

CUSTOM POWER GENERATION

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

Cheryl Beckett

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.

[2] The complaint relates to a Request for Proposal (RFP) (Solicitation No. 5P423-200293/A) issued on November 5, 2020, by the Department of Public Works and Government Services (PWGSC) on behalf of Parks Canada. The RFP was for the supply and delivery of nine new standby electrical generators to various locations at Jasper National Park in Jasper, Alberta.

[3] At issue in this complaint is whether the winning bid satisfied the requirements of the RFP. The complainant, Custom Power Generation, seeks a re-evaluation of the bids on the basis that it believes that the winning bidder, Prime Power Corp. (Prime), is incapable of fulfilling the terms of the resulting contract. In particular, the complainant alleges that Prime does not have the facilities, insurance coverage or factory certifications necessary to administer any work required under warranty.

[4] The complainant submitted a bid and was informed by PWGSC on January 27, 2021, that it would not be awarded the contract because its bid, although found to be responsive to the mandatory requirements of the solicitation, was not the highest-ranking under the evaluation methodology set out in the solicitation documents,³ namely that the responsive bid with the lowest evaluated price would be selected for contract award.⁴

[5] On January 29, 2021, the complainant objected to PWGSC's decision by telephone on the basis that Prime was unqualified, and requested a re-evaluation of the bids. PWGSC responded that re-evaluating the bids was unnecessary at that time, effectively denying the relief sought in the complainant's objection. The complainant filed its complaint with the Tribunal on February 10, 2021. The complaint is therefore timely as it was filed within the time limits required under section 6 of the *Regulations*.

[6] Pursuant to subsection 7(1)(c) of the *Regulations*, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal, discloses a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements set out in that subsection.⁵ The Tribunal has previously described the threshold as follows:

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2020-087-01 at 45.

⁴ Exhibit PR-2020-087-01 at 17.

⁵ The solicitation documents indicate that several of Canada's trade agreements apply to this procurement, including the *Canadian Free Trade Agreement* (CFTA), online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

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.⁶

[7] In this case, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the applicable trade agreements. The Tribunal comes to this conclusion for two reasons.

[8] First, the complainant's allegations relate to Prime's ability to fulfill the contract resulting from the solicitation process, and therefore to matters of contract administration falling outside the Tribunal's procurement review jurisdiction. The *CITT Act* and the *Regulations* allow a potential supplier to complain to the Tribunal about any aspect of a procurement process for a designated contract. When applying these provisions, the Tribunal has made an important distinction between the procurement process and contract administration. The procurement process begins after the government institution has decided on its procurement requirement and continues through to the awarding of the contract. Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed. The Tribunal has been clear that matters of contract administration are beyond the scope of its jurisdiction.⁷

[9] Second, even if the complainant had raised issues relating to the procurement process falling within the Tribunal's jurisdiction, it does not present any factual evidence to support its allegations apart from asserting that the complainant is "familiar" with Prime.⁸ While paragraph 7(1)(c) of the *Regulations* does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim.⁹ Mere allegations are insufficient to establish a reasonable indication of a breach of the trade agreements.¹⁰ In this case, such evidence might include pointing to specific requirements in the RFP and outlining characteristics of Prime's business which could indicate that its bid did not or could not comply with those specific requirements. Even then, however, the Tribunal would require some factual evidence demonstrating those characteristics of Prime's business beyond simple assertions by the complainant.

⁶ *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.

⁷ *Newland Canada Corporation* (13 August 2020), PR-2020-011 (CITT) at para. 11, citing *Sunny Jaura o/a Jaura Enterprises v. Department of Public Works and Government Services* (21 February 2013), PR-2012-043 (CITT) at para. 10. See also *WW-ISS Solutions Canada v. Department of Foreign Affairs, Trade and Development* (16 December 2019), PR-2019-050 (CITT) at para. 15; *Vidéotron Ltée v. Shared Services Canada* (5 October 2018), PR-2018-006 (CITT) at para. 16.

⁸ Exhibit PR-2020-087-01 at 8.

⁹ *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT).

¹⁰ *Smiths Detection Montreal Inc.* (14 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13. See also *Manitex Lifiting ULC* (19 March 2013), PR-2012-049 (CITT) at para. 22; *Vesseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (4 April 2014), PR-2013-048 (CITT) at para. 12.

[10] For the foregoing reasons, the Tribunal finds that the complaint discloses no reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

DECISION

[11] 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