



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-095

FFG Flensburger Fahrzeugbau
Gesellschaft mbH, RUAG Schweiz
AG, in Joint Venture

*Decision made
Thursday, March 25, 2021*

*Decision and reasons issued
Thursday, April 1, 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

**FFG FLENSBURGER FAHRZEUGBAU GESELLSCHAFT MBH, RUAG SCHWEIZ
AG, IN JOINT VENTURE**

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 COMPLAINT

[2] The complaint by FFG Flensburger Fahrzeugbau Gesellschaft mbH, RUAG Schweiz AG, in Joint Venture (FFG), relates to a Request for Proposal (RFP), Solicitation No W8486-184272/A, issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the repair, overhaul and upgrading of DND's Leopard 2 Main Battle Tank Turret Electro-Optics components.

[3] FFG alleges that there are several elements in the solicitation, including the evaluation procedures and scoring methodology of the RFP, that are problematic and require a review by an independent institution. Specifically, FFG claims that the "Single Phase Bid Compliance Process" used by PWGSC was improper because it allowed bidders to provide information that was missing in their initial bids, including additional financial information, after the bid closing date. FFG also alleges that the evaluation criteria set out in the RFP unduly penalized joint ventures and, as a result, the solicitation's requirements go against PWGSC's stated goal of obtaining the best value for money.

[4] FFG also suspects that PWGSC's evaluation process may have been influenced by the participation of an undisclosed bidder whose bid was not compliant and should, therefore, not have been considered. Finally, FFG alleges that the price offered by the winning bidder was too low and cannot cover its cost of doing business. As such, it submits that the winning bidder's offer "was not calculated under the principles of an orderly businessman and can be rated as a dumping price."³

[5] The Tribunal has decided not to conduct an inquiry into the complaint. For the reasons outlined below, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

BACKGROUND

[6] On November 29, 2019, PWGSC, on behalf of DND, published an RFP for the repair, overhaul and upgrading of DND's Leopard 2 Main Battle Tank Turret Electro-Optics components. The initial closing date for bid submissions was January 17, 2020, at 14:00 EST.

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2020-095-01 at 15.

[7] The RFP was the subject of 10 amendments between December 6, 2019, and July 17, 2020. Many of the amendments were issued to extend the deadline for bid submissions. Others were made to answer bidders' questions related to the procurement. The final deadline for bid submissions was July 31, 2020, at 14:00 EDT.

[8] On July 29, 2020, FFG submitted its bid to PWGSC via epost Connect.

[9] On September 29, 2020, FFG received a Compliance Assessment Report (CAR) indicating that its bid did not yet demonstrate compliance with all mandatory technical criteria and requesting additional information for the purpose of demonstrating such compliance. PWGSC set a return date of October 4, 2020, for FFG's response. PWGSC issued an amendment to FFG's CAR on September 29, 2020, extending the due date for response to November 4, 2020. FFG provided a response prior to that deadline.

[10] On November 29, 2020, PWGSC requested confirmation on the quoted currency in FFG's bid. FFG responded on the same day.

[11] On December 18, 2020, PWGSC requested FFG to extend the validity of its bid until January 31, 2021, to which FFG agreed.

[12] On January 19, 2021, PWGSC informed FFG that its bid, while compliant with the requirements of the RFP, had been unsuccessful. PWGSC indicated in its regret letter that, in accordance with the evaluation procedures and the basis of selection methodology set out in the RFP, it could not recommend FFG for contract award, since it did not obtain the best overall point score. PWGSC also informed FFG that it had awarded the contract to Rheinmetall Canada Inc. The awarded contract was valued at \$15,275,000, representing the estimated ceiling price for the initial three-year period.

[13] On January 27, 2021, after finding that the link to recourse mechanisms provided in PWGSC's regret letter was inactive, FFG contacted PWGSC requesting it to provide the correct link to information on ways to challenge PWGSC's decision. PWGSC replied on the same day. In an email to FFG, it provided the correct link to information on the recourses available and indicated that it was also available for a debriefing to discuss FFG's bid. On February 3, 2021, FFG requested a debriefing related to its bid.

[14] On February 17, 2021, FFG emailed the Office of the Procurement Ombudsman (OPO), requesting an independent review of the procurement process at issue. Included in its complaint to the OPO was a document describing its grounds of complaint, dated February 17, 2021, that FFG subsequently filed with the Tribunal (discussed below). The OPO acknowledged receipt of the complaint on the same day, indicating that it would respond in due course.

[15] On February 25, 2021, PWGSC provided a debriefing regarding FFG's bid and provided written answers to the questions FFG had posed. The Tribunal notes that, other than a question concerning the number of bidders who participated in the solicitation process, FFG's questions did not relate to the concerns mentioned in its complaint to the OPO.

[16] On March 8, 2021, FFG requested a follow-up from OPO on its initial complaint. Specifically, FFG sought further explanations on the OPO's review process.

[17] On March 10, 2021, OPO provided a response to FFG, indicating that, given that the value of the designated contract made trade agreements applicable, the matter did not fall within the jurisdiction of the OPO.

[18] On Friday, March 12, 2021, the Tribunal received a procurement complaint from FFG. This complaint was comprised of the document and attachments that had been previously filed by FFG with the OPO.⁴ In other words, FFG raised with the Tribunal the same grounds of complaint or concerns related to the procurement process at issue that it had initially brought to the OPO's attention.

[19] On the following Monday, i.e. on March 15, 2021, noting that the complaint did not comply with subsection 30.11(2) of the *CITT Act*, the Tribunal sent FFG a letter requesting that it provide the additional information required for its complaint to be determined compliant. In this way, the Tribunal informed FFG of the deficiencies to be corrected for the complaint to comply with that subsection and be considered to have been filed as soon as practicable.

[20] On March 19, 2021, FFG filed the requested information with the Tribunal. Therefore, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*,⁵ FFG's complaint was considered to have been filed on March 19, 2021.⁶

ANALYSIS

[21] On March 25, 2021, 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.

[22] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine that the following four conditions are met for it to conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[23] In this case, the Tribunal finds that the first condition is not met, as the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. Accordingly, it is not necessary to examine whether the other conditions for inquiry are met.

⁴ This fact was subsequently confirmed by FFG in an email to the Tribunal dated March 23, 2021.

⁵ SOR/91-499 [*CITT Rules*].

⁶ Paragraph 96(1)(b) of the *CITT Rules* 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."

The complaint is time-barred

[24] Pursuant to section 6 of the *Regulations*, 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 to file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time and the government institution denies it relief, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution. In this case, FFG did not object to the government institution before filing its complaint, as is confirmed by the information contained in the complaint form filed on March 19, 2021.

[25] Therefore, subsection 6(1) of the *Regulations* applies. This provision makes it clear that, in such cases, a potential supplier wishing to file a complaint with the Tribunal “shall do so 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.”

[26] The Tribunal finds that, at the latest, the basis of the complaint became known, or reasonably should have become known, to FFG on February 17, 2021, when it initially filed its complaint documents with the OPO. Indeed, FFG was clearly aware of the facts, concerns and arguments underlying all of its allegations as of that date, given that the grievances that it raised with the OPO were identical in all respects to those subsequently raised in its complaint to the Tribunal. The fact that FFG first contacted the OPO but did not receive a substantive response from the latter before March 10, 2021 does not alleviate it of the onus to comply with the time limits prescribed by the *Regulations*.⁷

[27] Therefore, the complaint, which was filed on March 19, 2021, is not timely (it was filed 22 working days late). The Tribunal also notes that FFG was most likely aware of the basis of its complaint well before February 17, 2021. In fact, for the most part, FFG’s concerns relate to requirements set out in the RFP. For example, FFG’s complaint contains allegations related to the structure of the solicitation, its evaluation procedures, including the possibility for bidders to provide additional information through the CAR process after the bid closing date, and the treatment of joint ventures. The basis for these allegations would have become known to FFG prior to the solicitation’s closing date and by July 31, 2020, the deadline for the submission of bids, at the latest. Accordingly, all allegations related to elements of the procurement process disclosed in the solicitation documents are also late for that reason.

[28] In this regard, the Tribunal is of the opinion that if a potential supplier believes that the criteria set out in an invitation to tender are inappropriate, unfair or raise questions concerning the integrity or merit of aspects of the procurement process, as is claimed in the case at hand, it must file a complaint in a timely manner. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected. In this regard,

⁷ In any event, on January 27, 2021, PWGSC provided FFG with a link to relevant information concerning the bid challenge process and the recourse mechanisms available to potential suppliers. This document indicates that strict deadlines for filing objections or complaints may apply. It also clearly states that the OPO can only review complaints about the award of certain federal contracts valued below \$26,400 for goods and \$105,700 for services. In view of the much higher value of the designated contract at issue in this case, FFG should have been able to determine, prior to March 10, 2021, that this matter was outside the mandate of the OPO.

in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, the Federal Court of Appeal provided the following guidance:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .⁸

[29] The Court added that a bidder must not adopt a “wait-and-see” attitude and make its challenge once the procurement process is over. It stated that this “is precisely the type of attitude that the procurement process and Regulations seek to discourage.”⁹

[30] In accordance with the Federal Court of Appeal’s interpretation, the Tribunal is of the view that the complainant could not wait for the outcome of the evaluation before objecting to the federal institution or filing a complaint with the Tribunal regarding its grievances concerning the evaluation procedure set out in the RFP.

[31] As for the other allegations, as discussed above, it is clear that the basis of the complaint concerning those grievances became known or reasonably should have become known to FFG between January 19, 2021, when it was informed of the outcome of the evaluation, including the score of the winning bidder’s proposal and the value of the awarded contract, and February 17, 2021, when it first raised these matters with the OPO. Otherwise, it would have been impossible for FFG to discuss these allegations and their alleged factual basis in detail in its complaint document dated February 17, 2021.

[32] Similarly, the information forming the basis of the allegation concerning the participation of a fourth bidder in the procurement process would have become known to FFG before February 17, 2021, since this allegation was also mentioned in the letter provided to the OPO on the same day. In sum, the Tribunal cannot conduct an inquiry into any of FFG’s allegations because they were all raised more than 10 days after their basis became known or reasonably should have become known to the complainant.

[33] Accordingly, having been filed outside the time limit set out in subsection 6(1) of the *Regulations*, the complaint does not meet one of the mandatory conditions for inquiry. The Tribunal further notes that, while the onus to comply with the time limits prescribed by the *Regulations* is stringent and forces potential suppliers to act swiftly, the procurement review process is meant to be expeditious. It is focused on achieving finality of contracts in the shortest possible time. As stated by the Federal Court of Appeal in *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*:

⁸ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

⁹ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 28.

[3] Short limitation periods for making an objection and filing a complaint help to ensure that delays in the supply of goods and services are minimized, and that the successful bidder's need for certainty is met. Hence, the Tribunal is entirely justified in regarding these time limits as important aspects of the regulatory scheme. . . .¹⁰

[34] Based on the foregoing, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

DECISION

[35] 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 *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*, 2005 FCA 177.