Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-008

Royal Indevco Properties Inc.

Decision made
Wednesday, May 12, 2021

Decision issued
Thursday, May 13, 2021

Reasons issued
Monday, May 31, 2021

Corrigendum issued
Tuesday, July 13, 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

ROYAL INDEVCO PROPERTIES INC.

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.

Frédéric Seppey
Frédéric Seppey
Presiding Member

The statement of reasons will be issued at a later date.

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

ROYAL INDEVCO PROPERTIES INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

CORRIGENDUM

The first sentence of paragraph 12 of the Statement of Reasons should read as follows: "On April 7, 2021, RIP requested that PWGSC disclose certain information contained in the IOLs submitted by other bidders pursuant to section 16 of Part 2 of the ITO.

Paragraph 35 of the Statement of Reasons should read as follows: "RIP submits that on April 5, 2021, it became aware that PWGSC was allowing bidders to proceed with acquiring the required security clearance after the submission of bids, in violation of the above-noted clauses and clause 16(c)(i)(bb) of Part 1 of the ITO, which provides that IOLs that fail to include all the required documentation will be considered non-compliant and will be given no further consideration".

Paragraph 65 of the Statement of Reasons should read as follows: "In its requests for a debriefing, RIP reiterated multiple times that it had questions about the project, however, despite being asked repeatedly by PWGSC to provide those questions, it did not. Given that PWGSC provided the information required under Article 516(1) of the CFTA and Article XVI(1) of the WTO-AGP, and that RIP did not provide any further questions for PWGSC to answer, in the Tribunal's view these communications are consistent with the requirements of those provisions."

Frédéric Seppey
Frédéric Seppey
Presiding Member

Canada

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 is a refiling of a previous complaint from the same complainant on the same grounds, into which the Tribunal decided not to conduct an inquiry on the basis that it was premature.[3] The complaint relates to an Invitation to Offer (ITO), issued by the Department of Public Works and Government Services (PWGSC), for the leasing of property in Nanaimo, British Columbia (Project No. 8100167).

[3] The complainant, Royal Indevco Properties Inc. (RIP), alleges the following:

(i) that PWGSC improperly accepted proposals which, at the time of the opening of submissions, were not compliant with the essential requirements of the solicitation, namely demonstration of security clearance;

(ii) that PWGSC has failed to disclose to RIP information pertaining to other proposals as, it argues, is required under the terms of the solicitation; and

(iii) that PWGSC refused to provide a detailed debriefing as per the terms of the ITO.

[4] RIP requests that the bids be re-evaluated, that it be awarded the contract under the solicitation, and that it be compensated for the costs of preparing its bid and this complaint and/or lost profits and lost opportunity.

[5] For the reasons that follow, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the relevant trade agreements. The Tribunal has therefore decided not to conduct an inquiry into the complaint.

BACKGROUND

[6] On October 6, 2020, PWGSC issued a Request for Qualification (RFQ) asking interested parties to provide information for a potential lease of office space in a specific area in Nanaimo, British Columbia. The closing date for this RFQ was October 30, 2020.[4]

[7] Further to the RFQ, on December 23, 2020, PWGSC issued an ITO, inviting bidders to submit an Irrevocable Offer to Lease (IOL) with regard to office space in Nanaimo, British Columbia.[5]

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1 R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2 SOR/93-602 [*Regulations*].
3 *Royal Indevco Properties Inc.* (21 April 2021), PR-2021-002 (CITT) [*RIP Inc.*].
4 Exhibit PR-2021-008-04B at 25-26.

[8] On December 31, 2020, PWGSC issued a Clarification to Offerors containing answers to questions from potential bidders in response to the ITO.[6]

[9] On January 26, 2021, RIP submitted its IOL in response to the ITO.[7]

[10] On April 5, 2021, RIP requested an update from PWGSC regarding the status of the project.[8]

[11] On April 6, 2021, the following email correspondence was exchanged between RIP and PWGSC. PWGSC informed RIP that it was not the successful bidder. RIP responded requesting confirmation that other IOLs received by PWGSC complied, at the time of submission, with the security clearance requirements set out in the ITO. PWGSC replied stating that the ITO required bidders to demonstrate compliance prior to the end of the acceptance period set out in the ITO (i.e. by April 14, 2021), and not at the time bids were submitted. RIP contested this interpretation of the solicitation documents and repeated its request. PWGSC maintained that its position was consistent with the terms of the ITO and Clarification to Offerors and declined to provide the requested information pertaining to other proposals.[9]

[12] On April 7, 2021, RIP requested that PWGSC disclose certain information contained in the IOLs submitted by other bidders pursuant to section 16 of the IOL (i.e. section 16 of Part 2 of the ITO). On the same day, PWGSC declined to provide the requested information, stating that RIP was not entitled to it under the terms of the solicitation.[10]

[13] On April 14, 2021, RIP filed the present complaint with the Tribunal. On April 15, 2021, the Tribunal requested further information before the complaint could be considered complete.

[14] Also on April 15, 2021, PWGSC sent RIP a regret letter officially informing it that it was not the successful bidder under the solicitation.[11] The same day, RIP replied to PWGSC requesting a formal debriefing pursuant to clause 19 of the ITO.[12]

[15] On April 16, 2021, RIP submitted the additional information requested by the Tribunal.[13]

[16] On April 20, 2021, the Tribunal decided not to conduct an inquiry into the complaint on the basis that the complainant had not yet received the formal debriefing which it had requested pursuant to the terms of the solicitation.

[17] Also on April 20, 2021, PWGSC replied to RIP by email, noting its request for a debriefing and reiterating that RIP's offer was rejected because it was not the lowest price and because it

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5 Exhibit PR-2021-008-04A at 13-14; Exhibit PR-2021-008-01 at 12-137.
6 Exhibit PR-2021-008-04B at 30-31.
7 Exhibit PR-2021-008-04C (protected).
8 Exhibit PR-2021-008-04A at 13.
9 *Ibid.* at 14-17.
10 Exhibit PR-2021-008-01 at 174.
11 *Ibid.* at 176.
12 *Ibid.* at 181.
13 Exhibit PR-2021-008-04B; Exhibit PR-2021-008-04C.

exceeded the project's budget. The same day, RIP replied thanking PWGSC for acknowledging its request for a debriefing under clause 19 of the ITO, and asking to arrange a discussion.[14]

[18] On April 21, 2021, the Tribunal issued the statement of reasons for its decision in File No. PR-2021-002, which noted that RIP might file another complaint with the Tribunal following the debriefing contemplated in clause 19 of the ITO.[15]

[19] On April 29, 2021, RIP again emailed PWGSC requesting whether PWGSC's email of April 20, 2021, constituted the debriefing and stating it still had a number of questions about the project. The same day, PWGSC replied stating "[y]es, that is effectively your debriefing." PWGSC stated that a more detailed debriefing might be relevant if, for example, the RIP's tender had been non-compliant and elaboration could assist in ensuring compliance in future bids, which was not the case here, and asked RIP what specific questions it had.[16]

[20] On May 3, 2021, RIP emailed PWGSC, thanking it for its response of April 29, 2021, and again requested a debriefing. RIP reiterated in this email that it had a number of questions about the project, but did not elaborate on their nature.[17]

[21] On May 5, 2021, RIP again emailed PWGSC, noting that it had not received a response to its debriefing request and requesting a status update.[18]

[22] On May 6, 2021, PWGSC replied stating "[a]s I've explained previously, your bid was not the lowest and the reason for it being unsuccessful" and noting that the purpose of clause 19 of the ITO is to provide the reasons why a bid is unsuccessful. PWGSC again asked what questions RIP wanted to ask. The same day, RIP replied, thanking PWGSC for its response, and shortly thereafter filed the present complaint with the Tribunal.[19]

[23] On May 7, 2021, the Tribunal wrote to RIP requesting that it confirm whether it wanted to have the record from File No. PR-2021-002 joined to the new complaint filed on May 6, 2021.[20]

[24] On May 10, 2021, RIP confirmed that the record from File No. PR-2021-002 could be joined to the present complaint.[21]

[25] On May 11, 2021, the Tribunal acknowledged receipt of the complaint.[22]

[26] On May 12, 2021, the Tribunal decided not to conduct an inquiry into the complaint.

[27] On May 13, 2021, the Tribunal issued its decision (with reasons to follow) that it had decided not to accept the complaint for inquiry.

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14 Exhibit PR-2021-008-01 at 180.
15 *RIP Inc.* at para. 22.
16 Exhibit PR-2021-008-01 at 179-180.
17 *Ibid.* at 178.
18 *Ibid.*
19 *Ibid.* at 177.
20 Exhibit PR-2021-008-02 at 1-2.
21 *Ibid.* at 1.
22 Exhibit PR-2021-008-03.

ANALYSIS

[28] 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 whether the following four conditions are met before it launches an inquiry:

(i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;[23]

(ii) the complainant is a potential supplier;[24]

(iii) the complaint is in respect of a designated contract;[25] and

(iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.[26]

[29] For the reasons set out below, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the relevant trade agreements, in this case the Canadian Free Trade Agreement[27] and the World Trade Organization's Revised Agreement on Government Procurement.[28]

[30] The Tribunal finds that the solicitation documents, including the Clarification to Offerors, did not require bidders to demonstrate the required security clearances at the time bids were submitted. Further, the disclosure consent clause in the solicitation documents relied on by RIP does not impose an obligation on PWGSC to disclose the requested information. Finally, the Tribunal finds that the debriefing process was consistent with the requirements of the trade agreements.

Demonstration of security clearance

[31] It is useful at the outset to describe the basic structure of the ITO. Part 1 is titled "Instructions to Offerors and Requirements", Part 2 is titled "Irrevocable Offer to Lease", and Part 3 is titled "Form of Lease". Clause 1(a) of Part 1 provides as follows:

> An Offeror submitting an Irrevocable Offer to Lease must use the specimen Irrevocable Offer to Lease form found in Part 2 of this Invitation to Offer document. The completed Irrevocable Offer to Lease must be identified by the Invitation to Offer document project number and received at the address noted below no later than 2:00:00 PM, local time, on the 26th day of January, 2021 (the "Closing Time and Closing Date"): . . .[29]

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23 Subsection 6(1) of the *Regulations*.
24 Paragraph 7(1)(a) of the *Regulations*.
25 Paragraph 7(1)(b) of the *Regulations*.
26 Paragraph 7(1)(c) of the *Regulations*.
27 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) [CFTA].
28 Online: World Trade Organization <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm> (entered into force 6 April 2014) [WTO-AGP].
29 Exhibit PR-2021-008-01 at 14.

[32] In effect, Part 2 of the ITO sets out the form in which offers were to be submitted, including both standard clauses required to be included in every offer as well as space for bidders to fill in details regarding their specific offer, for example corporate information and details of the property being offered for lease.

[33] The complainant alleges that PWGSC violated the terms of the solicitation by considering bids which were non-compliant with the instructions to bidders governing the submission of bids, specifically the requirement to demonstrate the required security clearance. RIP relies on clause 11 of Part 1 of the ITO, which provides as follows:

> (c) When submitting an Irrevocable Offer to Lease, the Offeror must include the following information:
>
> . . .
>
> (v) proof of the required level of Security Clearance in the form of a letter from the Industrial Organization Security Services (IOSS), to the level stated in Clause 8(b) of Part 1 of this Invitation to Offer document for the organization (DOS – Designated Organization Screening) and the name of the designated Company Security Officer;[30]

[34] Clause 8(b) of Part 1 of the ITO provides as follows:

> (b) The required level of Security Clearance for this project is "Reliability".[31]

[35] RIP submits that on April 5, 2021, it became aware that PWGSC was allowing bidders to proceed with acquiring the required security clearance after the submission of bids, in violation of the above-noted clauses and clause 16(c)(i)(bb) of Part 1 of the ITO, which provides that ITOs that fail to include all the required documentation will be considered non-compliant and will be given no further consideration.

[36] Article XV(4) of the WTO-AGP, cited by RIP, and Article 515(4) of the CFTA require that, to be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.

[37] RIP raised this concern with PWGSC via email on April 6, 2021. PWGSC responded that clause 8 of Part 1 of the ITO "was amended from standard issue to give time until our Acceptance Period so as to not get hung up on technicalities when our Contract Security Branch is inundated with Covid-related priorities."[32] It referred RIP to clause 8(a) of Part 1 of the ITO, which provides in relevant part as follows:

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30 *Ibid.* at 19.
31 *Ibid.* at 16.
32 Exhibit PR-2021-008-04A at 15.

(a) Security Screening

(i) Overview - This security requirement applies to Offerors that will submit an Irrevocable Offer to Lease (see Clause 34 of the Form of Lease). The requirement prescribes a mandatory security status for those individuals having access to Leased Premises. **The Security Clearance specifically for the Offerors must be obtained and provided to the Lessee prior to the date for acceptance of the Offer as outlined in "ACCEPTANCE PERIOD" under Clause 14 of Part 2 of this Invitation to Offer document ("Irrevocable Offer to Lease")**. . . .[33]

[38] On April 6, 2021, PWGSC stated to RIP that the language of clause 8 supersedes the language of clause 11, and referred to the Clarification to Offerors dated December 31, 2020, in which PWGSC provided answers to questions received with respect to the ITO. The first paragraph of the Clarification to Offerors provides as follows:

> The following questions have been received with respect to the Invitation to Offer document for project No. 81001677, dated December 23, 2020. This Clarification to Offerors is circulated to all parties, and shall form part of the Contract documents.[34]

[39] Regarding the requirement to demonstrate the required security clearance, the Clarification to Offerors provides as follows:

> Question 2.
>
> Please clarify if the Security Clearance must be submitted with the Irrevocable Offer to Lease, or may it be submitted prior to the expiration of the Acceptance Period as defined under Clause 14 of Part 2.
>
> [Answer:] Please start the submission process now and we can wait until the Acceptance Period to see it through. Security Clearance should not be a deal killer, but a necessary process none the less.[35]

[40] Clause 2 of Part 1 of the ITO, titled "Acceptance Period", provides as follows:

> Irrevocable Offers to Lease shall remain irrevocable by the Offeror and open for acceptance from the Closing Time and Closing Date up to and including the date indicated in the Acceptance Period of the Irrevocable Offer to Lease found in Part 2 of this Invitation to Offer document.[36]

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33 Exhibit PR-2021-008-01 at 15.
34 Exhibit PR-2021-008-04B at 30.
35 *Ibid.*
36 Exhibit PR-2021-008-01 at 14.

[41] Clause 14 of Part 2, also titled "Acceptance Period", provides as follows:

> This Irrevocable Offer to Lease is irrevocable and open for acceptance throughout the period from the Closing Time and Closing Date set for receipt to and including the 14th day of April, 2021.[37]

[42] In the Tribunal's view, the terms of clause 8(a)(i) and clause 11(c)(v) are contradictory as to when bidders must demonstrate the required security clearance. Clause 8(a)(i) requires demonstration of the required clearance prior to the end of the acceptance period, which pursuant to clause 2 of Part 1 and clause 14 of Part 2 was April 14, 2021. Clause 11(c)(v) requires demonstration of the required clearance at the time offers are submitted, which pursuant to clause 1(a) of Part 1 was to be no later than January 26, 2021.

[43] Absent additional clarification, these conflicting terms would present potential bidders with a genuine ambiguity as to when security clearances were required to be demonstrated. However, the Clarification to Offerors provides such additional clarification, stating that security clearances could be completed and demonstrated after the submission of bids during the acceptance period, as set out in clause 8(a)(i).

[44] The solicitation documents, including the Clarification to Offerors, make clear that bidders were required to demonstrate the required security clearance prior to the end of the acceptance period, that is April 14, 2021. The Tribunal notes that RIP provided no evidence that PWGSC was considering offers that did not demonstrate the required clearance at the time they were submitted. However, even if PWGSC had been doing so, the Tribunal finds that this would be consistent with the terms of the solicitation, so long as clearances were demonstrated prior to the end of the acceptance period. As RIP has provided no evidence or arguments that other bidders failed to demonstrate the required clearances prior to the end of the acceptance period, there is no basis for the Tribunal to inquire into whether PWGSC complied with that requirement.

Obligation to specify requirements

[45] In its complaint, RIP also cites Article 509(7)(b)(v) of the CFTA, which requires that tender documentation shall include all pertinent details concerning the requirements to be fulfilled by the supplier, and the terms or conditions applicable to the tender, including, if applicable, requirements related to the submission of the tender.

[46] RIP did not specifically argue how PWGSC is alleged to have violated Article 509(7)(b)(v) of the CFTA. If RIP is arguing that PWGSC accepted offers that did not comply with the requirements of the ITO, that ground of complaint would properly be raised under Article 515(4) and is addressed by the Tribunal's above analysis under that provision.

[47] If RIP is arguing that the ambiguity between clauses 8(a)(i) and 11(c)(v), which the Tribunal acknowledges, constitutes a breach of Article 509(7)(b)(v) of the CFTA, the Tribunal finds that this argument does not disclose a reasonable indication of such a breach because the Clarification to Offerors resolved the ambiguity.

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37 *Ibid.* at 40.

[48] RIP submits that at no time during the ITO process did PWGSC amend clause 11(c) of Part 1 of the ITO to remove the requirement for offerors to demonstrate proof of the required level of security clearance. PWGSC did not explicitly amend the text of clause 11(c), however, neither did it amend clause 8(a)(i) to remove the requirement that security clearances be demonstrated during the acceptance period. Instead, PWGSC issued the Clarification to Offerors, which resolved the ambiguity generated by the contradiction between those two clauses.

[49] Article 510 of the CFTA contemplates the clarification of the original information set out in the tender documentation in response to questions from suppliers, and requires only that such clarification be made available to all suppliers in an open, fair, and timely manner.

[50] The ITO was issued on December 23, 2020, while the Clarification to Offerors was issued on December 31, 2020. The Tribunal fails to see how this clarification was provided other than in an open, fair, and timely manner. The document indicates it was circulated to all bidders, and clearly states that it shall form part of the contract. In the Tribunal's view, this effectively amended the ITO by resolving any ambiguity as to when security clearances had to be demonstrated.

[51] Further, the Tribunal has repeatedly stated, and the Federal Court of Appeal has reaffirmed the Tribunal's statement,[38] that bidders bear the onus 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." It is up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

[52] Pursuant to section 6 of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no 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 supplier.[39] If RIP considered there to be some flaw in the solicitation documents constituting a breach of the CFTA, it had 10 working days to file a complaint in this regard. RIP submitted its original complaint on April 14, 2021, more than 10 working days after the Clarification to Offerors was issued on December 31, 2020.

[53] As such, the Tribunal finds that RIPs ground of complaint in this regard is late. Further, even if this ground of complaint were timely, in the Tribunal's view it would disclose no reasonable indication of a breach of Article 509(7)(b)(v) of the CFTA.

[54] For the foregoing reasons, the Tribunal finds that the grounds of complaint relating to the demonstration of security clearances do not disclose a reasonable indication of a breach of the CFTA or the WTO-AGP.

Disclosure of information

[55] On April 7, 2021, RIP requested via email that PWGSC disclose certain information contained in clauses 1 and 2 of other bidders' IOLs that it received under the ITO. PWGSC declined to provide the requested information, stating that RIP was not entitled to it under the terms of the solicitation.

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38 *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at para. 20.

39 Subsections 6(1) and (2) of the *Regulations*.

[56] As outlined above, Part 2 of the ITO contains the specimen IOL, meaning clauses 1 and 2 of the IOL correspond to clauses 1 and 2 of Part 2 of the ITO. Clauses 1 and 2 of Part 2 set out certain terms governing the submission of offers and provide space for bidders to fill in information regarding the proposal. Clause 1 contains the name and business contact information of the offeror, and clause 2 contains information regarding the premises offered for lease and computation of the rental rate.

[57] RIP argues that PWGSC's refusal to disclose the requested information is inconsistent with clause 16(a)(i) of Part 2 of the ITO, which provides as follows:

> (a) The Offeror hereby consents that:
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> > (i) The Lessee may provide the public at large at the opening of the Irrevocable Offers to Lease or after the opening of the Irrevocable Offers to Lease, upon written request to Public Works and Government Services Canada, with the information provided in Clauses 1 and 2 of this Irrevocable Offer to Lease;[40]

[58] RIP refers to Article 502(1) of the CFTA, which provides that parties shall provide open, transparent, and non-discriminatory access to covered procurement by their procuring entities. In addition, the Tribunal considers relevant Article 516(1) of the CFTA and Article XVI(1) of the WTO-AGP, regarding information provided to suppliers, and Article 516(2) of the CFTA and Article XVI(2) of the WTO-AGP, regarding publication of award information.

[59] The Tribunal does not agree with RIP that clause 16(a)(i) of Part 2 obligates PWGSC to disclose the information contained in clauses 1 and 2 of bidders' IOLs. As outlined above, Part 2 of the ITO contains, aside from the information to be filled in by bidders, mandatory terms which must be included in a submitted IOL.

[60] Clause 16(a)(i) is such a term, by which the *offeror* consents that PWGSC *may* disclose to the public at large the information contained in clauses 1 and 2 of submitted IOLs. Nothing in the ITO suggests a corresponding obligation for PWGSC to disclose that information. Such an obligation might be expected to appear in Part 1, which sets out the general terms of the solicitation process, however Part 1 makes no mention of disclosure whatsoever.

[61] Clause 39(k) of Part 3 discusses the disclosure of certain information, but states only that PWGSC reserves the right to make the following information available to the general public: the address of the leased property; the name and address of the lessor (i.e. the winning bidder); the commencement and termination dates of the lease; the options to extend the lease and dates thereof; and the area of the leased premises. Clause 39(k) also, similar to clause 16(a), provides that the lessor may not object to the disclosure of this information.

[62] Based on the above, the Tribunal fails to see how the terms of the ITO impose an obligation on PWGSC to disclose the information in clauses 1 and 2 of bidders' IOLs, although it clearly requires bidders to consent to such disclosure. This interpretation is consistent with PWGSC's explanation, in its email of April 7, 2021, at 4:47 p.m., that "[t]he disclosure clause is there as an acknowledgement that should we be required by policy or statute to divulge that information, we

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40 Exhibit PR-2021-008-01 at 40.

don't need any further consent from the Offerors."[41] RIP has submitted no evidence or arguments of such a requirement to divulge the information except for the wording of clause 16(a) of Part 2.

[63] Article 516(1) of the CFTA and Article XVI(1) of the WTO-AGP require procuring entities to promptly inform participating suppliers of its contract award decisions, including an explanation of why the procuring entity did not select its tender. As outlined above, on April 15, 2021, PWGSC sent RIP a regret letter officially informing it that it was not the successful bidder under the solicitation.

[64] On May 6, 2021, following RIPs request for a debriefing, PWGSC stated via email that "[a]s I've explained previously, your bid was not the lowest and the reason for it being unsuccessful."[42] In the Tribunal's view, this explanation satisfies the requirements of Article 516(1) of the CFTA and Article XVI(1) of the WTO-AGP, in that it explains the reason why RIP's bid was not selected (i.e. it was not the lowest price), and (as required by Article XVI(1) of the WTO-AGP) the relative advantages of the successful tender (i.e. that it was the lowest price).

[65] In its requests for a debriefing, RIP reiterated multiple times that it had questions about the project, however it declined to share any such questions when asked repeatedly to do so by PWGSC. Given that PWGSC provided the information required under Article 516(1) of the CFTA and Article XVI(1) of the WTO-AGP, and that RIP declined to provide any further questions for PWGSC to answer, in the Tribunal's view these communications are consistent with the requirements of those provisions.

[66] Based on the above, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of Article 516(1) of the CFTA or Article XVI(1) of the WTO-AGP.

[67] Article 516(2) of the CFTA and XVI(2) of the WTO-AGP do require procuring entities to publish certain information regarding the successful offer within 72 days of contract award. It is unclear from the complaint what date the contract was awarded, however the Tribunal considers April 14, 2021, the end of the acceptance period set out in the ITO, as the earliest date on which this would have occurred. On that basis, PWGSC would be obligated to publish the award information set out in Article 516(2) no later than June 25, 2021. As that date has not yet occurred at the time of this decision, the Tribunal finds that the complaint does not disclose a reasonable, or indeed any possible, breach of Article 516(2).

[68] The Tribunal finds that the complaint does not disclose a reasonable indication of a breach of Article 516(1) or Article 516(2) of the CFTA, and does not consider the complaint to reasonably indicate a breach of the obligation to provide access to open and transparent procurement processes under Article 502(1) of the CFTA or XVI(2) of the WTO-AGP.

<u>RIP is not a party to the WTO-AGP</u>

[69] In its complaint, RIP refers to Article XVII(1) of the WTO-AGP. For the following reasons, the Tribunal finds that Article XVII(1) does not apply to the complaint.

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41 *Ibid.* at 174.
42 *Ibid.* at 177.

[70] Article XVII(1) of the WTO-AGP provides as follows:

> On request of any other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives the information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the Party that provided the information.

[71] In the WTO-AGP, the term "Party", capitalized as a proper noun, refers to the government signatories to the agreement. This is confirmed by the first sentence of the preamble of the WTO-AGP, as well as the WTO website listing the governments that are parties to the agreement.[43] This meaning is distinct from that of "supplier", which is defined in Article 1(t) of the WTO-AGP, and means a person or group of persons that provides or could provide goods or services.

[72] As RIP is a supplier, and not a Party, within the meaning of the WTO-AGP, Article XVII of the WTO-AGP does not apply to disclosure between PWGSC and RIP.

[73] For the foregoing reasons, the Tribunal finds that this ground of complaint does not disclose a reasonable indication of a breach of the CFTA or the WTO-AGP.

Sufficiency of the debriefing

[74] In its submission of May 6, 2021, RIP requests that the complaint be considered based on the debriefing provided by PWGSC.

[75] Based on the above findings that the provision of information by PWGSC to RIP was consistent with the requirements of Article 516 of the CFTA and Article XVI of the WTO-AGP, the Tribunal finds that RIP's submissions regarding the debriefing process do not disclose a reasonable indication of a breach of the relevant trade agreements.

[76] That said, in the Tribunal's view, PWGSC could have provided more detail to RIP regarding the award decision, such as the price of the successful proposal, or the reasons why it was not required to disclose the requested information, namely that the Clarification to Offerors effectively amended clause 11(c) of Part 1 regarding the deadline for demonstrating required security clearances. While PWGSC did provide this explanation in its emails of 4:10 p.m. and 5:28 p.m. on April 6, in the Tribunal's view PWGSC could have addressed more fully RIP's apparent misconception that clause 11(c) of Part 1 would need to be explicitly amended to change the deadline for bidders to demonstrate security clearance, for example, by pointing out that the Clarification to Offerors formed part of the contract. The Tribunal provides these comments only to the extent they may be helpful in guiding future debriefing processes to provide as full and transparent an explanation to unsuccessful bidders as possible, and reiterates that it sees no indication that the debriefing process in this case breached the relevant trade agreements.

[77] For the foregoing reasons, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the relevant trade agreements.

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43 Online: <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.

DECISION

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

Frédéric Seppey

Frédéric Seppey
Presiding Member