



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2021-001

Leistritz Advanced Technologies  
Corp.

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, July 12, 2021*

*Reasons issued  
Wednesday, July 21, 2021*

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IN THE MATTER OF a complaint filed by Leistritz Advanced Technologies Corp. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**LEISTRITZ ADVANCED TECHNOLOGIES CORP.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**Government Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act (CITT Act)*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Leistritz Advanced Technologies Corp. its reasonable costs incurred in preparing and proceeding with its complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline (Guideline)*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Peter Burn

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Peter Burn

Presiding Member

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

Tribunal Panel:	Peter Burn, Presiding Member
Tribunal Counsel:	Zackery Shaver, Counsel
Complainant:	Leistritz Advanced Technologies Corp.
Counsel for the Complainant:	Charles Martin
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## STATEMENT OF REASONS

[1] On April 13, 2021, Leistriz Advanced Technologies Corp. (Leistriz) filed a complaint with the Tribunal pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> concerning a request for proposal (RFP) (Solicitation No. 31026-217733/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the National Research Council of Canada (NRC). The solicitation was for the purchase of a high free volume twin-screw extruder.

[2] Leistriz alleged that PWGSC improperly used undisclosed evaluation criteria or changed the evaluation methodology following protracted negotiations with Leistriz after it was identified as the sole responsive bidder. Subsequently, the contract was awarded to another bidder following what Leistriz was informed were revised technical evaluations.

[3] As a subsidiary argument, Leistriz also alleges that the winning bidder, Thermo Electron (Karlsruhe) GmbH (Thermo Electron), does not produce a product that would meet the criteria set out in the solicitation documents and should therefore not be awarded the contract.

[4] As a remedy, Leistriz has requested that the bids be re-evaluated in accordance with the original solicitation criteria or that the solicitation be retendered.

[5] The Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Act* and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

[6] The Tribunal conducted an inquiry into the validity of the complaint as directed by sections 30.13 to 30.15 of the *Act*.

## PROCEDURAL BACKGROUND

### The solicitation process

[7] PWGSC issued the RFP on October 15, 2020, with a closing date of November 30, 2020, at 2:00 p.m. EST. One amendment was made on November 18, 2020, to answer questions from suppliers. No amendment was made to the closing date.

[8] On November 26, 2020, Leistriz submitted its bid, as evidenced by its receipt in epost Connect.

[9] On January 25, 2021, PWGSC made a bid extension request to March 1, 2021. Leistriz agreed to the extension on the same day.

[10] On January 28, 2021, PWGSC informed Leistriz that it was the sole responsive bidder and requested full justification of the price quoted.

[11] On February 19, 2021, PWGSC made a second request to extend Leistriz's bid to March 31, 2021. Leistriz granted this request the same day.

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.) [*Act*].

<sup>2</sup> SOR/93-602 [*Regulations*].

[12] On March 18, 2021, Leistriz received an email from PWGSC stating that PWGSC had not awarded the contract and that PWGSC was in discussions with the NRC on retendering the RFP.

[13] On March 25, 2021, PWGSC informed Leistriz that its bid had not received the highest score and that Thermo Electron had been awarded the contract in the amount of US\$225,557 on March 24, 2021.

[14] On March 26, 2021, Leistriz communicated that it was unaware that additional technical evaluations had been undertaken and inquired why it had not been consulted.

[15] That same day, PWGSC replied that it had undertaken a review of all the bids submitted and found that there had been another supplier, Thermo Electron, that had submitted a compliant bid. The letter also included additional information on available bid challenge and recourse mechanisms.

[16] On March 27, 2021, in an email to PWGSC, Leistriz identified what it viewed as several inconsistencies in the procurement process and requested a date and time in which they could discuss these issues with PWGSC.

[17] On April 1, 2021, representatives from Leistriz and PWGSC met to discuss the outcome of the procurement and to address the basis for Leistriz's complaint. The officials from PWGSC also provided additional information on how to request information under access to information legislation and the relevant complaint process. This information was partially confirmed by email on the same day.

[18] On April 9, 2021, Leistriz sent a second email to PWGSC, detailing its concerns that the extruder that Thermo Electron would have likely submitted in the solicitation would not have met the mandatory requirements of the solicitation, particularly considering the answers provided to the questions in Amendment 1.

### **The complaint proceedings**

[19] On April 9, 12 and 13, 2021, Leistriz submitted its complaint to the Tribunal and it was accepted for inquiry on April 16, 2021.

[20] On May 4 and 25, 2021, PWGSC requested extensions to file the Government Institution Report (GIR). The Tribunal granted PWGSC's request on both occasions.

[21] PWGSC filed the GIR on May 31, 2021.

[22] Comments on the GIR were filed by Leistriz on June 7, 2021, with a short sur-reply filed by PWGSC on June 10, 2021.

### **ANALYSIS**

[23] Subsection 30.14(1) of the *Act* requires that, in conducting an inquiry, the Tribunal limits its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

[24] Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which in the present case is the WTO – Agreement on Government Procurement.<sup>3</sup>

[25] Leistritz’s two grounds of complaint can be summarized as follows:

- (a) PWGSC made use of erroneous or undisclosed evaluation criteria when evaluating Thermo Electron’s bid.
- (b) Thermo Electron’s bid could not have complied with the mandatory technical criteria, because Thermo Electron does not produce an extruder that meets these requirements.

### **Erroneous or undisclosed evaluation criteria**

[26] As discussed above, the first ground of complaint arose following discussions between Leistritz and PWGSC concerning the award of a contract to Thermo Electron. As a result of these discussions, in an email issued by PWGSC on March 26, 2021, the following statement was made:

Although your bid was initially found to be the only bid responsive to the mandatory requirements of the solicitation, the technical evaluations were *revised* and it was determined that more than one supplier was deemed to be compliant.<sup>4</sup>

[Emphasis added]

[27] As the sole responsive bidder, Leistritz had been in discussions with PWGSC beginning on January 28, 2021, when PWGSC sought additional information on its bid in order to justify the price quoted. Over the intervening months, it arose that the NRC was unable to proceed with the purchase of the extruder.

[28] As a result, it was concluded on March 18, 2021, that the contract would not be awarded, and results letters were sent by PWGSC to all the bidders.<sup>5</sup>

[29] Shortly after receiving its results letter,<sup>6</sup> Thermo Electron replied to PWGSC that its bid had erroneously been found to be non-compliant and that its bid had included all the required background information necessary to meet the mandatory technical criteria. In reference to PWGSC’s letter stating that it did not meet mandatory technical criterion 3.20, the representative from Thermo Electron provided a pinpoint citation to this information.

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<sup>3</sup> Revised Agreement on Government Procurement, online: World Trade Organization <[https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)> (entered into force 6 April 2014) [AGP]. The RFP and the Notice of Proposed Procurement published on Buyandsell.gc.ca list other applicable trade agreements. The Tribunal notes that the other applicable trade agreements have provisions that are similar to those of the CFTA, CUSMA and the AGP.

<sup>4</sup> Exhibit PR-2021-001-01 at 1.

<sup>5</sup> Exhibit PR-2021-001-16A at para. 25.

<sup>6</sup> *Ibid.* at 131.

[30] Mandatory technical criterion 3.20 reads as follows:

**3.0 Mandatory technical specifications**

**The delivered equipment must have the following specifications:**

**High free volume twin-screw extruder and accessories**

...

3.20 Must have a twin-screw side feeder with cooling, a minimum screw diameter of 20 mm (nominal) and a maximum screw rotation speed of at least 290 rpm.

[31] Realizing that the contracting officer had omitted to send a portion of the bid to the bid evaluation team, PWGSC proceeded to re-evaluate Thermo Electron's bid. Following receipt of this information, the bid evaluation team concluded that Thermo Electron's bid met all the mandatory technical criteria and should be awarded the contract.<sup>7</sup>

[32] PWGSC awarded the contract to Thermo Electron on March 24, 2021, and informed Leistriz of the corrected results on March 25, 2021.<sup>8</sup>

[33] PWGSC later clarified that the term "revised" used in the procurement officer's email above was an unfortunate error in translation and that it had sought to clear up this misunderstanding in another email sent March 26, 2021,<sup>9</sup> where it explained the mistake that took place and provided Leistriz with the coordinates for the available bid recourse mechanisms available to it.

## **POSITIONS OF THE PARTIES**

[34] In Leistriz's submissions, it is clear that Leistriz believes that it was treated unfairly and that PWGSC had not been sufficiently transparent in communicating why it had not awarded the contract in the first place. To correct these deficiencies, Leistriz requested that the contract be retendered, or that it at least have the opportunity to evaluate Thermo Electron's bid specifications.

[35] In PWGSC's submissions, it argues that it had made its best effort to secure authorization for the purchase of Leistriz's extruder and that it had evaluated all the bids in good faith. It was only after it had notified all the parties that no contract was to be awarded that it became aware of its mistake in evaluating Thermo Electron's bid. At this point PWGSC was obligated to correct its mistake.

## **OBLIGATION OF PWGSC TO CORRECT MISTAKES**

[36] In reviewing the communications between PWGSC and the parties, it is clear that a mistake had been made in finding Thermo Electron's bid non-compliant. The missing information was easily

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<sup>7</sup> *Ibid.* at paras. 28-29 and at 132-140.

<sup>8</sup> *Ibid.* at 143.

<sup>9</sup> Exhibit PR-2021-001-01 at 2.



found within its bid and PWGSC finalized the re-evaluation of Thermo Electron's bid on the same day Thermo Electron had communicated its objection.<sup>10</sup>

[37] As both the Federal Court of Appeal and the Tribunal have stated, a contracting authority must take appropriate steps to correct errors in the procurement process, in keeping with the terms of the solicitation and in a manner that preserves the integrity of the competitive procurement process.<sup>11</sup>

[38] The Tribunal also typically accords a large measure of deference to evaluators in their evaluation of proposals.<sup>12</sup> It has often indicated the following:

The Tribunal . . . will interfere only with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way. In addition, the Tribunal has previously indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.<sup>13</sup>

[39] Even had Leistritz been awarded the contract, Thermo Electron would have had a right to object to its bid being found non-compliant and PWGSC would have then had to address this objection. Had PWGSC acted otherwise, Thermo Electron would have similarly had the opportunity to file a complaint with the Tribunal.

### **Thermo Electron's extruder does not meet mandatory requirements**

[40] Leistritz's secondary argument concerns its belief that Thermo Electron's proposed extruder could not meet the following mandatory technical criteria:

- (a) That throughput for the extruder have a minimum rate of 2 kg/hr and a maximum rate of 50 kg/h or more.
- (b) The use of a segmented barrel design.
- (c) Maximum operating temperature of at least 400 degrees Celsius.<sup>14</sup>

[41] PWGSC provided detailed responses as to why Thermo Electron's bid was compliant with these criteria and has argued that this ground of complaint is without merit.<sup>15</sup> The evidence presented in the Affidavit of Andy Doucette, the procurement officer responsible for the solicitation, and its

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<sup>10</sup> *Ibid.* at 138.

<sup>11</sup> See *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 137; *Valcom Consulting Group Inc. v. Department of National Defence* (June 14, 2017), PR-2016-056 at para. 52; *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 at para. 33.

<sup>12</sup> See, for example, *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 58.

<sup>13</sup> *Ibid.*

<sup>14</sup> Exhibit PR-2021-001-01A at 13.

<sup>15</sup> Exhibit PR-2021-001-16A at 15-16.

supporting exhibits also provide a detailed look at the evaluation team's rationale for finding Thermo Electron's bid compliant.<sup>16</sup>

[42] Leistriz's principal has provided a list of his qualifications and expertise with respect to the sale of extruders;<sup>17</sup> however, this ground of complaint remains highly speculative. Leistriz opines as to why different extruders produced by Thermo Electron would or would not meet the requirements of the solicitation, but it provided little physical evidence to support its claims.<sup>18</sup>

[43] The Tribunal has consistently held that mere allegations, of a violation of the trade agreements, are insufficient to substantiate a claim, as follows:<sup>19</sup>

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.<sup>20</sup>

[44] In other Tribunal cases, affidavit evidence, in addition to supporting documentation from company websites, catalogues and other secondary sources, has been used to support an inquiry into a ground of complaint.<sup>21</sup> As stated above, a complainant must demonstrate that this ground of complaint raises a reasonable indication that an applicable trade agreement has been breached. In the present case, the Tribunal finds that the complainant has not met this burden for this ground of complaint.

## Conclusion

[45] For the reasons set out above, the Tribunal finds that this complaint is not valid.

## COSTS

[46] The Tribunal has broad discretion to award costs under section 30.16 of the *Act*. The Tribunal follows the "judicial model" under which, generally, the winning party is entitled to its costs. In this case, however, the Tribunal would award costs to Leistriz.

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<sup>16</sup> Exhibit PR-2021-001-16A at 20-168.

<sup>17</sup> Exhibit PR-2021-001-01A at 46.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Veseys 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; *Manitex Lifting ULC v. Department of Public Works and Government Services* (19 March 2013), PR-2012-049 (CITT) at para. 22.

<sup>20</sup> *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada v. Department of Foreign Affairs, Trade and Development* (24 September 2013), PR-2013-016 (CITT) at para. 26; *Terrapure Environmental v. Department of Public Works and Government Services* (22 June 2020), PR-2020-008 (CITT).

<sup>21</sup> See *Falcon Environmental Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 (CITT).

[47] In the complaint at issue, Leistriz entertained negotiations with PWGSC over the course of several months, believing it was the sole responsive bidder in the solicitation. It provided additional disclosure with respect to its pricing as requested by PWGSC and extended the validity of this pricing to March 31, 2021.<sup>22</sup>

[48] Mindful of the contents of the GIR, the award of the contract to Thermo Electron is logical; however, this information was not available to Leistriz when it made its complaint. Leistriz's complaint stems primarily from the incongruence it saw between PWGSC failing to award it the contract when it was found to be the sole responsive bidder, cancelling the solicitation for undisclosed reasons and then ultimately awarding the contract to its competitor.

[49] As discussed in the GIR, PWGSC made an honest mistake, having failed to include a portion of Thermo Electron's bid with the evaluation package sent to the evaluation team. Had PWGSC provided more timely and relevant disclosure of its decision-making, it's unlikely Leistriz would have filed this complaint.

[50] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline (Guideline)*, which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[51] In this case, the solicitation was not particularly complex, the issues raised by the complainant were limited and straightforward, and the proceedings were not overly complicated. Accordingly, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, which has an associated flat-rate amount of \$1,150.

## DETERMINATION

[52] Pursuant to subsection 30.14(2) of the *Act*, the Tribunal determines that the complaint is not valid.

[53] Pursuant to section 30.16 of the *Act*, the Tribunal awards Leistriz its reasonable costs incurred in preparing and proceeding with its complaint, which costs are to be paid by the PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Peter Burn  
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Peter Burn  
Presiding Member

<sup>22</sup> Exhibit PR-2021-001-01 at 1.