



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-057

Alliance Energy Ltd.

*Decision made
Tuesday, December 14, 2021*

*Decision issued
Thursday, December 16, 2021*

*Reasons issued
Wednesday, January 5, 2022*

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

ALLIANCE ENERGY LTD.

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.

Peter Burn

Peter Burn
Presiding Member

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

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 present complaint made by Alliance Energy Ltd. (Alliance) concerns the upgrading of the fire alarm system at the Correctional Service of Canada's penitentiary in Prince Albert, Saskatchewan (solicitation PW-PWU-183-12154). The request for proposals (RFP) was published on September 13, 2021, by the Department of Public Works and Government Services (PWGSC).

[3] The bid closing date was originally November 17, 2021, and was later extended to November 23, 2021, at 2 p.m. MST, in Amendment 10.

[4] Alliance submitted its bid in advance of bid closing.

[5] On November 23, 2021, following bid closing, Alliance received a copy of the bid results, in which it noticed that it had submitted the lowest bid.

[6] On November 24, 2021, Alliance was informed that its bid was considered unresponsive, as its bid bond did not comply with the requirement published in the RFP documents that the bond be at least 10 percent of a supplier's bid to a maximum of \$2 million. Alliance objected to being found non-compliant in the circumstances and indicated that the mistake had been unintentional, with Alliance and its broker, Aon, unaware that PWGSC had changed these requirements.

[7] On November 25, 2021, Alliance, Aon and PWGSC discussed the issue in a virtual meeting, where Alliance and Aon requested that PWGSC consider the matter as an "informality or minor irregularity" to Alliance's bid and sought permission to submit a corrected bid bond. PWGSC declined this request.

[8] Alliance filed its complaint with the Tribunal on December 7, 2021. In its complaint, Alliance alleges that PWGSC's decision to find its bid non-compliant violated articles 507(3)(b), 515(3) and (5)(b) of the Canadian Free Trade Agreement.³

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

² SOR/93-602 [Regulations].

³ Canadian Free Trade Agreement, 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].

LEGAL FRAMEWORK

[9] The relevant provisions of the CFTA read as follows:

Article 507: Conditions for Participation

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities, and the commercial and technical abilities, to undertake the relevant procurement.

...

3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:

- (a) evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity; and
- (b) base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation.

...

Article 515: Treatment of Tenders and Award of Contracts

Treatment of Tenders

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.

...

3. If a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.

...

Evaluation and Award of Contract

...

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

ANALYSIS

[10] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry if the following four conditions are met:

- 1) the complaint has been filed within the time limits prescribed by section 6;
- 2) the complainant is a potential supplier;
- 3) the complaint is in respect of a designated contract; and
- 4) the information provided discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

[11] With respect to the first three conditions, Alliance's complaint clearly meets all requirements.⁴

[12] For the reasons set out below, however, the Tribunal finds that Alliance's complaint is inadmissible based on the fourth requirement, as it fails to disclose a reasonable indication of a breach of the applicable trade agreement.

Reasonable indication of a breach

[13] The issue put before the Tribunal is whether the information contained in the complaint discloses a reasonable indication that PWGSC did not evaluate Alliance's bid in accordance with the essential requirements specified in the tender documentation. In other words, the Tribunal must determine whether the information provided by Alliance discloses a reasonable indication that PWGSC erred in declaring its bid non-responsive in view of the requirements set out in the tender documentation.

[14] PWGSC declared Alliance's bid unresponsive to the mandatory requirements of the solicitation, specifically clause GI08, in its letter dated November 24, 2021.⁵

[15] GI08 is part of document R2710T General Instructions - Construction Services - Bid Security Requirements contained in the *Standard Acquisition Clauses and Conditions Manual* (SACC Manual). GI08(1) is the relevant provision at issue:

GI08 (2018-06-21) Bid security requirements

1. The Bidder shall submit bid security with the bid in the form of a bid bond or a security deposit in an amount that is equal to not less than 10 percent of the bid amount. Applicable Taxes shall not be included when calculating the amount of any bid security that may be required. The maximum amount of bid security required with any bid is \$2,000,000.⁶

⁴ 1) Alliance's complaint was received eight business days after receiving denial of relief from PWGSC; 2) Alliance submitted an otherwise compliant bid in the procurement at issue; and 3) all three bids in the procurement were well above the threshold of application of the CFTA with respect to construction contracts.

⁵ Exhibit PR-2021-057-01 at 2231-2232.

⁶ General Instructions - Construction Services - Bid Security Requirements (R2710T), SACC Manual, effective date 2021-04-01.

[16] The language used by Alliance in its bid bond reads as follows:

NOT LESS THAN 10% OF THE FIRST \$500,000.00, PLUS AN AMOUNT THAT IS EQUAL TO NOT LESS THAN 5% + \$50,000 OF THAT PART OF THE TENDER AMOUNT THAT EXCEEDS \$500,000.00, TO THE MAXIMUM AMOUNT OF \$2,000,000.00.⁷

[17] This language mirrors the previous requirements for bid bonds, which expired on December 12, 2008, as per the SACC Manual:

GI08 (2008-05-12) Bid Security Requirements

- 1) The Bidder shall submit bid security with the bid in the form of a bid bond or a security deposit, and
 - (a) if the bid amount is \$500,000 or less, the bid security shall be equal to not less than 10 percent of the bid amount; or
 - (b) if the bid amount is greater than \$500,000, the bid security shall be \$50,000 plus an amount that is equal to not less than 5 percent of that part of the bid amount that exceeds \$500,000.

The maximum amount of bid security required with any bid is \$2,000,000.⁸

[18] The Tribunal has received a number of complaints involving bid bonds over the years and it has consistently held, contrary to Alliance's assertion, that bid bonds form an integral part of a potential supplier's bid and must be submitted in the form and manner required in the solicitation documents.

[19] In *9198-6919 Québec Inc. o/a Verreault Inc.*, the Tribunal concluded that the failure to submit a bid bond with the signature of the company's authorized representative, even if it was endorsed by the appropriate insurance company, amounted to a fatal deficiency in the potential supplier's bid:

Concerning Verreault's arguments that DCC is required, in the circumstances, to allow it to correct its unintentional error or "mere minor irregularity" contained in its bid by accepting the bid bond form duly signed by its authorized representative, who transmitted it to DCC on July 23, 2012, the Tribunal considers, on the grounds set out above, that Verreault's omission to submit a bid accompanied by a bid bond form duly signed by its authorized representative does not constitute a minor irregularity, but rather a failure to comply with an essential requirement of the solicitation.⁹

⁷ Exhibit PR-2021-057-01 at 2227.

⁸ General Instructions - Construction Services - Bid Security Requirements (R2710T), SACC Manual, effective date 2008-05-12.

⁹ *9198-6919 Québec Inc. o/a Verreault Inc. v. Defence Construction Canada* (1 August 2012), PR-2012-011 (CIIT) [*9198-6919 Québec Inc. o/a Verreault Inc.*] at para. 31.

[20] Suppliers are responsible for adhering to mandatory requirements. Errors of form with respect to a bid bond¹⁰ or the manner in which it is received¹¹ are unfortunate. Alliance correctly notes that GI11 of the SACC Manual and article SI10 of the solicitation documents allow PWGSC to waive or cause to be corrected minor irregularities contained in a bid. However, the exercise of that discretion falls solely within PWGSC's judgment; it must be satisfied that the differences between the tender and the exact requirements set out in the tender documents could be corrected or waived without being prejudicial to other bidders. It is clear that PWGSC did not consider it appropriate to use such discretion in this case.

[21] The Tribunal concludes that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the relevant provisions of the CFTA.

[22] In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Peter Burn

Peter Burn
Presiding Member

¹⁰ *Secure Energy (Onsite Services) Inc. v. Defence Construction (1951) Limited* (21 July 2017), PR-2017-020 (CITT) at paras. 32–38.

¹¹ *Tritan Electric and Controls Ltd. v. Department of Public Works and Government Services* (16 September 2009), PR-2009-043 (CITT) at paras. 8–10.