



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2021-031

Port of Spain Holdings Inc.

v.

Parks Canada Agency

*Order and reasons issued
Tuesday, November 30, 2021*

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IN THE MATTER OF a complaint filed by Port of Spain Holdings Inc. 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 of the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO the withdrawal of the complaint by Port of Spain Holdings Inc.

BETWEEN

PORT OF SPAIN HOLDINGS INC.

Complainant

AND

THE PARKS CANADA AGENCY

**Government
Institution**

ORDER

WHEREAS the above-mentioned complaint was filed on July 30, 2021, by Port of Spain Holdings Inc.;

AND WHEREAS the Canadian International Trade Tribunal decided, on August 9, 2021, to inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* (CITT Act) and subsection 7(1) of the *Canadian International Tribunal Procurement Inquiry Regulations*;

AND WHEREAS, on October 26, 2021, Port of Spain Holdings Inc. informed the Tribunal that it was withdrawing its complaint;

AND WHEREAS subsection 30.13(5) of the CITT Act provides that the Tribunal may cease conducting the inquiry;

THEREFORE, pursuant to subsection 30.13(5) of the CITT Act, the Tribunal hereby ceases its inquiry. Each party shall bear its own costs.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

STATEMENT OF REASONS

[1] Port of Spain Holdings Inc. (Port of Spain) submitted a bid in response to an invitation to tender (ITT) (Solicitation No. 5P421-21-0006/A) by the Parks Canada Agency (Parks Canada)¹ on May 12, 2021. The ITT pertained to work for the installation of various new shallow underground utilities within the Tunnel Mountain Campground Operations Area in Banff National Park, Alberta.²

[2] The Notice of Proposed Procurement for the ITT included a provision to inform bidders of an expected range of estimated project costs.³ Port of Spain's bid price fell within this range and its bid was the lowest compliant bid that was received before the tender closed on May 28, 2021.⁴

[3] Notwithstanding, on June 9, 2021, Parks Canada issued a succinctly worded regret letter, informing Port of Spain that the solicitation was cancelled and would be retendered.⁵ The reason for the cancellation was not specified, although the ITT contained the following provision, which afforded Parks Canada with the discretion to cancel the solicitation under certain circumstances:⁶

SI07 INSUFFICIENT FUNDING

- 1) In the event that the lowest compliant bid exceeds the amount of funding Canada has allocated for the work
 - (a) by 15% or less, Canada, at its sole discretion, shall either
 - (i) Cancel the solicitation; or
 - (ii) Obtain additional funding and, subject to the provisions of GI1 of the General Instructions to Bidders, award the Contract to the Bidder submitting the lowest compliant bid; or
 - (iii) Revise the scope of the work accordingly and negotiate, with the Bidder submitting the lowest compliant bid, a corresponding reduction in its bid price.
 - (b) by more than 15%, Canada, at its sole discretion, shall either
 - (i) Cancel the solicitation; or
 - (ii) Obtain additional funding and, subject to the provisions of GI11 of the General Instructions to Bidders, award the Contract to the Bidder submitting the lowest compliant bid; or
 - (iii) Revise the scope of the work accordingly and invite those who submitted compliant bids at the original solicitation to re-bid the work.
- 2) If negotiations or a re-bid are undertaken as is contemplated in subparagraphs 1)(a)(iii) or 1)(b)(iii) above, Bidders shall retain the same subcontractors and suppliers as they carried in their original bids.
- 3) If Canada elects to negotiate a reduction in the bid price as is contemplated in subparagraph 1)(a)(iii) herein and the negotiations fail to reach an agreement, Canada shall then exercise either of the options referred to subparagraphs 1)(a)(i) or 1)(a)(ii)

¹ Exhibit PR-2021-031-01.A (protected) at 1-18.

² Exhibit PR-2021-031-08.

³ Exhibit PR-2021-031-13 at 294.

⁴ Exhibit PR-2021-031-01 at 34-35; Exhibit PR-2021-031-13 at 320; Exhibit PR-2021-031-13.A (protected) at 331.

⁵ Exhibit PR-2021-031-01 at 35; Exhibit PR-2021-031-13 at 320.

⁶ Exhibit PR-2021-031-08 at 6.

[4] Port of Spain made inquiries of Parks Canada by telephone concerning the outcome of the tender. The content of those communications was apparently viewed by Port of Spain as being unsatisfactory. Allegedly, Parks Canada provided no adequate explanation for not awarding the contract to Port of Spain as the lowest bidder. Port of Spain also alleges that it was informed by Parks Canada that no further recourse was available.⁷

[5] On July 30, 2021, Port of Spain filed a complaint with the Tribunal.⁸ The complaint included an allegation that the decision by Parks Canada to terminate the solicitation was tainted by bias against Port of Spain, arising from an ongoing dispute between Port of Spain and Parks Canada on a different project that was tangentially related to the work described in the ITT.⁹

[6] Ostensibly, the delay in filing a complaint with the Tribunal may have been underpinned by misinformation allegedly conveyed to Port of Spain by Parks Canada. Port of Spain claimed it only became aware of possible recourse by way of complaint to the Tribunal, on July 23, 2021.¹⁰

[7] The Tribunal has recognized that there are limitations concerning the exercise of discretion by a procuring entity to cancel a solicitation.¹¹ Moreover, there is jurisprudence which suggests that the time limits for filing a complaint with the Tribunal¹² may not strictly apply in circumstances where the procuring entity has placed the complainant under misapprehension concerning the availability of recourse before the Tribunal.¹³

[8] Accordingly, and having regard to the requirements of section 7 of the Regulations, the Tribunal accepted the complaint for inquiry on August 9, 2021.¹⁴

[9] Parks Canada and Port of Spain each requested extensions of time to submit the Government Institution Report (GIR) and comments on the GIR.¹⁵ The Tribunal granted these requests and, as a result, extended the timeline for completion of these proceedings to 135 days.¹⁶

[10] Parks Canada filed the GIR on September 20, 2021.¹⁷

[11] The GIR included written submissions which alleged that Port of Spain's complaint was filed out of time. Parks Canada also provided more detailed information to explain the cancellation of the solicitation. More particularly, the GIR provided evidence¹⁸ and submissions explaining Parks Canada's decision-making, including the circumstances that every bid received by Parks Canada

⁷ Exhibit PR-2021-031-01 at 9.

⁸ *Ibid.*

⁹ *Ibid.* at 9.

¹⁰ Exhibit PR-2021-031-01B.

¹¹ For example, see *Marine Recycling Corporation and Canadian Maritime Engineering Ltd.* (22 February 2021), PR-2020-038, PR-2020-044, PR-2020-056 (CITT).

¹² Section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 [Regulations].

¹³ *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 1545 at paras. 66-72; *Agustawestland International Ltd. v. Canada (Public Works and Government Services)*, 2006 FC 767 at para. 24.

¹⁴ Exhibit PR-2021-031-04.

¹⁵ Exhibit PR-2021-031-09; Exhibit PR-2021-031-15.

¹⁶ Exhibit PR-2021-031-12; Exhibit PR-2021-031-16.

¹⁷ Exhibit PR-2021-031-13.

¹⁸ Exhibit PR-2021-031-13A (protected) at 15-339; Exhibit PR-2021-031-13A (protected) at 340-358.

exceeded the funding allocated to the project. As such, the circumstances fell within the parameters for project cancellation, according to the terms of the ITT.

[12] After reviewing the GIR, Port of Spain advised the Tribunal that it was satisfied with the explanation provided in the GIR and would not be pursuing its complaint any further. However, Port of Spain continued to vigorously dispute allegations by Parks Canada that the complaint was “delinquent” and untimely.¹⁹

[13] Parks Canada did not object to Port of Spain’s expressed intention to withdraw the complaint.²⁰

[14] Having regard to the foregoing, the Tribunal has decided to terminate this inquiry. In doing so, the Tribunal emphasizes that it makes no findings of fact, or of mixed fact and law, concerning any matter upon which the parties have joined issue, including the timeliness of Port of Spain’s complaint.

[15] The Tribunal is conferred with a broad statutory discretion concerning the allocation of costs in a procurement dispute.²¹ That decision must be exercised on a principled basis.²²

[16] As a general rule, costs usually follow the event.²³ Withdrawal of a complaint or a proceeding may, in some circumstances, be viewed as a successful outcome for the government institution so as to justify an award of costs in its favour.

[17] In this case, it appears as if the complaint might not have been filed had the regret letter provided some information to explain the reasons for cancellation of the solicitation. Parks Canada also conceded that the regret letter did not provide information concerning possible recourse. It also contends that Port of Spain is a sophisticated bidder with knowledge of its potential remedies and has not justified the delay in filing the complaint.²⁴ The GIR and Port of Spain’s reply to the GIR reflect some ongoing disagreement concerning the substance and content of subsequent communications between Parks Canada and Port of Spain concerning these issues.

[18] In view of these circumstances, and noting that neither party has sought costs, the Tribunal finds that the parties shall each bear their own costs in this matter.

Susan D. Beaubien
Susan D. Beaubien
Presiding Member

¹⁹ Exhibit PR-2021-031-17.

²⁰ Exhibit PR-2021-031-20.

²¹ Section 30.16 of the *Canadian International Trade Tribunal Act*, R.S.C., 1985 c. 47 (4th Supp.); *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 [*Georgian College*] at para. 26.

²² *Georgian College* at paras. 26-27, 30.

²³ *Ibid.* at para. 28; *Canada (Attorney General) v. Educom TS Inc.*, 2004 FCA 130 at para. 11.

²⁴ Exhibit PR-2021-031-13 at 8-10.