



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-078

Gestion Exen inc.

*Decision made
Tuesday, February 22, 2022*

*Decision and reasons issued
Wednesday, March 2, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

BY

GESTION EXEN 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.

Georges Bujold

Georges Bujold
Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations), 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 relates to a request for a standing offer (RFSO) (solicitation EF928-210587/A) published by the Department of Public Works and Government Services (PWGSC) for consulting services in the field of storage tank systems for petroleum products and allied petroleum products.

[3] The complainant, Gestion Exen inc. (GE), alleges that the clause of the RFSO concerning security requirements, i.e. the designated screening clearance required at the time of the bid, is discriminatory. In essence, GE submits that the clause excluded it from the public procurement process from the outset, despite the fact that it met all other requirements, because the deadline for complying with the security requirement was too short. As a result, GE finds that the businesses in its consortium were adversely affected, as they were unable to obtain the required security clearance in time for bid submission.³

[4] As a remedy, GE is seeking to have the bids reassessed. GE is also seeking compensation for lost opportunity. Furthermore, it is seeking its bid preparation costs.⁴

[5] The Tribunal has decided not to conduct an inquiry into the complaint. For the reasons that follow, the Tribunal finds that GE's complaint was not filed in accordance with the time limits set out in section 6 of the Regulations.

BACKGROUND

[6] On September 9, 2021, PWGSC published the solicitation in question on Buyandsell.gc.ca. The bid closing date was October 19, 2021, at 2:00 p.m. Eastern Daylight Time (EDT).⁵

[7] On October 7, 2021, GE sent an initial email to PWGSC to inquire about the security clearance requirements listed in clause 6.1 of the RFSO. More specifically, since neither GE nor its consortium held designated screening clearances or a reliability status, GE inquired with PWGSC to determine whether those requirements excluded it at the outset from the solicitation and,

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2021-078-01 at 7–11.

⁴ *Ibid.* at 9–10.

⁵ See the description on Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-MTC-035-16270>>.

alternatively, if any procedure allowed it to submit its bid despite the fact that the security clearances had not been obtained or issued in full.⁶

[8] On October 13, 2021, having received no response, GE contacted PWGSC again by email.

[9] On October 14, 2021, in response to the two questions from GE, PWGSC confirmed, on the one hand, that the security clearances were required at the time of submitting the bid and, on the other hand, that there “. . . is a mechanism [by which] you can apply to obtain these clearances for future projects”⁷ [translation].

[10] The next day, on October 15, 2021, GE emailed an objection to PWGSC and noted, among other things, its lack of understanding of clause 6.1 of the RFSO, which it feels is unfair and discriminatory. In essence, GE alleges that the clause excluded it from the outset as a potential supplier, because the deadline for complying with the security requirement was too short. GE also mentioned the following in the same email: “Given that our solicitation documents are now almost complete, we still intend to file them by bid closing next Tuesday. We hope that you will nonetheless find the means to consider them.”⁸ [translation].

[11] On the same day, PWGSC replied to GE by email, stating that it is common practice to include a mandatory requirement that bidders hold an organization security clearance when submitting a bid in order to obtain the services of firms quickly and immediately meet the needs of the government institution. In its response, PWGSC also encouraged GE to participate in other future projects once it obtained its clearance.

[12] As GE had planned, it did in fact submit its bid on or about October 19, 2021.⁹

[13] On January 17, 2022, having received no decision following the submission of its bid, GE contacted PWGSC again by email.¹⁰

[14] On February 1, 2022, PWGSC sent GE a letter of regret indicating, not surprisingly, that the bid was determined to be non-responsive with the mandatory requirements of the RFSO, as it had not met the security requirements at the time the bid was submitted and, therefore, was not responsive based on the assessment methodology described in the RFSO.¹¹

[15] It appears that GE took notice of the letter of regret on February 2, 2022.¹²

[16] On February 16, 2022, GE filed its complaint with the Tribunal.

[17] On February 18, 2022, the Tribunal requested additional information so that the complaint could be considered properly documented, pursuant to subsection 30.11(2) of the CITT Act. On that same day, GE submitted the requested information. Accordingly, pursuant to paragraph 96(1)(b) of

⁶ Exhibit PR-2021-078-01 at 16–17.

⁷ *Ibid.* at 15.

⁸ *Ibid.* at 13–14.

⁹ Exhibit PR-2021-078-01.A at 74.

¹⁰ *Ibid.* at 75.

¹¹ *Ibid.*

¹² Exhibit PR-2021-078-01 at 11.

the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on February 18, 2022.¹³

[18] On February 22, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

ANALYSIS

[19] Pursuant to section 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 can conduct an inquiry:

- i) the complaint has been filed within the prescribed time limits;¹⁴
- ii) the complainant is a potential supplier;¹⁵
- iii) the complaint is in respect of a designated contract; and¹⁶
- iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.¹⁷

[20] In this case, the Tribunal finds that the first condition has not been met, as the complaint was not filed within the time limits set out in section 6 of the Regulations. Therefore, there is no need to consider whether the other conditions have been met.

The complaint is time-barred

[21] Pursuant to subsections 6(1) and (2) 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. Further, a potential supplier who has made a timely objection to the procuring government institution and is denied relief may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.

[22] In this case, GE submits that it filed an objection with the government institution on October 15, 2021, a few days before the submission of its bid, as indicated in the information contained in the complaint form and the email exchanges between GE and PWGSC filed in support of the complaint.

[23] On that same day, PWGSC responded to the objection, stating that it was common practice to include a mandatory requirement that bidders hold an organization security clearance. Moreover, in its response, PWGSC indicated the following:

¹³ Exhibit PR-2021-078-03.

¹⁴ Subsection 6(1) of the Regulations.

¹⁵ Paragraph 7(1)(a) of the Regulations.

¹⁶ Paragraph 7(1)(b) of the Regulations.

¹⁷ Paragraph 7(1)(c) of the Regulations.

We hope that you will take part *in our future projects once you have obtained your clearance*¹⁸.

[Translation, emphasis added]

[24] Notwithstanding PWGSC's response and the fact that GE did not meet the security requirement when the bid was submitted, GE nonetheless knowingly decided to submit the bid, hoping that the government institution could find a means of considering it for assessment purposes.

[25] In the Tribunal's view, there is no doubt that GE had knowledge of the facts that led to the complaint on or about October 15, 2021. Indeed, an objection cannot be filed with the government institution without first knowing the grounds for claims related to the procurement process.

[26] Subsection 6(2) of the Regulations states that, when a potential supplier has filed an objection with the government institution within the required timeframe, as is the case here, it must file a complaint with the Tribunal "within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

[27] Given that provision, the Tribunal finds that GE should reasonably have understood that relief had been denied by the government institution and that the objection had been refused no later than the bid closing date of October 19, 2021.

[28] Indeed, given that, despite its objection, there were no changes to the security requirements for bidding on the solicitation and no changes to the mandatory requirements in that respect, it is clear that GE should reasonably have understood that relief was denied by PWGSC. Moreover, with no amendments having been made to the requirements of the solicitation further to GE's requests, GE knew or should have known at that time that its bid was non-responsive. These facts are also corroborated by GE's assertions in the complaint filed with the Tribunal, in which GE refers to PWGSC's response in October 2021 following the objection it had filed with the government institution:

The [person responsible for] procurement told us that this clause in fact excluded us from this request for a standing offer but that we could obtain the required clearances and apply again in three years¹⁹.

[Translation]

[29] GE waited until February 16, 2022, to file its complaint, which the Tribunal cannot condone. In this respect, the Tribunal notes that bidders must be vigilant and react as soon as they become aware or reasonably should have become aware of a flaw in the process. Potential bidders, therefore, cannot develop a wait-and-see approach. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,²⁰ the Federal Court of Appeal states as follows:

In procurement matters, time is of the essence.

¹⁸ Exhibit PR-2021-078-01 at 13.

¹⁹ *Ibid.* at 8.

²⁰ 2002 FCA 284.

...

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.

...

The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of [a request for proposals] should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

[30] The Tribunal would also remind that the RFSO designated the Tribunal as a possible option for recourse under the “Bid Challenge and Recourse Mechanisms” section.²¹ It was also noted that there are strict deadlines for filing complaints and that bidders must act quickly if they wish to challenge an aspect of the procurement process.

[31] Considering the above, the Tribunal finds that the deadline for filing a complaint with the Tribunal was no later than 10 business days from the bid closing date, i.e. 10 business days from October 19, 2021.

[32] Even if the Tribunal were to find that the prescribed period of 10 business days began on February 2, 2022, the date on which GE apparently received the letter of regret, the complaint was not deemed to have been filed with the Tribunal until February 18, 2021. Thus, even in that scenario, to which the Tribunal in no way subscribes, the complaint would still have been considered untimely.

[33] In short, in all cases, since the complaint was not filed within the prescribed time, the Tribunal cannot relieve GE from its failure to comply with section 6 of the Regulations. Therefore, the Tribunal is not required to determine whether the other conditions for initiating an inquiry have been met.

DECISION

[34] 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

²¹ Exhibit PR-2021-078-01.A at 6.