



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-063

Beonbrand Inc.

*Decision made
Thursday, January 6, 2022*

*Decision and reasons issued
Wednesday, January 26, 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

BEONBRAND 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.

Cheryl Beckett

Cheryl Beckett

Presiding Member

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 relates to a solicitation issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Health (Health Canada) for the provision of videos concerning the prevention of youth vaping and the cessation of adult tobacco use (solicitation H1020-214653).

[3] In its complaint to the Tribunal, the complainant, Beonbrand Inc. (Beonbrand), alleges that its bid was not fairly scored³ and that the winning bidder had an unfair advantage because of its status as the incumbent supplier.⁴

BACKGROUND

[4] On November 17, 2021, PWGSC published the solicitation.

[5] Beonbrand submitted a bid on or before the closing date.

[6] On December 15, 2021, PWGSC sent a regret letter to Beonbrand, advising that its bid did not meet all of the requirements. A contract was awarded to Banfield-Seguin Ltd (Banfield-Seguin) in the amount of \$186,450.⁵

[7] On December 15, 2021, Beonbrand emailed PWGSC and requested feedback concerning how its bid was scored. On that same day, PWGSC provided explanations on the rating of each technical requirement in Beonbrand's bid.

[8] On December 20, 2021, Beonbrand sent PWGSC an email asking for a formal debriefing.

[9] On December 22, 2021, PWGSC and Beonbrand held a debriefing by videoconference.

[10] On December 31, 2021, Beonbrand filed a complaint with the Tribunal.

[11] On January 6, 2022, the information on Tribunal File PR-2021-060 (the Tribunal had found the complaint to be premature) was added to the present file.⁶

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

² SOR/93-602 [Regulations].

³ Exhibit PR-2021-063-01.F at 23.

⁴ Exhibit PR-2021-063-04 at 8.

⁵ *Ibid.* at 12.

⁶ Exhibit PR-2021-063-06.

ANALYSIS

[12] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry into a complaint if all of the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6 of the Regulations;⁷
- ii. the complainant is a potential supplier;⁸
- iii. the complaint is in respect of a designated contract;⁹ and
- iv. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹⁰

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

No reasonable indication of a breach of the trade agreements

No unfair advantage to the incumbent supplier

[14] Beonbrand alleges that the results of the evaluation demonstrate that the incumbent supplier, who was ultimately the successful proponent, had an unfair advantage precisely by reason of its incumbency.¹¹ Beonbrand's claim is that Banfield-Seguin "was able to acquire a unique knowledge about Health Canada's Vaping and Smoking Campaigns, had a great understanding of their clients' needs as a result of the kick-off meetings that should have taken place, got provided with creative briefs, intel and revision requests that [could not] be obtained from the published RFP Guideline[s]".¹²

[15] The Tribunal has consistently found that, while certain situations may arise where bidders have a somewhat competitive-type advantage regarding a particular procurement process, it does not necessarily follow that the process is biased.¹³ The Tribunal has also stated that such competitive-type advantages may stem from a variety of different sources, including incumbency, but that this is not, in itself, considered to be unfair.¹⁴ In *Array Systems* for example, the Tribunal found that an incumbent may hold a non-discriminatory natural advantage over its competitors from the experience that it gained in past contracts and that, in itself, this is not considered to be unfair.¹⁵

⁷ Subsection 6(1) of the Regulations.

⁸ Paragraph 7(1)(a) of the Regulations.

⁹ Paragraph 7(1)(b) of the Regulations.

¹⁰ Paragraph 7(1)(c) of the Regulations.

¹¹ Exhibit PR-2021-063-04 at 8.

¹² Exhibit PR-2021-063-01.F at 23.

¹³ *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (24 April 2017), PR-2017-002 (CIIT) at paras. 27–28.

¹⁴ *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services* (23 June 2017), PR-2016-058 (CIIT) [*Le Groupe Conseil Bronson*] at para. 34.

¹⁵ *Array Systems Computing Inc.* (25 March 1996), PR-95-024 (CIIT) at 8 [*Array Systems*]; see also *CAE Inc.* (7 September 2004), PR-2004-008 (CIIT) at para. 43, *Dendron Resource Surveys Inc. v. Department of Natural Resources* (28 July 2010), PR-2010-008 (CIIT) at para. 39.

Additionally, “. . . there is no obligation to offset the effect of incumbency in the formulation of solicitations”¹⁶

[16] These findings do not displace the prohibition in the trade agreements against structuring a procurement to prevent participation by non-incumbents. However, in the absence of evidence demonstrating that the requirements of a procurement are “discriminatory, impossible to meet or unreasonable”, the fact that a potential supplier is unable to meet them does not mean that the requirements are inconsistent with the applicable trade agreements.¹⁷

[17] Based on the evidence from the debriefing information provided by PWGSC, the Tribunal considers that the successful bidder’s prior experience working on similar projects for Health Canada can be characterized as a source of experience that could have been relevant under the terms of the evaluation. This experience can therefore be more accurately described as a competitive advantage, which, as outlined above, the Tribunal has found to not, in and of itself, indicate a discriminatory solicitation.

Beonbrand’s technical bid was fairly scored

[18] Concerning requirements R.1 and R.2, Beonbrand alleges that evaluators would not have “scored [its proposal] fairly” and claims that “[s]ome of the debriefing comments suggest that [it] missed to mention some points even though they were mentioned in [its] respond [sic] to the RFP.”¹⁸

[19] On December 15, 2021, by email, PWGSC gave feedback to Beonbrand on how its technical bid scored; the summary of that feedback is as follows:

- i. Concerning requirement R.1: PWGSC indicates that the overall creative approach of the complainant lacked originality and did not properly take into consideration the target audience’s age.
- ii. Concerning requirement R.2: PWGSC notes that “no timelines with milestones or date[s] [were] provided” and that “risk and mitigation strategies were not provided”. Additionally, PWGSC indicated that “the project management approach didn’t indicate how they would take care of the 2 projects (vaping and tobacco) at the same time. . . . This section did not consider client needs as addressed in the SOW, nor did it demonstrate how videos 1, 2, 3, 4 would be produced simultaneously. This section identified risk areas specific to the project and provided average mitigation strategies.”¹⁹

¹⁶ *Le Groupe Conseil Bronson*, citing *Corel Corporation v. Department of Public Works and Government Services* (26 October 1998), PR-98-012 and PR-98-014 (CITT).

¹⁷ *Almon Equipment Limited* (3 January 2012), PR-2011-023 (CITT) at para. 72; see also *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at paras. 26–29; *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (18 December 2020), PR-2020-024 (CITT) at paras. 44–47, 54–57.

¹⁸ Exhibit PR-2021-063-01.F at 23.

¹⁹ Exhibit PR-2021-063-01.F at 25.

[20] On December 20, 2021, Beonbrand responded to PWGSC, in summary, as follows:

- i. Concerning requirement R.1, it argued that it structured its proposed advertisement ideas based on resources it had access to, specifically Health Canada's previous vaping campaigns, the RFP requirements and research assessing the efficiency of former campaigns; and
- ii. Concerning requirement R.2, it further argued that the technical and financial bids contain risk mitigation and risk management analyses as well as project milestones and timelines.²⁰

[21] In all but the rarest of circumstances, the Tribunal defers to the expertise of the evaluators and does not substitute its scoring on rated requirements of a solicitation for that of the evaluators. Leading cases on this issue include *FMD International Inc.*, where the Tribunal found as follows:

The Tribunal periodically receives complaints alleging that the scoring by a government entity against individual criteria was unfair. However, the Tribunal cannot regularly undertake a re-weighing of the points assigned by the government entities unless the treatment of the bid under review amounts to a denial of fair treatment and, consequently to a breach of the relevant trade agreement. Absent such unfair treatment, the Tribunal will generally defer to the judgment of the officials who are best qualified to assess the merits of the bids. Consequently, even though the Tribunal may disagree with the points awarded to a bidder in respect of specific evaluation criteria, it will not substitute its judgment for that of the government officials, unless their conduct amounts to a breach of one of the trade agreements.²¹

[22] Furthermore, as it has stated in the past, the Tribunal will not substitute its judgment for that of the evaluators unless 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 or have based their evaluation on undisclosed criteria.²²

[23] The Tribunal finds that PWGSC's email of December 20, 2021, and its debriefing of December 22, 2021, provide a cogent explanation as to how Beonbrand reached its scores on requirements R.1 and R.2. It provides Beonbrand with the relative merits and flaws of its bid in respect of the technical requirements of the RFP. The Tribunal is satisfied that the evaluators properly applied the criteria and methodology of the solicitation documents.

[24] The Tribunal is also satisfied that, given the evidence on the record, the evaluators have acted in a fair manner and must defer to PWGSC's judgment on the assignment of points.²³

²⁰ Exhibit PR-2021-063-01.F at 23.

²¹ *FMD International Inc.* (22 August 2000), PR-2000-007 (CITT) at 4.

²² *Excel Human Resources Inc. (operating as excelITR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10; *ACMG Management Inc.* (5 June 2002), PR-2001-056 (CITT) at 13.

²³ *Mirtech International Security Inc.* (3 June 1997), PR-96-036 (CITT) at 8.

DECISION

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

Cheryl Beckett

Cheryl Beckett
Presiding Member