



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-005

The Braintree Group Inc

*Decision made
Tuesday, April 26, 2022*

*Decision and reasons issued
Thursday, May 5, 2022*

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

BY

THE BRAINTREE GROUP INC

AGAINST

SHARED SERVICES CANADA

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 (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 proposal (RFP) (solicitation BPM014856/17477) issued by Shared Services Canada (SSC) for the supply of a Software Asset Management (SAM) software solution that satisfies the Department of National Defence's operations and business requirements³.

[3] The Braintree Group Inc (Braintree Group) mainly raises, in its complaint, allegations of collusion, bid tampering and bias, referred hereinafter as the "first ground of complaint". These allegations appear to have been brought following an incident where a notice of contract award was inadvertently published in error during the bid evaluation period. The premature notice indicated that the contract was awarded to an incumbent supplier that has provided various services to the Government of Canada and who ultimately ended up being the successful bidder.

[4] In support of its allegations, Braintree Group relies on various provisions of the North American Trade Agreement⁴ (NAFTA) and purports the following assertions:

- The bids were not properly evaluated as the RFP was awarded prior to the bids being evaluated;⁵
- The bids were not evaluated because Braintree Group's ". . . particular [technical] strengths are not automatically available in [its] competitors' systems . . .";⁶
- The successful bidder was too engrained with SSC to be eligible to bid;⁷
- The successful bidder is an incumbent supplier that has provided a wide range of IT-related services to the Government of Canada and SSC. As such, the successful bidder had advance knowledge of the configuration, which required components it previously

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ See description and solicitation documents, namely the RFP, Annex A to the RFP and Form 2, on Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/SSC-22-00017477-T>>.

⁴ North American Free Trade Agreement, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994). See, to that effect, Exhibit PR-2022-005-01.B at 1–12. Braintree Group relies on articles 1007(3) and (4), 1008(2)(a) and (b), 1014(3), and 1015.

⁵ Exhibit PR-2022-005-01 at 1–2; Exhibit PR-2022-005-01.B at 7.

⁶ Exhibit PR-2022-005-01 at 2; Exhibit PR-2022-005-01.B at 10.

⁷ Exhibit PR-2022-005-01 at 2.

supplied and installed, namely the MS Endpoint Configuration Manager, which is needed for the SAM software solution. Braintree Group is therefore of the view that a bias precluding competition was formed;⁸

- SSC sought or accepted, in a manner that would have the effect of precluding competition, advice that may have been used in the preparation or adoption of any technical specification for this procurement from the successful bidder;⁹
- The successful bidder had access to all competitive bids, which enabled it to tailor its bid submission. The successful bidder also had access to all the information needed to secure the outcome of the bid in its favour before the release of the RFP;¹⁰
- For these reasons, the initial contract award notice was not premature, nor was it a technical problem, but rather pre-determined. It is highly likely that collusion or bid tampering was in place.¹¹

[5] Moreover, although not clearly articulated, Braintree Group appears to allege, as a second and separate ground of complaint, that the RFP's technical specification related to the integration of the MS Endpoint Configuration Manager to the SAM software solution, which was allegedly installed and supplied by the successful bidder, breaches the provisions of NAFTA.¹²

[6] As a remedy, Braintree Group seeks to receive compensation for lost profits.

[7] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

BACKGROUND

[8] On January 13, 2022, SSC published the RFP in question on Buyandsell.gc.ca.¹³ Four amendments to the RFP were published and the solicitation closed on February 7, 2022, at 2:00 p.m. EST.¹⁴

[9] Braintree Group submitted a bid on or before the closing date.

[10] On February 18, 2022, Braintree Group emailed SSC, inquiring about when the contract was expected to be awarded.¹⁵

[11] On February 22, 2022, SSC responded that the planned timeline was to award the contract prior to March 31, 2022.¹⁶

⁸ *Ibid.* at 1–2; Exhibit PR-2022-005-01.B at 7, 11–12.

⁹ Exhibit PR-2022-005-01.B at 7, 10–11.

¹⁰ Exhibit PR-2022-005-01 at 1–2; Exhibit PR-2022-005-01.B at 11.

¹¹ Exhibit PR-2022-005-01 at 1–2; Exhibit PR-2022-005-01.B at 7, 11.

¹² Exhibit PR-2022-005-01.B at 10–12.

¹³ *Supra* note 3.

¹⁴ *Ibid.*

¹⁵ Exhibit PR-2022-005-01 at 5.

¹⁶ *Ibid.* at 4–5.

[12] On February 23, 2022, a contract award notice was published on Buyandsell.gc.ca, which indicated that the contract had been awarded to IPSS Inc. as of February 22, 2022.¹⁷ Braintree Group immediately sent an email to SSC, inquiring about whether the contract had been awarded and requesting to speak to someone regarding its score.¹⁸

[13] On that same day, SSC responded by stating: “This RFP is still in evaluation – apologies – a box was selected in P2P in error.”¹⁹

[14] On February 28, 2022, noticing that the contract was still listed as awarded, Braintree Group followed up with SSC to inquire about whether the status of the contract had now changed to “awarded permanently”.²⁰

[15] On March 1, 2022, SSC responded by stating: “Our technical team is reviewing; however, the procurement is still in evaluation.”²¹

[16] On March 12, 2022, Braintree Group appears to have discovered the assertions upon which it based its allegations.²²

[17] On April 11, 2022, Braintree Group received a regret letter²³ from SSC advising that it had not achieved the highest ranking bid and that a contract had been awarded to IPSS Inc.

[18] Following the issuance of the regret letter, Braintree Group did not request a debriefing with SSC, nor were there any debriefs that were held during the months of March and April 2022.²⁴

[19] On April 19, 2022, Braintree Group filed an incomplete complaint with the Tribunal.²⁵

[20] On April 20 and 22, 2022, the Tribunal requested additional information and documents, pursuant to subsection 30.12(2) of the CITT Act, before the complaint could be considered to have been filed with the Tribunal.²⁶

[21] On April 21 and 22, 2022, Braintree Group submitted the requested documents and information, and the Tribunal acknowledged receipt of a perfected complaint on April 22, 2022.²⁷ Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*,²⁸ the complaint was considered to have been filed on April 22, 2022.

[22] On April 26, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

¹⁷ *Ibid.* at 1; Exhibit PR-2022-005-01.B at 13.

¹⁸ Exhibit PR-2022-005-01 at 4.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 3.

²¹ *Ibid.*

²² Exhibit PR-2022-005-01.B at 10–12.

²³ Exhibit PR-2022-005-01 at 8.

²⁴ Exhibit PR-2022-005-01.C.

²⁵ Exhibit PR-2022-005-01.

²⁶ Exhibit PR-2022-005-02; Exhibit PR-2022-005-03.

²⁷ Exhibit PR-2022-005-04.

²⁸ SOR/91-499.

ANALYSIS

[23] Pursuant to sections 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 time limits prescribed by section 6 of the Regulations;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[24] For the following reasons, the Tribunal finds that the first ground of complaint does not disclose a reasonable indication that the procurement was conducted in violation of the applicable trade agreements.

[25] As for the second ground of complaint, the Tribunal finds that the ground of complaint is time-barred. Therefore, the Tribunal is unable to consider this ground of complaint, and even if it could, it would still not disclose a reasonable indication of a breach of the applicable trade agreements.

The first ground of complaint does not disclose a reasonable indication of a breach

[26] Pursuant to subsection 7(1)(c) of the Regulations, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal, discloses a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements set out in that subsection. The Tribunal has previously described the threshold as follows:

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.²⁹

[27] While paragraph 7(1)(c) of the Regulations does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim.³⁰ Mere allegations

²⁹ *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) [*K-Lor*] at 6.

³⁰ *K-Lor*.

made by a complainant that are unsupported by evidence are insufficient to establish a reasonable indication that the procurement process was conducted in breach of the trade agreements.³¹

[28] In its complaint, Braintree Group relies exclusively on provisions of NAFTA. However, NAFTA is no longer in force and it does not apply to procurements commenced on or after July 1, 2020.³² Nevertheless, absent position to the contrary, the Tribunal considers the Canadian Free Trade Agreement³³ (CFTA) to be applicable, at a minimum, and has taken the relevant provisions of the CFTA into account in considering Braintree Group's complaint.

[29] Having considered Braintree Group's allegations of collusion, bid tampering and bias, and the evidence placed in the record, the Tribunal finds that the complaint rests on allegations and assertions that are not supported by evidence. Rather, these allegations appear to be based on mere suppositions or suspicions. As such, Braintree Group failed to demonstrate a reasonable indication that the procurement process was conducted in breach of the applicable trade agreements.

[30] The notice of contract award that was published during the bid evaluation period is not, in and of itself, sufficient evidence that could substantiate the complainant's allegations, nor is the fact that IPSS Inc. was ultimately awarded the contract afterwards. In the email correspondence that was filed by the complainant, SSC stated that the notice of contract award was selected in error, inadvertently, that it was being reviewed by its technical team, and that the procurement was still under evaluation. The Tribunal did not find any evidence that would cause it to believe otherwise.

[31] Moreover, the fact that the successful bidder has been awarded multiple contracts in the past or has provided various IT related services to the Government of Canada is also insufficient to substantiate the complainant's allegations, and does not disclose a reasonable indication of a breach of the applicable trade agreements.³⁴

[32] With regard to the other assertions made by the complainant, the Tribunal finds them to be unsupported by any evidence. In particular, no evidence was provided to substantiate the complainant's assertions that the bids were not evaluated or that IPSS Inc. had access or had been provided information to secure the outcome of the procurement. Additionally, nothing in the evidence suggests that SSC sought or accepted from IPSS Inc., in a manner that would have the

³¹ *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13. See also *Manitex Lifting ULC* (20 March 2013), PR-2012-049 (CITT) at para. 22; *Vesey's Seeds Limited, doing business as Club Car Atlantic* (19 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at para. 12.

³² On July 1, 2020, the Canada-United States-Mexico Agreement (CUSMA) came into force, replacing NAFTA. Unlike NAFTA, Canada is not a party to the government procurement chapter in CUSMA. Therefore, neither NAFTA nor CUSMA is included in the list of applicable trade agreements found in subsection 3(1) of the Regulations. See Contracting Policy Notice 2020-2: Replacement of the North American Free Trade Agreement, online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2020-2-replacement-north-american-free-trade-agreement-nafta.html>>.

³³ Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2021/09/CFTA-Consolidated-Version-September-24-2021.pdf>> (entered into force July 1, 2017).

³⁴ Article 507(2)(a) of the CFTA provides that a procuring entity shall not impose a condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity. The Tribunal notes that the RFP at issue contains no clauses that impose such condition.

effect of precluding competition, advice that may have been used in the preparation or adoption of any technical specification for this procurement.

[33] It warrants noting, as the Tribunal has done in the past,³⁵ that allegations of bid rigging and collusion are serious accusations that can carry hefty penalties and that go well beyond procedural irregularities or failures on the part of federal entities in conducting a procurement process. To substantiate such allegations, parties are expected to bring forward strong evidence. Suppositions, suspicious or allegations that are unsupported by evidence are clearly not sufficient. In the absence of any strong evidence, the Tribunal cautions parties to refrain from making such grave accusations in proceedings before it.

[34] Having said this, the Tribunal is cognizant of the particular facts of this matter and as such, SSC's error cannot be overlooked. In order to avoid any perceptions of misconduct, the Tribunal encourages SSC to implement measures to prevent these types of errors from occurring in the future, in addition to implementing measures that would ensure that these types of errors are corrected in a timelier fashion.

[35] For these reasons, the Tribunal finds that the first ground of complaint does not disclose a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements. Simply put, the allegations and assertions made by Braintree Group are not adequately supported by evidence. Mere allegations or assertions based on suppositions or suspicions are insufficient to establish a reasonable indication of a breach of the trade agreements, especially when serious accusations are being made against the procuring entity and the successful bidder.

The second ground of complaint is time-barred and does not disclose a reasonable indication of a breach

[36] As a second ground of complaint, Braintree Group appears to challenge the manner in which the technical specifications were set out in the RFP, namely the requirement that the MS Endpoint Configuration Manager be integrated into the SAM software solution.

[37] Pursuant to section 6 of the Regulations, Braintree Group had 10 working days from when it knew or reasonably should have known about this ground of complaint to file a complaint with the Tribunal. Braintree Group was aware of this mandatory technical requirement upon issuance of the RFP and accordingly, should have issued a complaint within 10 working days of the close of the RFP. Braintree Group stated in its complaint that it became aware of various assertions upon which it based its allegations on March 12, 2022.³⁶ Even if this was the case, Braintree Group would have been required to file its complaint regarding this ground of complaint with the Tribunal within 10 working days of that date. Accordingly, the Tribunal finds that this ground of complaint is time-barred and, therefore, cannot be further considered.

[38] Nevertheless, even if the ground of complaint had been filed in a timely manner, the Tribunal finds that it does not disclose a reasonable indication of a breach of the applicable trade agreements. It is well established that a procurement authority can define and establish its own solicitation

³⁵ *SupremeX Inc. v. Department of Public Works and Government Services* (19 January 2022), PR-2021-043 (CITT) at para. 58; *Brisk Corporation* (28 April 2003), PR-2002-047 (CITT).

³⁶ Exhibit PR-2022-005-01.B at 10-12.

requirements. Moreover, albeit the lack of evidence in support of the complainant's contentions, the Tribunal is of the view that requiring the integration of a software that is being used or has been used previously by the Government of Canada as part of a solution that is being procured does not demonstrate a reasonable indication that SSC breached the applicable trade agreements. Finally, while complainants are expected to provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place, the Tribunal is of the view that this was not done in this case.

[30] Based on the foregoing reasons, the Tribunal will not conduct an inquiry into this complaint.

DECISION

[39] 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