



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-069

Terra Reproductions Inc.

*Decision made
Thursday, February 23, 2023*

*Decision issued
Friday, February 24, 2023*

*Reasons issued
Wednesday, March 8, 2023*

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

BY

TERRA REPRODUCTIONS INC.

AGAINST

THE DEPARTMENT OF NATURAL RESOURCES

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.

Bree Jamieson-Holloway

Bree Jamieson-Holloway

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 (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 must decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] This complaint by Terra Reproductions Inc. (Terra) relates to a procurement (solicitation 5000067177) issued by the Department of Natural Resources (NRCan) to qualify suppliers to electronically reproduce the National Air Photo Library's original photographic material to specified standards. The standing offer was divided into two streams, as follows:

- Stream A: Scanning of black and white or color paper based contact prints of aerial photographs at resolutions of 800 dpi. Each paper photo has a size of about 10" x 10" or less.
- Stream B: Scanning of original negative rolls at a dpi of higher than 1500 (1501 to 2100 dpi).

[3] Terra claims that the test supplied by NRCan to demonstrate compliance with mandatory requirement M4a for Stream A was not a valid test and that, accordingly, the evaluators wrongly determined that its offer did not comply with this mandatory requirement.

[4] As a remedy, Terra requests that its offer be re-evaluated based on a different test to determine compliance with requirement M4a and that the offer be awarded to Terra. If the offer is not re-awarded, Terra requests to be compensated for lost profits. Terra further requests the reimbursement of its complaint costs and bid preparation costs.

BACKGROUND

[5] The Request for Standing Offer (RFSO) in question was published on October 10, 2022,³ with an initial closing date of November 14, 2022. Amendment 001 extended the closing date to November 16, 2022,⁴ and Amendment 004 further extended the closing date to November 22, 2022.⁵

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01009859>>. A total of four amendments were issued for this solicitation and are not in issue in this case.

⁴ Exhibit PR-2022-069-01 at 101.

⁵ *Ibid.* at 116.

[6] On January 11, 2023, NRCan notified Terra that standing offers had been awarded to three suppliers having submitted successful offers.⁶ NRCan further explained that Terra's offer was disqualified because the evaluators determined that it did not comply with mandatory requirement M4a for Stream A, which prescribed the following: "The Offeror MUST be able to reproduce original reflective material electronically at a true resolution of 800 Dots Per Inch –DPI– in X and Y (+/- 20%)."⁷

[7] On January 30, 2023, Terra responded to NRCan by stating that it had reviewed the test method used to determine compliance with mandatory requirement M4a and that it could prove that the test supplied was "not a valid test for a flatbed scanner because the glass that was supplied was 1.5 mm thick", which brings the target out of focus.⁸

[8] On February 3, 2023, having had no response from NRCan, Terra informed NRCan that it needed a response to its previous correspondence before February 8, 2023.⁹ The same day, NRCan replied that a response would be provided to Terra before then.¹⁰

[9] On February 7, 2023, NRCan responded to Terra's claims. It explained that the supplied 1.5 millimetres glass was the same glass provided to all offerors during the solicitation process, that the targets used for the tests were tested by NRCan on flatbed scanners to ensure they met its needs prior to the solicitation and that these internal tests allowed NRCan to achieve high levels of resolutions. NRCan also stated in its email to Terra that it was incumbent on offerors to raise their questions or concerns prior to solicitation closing and that it had not received any questions from Terra prior to solicitation closing. Therefore, NRCan advised Terra that it would not be re-issuing a solicitation.¹¹

[10] The same day, Terra responded that the instructions provided with the test were insufficient and requested that it be allowed to provide new results for the test. Terra further explained that it did not have the opportunity to ask questions because it did not know what type of target it would get before the day of the test.¹²

[11] On February 8, 2023, NRCan responded to Terra stating that it was the offeror's responsibility to demonstrate its ability to reproduce the scanning resolution to meet mandatory requirement M4a.¹³ The same day, Terra requested a phone call with NRCan, claiming once again that the test supplied was not appropriate.¹⁴ NRCan advised Terra that it was seeking clarification and would provide a response to Terra the following day.¹⁵

⁶ Exhibit PR-2022-069-01.B at 1.

⁷ *Ibid.* at 1, referring to Exhibit PR-2022-069-01 at 62. Requirement M4a for Stream A refers to Annex "A2" of the RFSO, which specifies that offerors "must pass the resolution test as described in Annex 'A3' (requirement M4-a). Failure to pass makes the proposal non-compliant" (see Exhibit PR-2022-069-01 at 90). Annex "A3" of the RFSO does provide some instructions and information on the tests offerors must perform (see Exhibit PR-2022-069-01 at 92-94).

⁸ Exhibit PR-2022-069-01.B at 2.

⁹ *Ibid.* at 4.

¹⁰ *Ibid.* at 6.

¹¹ *Ibid.* at 8.

¹² *Ibid.* at 10.

¹³ *Ibid.* at 14.

¹⁴ *Ibid.* at 16.

¹⁵ *Ibid.* at 18 and 24.

[12] On February 9, 2023, NRCan explained in an email to Terra that offerors were instructed to put a sheet of paper behind the target while undergoing the tests, which ensured the same reflectivity of the target for all offerors.¹⁶ The same day, Terra responded that it did not believe using the sheet of paper resolved the issue.¹⁷

[13] On February 13, 2023, Terra submitted its complaint to the Tribunal.

[14] On February 15, 2023, NRCan advised Terra that compliance with mandatory requirement M4a did not require any specific type of scanner to be used by the offerors and that it was the responsibility of the offerors to ensure they met the reproduction requirements of M4a using their own equipment. NRCan reiterated previously provided information and stated once again that it would not accept any submission and re-test.¹⁸

[15] On February 15, 2023, the Tribunal requested from Terra additional information pursuant to subsection 30.12(2) of the CITT Act. On February 17, 2023, Terra submitted the requested information, and its complaint was then considered to have been filed.¹⁹

[16] On February 23, 2023, the Tribunal decided not to conduct an inquiry into the complaint.

ANALYSIS

The complaint

[17] 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.

[18] For the following reasons, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the Regulations. Therefore, the Tribunal will not conduct an inquiry into the complaint.

¹⁶ *Ibid.* at 27.

¹⁷ *Ibid.* at 30.

¹⁸ *Ibid.* at 33.

¹⁹ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the CITT Act, the complaint is considered to have been filed “... on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.”

[19] Subsections 6(1) and (2) of the Regulations provide that 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.

[20] Terra raised by email an objection with NRCan on January 30, 2023.²⁰ If the Tribunal were to consider that the basis of Terra's complaint only became known on January 11, 2023, when NRCan informed it that its offer was found non-compliant to mandatory requirement M4a,²¹ the objection it made does not fall within the 10-working-day limit of subsection 6(2) of the Regulations. In fact, Terra made its objection 13 working days after the day on which it was informed that its offer was found non-compliant.

[21] Given the circumstances at hand, the Tribunal finds that Terra's objection was not raised within the time limits prescribed by subsection 6(2) of the Regulations and, therefore, that the complaint is time-barred.

[22] The Tribunal reminds parties that, in procurement matters, time is of the essence and that potential suppliers must be vigilant and react as soon as they become aware or reasonably should have become aware of a flaw in the process.²² The time limits fixed by the Regulations reflect this fact,²³ including those for raising an objection with the government institution.

Observation

[23] The Tribunal has repeatedly held that it is incumbent on the bidder to, *before* submitting its bid, seek clarification from the procuring entity to assure itself that it has not made incorrect assumptions.²⁴ If there is any doubt about the essential elements of a solicitation, the Tribunal encourages bidders to pose questions and to seek clarification during the bidding process. Understanding the fundamentals of a solicitation ought to be achieved during the bidding period, not after, and bidders can avoid disappointment and provide better responses to published opportunities if they carefully consider all the terms of a solicitation and pose questions instead of making assumptions.²⁵

[24] Thus, when it received and performed the test supplied by NRCan for mandatory requirement M4a, if Terra had any uncertainties about the validity of the test, it should have sought clarification during the bidding process, before the closing date.

²⁰ Exhibit PR-2022-069-01.B at 2.

²¹ *Ibid.* at 1.

²² *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at para. 20.

²³ *Sanjiv Gulati Medicine Professional Corporation* (22 March 2022), PR-2021-076 (CITT) at para. 20. In this case, the Tribunal was referring to the time limits for initiating and completing the challenge process before the Tribunal.

²⁴ *Accipiter Radar Technologies v. Department of Public Works and Government Services* (13 May 2019), PR-2018-049 (CITT) at para. 75.

²⁵ *Newland Canada Corporation v. Department of National Defence* (4 August 2022), PR-2022-027 (CITT) at para. 23 and footnote 14.

DECISION

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

Bree Jamieson-Holloway

Bree Jamieson-Holloway

Presiding Member