



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-025

MLVX Technologies Inc.

*Decision made
Friday, August 4, 2023*

*Decision issued
Tuesday, August 8, 2023*

*Reasons issued
Friday, August 18, 2023*

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

BY

MLVX TECHNOLOGIES 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.

Randolph W. Heggart

Randolph W. Heggart
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] The complaint relates to a call for proposals (CFP) (solicitation EN578-23IS11) published on CanadaBuys³ on March 21, 2023, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Industry (Innovation, Science and Economic Development Canada) and other participating departments.

[3] By the terms of the CFP and through the Innovative Solutions Canada Program – Testing Stream, a research and development (R&D) program,⁴ PWGSC sought to procure, test and evaluate R&D pre-commercial goods and services in late-stage development to address certain government operational requirements organized under the umbrella of “problem statement topics”⁵.

[4] The CFP was expressly reserved for small businesses under the small business set-aside program. In order to be eligible, bidders were required, among other things, to be for-profit with 499 or fewer full-time equivalent employees⁶.

[5] The complainant, MLVX Technologies Inc. (MLVX), alleges⁷ that the wording of one of the questions in the Point-Rated Screening Criteria section of the CFP was misleading and that PWGSC’s evaluation of its proposal in respect of that criterion was unfair because it was inconsistent with the evaluation grid. MLVX seeks a re-evaluation of its bid and the postponement of the contract award.

BACKGROUND

[6] MLVX submitted a proposal in response to the CFP on the closing date, April 18, 2023.⁸

[7] On June 9, 2023, PWGSC advised MLVX that its proposal had not been retained⁹ because it did not demonstrate that it had sufficient financial resources and a credible financial strategy to

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ [Call for Proposals TS7 - Innovative Solutions Canada - Testing Stream - Tender Notice, CanadaBuys.](#)

⁴ An initiative designed to stimulate technology research, development and commercialization of Canadian innovations. For more information see <https://ised-isde.canada.ca/site/innovative-solutions-canada/en>.

⁵ Exhibit PR-2023-025-01.A, p. 13.

⁶ *Ibid.*, p. 16.

⁷ Exhibit PR-2023-025-01.C, p. 5.

⁸ Exhibit PR-2023-025-01.D, p. 1.

⁹ Exhibit PR-2023-025-01.C, p. 134–135.

execute its commercial launch plan, as required by point-rated screening criterion 4 and its evaluation criteria¹⁰, which read as follows:

PS4: Financial Capacity

The Bidder must demonstrate that they have sufficient financial resources and a credible financial strategy in order to execute their commercial launch plan, without a potential ISC Testing Stream Contract.

In determining the credibility of a financial strategy, evaluators consider: funding sources, the amount of secured and unsecured funds, the degree of risk, and whether these risks are reasonable or sufficiently mitigated based on the context of the sector. Credibility, potential risks, and applicability to support launch costs should also be considered.

Financial resources must demonstrate the ability to commercialize the proposed innovation.

0 points	<ul style="list-style-type: none"> • The Bidder has not demonstrated they have sufficient funds to commercialize the proposed innovation; OR • The Bidder has no credible plan to secure necessary funds or the costs are significantly underestimated; OR • The financial strategy provided is inadequate, unrealistic, or incomplete.
8 points Minimum	<ul style="list-style-type: none"> • The Bidder has demonstrated they have funds in place, and otherwise possesses the financial capacity to undertake production and delivery of the proposed innovation; OR • The Bidder has a credible financial strategy and remaining unsecured funds will not significantly impede commercializing the proposed innovation.
12 points	The Bidder has demonstrated they have sufficient secured funds and have a credible financial strategy to successfully commercialize the proposed innovation.

[8] PWGSC awarded MLVX zero points for PS4.¹¹

[9] On the same day, MLVX wrote to PWGSC and objected to the latter's finding that the bid was unresponsive. MLVX explained that it found Question 5 of PS4 misleading.

[10] Question 5 of PS4 required bidders to “[p]rovide details on [their] company’s secured (existing or remaining) funding sources, as well as unsecured funding sources at the time of proposal submission, in order to demonstrate sufficient capital to execute [their] commercial launch plan”.¹² The question also instructed bidders not to include revenue from a potential Innovative Solutions Canada Testing Stream contract.

[11] MLVX explained to PWGSC that it had understood the question to be asking the bidder to demonstrate how it planned to cover the exact costs of the commercial launch plan, which is why it only included its sources of funds to match those costs exactly. MLVX further stated if the intended

¹⁰ Exhibit PR-2023-01.A, p. 46.

¹¹ Exhibit PR-2023-025-01.C, p. 7.

¹² Exhibit PR-2023-025-01.D, p. 66.

purpose was instead to ask the bidder to demonstrate its funding beyond the amount allocated for the commercial launch plan, then PWGSC could direct its attention to the attached updated and complete figures it stated would satisfy that understanding of Question 5.¹³

[12] On June 16, 2023, PWGSC reiterated the evaluation criteria of PS4 (see para. 6 above) and referred MLVX to section 3.3.2 of Part 3 of the Proposal Preparation and Submission Instructions:¹⁴

3.3.2 To maintain the integrity of the evaluation, Evaluators will consider only information presented in the proposal submitted prior to the solicitation closing date and time. No information will be inferred and personal knowledge or beliefs will not be utilized in the assessment.

[13] PWGSC explained that unless it was explicitly stated in the proposal, the evaluators could not assume that MLVX's forecasted commercialization costs were inclusive of monies for risk mitigation, nor could it consider the additional information MLVX provided in its June 9, 2023, email. Moreover, because the proposal did not indicate "the degree of risk and whether the risks were reasonable or sufficiently mitigated", the evaluators determined that the proposal plan was incomplete.

[14] On June 16, 2023, MLVX replied to PWGSC and, among other things, requested that PWGSC "correct the grade for Question PS4" in light of the additional information provided.¹⁵

[15] On June 23, 2023, PWGSC confirmed it would "return to the evaluation team for a second look at the failed criterion".¹⁶ PWGSC further indicated that while this might not change the final result, it would provide MLVX with a better understanding of why the proposal did not meet the requirement in question.

[16] On July 21, 2023, PWGSC informed MLVX that following a review by the evaluation team of its proposal against its comments of June 9 and 16, 2023, the evaluation results remained the same. However, PWGSC transmitted additional comments from the evaluation team for further clarity, comments which it deemed to conclude the debrief process.

[17] On July 27, 2023, MLVX filed its complaint with the Tribunal.

ANALYSIS

[18] 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;
- (ii) the complainant is a potential supplier;

¹³ Exhibit PR-2023-025-01.C, p. 134–135.

¹⁴ *Ibid.*, p. 133–134; see also Exhibit 2023-025-01.A, p. 26.

¹⁵ Exhibit PR-2023-025-01.C, p. 132–133.

¹⁶ *Ibid.*, p. 131–132.

(iii) the complaint is in respect of a designated contract¹⁷; 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.

[19] A “designated contract” is defined in section 30.1 of the CITT Act as “a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations.”

[20] Subsection 3(1) of the Regulations further provides that a “designated contract” is any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in the applicable trade agreements.

[21] For the following reasons, the Tribunal finds that the complaint has not been made in respect of a designated contract and as such, the conditions for inquiry have not been satisfied.

With the exception of the Canadian Free Trade Agreement, the applicable trade agreements exclude, expressly or otherwise, government contracts for research and development services from coverage within their procurement chapters

[22] As mentioned above, the Tribunal may only inquire into a complaint when certain conditions are met. One of those conditions is that the procurement in issue must be for a good or service covered under one of the trade agreements listed in the Regulations.

[23] By the terms of the procurement in issue, PWGSC sought to procure, test and evaluate research and development (R&D) pre-commercial goods and services in late-stage development. Appendix 2 of the CFP defines pre-commercial innovations as “those in the phases of research and development prior to commercialization”.¹⁸ As noted above, this was to be accomplished through the Innovative Solutions Canada Program – Testing Stream, defined in the CFP as an R&D program. The Tribunal finds that the overall objective of the CFP was to purchase R&D services.

[24] That the purpose of the CFP was to purchase R&D services is supported by Article 1.6 of the CFP, which expressly lists the trade agreements set out in the Regulations and states, among other things, that they do not cover the procurement of R&D services.¹⁹

[25] Except for the Canadian Free Trade Agreement (CFTA), government procurement processes for the acquisition of R&D services are excluded, expressly or otherwise, from coverage by the trade agreements listed in subsection 3(1) of the Regulations.

[26] Specifically, R&D activities are expressly excluded from coverage under the following agreements: Canada-Chile Free Trade Agreement (Annex Kbis-01.1-4 Services, Section B), Canada-Colombia Free Trade Agreement (Annex 1401-4 Services, Section B, Part 1), Canada-Korea Free Trade Agreement (Annex 14-C), Canada-Panama Free Trade Agreement (Annex 5, Section B), Canada-Peru Free Trade Agreement (Annex 1401.1-4, Section B, Part I-A) and Canada-Honduras Free Trade Agreement (Annex 17.4, Section B, Part I).

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

¹⁸ Exhibit PR-2023-025-01.A, p. 52.

¹⁹ *Ibid.*, p. 17–20.

[27] Moreover, the World Trade Organization’s Agreement on Government Procurement (Appendix 1, Annex 5), Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (Annex 19-5), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Annex 15A, Section E), Canada-Ukraine Free Trade Agreement (Annex 10-4), and Canada-UK Trade Continuity Agreement (as per CETA Annex 19-5), adopt a positive-listing approach to service disciplines within their respective procurement chapters (i.e., only those items which are listed fall within the agreement’s scope and coverage). In each case, R&D services do not appear as a listed service, and as a result, are excluded from coverage.

[28] The procurement in issue is therefore not covered by the above-listed trade agreements.

Article 504(13) of the CFTA provides that the agreement does not apply to procurement that is part of a small business set-aside program, provided that the program is fair, open, transparent and does not discriminate on the basis of origin or location within Canada of goods, services or suppliers

[29] In contrast to the foregoing agreements, the CFTA appears to specifically cover the procurement of R&D services in connection with its procurement disciplines.²⁰

[30] However, pursuant to Article 504(13), the CFTA “does not apply to procurement that is part of a small business set-aside program, provided that the program is fair, open, transparent, and does not discriminate on the basis of origin or location within Canada of goods, services, or suppliers”.

[31] While the small business set-aside exception is not defined in Article 504(13) the CFTA, a plain language reading of this article suggests that the exception applies where the small business set-aside program in issue was fair, open, transparent and non-discriminatory.²¹

[32] Part 1.3 of the CFP expressly indicates that the procurement was “reserved for small businesses under the Small Business Set-aside to help grow small, Canadian businesses and provide them opportunities to contract with the Government of Canada”.²²

[33] As a result, to the extent that the program was fair, open, transparent and non-discriminatory, the exception in Article 504(13) of the CFTA applies.

[34] In its complaint, MLVX takes issue with the evaluation of its proposal and the wording of Question 5 of PS4. MLVX does not argue that the small business set-aside program was not open, fair, transparent, or that it discriminated on the basis of origin or location within Canada of goods, services or suppliers.

[35] While the conduct of an individual procurement under a small business set-aside program could possibly indicate that the program itself is not fair, nothing in the present complaint suggests such broader concerns in this case. The Tribunal concludes that there is no evidence before it to indicate a systemic problem with the small business set-aside program in issue such as is contemplated in Article 504(13).

²⁰ See, for example, Article 513(f) of the CFTA.

²¹ See *Miwayawin Health Care Solutions Ltd.* (23 November 2018), PR-2018-041 (CITT), where the Tribunal briefly considered in obiter this exception.

²² Exhibit PR-2023-025-01.A, p. 15.

[36] As a result, the small business set-aside exception in Article 504(13) applies and the procurement in issue is not covered by the CFTA.

[37] As no applicable trade agreement applies to the procurement in issue, the Tribunal finds that the complaint does not relate to a “designated contract” as required by subsection 30.11(1) of the CITT Act. As such, the Tribunal does not have jurisdiction to inquire.

[38] It should be noted that, even if the Tribunal had jurisdiction in this case, the Tribunal is of the opinion that the conduct of the evaluators and their interpretation of the meaning and purpose of the evaluation criterion in question was not unreasonable in the circumstances. It is not unreasonable that a financial capacity assessment takes into account risks and contingencies and extends beyond the proposed budget.

DECISION

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

Randolph W. Heggart

Randolph W. Heggart
Presiding Member