



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2008-021

ComXel Inc.

*Decision made
Wednesday, July 23, 2008*

*Decision and reasons issued
Tuesday, August 5, 2008*

IN THE MATTER OF a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

COMXEL 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.

André F. Scott
André F. Scott
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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 (the 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. Moreover, 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.
2. The complaint relates to a procurement (Solicitation No. EN869-055068/D) by the Department of Public Works and Government Services (PWGSC) for the provision of network management infrastructure services.
3. ComXel Inc. (ComXel) alleged that PWGSC improperly evaluated its bid and failed to provide it with a debriefing.
4. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*³, Chapter Five of the *Agreement on Internal Trade*⁴ or the *Agreement on Government Procurement*⁵ applies. In this case, the *AIT*, *NAFTA* and the *AGP* apply.
5. Article 506(6) of the *AIT* provides as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.
6. Article 1013 of *NAFTA* provides as follows:
 1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders ... The documentation shall also include:

...

h. the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders ...
7. Article 1015(4)(a) of *NAFTA* provides as follows:
 - a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation.

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

2. S.O.R./93-602 [*Regulations*].

3. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

8. Article 1015(4)(d) of *NAFTA* provides as follows:
- d. awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.
9. Article XIII(4)(a) of the *AGP* provides as follows:
- To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. . . .
10. Clause A.15, “Joint Venture Offers”, of the Request for a Standing Offer (RFSO), reads as follows:
- ...
- (h) **Security Requirement:** Unless this solicitation expressly provides otherwise, each member of a joint venture Offeror must satisfy the requirement described in this Article entitled “Security Requirement”.
- ...
11. Section 5, “Conditions for Contracting”, of the RFSO, reads as follows:
- Note to Offerors: This Section contains conditions for contracting. *These are conditions precedent to any standing offer award. To be considered for award of a standing offer, the Offeror must comply with all the Conditions for Contracting set out in this Section . . .***
- . . . Some of the Conditions for Contracting require the [Offeror] to contact or apply to a third party to meet the requirement. *Therefore, Offerors should initiate such processes as early in the bidding period as possible.*
- . . . *Canada is not required to delay the award of any standing offer to allow [the] Offeror to comply with the Conditions for Contracting.*
- ...
- [Emphasis added]
12. Clause A.39, “Security Requirement (CIISD)”, of the RFSO, is a condition for contracting. That clause reads as follows:
- (a) The Offeror must, at all times during the performance of the Standing Offer, hold a valid Facility Security Clearance at the level of SECRET, issued by the Canadian and International Industrial Security Directorate (CIISD), Public Works and Government Services Canada (PWGSC).
- ...
13. The Tribunal notes that PWGSC reminded ComXel, on several occasions, of the security requirements contained in the RFSO. In its complaint, ComXel submitted that it initially understood that it could rely on the Facility Security Clearance obtained by one of its joint venture partners, Combat Networks, because the facility to be used in the performance of the standing offer was the same building used by ComXel. According to the complaint, once it was made clear that this was not possible, ComXel immediately submitted another security application⁶ and, on March 20, 2008, ComXel asked PWGSC to sponsor its security clearance application. According to the complaint, on March 24, 2008, ComXel’s

6. Complaint, paras. 37, 38.

security application was submitted to CIISD.⁷ According to the complaint, on June 4, 2008, PWGSC advised ComXel that a standing offer had been issued to another offeror and that ComXel's bid was deemed non-compliant in accordance with the security requirement.⁸ In its complaint to the Tribunal, ComXel submitted that the RFSO only required that offerors have the Facility Security Clearance during the performance period of any resulting standing offer, not at the time that the standing offer was awarded. It also submitted that the only security requirement that it did not possess on or by the date on which the solicitation was awarded was the Facility Security Clearance as described in clause A.39(a) of the RFSO; however, it maintained that its offer nevertheless complied with all the conditions for contracting.⁹

14. The Tribunal is of the view that the security requirement, as a condition for contracting, is very clear. The Tribunal notes, in particular, that it was necessary for the offeror to hold a valid Facility Security Clearance at the level of secret "... at all times during the performance of the Standing Offer ...". In order to meet this requirement, which is outlined in clause A.39(a) of the RFSO, it is incumbent upon an offeror to keep in mind both the overriding requirement stated in section 5 that the conditions for contracting are "... conditions precedent to any standing offer award ...". and the fact that the RFSO contains no obligation on PWGSC to advise offerors in advance of the date on which it intends to issue a standing offer. Taken together, and considered in light of the further indication in section 5 that offerors initiate processes "... as early in the bidding period as possible ...", it becomes apparent that these facts require an offeror to act with due dispatch in fulfilling security requirements. It is obvious to the Tribunal that an offeror without a valid Facility Security Clearance at the time that PWGSC intends to issue a standing offer would not meet the condition of possessing that clearance "... at all times during the performance of the Standing Offer ...".

15. The Tribunal notes that, in accordance with Clause A.11, "Offeror's Responsibilities",¹⁰ of the RFSO, it was the offeror's responsibility to obtain clarification of the requirements, if necessary, to ensure that it responded to all the requirements, to prepare its offer in accordance with the instructions in the RFSO and to submit a complete offer prior to bid closing.

16. Given that the RFSO was issued on June 20, 2007, that bids closed on September 14, 2007, that ComXel submitted a bid as a joint venture and that ComXel was aware of the time frames involved in obtaining security clearances,¹¹ the Tribunal is of the view that ComXel had sufficient time. In fact it was informed on several occasions of the need to comply with the requirement for security clearance prior to the issuance of a standing offer. In this case, the Tribunal is of the view that ComXel did not act diligently in initiating and following through with its security applications. ComXel filed its application for security clearance more than nine months after the solicitation was published, six months after bids were closed and two months after PWGSC began seeking clarifications from ComXel with respect to its status regarding security. The Tribunal is also of the view that PWGSC was under no obligation to advise the offerors, in advance, of the date on which it intended to issue a standing offer, in order for bidders to obtain the required security clearances.

17. The case now before the Tribunal compares with the precedent set in *SECOR Consulting Inc.*¹² In the facts relating to *SECOR*, as is the case here, time, whether or not specified within a rigid time frame, was of the essence, and offerors were reasonably informed of what could be considered a reasonable period within which bidders had to act in order to fulfill the conditions for obtaining the required security clearances.

7. Complaint, para. 38.

8. Complaint, para. 20.

9. Complaint, para. 29.

10. Complaint, tab A at 12.

11. Complaint, para. 39.

12. *Re Complaint Filed by SECOR Consulting Inc.* (14 February 2007), PR-2006-043 (CITT) [*SECOR*].

18. The facts of the present case are different from those at issue in *P&L Communications Inc.*¹³ In that case, the Tribunal found that the signing of the contract was a crucial element, as it was a milestone upon which the contractor was to hold the required security clearance. Since no date for the “signing of the contract” was provided for under the RFP, that specific contracting structure resulted in the government institution possessing an obligation to accommodate the successful bidder. The Tribunal therefore concluded that Statistics Canada applied a unilateral, stringent requirement pursuant to which the successful bidder had to provide its security clearance within approximately 4.5 hours of being advised that it had won the contract. The Tribunal also concluded that the government institution did not co-operate to the extent that the circumstances would have suggested that it did.

19. In the case now before the Tribunal, however, the requirement that the offeror hold a security clearance is a condition precedent to the award of a standing offer. In the Tribunal’s view, offerors could reasonably expect a standing offer to be issued after bids closed and after the offers were evaluated. In contrast with *P&L*, the evidence in this case demonstrates that PWGSC took all the necessary steps to cooperate with ComXel to ensure that it would obtain the required security clearance on time. The Tribunal is also of the view that a procuring entity does not have the obligation to jeopardize its operational requirements by delaying the award of a contract indefinitely. In fact, as clearly stated in the RFSO, “. . . Canada is not required to delay the award of any standing offer to allow [the] Offeror to comply with the Conditions for Contracting”

20. Therefore, with respect to ComXel’s first ground of complaint, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

21. With respect to ComXel’s allegation that PWGSC did not provide it with a debriefing, the Tribunal notes that PWGSC provided ComXel with the name of the winning bidder, the estimated value of the standing offer that was issued, the winning bidder’s bid evaluation price and the reason why ComXel’s offer was declared non-complaint. PWGSC also provided ComXel with certain documents concerning the evaluation of its bid.

22. Article 1015(6)(b) of *NAFTA* provides as follows:

- b. on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

23. Article XVIII(2) of the *AGP* reads as follows:

2. Each entity shall, on request from a supplier of a Party, promptly provide:

. . .

- (c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

24. The Tribunal notes that there is no similar provision in the *AIT*. The Tribunal also notes that the provisions in *NAFTA* and the *AGP* do not dictate the format or the method by which the information is to be provided to unsuccessful bidders.

13. *Re Complaint Filed by P&L Communications Inc.* (6 June 2006), PR-2005-056 (CITT) [*P&L*].

25. In *Ecosfera Inc.*,¹⁴ the Tribunal stated as follows:

...

The relative characteristics and advantages of the tender selected constitute the subject matter of the information to be provided. One must look to the words used by the drafters of the provision to understand the potential scope of the requirement. The word “characteristic” (*caractéristique*) generally refers to a feature or quality of a thing, in this case, Stratos’s bid. The word “advantage” (*avantage*) generally means that a thing or person is better than another; in this context, it refers to the advantages of Stratos’s bid when compared to that of Ecosfera. Clearly, the particularities of each case determine the information that is to be provided

[Footnotes omitted]

26. Upon review of the evidence, the Tribunal is of the view that the information that PWGSC provided to ComXel satisfied the requirements of *NAFTA* and the *AGP* with respect to the reasons for not selecting its bid, as well as the characteristics and relative advantages of the tender selected. Therefore, the Tribunal finds that, for this ground of complaint, the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

27. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

André F. Scott
André F. Scott
Presiding Member

14. *Re Complaint Filed by Ecosfera Inc.* (11 July 2007), PR-2007-004 (CITT).