



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-010

Fleetway Inc.

*Decision made
Thursday, May 28, 2009*

*Decision and reasons issued
Wednesday, June 3, 2009*

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

FLEETWAY 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.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
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. 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 by the Department of Public Works and Government Services (PWGSC) for the provision of quality assurance and management support services on behalf of the Department of National Defence (DND).

3. Fleetway Inc. (Fleetway) alleges that PWGSC improperly cancelled and re-issued the solicitation.

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 the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies.

5. On January 12, 2009, PWGSC issued a solicitation for Requirement No. 09-P2EW, under Request for Supply Arrangement (RFS) Solicitation No. E60BQ-008SAD/A. The bid closing date was February 24, 2009. Fleetway submitted a proposal in response to the solicitation.

6. On March 8, 2009, Fleetway received an e-mail from an individual who was an incumbent resource. In the e-mail, the individual advised that he was aware that Fleetway did not propose him as a resource in its bid and that he was aware of two candidates proposed by Fleetway.⁷ On March 13, 2009, Fleetway advised PWGSC of its concerns with the bidding process in light of the information obtained from the incumbent resource.⁸ PWGSC advised Fleetway that it would look into the matter.⁹

7. On March 25, 2009, PWGSC advised Fleetway that information in its bid was transmitted to the individual by an employee of DND who subsequently received disciplinary measures.¹⁰ On March 26, 2009, Fleetway advised PWGSC that, in its view, the procurement process had been compromised.¹¹

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).

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

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

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997).

7. Confidential complaint, tab 4.

8. Confidential complaint, tab 5.

9. Confidential complaint, tab 6.

10. Confidential complaint, tab 7.

11. Complaint, tab 10.

8. On April 16, 2009, Fleetway advised PWGSC that, in its view, the only fair course of action was that all bidders who proposed the particular individual as a resource be declared non-compliant.¹² On May 8, 2009, PWGSC cancelled and re-issued the solicitation. The deadline for bid submission was May 26, 2009.¹³

9. On May 22, 2009, Fleetway filed its complaint with the Tribunal.

10. The Request for Proposal issued on January 12, 2009, contained the following terms:

... Unless otherwise specified in this document, all terms and conditions contained in the Supply Arrangements issued as a result of RFSA solicitation No. E60BQ-008SAD/A are hereby incorporated into this RFP by reference

11. The RFSA incorporated by reference two versions of the Standard Instructions and Conditions 2003 i.e. (2007/05/25) and (2007/11/30). However, both those versions include the following provisions:

...

Rights of Canada

Canada reserves the right to:

...

(d) cancel the bid solicitation at any time;

(e) reissue the bid solicitation;

...

12. It was accepted by PWGSC that certain information was inappropriately transmitted from DND to an individual who was not entitled to view this information. While there is no evidence on file to indicate why PWGSC cancelled and re-issued the solicitation, it is clear from its terms and conditions that PWGSC had a right to do so and that the bidders, as part of the bid submission process, would have agreed to those terms and conditions. The Tribunal is of the view that, given the circumstances, it was not unreasonable for PWGSC to cancel and re-issue the solicitation.

13. Therefore, 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.

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

DECISION

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

Ellen Fry
Ellen Fry
Presiding Member

12. Complaint, tab 11.

13. Complaint, tab 13.