



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2014-024

2040077 Ontario Inc.  
o/a FDF Group

*Decision made  
Wednesday, August 27, 2014*

*Decision and reasons issued  
Tuesday, September 2, 2014*

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

**BY**

**2040077 ONTARIO INC. O/A FDF GROUP**

**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.

Pasquale Michaele Saroli

Pasquale Michaele Saroli

Presiding Member

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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 Request for a Standing Offer (RFSO) by the Department of Public Works and Government (PWGSC) on behalf of the Department of National Defence (DND) for the supply, installation and maintenance of cardiovascular fitness equipment (Solicitation No. W2B03-140009/A).

3. 2040077 Ontario Inc. o/a FDF Group (FDF) alleged that the point rating scale for the technical evaluation criteria set out in the RFSO was inherently biased in favour of a specific manufacturer's treadmill products and did not allow for legitimate competition by other bidders, including FDF. Specifically, FDF argued that the point rating scale for the treadmills being procured was intentionally designed for the allocation of more points for certain technical specifications (i.e. relating to the size of tapered rollers or rubber slates and the treadmill decline range) that could only be met by a single manufacturer's products. According to FDF, the contract was ultimately awarded to another bidder offering that same manufacturer's products. Moreover, FDF alleged that the technical specifications in question were unprecedented in past procurements of fitness equipment for DND.

4. By way of remedy, FDF requested that a new solicitation be issued and that the specifications in question be re-evaluated.

5. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... not 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 potential supplier."

6. Subsection 6(2) of the *Regulations*, in turn, provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal "... within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

7. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

8. The solicitation was issued by PWGSC on October 30, 2013, and published on October 31, 2013.

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

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

9. On November 13, 2013, FDF sent an e-mail to PWGSC, referring to an attached question regarding the technical specifications of the RFSO. That attachment was not included in the documents filed with the complaint. However, PWGSC's written response dated November 14, 2013, expressly referred to FDF's request for a revision of the technical criterion relating to the preferred size of rollers or rubber slates for the treadmills being procured. PWGSC stated that "[it was] not planning to revise the particular point-rated criterion that [FDF] disputed" and went on to explain the reason for its decision.<sup>3</sup>

10. On November 18, 2013, FDF sent two further e-mails to PWGSC objecting to the point rating scale for the following rated technical criteria in relation to the procurement: rollers/rubber slates size, decline range and running belt width.<sup>4</sup> In its response of November 25, 2013, PWGSC rejected FDF's request to change the point-rated criteria in question with detailed reasons for each.

11. The solicitation closed on December 10, 2013.

12. On August 8, 2014, the contract was awarded to TDI Fitness Consultants.

13. FDF filed its complaint form with the Tribunal on August 22, 2014. Documents in support of the complaint were filed on August 25 and 26, 2014.

14. The Tribunal is of the view that, if a potential supplier believes that the criteria set out in an invitation to tender are not impartial, but rather inherently biased in favour of a particular supplier, it must file a complaint in a timely manner.<sup>5</sup> The procurement review process does not provide for grievances to be accumulated and then presented only when the contract is awarded. In this respect, the Federal Court of Appeal, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,<sup>6</sup> stated that potential suppliers "... are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process."<sup>7</sup>

15. The complaint filed with the Tribunal clearly shows that FDF knew the basis of its complaint, which relates to the design of the technical specifications in the RFSO, at the latest, on October 31, 2013, when the solicitation was published. FDF's objection to PWGSC in relation to the size of the rollers/rubber slates was first made on November 13, 2013, which fell within the 10-working-day time frame to make an objection. The Tribunal considers that FDF received a clear denial of relief from PWGSC in relation to that technical criterion on November 14, 2013. FDF then had 10 working days after that date to file a complaint with the Tribunal in relation to that ground of complaint, in accordance with subsection 6(2) of the *Regulations*. It is clear that the prescribed time limit had long since expired when the present complaint was filed with the Tribunal.

16. FDF objected to PWGSC regarding the point-rated criterion for the treadmill decline range on November 18, 2013, which fell outside the prescribed 10-working-day deadline for an objection to be made under subsection 6(2) of the *Regulations*. Even if its objection in relation to this second ground of complaint had been filed on time, FDF received a clear denial of relief from PWGSC on this ground of complaint on November 25, 2013, and it did not file its complaint with the Tribunal until August 22, 2014, which was well beyond the prescribed time limits under the same subsection.

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3. See e-mail correspondence filed with Tribunal on August 25, 2014, "Re\_Question – W2B03-140009".

4. The Tribunal notes that the point-rated criterion in relation to the running belt width of the treadmill was not raised by FDF in the present complaint.

5. See, for example, *APM Diesel 1992 Inc.* (15 February 2012), PR-2011-052 (CITT).

6. 2002 FCA 284 (Can LII).

7. *Ibid.* at para. 20.

17. The Tribunal therefore finds that FDF's complaint is time-barred by operation of law.

18. While the Tribunal's preference is to dispose of complaints on their substantive merits, it has no authority to do so in cases such as this, where the complaint was clearly filed outside the mandatory time limits prescribed under section 6 of the *Regulations*.

19. Although it is not necessary to address other aspects of the complaint in light of the above finding, the Tribunal would simply note that, contrary to FDF's implication, PWGSC was under no obligation to structure its procurement requirement in accordance with technical specifications used in previous procurements. In this regard, it is well established in Tribunal jurisprudence that a government entity is entitled to structure the RFSO and define its procurement terms and conditions in a manner which fulfills its legitimate operational requirements, which may change over time.<sup>8</sup>

## DECISION

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

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

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8. See, for example, *Accent on Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Bajai Inc.* (7 July 2003), PR-2003-001 (CITT).