



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-031

McGaw Technical Services Inc.

*Decision made
Thursday, October 2, 2014*

*Decision and reasons issued
Friday, October 3, 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

MCGAW TECHNICAL SERVICES 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.

Jason W. Downey _____
Jason W. Downey
Presiding Member

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.

COMPLAINT

2. The complaint relates to stipulations contained in a procurement (Solicitation No. EJ196-131151/B) by the Department of Public Works and Government Services (PWGSC) with regard to the maintenance of emergency power generators.

3. On June 30, 2014, McGaw Technical Services Inc. (McGaw) wrote to PWGSC to indicate its concern over stipulations contained in the aforementioned procurement. The stipulations, as explained by McGaw, require bidders to be in possession of a service and maintenance contract executed with ASCO Power Technologies (ASCO) and to obtain access to proprietary software granted by ASCO.

4. McGaw indicated that ASCO, as a bidder on the procurement, would neither execute such a contract nor grant the required software access. Further, McGaw asserted that the stipulations made by PWGSC were not necessary for the performance of the services to which the procurement pertains.

5. On July 21, 2014, PWGSC replied to McGaw, explaining its rationale for including the stipulations in the solicitation and for issuing a competitive solicitation rather than proceeding with a sole-sourced contract. PWGSC explained that the technical capacity required pertains to the manipulation of controls that are the intellectual property of ASCO. PWGSC included a letter from ASCO, dated July 18, 2014, in which it states that it owns the intellectual knowledge for the controls and which makes clear that it does not license any entity with regard to the maintenance of its controls and maintains those controls itself.

6. McGaw replied to PWGSC on the same day, reiterating its earlier stated positions and indicating that PWGSC ought to consider the solicitation as contested.

7. On September 2, 2014, McGaw filed a complaint with the Office of the Procurement Ombudsman (OPB). In that complaint, McGaw indicated that it first became aware of its ground of complaint on May 1, 2014. Further, McGaw indicated the dollar value of the procurement to be approximately \$250,000.

8. On September 30, 2014, McGaw forwarded its OPB complaint to the Tribunal, indicating that it had been informed by an official of the OPB that the estimated value of the procurement exceeds the jurisdiction of the OPB.

ANALYSIS

9. 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

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

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

reasonably should have become known to the potential supplier.” Subsection 6(2) 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.”

10. In other words, a complainant has 10 working days from the date on which it first became 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.

11. Where a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days of having actual or constructive knowledge of the denial of relief by the government institution.

12. McGaw has indicated that it became aware of its ground of complaint on May 1, 2014. Thus, its objection to PWGSC on June 30, 2014, occurred outside the time limit set out in the *Regulations*. This fact alone is supportive of the conclusion that McGaw’s complaint was not filed in a timely manner. Should the Tribunal consider McGaw’s subsequent acts, and to the extent that PWGSC’s letter of July 21, 2014, can be construed as a denial of relief, it becomes clear that, in filing its complaint with the Tribunal on September 30, 2014, McGaw once again acted outside the time limit set out in the *Regulations*.

13. Additionally, other than simply directing correspondence to the Tribunal, McGaw has not placed information supportive of its complaint, either by way of evidence or by way of argument, before the Tribunal. The complaint is bereft of information required pursuant to paragraphs 30.11(2)(c), (d) and (f) of the *Act*.

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.

Jason W. Downey

Jason W. Downey
Presiding Member