



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-034

UPA Construction Group (AB) Ltd.

*Decision made
Thursday, October 16, 2014*

*Decision and reasons issued
Tuesday, October 21, 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

UPA CONSTRUCTION GROUP (AB) LTD.

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.

Ann Penner

Ann Penner

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 a revised bid that UPA Construction Group (AB) Ltd. (UPA) submitted to the Department of Public Works and Government Services (PWGSC) on August 12, 2014, in response to solicitation No. EW038-150285/A for construction services at the Willow Cree Healing Lodge.

3. According to the solicitation document, all bids had to be submitted to PWGSC by 2:00 p.m. Central Daylight Saving Time on August 19, 2014.³

4. On August 19, 2014, at 12:42 p.m., UPA faxed its revised bid to PWGSC.⁴ The Communication Result Report for the fax transmittal indicated a result of “OK”. However, according to UPA’s complaint, the revised bid was actually not received by PWGSC until 2:05 p.m. for “reasons unknown”, but possibly within the control of PWGSC.

5. On August 20, 2014, subsequent to a telephone conversation between officials of UPA and PWGSC, UPA sent an e-mail to PWGSC, requesting that its revised bid be accepted as filed in a timely manner. UPA also indicated that other contractors experienced similar fax transmittal difficulties that, in its view, were indicative of fax reception problems on the part of PWGSC.

6. On August 22, 2014, PWGSC replied to UPA by e-mail, indicating that subsequent to consultations with its lawyers, it concluded that, since the revised bid was not received by the deadline of 2:00 p.m. on August 19, 2014, UPA’s revised bid could not be considered and that PWGSC would proceed with an evaluation of UPA’s original bid instead.

7. On August 25, 2014, UPA again wrote to PWGSC, requesting that PWGSC reconsider its position. PWGSC replied on August 28, 2014, providing some explanations with regard to its original position and indicating that it considered the matter closed.

8. On September 16, 2014, PWGSC wrote to UPA, inquiring as to whether UPA would be agreeable to an extension of the acceptance period for UPA’s bid to October 17, 2014. PWGSC explained that an extension was required to complete certain administrative processes. UPA replied on the same day, confirming that it was agreeable to the extension.

9. On September 22, 2014, PWGSC wrote to UPA to inform it that a different bidder had been awarded the contract. According to PWGSC, the successful bidder had proposed a price lower than UPA’s

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

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

3. UPA’s complaint, tab 1 at 4, tab 3 at 7.

4. The revised bid amended UPA’s total bid price.

original bid, but higher than UPA's revised bid (which had been deemed late). PWGSC also returned UPA's bid bond, given that UPA was not the successful bidder. UPA indicated in its complaint that it received this correspondence on September 25, 2014.

10. On October 15, 2014, UPA filed its complaint with the Tribunal.

ANALYSIS

11. 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." 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."

12. 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.

13. 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.

14. Based on the evidence, it is clear that UPA became aware of the ground of its complaint on August 20, 2014, i.e. the day on which it spoke to PWGSC by telephone with regard to the receipt of its revised bid. Thus, its objection to PWGSC on the same day, as well as on August 25, 2014, occurred within the time limits set out in the *Regulations*.

15. It is the Tribunal's determination that the reply by PWGSC on August 28, 2014, in which it indicated that it considered the matter closed, constitutes the denial of relief for the purposes of subsection 6(2) of the *Regulations*. Consequently, UPA had 10 working days from that day to file its complaint with the Tribunal in order for the complaint to be considered timely. As UPA's complaint was filed on October 15, 2014, the Tribunal can only conclude that it was filed outside the time limit prescribed by the *Regulations*.

16. Should the Tribunal instead infer from UPA's delay that it was awaiting PWGSC's decision, given PWGSC's request for an extension period, it is possible that, at the very latest, UPA became aware of the denial of relief by way of the award of the contract to a different bidder on September 25, 2014. UPA should then have filed its complaint within 10 working days of September 25, 2014 (i.e. by October 9, 2014). However, given that UPA did not file its complaint until October 15, 2014, the Tribunal must conclude once again that UPA's complaint was filed outside the time limit prescribed by the *Regulations*.

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

DECISION

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

Ann Penner

Ann Penner

Presiding Member