



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-066

2040077 Ontario Inc.
s/n FDF Group

*Decision made
Friday, March 27, 2015*

*Decision and reasons issued
Wednesday, April 1, 2015*

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.

Peter Burn
Peter Burn
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.
2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. W010S-15A032/A) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply of urethane dumbbells for the Stadacona Sports and Fitness Centre.
3. 2040077 Ontario Inc. o/a FDF Group (FDF) alleged that the contract was awarded to a supplier that did not meet the mandatory criteria set forth in the RFP. Specifically, the bid solicitation documents required that the dumbbells be “100% manufactured in the US”. FDF alleged that the products to be supplied by the successful bidder are to be assembled in the United States using parts manufactured in China.
4. FDF has requested that it be compensated for lost opportunity and lost profits.
5. The solicitation was issued by PWGSC on November 12, 2014. PWGSC additionally issued three amendments to the solicitation on November 21, December 12 and December 15, 2014. Amongst other changes (which are not relevant to this complaint), the second amendment added the “100% manufactured in the US” specification to Annex A – Statement of Requirement,³ and the third amendment changed the delivery date from January 18 to March 31, 2015.⁴
6. The bid closing date was December 18, 2014.
7. The contract was awarded on January 28, 2015.
8. On February 2, 2015, FDF sent an initial letter of objection to PWGSC explaining its concerns that the contract had been awarded to a non-compliant bidder. PWGSC responded on February 4, 2015, that it was looking into FDF’s concerns. On February 19, 2015, FDF filed a complaint with the Tribunal. On February 27, 2015, the Tribunal issued a decision that the complaint was premature since “. . . FDF [had] not yet received a formal denial of relief with respect to its alleged ground of complaint, as set out in subsection 6(2) of the *Regulations*.”⁵
9. Between February 2 and March 3, 2015, FDF made several additional attempts to contact PWGSC. On March 3, 2015, having received no response from PWGSC, FDF filed another complaint with the Tribunal. On March 6, 2015, the Tribunal again found that the complaint was premature, since FDF had still

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

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

3. See amendment No. 002 filed with the Tribunal on February 19, 2015 (documentation from File No. PR-2015-058 joined to the present complaint).

4. See amendment No. 003 filed with the Tribunal on February 19, 2015 (documentation from File No. PR-2015-058 joined to the present complaint).

5. *2040077 Ontario Inc. o/a FDF Group* (27 February 2015), PR-2014-058 (CITT) at para. 13.

not received a denial of relief. However, the Tribunal indicated that, if FDF did not receive a response from PWGSC by March 11, 2015, it could assume that a denial of relief had taken place.⁶

10. On March 12, 2015, PWGSC informed FDF that the contract with the allegedly non-compliant bidder had been cancelled “. . . in light of the issues raised” and that PWGSC was “. . . engaging with DND in terms of how to satisfy this requirement in the future.”⁷

11. The present complaint was filed on March 24, 2015.

12. Subsection 6(2) of the *Regulations* 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.”

13. FDF’s objection to PWGSC on February 2, 2015, was made within 10 working days of FDF having knowledge of the ground of its complaint. In addition, the present complaint was filed within 10 working days of receipt of PWGSC’s letter dated March 12, 2015. The conditions of subsection 6(2) of the *Regulations* are therefore met. FDF’s complaint is timely.

14. However, the Tribunal does not have jurisdiction to inquire into FDF’s complaint because it is not in relation to a “designated contract”.

15. Pursuant to subsection 30.11(1) of the *CITT Act*, “. . . a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a *designated contract* . . .” [emphasis added].

16. “Designated contract” is defined in section 30.1 of the *CITT Act* as “a contract for the supply of goods or services that *has been or is proposed to be awarded by a government institution* and that is designated or of a class of contracts designated by the regulations” [emphasis added].

17. As set out above, PWGSC cancelled the contract at issue and has not yet re-issued a solicitation to procure the dumbbells. As a result, as of the date of FDF’s complaint (March 24, 2015), there was no designated contract in existence. The Tribunal is therefore precluded from conducting an inquiry into this complaint.

18. In addition, PWGSC’s decision to cancel the contract, in light of the issues raised by FDF, means there is no longer any basis for the remedies sought by FDF. A finding of lost opportunity or lost profit would be based on the Tribunal’s estimation of the likelihood of FDF being awarded the contract in lieu of the allegedly non-compliant bidder. The absence of a designated contract means that there is no opportunity or profit to lose.

19. PWGSC has stated that it is in discussions with DND on how to meet this requirement. Should the requirement be re-tendered in the future, it will be open to FDF to submit a bid and to raise any concerns that it may have in relation to the new solicitation.

6. 2040077 *Ontario Inc. o/a FDF Group* (6 March 2015), PR-2014-063 (CITT).

7. See e-mail from PWGSC concerning contract No. W010S-15A032/001/HAL and attached letter filed with the Tribunal on March 25, 2015.

DECISION

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

Peter Burn

Peter Burn

Presiding Member