



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-006

Optima

*Decision made
Thursday, May 21, 2015*

*Decision issued
Monday, May 25, 2015*

*Reasons issued
Thursday, May 28, 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

OPTIMA

AGAINST

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.

Serge Fréchette
Serge Fréchette
Presiding Member

The statement of reasons will be issued at a later date.

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.

SUMMARY OF COMPLAINT

2. On April 14, 2015, the Tribunal received a complaint from Optima regarding two Requests for Standing Offers (Solicitation Nos. C1111-140554/A [the first solicitation] and C1111-140554/B [the second solicitation]) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of Canadian Heritage, for the provision of professional services involved in producing, printing and installing exhibit signage and decors required for national events organized by the Department of Canadian Heritage.

3. With respect to the first solicitation, Optima alleges that its proposal was unfairly rejected although it met all the criteria of the solicitation. With regard to the second solicitation, which, based on the information in the complaint, was issued by direct invitation to certain potential suppliers, Optima complains that it did not receive an invitation e-mail from PWGSC and was therefore unable to participate in this solicitation. As a remedy, Optima is requesting that the bids be re-evaluated and that it be added to the list of approved suppliers.

4. On May 19, 2015, the Tribunal notified Optima that some additional information needed to be filed in order for the complaint to be deemed compliant with subsection 30.11(2) of the *CITT Act*. Optima replied the following day, stating that it had no additional information or documentation in its possession. However, given that information in the complaint indicated otherwise, on May 21, 2015, the Tribunal contacted a representative of Optima in order to explain the nature of the missing information and documentation. Following this, Optima was able to provide, that same day, part of the missing information.

5. As a result, having determined that the information contained in the complaint was sufficient to meet the conditions of subsection 30.11(2) of the *CITT Act*, the Tribunal considered, in accordance with subsection 96(1) of the *Canadian International Trade Tribunal Rules*,³ the complaint to have been filed on May 21, 2015.

6. After reviewing the complaint, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for that decision are as follows.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

ANALYSIS

7. When determining whether to inquire into a complaint, the Tribunal must take into account the *Regulations*, which set out certain conditions that must be met in order for the Tribunal to inquire into a complaint.

8. Among other conditions, the *Regulations* provide for strict time limits for filing a complaint. More specifically, section 6 sets out that a potential supplier has 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 to file a complaint with the Tribunal. However, in cases where the potential supplier has made an objection to the relevant government institution, it may file a complaint with the Tribunal within *10 working days after the day on which the potential supplier had knowledge of the denial of relief from that government institution*. The relevant provisions provide as follows:

6(1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so 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.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract 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.

9. In this case, Optima's complaint regarding the two solicitations was not filed within these time limits.

10. Optima participated in the first solicitation, which closed on March 12, 2015. On the basis of the information contained in the complaint, the Tribunal found that Optima had learned, during the week of March 16, 2015, that its proposal had been rejected in the first solicitation, having been deemed not to have met one of the technical criteria.⁴ In addition, Optima had indicated having had a telephone discussion with PWGSC during which it had expressed its "puzzlement" at the rejection of its proposal. PWGSC's response appears to have been that Optima need not worry, as another Request for Standing Offers would soon be issued. Optima indicated that this telephone conversation occurred between March 25 and 31, 2015.⁵

11. Further, it appears from the evidence on the record that Optima indeed decided to wait for this second solicitation. However, when Optima inquired as to the fact that it had yet to receive this second solicitation, PWGSC stated, in an e-mail dated April 21, 2015, that the solicitation had been sent to Optima on April 2, 2015. Moreover, PWGSC indicated that the bid closing date for the second solicitation was April 17, 2015, and had thus already passed.

4. Despite the Tribunal's attempts to obtain a clear explanation in this regard, the specific dates on which the events surrounding the initial rejection of Optima's proposal occurred remain uncertain. However, the information and clarifications provided by Optima reasonably indicate that the initial rejection of Optima's proposal occurred during the week of March 16, 2015. See complaint form at 5, as well as the e-mails dated March 19, 2015, from Optima to PWGSC regarding the disputed technical criterion.

5. Document titled "Objection letter", filed with revisions on May 21, 2015.

12. On April 22, 2015, Optima notified PWGSC of its objection on two grounds: not having received the e-mail regarding the second solicitation and not having been selected in the first solicitation for an unjustified reason, in its view. PWGSC replied to this objection by e-mail the same day, reiterating that the bid closing date for the second solicitation had passed and indicating that suppliers wishing to challenge federal government procurement decisions can contact the Tribunal.

13. The Tribunal considers PWGSC's reply, dated April 22, 2015, to be a clear and definitive denial of relief. Moreover, there is little doubt that PWGSC's denial became known to Optima that same day.⁶ As indicated above, Optima filed its complaint on May 21, 2015.

14. On these facts, the Tribunal concludes that the complaint was not filed within the prescribed time limits. As far as the first solicitation is concerned, Optima had knowledge of the basis of the complaint in March 2015, at which time it made a first objection, which was followed by another on April 22, 2015. Even considering, for the purposes of this analysis, that PWGSC only definitively denied relief on April 22, 2015, the Tribunal cannot but conclude that the complaint was filed late. Indeed, if the denial on April 22, 2015, is used as a starting point, Optima had, pursuant to subsection 6(2) of the *Regulations*, 10 working days, namely, until May 6, 2015, to file a complaint with the Tribunal on this ground.

15. A similar analysis applies to the ground of complaint regarding the alleged non-receipt of the second solicitation. Given that PWGSC had definitively denied relief to Optima's objection on April 22, 2015, the latter once again had until May 6, 2015, to file a complaint with the Tribunal.

16. Having been filed after the May 6, 2015, deadline, the complaint is time-barred. Consequently, even if there was a reasonable indication of a violation of a trade agreement applicable to these procurements, the complaint cannot be accepted for inquiry.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

6. See Optima's e-mails dated April 22, 2015, sent following PWGSC's denial.