



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-023

MasterBedroom Inc.

*Decision made  
Friday, August 14, 2015*

*Decision and reasons issued  
Thursday, August 20, 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**

**MASTERBEDROOM 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.

Peter Burn  
Peter Burn  
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.

### SUMMARY OF THE COMPLAINT

2. This complaint relates to a Request for a Standing Offer (RFSO) (Solicitation No. B3275-150511/A) issued by the Department of Public Works and Government Services (PWGSC) for the provision of basic household furniture to individuals or families in Toronto and elsewhere in Ontario on behalf of the Department of Citizenship and Immigration (CIC). MasterBedroom Inc. (MasterBedroom) alleged that, in initially awarding the standing offer for Toronto to it and subsequently retracting that award in order to rectify an error, PWGSC mishandled the evaluation of its bid.

### RELEVANT FACTS

3. On May 11, 2015, PWGSC issued an RFSO on behalf of CIC for the provision of basic household furniture to individuals or families. The closing date for the solicitation was June 22, 2015.

4. Among its provisions, section 6.3.1 of Part 6 of the RFSO provided as follows:

2005 (2014-09-25), General Conditions – Standing Offers – Goods or Services, apply to and form part of the Standing Offer.<sup>3</sup>

5. Further, section 4.2.1 of Part 4 of the RFSO provided as follows:

An offer must comply with the requirements of the Request for Standing Offers and meet all mandatory technical criteria to be declared responsive. The responsive offer with the lowest evaluated price for each geographic area will be recommended for issuance of a standing offer.

6. The Government of Canada's procurement Web site, [buyandsell.gc.ca](http://buyandsell.gc.ca), indicates that the RFSO is covered by a number of trade agreements, including the World Trade Organization's *Agreement on Government Procurement*<sup>4</sup> and the *North American Free Trade Agreement*.<sup>5</sup>

7. On June 18, 2015, MasterBedroom submitted its proposal with regard to the RFSO.

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

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

3. The General Conditions form part of the Standard Acquisition Clauses and Conditions (SACC) Manual, available at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual>, with the 2014-09-25 iteration available by way of a search option that includes superseded versions of the manual.

4. *Protocol Amending the Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014).

5. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

8. On June 16, 2015, PWGSC issued an amendment to the RFSO, changing the bid closing date from June 22 to June 29, 2015.

9. On July 29, 2015, PWGSC awarded the standing offer for Toronto to MasterBedroom.

10. On July 31, 2015, PWGSC wrote to MasterBedroom to inform it that the standing offer awarded to it had been set aside due to an evaluation error. PWGSC stated that another company was entitled to the standing offer and indicated that this retraction was undertaken according to articles 2 and 4.2.e. of the SACC Manual's General Conditions. Those articles provide as follows:

2005 02 . . . General

The Offeror acknowledges that a standing offer is not a contract and that the issuance of a Standing Offer and Call-up Authority does not oblige or commit Canada to procure or contract for any goods, services or both listed in the Standing Offer. The Offeror understands and agrees that Canada has the right to procure the goods, services or both specified in the Standing Offer by means of any other contract, standing offer or contracting method.

. . .

2005 04 . . . Offer

. . .

2. The Offeror understands and agrees that:

. . .

e. the Standing Offer may be set aside by Canada at any time.

11. In addition, PWGSC made clear that its error pertained to the fact that MasterBedroom's bid did not contain the lowest evaluated price for Toronto. The bid with the lowest evaluated price for Toronto was approximately 0.195 percent less than the bid submitted by MasterBedroom.<sup>6</sup>

12. Upon being informed of the retraction of its standing offer, MasterBedroom sought the intervention of a number of federal government offices by way of correspondence to the Minister of CIC on August 3, 2015, and to the Minister of PWGSC and the Office of the Procurement Ombudsman (OPO) on August 5, 2015.

13. On August 6, 2015, further to a referral from the OPO, MasterBedroom filed its complaint with the Tribunal.

14. On August 10, 2015, the Tribunal wrote to MasterBedroom requesting additional information pursuant to subsection 30.12(2) of the *CITT Act*.

15. On August 11, 2015, MasterBedroom wrote to a regional director general at PWGSC and, in that correspondence, mentioned details of a telephone conversation that had transpired between them, including PWGSC's reiteration that the standing offer had to be retracted due to an error in the evaluation of the bids submitted.

16. On August 13, 2015, MasterBedroom provided the information requested by the Tribunal and, thus, pursuant to subsection 6(1) of the *Regulations*, the Tribunal considers that a complete complaint related to

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6. In its complaint, MasterBedroom indicated the difference as "0.1%". The Tribunal is satisfied that the difference in values was very small.

the procurement at hand was properly filed on that date. MasterBedroom filed additional materials with the Tribunal on August 14 and 17, 2015.

## ANALYSIS

17. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before an inquiry can be conducted:

- whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*, which stipulates in part that a complaint must be filed with the Tribunal within 10 working days of the basis of the complaint becoming known;
- whether the complainant is an actual or potential supplier;
- whether the complaint is in respect of a designated contract; and
- whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the trade agreements.<sup>7</sup>

18. It is important to delve further into the first of the four conditions set out above. Should an objection related to an issue of concern to a potential supplier be made to a government institution within 10 working days of the issue of concern becoming known to the potential supplier, and should the government institution deny relief to the potential supplier, then section 6 of the *Regulations* stipulates that any complaint by the potential supplier must subsequently be filed with the Tribunal within 10 working days of that denial of relief.

19. On the basis of the facts pertaining to the case, the Tribunal considers that, by way of correspondence to the Minister of PWGSC on August 5, 2015, MasterBedroom made an objection to PWGSC with regard to its issue of concern two working days after the day on which that issue of concern became known to it.

20. Further, the Tribunal considers that MasterBedroom's correspondence of August 11, 2015, to a regional director general at PWGSC suffices as evidence that, as of that date, MasterBedroom had received denial of relief from PWGSC by way of a telephone conversation. Thus, MasterBedroom's complete complaint filed on August 13, 2015, occurred two working days after it was denied relief and well within the time limit stipulated in the *Regulations*.

21. MasterBedroom's complaint also meets the second and third conditions set out above. MasterBedroom is an actual supplier, and the complaint is in respect of a solicitation by PWGSC that is acknowledged by that government institution as covered by *NAFTA* and, thus, a "designated contract" by virtue of section 30.1 of the *CITT Act* and section 3 of the *Regulations*.<sup>8</sup>

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7. Canada has entered into a number of trade agreements with other countries, all of which include somewhat similar provisions with regard to government procurement. For the purpose of ease with regard to the matter at hand, the Tribunal will designate *NAFTA* as a representative trade agreement. Chapter Ten of *NAFTA* contains the trade agreement's government procurement provisions.

8. Further, with regard to *NAFTA* coverage, the Tribunal notes that the RFSO indicated a possible maximum term of three years and an estimated annual expenditure for Toronto in the amount of \$985,000. The current adjusted monetary threshold for *NAFTA* with regard to the procurement of goods, as determined by the Treasury Board of Canada Secretariat, is \$25,200. See [http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/ContPolNotices/2013/13-5-eng.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2013/13-5-eng.asp).

22. Thus, the Tribunal will focus its analysis on whether the information provided by MasterBedroom discloses a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements. Article 1015(4) of *NAFTA* provides as follows:

4. An entity shall award contracts in accordance with the following:

...

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; . . .

...

23. Thus, government institutions are required to ensure that contracts are awarded pursuant to the terms set out in tender documents.

24. The RFSO at issue stipulated that the “. . . responsive offer with the lowest evaluated price . . .” will be recommended for issuance of a standing offer. That criterion was effectively a requirement for PWGSC to uphold. In initially issuing a standing offer to MasterBedroom, a bidder whose proposal did not contain the lowest evaluated price, PWGSC had actually failed to uphold that requirement and, in doing so, failed to conduct the procurement in accordance with the trade agreements. Thus, in rectifying its error by retracting the standing offer made to MasterBedroom and issuing a standing offer instead to the bidder whose proposal did contain the lowest evaluated price, PWGSC took material and consequential steps to ensure its obligations were fulfilled. These are not steps for which the Tribunal can fault PWGSC.<sup>9</sup>

25. MasterBedroom indicated that the proposed amount that represented the lowest evaluated price was only 0.1 percent less than its proposed amount; the Tribunal subsequently calculated the difference as being approximately 0.195 percent. Nonetheless, regardless of quantum, the criterion in the RFSO is clear and cannot be made the subject of negotiations as to quantum.

26. In addition, in retracting the standing offer made to MasterBedroom, PWGSC was entitled to rely on the General Conditions of the SACC Manual, as those provisions formed part of the RFSO by reference. MasterBedroom asserted, in its complaint, that the “spirit and context” of article 4.2.e. of the General Conditions was to allow government institutions to set aside standing offers in cases such as “. . . no more work needed, lack of funding, program cancellation, etc.”<sup>10</sup> However, MasterBedroom did not produce any evidence in support of its assertion. The Tribunal is of the opinion that the words in article 4.2.e. speak for themselves and enable the setting aside of a standing offer at any time.

27. Thus, the Tribunal finds that MasterBedroom’s complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the trade agreements.

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9. Illustratively, had PWGSC not taken those steps, and had the bidder with the lowest evaluated price complained to the Tribunal, the Tribunal would have a strong basis for inquiring into whether PWGSC’s evaluators had not applied themselves or had ignored vital information in undertaking the evaluation of the bids received in response to the RFSO.

10. Complaint Form, Appendix 7.

28. In light of the above, the Tribunal will not conduct an inquiry into the complaint.

**DECISION**

29. 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