



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-024

MasterBedroom Inc.

*Decision made  
Wednesday, August 26, 2015*

*Decision and reasons issued  
Monday, August 31, 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 is the second complaint filed by MasterBedroom Inc. (MasterBedroom) relating 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 alleged that the winning bid was improperly evaluated and that the winning bidder should not have been awarded a contract.

### 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. 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>3</sup> and the *North American Free Trade Agreement*.<sup>4</sup>

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

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

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

8. On July 30, 2015, PWGSC conducted a debriefing with one of the other bidders, the "Ottawa company", at which point PWGSC became aware that it had overlooked the "Annex Cs" detailing the financial offer portion of the bid that had been submitted by the Ottawa company for the other geographic regions of the RFSO. Upon confirming that these annexes had been included in the original bid, and in evaluating Annex C for Toronto, PWGSC determined that the Ottawa company's bid offered the lowest price; therefore, the standing offer for Toronto should have been awarded to that company.

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

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

3. *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).

4. *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*].

9. 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 General Conditions of the Standard Acquisition Clauses and Conditions (SACC) Manual.

10. On August 5, 2015, MasterBedroom raised an objection to PWGSC regarding the procedures that it followed.

11. On August 6, 2015, MasterBedroom filed its first complaint with the Tribunal, alleging that, by initially awarding the standing offer to MasterBedroom and then later retracting that award, PWGSC had acted improperly in the evaluation of its bid.

12. PWGSC responded to MasterBedroom's concerns via telephone conversation on August 11, 2015,<sup>5</sup> and then via additional correspondence on August 12, 2015.<sup>6</sup> PWGSC maintained that the retraction of the award to MasterBedroom was both valid and imperative.

13. On August 14, 2015, the Tribunal made its decision with regard to MasterBedroom's first complaint (File No. PR-2015-023), finding that PWGSC had acted consistently with articles 2 and 4.2.e. of the General Conditions of the SACC Manual in its retraction of the standing offer and that, therefore, there had been no impropriety on the alleged ground.

14. MasterBedroom filed the present complaint with the Tribunal on Saturday, August 22, 2015, and it was deemed filed on Monday, August 24, 2015. The present complaint alleges new grounds which were in part revealed from its further correspondence with PWGSC. MasterBedroom also filed an additional e-mail with the Tribunal on August 25, 2015.

## ANALYSIS

15. 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>

16. With respect to the timeliness, MasterBedroom has filed the present complaint within 10 working days of the day on which it became aware of its denial of relief from PWGSC. The Tribunal considers that,

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5. Procurement complaint form, Doc. 3.

6. Procurement complaint form, Doc. 4.

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.

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.

17. Further, the Tribunal considers that MasterBedroom received denial of relief from PWGSC by way of a telephone conversation on August 11, 2015. Thus, the current complaint, deemed filed on August 24, 2015, was filed on the ninth working day from when MasterBedroom was denied relief by PWGSC.

18. While it is irregular to have two separate complaints from the same complainant on the same procurement, the Tribunal notes that MasterBedroom filed both within the prescribed time limits and that, in its judgement, the second complaint raised sufficiently new grounds so as to be worthy of consideration.

19. MasterBedroom's present 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, is a "designated contract" by virtue of section 30.1 of the *CITT Act* and section 3 of the *Regulations*.<sup>8</sup>

20. The Tribunal will therefore 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.

21. In the present complaint, MasterBedroom has argued that PWGSC failed to comply with section 4.2.1 of Part 4 of the RFSO in evaluating the Ottawa company's bid. Section 4.2.1 provides 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.

22. MasterBedroom has premised its position regarding section 4.2.1 of Part 4 of the RFSO on four discrete assertions. First, MasterBedroom has maintained that the Ottawa company could not have met the technical criteria because of the large distance between Ottawa and Toronto.

23. With respect to that assertion, the Tribunal notes that the location of a company does not inform or curtail the location of its assets or its relationships. Therefore, there is no reason to be more suspect of an Ottawa company's capacity to carry out the terms of the contract than any other company. As has been held by the Tribunal in the past, "... unless there is evidence indicating that the government knew or must have known at the time of the evaluation that a proposal did not in fact comply with a requirement, the government is entitled, at the time of evaluating the proposals and awarding the contract, to rely on the declaration provided by the bidders."<sup>9</sup> It is the bidder's responsibility to ensure that it has the proper

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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).

9. *Central Automotive Inspections Records & Standards Services (CAIRSS) Corp.* (31 October 2012), PR-2012-025 (CITT) at para. 21; *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT); see, also, *3202488 Canada Inc. o/a Kinetic Solutions* (18 February 2011), PR-2010-089 (CITT); *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT).

infrastructure and equipment, and PWGSC was entitled to rely on the Ottawa company's statements in its bid.

24. In its second assertion, MasterBedroom called into question the extent to which PWGSC had conducted a proper due diligence with respect to the Ottawa company's bid. In order to deal with this issue, it is important to understand how the RFSO was set up. Bidders were required to complete three sections for the bid: the technical offer (three copies), the financial offer (two copies) and the certifications (one copy). The Annex C, at issue in this complaint, was part of the financial offer.

25. MasterBedroom asserted that it is implausible to conclude that numerous people lost or failed to notice the same document, resulting in the delayed evaluation that was the reason given by PWGSC for switching the award. However, that assertion is premised on an assumption that, because PWGSC requested multiple copies of the bid, numerous persons must have been involved in evaluating it. In its correspondence of August 12, 2015, PWGSC referred, on multiple occasions, to "the procurement officer", making clear that the error was committed by one person. Further, as there were only two copies requested for the financial offer portion of the bid, it is entirely plausible that only one person evaluated that section, with the other copy retained for purposes such as review or loss substitution. Therefore, the Tribunal finds it reasonable to consider that one person's human error led to the mistake of the initially overlooked Annex C.

26. Similarly, MasterBedroom alleged that the one-day time frame between when the error was recognized and when the contract to MasterBedroom was set aside was too short for a full evaluation to be performed, particularly since that one day was so close to a public holiday. MasterBedroom further maintained that the "Technical Offer" portion of the bid went to ". . . different people in PWGSC as well as C.I.C. offices",<sup>10</sup> which could not possibly have been done in that time frame. However, the Tribunal notes that PWGSC made no indication that it undertook the entire evaluation in a day; rather, it is possible to conclude that a proper evaluation of the technical offer had already been undertaken by any number of people prior to July 30, 2015. Such a conclusion is supported by PWGSC's indication, made in its correspondence of August 12, 2015, that the Ottawa company's bid had been initially deemed "non compliant" solely on the basis of a supposedly missing Annex C and is further supported by the fact that the Ottawa company was already the winning bidder for the Ottawa region of the RFSO.

27. Finally, MasterBedroom suggested that the Ottawa company's technical proposal could not have been assessed, as it was missing. However, this ground is not supported by the evidence; PWGSC made no indication that the Ottawa company's technical proposal was missing, only that its Annex C was not initially noticed.

28. In light of the foregoing, there is no reasonable indication of a breach of the trade agreements, and 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

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10. Procurement complaint form, Doc. 5.