



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-013

Konica Minolta Business Solutions  
(Canada) Ltd.

*Decision made  
Friday, July 3, 2015*

*Decision issued  
Tuesday, July 7, 2015*

*Reasons issued  
Thursday, July 16, 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**

**KONICA MINOLTA BUSINESS SOLUTIONS (CANADA) 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.

Jean Bédard  
Jean Bédard  
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*<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. The complaint relates to a procurement (Solicitation No. M5000-151439/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for the lease of two high-speed monochrome-only printer/copiers and one monochrome/colour printer/copier.

3. The Request for Proposal (RFP) was issued on February 12, 2015, with an initial submission deadline of March 25, 2015. On March 24, 2015, the RFP was amended to extend the submission deadline to March 31, 2015. Konica Minolta Business Solutions (Canada) Ltd. (Konica), the incumbent supplier, filed a bid in response to the RFP.

4. On May 5, 2015, PWGSC sent an e-mail to Konica requesting clarification of an element of its submission. Mandatory criterion A.3.36 of the RFP stated that the high-speed monochrome/colour printer/copier “[m]ust have 80 ppm monochrome/50ppm colour scanning”. In its bid, Konica indicated that the monochrome/colour printer that it was proposing did not meet this requirement and that it “. . . scans at a speed of 70ppm for both colour and monochrome”. PWGSC’s e-mail sought to confirm that this information was accurate.

5. On May 6, 2015, Konica replied that the information in its bid was correct. Konica also acknowledged that it realized that it had not met the 80ppm monochrome scanning requirement, but stated that the 70ppm scanning speed was an improvement over what the RCMP was currently using. In a separate e-mail sent the same day, Konica also mentioned that its printers had not met the requirements for scanning speed in a similar RFP issued in 2009 and that the RCMP had awarded it the contract despite this deficiency.

6. On June 12, 2015, Konica was informed that its bid had not been selected for award of the contract because it did not meet the mandatory requirement as set out above.

7. On June 26, 2015, Konica filed this complaint with the Tribunal. Konica’s complaint, in essence, is that the mandatory requirement for 80ppm monochrome scanning speed in the monochrome/colour copier/printer is unreasonable. Konica alleged that the 80ppm requirement “. . . is in excess of what is required for efficient operating use.”<sup>3</sup> Konica also alleged that a gain of 10ppm in scanning speed does not represent value for money when considered in light of the difference between Konica’s financial bid and the winning financial bid and that this constitutes an overpayment that is not in line with best procurement

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

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

3. Complaint, section 2.

practices. Finally, Konica noted that it has been the incumbent supplier since 2005 and provided e-mail correspondence from a contact at the RCMP stating that the award of the contract to another supplier is “. . . a very disruptive outcome”.<sup>4</sup>

8. Konica also alleged that the winning devices were delivered and on-site ready for testing purposes prior to the publication of the notice of contract of award, but that the RFP stipulates that there will be no communication between PWGSC and suppliers prior to the award of the contract being announced. Any communication that took place to have the devices on-site is therefore a violation of the process.

9. As a remedy, Konica requested that the bids be re-evaluated and the contract awarded to Konica, or that a new solicitation be issued.

## ANALYSIS

10. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>5</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>6</sup> the *Agreement on Government Procurement*,<sup>7</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*,<sup>8</sup> Chapter 14 of the *Canada-Peru Free Trade Agreement*,<sup>9</sup> Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,<sup>10</sup> Chapter Sixteen of the *Canada-Panama Free Trade Agreement*,<sup>11</sup> Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*<sup>12</sup> or Chapter Fourteen of the *Canada-Korea Free Trade Agreement*<sup>13</sup> applies.

11. Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of

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4. Complaint, supporting documentation, e-mail from M. Castle, RCMP, to K. Rainville, Konica.

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].

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

7. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

8. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

9. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

10. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

11. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

12. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014).

13. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).

weighting and evaluating the criteria”, and Article 1015(4) of *NAFTA* provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”<sup>14</sup>

12. The Tribunal finds that PWGSC correctly disqualified Konica’s bid because it failed to meet a mandatory requirement. That decision is consistent with Article 506(6) of the *AIT* and Article 1015(4) of *NAFTA*. All bidders, including incumbent suppliers, must meet mandatory requirements to have their proposals considered further.

13. The Tribunal has often stated that the federal government has the right to define its procurement requirements, to the extent that they meet its operational requirements<sup>15</sup> and, “. . . while PWGSC has the right to establish the parameters of [an RFP], it must do so reasonably. PWGSC does not have licence to establish conditions that are impossible to meet.”<sup>16</sup> The government is also not entitled to apply criteria that are discriminatory towards or against particular goods or services or their suppliers.<sup>17</sup>

14. There is no indication here that the choice of 80ppm monochrome scanning speed was discriminatory, unreasonable or impossible to meet, or that it was not chosen in response to legitimate operational requirements. Konica submitted no evidence beyond its own assertion that this speed “. . . is in excess of what is required for efficient operating use”.<sup>18</sup>

15. The Tribunal also notes that PWGSC published two sets of questions from potential suppliers, along with its responses, in amendment Nos. 001 and 004 to the RFP. Given that this requirement was stated in the RFP when it was published, Konica thus would have had to object to this requirement (A.3.36) prior to bid closing for this ground of complaint to be timely.<sup>19</sup>

16. Furthermore, Konica’s allegation that PWGSC’s choice of another supplier raises issues of value for money does not specifically relate to the provisions of the trade agreements pertaining to the fairness of the procurement process and is therefore not further considered by the Tribunal.

17. Finally, Annex D to the RFP requires that, “[at] the request of Canada, the Contractor with the best value technically compliant bid . . .” must arrange for delivery of its printer/copiers to the RCMP site for compatibility testing as a last step prior to contract award.<sup>20</sup> The stipulation in the RFP regarding communications prior to the award of the contract must be read in the context of the requirement set out in Annex D to the RFP. Accordingly, the Tribunal finds that the events noted by Konica do not constitute improper behaviour by PWGSC. Furthermore, had Konica wished to challenge that requirement, it would have had to object to it prior to bid closing for such a ground to be timely.<sup>21</sup>

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14. As the other applicable trade agreements contain similar provisions, they have not been replicated here.

15. *APM Diesel 1992 Inc.* (15 February 2012), PR-2011-052 (CITT) at para. 18; *Inforex Inc.* (24 May 2007), PR-2007-019 (CITT); *FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT); *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

16. *APM Diesel 1992 Inc.* (15 February 2012), PR-2011-052 (CITT) at para. 18; *MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc.* (5 August 2005), PR-2004-061 (CITT) at para. 67.

17. Article 504(3)(b) of the *AIT*.

18. Complaint, section 2.

19. Section 6 of the *Regulations*; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) [*IBM*] at paras. 18-21.

20. RFP at 33.

21. Section 6 of the *Regulations*; *IBM* at paras. 18-21.

18. For the reasons set out above, the Tribunal finds that the objections raised by Konica have not been raised on a timely basis and that, in any event, there is no reasonable indication that the procurement at issue has not been conducted in accordance with the applicable trade agreements.

#### **DECISION**

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

Jean Bédard  
Jean Bédard  
Presiding Member