



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-029

Workplace Medical Corp.

*Decision made
Monday, September 28, 2015*

*Decision issued
Friday, October 2, 2015*

*Reasons issued
Friday, October 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

WORKPLACE MEDICAL CORP.

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

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

2. This complaint relates to a Request for Proposal (RFP) for occupational health monitoring services (Solicitation No. 5P015-140714/A) issued on August 14, 2015, by the Department of Public Works and Government Services (PWGSC) on behalf of the Parks Canada Agency. On September 25, 2015, Workplace Medical Corp. (WMC) filed a complaint with the Tribunal, alleging that the pricing model and estimated contract value provided by PWGSC and the subsequent addenda were misleading and created an unfair and uneconomical business model. As a remedy, WMC requested that a new solicitation be issued.

3. For the reasons detailed below, the Tribunal determines that, pursuant to subsection 6(1) of the *Regulations* and subsection 30.11(1) of the *CITT Act*, the complaint is both outside the Tribunal's jurisdiction and not timely. Accordingly, the Tribunal decides, pursuant to subsection 30.13(1) of the *CITT Act*, not to conduct an inquiry into this complaint.

ANALYSIS

Does the Tribunal have Jurisdiction to Conduct an Inquiry into the Complaint?

4. In order for the Tribunal to conduct an inquiry into a complaint, it must have the requisite jurisdiction. Pursuant to subsection 30.11(1) of the *CITT Act*, the Tribunal only has jurisdiction to conduct an inquiry into a complaint that relates to a "designated contract". A "designated contract" is defined in subsection 3(1) of the *Regulations* as any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Chapter Five of the *Agreement on Internal Trade*,³ Chapter Ten of the *North American Free Trade Agreement*,⁴ the *Agreement on Government Procurement*,⁵ Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the

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

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

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

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*].

5. *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> (entered into force 6 April 2014) [*AGP*].

6. *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.

Canada-Peru Free Trade Agreement,⁷ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,⁸ Chapter Sixteen of the *Canada-Panama Free Trade Agreement*,⁹ Article 17.2 of Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*¹⁰ or Article 14.3 of Chapter Fourteen of the *Canada-Korea Free Trade Agreement*.¹¹

5. Each of the trade agreements includes a list of covered goods or services and exclusions. For a procurement to relate to a designated contract, a relevant trade agreement must include the procured goods or services in that list. In reviewing the Government of Canada's tender notice for Solicitation No. 5P015-140714/A, the Tribunal determined that the RFP is for a health-related service, as it is classified under "G009D: Health and Allied Services, Not Elsewhere Specified".¹²

6. None of the trade agreements includes health-related services in their respective list of covered services. For example, Annex 502.1B of the *AIT* specifies that "[a]ll services are covered except . . . health services and social services . . ." thereby precluding the RFP from being covered under the *AIT*. Annex 1001.1b-2 of *NAFTA* indicates that it does not cover "G. Health and Social Services – All Classes". Likewise, Annexes 4 and 5 of the *AGP*¹³ contain lists of covered services under the United Nations' Provisional Central Product Classification (CPC).¹⁴ The Tribunal determined that the RFP is properly categorized under division 93 of section 9 of the CPC as "[h]ealth and social services", which are not included in the lists of covered services in Annexes 4 or 5 of the *AGP*. Similarly, the same analysis was performed for each of the other trade agreements, leading to the same conclusion.

7. As the procured services are not covered under the relevant trade agreements,¹⁵ the RFP does not relate to a designated contract under subsection 3(1) of the *Regulations*. Accordingly, the Tribunal finds that it does not have jurisdiction to conduct an inquiry into this complaint.

Did WMC File the Complaint within the Designated Timelines?

8. Even if the Tribunal had jurisdiction, the complaint would still need to have been filed within the designated time. Pursuant to subsection 6(1) of the *Regulations*, WMC had 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to file the

7. *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).

8. *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).

9. *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).

10. *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).

11. *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-corea/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).

12. <https://buyandsell.gc.ca/procurement-data/goods-and-services-identification-number/gsin/G009D>.

13. https://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm.

14. <http://unstats.un.org/UNSD/cr/registry/regcst.asp?Cl=9&Lg=1>.

15. This is consistent with the Government of Canada's tender notice, which indicated that the RFP was not covered by any trade agreements.

complaint with the Tribunal. As the grounds for this complaint became known when PWGSC issued the RFP, i.e. on or about August 14, 2015, WMC had until August 28, 2015, to file its complaint with the Tribunal. WMC filed this complaint on September 25, 2015, four weeks after the deadline. As a result, the complaint was time-barred by operation of subsection 6(1) of the *Regulations*.

CONCLUSION

9. For the reasons set out above, the Tribunal finds that this procurement is not covered by the relevant trade agreements and that, pursuant to subsection 30.11(1) of the *CITT Act*, it does not have jurisdiction to inquire into the complaint. Furthermore, the Tribunal determines that, pursuant to subsection 6(1) of the *Regulations*, WMC filed the complaint outside the designated time limits, rendering it time-barred from the Tribunal's consideration.

10. The Tribunal notes that this is the fourth complaint filed by WMC involving the procurement of health-related services. In the Tribunal's determination and decision regarding WMC's prior complaints, the Tribunal clearly stated that it did not have jurisdiction over procurements for health-related services.¹⁶ However, WMC still filed the present complaint. In the Tribunal's view, WMC should have, at the very least, addressed the Tribunal's prior decisions and demonstrated how this latest complaint was an appropriate use of the Tribunal's mechanisms for redress.

DECISION

11. 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

16. *Workplace Medical Corp. v. Canadian Food Inspection Agency* (27 July 2015), PR-2015-004 (CITT) at paras. 28, 29; *Workplace Medical Corp.* (3 July 2015), PR-2015-014 and PR-2015-016 (CITT) at paras. 6, 7, 8.