



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-052

MasterBedroom Inc.

*Decision made
Tuesday, January 12, 2016*

*Decision and reasons issued
Monday, January 18, 2016*

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*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 THE COMPLAINT

2. This is the third 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) on behalf of the Department of Citizenship and Immigration (CIC) for the provision of basic household furniture to individuals or families in Toronto, Ontario, and elsewhere in Ontario. MasterBedroom alleged that the winning bidder's bid was improperly evaluated and should not have resulted in a contract award.

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, indicates that the RFSO is covered by a number of trade agreements, including the World Trade Organization's *Agreement on Government Procurement*³ and the *North American Free Trade Agreement*.⁴

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 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 bidder 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. Further, PWGSC indicated that human error had led to taking these steps, specifically, that its evaluators had failed to notice

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

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

3. *Revised 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).

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, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

and evaluate the Toronto portion of the financial annex of the other bidder's proposal. According to PWGSC, upon confirming that the annex had been included in the original bid, and upon evaluating the annex, it determined the other bidder's proposal offered the lowest price; therefore, the standing offer for Toronto should have been granted to that bidder.

9. On August 6, 2015, MasterBedroom filed its first complaint⁵ 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. The Tribunal found that PWGSC had acted consistently with articles 2 and 4.2.e. of the General Conditions of SACC Manual in its retraction of the standing offer and that, therefore, there had been no impropriety on the alleged ground.

10. On August 24, 2015, MasterBedroom filed its second complaint⁶ with the Tribunal, alleging that the other bidder could not have met the technical criteria because of the large distance between Ottawa, Ontario, the location of that bidder, and Toronto. Further, MasterBedroom alleged that, even if the other bidder did meet the technical criteria, the irregularities with the bid process give reason to suspect PWGSC's quick conclusion that the other bidder's proposal was compliant in all respects and offered the lowest price. The Tribunal found that there was no reason to be more suspect of an Ottawa company's capacity to carry out the terms of the contract than any other company and that it was reasonable to consider that human error had led to the failure to evaluate the missing annex.

11. On January 9, 2016, MasterBedroom forwarded a new objection to PWGSC, asserting that the other bidder's proposal, obtained on January 5, 2016, pursuant to an Access to Information and Privacy request, did not in fact meet a mandatory requirement of the solicitation, in that the bidder did not checkmark Toronto as an area for which it was bidding.

12. On January 11, 2016, prior to receiving a response or denial of relief from PWGSC, MasterBedroom filed the present complaint with the Tribunal.

ANALYSIS

13. 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 complainant is an actual or potential supplier;
- whether the complaint is in respect of a designated contract;
- whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the trade agreements;⁷ and
- 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 actual or constructive knowledge of denial of relief from a government institution, in the event a complainant made an objection to that institution within 10 working days of becoming aware of the basis of its complaint.

5. *MasterBedroom Inc.* (14 August 2015), PR-2015-023 (CITT).

6. *MasterBedroom Inc.* (26 August 2015), PR-2015-024 (CITT).

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.

14. As determined by the Tribunal in File No. PR-2015-024, the first and second conditions set out above were met. 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*.⁸

15. Further, the Tribunal is satisfied that the information provided by MasterBedroom discloses a reasonable indication of a breach of the trade agreements. The other bidder’s failure to checkmark Toronto provides an alternative explanation for the irregularities in the evaluation of its bid, and that explanation runs counter to PWGSC’s indication that those irregularities resulted from human error on the part of its evaluators. In essence, on the face of the new information provided by MasterBedroom, it appears that there is evidence indicating that PWGSC knew or must have known at the time of the evaluation that a proposal did not in fact comply with a requirement.

16. With respect to the timeliness of the present complaint however, the Tribunal notes that MasterBedroom has made an objection to PWGSC and has yet to receive a response or denial of relief. Thus, the complaint is premature at this time.

17. In light of the foregoing, the Tribunal will not conduct an inquiry into this complaint. However, in the event that MasterBedroom does not receive, within 40 days of the issuance of these reasons, a response from PWGSC that conclusively addresses the concerns of or denies relief to MasterBedroom, the Tribunal will construe PWGSC’s silence as constructive denial of relief, and MasterBedroom may then file a new complaint with the Tribunal.

18. Should MasterBedroom file a new complaint, it must do so within the time limits prescribed by subsection 6(2) of the *Regulations*. In that event, MasterBedroom may request that the documentation already filed with the Tribunal be joined to the new complaint.

DECISION

19. 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

8. 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.