



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-059

Imperial Surgical Limited

*Decision made  
Wednesday, February 24, 2016*

*Decision and reasons issued  
Monday, February 29, 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**

**IMPERIAL SURGICAL LIMITED**

**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.

Rose Ritcey  
Rose Ritcey  
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 that the Tribunal 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 a complaint filed by Imperial Surgical Limited (ISL), relating to a Request for Proposal (RFP) (Solicitation No. H3551-150741/B) issued by the Department of Public Works and Government Services (PWGSC) for the provision of medical warming cabinets. ISL alleged that PWGSC incorrectly declared its bid non-compliant.

### RELEVANT FACTS

3. On September 1, 2015, PWGSC issued an RFP (Solicitation No. H3551-150741/A) for the provision of medical warming cabinets, with a bid closing date of October 23, 2015. Mandatory requirement 1.5 of the RFP stipulated that proposed medical warming cabinets include a door latch.

4. ISL bid on the RFP, proposing medical warming cabinets that feature magnetic gaskets instead of door latches. On December 8, 2015, ISL was awarded the contract pursuant to the RFP. However, ISL decided against signing the contract as it stipulated that the supplied medical warming cabinets must be equipped with door latches. ISL informed PWGSC of its decision regarding the contract on December 9, 2015.

5. On December 11, 2015, PWGSC wrote to ISL by email, indicating that as “. . . Imperial Surgical offered a product that did not meet the exact requirement of 1.5 and in good faith advised Canada of this issue, Canada will be initiating a termination of the contract by mutual consent.”

6. Subsequent to the termination of the contract, PWGSC issued a new RFP (Solicitation No. H3551-150741/B) on January 6, 2016. The new RFP again stipulated that proposed medical warming cabinets include a door latch.

7. ISL bid on the new RFP and again proposed medical warming cabinets that feature magnetic gaskets instead of door latches.

8. On January 21, 2016, PWGSC awarded the contract to Ashcon International (Ashcon), and informed ISL that its bid had been adjudged non-compliant since it did not meet mandatory requirement 1.5 pertaining to the inclusion of a door latch on proposed medical warming cabinets.

9. On the same day, ISL objected in writing to PWGSC, requesting a review of the contract award to Ashcon and asserting that:

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].  
2. S.O.R./93-602 [*Regulations*].

- Ashcon is not a medical equipment company;
- its financial bid was lower than Ashcon's, with the result that PWGSC is set to pay more for the medical warming cabinets for "the simple reason [of] a latch closing mechanism";
- Ashcon might not be able to provide a warranty with regard to its proposed medical warming cabinets;
- Ashcon's proposed medical warming cabinets might not be compliant with maximum temperature restrictions; and
- the medical warming cabinets it had proposed are made in Canada and, as such, that "[by being] the lowest bidder by almost \$50,000 some special consideration is warranted".

10. On January 25, 2016, PWGSC replied in writing to ISL, indicating that Ashcon "has been deemed to comply with all of the mandatory requirements of the bid solicitation." ISL wrote to PWGSC on the same day, reiterating its position. PWGSC wrote to ISL subsequent to this correspondence and promised to "look into" the concerns raised.

11. On February 5, 2016, a PWGSC official wrote to ISL and maintained its position that ISL's bid did not comply with a mandatory requirement of the solicitation.

12. On February 10, 2016, ISL filed this complaint with the Tribunal, making the same assertions it had made to PWGSC. However, due to a technical malfunction concerning the Tribunal's electronic filing system, the complaint was not received until February 19, 2016. As a result, the Tribunal considers the complaint to have been filed on February 10, 2016, but in applying the legislatively mandated test regarding the time limit for the filing of complaints, will discount the time between February 10, 2016, and February 19, 2016.

## 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 a number of conditions have been met before an inquiry can be conducted. Two of those conditions are relevant in the present circumstance:

- 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; 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.

14. With regard to the first condition, the Tribunal notes that ISL became aware of the basis of its complaint on January 21, 2016, upon being informed by PWGSC that it had not been awarded the contract resulting from the new RFP. ISL objected to PWGSC on the same day, and was thus well within the 10-working-day time frame stipulated in the *Regulations*.

15. Further, ISL acquired actual knowledge of denial of relief on February 5, 2016, upon being informed that PWGSC remained steadfast in the position that its bid did not comply with a mandatory

requirement of the solicitation. ISL filed this complaint three working days later, on February 10, 2016, again well within the 10-working-day time frame stipulated in the *Regulations*.

16. As a result, the Tribunal concludes that ISL filed its complaint in a timely manner.

17. With regard to the second condition, the Tribunal notes that the operative test is whether or not the complaint, as filed, discloses a reasonable indication that the procurement has not been conducted in accordance with the trade agreements.

18. In this regard, it is noteworthy that Canada has entered into a number of trade agreements with other countries, all of which include somewhat similar provisions with regard to government procurement. PWGSC's tender notice with regard to the solicitation at hand lists a number of those trade agreements as applicable,<sup>3</sup> including the *North American Free Trade Agreement*.<sup>4</sup> Thus, for ease of analysis, the Tribunal designates *NAFTA* as a representative trade agreement.

19. Chapter Ten of *NAFTA* lists the government procurement provisions of the trade agreement. Within that chapter, Article 1015(4)(d) provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation". In interpreting this and similar provisions, the Tribunal has indicated that a government institution must evaluate a bidder's conformity with an essential or mandatory requirement thoroughly and strictly.<sup>5</sup>

20. Thus, PWGSC does not have the discretion to waive mandatory requirements contained in tender documents. Those requirements cannot be made subject to extraneous considerations such as a bidder's national origin or improvements in design features that purportedly negate those designated as mandatory within the tender documents.

21. ISL was aware of the need to propose a medical warming cabinet model that includes a door latch. That mandatory requirement was contained in the original RFP, regarding which a contract was erroneously awarded to ISL, an award that was clearly in breach of the trade agreements. PWGSC remedied that breach by cancelling the award and issuing a new RFP. Since the new RFP contained the same mandatory requirement, ISL should have taken care to identify and propose a fully compliant medical warming cabinet model, regardless of ISL's misgivings about what it considers to be a requirement for antiquated and failure-prone technology.

22. Compliance by potential suppliers with all of the mandatory requirements of solicitation documents remains imperative to maintaining the integrity of any procurement system. Potential suppliers can in no instance cherry-pick mandatory requirements, no matter how benign or outmoded those requirements may appear.

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3. Online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-WPG-006-9573>.

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*].

5. See *IBM Canada Ltd.* (7 September 2000), PR-99-020 (CITT) and *Valcom Consulting Group Inc. v. Department of Public Works and Government Services* (9 July 2014), PR-2013-044 (CITT).

23. As a result, ISL's complaint cannot be accepted for inquiry—it does not disclose a reasonable indication that the procurement by PWGSC was not conducted in accordance with the trade agreements. PWGSC correctly declared ISL's bid non-compliant.

#### **DECISION**

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

Rose Ritcey

Rose Ritcey

Presiding Member