



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2016-028

MasterBedroom Inc.

*Decision made  
Thursday, August 25, 2016*

*Decision issued  
Friday, August 26, 2016*

*Reasons issued  
Tuesday, August 30, 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.

Rose Ritcey \_\_\_\_\_  
Rose Ritcey  
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.

2. MasterBedroom Inc. (MasterBedroom) filed a complaint with the Tribunal on August 19, 2016.<sup>3</sup> The Tribunal has determined that it does not have jurisdiction to inquire into the complaint for the reasons that follow.

### SUMMARY OF THE COMPLAINT

3. The complaint follows an inquiry conducted by the Tribunal in relation 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, Hamilton, Kitchener, London, Windsor and Ottawa, Ontario.

4. This is the fifth complaint filed by MasterBedroom in relation to the RFSO.<sup>4</sup> Following the Tribunal's decisions not to inquire into the first three complaints, the fourth complaint was accepted for inquiry and determined to be valid on May 26, 2016.<sup>5</sup> As a remedy, the Tribunal recommended that PWGSC terminate the contract<sup>6</sup> awarded to the successful bidder for the Toronto area and award it to MasterBedroom. The Tribunal also recommended that MasterBedroom be compensated by an amount equal to the profit that it would have earned from the date of contract award to the successful bidder to the date of the subsequent award to MasterBedroom.

5. On July 28, 2016, MasterBedroom notified the Tribunal that it had reached an agreement with PWGSC on the amount of compensation for past lost profit payable to MasterBedroom, in accordance with the remedy recommended by the Tribunal. In addition, PWGSC awarded the standing offer for the Toronto

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

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

3. The complaint filed by MasterBedroom on August 18, 2016, did not comply with subsection 30.11(2) of the *CITT Act*. The Tribunal considers the complaint to have been filed on August 19, 2016, in accordance with paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, because that is when it received supporting documentation from MasterBedroom that corrected the earlier deficiencies in the complaint.

4. *MasterBedroom Inc. v. Department of Public Works and Government Services* (26 May 2016), PR-2015-064 (CITT) [*MasterBedroom*] at paras. 7-13.

5. *MasterBedroom*.

6. Since the procurement in question related to the award of a standing offer, it was understood that the Tribunal's recommendation to terminate the "... contract awarded to 4461789 Canada Inc. for the Toronto area and award it to MasterBedroom Inc." referred to terminating the standing offer awarded to 4461789 Canada Inc. In accordance with the recommendation, PWGSC terminated the existing standing offer and awarded it to MasterBedroom. Similarly, the Tribunal's recommendation to "... compensate MasterBedroom Inc. for the profit that it would have earned had it been awarded the contract for the Toronto area ..." referred to the profit that it would have earned had it been awarded the standing offer.

area to MasterBedroom for the period from July 7 to July 31, 2016, and granted MasterBedroom an extension of the standing offer from August 1, 2016, to July 31, 2017, as per the terms of the RFSO.

6. In its current complaint, MasterBedroom alleged that PWGSC is effectively seeking to avoid or bypass the remedy recommended by the Tribunal by reason of the fact that PWGSC and/or CIC is offering payments to eligible individuals or families in the Toronto area in lieu of issuing call-ups to MasterBedroom under the standing offer from July 7, 2016, onwards. MasterBedroom further alleged that it is being treated unfairly because such direct payments appear not to be taking place other than in Toronto.

## ANALYSIS

7. The Tribunal must be satisfied that four conditions are met before it can accept a complaint for inquiry: (1) the complaint was submitted in a timely manner; (2) the complainant is a potential supplier; (3) the complaint is in respect of a designated contract; and (4) the complaint discloses a reasonable indication that the procurement has not been conducted in accordance with an applicable trade agreement.<sup>7</sup>

8. In this case, the Tribunal has determined that it has no jurisdiction to inquire into the complaint because it is not in respect of a designated contract and, therefore, does not meet the third condition for inquiry.

9. Section 30.1 of the *CITT Act* defines a “designated contract” as “. . . a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations”. Subsection 3(1) of the *Regulations* further provides that “. . . any contract or class of contracts concerning the procurement of goods or services or any combination of goods or services, as described in [the trade agreements], that has been or is proposed to be awarded by a government institution, is a designated contract”.

10. In this case, the complaint is essentially seeking to challenge what is a policy decision by PWGSC and/or CIC to make direct payments to families and individuals so that they can purchase furnishings. The Tribunal does not have jurisdiction to review the actions taken under such a vehicle of policy delivery because it falls outside of a government procurement process. There is no direct relationship between any such payments and the RFSO, nor between these payments and Masterbedroom’s previous complaints.

11. To be sure, the RFSO also involved the provision of furniture to identified families on the behalf of the Government of Canada, but that vehicle stemmed directly from a procurement process (specifically, call-ups pursuant to a standing offer).<sup>8</sup> On the other hand, the giving of monies by the government to individuals for whatever policy reason is in the nature of a grant or contribution—it is not a procurement process. As such, as a matter of fact and law, the Tribunal finds that this complaint is not in respect of a “designated contract” within the confines of the government procurement.

12. To the extent that MasterBedroom has alleged that PWGSC’s actions avoid or bypass the benefits to which it was entitled arising from the Tribunal’s recommendation in *MasterBedroom*, the complaint also relates to a matter over which the Tribunal does not have jurisdiction. Indeed, because the Tribunal has not

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7. Section 6 and subsection 7(1) of the *Regulations*.

8. Section 1.2 of the RFSO. Exhibit PR-2015-064-10, tab 1, Vol. 1B.

been given statutory powers to enforce its recommendations, parties seeking that type of redress must address their grievances to the courts.<sup>9</sup>

13. Nevertheless, the Tribunal observes that the terms of the RFSO and the resulting standing offer stated that the requirement was for goods to be supplied on an “as and when requested basis”<sup>10</sup> and that the same terms applied to the extension.<sup>11</sup> Also, the RFSO clearly provided that the estimated expenditures for the initial term of the standing offer are “. . . estimates only and are not a guarantee”;<sup>12</sup> a similar statement would apply to the estimated expenditures for the extension period from August 1, 2016, to July 31, 2017.

14. Finally, the Tribunal notes that there is no indication that the actions of PWGSC to which MasterBedroom objects involve the re-tendering of the goods to be supplied pursuant to the standing offer.

## DECISION

15. 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

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9. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) at para. 37; *TPG Technology Consulting Ltd. v. Canada (Minister of Public Works and Government Services)*, 2007 FCA 219 (CanLII) at para. 25.

10. Section 1.2 of the RFSO stated that “(i) [t]his requirement is for the supply, delivery, and assembly, on an ‘as and requested’ basis . . .” In the standing offer clauses set out in the RFSO, section 6.1.1 provided as follows: “The Offeror offers to supply, deliver, and assemble, *on an as and when requested basis*, household furniture . . .” [emphasis added]. Exhibit PR-2015-064-10, tab 1, Vol. 1B.

11. In the standing offer clauses set out in the RFSO, section 6.4.2 stated the following with respect to the extension of any standing offer: “If the Standing Offer is authorized for use beyond the initial period, the Offeror offers to extend its offer for an additional 2-1 year periods, from 1 August 2016 to 31 July 2017 and 1 August 2017 to 31 July 2018 *under the same conditions and at the same rates or prices specified in the Standing Offer* . . .” [emphasis added]. Exhibit PR-2015-064-10, tab 1, Vol. 1B.

12. Section 1.2 of the RFSO stated that “(v) [t]he estimated expenditure per year, applicable taxes excluded, for each of the areas is as follows: -Toronto Area (GTA) - \$985,000.00 . . . The above amounts are estimates only and are not a guarantee.” Exhibit PR-2015-064-10, tab 1, Vol. 1B.