



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## ORDER AND REASONS

File No. PR-2016-018

Lincoln Landscaping Inc.

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Friday, September 16, 2016*

**TABLE OF CONTENTS**

ORDER .....	i
STATEMENT OF REASONS .....	1
PROCEDURAL HISTORY .....	1
ANALYSIS .....	1
Does the Tribunal Continue to Have Jurisdiction over Lincoln's Complaint? .....	2
Did the Cancellation of the Solicitation Render Lincoln's Complaint Trivial or Unimportant?.....	2
DECISION .....	5

IN THE MATTER OF a complaint filed by Lincoln Landscaping Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision of the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a motion filed by the Department of Public Works and Government Services on August 12, 2016, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, requesting that the Canadian International Trade Tribunal cease to conduct the inquiry.

**BETWEEN**

**LINCOLN LANDSCAPING INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**ORDER**

The Canadian International Trade Tribunal will proceed with its inquiry into the complaint filed by Lincoln Landscaping Inc. The cancellation of the solicitation does not obviate the Canadian International Trade Tribunal's jurisdiction in this matter, nor does it render the grounds of complaint trivial or without merit.

The motion brought by the Department of Public Works and Government Services is therefore denied.

Ann Penner  
Ann Penner  
Presiding Member

## STATEMENT OF REASONS

1. On July 4, 2016, Lincoln Landscaping Inc. (Lincoln) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> concerning a Request for Proposal (RFP) (Solicitation No. W0105-16E028/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND) for the provision of snow and ice control, and grass cutting and maintenance services.

2. Lincoln put forward three grounds of complaint, alleging that PWGSC had:

- refused to award it the resulting contract despite having met all the requirements of the solicitation;
- conducted an improper evaluation process by involving a third-party competitor; and
- improperly entered into a sole-sourced contract with that third party during the procurement process.

3. As a remedy, Lincoln requested that the Tribunal recommend that it be awarded the contract. Alternatively, Lincoln requested that the Tribunal recommend that PWGSC compensate it for lost profits or lost opportunity.

## PROCEDURAL HISTORY

4. The Tribunal accepted the complaint for inquiry on July 5, 2016, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

5. On July 11, 2016, PWGSC acknowledged receipt of the complaint and informed the Tribunal that no contract had been issued with regard to the RFP.

6. On July 26, 2016, PWGSC informed the Tribunal that the solicitation had been cancelled.

7. On August 12, 2016, PWGSC filed a motion requesting that the Tribunal cease to conduct its inquiry on the grounds that the solicitation had been cancelled and that the Tribunal no longer had jurisdiction because there was no designated contract. Alternatively, PWGSC argued that the complaint had been rendered trivial and without any valid basis.

8. On August 22, 2016, Lincoln filed its response to PWGSC's motion.

9. Although the Tribunal provided PWGSC with an opportunity to provide a reply to Lincoln's response to the motion, no further submissions were filed.

## ANALYSIS

10. The issue before the Tribunal is whether it retains jurisdiction over the complaint, given that the solicitation was cancelled, or whether that cancellation has rendered the complaint trivial or without merit.

---

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

2. S.O.R./93-602.

11. The Tribunal has held that, “. . . once the Tribunal has the jurisdiction required to initiate an inquiry pursuant to subsection 30.11(1) of the *CITT Act*, it is under no obligation to cease it, regardless of whether the procurement process is cancelled during the inquiry.”<sup>3</sup> At the same time, however, the Tribunal has also been cognizant of subsection 30.13(5), which provides that the Tribunal may cease conducting an inquiry at any time “. . . if it is of the opinion that the complaint is trivial . . . .”

12. The Tribunal has taken subsection 30.13(5) of the *CITT Act* to mean that it could continue an inquiry if or when such an inquiry could have a practical impact, as opposed to a theoretical one, on the complainant. For example, the Tribunal has continued with an inquiry even when a solicitation was cancelled in order to duly consider whether the complainant was entitled to the essence of the remedy that it would have been awarded if its complaint had been found to be valid.<sup>4</sup>

13. In this context, then, the Tribunal must determine (1) whether it continues to have jurisdiction over Lincoln’s complaint and (2) whether the cancellation of the solicitation rendered Lincoln’s complaint trivial or unimportant (i.e. whether the continuation of the inquiry into Lincoln’s complaint would have any practical impact on Lincoln).

### **Does the Tribunal Continue to Have Jurisdiction over Lincoln’s Complaint?**

14. The Tribunal is satisfied that a designated contract existed when the Tribunal commenced its inquiry on July 5, 2016. As such, it is not obligated to cease its inquiry just because the solicitation was cancelled shortly thereafter. Therefore, the Tribunal finds that PWGSC’s contention that the Tribunal does not have jurisdiction to continue with its inquiry is without merit.

### **Did the Cancellation of the Solicitation Render Lincoln’s Complaint Trivial or Unimportant?**

15. Having found that it continues to have jurisdiction, the Tribunal will consider PWGSC’s argument that the cancellation of the solicitation has rendered the complaint trivial. To do so, the Tribunal will examine each of the three grounds of Lincoln’s complaint in turn. It will then determine whether to cease the inquiry entirely, continue the inquiry in regard to certain grounds of complaint only or continue the inquiry in regard to all grounds of complaint.

#### Ground One: PWGSC’s Refusal to Award the Resulting Contract to Lincoln

16. Lincoln alleged that PWGSC wrongly refused to award it the contract even though it was fully compliant with the terms of the RFP and, thus, objected to the cancellation of the solicitation.

17. In support of its motion, PWGSC referred to the Standard Instructions, Clauses and Conditions, incorporated by reference in this RFP, which provide as follows:

#### **11 (2007-11-30) Rights of Canada**

Canada reserves the right to:

- a. reject any or all bids received in response to the bid solicitation;

---

3. *Adélarde Soucy (1975) Inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) at para. 28. This principle has since been elaborated on in *The Access Information Agency Inc. v. Department of Global Affairs* (19 August 2016), PR-2016-001 (CITT).

4. *MD Charlton Co. Ltd. v. The Royal Canadian Mounted Police* (30 January 2015), PR-2014-041 (CITT) at para. 10; *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at paras. 11-12.

- b. enter into negotiations with bidders on any or all aspects of their bids;
- c. accept any bid in whole or in part without negotiations;
- d. *cancel the solicitation at any time*;
- e. reissue the bid solicitation;
- f. if not responsive bids are received and the requirement is not substantially modified, reissue the bid solicitation by inviting only the bidders who bid to resubmit within a period designated by Canada; and,
- g. negotiate with the sole responsive Bidder to ensure best value to Canada.<sup>5</sup>

[Emphasis added]

18. On its face, the RFP does indeed contain a cancellation provision which appears to confer the unrestricted ability to PWGSC to cancel the solicitation. This would include the right to cancel the solicitation notwithstanding Lincoln's assertion that it submitted a compliant bid.

19. However, the Tribunal notes the applicability of Article 1015 of the *North American Free Trade Agreement*<sup>6</sup> to the case at hand. It provides as follows:

4. An entity *shall award contracts* in accordance with the following:

...

(c) unless the entity decides in the public interest not to award the contract, *the entity shall make the award* to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.

[Emphasis added]

20. Both the Tribunal and the Federal Court have held that Article 1015(4)(c) of *NAFTA* should be interpreted to mean that, in situations where there is a compliant bidder, the government institution is obligated to award a contract unless there is a sound public policy reason to cancel the solicitation.<sup>7</sup> Although PWGSC has pointed to its purported right to cancel the solicitation at any point in the process as set out in the Standard Instructions, Clauses and Conditions, it has not provided a sound public policy reason for its actions. The terms of the RFP *cannot* trump Canada's international trade obligations. To enable PWGSC to do so would open the door to a situation in which contracting entities could contract out of, and thus circumvent, the trade agreements.

21. As such, the Tribunal is not satisfied that the complaint has become trivial or unimportant. Since there has been no suggestion that Lincoln's bid was in any way non-compliant with the RFP, the Tribunal finds that the question of whether or not PWGSC breached its obligation under the *NAFTA* by refusing to

5. Exhibit PR-2016-018-01 at 101, Vol. 1.

6. *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: Global Affairs Canada <<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*].

7. *Wang Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [1999] 1 FCR 3, 1998 CanLII 9093 (FC); *Conair Aviation, A division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CITT); *Carsen Group Inc.* (22 March 1995), 94N66W-021-0019 (CITT).

award the contract remains a live issue. This question is not remedied or made trivial by the cancellation of the solicitation, as that very action is at the heart of the first ground of Lincoln's complaint.

22. In light of the foregoing, the Tribunal will continue the inquiry into this ground of complaint.

Ground Two: Improper Evaluation Process by Involving a Third-party Contractor

23. Lincoln alleged that PWGSC conducted an improper evaluation process by involving a third-party competitor. Lincoln submitted that PWGSC may have allowed the third-party competitor to have access to the prices that it bid in response to the RFP.

As with the first ground of complaint, the cancellation of the solicitation does not make the inquiry trivial or unimportant. In fact, the Tribunal finds the opposite to be true. If evidence reveals that PWGSC indeed involved a third-party competitor and disclosed the prices that Lincoln bid, PWGSC may have breached its obligation under Article 1008(2) of *NAFTA*, which provides that "... each Party shall ensure that its entities: (a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition . . . ."

24. As such, the Tribunal will continue the inquiry into this ground of complaint.

Ground Three: Improper Sole-sourcing during the Procurement Process

25. Lincoln alleged that, during the procurement process, DND approached and entered into a contract with a third-party competitor to carry out the work that was the subject of the RFP. Lincoln also alleged that this third-party competitor did not submit a bid in response to the RFP.

26. PWGSC maintained that it engaged a third-party that already held a standing offer from a separate competitive process. As a result, PWGSC contended that the contract for the work was properly tendered and that the contract with the third-party competitor was *not* sole-sourced.

27. The Tribunal finds that PWGSC improperly used a motion to cease the inquiry in order to submit evidence and make arguments on the merits of Lincoln's complaint. Any arguments that PWGSC may have as to the substance or evidentiary merit of this ground of complaint should be the subject of the Government Institution Report, which has yet to be filed. To cease the inquiry on the basis of the arguments included in PWGSC's motion would be procedurally unfair to Lincoln, as it would necessitate the Tribunal finding the complaint not valid before the inquiry is completed.

28. The Tribunal also notes that the motion was brought on the basis either that the cancellation of the solicitation has removed the Tribunal's jurisdiction<sup>8</sup> or that the complaint had become trivial because the issues were effectively resolved by the cancellation of the solicitation. However, if a third party was improperly given a sole-sourced contract during the procurement process, the cancellation of the solicitation will have no bearing on this fact and may actually exacerbate it by causing the third party to continue carrying out the allegedly sole-sourced work while the RFP is re-tendered. Moreover, the cancellation of the solicitation will not provide any remedy if it emerges that Lincoln was unfairly prevented from bidding on and/or being awarded the work in question.

29. In light of the foregoing, the Tribunal will continue the inquiry into this ground of complaint.

---

8. A position which is inconsistent with repeated statements to the contrary by the Tribunal, as discussed above.

**DECISION**

30. The Tribunal will proceed with its inquiry into the complaint filed by Lincoln. The cancellation of the solicitation neither obviates the Tribunal's jurisdiction in this matter nor renders the grounds of complaint trivial or without merit.

31. The motion brought by PWGSC is therefore denied.

Ann Penner

Ann Penner  
Presiding Member