



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-045

TPG Technology Consulting Ltd.

Decision made
Wednesday, November 30, 2016

Decision issued
Monday, December 5, 2016

Reasons issued
Wednesday, December 7, 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

TPG TECHNOLOGY CONSULTING LTD.

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

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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 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] TPG Technology Consulting Ltd. (TPG) filed this complaint with the Tribunal on November 28, 2016.

[3] TPG's complaint concerns a Request for Proposal (RFP) (Solicitation No. EN869-04-0407/A) for the provision of engineering and technical support services issued by the Department of Public Works and Government Services (PWGSC) on May 30, 2006—over 10 years ago.

[4] In 2008, TPG commenced an action in damages at the Federal Court seeking compensation from PWGSC with regard to its handling of the RFP. Protracted litigation of that matter followed,³ culminating in a six-week trial in 2014. The Federal Court ultimately denied TPG's claims.⁴ That decision was recently upheld by the Federal Court of Appeal.⁵ The Tribunal reads the decisions of the federal courts as confirming that TPG had the option to bring its grievances in respect of the RFP to the Tribunal, even though it chose not to do so.

[5] TPG now claims that the proceedings at the federal courts provide the basis for the Tribunal to inquire into a prejudice to the integrity and efficiency of the procurement system caused by PWGSC's management of the RFP. TPG is effectively asking the Tribunal to overturn the Federal Court of Appeal's decision and to re-consider the trial evidence that was heard by the Federal Court. TPG comes to the Tribunal seeking monetary compensation of over \$7 million, comprising \$300,000 to \$400,000 in bid preparation costs, \$4 million in lost profits, \$2.3 million for TPG's legal costs in pursuing its claims at the federal courts and a reimbursement of \$611,303 in legal costs that the federal courts ordered it to pay PWGSC as a result of that litigation.⁶ It bases its claim for these amounts on the fact that the Federal Court, while ultimately denying TPG's claims, recognized that PWGSC unfairly evaluated TPG's bid on 2 out of 217 criteria. It raises other issues (record keeping, debriefing explanation of evaluation results) to support its claim that PWGSC's conduct, as a whole, prejudiced the integrity of the procurement system.

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

² SOR/93-602 [*Regulations*].

³ *TPG Technology Consulting Ltd. v. Canada*, 2011 FC 1054 (CanLII) (granting the Crown's motion for summary judgment); *TPG Technology Consulting Ltd v. Canada*, 2013 FCA 183 (CanLII) (dismissing the Crown's motion for summary judgment).

⁴ *TPG Technology Consulting Ltd. v. Canada*, 2014 FC 933 (CanLII) [*TPG FC*].

⁵ *TPG Technology Consulting Ltd. v. Canada*, 2016 FCA 279 (CanLII) [*TPG FCA*]. *TPG FC* and *TPG FCA* together are referred to as "the decisions of the federal courts".

⁶ TPG submits that its claim for its own and the Crown's legal costs at the courts is justified because its litigation therein served a public interest in revealing the problems with PWGSC's evaluation methodology, even though TPG did not prove that these errors had any bearing on the ultimate ranking of bid evaluations.

[6] The Tribunal finds that the complaint filed November 28, 2016, is untimely. It also finds that the matter has already been judged, such that accepting the complaint for inquiry would ignore the fundamental principle that our legal system provides for finality of disputes. The complaint will therefore not proceed to inquiry.

COMPLAINT IS NOT TIMELY

[7] Subsections 6(1) and (2) of the *Regulations* provide for a strict 10-working-day time frame within which complainants must act.⁷ Without citing any authority, TPG argues that the proceedings that it instituted at the federal courts interrupted or tolled these time frames for purposes of this complaint, such that its time frame to file this complaint started to run only as of the date of release of *TPG FCA*. Alternatively, it argues that the Tribunal has discretion to accept its complaint as being timely by application of rule 6 of the *Canadian International Trade Tribunal Rules*.⁸

[8] TPG's views on the timeliness of its complaint are mistaken. First, rule 6 of the *Rules* only allows the Tribunal to vary one of its rules of procedure—it does *not* allow it to modify the time frames for filing procurement challenges, which are set out in the *Regulations*. Second, the deadline set by sections 6 of the *Regulations* starts running as of the day on which the *basis* of the complaint becomes known, not after the day on which new *evidence* is *discovered*.⁹ All the facts in support of TPG's complaint became known to it either at some point before it began its action at the Federal Court in 2008 or, at the latest, during the course of the proceedings there, the trial of which took place in 2014. The time frames for any of the scenarios provided by Parliament in section 6 of the *Regulations* all lapsed long ago.

[9] Opting to bring grievances in respect of the RFP to the Federal Court instead of the Tribunal in no way interrupts or suspends the time frames provided for in section 6 of the *Regulations*. The fact that evidence obtained in another legal forum may have substantiated already known grounds does not restart the clock for filing a complaint with the Tribunal—to hold otherwise would leave the Tribunal “. . . faced with the possibility of multiple collateral attacks on completed complaint proceedings.”¹⁰ Accordingly, TPG's complaint is not timely.

COMPLAINT HAS NO VALID BASIS

[10] In *Canadian Law of Competitive Bidding and Procurement*, Anne C. McNeely describes the two distinct regimes of procurement review in Canada: the general common law regime applied by

7. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier”. Subsection 6(2) states that a potential supplier who has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

Subsection 6(4) permits a complainant to file a complaint up to 30 days after the day on which the basis of the complaint became known, but only in the limited circumstances identified in subsection 6(3).

8. S.O.R./91-499 [*Rules*].

9. *TA Instruments* (15 September 2011), PR-2011-029 (CITT) [*TA Instruments*] at para. 9, in which the Tribunal stated that “[i]t is important to bear in mind that the issue of timeliness relates to the time of knowledge of the basis of a complaint rather than the time of receipt of the evidence.”

10. *Netgear, Inc.* (16 April 2009), PR-2009-001 to PR-2009-004 (CITT) [*Netgear*] at para. 15.

the courts (the same regime has been adopted into the civil law of Quebec and is applied by the courts there) and the procurement review regime of the Tribunal, which applies statutory powers and principles derived from inter-governmental trade agreements. She describes the rules in one regime as having “counterparts” in the other regime, with essentially the same substantive rules flowing from different sources of the law.¹¹ As such, in the area of federal government procurement review covered by the trade agreements, opting between the courts (the Federal Court or superior courts of a province or territory) or the Tribunal remains essentially only a question of tactical preference or choice of one forum over the other.

[11] In the current case, the grounds raised by TPG in its complaint are the same as those that were (or could have been) examined by the federal courts.¹² In fact, several of the claims that it reiterates now were abandoned on consent before trial at the Federal Court.¹³ It follows that, even if the complaint were timely, it has no valid basis, as the matter has already been judged. That the judgments of the federal courts were made through the lens of the common law instead of the trade agreements is inconsequential.

[12] Under the doctrine of *res judicata*, where a final decision has been pronounced, a party cannot dispute the merits of the decision in a re-litigation of the same issues.¹⁴ Where a potential supplier files a complaint attempting to re-litigate issues already decided by the Tribunal or the courts, the Tribunal will not accept the complaint for inquiry, as it does here.¹⁵

[13] TPG attempted to re-couch its Federal Court claim under the guise of a request for an inquiry by the Tribunal into the “integrity of the procurement regime”. The Tribunal does not have the power to inquire, at large, into the integrity of the competitive procurement system. Rather, the Tribunal examines claims in regard to violations of provisions of the various trade agreements. When it finds a violation of a provision of a trade agreement, the Tribunal is directed by paragraph 30.15(3)(c) of the *CITT Act* to consider the “. . . degree to which the integrity and efficiency of the competitive procurement system was prejudiced” [emphasis added]. However, that exercise is engaged only *after*

11. “For example, a trade agreement requirement that a winning bid be selected only in accordance with the selection criteria disclosed in advance to bidders parallels the Contract ‘A’ requirement that an owner not make award decisions on the basis of undisclosed criteria.” Anne C. McNeely, *Canadian Law of Competitive Bidding and Procurement*, 2010, Canada Law Book, at 37.

12. *TPG FC* at paras. 10, 58-59, 71-72, 98, 104, 106-110, 116, 124-27, 139-42; *TPG FCA* at paras. 4-7, 31-33. Moreover, many of the various grounds raised by TPG in this complaint—the evaluation of sections 3.3.3 and 3.3.5 of the RFP, the new scoring methodology, PWGSC’s record-keeping practices for the procurement, etc.—were alleged in TPG’s “Fresh Amended Statement of Claim” dated February 25, 2014, filed in the Federal Court, at paras. 26-40. Indeed, at page 4 of its complaint form to the Tribunal, under the heading “Content or nature of objection”, TPG references its pleading by writing the following: “Amended Amended Statement of claim which was further revised in a Fresh Amended Statement of Claim (see attached)”.

13. Most notably, TPG abandoned, by consent order (and “with prejudice”) *before* trial, all its claims relating to, *inter alia*, “negligence”, “all allegations of bad faith, including all claims of misconduct, bias, fraud or unconscionability” and “all allegations related to process as it relates to the evaluation of the TPG . . . bid”, i.e. the issues fundamental to its claim of “prejudice” to the integrity and fairness of the procurement system. *TPG FC* at para. 59.

14. *Netgear* at paras. 13-14; *TA Instruments* at para. 8.

15. *Netgear, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 9. Subsection 30.13(5) of the *CITT Act* provides that “[t]he Tribunal may decide not to conduct an inquiry into a complaint . . . if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith” Further, section 10 of the *Regulations* provides that “[t]he Tribunal may, at any time, order the dismissal of a complaint where (a) . . . the Tribunal determines that the complaint has no valid basis”.

a trade agreement violation has been found, during the subsequent consideration of an appropriate *remedy*; a prejudice to the integrity of the procurement system is a *consequence* of a violation of the trade agreements, but it is not a *ground for a complaint* in and of itself. In this instance, there is no remedy to consider because there is *res judicata* by the federal courts on TPG's grounds of complaint.

[14] The Tribunal recognizes that the federal courts found that PWGSC's evaluation of TPG's bid was unfair in regard to 2 (of 217) evaluation criteria. However, the Federal Court of Appeal also upheld the Federal Court's finding that TPG had failed to prove that any unfairness had been consequential to the outcome of the evaluation.¹⁶ Thus, the facts and procedural posture of this case suffice to distinguish it from those of the decision on which TPG relied, *Canada v. Almon Equipment Ltd.*¹⁷ To the extent that the federal courts confirmed that PWGSC unfairly evaluated TPG's proposal on 2 of 217 criteria, the Tribunal trusts that PWGSC has taken note of these findings and has motified or will modify its practices accordingly for the future.

[15] In its decision, the Federal Court of Appeal did not address the trial judge's finding that TPG *should* have filed originally with the Tribunal. The Tribunal understands nonetheless that TPG, at the very least, *could* have opted to file its claim in the first instance with the Tribunal.¹⁸

[16] The Tribunal possesses 30 years of specialized experience in the conduct of government procurement review.¹⁹ Over that period, the Tribunal has examined a wide gamut of issues, including in regard to complex procurement processes that regularly have contract values into the hundreds of millions of dollars, or more. It has the powers of a superior court of record in regard to the "... attendance, swearing and examination of witnesses, the production and inspection of documents ..."²⁰ It regularly orders the production of documents necessary to properly inquire into a matter and, from time to time, holds oral hearings only when issues of credibility need to be tested. In addition, the Tribunal is bound to complete its review of a matter in 45 days, in the case of the "express option", 90 days under a normal procedure or 135 days in the case of proceedings that have been extended. The advantages of this system, including in regard to expediency and costs, are often compelling to many complainants seeking the consideration of their grievances.

[17] In this case, TPG had the choice to file its claim in the first instance with the Tribunal. It chose not to do so. It cannot now turn back the clock on that choice.

16. *TPG FC* at paras. 148, 151, 213; *TPG FCA* at paras. 34-41.

17. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) [*Almon*]. In *Almon*, the Federal Court of Appeal remanded a procurement challenge to the Tribunal for redetermination on a judicial review application, a process consistent with Parliament's scheme set out in the *Federal Courts Act*, R.S.C., 1985, c. F-7, for the federal courts to review the decisions of federal administrative bodies. Furthermore, in *Almon*, the Federal Court of Appeal found that the evaluators' "... modest record-keeping and the unknowable nature of the procedures they followed ..." made it a "live issue" as to whether, in fact, the potential supplier's proposal should have been the highest ranked one (at paras. 27, 34, 40-41, 45-49). In the present instance, that issue was decided by the federal courts, which explicitly found that TPG had not proven, on a balance of probabilities, that it would have otherwise won (or even lost a potential opportunity to win) the RFP. *TPG FC* at paras. 148, 151, 213; *TPG FCA* at paras. 34-41.

18. In that regard, it should be noted that TPG's claim as amended for trial included no tort claims, only breach of contract.

19. The Tribunal includes, in this time frame, the body of work accomplished by its predecessor, the Procurement Review Board, that dealt with such matters from 1988 to 1993.

20. Subsection 17(2) of the *CITT Act*.

DECISION

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

Peter Burn

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Presiding Member