



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2016-026

Caduceon Environmental  
Laboratories

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Wednesday, October 26, 2016*

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IN THE MATTER OF a complaint filed by Caduceon Environmental Laboratories 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 inquire 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 September 1, 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**

**CADUCEON ENVIRONMENTAL LABORATORIES**

**Complainant**

**AND**

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

**Government Institution**

**ORDER**

Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings relating thereto. The Tribunal awards Caduceon Environmental Laboratories its costs in the amount of \$1,150 for preparing and proceeding with the complaint.

Jason W. Downey  
Jason W. Downey  
Presiding Member

## STATEMENT OF REASONS

### BACKGROUND

1. On August 4, 2016, Caduceon Environmental Laboratories (Caduceon) 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> Its complaint concerned a Request for a Standing Offer (RFSO) (Solicitation No. E6TOR-15RM11/A) issued by the Department of Public Works and Government Services<sup>2</sup> (PWGSC) for the provision of commercial testing laboratory services.

2. Caduceon alleged that PWGSC used undisclosed criteria when evaluating the bids and that it awarded the contract to a non-compliant bidder. Specifically, Caduceon stated that it was informed by PWGSC on July 28, 2016, two days after the standing offer was awarded, that PWGSC had revised, on June 17, 2016, requirement 1.9.1 of Annex A to the RFSO, which provided that “. . . the Offeror must have a laboratory located in Ottawa”,<sup>3</sup> to accept instead a depot in Ottawa, Ontario, in lieu of a laboratory. PWGSC further acknowledged that it “. . . inadvertently missed adding this revision at the solicitation stage”.<sup>4</sup> As a remedy, Caduceon requested that the solicitation be terminated and that a new solicitation be issued.

3. On August 8, 2016, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act*, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup>

4. In a letter to the Tribunal dated August 10, 2016, PWGSC informed the Tribunal that the standing offer awarded as a result of the RFSO was to ALS Canada Inc. (ALS). On the same day, the Tribunal informed ALS that a complaint had been filed by Caduceon concerning the RFSO.

5. On August 18, 2016, ALS requested intervener status. On August 19, 2016, Caduceon filed its comments on the request for intervener status, and ALS filed its reply on August 23, 2016. On September 2, 2016, the Tribunal informed the parties that it granted intervener status to ALS.

6. On September 1, 2016, PWGSC filed a motion pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*<sup>6</sup> requesting that the Tribunal cease the inquiry, on the grounds that the RFSO concerning the procurement covered by the complaint had been set aside and that, therefore, the complaint was trivial, had no valid basis and was not in respect of a procurement process by a government institution. In the alternative, PWGSC argued that the Tribunal no longer had jurisdiction to inquire into the complaint since there remained no procurement process or designated contract.

7. In its motion, PWGSC explained that, upon receipt of the complaint, it conducted a full review of the solicitation process, determining that, indeed, there had been a revision to the solicitation that was inadvertently not published as an amendment to the RFSO and that “. . . this would bear on all bidders who

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

2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services Canada will be changed to Public Services and Procurement Canada.

3. Exhibit PR-2016-026-01 at 33, Vol. 1.

4. Exhibit PR-2016-026-01 at 10, Vol. 1.

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

6. S.O.R./91-499.

could fairly participate in a solicitation.”<sup>7</sup> Accordingly, on August 26, 2016, it set aside the standing offer and indicated that it would initiate a new solicitation.

8. On September, 9, 2016, ALS filed its comments on PWGSC’s motion. ALS did not respond to PWGSC’s arguments, but instead argued that Caduceon’s complaint was frivolous and without merit, given the fact that its bid was non-compliant. ALS submitted that PWGSC should be required to re-award the standing offer to it or, in the alternative, that only responsive bidders to the original solicitation should be allowed to bid on the new solicitation. Caduceon did not submit any comments on the motion.

## TRIBUNAL ANALYSIS

9. PWGSC submitted that the Tribunal should cease its inquiry on the basis that the cancellation and re-tendering rendered the complaint trivial and because there is no procurement process or designated contract over which the Tribunal has jurisdiction.

10. As it has explained in the past,<sup>8</sup> the Tribunal is of the view that nothing in the *CITT Act* or the *Regulations* suggests that Parliament contemplated that a decision by a government institution to cancel a contract could terminate the Tribunal’s jurisdiction to continue an inquiry that was commenced in accordance with the law.

11. In this case, the complaint filed by Caduceon met all conditions necessary for the Tribunal to exercise its jurisdiction to initiate and proceed with an inquiry. As a first condition, the complaint was timely pursuant to section 6 of the *Regulation*. In relation to the other conditions, Caduceon satisfied the Tribunal that it was a potential supplier, that a designated contract had been awarded and that there was a reasonable indication that the procurement had not been conducted in accordance with the applicable trade agreements. Accordingly, the conditions of subsection 7(1) of the *Regulations* were met.<sup>9</sup>

12. Given that the conditions of sections 6 and 7 of the *Regulations* were met, the cancellation of the standing offer did not affect the Tribunal’s jurisdiction. As long as a review of the grounds of complaint remains relevant, the purpose of the inquiry is not affected; cancellation or not, that purpose remains to determine, in respect of a designated contract that has been awarded, whether the procurement process was followed in accordance with the relevant provisions of the applicable trade agreements.

13. In this matter, however, the opportunity of pursuing the inquiry has been severely curtailed, if not eliminated, because the cancellation and announced re-tendering of the RFSO by PWGSC coincides with the primary remedy requested by Caduceon in its complaint. As such, any further review of the grounds of complaint would have only limited theoretical value and little, if any, practical impact.<sup>10</sup>

14. Furthermore, the Tribunal notes that Caduceon did not oppose PWGSC’s motion requesting that the inquiry be ceased.

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7. Exhibit PR-2016-026-14 at 2, Vol. 1.

8. *Adélard Soucy (1975) Inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) [*Adélard Soucy*] at paras. 11-32; *Unisource Technology Inc. v. Department of Public Works and Government Services* (22 August 2016), PR-2016-013 (CITT) [*Unisource Technology*] at paras. 9-11.

9. *Adélard Soucy* at para. 7; *Unisource Technology* at para. 10.

10. *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) at para. 11.

15. Therefore, taking into account the circumstances of the procurement, the Tribunal has decided to cease its inquiry pursuant to subsection 30.13(5) of the *CITT Act*.

### Costs

16. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal can award costs of proceedings before it. This power is discretionary.

17. In its motion, PWGSC acknowledges that “. . . there had been a revision to the solicitation that was inadvertently not published as an Amendment to the RFSO and that this would bear on all bidders who could fairly participate in a solicitation.”<sup>11</sup> This was an error in the procurement process. Caduceon bore the effort and expense of pursuing a complaint which would have been unnecessary had PWGSC not made the error.

18. For this reason, and considering the Tribunal’s *Procurement Costs Guideline*, the Tribunal will exercise its discretion by awarding Caduceon \$1,150 for the costs associated with pursuing this complaint.

### ORDER OF THE TRIBUNAL

19. Pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings relating thereto. The Tribunal awards Caduceon its costs in the amount of \$1,150 for preparing and proceeding with the complaint.

Jason W. Downey

Jason W. Downey  
Presiding Member

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11. Exhibit PR-2016-026-14 at 2, Vol. 1.