



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-025

8146292 Canada Incorporated

*Decision made
Tuesday, September 1, 2017*

*Decision and reasons issued
Monday, September 11, 2017*

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

BY

8146292 CANADA INCORPORATED

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.

Jean Bédard
Jean Bédard
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 (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. For the reasons provided below, the Tribunal finds that the complaint is untimely and, consequently, has decided not to commence an inquiry into the complaint.

BACKGROUND

3. This complaint relates to an Advanced Contract Award Notice (ACAN) W8482-182148 published by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the supply of a submarine storage battery assembly. An ACAN is a type of limited (i.e., non-competitive) tendering in which a government institution issues a public notice advising suppliers that it intends to award a procurement contract to a pre-identified supplier, but, before doing so, allows other suppliers to signal their interest in bidding by submitting a statement of capabilities. If the government receives statements of capability demonstrating that there are in fact other suppliers able to provide the goods or services requested, then a competitive procurement will be run. If no compliant statement of capacity is received by the closing date provided in the ACAN, the contract will proceed to be awarded to the pre-identified supplier.

4. The ACAN at issue here requires suppliers to have in place a security clearance of Reliability Status before being allowed to view the functional performance characteristics of the goods being procured because they contain restricted information. The ACAN was published on August 3, 2017, and required submissions of statements of capabilities by August 17, 2017.

5. 8146292 Canada Incorporated (8146292 Canada) alleges that the ACAN provides insufficient time (only two weeks) for a supplier who does not already have a Reliability Status security clearance to obtain one, review the functional performance requirements, and then submit a statement of capability. When 8146292 Canada complained to PWGSC about this on August 4, 2017, PWGSC stated that it can take between five and eight weeks to obtain such a clearance and, for that reason, the ACAN requires suppliers to already hold such clearances before being provided the restricted information.

6. Sometime around August 21, 2017, Mr. Owodunni, the Chief Executive Officer of the complainant, spoke with a representative of the Office of the Procurement Ombudsman (OPO) about bringing a complaint. On or around August 23, 2017, he filed a complaint with the OPO. An email to him from the OPO acknowledging receipt of the complaint also contained a denial of his request that the OPO present his complaint to the Tribunal, on the basis that the OPO is a neutral body that does not represent suppliers. On August 29, 2017, the OPO emailed the complainant to advise that the dollar value of the ACAN (\$20 million) likely exceeded the threshold of the OPO's jurisdiction for investigating a complaint about a specific procurement process, and to suggest that the complainant file a complaint with the Tribunal. On

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

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

August 30, 2017, the OPO emailed the complainant to advise him that, since the OPO only has jurisdiction to review complaints regarding the *award* of a procurement contract and no such award had yet been made, 8146292 Canada's complaint to the OPO was premature. The OPO reiterated that the complainant consider filing a complaint with the Tribunal.

7. On August 30, 2017, the complainant emailed a one-page complaint to the Tribunal objecting to the short time frame set in the ACAN, which bidders who do not already have a security clearance would be unable to meet. That same day, the Tribunal acknowledged receipt of the email, but informed the complainant that its complaint was incomplete and that the Tribunal required further information – in particular, a completed complaint form and copies of all correspondence with PWGSC and the OPO. 8146292 Canada's complaint was perfected as complete when this additional documentation was provided on August 31, 2017.³

ANALYSIS

8. In order for the Tribunal to commence an inquiry into a complaint, it must determine whether the complaint is timely, is made by a “potential supplier”, involves a “designated contract” (i.e., a good or service procured by a covered government institution and meeting a minimum monetary value as established by a trade agreement), and “discloses a reasonable indication that the procurement has not been conducted in accordance” with the applicable trade agreement.⁴

9. Here, the Tribunal finds the complaint is untimely and, as such, need not address the other prerequisites.

10. 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) provides that a potential supplier that 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.”

11. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

12. Here, the ACAN was published (and the basis of the complaint became apparent) on August 3, 2017. The complainant objected to PWGSC on August 4, 2017, and received PWGSC's denial of his objection the same day. The 10-working-day time frame therefore began on August 4 and elapsed on Monday, August 21, 2017. The complainant did not perfect his complaint with the Tribunal until Thursday, August 31, 2017, 10 days after the expiration of the deadline under the *Regulations*.

3. Rule 96, *Canadian International Trade Tribunal Rules*, SOR/91-499.

4. Section 7 of the *Regulations*.

13. The complainant pleads that he did not become aware of the Tribunal as a forum for hearing his complaint until he attended an education session at a meeting with the OPO on August 21, 2017.

14. There is provision under subsection 6(3) of the *Regulations* for extending the deadline to 30 days where the failure to file was “attributable to a cause beyond the control” of the supplier or “concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more” of the trade agreements. The complaint does not disclose any grounds for applying either of these exceptions to the default 10-working-day deadline for filing complaints.

15. Not being aware of the existence of the Tribunal or the regulations, rules, or procedures that govern its hearing of complaints does not constitute “a cause beyond the control” of a supplier.⁵ Moreover, the Tribunal does not find in this instance that the filing of a complaint at the OPO instead of the Tribunal resulted from any cause beyond the complainant’s control. The complainant admits that as of August 21, 2017 (the deadline for filing a complaint with the Tribunal), it knew of the Tribunal’s existence. It, instead, chose to proceed with a complaint to the OPO. It even asked the OPO at that time to forward its complaint to the Tribunal and took no further action when the OPO declined to do so.

16. Likewise, the Tribunal finds that the requirement that potential suppliers already have security clearances in place to respond to ACANs issued on behalf of the Department of National Defence does not constitute an “aspect of the procurement, of a systemic nature, relating to . . . compliance with” a trade agreement, in this case, per the terms of the tender notice for the ACAN, the *North American Free Trade Agreement*⁶ and the World Trade Organization’s *Agreement on Government Procurement*.⁷ The time limits for keeping a notice of tender open under article 1012 of *NAFTA* and article XI of the *AGP* do not apply to limited tenders such as ACANs.⁸ Moreover, there is no evidence in this complaint that the limited tendering provisions of the trade agreements have been impermissibly used in this instance “for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers”.⁹ In the context of a solicitation that requires a security clearance to be viewed, there are two options available to the government institution: require all potential suppliers to have security clearances already in place or fix a closing date of a length sufficient to permit potential suppliers to obtain security clearances. This is a policy choice, but not one that is addressed by the trade agreements. In this instance, there is no compelling evidence that PWGSC impermissibly used a security clearance requirement in bad faith so as to avoid competition.

17. For the reasons provided above, the Tribunal considers the complaint to have been filed outside the time limit established in the *Regulations*.

18. The Tribunal acknowledges the severity of the 10-working-day deadline on bidders – in particular, for first-time or small-business bidders – but that deadline is fixed by the *Regulations* and the authority

5. *Educom Training Systems Inc.* (3 May 2000), PR-99-037 (CITT) (characterizing Tribunal delay in providing complainant with a notice of deficiencies as delay attributable to a cause beyond a complainant’s control).

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://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

7. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*AGP*].

8. See Article 1016(1) of *NAFTA* (excluding application of, *inter alia*, article 1012) and Article XIII of the *AGP* (excluding application of, *inter alia*, article XI).

9. See article XIII of the *AGP* and similar language in article 1016 of *NAFTA*.

found in subsection 6(3) for the Tribunal to extend the deadline to 30 days is circumscribed and of an exceptional nature because time is of the essence in procurements, including the time frame for initiating and completing the challenge process at the Tribunal.¹⁰ The Tribunal can only reiterate its frequently made¹¹ invitation to PWGSC and other government institutions that they, systematically, include and prominently place in *every* tender notice posted on the government electronic tendering service information to bidders explaining their avenue of recourse at the Tribunal.

DECISION

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

Jean Bédard

Jean Bédard

Presiding Member

10. See, for example, *Teledyne Webb Research, A Business Unit of Teledyne Benthos, Inc.* (20 October 2011), PR-2011-038 (CITT) at para. 17; *The Corporate Research Group Ltd., Operating as CRG Consulting* (26 January 2010), PR-2009-075 (CITT) at para. 24; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

11. See, for example, *Traductions TRD v. Department of Western Economic Diversification* (7 July 2014), PR-2014-004 (CITT) at paras. 51-53; *M.L. Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 63; *ADR Education* (16 July 2013), PR-2013-009 (CITT) at para. 34; *R.H. MacFarlands (1996) Ltd.* (20 December 2013), PR-2013-029 (CITT) at para. 31; *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at para. 55; *GESFORM International* (26 May 2014), PR-2014-012 (CITT).