



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-023

Vintage Designing Co.

*Decision made
Tuesday, September 5, 2017*

*Decision issued
Friday, September 8, 2017*

*Reasons issued
Wednesday, September 13, 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, c. 47 (4th Supp.).

BY

VINTAGE DESIGNING CO.

AGAINST

LIBRARY AND ARCHIVES CANADA

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.

Ann Penner
Ann Penner
Presiding Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. On August 28, 2017, Vintage Designing Co. (Vintage) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ concerning a Request for Standing Offer (RFSO) (Solicitation No. 5Z011-17-0123) published by Library and Archives Canada (LAC) for the provision of graphic design services.
2. For the reasons set out below, the Tribunal finds that the complaint is untimely. Consequently, it cannot commence an inquiry into the complaint.
3. Nevertheless, the Tribunal notes that the untimeliness of the complaint is not the fault of Vintage alone, but rather stems from a broader issue whereby government institutions do not ensure that bidders are properly and duly informed of their options should they choose to complain about the results of a procurement process.

SUMMARY OF COMPLAINT

4. Vintage noted that its complaint was not about LAC's procurement process *per se*, but rather rooted in a more systemic issue about the manner in which the RFSO was structured on the basis of median price. Having learned that the winning bid featured a price 50 percent lower than its own, Vintage "questioned the validity of the quote" because the winning bidder (who "is not affiliated with any design associations and therefore not governed by any ethics and pricing guidelines") could recoup its low bid price by inflating its billable hours.
5. Vintage, therefore, requested measures to guard against lowball bidding, including a review of the RFSO drafting process to include "checks and balances" to deter low bidding—such as adding in a clause that "throws out an abnormally low bid"—and revising the weighting of the financial score to include "10 points on a design brief exercise so competitors can price an actual job". Vintage also sought its bid preparation costs and requested that a new solicitation be issued.

BACKGROUND

6. On March 3, 2017, LAC issued the RFSO with a closing date of April 19, 2017.
7. On June 1, 2017, LAC informed Vintage that while its bid met the mandatory requirements of the RFSO, it was not one of the four highest-scored proposals (based on overall technical and financial scores weighted 70 and 30 percent respectively).
8. Vintage requested a debrief with LAC, which took place sometime between June 2 and June 8, 2017. On June 8, 2017, LAC solicited input from all bidders about the recently concluded RFSO process, and Vintage reported back on the same day that it was pleased with the feedback it had received during the debrief.
9. On August 2, 2017, Vintage filed a complaint with the Office of the Procurement Ombudsman (OPO) objecting that the winning bidder had "lowballed" its pricing. On August 28, 2017, the OPO alerted Vintage to the possibility of filing a complaint with the Tribunal, which it then did on the same day.

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

ANALYSIS

10. In order for the Tribunal to accept a complaint for inquiry, it must first determine whether the complaint is timely. A timely complaint is one in which a potential supplier files its complaint 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 them.²

11. Vintage did not satisfy that requirement.

12. At the earliest, Vintage should have become aware of the basis of its complaint (i.e., the structure of the financial evaluation, which, in its view, encouraged bad faith lowball bidding), as early as the date on which the RFSO was published (i.e., March 3, 2017). Therefore, Vintage should have come to the Tribunal within 10 working days of that date or by March 17, 2017.

13. At the latest, Vintage should have become aware of the grounds of its complaint as of the date LAC released the results of the RFSO (i.e., June 1, 2017), when it learned of the relative bid pricing scores. Using that date to establish timeliness, Vintage should have complained to the Tribunal by June 15, 2017.

14. The Tribunal acknowledges the severity of the 10-working-day deadline on bidders—in particular, on first-time or small-business bidders—but that deadline is fixed by the *Regulations* and limited because time is of the essence in procurements, including the time frame for initiating and completing the challenge process at the Tribunal.³ As a result, it is not possible for the Tribunal to extend the time period by calculating the deadline from a later date (such as August 28, 2017) based on when a complainant learned of the possibility of recourse at the Tribunal, as subsection 6(4) of the *Regulations* clearly instructs that a complaint “. . . may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.” In other words, the deadlines run from the day the complainant learns of the ground of objection to the procurement, not the day the complainant learns of the Tribunal’s bid challenge procedures.⁴

15. Consequently, the Tribunal has no choice but to consider the complaint late as it was filed outside the time limit established in the *Regulations*.

16. Nevertheless, as noted above, the Tribunal finds that the fault lies not with Vintage, but with the government institutions involved in the procurement at hand. As such, the Tribunal strongly reiterates its

2. Section 6 of the *Regulations*.

3. 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).

4. 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. However, the Tribunal has found that 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. See, for example, *Educom Training Systems Inc.* (3 May 2000), PR-99-037 (CITT). Regardless, even if the Tribunal invoked the 30-day deadline and applied it to the latest date by which grounds of complaint became known to Vintage (June 1, 2017), the 30-day deadline would have expired long before the date the complainant filed with the Tribunal (August 28, 2017).

frequently made⁵ recommendation that *all* government institutions (including the Department of Public Works and Government Services and LAC) systematically include information about the Tribunal so that bidders understand their avenue of recourse should they decide to challenge the results of a procurement. This type of information should be featured prominently in *each and every* tender notice as well as in *each and every* communication of tender results so that extremely unfortunate situations such as this one do not continue to happen and detract from the ability of small- and medium-sized businesses to compete fairly for government contracts.

DECISION

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

Ann Penner
Ann Penner
Presiding Member

5. 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).