



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2017-048

ASC International (ASC Canada)

*Decision made  
Wednesday, January 17, 2018*

*Decision issued  
Friday, January 19, 2018*

*Reasons issued  
Wednesday, January 31, 2018*

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**

**ASC INTERNATIONAL (ASC CANADA)**

**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.

Serge Fréchette  
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Serge Fréchette  
Presiding Member

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

## STATEMENT OF REASONS

### INTRODUCTION

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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. On January 12, 2018, ASC International (ASC Canada) (hereafter, ASC Canada) filed a complaint in relation to a Request for Proposal (solicitation No. 08324-170224/A) (the RFP) and in respect to the National Master Standing Offer No. 08324-160210/001/HP (the NMSO), both of which were issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Foreign Affairs, Trade and Development (Global Affairs Canada).

3. On January 17, 2018, the Tribunal decided not to conduct an inquiry into the complaint, for the reasons that follow.

### ANALYSIS

4. ASC Canada is the holder of the NMSO, which came into effect on January 1, 2017, and is valid until December 31, 2019. Pursuant to the terms of the NMSO, ASC Canada offers to supply certain types of armoured sport utility vehicles when requested through a call-up against the NMSO by Global Affairs Canada.

5. ASC Canada's complaint alleges that PWGSC made an unjustified, unfair and prejudiced decision to tender a significant number of armoured sport utility vehicles through the RFP – i.e. a new competitive procurement process –, instead of issuing a call-up against the NMSO.

6. In deciding whether to initiate an inquiry, the *Regulations* require the Tribunal to consider whether the complaint meets a number of conditions. One such condition is that the complaint must be filed within prescribed deadlines.

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.”

8. Subsection 6(2) of the *Regulations* provides 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.”

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

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

9. 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.

10. PWGSC issued the RFP on October 19, 2017. The Tribunal accepts on the basis of the information before it that ASC Canada became aware or reasonably should have become aware that PWGSC had in fact decided to issue the RFP instead of a call-up against the NMSO for the same goods on October 19, 2017. Therefore, the basis of ASC Canada's complaint became known, or reasonably should have become known to it on that date.

11. The documents submitted with the complaint indicate that a number of emails were exchanged, and a number of conversations took place between ASC Canada and PWGSC between October 23, 2017, and December 6, 2017. The Tribunal accepts for the purposes of this analysis that ASC Canada's email to PWGSC dated October 23, 2017, constituted a timely objection by ASC Canada to the issuance of the RFP.

12. However, the Tribunal finds that ASC Canada received a clear denial of relief to its objection at the latest on December 6, 2017. PWGSC's email dated December 6, 2017, included the following passage:

... It is also important to note that a standing offer is not a contract nor a firm commitment for a set number of vehicles.

*With respect to your request that the new tender be put in abeyance, PSPC intends on continuing with that solicitation which is currently in the evaluation phase . . .*

[Emphasis added]

13. In accordance with subsection 6(2) of the *Regulations*, ASC Canada then had 10 working days from December 6, 2017, or until December 20, 2017, to file a complaint with the Tribunal on this issue. ASC Canada's complaint, filed on January 12, 2018, is therefore time-barred on the same issue and cannot be accepted for inquiry.

14. In this regard, it appears that instead of filing a complaint within 10 working days from PWGSC's denial of relief, ASC Canada decided to wait for the outcome of the RFP, which became known to ASC Canada on December 28, 2017, when it was informed that it was not the successful bidder. ASC Canada filed this complaint 10 working days after December 28, 2017. However, the course of action chosen by ASC Canada is not consistent with the regulatory regime of the *CITT Act*, which aims to ensure that procurement processes are conducted in accordance with the rules of the trade agreements, while achieving finality of contracts in the best possible time.<sup>3</sup> In this context, it is well established that potential suppliers must raise their objections and file any complaints as soon as they become known to them, and that the procurement review process does not allow for an accumulation of grievances to be put forward only in the event of an unsuccessful bid.<sup>4</sup>

15. Given the Tribunal's conclusion of above, the Tribunal need not examine further the allegations made by ASC Canada in its complaint.

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3. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

4. *Ibid.*; *Trans-Cycle Industries Inc.* (6 October 2000), PR-2000-015 (CITT) at 5.

16. Nevertheless, the Tribunal notes that ASC Canada's complaint also contains the following allegation:

We feel significantly prejudiced by this procurement process for multiple reasons including and not limited to:

...

5. The non-award of NPP 03824-170224/A to ASC Canada. . . .

17. To the extent that ASC Canada is also challenging the fact that it was not awarded the contract pursuant to the RFP procurement process, the Tribunal has also decided not to initiate an inquiry into that allegation.<sup>5</sup> While timely, it does not disclose a reasonable indication of a breach of the trade agreements as required by the *Regulations* as a condition of inquiry by the Tribunal.

18. ASC Canada does not detail the exact basis on which it considers that it should have been awarded the contract pursuant to the RFP. The only information that pertains to the evaluation of ASC Canada's bid is found in certain correspondence included with the complaint. These documents indicate that ASC Canada's bid was unsuccessful because it failed to comply with all the mandatory criteria of the solicitation and did not have the lowest price. PWGSC's letter to ASC Canada dated December 28, 2017, included the following information:

... This is to inform you that a contract will not be awarded to you for this requirement. A contract has been awarded to the successful bid submitted by Jankel Tactical Systems. . . . The price of the awarded contract is \$6,138,299.00, excluding applicable taxes.

As indicated in the solicitation, a bid was required to meet each and every mandatory requirement. Unfortunately, the evaluating team determined that your bid did not comply with all the mandatory requirements of the solicitation, including the following:

Phase II: Technical Bid:

Compliance Assessment Report dated 19 December 2017

Appendix 1: Item #1; Item #4 and Item #11

In accordance with the Compliance Assessment Report, as your firm's response was received past 10:00am on 22 December, the bid was deemed non-responsive and was given no further consideration. . . .

19. The same day, ASC Canada sent the following email to PWGSC:

My response was rejected because email servers would not take large files? . . . This is largely ridiculous. . . .

20. On December 29, 2017, PWGSC answered, as follows:

... In response to your email, the Compliance Assessment Report issued to ASC Canada on 19 December 2017 indicated a response was to be received on or before 22 December 2017 10:00am.

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5. In the same paragraph, ASC Canada alleges four other "reasons" why it feels "prejudiced by this procurement process": 1) PWGSC communicating with third parties in respect of the NMSO instead of with ASC Canada and thus acting on incorrect information; 2) PWGSC tendering of the RFP for the same vehicles as covered by the NMSO; 3) PWGSC making nine "significant" amendments to the RFP during the solicitation; 4) PWGSC allegedly providing varying justifications for issuing the RFP rather than a call-up on the NMSO. The Tribunal does not read these other four listed reasons as anything other than elements supporting ASC Canada's main complaint that PWGSC's proceeding with the RFP rather than through a call-up was unjustified and unfair.

Unfortunately, your response was received on 22 December 2017 2:09pm. A request for extension to the deadline was not received from your firm, therefore, the information submitted in your response to the Compliance Assessment Report was not evaluated.

PSPC would also like to bring to your attention the Basis of Selection for award of a Contract for this requirement and advise that ASC Canada was not the lowest priced bidder. . . .

21. The Tribunal accepts that this ground of complaint was timely. ASC Canada learnt on December 28, 2017, that it was not the successful bidder for the RFP, and the reasons why. It objected the same day to the fact that PWGSC had not taken into consideration its late response of December 22, 2017, in the evaluation of its bid. PWGSC denied relief on December 29, 2017. ASC Canada's complaint was filed on the 9th working day from December 29, 2017.

22. However, as indicated above, this allegation does not disclose a reasonable indication of a breach of the trade agreements as required by the *Regulations* as a condition of inquiry by the Tribunal.<sup>6</sup> The trade agreements generally require that the contract be awarded in accordance with the evaluation and award criteria set out in the solicitation documents. For example, the *North American Free Trade Agreement*<sup>7</sup> provides as follows:

**Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts**

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

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

. . .

(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;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation;

. . .

23. As stated in PWGSC's letter of December 28, 2017, the RFP indicated that a bid had to meet all mandatory criteria to be declared responsive, and that the lowest-priced compliant bid would be recommended for award of a contract.<sup>8</sup> The RFP also described the "phased" bid evaluation process applicable to this procurement, in respect to which it specified that bidder responses to a Compliance Assessment Report issued by PWGSC must be received within the period specified by PWGSC and that responses received after the end of such a period will not be considered, except in circumstances and on terms expressly provided for in the Compliance Assessment Report.<sup>9</sup>

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6. Paragraph 7(1)(c) of the *Regulations*.

7. *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).

8. See e.g. RFP, section 4.2. The solicitation documents are available online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-HP-912-73590>.

9. RFP, section 4.1.1.3(c).

24. ASC Canada did not submit with its complaint the Compliance Assessment Report issued by PWGSC on December 19, 2017, nor its response to that report, nor any other evidence or even argument that could suggest that PWGSC should have concluded that ASC Canada was the lowest-priced compliant bidder.

25. The Tribunal finds that the information provided with the complaint fails to provide a reasonable indication that PWGSC evaluated or awarded the contract pursuant to the RFP in breach of the trade agreements. While “reasonable indication” is a low threshold that does not require a bidder to prove its allegations at this stage on the balance of probabilities, a complainant must provide a reasonable foundation upon which the Tribunal can anchor its analysis. ASC Canada’s complaint in this case fails to provide any indication that PWGSC conducted the evaluation and contract award contrary to the requirements of the trade agreements.

26. In this regard, while the Tribunal may, where applicable, request that a complainant submit additional information in support of its complaint, a sufficiently documented complaint must nevertheless be filed within the deadlines for the filing of a complaint prescribed in the *Regulations*.<sup>10</sup> ASC Canada’s complaint on the second ground was filed at the very limit of these deadlines. In the circumstances, the prescribed deadlines did not allow for any further useful opportunity for the Tribunal to request that ASC Canada file additional information that may have supported its complaint, nor for ASC Canada to file such additional information in a timely manner.

27. In conclusion, the information before the Tribunal does not disclose any reasonable indication that PWGSC conducted this evaluation inconsistently with the requirements of the RFP and, thus, of the trade agreements.

## DECISION

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

Serge Fréchette  
Serge Fréchette  
Presiding Member

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10. See subsection 30.11(2) of the *CITT Act*, section 6 of the *Regulations* and paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*.