



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-020

Interis Consulting Inc.

*Decision made  
Thursday, July 17, 2008*

*Decision and reasons issued  
Wednesday, July 30, 2008*

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

**BY**

**INTERIS CONSULTING INC.**

**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.

Pasquale Michael Saroli

Pasquale Michael Saroli

Presiding Member

Randolph W. Heggart

Randolph W. Heggart

Acting Secretary

## STATEMENT OF REASONS

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 (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. Moreover, 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. The complaint relates to a procurement (Solicitation No. 9200-07-0040/A) by the Office of Indian Residential Schools Resolution of Canada (IRSRC) of professional audit services.

3. Interis Consulting Inc. (Interis) alleged that IRSRC improperly amended the solicitation late in the bidding process, such that Interis was unable to revise its bid.

4. 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.”

5. 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.

6. On March 6, 2008, IRSRC issued a Request for Proposal (RFP). After a series of changes to the bid closing date, it was ultimately set for April 11, 2008, at 2:00 p.m. The following events occurred on that day. At 12:08 p.m., IRSRC issued a set of questions and answers for bidders. According to Interis, at 12:00 p.m., its bid had been packaged and sent from its premises for delivery. At 3:48 p.m., Interis sent an e-mail to IRSRC to inquire as to whether its bid was compliant and, in the event that its bid was found to be non-compliant, to request an extension to the bid closing deadline “. . . in light of the fact that the amendment was provided immediately before the submission deadline, making it impossible for firms to react to the changes resulting from it . . . .”<sup>3</sup>

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].  
2. S.O.R./93-602 [*Regulations*].  
3. Complaint, tab 24.

7. On May 30, 2008, three contracts were awarded. Interis was not awarded a contract. On June 13, 2008, the award notices for the contracts were published on MERX.<sup>4</sup> According to Interis, it became aware of the successful contractors on June 17, 2008. On June 19, 2008, Interis received a letter from IRSRC dated June 12, 2008, indicating that its bid was deemed non-compliant because it had exceeded Interis's ceiling rate for the option years for Stream 2. On June 27, 2008, Interis sent a letter to IRSRC to contest the results of the evaluation of its bid and to advise it that it was intending to file a complaint with the Tribunal. On July 11, 2008, Interis filed its complaint with the Tribunal.

8. With regard to whether Interis filed its complaint in a timely manner pursuant to subsections 6(1) and (2) of the *Regulations*, the Tribunal is of the view that Interis knew or reasonably should have known of the basis of its complaint on April 11, 2008, once bidding closed, at 2:00 p.m., without IRSRC having further extended the bid closing date to afford bidders a reasonable time to react to the set of questions and answers published earlier that day.

9. In order for a complaint to have been filed with the Tribunal in accordance with the time frame provided for in subsection 6(1) of the *Regulations*, Interis would have had to file a complaint with the Tribunal within 10 working days from the date on which it became aware of the basis of its complaint, which the Tribunal considers to have been April 11, 2008. Interis filed its complaint with the Tribunal on July 11, 2008, which was well beyond that time frame. Consequently, the Tribunal is of the view that Interis failed to file its complaint with the Tribunal within the prescribed time limit and that the complaint is therefore time-barred by law.

10. The Tribunal does not consider the Interis letter of June 27, 2008, to constitute an objection within the meaning of that term in subsection 6(2) of the *Regulations*, but rather a notice of intent to file a complaint with the Tribunal. In any event, even if it were considered an objection, it would have been made well beyond 10 working days after the day on which the basis of the objection (i.e. IRSRC's failure to provide bidders with a reasonable period of time to respond to changes resulting from the last set of questions and answers) became known to Interis, which the Tribunal has found to be April 11, 2008.

11. In this regard, the Tribunal notes the Federal Court of Appeal's decision on the issue of ambiguity in RFPs in *IBM Canada v. Hewlett-Packard (Canada) Ltd.*<sup>5</sup> In that decision, the Federal Court of Appeal, in the context of discussing time limits for filing complaints with the Tribunal, made clear the importance of potential suppliers complaining as soon as they are aware of a flaw in the process, including problems with the interpretation of solicitation requirements. The decision read as follows:

... They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. The whole procurement process ... is meant to be as open as it is meant to be expeditious ...<sup>6</sup>

...

The Federal Court of Appeal went on to say that to adopt a "wait-and-see attitude" is precisely what the procurement process and *Regulations* seek to discourage.<sup>7</sup>

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4. Canada's electronic tendering service.

5. 2002 FCA 284 (CanLII).

6. *Ibid.* at para. 20.

7. *Ibid.* at para. 28.

12. Notwithstanding the foregoing, the Tribunal is troubled by the particular circumstances of this case, specifically the timing of the release of an amendment so close to the bid closing deadline. The Tribunal notes that the trade agreements contain provisions regarding the timing of events in the procurement process and fairness to bidders. The Tribunal cautions IRSRC to be fully mindful of its obligation to adhere to those provisions.

13. In light of the above, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

#### **DECISION**

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

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member