



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2008-055

Knoll North America Corporation

*Decision made
Tuesday, March 10, 2009*

*Decision and reasons issued
Tuesday, March 17, 2009*

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

KNOLL NORTH AMERICA CORPORATION

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.

Diane Vincent
Diane Vincent
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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. 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. E60PQ-080001/B) by the Department of Public Works and Government Services (PWGSC) for the provision of freestanding furniture on behalf of various government departments.

3. Knoll North America Corporation (Knoll) alleged that PWGSC, contrary to Article 1010:7 of the *North American Free Trade Agreement*,³ did not provide the opportunity to question an amendment regarding the discount structure of the bid. As a result, Knoll's bid was found non-compliant.

LEGAL FRAMEWORK

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 either to object to the government institution or to 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.

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

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

3. *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 (entered into force 1 January 1994) [*NAFTA*]. Article 1010:7 of *NAFTA* indicates: "Where, after publication of an invitation to participate, but before the time set for the opening or receipt of tenders as specified in the notices or the tender documentation, an entity finds that it has become necessary to amend or reissue the notice or tender documentation, the entity shall ensure that the amended or reissued notice or tender documentation is given the same circulation as the original. Any significant information given by an entity to a supplier with respect to a particular procurement shall be given simultaneously to all other interested suppliers and sufficiently in advance so as to provide all suppliers concerned adequate time to consider the information and to respond."

KEY FACTS

6. On October 15, 2008, PWGSC issued a Request for a Standing Offer (RFSO). The original bid closing date was November 25, 2008.

7. Clause 3 of Part 2, "OFFEROR INSTRUCTIONS", of the RFSO provides as follows:

3. Enquiries – Request for Standing Offers

All enquiries must be submitted in writing to the Standing Offer Authority no later than ten (10) calendar days before the Request for Standing Offers (RFSO) closing date. Enquiries received after that time may not be answered.

...

8. On Friday, November 14, 2008, PWGSC issued amendment No. 005 to the RFSO. According to Knoll, the amendment was issued at 7:14 p.m., outside normal business hours, and included the following:

...

Question no 4:

In Annex B, Pricing & Basket of Goods, you mentioned "Offeror must quote firm prices unit prices less a percentage discount for one or more categories within the basket of goods detailed in Canadian dollars." Therefore if we have two categories in the same basket of goods can we have separate discounts?

Answer no 4:

You must complete the Discount & Installation Charges spreadsheets for each series and category that you are offering. The discount can vary from series to series and category to category.

...

9. The following question and answer was also in amendment No. 005:

...

Question no 15:

When providing a complete product solution within a single series (Executive or general Office Fixed Height etc.) compatible products can be mixed to provide the most appropriate or cost effective solution. These products may have a different discount structure i.e. the wood desk may be 50% off and the conference table 60%.

Can we submit separate discounting for the supplemental product within a single product category?

Answer no 15:

no

...

10. On November 17, 2008, Knoll sent an e-mail to PWGSC stating as follows:

...

Again, I understand that my question should have been in on Friday, however, I am asking for your consideration of this question. . . .

11. On November 17, 2008, PWGSC responded to Knoll as follows:

...

I regret to inform you that we will not respond to your questions that you sent on November 17, 2008.

As stated in the RFSO document Part 2 – Offeror Instructions Item 3, the last day to submit your questions was November 15, 2008.

...

12. On November 18, 2008, PWGSC issued amendment No. 007 to the RFSO, which extended the bid closing date to December 2, 2008, and altered some mandatory technical criteria.

13. On December 1, 2008, Knoll submitted its bid. On December 2, 2008, bids closed.

14. In an e-mail sent on February 10, 2009, Knoll objected to PWGSC's determination that its bid was non-compliant. In a return e-mail dated February 17, 2009, PWGSC advised Knoll that it would not reconsider its decision.

15. On March 3, 2009, Knoll filed its complaint with the Tribunal.

ANALYSIS

16. The Tribunal notes that the instructions in the RFSO, with respect to the date by which potential suppliers had to submit questions, were clear. As noted above, all enquiries regarding the RFSO had to be submitted to PWGSC no later than 10 calendar days before the solicitation closing date.

17. With respect to Knoll's contention that the answer to question No. 4 in amendment No. 005 was vague and that more than one conclusion could have been drawn from the response, the Tribunal is of the view that questions No. 4 and 15 addressed the pricing discount structure and that PWGSC was sufficiently clear on what was permissible and what was not.

18. Knoll became aware or should have become aware of the basis of its complaint relating to the discount structure on November 14, 2008, the date on which amendment No. 005 was issued. Arguably, Knoll became aware or should have become aware of the basis of its complaint relating to the time allowed to consider and question the new information on November 17, 2008, the day on which PWGSC refused to answer its question.

19. PWGSC advised Knoll on November 17, 2008, that it could not respond to any further questions, since the closing date at that time was November 25, 2008, and that all enquiries had to be submitted by November 15, 2008. The Tribunal notes however that on November 18, 2008, PWGSC issued amendment No. 007, which extended the bid closing date to December 2, 2008. In effect, this amendment also extended the date by which bidders could submit questions to PWGSC. As a result, bidders could have submitted questions until November 22, 2008, the tenth calendar day before the closing date of December 2, 2008. There is no evidence that Knoll presented any questions to PWGSC after November 17, 2008, or that PWGSC refused to answer questions submitted after the bid closing date was extended.

20. Pursuant to section 6 of the *Regulations*, Knoll had to file its complaint with the Tribunal, or object to PWGSC, within 10 working days from the date on which it became aware or reasonably should have become aware of the basis of its complaint. According to the evidence submitted, Knoll made its objection to PWGSC on February 10, 2009, and filed its complaint with the Tribunal on March 3, 2009, both dates being well beyond the 10-working-day time frame permitted by the *Regulations*.

21. It is evident that Knoll had concerns about the wording of the specification and/or the wording of the amendment as early as November 2008. However, rather than make an objection to PWGSC or file a complaint with the Tribunal at that time, Knoll chose instead to wait for PWGSC to make its decision regarding the procurement before it took action. As can be seen in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,⁴ the Federal Court of Appeal made it clear that there is an onus on potential suppliers to challenge problems in the procurement process when they become aware of them (or when they reasonably should have become aware of them). Of particular relevance are the following excerpts from that decision:

[20] . . . potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. 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. . . .

[28] . . . If Hewlett-Packard was of the view that such a clear answer contradicted the procurement requirements, it should have filed a complaint then and there. It chose, rather, to ignore answer 95, to adopt a wait-and-see attitude and to make its challenge once the procurement process was over. This is precisely the type of attitude that the procurement process and Regulations seek to discourage.

22. In light of the foregoing, the Tribunal is of the view that the filing of Knoll's complaint was not timely and, consequently, the Tribunal will not conduct an inquiry into the complaint. The Tribunal considers the matter closed.

DECISION

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

Diane Vincent
Diane Vincent
Presiding Member

4. 2002 FCA 284 (CanLII).