



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-032

Barer Engineering International

*Decision made  
Friday, October 31, 2008*

*Decision and reasons issued  
Tuesday, November 18, 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**

**BARER ENGINEERING INTERNATIONAL**

**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.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
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 (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 in issue relates to a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for heavy-duty engine lathes. In regard to Solicitation No. W0103-066206/B, Barer Engineering International (Barer), of Montréal, Quebec, alleged that PWGSC improperly disqualified its proposal for engine lathes and based the specifications of the solicitation on the winning bidder's design.

3. According to the complaint, on September 4, 2008, PWGSC informed Barer that it had failed to meet two mandatory requirements contained in the Statement of Requirement (SOR) that formed part of the solicitation. According to Barer, PWGSC informed it that the overall length of its proposed product was too great and that the product's spindle bore diameter of 65 mm was larger than the required diameter of 54 mm. Barer also claimed that PWGSC had informed it that no bidder, other than the winning one, had met all the technical requirements of the SOR.

4. On September 10, 2008, Barer e-mailed its objection to PWGSC concerning the evaluation results. On the issue of length, Barer argued that, because the overall length of the product had not been identified as a specific requirement in the SOR, that specification could not be used to determine whether a bid was compliant. Second, Barer explained that, in its industry, specifications are construed to mean "meet or exceed". Barer therefore claimed that its proposed spindle bore of 65 mm complied with PWGSC's requirement for a 54-mm spindle bore. Barer argued that it had not restricted its proposed spindle bore to 54 mm, which, it claimed, it could have supplied, because every user would rather have a larger spindle bore and that there had been no functional reason to restrict the bore to 54 mm. Regarding the fact that only a single bidder had been able to meet all the requirements, Barer claimed that PWGSC had taken the specifications of the SOR from the winning bidder's design. Barer also stated that, if PWGSC truly wanted an equivalent product, it should have allowed bidders to meet or exceed the specifications so that an equivalent machine could be obtained without sacrificing any user requirement.

5. On September 24, 2008, PWGSC responded to Barer's objection by acknowledging that the overall length of Barer's proposed engine lathe met the requirements of the SOR. On the second issue, PWGSC informed Barer that the 54-mm spindle bore requirement was mandatory and that, because Barer's spindle bore had not met that requirement, its proposal had been disqualified.

6. On September 25, 2008, Barer again wrote to PWGSC and argued that the accessory devices that had been mentioned in association with the spindle bore requirement were standard among all machines and that any accessory device that fit in one machine would also fit in another. Barer also noted that its bid price was \$390,000 less than that of the winning bidder and that any retooling or additional expense required on the part of DND to retrofit existing accessories to the larger bore was insignificant in relation to this price

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

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

difference. Barer also claimed that PWGSC had evaluated its proposal in an inconsistent manner. By way of example, it noted that, even though the SOR contained a requirement for a "... swing over bed of 15 inches ...", PWGSC apparently found that Barer's machine with a swing-over bed of 15.7 inches met the specification. Barer claimed that PWGSC's interpretation of this size requirement made it clear that its size specifications should be held to a "greater or equal to" standard. Barer argued that its proposal should not be deemed non-compliant on the basis of this contradictory evaluation.

7. On October 16, 2008, PWGSC responded that, as it had noted in its letter dated September 24, 2008, the 54-mm spindle bore requirement was mandatory and that Barer's proposal was non-compliant.

8. On October 29, 2008, Barer filed its complaint with the Tribunal.

9. 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."

10. In the Tribunal's view, Barer's initial objection to PWGSC was properly made in accordance with subsection 6(2) of the *Regulations*, i.e. within the stipulated 10 working days. The Tribunal is also satisfied that PWGSC provided a "denial of relief", in accordance with the same subsection, on September 24, 2008, when it advised Barer that the spindle bore requirement was mandatory and that Barer had not met this requirement. The Tribunal does not consider that PWGSC's response invited further discussion from Barer or that it indicated that Barer should expect any additional action on the part of PWGSC to rectify the alleged wrong. Therefore, the Tribunal finds that Barer's complaint would need to have been filed with the Tribunal by October 8, 2008, i.e. 10 working days after September 24, 2008. As the complaint was not filed until October 29, 2008, the Tribunal considers it to have been filed in an untimely manner.

11. The additional allegation that the specification had been taken from the winning bidder's design first appeared in Barer's objection, which it e-mailed to PWGSC on September 10, 2008. It is unclear to the Tribunal that this allegation in fact constitutes a ground of objection to the government institution, given that Barer's e-mail focuses on the two specific reasons for PWGSC's rejection of Barer's proposal noted above. The Tribunal's view that Barer's belief in this regard was not a formal basis for its objection to PWGSC is reinforced by the fact that Barer did not pursue the matter in its letter of September 25, 2008, to PWGSC, but instead dealt solely with the matter of the spindle bore. The Tribunal notes that Barer knew on September 4, 2008, of the award of the contract to Standard Modern. Even if the allegation that the specification had been taken from the winning bidder's design were to be considered a point of objection in Barer's September 10, 2008, letter to PWGSC, the Tribunal is of the view that it was clearly implicit in the latter's reply letter of September 24, 2008, that the award would remain with the successful bidder. The Tribunal therefore considers this aspect of the complaint also to have been filed in an untimely manner.

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

**DECISION**

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

James A. Ogilvy  
James A. Ogilvy  
Presiding Member