



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DECISION AND REASONS

File No. PR-2009-018

Flag Connection Inc.

*Decision made  
Friday, July 3, 2009*

*Decision and reasons issued  
Tuesday, July 14, 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**

**FLAG CONNECTION 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.

Serge Fréchette  
Serge Fréchette  
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. 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 Request for Proposal (RFP) (Solicitation No. C1111-080972/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Canadian Heritage for the provision of paper hand flags.

3. Flag Connection Inc. (FCI) alleged that PWGSC improperly awarded a contract to a non-compliant bidder.

4. The RFP contained the following terms:

### **PART 3 – EVALUATION PROCEDURES AND BASIS OF SELECTION**

#### **1. EVALUATION PROCEDURES**

(a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.

...

#### **1.1 TECHNICAL EVALUATION**

##### **1.1.1 MANDATORY TECHNICAL CRITERIA**

##### **PRE-AWARD SAMPLE**

As part of the technical evaluation, to confirm a Bidder's capability of meeting the technical requirements, a pre-award sample is required **with the bid**.

...

The Bidder must ensure that the required pre-award sample is manufactured in accordance with the technical requirement and is fully representative of the bid submitted. Rejection of the pre-award sample will be the basis of declaring the bid non-responsive.

...

The sample will be evaluated for quality of workmanship and conformance to specified materials and measurements.

The requirement for a pre-award sample will not relieve the successful bidder from submitting samples as required by the contract terms or from strictly adhering to the technical requirement of this Request For Proposal and any resultant contract.

...

---

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

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

## Annex "A"

## REQUIREMENT

**1. TECHNICAL REQUIREMENT:**

To be in accordance with the Canadian General Standards Board (CGSB) Standard CAN/CGSB-98.3-M91 (latest issue) with the following exceptions:

- 1) . . . Colour must be Federal Identity Program Red, Pantone Red 032U.
5. The RFP was issued on February 25, 2009, and bids closed on April 7, 2009. According to the complaint, on April 16, 2009, PWGSC awarded a contract to Tobermory Press Inc. (Tobermory).
6. According to FCI, on May 25, 2009, there was a CGSB Flag Committee meeting held in Ottawa, Ontario. FCI submitted that, at the meeting, it had concerns about the colour of the flags. On June 5, 2009, FCI acquired flags from Tobermory that, it claims, were from the production of flags shipped against the contract.
7. On June 8, 2009, FCI made an objection to PWGSC regarding its concerns about the contracted product and delivery dates and requested that the contract be terminated. It stated: ". . . the accepted bid submission and pre production samples do not meet the One Event Only Standard colour requirements nor the purchase description equivalent of Pantone 032U. It is as well evident that the deliveries as outlined in the bid submission have not been attained. . . ."
8. On June 10, 2009, PWGSC advised FCI of the following: "The contract was awarded based on the information requested at the time of bid closing. The contract will not be terminated. . . ."
9. According to FCI, the colour of the flags obtained from Tobermory on June 16, 2009, was Pantone Red 185U. On June 23, 2009, FCI submitted its complaint to the Tribunal. On June 25, 2009, the Tribunal requested additional information from FCI. On June 30, 2009, FCI filed the requested information with the Tribunal.
10. Subsection 30.11(2) of the *CITT Act* requires that a complaint include, among other things, all information and documents relevant to the complaint that are in the complainant's possession.
11. 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."
12. 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.

13. The Tribunal required additional information before the complaint could be considered properly filed. In particular, without the knowledge of certain dates, the Tribunal would have been unable to determine if FCI's objection was made within the time frame stated in the *Regulations*.

14. Upon review of the information filed by FCI on June 30, 2009, the Tribunal finds that FCI knew or reasonably should have known the basis of its objection on June 5, 2009, when it acquired flags stated to have been manufactured from the production of flags shipped against Tobermory's contract. FCI made its objection to PWGSC on June 8, 2009, which, the Tribunal finds, is within the time limit specified in subsection 6(2) of the *Regulations*. The Tribunal considers that FCI had knowledge of PWGSC's denial of relief on June 10, 2009, when PWGSC advised it that the contract had been awarded based on the information requested at the time of bid closing and that the contract would not be terminated. In order to meet the requirements of subsection 6(2), FCI had to file its complete complaint with the Tribunal not later than June 24, 2009. FCI submitted its complaint to the Tribunal on June 23, 2009, however, it was not considered to have been properly filed because it lacked the above-noted critical information. This information was received by the Tribunal on June 30, 2009, which was beyond the prescribed time limit for filing the complaint.

15. In addition, the Tribunal is of the view that the solicitation document was clear, in that the requirements for evaluating the proposals and awarding the contract clearly stated the conditions that had to be met by the bidder.

16. According to the complaint, PWGSC stated that the contract was awarded based on the information received at the time of bid closing. FCI alleges, based on the testing of several flags that it bought from Tobermory, that "... the deliveries as outlined in the bid submission have not been attained. ..." The Tribunal infers that FCI is referring to "deliveries" under the contract between Tobermory and PWGSC that resulted from the RFP. However, there is no evidence on file regarding the proposal submitted by Tobermory, or the terms of the resulting contract, including the colour requirement. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "... any aspect of the procurement process ...", which encompasses all elements of the procurement cycle up to and including contract award. Any discrepancy between the contract terms and the actual "deliveries" thereunder becomes a matter of contract administration, which is beyond the Tribunal's jurisdiction.

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

## DECISION

18. 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