



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DECISION AND REASONS

File No. PR-2010-092

The Typhon Group (Barrie) Limited

*Decision made  
Monday, March 28, 2011*

*Decision and reasons issued  
Wednesday, April 13, 2011*

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

BY

**THE TYPHON GROUP (BARRIE) LIMITED**

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

Dominique Laporte  
Dominique Laporte  
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 procurement (Solicitation No. 531624 - Barrie) by the Department of Public Works and Government Services (PWGSC) on behalf of the Canada Revenue Agency for the leasing of office space in Barrie, Ontario.
3. The Typhon Group (Barrie) Limited (Typhon) alleged that PWGSC awarded the contract to a supplier that submitted a non-compliant 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 has 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.
6. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, the Federal Court of Appeal stated that, “[i]n procurement matters, time is of the essence. . . . [P]otential suppliers . . . 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.”<sup>3</sup>
7. On July 16, 2010, PWGSC invited companies, including Typhon, to submit bids to lease office space in Barrie, Ontario, for a period of 15 years, to be ready for occupancy and use on September 1, 2012. The requirement was for 3,778 square metres of space and 20 reserved parking spots. According to the complaint, PWGSC received eight bids. On November 1, 2010, PWGSC awarded the contract to one of Typhon’s competitors.

---

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. 2002 FCA 284 (CanLII) at paras. 18, 20.

8. By letter dated January 17, 2011, Typhon advised PWGSC that it was aware that Typhon's competitor had filed an application to the City of Barrie's Committee of Adjustment (the Committee) to obtain variances and exemptions from the zoning by-law affecting the property, including variances and exemptions relating to the height of the proposed building, a side yard setback and parking. Typhon's letter noted that, after a hearing held on December 15, 2010, the Committee refused to grant certain elements of the application and, among other things, made the development conditional on Typhon's competitor obtaining a parking agreement with the City of Barrie. In its letter, Typhon noted section 12.4 of Part 1 of the tender documentation package, which stated that "[a]n Offer will not be subject to further evaluation if, in the sole opinion of [PWGSC], the Offer is conditional or qualified in any matter." Typhon further noted that, according to paragraph 9 of the Form of Offer included in Part 2 of the tender documentation package, the bidder had to represent that the proposed leased premises complied "... in all respects with the requirements of all applicable laws." Typhon submitted that the competitor's bid was conditional on obtaining consents and variances to make the premises compliant with applicable laws and that PWGSC had not complied with section 12.4 of Part 1 of the tender documentation package. Typhon also submitted that, as its bid had been the second lowest, the proper course was for PWGSC to accept Typhon's bid.

9. On February 17, 2011, PWGSC responded to Typhon's letter and advised Typhon of the following:
- (a) when PWGSC accepted Typhon's competitor's bid, there was no indication that the bid was non-compliant;
  - (b) since the date of contract award, Typhon's competitor confirmed that its tender continued to meet the project requirements; and
  - (c) any failure to execute the lease on the terms specified in the request for tender would be an issue of non-performance that would be addressed in an appropriate manner.

10. On March 3, 2011, Typhon responded to PWGSC's February 17, 2011, letter, and reiterated that its competitor's offer did not meet the by-law parking requirements nor had it ever done so. Typhon submitted that its competitor's application for variances was an effort to repair its bid. In reply to PWGSC's comment that there was no indication that the bid was non-compliant, Typhon submitted that its conversations with PWGSC, shortly after the bid closing period, indicated that PWGSC was aware of the compliance issues at that early stage. It also submitted that its competitor's assertions that its bid continued to meet the requirements were patently wrong. It reiterated that the proper course for PWGSC was to disqualify its competitor's bid and to move on to the next lowest bid, i.e. Typhon's. Typhon suggested that a meeting between it and PWGSC was necessary and appropriate in order to deal with Typhon's concerns.

11. On March 8, 2011, Typhon wrote to the Tribunal, copying PWGSC, requesting an extension of time to file a complaint with the Tribunal in order to preserve its right to file a complaint should the matter not be resolved directly with PWGSC. It requested the extension pursuant to rules 8, 23.1 and 24.1 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup>

12. On March 10, 2011, the Tribunal responded to Typhon, advising it that, in accordance with the *Regulations*, the Tribunal does not have the discretion to grant such an extension. The Tribunal advised Typhon that rule 8 of the *Rules* allows the Tribunal to extend time limits that have been fixed by the *Rules* or otherwise fixed by the Tribunal (when it is fair and equitable to do so), but that this rule does not permit the Tribunal to extend time limits which have been established by section 6 of the *Regulations*.

---

4. S.O.R./91-499 [*Rules*].

13. On March 11, 2011, PWGSC advised Typhon that, in view of Typhon's letter to the Tribunal, it would be inappropriate for PWGSC to respond to Typhon's letter of March 3, 2011.

14. Typhon filed its complaint with the Tribunal on March 21, 2011.

15. The Tribunal notes that the complaint indicates that Typhon made an objection to PWGSC on January 17, 2011.<sup>5</sup> In its letter to the Tribunal of March 8, 2011, Typhon states that its objection of January 17, 2011, was made a short time after Typhon learned of the non-compliance of the winning offer. Pursuant to subsection 6(2) of the *Regulations*, Typhon had 10 working days from the date on which Typhon became aware of, or reasonably should have known, its ground of complaint to file a complaint with the Tribunal or to make an objection. As the information submitted by Typhon does not allow the Tribunal to know for certain when Typhon became aware of (or reasonably should have known) its ground of complaint, i.e. that PWGSC accepted a non-compliant bid, the Tribunal cannot determine conclusively whether its objection to PWGSC was made within the time limit established by subsection 6(2).<sup>6</sup>

16. Assuming that Typhon's objection was filed within the time limit permitted by subsection 6(2) of the *Regulations*, the Tribunal is of the view that, on the basis of the evidence submitted in the complaint, Typhon received actual denial of relief to its objection on February 17, 2011, when PWGSC responded to Typhon's objection.<sup>7</sup> PWGSC's response stated that the winning bid was compliant at the time of bid submission and remained compliant, and it did not suggest that the issue of a non-compliant bid could be reconsidered at a later date. Instead, it suggested that any failure on the part of the winning bidder to execute the lease on the terms specified would be an issue of non-performance of the contract.

17. Consequently, Typhon had actual knowledge of the denial of relief on February 17, 2011, and, pursuant to subsection 6(2) of the *Regulations*, it had to file a complaint to the Tribunal "... within 10 working days after the day on which [it had] actual or constructive knowledge of the denial of relief . . . ." As a result, it had until March 3, 2011, to file its complaint with the Tribunal. Since the complaint was filed on March 21, 2011, the Tribunal therefore considers that it was filed in an untimely manner.

18. In the Tribunal's opinion, Typhon sent a second objection to PWGSC on March 3, 2011, which contained additional arguments. In that letter, Typhon raised the same ground of complaint, namely, that PWGSC accepted a non-compliant bid. The Tribunal is of the view that providing additional arguments with respect to the same ground of complaint does not affect the relevant dates for calculating the time limits set out in subsection 6(2) of the *Regulations*.

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

---

5. Complaint at 3-4.

6. The Tribunal also notes that the complaint includes the Committee's provisional decision with reasons, dated December 15, 2010, which contains the Committee's disposition regarding the three variance requests. In the absence of any explanation by Typhon, it appears reasonable to the Tribunal that the ground of complaint may have become known to Typhon on or about December 15, 2010. Therefore, Typhon would have had to file its complaint or make an objection within 10 working days from that date, that is, on or about December 30, 2010. As Typhon made an objection to PWGSC on January 17, 2011, there is some doubt as to whether the objection was filed within the time limit established by subsection 6(2) of the *Regulations*.

7. Complaint, tab O.

**DECISION**

20. 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