



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2011-011

TA Instruments

*Decision made  
Wednesday, June 22, 2011*

*Decision and reasons issued  
Thursday, June 30, 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**

**TA INSTRUMENTS**

**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

Gillian Burnett  
Gillian Burnett  
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 (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. 01B30-110325/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Agriculture and Agri-Food (AAFC) for the provision of a rheometer.

3. TA Instruments (TA) alleged that the rheometer offered by the winning bidder, Anton Paar Canada (Anton Paar), does not meet one of the mandatory technical specifications. Specifically, TA submitted that the product offered does not comply with the requirement that the instrument motor inertia be less than or equal to 20  $\mu\text{N.m.s}^2$ .

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."

5. Subsection 6(2) of the *Regulations* 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."

6. These provisions make it clear that 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.

7. On November 30, 2010, PWGSC issued a Request for Proposal (RFP) for the provision of a rheometer. Bidding closed on January 10, 2011.

8. With respect to the mandatory technical criteria, Annex A to the RFP, "**MANDATORY SPECIFICATIONS FOR RHEOMETER**", provides as follows:

**9.0** The rheometer motor inertia must be  $\leq 20 \mu\text{N.m.s}^2$ ;

...

9. On January 17, 2011, PWGSC advised TA that a contract had been awarded to Anton Paar.

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

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

10. According to the complaint, on January 18, 2011, TA made an objection to PWGSC claiming that it was “well aware” that Anton Paar’s product did not meet the mandatory technical requirement regarding the instrument motor inertia. In its objection, TA submitted that Anton Paar’s proposal should be declared non-compliant. It also requested that PWGSC provide it with information and documentation on the product model offered by Anton Paar in response to the subject solicitation.

11. The complaint further indicates that, on January 19, 2011, PWGSC advised TA that Anton Paar’s technical proposal had been reviewed by both AAFC and PWGSC and that it had been found to meet all the mandatory requirements. PWGSC also advised TA that it had to contact the Access to Information and Privacy Coordinator in order to obtain more information regarding the solicitation.

12. According to the complaint, TA repeated its concerns to PWGSC regarding Anton Paar’s technical proposal in an e-mail sent on January 20, 2011. On January 24, 2011, PWGSC advised TA that it and AAFC had, for a second time, reviewed Anton Paar’s technical proposal and had, once again, concluded that it met all the mandatory requirements.

13. TA indicated in the complaint that, on January 25, 2011, it advised PWGSC that it would formally protest the award of the contract to Anton Paar. That same day, PWGSC responded and advised TA that bidders were required to state their compliance with all the mandatory technical requirements and provide technical brochures and data to support compliance. PWGSC further indicated that the technical authority had found that both bids were fully compliant with all technical criteria. PWGSC also advised TA that Anton Paar would be required to install the system and demonstrate compliance with all the mandatory requirements, adding that, if it failed to meet any of the criteria, the contract would be terminated for default.

14. TA submitted that it replied to PWGSC’s e-mail on January 25, 2011, maintaining its position and requesting to speak with the contracting officer’s superior.

15. On January 27, 2011, according to a summary of a telephone conversation provided by TA, the contracting officer’s superior reiterated that Anton Paar would need to prove that it met all the mandatory requirements when the rheometer was installed. The contracting officer’s superior also provided TA with information on filing a complaint with the Tribunal and on requesting information from the Access to Information and Privacy Coordinator.

16. TA made an access to information request dated February 25, 2011, and received the requested information on June 6, 2011.

17. On June 15, 2011, the Tribunal received a complaint from TA. On June 17, 2011, the Tribunal requested additional information from TA, specifically, a copy of the solicitation document. TA filed the requested document on the same day; therefore, the complaint was considered filed on June 17, 2011.

18. On the basis of the evidence submitted in the complaint, the Tribunal is of the view that TA knew or reasonably should have known its ground of complaint on January 17, 2011, when it was advised by PWGSC that a contract had been awarded to Anton Paar. According to TA, it made an objection to PWGSC on the next day, January 18, 2011.<sup>3</sup> This objection was made within the time limit specified in subsection 6(2) of the *Regulations*.

19. The Tribunal considers that PWGSC, in advising TA on January 19, 2011, that Anton Paar’s proposal had been reviewed again and had been found to meet all the mandatory criteria, very clearly had the effect of denying TA the relief that it sought, i.e. that Anton Paar’s proposal be declared non-compliant.

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3. Complaint at 5.

Therefore, the Tribunal is of the view that TA received actual denial of relief to its objection on January 19, 2011. As a result, TA had, at the latest, until February 2, 2011 (i.e. within 10 working days after January 19, 2011), to file a complaint with the Tribunal.

20. However, according to the complaint, there were additional objections made by TA over the next week that resulted in PWGSC performing another review of Anton Paar's proposal. The results of this further review were communicated to TA on January 24, 2011. The complaint also indicates that, on January 27, 2011, TA spoke with the contracting officer's superior, who reiterated that Anton Paar would have to demonstrate its compliance with all the technical requirements at installation and advised TA that it could file a complaint with the Tribunal.

21. Although the Tribunal considers that TA received actual denial of relief with regard to its objection on January 19, 2011, and even if the Tribunal were to consider that TA received actual denial of relief on January 27, 2011, when TA spoke with the contracting officer's superior, the complaint would still have been filed outside the time limit established in the *Regulations* (i.e. within 10 working days after the day on which the potential supplier had actual or constructive knowledge of the denial of relief).

22. With respect to the documents that TA received on June 6, 2011, as a result of its access to information request, the Tribunal is of the view that these documents did not provide TA with any new grounds of complaint, nor did it provide TA with any information that it did not already have or presume to have on January 18, 2011, when it made its objection to PWGSC. The Tribunal is of the opinion that the additional evidence received on June 6, 2011, merely confirmed a known ground of complaint and was not sufficiently different to be considered a new ground of complaint.<sup>4</sup>

23. Therefore, in order for the complaint to have been filed in a timely manner, it would have had to have been filed within 10 working days of January 19, 2011, that is, on February 2, 2011, or, at the latest, within 10 working days of January 27, 2011, that is, on February 10, 2011. As the complaint was not filed until June 17, 2011, the Tribunal finds that the complaint was filed outside the time limit established in the *Regulations*.

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

## DECISION

25. 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

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4. TA states at page 6 of its complaint that, "[b]ased upon the actual information received on June 6, 2011, TA Instruments can now confirm that Anton Paar cannot meet the specific mandatory technical requirement of specification 9.0 and, therefore, should not have been awarded the contract."