



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-029

TA Instruments

*Decision made
Thursday, September 15, 2011*

*Decision and reasons issued
Friday, September 23, 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.

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*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. 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 for the provision of a rheometer.

3. TA Instruments (TA) alleged that the winning bidder, Anton Paar Canada (Anton Paar), submitted fraudulent information to PWGSC and, as a result, was improperly awarded the contract, as its proposed rheometer model fails to meet a mandatory requirement stated in the solicitation document. That mandatory requirement stipulates that the instrument motor inertia be less than or equal to 20 $\mu\text{N.m.s}^2$. TA alleges that Anton Paar falsely stated, in its proposal, that its rheometer could meet this mandatory requirement. In support of its complaint, TA filed documents that it received on September 1, 2011, as a result of an access to information request, that allegedly demonstrate that Anton Paar's proposed rheometer cannot meet the mandatory requirement in question.

4. The Tribunal has already received a complaint filed by TA in relation to this same procurement and in relation to the issue of the alleged improper award of the contract to Anton Paar.³ In the first complaint, TA also alleged that the contract was improperly awarded to Anton Paar because the rheometer that it offered did not comply with the requirement that the instrument motor inertia be less than or equal to 20 $\mu\text{N.m.s}^2$. In that case, TA also filed documents that, it claimed, confirmed that Anton Paar's proposed rheometer cannot meet the above-mentioned mandatory requirement. The Tribunal determined that the complaint had been filed outside of the time limit specified in the *Regulations* and, therefore, decided that it would not conduct an inquiry into the first complaint. In other words, the Tribunal did not consider the substantive merits of TA's allegation, having concluded that the first complaint could not proceed on the basis of the procedural merits of the statutory bar for lateness.

5. The Tribunal is unable to conclude that the new information provided by TA in the current complaint relates to a new ground of complaint. The Tribunal is of the view that the documentary evidence filed by TA with the current complaint that was not before the Tribunal when it examined and decided the first complaint merely constitutes additional evidence in support of the ground raised by TA in the first complaint, namely, that the contract was improperly awarded to Anton Paar. The Tribunal finds that the additional evidence concerning results of tests performed on the rheometer offered by Anton Paar, which TA claims to have received on September 1, 2011, confirmed a known ground of complaint, namely, that the contract was improperly awarded to Anton Paar, since its rheometer cannot meet the mandatory requirement in regard to the instrument motor inertia. As such, this information cannot be considered to form the basis of a new ground of complaint.

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

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

3. *Re Complaint Filed by TA Instruments* (22 June 2011), PR-2011-011 (CITT) [the first complaint].

6. The Tribunal notes that, on June 22, 2011, it determined that, in order for a complaint with respect to that known ground 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, 2011.⁴

7. Since the procurement process that gave rise to the first and current complaints is the same, since the allegation being made in relation to the procurement process is essentially the same and since the relevant parties, that is, TA and PWGSC, are the same, TA's current allegation constitutes an attempt to re-litigate the same complaint.

8. A re-litigation of the first complaint by TA is subject to the doctrine of *res judicata*, on the procedural issue of lateness that resulted in the first complaint not being accepted for inquiry. Pursuant to that doctrine, where a final judicial decision has been pronounced, a party is estopped from disputing the merits of the decision in a re-litigation before the same court.⁵ Thus, although the complaint has not been examined on substantive merits in the first complaint, the ground of complaint invoked by TA in the current complaint has already been examined on procedural merits relating to timeliness of filing or lateness. The Tribunal's prior decision on lateness disposed of the matter, which cannot be the subject of a new complaint on the same ground through the introduction of new evidence relating to substantive merits. In this regard, the Tribunal has previously indicated that the statutory bar on a ground of complaint for lateness, which applied to an original complaint, cannot be cured through the introduction of new evidence, no matter how compelling that evidence may be.⁶

9. Thus, the Tribunal cannot accept that the discovery of new evidence by TA would constitute a new basis for its complaint, such that the Tribunal ought to reset the clock on when a complaint has to be filed with the Tribunal in order to meet the time limits established by section 6 of the *Regulations*. It is important to bear in mind that the issue of timeliness relates to the time of knowledge of the basis of a complaint rather than the time of receipt of the evidence.

10. The Tribunal is aware that a narrow exception to the doctrine of *res judicata* is the discovery of new evidence that could not, by reasonable diligence, have been produced in the first litigation. However, that exception is not applicable here because TA's new evidence, apart from any consideration of whether it could, by reasonable diligence, have been produced in the first complaint, relates to the substantive merits of the complaint, not to the procedural merits upon which the doctrine of *res judicata* rests in this instance.

11. Therefore, the Tribunal is of the view that the doctrine of *res judicata* applies to prevent it from considering the current complaint. More specifically, the Tribunal cannot conduct an inquiry into the present complaint, since it has already made a final determination in the first complaint that TA's ground of complaint was time-barred from being examined by the Tribunal. In light of the foregoing, the Tribunal concludes that it cannot re-examine TA's ground of complaint and considers the matter closed.

12. Finally, the Tribunal notes that, even if the doctrine of *res judicata* did not apply, if it becomes known, after the award of the contract, upon delivery of the product, that the latter did not meet a mandatory requirement or that the winning bidder failed to abide by the terms of a resulting contract clause, the issue may then become one of contract administration or contract performance and may therefore not fall within the Tribunal's jurisdiction.

4. The first complaint at 3.

5. *Wavel Venture Corp. v. Constantini*, [1997] 4 W.W.R. 194.

6. *Re Complaints Filed by Netgear, Inc.* (16 April 2009), PR-2009-001 to PR-2009-004 (CITT).

DECISION

13. 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