



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2012-017

Headwall Photonics, Inc.

*Decision made  
Tuesday, September 25, 2012*

*Decision issued  
Wednesday, September 26, 2012*

*Reasons issued  
Wednesday, October 10, 2012*

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**

**HEADWALL PHOTONICS, 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.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

The statement of reasons will be issued at a later date.

## 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 filed by Headwall Photonics, Inc. (Headwall) on September 19, 2012, relates to a procurement by the Department of Public Works and Government Services (PWGSC) (Solicitation No. W7701-125134/C) on behalf of Defence Research and Development Canada (DRDC) - Valcartier, an agency of the Department of National Defence, for the provision of one high-performance hyperspectral imaging system operating in the visible and near-infrared radiometer and short-wavelength infra-red radiometer spectral range (between 400 and 2,400 nanometres).

3. Headwall alleges that PWGSC improperly rejected its proposal, on the basis that it was submitted late. As a remedy, Headwall requested the postponement of the contract award, the reversal of the disqualification of its proposal and a direction to DRDC to declare its proposal compliant.

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* states that a potential supplier who 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. 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 will have 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.

7. Subsection 7(1)(c) of the *Regulations* requires that the Tribunal, within five working days after the day on which the complaint is filed, determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of the *North American Free Trade Agreement*,<sup>3</sup> the *Agreement on Internal Trade*,<sup>4</sup> the

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

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

3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*].

*Agreement on Government Procurement*,<sup>5</sup> the *Canada-Chile Free Trade Agreement*,<sup>6</sup> the *Canada-Peru Free Trade Agreement*<sup>7</sup> or the *Canada-Colombia Free Trade Agreement*<sup>8</sup> applies. While the complaint did not specifically indicate which, if any, of the above trade agreements are applicable in this case, the Tribunal notes that, at a minimum, *NAFTA* applies.<sup>9</sup>

8. On June 29, 2012, the solicitation was published on MERX.<sup>10</sup> Three amendments were subsequently made to the solicitation, of which the third was published on July 31, 2012. The deadline for the receipt of bids was August 14, 2012, at 2:00 p.m.

9. On August 13, 2012, Headwall sent its proposal in response to the solicitation from its offices in Massachusetts via FedEx International Priority® (FedEx) delivery services for next day delivery (presumably before 10:00 a.m. on August 14, 2012) at PWGSC's bid receiving office in Quebec, Quebec. At 2:00 p.m. on August 14, 2012, bids closed. At 2:09 p.m. that same day, PWGSC signed for the FedEx package containing Headwall's proposal, and FedEx inputted the package as "Delivered".

10. Between August 14 and 27, 2012, PWGSC declared Headwall's proposal late. On August 27, 2012, Headwall made a formal objection regarding the declaration that its proposal was late in a letter to PWGSC. Headwall alleged that it undertook all steps necessary for its proposal to arrive on time and that the FedEx package was on PWGSC's premises well within the solicitation closing period (i.e. before 2:00 p.m. on August 14, 2012).<sup>11</sup>

11. According to Headwall, the fact that the FedEx package was not signed for until 2:09 p.m. (nine minutes late) could be attributed to any number of circumstances on PWGSC's shipping/receiving end. For instance, Headwall submitted that the FedEx representative may have had to wait for PWGSC's bid receiving attendant to sign for numerous packages arriving at the same time.

12. Headwall reiterated its objection to PWGSC in e-mails dated August 30 and September 13, 2012, and in a letter dated September 12, 2012. Headwall submitted that PWGSC ought to accept its proposal in accordance with the bidder instructions pertaining to "delayed bids" which are found in the bid documents (discussed below). On September 16, 2012, PWGSC responded by re-iterating its decision to the effect that Headwall's proposal was filed late and, therefore, could not be accepted.

13. On September 19, 2012, Headwall filed its complaint with the Tribunal. Accordingly, the complaint was filed within the time limit established in the *Regulations*.

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5. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [AGP].
  6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [CCFTA]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.
  7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [CPFTA].
  8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [CCOFTA].
  9. The AGP, the CCFTA, the CPFTA and the CCOFTA have similar provisions. The AIT does not apply in this case.
  10. Canada's electronic tendering service.
  11. Considering that the time limit for making an objection is 10 working days, the Tribunal accepts that the objection made by Headwall on August 27, 2012, was timely.

14. Article 1010 of the *NAFTA* provides as follows:

**Article 1010: Invitation to Participate**

1. Except as otherwise provided in Article 1016, an entity shall publish an invitation to participate for all procurements in accordance with paragraphs 2, 3 and 5, in the appropriate publication referred to in Annex 1010.1.

2. The invitation to participate shall take the form of a notice of proposed procurement that shall contain the following information:

...

(e) the address to which tenders must be submitted, the final date for receiving tenders and the language or languages in which tenders may be submitted;

...

15. Article 1013(1) of the *NAFTA* provides as follows:

**Article 1013: Tender Documentation**

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h). The documentation shall also include:

(a) the address of the entity to which tenders should be submitted;

...

(d) the closing date and time for receipt of tenders and the length of time during which tenders should be open for acceptance;

...

16. Article 1015(1) of the *NAFTA* provides as follows:

**Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts**

...

2. No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.

...

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

17. In the Tribunal's view, the bid solicitation clearly indicated the date, time and place for the submission of proposals to PWGSC, as well as the consequences of not meeting these requirements.

18. Page 1 of the bid solicitation, as amended, clearly states that the solicitation closes at 2:00 p.m. Eastern Time on August 14, 2012.

19. Part 2 of the bid solicitation, as amended, which is titled “Bidder Instructions”, provides as follows:

**1. Standard Instructions, Clauses and Conditions**

...

Bidders who submit a bid agree to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract.

The **2003 (2012-07-11)** Standard Instructions - Goods or Services - Competitive Requirements, are incorporated by reference into and form part of the bid solicitation.

...

**2. Submission of bids**

Bids must be submitted only to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit by the date, time and place indicated on page 1 of the bid solicitation.

...

20. Part 4 of the bid solicitation, which is titled “Evaluation Procedures and Basis of Selection”, provides as follows:

**2. Basis of Selection**

1. To be declared responsive, a bid must:

- (a) comply with all the requirements of the bid solicitation;

...

21. The aforementioned 2003 Standard Instructions provide as follows:

**05 Submission of Bids**

...

2. It is the Bidder’s responsibility to:

...

- b. prepare its bid in accordance with the instructions contained in the bid solicitation;  
c. submit by closing date and time a complete bid;

...

**06 Late Bids**

PWGSC will return bids delivered after the stipulated bid solicitation closing date and time, unless they qualify as a delayed bid as described below.

**07 Delayed Bids**

1. A bid delivered to the specified bid receiving unit after the closing date and time but before the contract award date may be considered, provided the bidder can prove the delay is due solely to a delay in delivery that can be attributed to the Canada Post Corporation (CPC) (or national equivalent of a foreign country). Purolator Inc. is not considered to be part of CPC for the purposes of delayed bids. The only pieces of evidence relating to a delay in the CPC system that are acceptable to PWGSC are:

- a. a CPC cancellation date stamp; or  
b. a CPC Priority Courier bill of lading; or

c. a CPC Xpresspost label

that clearly indicates that the bid was mailed before the bid closing date.

22. Headwall does not dispute the fact that its proposal was formally received after the bid closing time of 2:00 p.m. on August 14, 2012. Given these circumstances, and in accordance with the terms of the bid solicitation, the Tribunal is of the view that PWGSC had no choice but to reject Headwall's proposal. This view is consistent with previous Tribunal decisions in relation to cases where bids received after the deadline for the receipt of bids were rejected.<sup>12</sup> Where the solicitation is clear in respect of the date and time by which bid proposals have to be submitted, the bids will be considered to have arrived at the time when they are received.

23. No evidence was presented with the complaint to support Headwall's assertion that the submission of its proposal was delayed due to circumstances somehow attributable to PWGSC's shipping/receiving department or personnel. Neither the waybill nor the shipment travel history indicates that the package was on PWGSC's premises before 2 p.m., as claimed by Headwall. No statement, document or affidavit emanating from either FedEx or the driver himself was presented to support the claim of logistical difficulties. On the contrary, the courier's travel shipment history clearly indicates that the package was "delivered" (FedEx's own term) at 2:09 p.m.

24. The Tribunal notes that, in accordance with Article 1015(2) of *NAFTA*, the 2003 Standard Instructions allow for the acceptance of a delayed bid, at PWGSC's discretion, in cases where the bidder has dealt with CPC, or a national equivalent of a foreign country. The Tribunal finds that, since FedEx is neither affiliated with CPC nor a national equivalent of a foreign country, this exception therefore does not apply in the present case.

## DECISION

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

Jason W. Downey

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Jason W. Downey  
Presiding Member

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12. *Re Complaint Filed by Corbel Management Corp.* (25 May 2009), PR-2009-009 (CITT); *Re Complaint Filed by GHK Group* (4 September 2007), PR-2007-031 (CITT); *Re Complaint Filed by Promaxis Systems Inc.* (11 January 2006), PR-2005-045 (CITT).