



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-030

Todd Dunnett Enterprises

*Decision made
Thursday, December 6, 2012*

*Decision issued
Monday, December 10, 2012*

*Reasons issued
Friday, December 14, 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

TODD DUNNETT ENTERPRISES

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.

Stephen A. Leach

Stephen A. Leach
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*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 by the Department of Public Works and Government Services (PWGSC) (Solicitation No. E60HN-12SHRD/A) for the purchase of the various types of secure shredders, namely, Type II, Type II (level 6), Type IIIA and Type IIIB, for all federal departments and agencies of the Government of Canada.

3. Todd Dunnett Enterprises (TDE) alleged that the Request for a Supply Arrangement (RFSA) prevents it and other resellers of shredders from competing on an equal footing with rival distributors. TDE claimed that, in the past, distributors did not sell directly to the Government and relied on local resellers to generate sales in that market. As a remedy, TDE requested that the RFSA be cancelled and that a new RFSA be issued to ensure fair competition between potential suppliers without undermining the existing dealer network.

4. On October 23, 2012, the solicitation was posted on MERX.³ Three amendments were subsequently made to the solicitation, of which the third was published on November 21, 2012. The deadline for the receipt of bids was December 3, 2012.

5. According to the complaint, TDE sent a letter to PWGSC on September 16, 2012, and made an objection by e-mail to PWGSC on October 29, 2012.

6. TDE filed its complaint with the Tribunal on December 3, 2012. On December 4, 2012, the Tribunal wrote to TDE requesting a copy of the October 29, 2012, letter to PWGSC and a copy of PWGSC's response.

7. On December 4, 2012, TDE wrote to the Tribunal advising it that the October 29, 2012, objection letter had been sent to itself instead of PWGSC by mistake and that this letter was actually only sent to PWGSC on December 3, 2012. A copy of this objection letter was attached to TDE's correspondence of December 4, 2012, for the Tribunal's consideration.

8. On the same day, TDE forwarded to the Tribunal a copy of an e-mail dated October 26, 2012, between TDE and the Office of Small and Medium Enterprises of PWGSC, in which TDE raised its concerns regarding the RFSA.

9. 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

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

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

3. Canada's electronic tendering service.

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.”

10. 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.

11. Where 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.

12. The Tribunal is satisfied that TDE made its objection to PWGSC at least once during the time frame provided for at subsection 6(2) of the *Regulations*, i.e. before November 6, 2012, or within 10 working days after the issuance of the solicitation. This was done through TDE’s October 26, 2012, e-mail to the Office of Small and Medium Enterprises of PWGSC.

13. In this regard, the fact that TDE did not make its objection directly to the supply arrangement authority or contact person identified in the RFSA is not of prime importance to the Tribunal. This finding reflects a decision of the Federal Court of Appeal that the Tribunal should not be formalistic in determining what constitutes an objection, especially when a complainant is not represented by counsel.⁴ What is important for the Tribunal’s purposes is that TDE made an objection known to the government institution involved in the procurement process in a timely manner.

14. However, the Tribunal finds that, because TDE has not received a final response to its objection from PWGSC, it has not yet received a denial of relief with respect to its alleged ground of complaint, as contemplated by subsection 6(2) of the *Regulations*. Indeed, it is not clear to the Tribunal when the relevant authorities at PWGSC were made aware of TDE’s objection with respect to the procurement process at issue. The Tribunal therefore finds that TDE’s complaint was filed prematurely.

15. The Tribunal’s decision does not however preclude TDE from filing a new complaint when PWGSC responds to its objection or fails to do so within a reasonable amount of time. In the event that TDE does file a new complaint, it must do so within the time limits specified in the *Regulations*.

DECISION

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

Stephen A. Leach
Stephen A. Leach
Presiding Member

4. *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*, 2005 FCA 177 (CanLII).