



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2013-004

All Canadian Courier Corp.

*Decision made  
Tuesday, June 11, 2013*

*Decision issued  
Thursday, June 13, 2013*

*Reasons issued  
Thursday, June 27, 2013*

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**

**ALL CANADIAN COURIER CORP.**

**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.

### SUMMARY OF THE COMPLAINT

2. The complaint relates to a procurement (Solicitation No. E60LM-120020/A) (Solicitation A) by the Department of Public Works and Government Services (PWGSC), on behalf of various departments, agencies and Crown corporations, seeking proposals to issue standing offer for the provision of courier and freight services from one city to another in Canada and worldwide, including locations within Comprehensive Land Claims Settlement Areas.<sup>3</sup>

3. All Canadian Courier Corp. (All Canadian) alleged that PWGSC unfairly disqualified its bid. Specifically, All Canadian acknowledged that it submitted its bid by mistake in relation to another procurement. That other procurement, i.e. Solicitation No. E60LM-120020/B (Solicitation B), was a set-aside for aboriginal businesses to bid for the provision of courier and freight services similar to Solicitation A. All Canadian inadvertently bid on Solicitation B instead of Solicitation A because it downloaded the wrong solicitation document. Despite this, it is of the view that PWGSC should have allowed it to rectify its mistake and allowed All Canadian to be issued a standing offer under Solicitation A. All Canadian argued that this would be fair because PWGSC knew that it was not an aboriginal business.

4. As a remedy, All Canadian requested that it be added to the suppliers' list under Solicitation A.

### BACKGROUND TO THE COMPLAINT

5. On January 25, 2013, two similar Requests for a Standing Offer (RFSOs), i.e. Solicitation A and Solicitation B, were published on MERX for the provision of courier and freight services. Solicitation A was open to all suppliers, whereas Solicitation B was open to aboriginal businesses only.

6. The RFSOs closed on March 11, 2013. All Canadian submitted a bid on time under Solicitation B.

7. On April 8, 2013, PWGSC wrote to All Canadian asking to confirm that it was an aboriginal business. On the same day, All Canadian responded that it was not.

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

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

3. This information relating to Solicitation A comes from amendment No. 008 to that solicitation that was provided with the complaint. It should be noted that the complaint did not include a copy of Solicitation A, but only some of its amendments (Nos. 002, 003, 007, 008 and 009). This had no effect in the context of the complaint since it was not essential for the Tribunal to review all such documentation relating to Solicitation A in order to make the present determination. Only a copy of Solicitation No. E60LM-120020/B and other related documents were provided with the complaint.

8. On April 30, 2013, PWGSC wrote to All Canadian advising that its bid was not further considered because All Canadian was not an aboriginal business. Further e-mails were exchanged on the same day between All Canadian and PWGSC.
9. On May 1, 2013, All Canadian was told by PWGSC, during a telephone conversation, that it would not re-consider its decision.
10. On May 3, 2013, All Canadian requested a meeting with PWGSC to discuss the matter further.
11. On May 15, 2013, All Canadian met with PWGSC. PWGSC stated that it would review the matter further.
12. On May 31, 2013, PWGSC wrote to All Canadian. PWGSC stated that it would not issue a standing offer to All Canadian.
13. On June 7, 2013, All Canadian filed a complaint with the Tribunal. Additional documents related to the complaint were received on June 11, 2013.

### TRIBUNAL'S ANALYSIS

14. Upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether it meets certain conditions before conducting an inquiry. The first condition is that the complaint be filed within the time limits prescribed by section 6 of the *Regulations*.
15. 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."
16. 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."
17. 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. Thus, in order to determine whether the complaint was filed in a timely manner, the Tribunal must determine whether All Canadian made an objection with respect to its ground of complaint.
18. The complaint indicates that All Canadian made an objection to PWGSC on May 1, 2013. The complaint contains no document dated May 1, 2013. However, information contained in the complaint also indicates that All Canadian spoke with PWGSC via telephone on May 1, 2013, as well as on May 3, 2013, and at a meeting on May 15, 2013. All Canadian indicated that it first complained to PWGSC on May 1, 2013. For the purpose of subsection 6(2) of the *Regulations*, the Tribunal accepts that All Canadian made its objection to PWGSC on May 1, 2013.
19. At the end of the meeting between the parties held on May 15, 2013, PWGSC indicated that it would take All Canadian's position under advisement. For the purpose of subsection 6(2) of the

*Regulations*, it is on May 31, 2013, that PWGSC denied All Canadian the relief that it was requesting by indicating that it would not issue a standing offer to All Canadian.

20. The objection made by All Canadian and the complaint that it made to the Tribunal following denial of relief were timely.

21. Having found that the complaint was filed in a timely manner, the Tribunal must assess whether the complaint meets the conditions specified in subsection 7(1) of the *Regulations* before deciding to initiate an inquiry. Specifically, paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>4</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>5</sup> the *Agreement on Government Procurement*,<sup>6</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*,<sup>7</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,<sup>8</sup> Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>9</sup> or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*<sup>10</sup> applies. In this case, all the foregoing trade agreements apply.

22. Article 506(6) of the *AIT* requires that solicitation documents “. . . clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

23. Article 1015(4)(a) of *NAFTA* provides as follows: “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . .” In turn, Article 1015(4)(d) provides as follows: “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”. The other trade agreements have similar obligations.

24. The Tribunal finds that there is no reasonable indication of a breach of the trade agreements in this matter.

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4. *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*].

5. 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*].

6. 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)>.

7. *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). Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

8. *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).

9. *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).

10. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

25. All Canadian argued that, even though it bid on the wrong solicitation, PWGSC unfairly disqualified its bid for consideration under Solicitation A because of the following:

- its bid on Solicitation B complied with all criteria of Solicitation A;
- PWGSC knew at all times that All Canadian was not an aboriginal business;
- PWGSC did not advise All Canadian that it may have downloaded the wrong document in error (All Canadian stated that PWGSC has access to which companies have downloaded bid documents); and
- PWGSC is supposed to promote competition and encourage companies to bid on government opportunities, but PWGSC's decision in this matter runs contrary to that principle.

26. Very clearly, PWGSC did not err in this matter. To be sure, All Canadian made a mistake—it bid on the wrong procurement. All Canadian must assume the consequences of that mistake. PWGSC was under no obligation to allow All Canadian to apply the bid that it made in response to Solicitation B for the purposes of Solicitation A. Furthermore, the deadline for submission of bids on Solicitation A had passed by the time All Canadian discovered its mistake.

27. When responding to a solicitation, a bidder has the onus to demonstrate that it meets all the mandatory requirements of the procurement,<sup>11</sup> including the requirement to submit a bid no later than a specified closing date and time. There is no indication that PWGSC did anything to prevent All Canadian from submitting a bid under Solicitation A.

28. Moreover, the Tribunal recalls that bidders must treat each solicitation independently and should govern themselves according to the express terms contained in each specific solicitation.<sup>12</sup>

29. The Tribunal observes that Part 1 of the general information for Solicitation B specifically states that the requirement was a set-aside for Aboriginal suppliers in accordance with the Procurement Strategy for Aboriginal Business. This fact was reiterated in amendment No. 002 to both Solicitation A and Solicitation B, as well as in amendment No. 003 to Solicitation A. All Canadian had provided signed confirmation to acknowledge receipt of these amendments.

30. Finally, the Tribunal has previously stated that it is incumbent upon bidders to exercise due diligence in the preparation and delivery of their proposals and that this responsibility cannot be transferred to the Government.<sup>13</sup> Accordingly, while the Tribunal appreciates how unfortunate this mistake has been,

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11. See, for example, *P.J.W. van Zyl and Sons Ltd.* (5 October 2012), PR-2012-019 (CITT) [*van Zyl*] at para. 8; *Kanter Marine Inc.* (21 February 2012), PR-2011-054 (CITT) at para. 28; *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34; *PA Consulting Group* (20 September 2011) PR-2011-030 (CITT) [*PA Consulting*] at para. 13; *Cauffiel Technologies Corporation* (5 April 2011), PR-2010-094 (CITT) [*Cauffiel Technologies*] at para. 11; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) [*Integrated Procurement Technologies*] at para. 13; *Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT) at para. 23.

12. See, for example, *van Zyl* at para. 8; *APM Diesel 1992 Inc.* (15 February 2012), PR-2011-052 (CITT) at para. 20; *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *The Spallumcheen Band* (26 April 2001), PR-2000-042 (CITT).

13. See, for example, *PA Consulting* at para. 13; *BRC Business Enterprises Ltd.* (27 September 2010), PR-2010-012 (CITT) at para. 51; *Cauffiel Technologies* at para. 11; *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT) at para. 19; *Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT) at paras. 11-12; *Integrated Procurement Technologies* at para. 13; *GHK Group* (4 September 2007), PR-2007-031 (CITT).

All Canadian bears ultimate sole responsibility to exercise proper due diligence in the submission of its offers.

## **DECISION**

31. 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 \_\_\_\_\_

Jason W. Downey  
Presiding Member