



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-009

ADR Education

*Decision made
Tuesday, July 16, 2013*

*Decision issued
Thursday, July 18, 2013*

*Reasons issued
Wednesday, July 31, 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

ADR EDUCATION

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.

Ann Penner
Ann Penner
Presiding Member

Gillian Burnett
Gillian Burnett
Acting 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.

SUMMARY OF THE COMPLAINT

2. The complaint relates to a Request for a Standing Offer (RFSO) (Solicitation No. E60ZG-090005/C) by the Department of Public Works and Government Services (PWGSC) for the provision of alternative dispute resolution services. The RFSO stated PWGSC's intention to authorize multiple standing offers in various locations across Canada as a result of this solicitation.

3. ADR Education (ADR) complained that PWGSC evaluated its proposal improperly on two grounds. First, ADR alleged that a change to the bid closing date affected the degree to which its projects complied with some of the mandatory requirements of the RFSO. Specifically, ADR complained that its project No. 10 was improperly deemed non-compliant on the basis that it had neither started nor was completed within five years of a certain revised bid closing date.

4. Second, ADR alleged that the guidelines in the RFSO about what constituted a "group process" were unclear. Furthermore, ADR claimed that inconsistent and mistaken evaluation criteria were applied. As a result, ADR complained that the evaluation of its proposal was tainted, especially in regard to project Nos. 8 and 9, both of which were considered non-compliant because they only related to group process examples and not to conflicting situations.

5. Above and beyond its two grounds of complaint, ADR expressed dissatisfaction with the way in which PWGSC allegedly handled its concerns about the evaluation of its proposal prior to the date on which it filed its complaint with the Tribunal.³

6. As a remedy, ADR requested that its proposal be considered eligible and compliant under Stream 3 of the RFSO and that it be issued a standing offer for Stream 3. ADR also requested that it be awarded costs for filing its complaint.

BACKGROUND TO THE COMPLAINT

7. PWGSC published the RFSO on MERX⁴ on November 8, 2011.⁵ The RFSO was amended 14 times during the bid solicitation period. Most notably for the complaint, the bid closing date was changed and extended 3 times, from November 8, 2011, to January 13, 2012.⁶

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

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

3. See the detailed statement of facts and arguments at attachment 10 to the complaint.

4. Canada's electronic tendering service.

5. As specified in the Notice of Proposed Procurement; however, the RFSO is dated November 7, 2011.

6. See amendment No. 1 (extending the bid closing date from November 8 to December 19, 2011), amendment No. 6 (extending the bid closing date from December 19, 2011, to January 6, 2012), amendment No. 7 (reiterating the extension of the bid closing date from December 19, 2011, to January 6, 2012) and amendment No. 13 (extending the bid closing date from January 6 to 13, 2012) to the RFSO at attachment 4 to the complaint.

8. ADR submitted its proposal by mail on December 13, 2011, to meet the bid closing date that was in effect at that time (i.e. December 19, 2011).⁷ The next day, ADR learned that PWGSC issued amendment Nos. 5 and 6 to the RFSO, the latter of which extended the bid closing date from December 19, 2011, to January 6, 2012. As a result, ADR wrote to PWGSC on December 14, 2011, and expressed its concerns about the change to the bid closing date and PWGSC's answer "A.2" to question "Q.2" in amendment No. 5.⁸

9. On April 23, 2013, PWGSC informed ADR that it had been selected for issuance of a standing offer for Streams 2, 4 and 5 but not for Stream 3 because its proposal did not comply with all the mandatory requirements, including "MT-3.2" and "MT-3.4".

10. ADR submitted that it objected to PWGSC by telephone on April 30, 2013. On the basis of the information provided with the complaint, ADR seems to have expected that PWGSC might reconsider its evaluation of ADR's proposal for Stream 3, particularly since PWGSC's Standing Offer Authority (SOA) supposedly suggested that she would look into ADR's concerns. However, no evidence was provided in the complaint to confirm what either party said, or committed to, during the telephone conversation.

11. On May 9, 2013, the SOA sent an e-mail to ADR and recalled what had been discussed during the previous telephone conversation. The SOA reiterated why ADR's project Nos. 8, 9 and 10 were deemed non-compliant with the mandatory requirements of Stream 3. The SOA also informed ADR of its right of recourse to the Tribunal.

12. On May 9, 2013, ADR also sent an e-mail to the SOA to follow up on the previous telephone conversation and to ask if PWGSC had indeed looked into its complaint. ADR requested a "written and dated response" from the SOA confirming specifically that "I [ADR] have contacted you with my concerns and you are or are not willing to address them."⁹ ADR also reiterated its view about the compliance of its proposal. It indicated in its complaint to the Tribunal that it considered this e-mail to be another objection made to PWGSC.

13. On May 10, 2013, ADR had another conversation with the SOA to ask for clarification of why its proposal was rejected.¹⁰ ADR said that it wanted clarification for the purpose of filing a complaint with the Tribunal. According to ADR, the SOA indicated that she would speak with her manager and provide ADR with an "official"¹¹ written clarification.

14. On May 27, 2013, ADR sent an e-mail to the SOA to remind her that it was still waiting for the "promised"¹² response. ADR indicated in its complaint that it considered this e-mail to be another objection made to PWGSC.

7. The Tribunal notes that the specified date of the original bid submission cannot be found in the documents submitted with the complaint; ADR's bid documentation was only provided in part. There is also no information in the complaint confirming an official date of a revised bid that may have been submitted in response to the RFSO. However, these matters do not affect the present determination.

8. The Tribunal notes that amendment No. 7 to the RFSO provided that PWGSC's answer "A.2" to question "Q.2" was replaced and that the criteria at issue remained the same as previously stated (i.e. before the issuance of amendment No. 5).

9. See e-mail from ADR to the SOA dated May 9, 2013 at 12:06 p.m. at attachment 8 to the complaint.

10. This is based on the information contained in the detailed statement of facts and arguments at attachment 10 to the complaint.

11. As mentioned in the detailed statement of facts and arguments at attachment 10 to the complaint.

12. *Ibid.*

15. On May 28, 2013, the SOA responded to ADR that she would discuss the matter with her manager.
16. On June 7, 2013, ADR wrote to the SOA to inquire as to whether a decision had been made with regard to the matter.
17. On June 19, 2013, the SOA sent an e-mail to ADR stating that, after review of ADR's documentation and related projects, nothing justified a change to PWGSC's decision of April 23, 2013.
18. Further e-mails were exchanged between ADR and the SOA on June 19, 2013, showing that ADR still expected a letter from the SOA's manager as "promised". An e-mail on the record appears to indicate that the SOA did not share that view. Two other e-mails on the record show that ADR repeatedly requested a written response from the SOA's manager for the purposes of filing a complaint with the Tribunal and to "clos[e] the loop".
19. On June 21, 2013, the SOA sent a letter to ADR reiterating that PWGSC would not revise its decision of April 23, 2013.
20. On July 12, 2013, ADR filed its complaint with the Tribunal.

ANALYSIS

21. Upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*,¹³ the Tribunal must decide whether it meets certain conditions before conducting an inquiry. The first condition is that the complaint must be filed within the time limits prescribed by section 6 of the *Regulations*.
22. 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."
23. 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."
24. 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 ADR made an objection with respect to its ground of complaint.
25. ADR made objections to PWGSC on three occasions: by telephone on April 30, 2013, by e-mail sent to the SOA on May 9, 2013, and by e-mail sent to the SOA on May 27, 2013. For the purpose of subsection 6(2) of the *Regulations*, the Tribunal is satisfied that ADR made its objection to PWGSC on April 30, 2013. Although the matter of making an objection to PWGSC is not at issue in this case, the Tribunal notes, as it has held in the past, that making more than one objection in no way affects the relevant dates for calculating the time limits set out in subsection 6(2) of the *Regulations*.

13. Subsection 30.11(2) of the *CITT Act* specifies the applicable requirements concerning the contents of any complaint filed with the Tribunal pursuant to subsection 30.11(1).

26. In order for the Tribunal to find that ADR's complaint was filed in a timely manner in accordance with subsection 6(2) of the *Regulations*, the Tribunal will now consider whether the following two conditions are met: (1) ADR must have filed its objection to PWGSC within 10 working days after the day on which it became aware, or reasonably should have become aware, of its ground of complaint; and (2) the complaint must have been filed with the Tribunal within 10 working days of ADR having received the denial of relief from PWGSC.

27. With respect to the first condition, the Tribunal considers that ADR became aware, or reasonably should have become aware, of its ground of complaint on April 23, 2013, when PWGSC informed it of the results of the evaluation of its proposal. In accordance with subsection 6(2) of the *Regulations*, the Tribunal therefore finds that ADR's objection was timely.

28. With respect to the second condition, the Tribunal considers that ADR had actual or constructive knowledge of the denial of relief on June 19, 2013, when PWGSC responded by e-mail to ADR's objection and reiterated its decision of April 23, 2013. The Tribunal notes that the follow-up letter from PWGSC of June 21, 2013, essentially repeated what was communicated by e-mail on June 19, 2013, and, therefore, does not constitute the denial of relief for the purpose of subsection 6(2) of the *Regulations*.

29. As ADR received the denial of relief from PWGSC on June 19, 2013, and the complaint was filed with the Tribunal on July 12, 2013, the Tribunal therefore finds that the complaint was not filed within the time limit prescribed by subsection 6(2) of the *Regulations*. Subsection 6(2) makes it clear that a complainant has 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief. As the Tribunal has held in the past, complainants cannot take a wait-and-see approach; they must file a complaint with the Tribunal within 10 working days of receiving the first indication that they have been denied the relief that they are seeking.¹⁴

30. In this case, ADR should have filed its complaint with the Tribunal no later than on the applicable statutory deadline of July 4, 2013. The Tribunal notes that, even if it had been possible to consider PWGSC's letter of June 21, 2013, as the date on which ADR received the denial of relief from PWGSC, ADR's complaint would still not have been timely.

31. The Tribunal acknowledges that it may have been very difficult for ADR to ascertain the time frame within which it had to file a complaint with the Tribunal and that this may have contributed to its complaint being filed beyond the prescribed time frame. Indeed, the main body of the RFSO contains no indication of recourses for bidders, nor does it provide any indication of the very tight time frame applicable for filing a complaint with the Tribunal.

32. To be sure, bidders are ultimately responsible for apprising themselves of how and when to engage the bid challenge mechanism. The Tribunal notes that, in this case, this information was available to bidders that would have dug deep enough into various documents incorporated by reference into the RFSO. Indeed, at least some information regarding the possibility of filing a complaint with the Tribunal can be found by beginning to look at the "2006 (2011-05-16) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements" [Standard Instructions].¹⁵

33. Nevertheless, the Standard Instructions offer no direct information on bidders' recourse to the Tribunal and are overly complex for those who may not be as familiar with the procurement process as

14. See *Weir Canada Inc.* (6 September 2012), PR-2012-014 (CITT) at paras. 14-16.

15. Incorporated by reference, as specified at page 7 of the RFSO under Part 2, section 1.

PWGSC. Only the Code of Conduct for Procurement¹⁶ incorporated by reference, in the way in which it read during the Tribunal's review of this case, as referred to in passing in subsection 01(1) of the Standard Instructions, contains a section titled "Vendor Complaints and Procedural Safeguards", where perfunctory information regarding recourse to the Tribunal is available. That information makes no reference whatsoever to the time frame within which a complaint must be filed with the Tribunal in order to be determined timely.

34. Therefore, the Tribunal would encourage PWSGC to consider how it could better inform bidders on recourse to the Tribunal and, particularly, on how it could increase awareness of the time frame to file a complaint with the Tribunal in an effort to prevent a complaint from not being accepted for inquiry on the basis of timeliness alone. For example, PWGSC should consider the inclusion of the following paragraph in the main body of its solicitations, just as it does when informing bidders of the possibility of requesting a debriefing, as well as in all letters advising bidders when they are not successful:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) **within 10 working days** from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [PWGSC]; if [PWGSC] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal's Web site (www.citt-tcce.gc.ca) or by contacting the Secretary of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

35. Having found that ADR's complaint is time-barred by application of section 6 of the *Regulations*, the Tribunal does not need to examine the other conditions applicable when deciding whether to conduct an inquiry into a complaint filed with the Tribunal.

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

DECISION

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

Ann Penner
Ann Penner
Presiding Member

16. See <http://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/index-eng.html>.