



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-010

Flag Connection Inc.

*Decision made
Tuesday, July 30, 2013*

*Decision issued
Tuesday, July 30, 2013*

*Reasons issued
Thursday, August 1, 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

FLAG CONNECTION 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.

Serge Fréchette
Serge Fréchette
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.

SUMMARY OF THE COMPLAINT

2. The complaint relates to a procurement (Solicitation No. W8486-136717/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply of casket flags and wind bands.

3. While it is not clear from the submissions received from Flag Connection Inc. (FCI), it appears that FCI contends that PWGSC's contracting authority worked alongside an unnamed manufacturer to devise new specifications for the Request for Proposal (RFP), which were not in accordance with the standards of the Canadian General Standards Board (CGSB) relating to the manufacture of the national flag of Canada, as set out in the *National Flag of Canada Manufacturing Standards Act*.³ FCI appears to allege that PWGSC's actions, in working with a manufacturer in drafting new specifications, combined with the possibility that this manufacturer was subsequently awarded the contract, constitute an unfair bidding process.

4. FCI also alleges that DND knowingly allowed, and continues to allow, the use of non-compliant flags for repatriation ceremonies. FCI argued that the flags do not comply with the standards of the CGSB. More specifically, FCI contended that the RFP is in breach of the *FCMSA* because the specifications of the flags to be supplied under the RFP deviate from the three existing CGSB standards for flags (those that pertain to "indoor use", "outdoor use" and "one-event-only use"), to the point of diluting and going outside the scope of these standards.

5. In support of its complaint, FCI filed an e-mail that it received from PWGSC on July 16, 2013, informing it that it would not be awarded a contract, as it was not the lowest technical compliant bidder. In the same e-mail, PWGSC also informed FCI that a contract had been awarded to Scythes Inc.

6. The Tribunal has already received a complaint filed by FCI in relation to this same procurement and in relation to the issue of the alleged improper use of non-compliant flags for repatriation ceremonies.⁴

BACKGROUND

7. The RFP was issued on March 6, 2013, and was amended by amendment No. 001 dated March 26, 2013, amendment No. 002 dated April 3, 2013, and amendment No. 003 dated April 15, 2013. The RFP closed on April 18, 2013.

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

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

3. R.S.C. 1985, c. N-9 [*FCMSA*].

4. *Flag Connection Inc.* (7 May 2013), PR-2013-003 (CITT) [the previous complaint].

8. On March 22, 2013, FCI requested that PWGSC terminate the existing solicitation and re-evaluate the requirements so that the specifications in the RFP could be brought into compliance with the CBSB standards and existing DND guidelines.
9. On March 26, 2013, PWGSC wrote to DND requesting clarifications on existing policies and regulations, and previously used specifications.
10. On April 2, 2013, PWGSC forwarded to FCI the response that it received from DND, in which DND essentially stands by the appropriateness of the specifications that it included in the RFP.
11. On April 2, 2013, FCI wrote to PWGSC in order to ask for further clarifications, to request an extension of the bid closing date and to reiterate the objections that it had previously made.
12. On April 11, 2013, PWGSC replied to FCI. PWGSC informed FCI that the bid closing date had been extended to April 18, 2013, and that the DND specifications in the RFP would not be amended.
13. On April 11, 2013, FCI wrote to PWGSC to again reiterate the objections that it had previously made.
14. On July 16, 2013, PWGSC informed FCI that it would not be awarded a contract, as it was not the lowest technical compliant bidder. PWGSC also informed FCI that a contract had been awarded to Scythes Inc.
15. On July 25, 2013, FCI filed its complaint with the Tribunal.

ANALYSIS OF THE COMPLAINT

16. 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*.
17. 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."
18. 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."
19. 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 FCI made an objection with respect to its ground of complaint.

Alleged Unfair Bidding Practice

20. In order for a complaint to be accepted for inquiry, the complainant bears the onus of establishing that the complaint was filed in a timely manner. With regards to the allegations of unfair bidding practices, FCI simply stated the following:

The Repatriations contractor acknowledged at a Heritage meeting in 2012 that he had worked with a manufacturer as he did not like the existing Casket Flag specifications.⁵

21. From this passage, it could be inferred that FCI first learned of the alleged collaboration between PWGSC and an unnamed manufacturer at the Heritage meeting of 2012. On the basis of such a reading, FCI's current complaint is time-barred, as the complaint was not filed with the Tribunal until July 25, 2013.

22. In any case, FCI has not discharged its onus of establishing that the complaint was filed in a timely manner. FCI did not provide any documentary evidence regarding this ground of complaint or its awareness of it. As such, the time at which FCI became aware of this possible ground of complaint, as well as whether or not any objection relating to it was made to PWGSC, remains entirely speculative. Therefore, the Tribunal is unable to conclude that this ground of the complaint was filed within the time limits prescribed in the *Regulations*, and it will not conduct an inquiry on this ground of complaint.

23. Notwithstanding the issue of timeliness, the Tribunal has also decided not to conduct an inquiry into this ground of complaint because the allegations made by FCI are unsupported by any factual evidence. Beyond an assertion made in the complaint filed with the Tribunal, FCI has not provided any documentation to substantiate its claim that an unknown manufacturer collaborated with PWGSC to draft the specifications to be used in the RFP. Moreover, it is not at all clear whether the manufacturer alleged to have worked with PWGSC to draft the specifications used in the RFP was awarded a contract or even submitted a bid in response to the solicitation.

24. The Tribunal notes that, upon receipt of the complaint, it requested that FCI file any and all documentation in support of its submissions. Despite this request, however, FCI did not provide any evidence to support the allegations discussed above. As a result, the Tribunal finds that this ground of complaint is purely speculative, and it will therefore not conduct an inquiry in this respect.

Alleged Breach of CGSB Standards

25. With regards to FCI's complaint that the specifications in the RFP are not in accordance with the CGSB standards, the Tribunal notes that this is the same allegation that FCI submitted in the previous complaint. The previous complaint concerned not only the same allegation but also the same RFP as the one in this case. In fact, the Tribunal has determined that the current allegation regarding an alleged breach of the CGSB standards is identical to the allegation in the previous complaint, into which the Tribunal decided not to conduct an inquiry.

26. The principle of *res judicata* states the following:

... 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.⁶

5. FCI's letter of July 25, 2013, to the Tribunal.

6. See *TA Instruments* (15 September 2011), PR-2011-029 (CITT) at para. 8.

27. In other words, since FCI has already brought a complaint before the Tribunal alleging a breach of the CGSB standards for this RFP, FCI may not bring an identical complaint back to the Tribunal in hopes of receiving a different result. This issue was decided upon by the Tribunal in the previous complaint, and it may not be reargued in the present case.

28. While the Tribunal will not re-examine this ground of complaint since the doctrine of *res judicata* applies, the Tribunal wishes to reiterate that, with respect to procurement issues, the Tribunal's authority is limited. The Tribunal's mandate is to determine whether a procurement has been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,⁷ Chapter Five of the *Agreement on Internal Trade*,⁸ the *Agreement on Government Procurement*,⁹ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,¹⁰ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,¹¹ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*¹² or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹³ applies.

29. FCI's complaint that PWGSC breached the CGSB standards revolves around an alleged breach of the *FCMSA*. The *FCMSA* is not part of any of the trade agreements listed above, but is instead an act of Parliament. The Tribunal's mandate does not include examining whether government actions comply with an act of Parliament. The Tribunal therefore repeats that a ground of complaint based on an alleged breach of the *FCMSA* is outside the Tribunal's authority.

30. In light of the foregoing, the Tribunal concludes that it cannot re-examine FCI's ground of complaint and considers the matter closed.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

7. *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).

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

10. *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.

11. *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).

12. *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).

13. *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).