



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-051

MasterBedroom Inc.

*Decision made
Friday, January 11, 2019*

*Decision issued
Monday, January 14, 2019*

*Reasons issued
Wednesday, January 23, 2019*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

BY

MASTERBEDROOM 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.

Randolph W. Heggart

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Presiding Member

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 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 by MasterBedroom Inc. (MasterBedroom) relates to a Request for a Standing Offer (RFSO) (Solicitation No. B8710-160020/A) by the Department of Public Works and Government Services (PWGSC) for household furniture on behalf of Immigration, Refugee and Citizenship Canada (IRCC) for the Resettlement Assistance Program.

[3] MasterBedroom alleges that, with respect to the solicitation, contrary to the RFSO, PWGSC did not conduct a technical evaluation and that the bids should not have been evaluated by a single evaluator.

BACKGROUND

[4] On June 13, 2017, PWGSC informed MasterBedroom that it would not be awarded the Standing Offer (SO) for the province of Ontario (Toronto area). Although MasterBedroom's bid was responsive to the mandatory requirements, PWGSC advised that the SO would be awarded to Charley's Furniture, who submitted the lowest-priced bid.

[5] The following day, on June 14, 2017, MasterBedroom responded to PWGSC questioning the results and the delay in announcing the winning bid. Also on June 14, 2017, MasterBedroom submitted an information request under the *Access to Information Act (ATIA)* for information concerning the solicitation.

[6] On June 22, 2017, MasterBedroom filed a complaint with the Tribunal alleging, with respect to the solicitation, that there was an undue delay in evaluating bids for the work in geographical areas for which Charley's Furniture had been found to have the winning bid, and that Charley's Furniture could not have met the mandatory criteria. On June 28, 2017, the Tribunal issued its decision not to accept the complaint for inquiry as it did not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreement. The allegation of misconduct was found to be speculative and unsupported by the evidence submitted with the complaint.³

[7] On October 26, 2017, MasterBedroom corresponded further with PWGSC regarding the solicitation results and whether aspects of the "Technical Criteria" and "Requirements Section" of the RFSO had been met. Additionally, MasterBedroom indicated that call-ups against the SO for the

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. *MasterBedroom Inc.* (28 June 2017), PR-2017-017 (CITT).

Toronto area appeared to be going to a company other than Charley's Furniture. PWGSC responded to MasterBedroom on November 1, 2017, indicating that it had reviewed the information that MasterBedroom had provided and that it had communicated with IRCC with respect to the administration of the call-ups.

[8] On May 4, 2018, PWGSC's Access to Information and Privacy section (PWGSC ATIP) disclosed all accessible documents to MasterBedroom in response to its request under the *ATIA*. Following an exchange of correspondence with the Office of the Information Commissioner of Canada concerning documents allegedly missing from the disclosure, MasterBedroom made a new request on September 13, 2018, for information under the *ATIA* with respect to the solicitation. There were subsequent email exchanges between PWGSC ATIP and MasterBedroom. Starting on November 28, 2018, the correspondence referred to a certain email from the Senior Director of PWGSC's Commercial and Consumers Directorate to PWGSC ATIP and how MasterBedroom could access said email. Furthermore, from the email exchanges on November 29, 2018, MasterBedroom sought from PWGSC ATIP an explanation regarding the allegedly missing information from the original disclosure relating to certain portions of the RFSO.

[9] On November 30, 2018, the Senior Director of the Commercial and Consumers Directorate forwarded to MasterBedroom a copy of his email dated November 15, 2018, to PWGSC ATIP in which he confirmed that there was no technical evaluation and that bidders were required to submit a certification of product conformance to the technical specifications listed in Appendix B (Furniture Description and Specifications) of the RFSO in order to be responsive; the submission of such certification did not constitute a technical evaluation. Furthermore, referring to the evaluation procedures set out in paragraph 4.1(b) of the RFSO, which stated that "[a]n evaluation team composed of representatives of Canada will evaluate the offers", the Senior Director described this statement as "templated language" and that the evaluation was conducted by only one person, the contracting officer. In its correspondence with PWGSC ATIP on December 1, 2018, MasterBedroom confirmed that it had read the email from the Senior Director.

[10] Following several further exchanges with PWGSC ATIP, including clarification of the scope of information requested concerning the solicitation, PWGSC ATIP indicated in its correspondence dated December 7, 2018, which was received stamped by MasterBedroom on December 19, 2018, that there were no records responsive to its request. Moreover, it advised that no technical evaluations were conducted as there were no technical criteria, referring also to the email of the Senior Director dated November 15, 2018, and that the financial evaluation was conducted by a supply specialist only and reviewed by its supervisor.

[11] MasterBedroom submitted its complaint to the Tribunal on December 26, 2018. In reviewing the complaint, the Tribunal noted deficiencies with the supporting documents and requested, on December 28, 2018, that additional information be provided. MasterBedroom submitted the additional information on January 4, 2019.

ANALYSIS

[12] On January 11, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. In this case, the Tribunal has determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. The reasons for that decision are as follows.

[13] 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) 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.”

[14] The *Regulations* make it clear that a complainant has 10 working days from the day on which the basis of the complaint becomes known, or should have been reasonably known, to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within those 10 days, it may afterwards file a complaint with the Tribunal within 10 working days after it gains actual or constructive knowledge of the denial of relief by the government institution.

[15] In its complaint, MasterBedroom claims to have made an objection on *July 13, 2017*, when the award of the SO was announced. The Tribunal finds that, based on the evidence, the award of the SO was announced on June 13, 2017, and that MasterBedroom corresponded with PWGSC in respect of said announcement on June 14, 2017. That said, the Tribunal is of the view that this correspondence does not constitute an objection within the meaning of subsection 6(2) of the *Regulations* as the nature of the issues it raised are distinct from the grounds of complaint specified in the present case, which relate to the alleged omission of an evaluation of technical requirements and the use of a single evaluator.

[16] It is clear, however, that MasterBedroom gained knowledge of its current grounds of complaint on November 30, 2018, when it was sent a copy of the email dated November 15, 2018, between the Senior Director of the Commercial and Consumers Directorate and PWGSC ATIP, which indicated that no technical evaluation had been performed and that only one evaluator had conducted the evaluation. An email dated December 1, 2018, from MasterBedroom to PWGSC ATIP confirmed that it had read the email which articulated the grounds of complaint. The fact that MasterBedroom chose to further pursue a response from PWGSC ATIP with respect to its request for information under the *ATIA* does not negate the application of the timeframe to file a complaint prescribed in subsection 6(1) of the *Regulations*.

[17] Thus, MasterBedroom would have had to file its complaint with the Tribunal by December 14, 2018, at the latest, to comply with subsection 6(1) of the *Regulations*. However, the complaint was not received by the Tribunal until December 26, 2018, and was not considered filed until January 4, 2019, when additional information required to correct the deficiencies in the complaint was received. The complaint was therefore filed outside the time limit established in the *Regulations*.

[18] Accordingly, it is not necessary for the Tribunal to examine whether the other conditions for inquiry have been met. By application of section 6 of the *Regulations*, the Tribunal considers this matter closed.

DECISION

[19] In light of the above, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Randolph W. Heggart

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Presiding Member