



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-035

J.D. Irving, Limited d.b.a. Chandler
Sales

*Decision made and issued
Friday, October 4, 2019*

*Reasons issued
Wednesday, October 16, 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

J.D. IRVING, LIMITED D.B.A. CHANDLER SALES

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.

Peter Burn

Peter Burn

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 (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] This complaint relates to a Request for a Standing Offer (RFSO) (Solicitation No. W0105-20F007/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the purpose of establishing a Regional Individual Standing Offer for the supply and delivery of kitchen and cleaning products to the kitchens of DND at the 5th Canadian Division Support Base Gagetown located in Oromocto, New Brunswick.

[3] The complainant, J.D. Irving, Limited d.b.a. Chandler Sales (Chandler) alleged that PWGSC improperly set aside the standing offer it was initially issued. As a remedy, Chandler requested that it be re-issued the standing offer. It also requested the reimbursement of its complaint costs.

BACKGROUND

[4] On May 31, 2019, PWGSC published the RFSO on Buyandsell.gc.ca, which is the Government of Canada's official procurement information Web site. The original closing date for the solicitation was July 10, 2019. However, amendments No. 3 and 4 extended the closing date to July 23, 2019.

[5] The RFSO was for the issuance of a standing offer valid for a one-year period with the option to renew for an additional one-year period. The financial limitation for all call-ups made against the standing offer was set at \$425,000, excluding taxes.

[6] Annex B to the RFSO ("Basis of Payment") required that offerors provide prices and other information (i.e. size, brand and product code) for 94 different items required by DND. Relevant to this complaint is item No. 3, which is for the supply of mesh caps that are described in the following manner: "Mesh cap Blue Strip by Lapaco Brand only No Substitute".

[7] On August 27, 2019, PWGSC issued a standing offer to Chandler. On the same day, PWGSC sent an email to at least one other offeror informing it that a more favourable offer had been accepted from Chandler. The email noted that individual prices for the items included in the standing offer (i.e. Chandler's unit prices) were attached.

[8] On August 28, 2019, PWGSC emailed Chandler and asked whether the "Polar" brand it had offered for item No. 3 was correct. Chandler promptly replied that this was an error and that the mesh caps it offered were actually the "Lapaco" brand as required by the RFSO. In a further email,

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

² SOR/93-602 [*Regulations*].

Chandler explained that the error was the result of a new assistant filling out the information and it being missed by spot checks. PWGSC responded that it would “change it for this time” and notify DND to be sure that they always receive the Lapaco brand mesh caps.

[9] Later that day, PWGSC sent another email to Chandler advising it that, after an in-depth review of its offer, it had determined that it was not compliant with item No. 3 at the time the solicitation closed as it had offered the Polar brand mesh caps instead of the requested Lapaco brand. It therefore informed Chandler that it would be setting aside its standing offer on the basis of this non-compliance. It added that, as DND’s requirements had changed significantly, and in order to be transparent and fair to all interested suppliers, it would be going back out to tender in the near future with a revised items list.

[10] On August 29, 2019, PWGSC sent an email to what appears to be interested suppliers, including Chandler, informing them that the solicitation had been cancelled and the standing offer set aside, and that a new solicitation would be posted in the near future.

[11] On August 30, 2019, Chandler sent an email to PWGSC stating that it had been supplying Lapaco brand mesh caps to DND for the past five years (as the incumbent supplier) and that Polar, which sells plastic utensils and not mesh caps, was entered by mistake. It indicated that the product code was actually that of the Lapaco mesh caps. It added that setting aside the standing offer for this error seemed “very drastic” and requested that PWGSC review and reconsider its decision.

[12] On September 10, 2019, Chandler requested a meeting with PWGSC regarding the setting aside of its standing offer. The next day, PWGSC responded by indicating that a meeting had been scheduled for September 16, 2019, in Moncton, New Brunswick.

[13] According to Chandler, it was verbally denied any relief by PWGSC on September 16, 2019.

[14] On September 18, 2019, PWGSC sent an email to Chandler asking whether, as discussed during the meeting two days earlier, it was willing to extend its existing standing offer (originally issued in 2017 as part of solicitation No. W0105-17F011) until December 31, 2019.

[15] On September 27, 2019, Chandler filed its complaint with the Tribunal.

ANALYSIS

[16] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry into a complaint if the following conditions are met:

- the complaint has been filed within the prescribed time limits;³
- the complainant is a potential supplier;⁴
- the complaint is in respect of a designated contract;⁵ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁶

³ Section 6 of the *Regulations*.

⁴ Paragraph 7(1)(a) of the *Regulations*.

⁵ Paragraph 7(1)(b) of the *Regulations*.

⁶ Paragraph 7(1)(c) of the *Regulations*.

[17] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into Chandler's complaint on the basis that the information provided does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements, which, in this instance, includes the *Canadian Free Trade Agreement*.⁷

[18] Article 515(4) of the *CFTA* provides that, "[t]o be considered for an award, a tender shall . . . at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation"

[19] Part 4 of the RFSO, "**EVALUATION PROCEDURES AND BASIS OF SELECTION**", provides as follows:

4.1.1 Technical Evaluation

4.1.1.1 Mandatory Technical Criteria

Mandatory Technical Criteria as specified in Annexes A and B.

. . .

4.2.1 Basis of Selection – Multiple Items

An offer must comply with the requirements of the Request for Standing Offers and meet all mandatory technical evaluation criteria to be declared responsive. . . .

[20] Annex A to the RFSO provides as follows:

Suppliers **MUST** ensure **100% compliance with all items listed** in the attached «**List of Products**» at **Annex "B"**. Any deviations from the Product List such as Brand, Product Type, Packaging, Item's Dimensions etc. . . **MUST be approved** by the Standing Offer Authority at Public Services and Procurement Canada (PSPC), **in writing, PRIOR to bid closing**.

[Emphasis in original]

[21] On the basis of the above provisions, it is clear that, in order to be declared responsive, offers could not deviate in any way from the items listed at Annex B of the RFSO. It is equally clear that, when it prepared its offer, Chandler entered the name "Polar" for the brand of mesh caps that were requested at item No. 3, whereas that item explicitly required the "Lapaco" brand of mesh caps. Regardless of whether Chandler's reference to the "Polar" brand was the result of a clerical error and did not, as it claims, reflect its true intentions, it cannot be said that its offer was fully compliant with the mandatory requirements of the solicitation.

[22] In cases of conformance with mandatory requirements, the Tribunal has previously found that the test is one of strict compliance. Failure to meet a mandatory requirement is not a "mere" or minor irregularity.⁸ Furthermore, the Tribunal has often stated that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder

⁷ The Notice of Proposed Procurement published on Buyandsell.gc.ca and section 1.2.1 of the RFSO list all of the applicable trade agreements, which include the *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*]. The Tribunal notes that Chandler only referred to the *CFTA* in its complaint.

⁸ See, for example, *Otec Solutions Inc. v. Department of Foreign Affairs, Trade and Development* (5 October 2016), PR-2016-012 (CITT) at para. 30; *Neopost Canada Limited v. Canada Revenue Agency* (29 December 2015), PR-2015-033 (CITT) at para. 23.

and that it is therefore incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential respects.⁹

[23] The Tribunal is of the view that the foregoing provides a sufficient basis for it to conclude that the information contained in Chandler's complaint does not reasonably indicate that, in setting aside its standing offer, PWGSC failed to comply with the applicable trade agreements. Nevertheless, as Chandler made a number of alternative arguments in its complaint, the Tribunal considers it appropriate to briefly address them below.

[24] Chandler submitted that, even if the reference to the "Polar" brand constituted a deviation from what was requested at item No. 3, PWGSC entered into a binding contract with Chandler containing this alleged deviation and cannot simply cancel or rescind the agreement once concluded.

[25] This is simply not the case. The *General Conditions* applicable to the standing offer, which were incorporated by reference in the RFSO (at section 6.3.1) and the standing offer (at section 1.3.1), provide as follows:¹⁰

2005 02 . . . General

The Offeror acknowledges that a standing offer is not a contract and that the issuance of a Standing Offer and Call-up Authority does not oblige or commit Canada to procure or contract for any goods, services or both listed in the Standing Offer. The Offeror understands and agrees that Canada has the right to procure the goods, services or both specified in the Standing Offer by means of any other contract, standing offer or contracting method.

...

2005 04 . . . Offer

...

2. The Offeror understands and agrees that:

...

e. the Standing Offer may be set aside by Canada at any time.

[26] Thus, the *General Conditions* make it explicitly clear that a standing offer is not a contract and that it can be set aside at any time. PWGSC was entitled to rely on these conditions.¹¹

[27] Chandler further submitted that, by seeking and obtaining clarification that the reference to the "Polar" brand was an error, PWGSC waived the right to cancel or rescind the standing offer.

[28] The Tribunal is unable to find anything in the terms of the solicitation or *General Conditions* that would effectively prohibit PWGSC from setting aside a standing offer after having initially received and accepted a clarification from the standing offer holder. As noted above, the *General Conditions* allow for the setting aside of a standing offer *at any time*. In fact, had PWGSC not set

⁹ See, for example, *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

¹⁰ See 2005 (2017/06/21) *General Conditions – Standing Offers – Goods or Services [General Conditions]*, available at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual>.

¹¹ See *MasterBedroom Inc.* (14 August 2015), PR-2015-023 (CITT) [*MasterBedroom*] at para. 26.

aside Chandler's standing offer, it would arguably have been contravening section 4.2.1 of the RFSO, which required that offers meet all mandatory technical criteria of the solicitation.¹²

[29] Finally, Chandler submitted that, while its standing offer was ostensibly set aside because of its alleged non-compliance with the mandatory requirements of the solicitation, the setting aside was actually motivated for an improper purpose to allow PWGSC to correct a flaw in its original solicitation.

[30] As the Tribunal has already determined that the information contained in the complaint does not reasonably indicate that, in setting aside Chandler's standing offer, PWGSC failed to comply with the applicable trade agreements, the question as to whether or not the setting aside was done to correct a flaw in the original solicitation is irrelevant.

[31] The Tribunal notes that, in the present case, PWGSC's decision to retender the requirement with a revised items list will provide Chandler with another opportunity to be issued a standing offer. In addition, the information contained in the complaint indicates that PWGSC was intent on extending Chandler's previous standing offer until December 31, 2019.

[32] Aside from Chandler's alternative arguments addressed above, the complaint appears to raise an additional ground of complaint. Although not explicitly stated as a separate ground of complaint, Chandler submitted that, by disclosing its pricing, setting aside its standing offer and tentatively retendering the requirement, PWGSC has provided competing offerors an unfair advantage in any subsequent tendering process.¹³

[33] Complainants must ensure that their grounds of complaint are properly identified and fully articulated at the time of filing. This requirement is essential for the Tribunal to either properly dispose of the complaint or to frame the subject matter of its inquiry, should it find that the conditions necessary for the conduct of an inquiry have been met. In the present case, even if the Tribunal considers Chandler's above submissions as a separate ground of complaint, it would not conduct an inquiry on the basis that the complaint, as it pertains to this separate ground, has not been filed within the prescribed time limits.

[34] 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 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."

[35] These provisions make it clear that 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.

¹² See *MasterBedroom* at para. 24 where the Tribunal adopted similar reasoning. See also *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 at para. 33.

¹³ See paragraphs 15 to 17 of Schedule A to Chandler's complaint (Exhibit PR-2019-035-01, Vol. 1 at 14-15).

[36] In this instance, the Tribunal is of the view that Chandler first became aware, or reasonably should have become aware, of this additional ground of complaint on August 28, 2019, when it was informed by PWGSC that its standing offer was being set aside and that it would be going back out to tender in the near future. Chandler had already learned that its unit prices had been disclosed when, on August 27, 2019, it was copied on an email sent by PWGSC to another offeror informing that offeror that they would not be issued a standing offer and providing it with the individual prices for the items included in Chandler's standing offer.

[37] Therefore, the Tribunal considers that Chandler had, at the latest, until September 12, 2019 (i.e. 10 working days from August 28, 2019), to either object to PWGSC or file a complaint with the Tribunal. The materials and documentation filed by Chandler as part of its complaint do not indicate that it made an objection to PWGSC regarding this ground. As Chandler only filed its complaint with the Tribunal on September 27, 2019, the Tribunal considers that it has not been filed in a timely manner.

[38] In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Peter Burn

Peter Burn
Presiding Member