



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-048

Seigniory Chemical Products
Limited, trading as SCP SCIENCE

*Decision made
Friday, December 6, 2019*

*Decision and reasons issued
Friday, December 13, 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

SEIGNIORY CHEMICAL PRODUCTS LIMITED, TRADING AS SCP SCIENCE

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.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

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 concerns a Notice of Proposed Procurement for a microwave digestion system, issued by the Department of Public Works and Government Services (PWGSC) for use by the Department of the Environment (Solicitation No. K8A30-190862/B).

[3] The complainant, Seignior Chemical Products Limited, trading as SCP SCIENCE (SCP), alleges that the winning bidder did not fulfil the mandatory requirement that the microwave digestion system be capable of continuous processing.

[4] The Tribunal has decided not to conduct an inquiry into SCP's complaint because it was not filed within the time limits set by section 6 of the *Regulations*.

BACKGROUND

[5] PWGSC published the solicitation on July 16, 2019. SCP submitted its bid on August 14, 2019, and bidding closed on August 28, 2019.

[6] On October 16, 2019, PWGSC advised SCP that the contract was awarded to another bidder and that SCP did not comply with one of the mandatory criteria ("M5") because it had failed to show that its digestion vessels were able to process volumes of 3 millilitres.

[7] On October 17, 2019, SCP provided PWGSC with an explanation of its compliance with M5. At the same time, SCP also raised concerns about whether the winning bidder's microwave digestion system was fully automatic.

[8] On October 25, 2019, PWGSC notified SCP that, upon further review, its bid was compliant with M5. However, SCP was also told that it still was not the highest-ranking bidder as its price was higher than that of the winning bidder.

[9] On October 28, 2019, SCP requested that PWGSC confirm the winning bidder's compliance with the mandatory requirement of the solicitation that the good "be able to process sets of at least 60 samples in continuous, unattended fashion" ("M3").³ SCP indicated that if not for M3, they would have proposed a non-automatic and less-expensive model.

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2019-048-01B, Vol. 1 at 21.

[10] On October 31, 2019, SCP requested that PWGSC discuss the outcome of the bid over the phone.

[11] On November 1, 2019, PWGSC communicated its view that the winning bidder met all mandatory requirements and that the responsive bid with the lowest price was awarded the contract. The parties spoke on the telephone and agreed to meet the following week to discuss the file with a supervisor present.

[12] On November 3, 2019, SCP sent to PWGSC an explanation of the ways in which the winning bidder did not meet the M3 requirement of continuous operation. SCP emphasized that the system it proposed was fully automated, in contrast to the “batch model” proposed by the winning bidder.⁴

[13] On November 5, 2019, PWGSC advised SCP that the previously scheduled meeting would not take place but that the file was under review.

[14] On November 8, 2019, PWGSC acknowledged SCP’s concerns but stated that “all bids were evaluated in accordance with the evaluation criteria set out in the bid solicitation and the contract was awarded to the highest ranking [compliant] bid as per the basis of selection described in the bid solicitation.”⁵

[15] Further to that response, and also on November 8, 2019, SCP restated its position that PWGSC’s purchase decision was not based on the specifications of the solicitation, adding again that it would have proposed a lower-cost alternative if it had known that PWGSC would purchase a system with the specifications that it did. SCP requested that PWGSC advise on the procedure to “make a formal protest”.⁶

[16] On November 15, 2019, or one week after it first posed the question on November 8, 2019, SCP still had not received a response from PWGSC, so SCP again requested that PWGSC advise how SCP ought to go about making a formal protest.

[17] On November 15, 2019, PWGSC referred SCP to hyperlinks for a webpage entitled “Recourse Mechanisms” on buyandsell.gc.ca, as well as hyperlinks to the websites of the Tribunal and the Office of the Procurement Ombudsman (OPO). PWGSC noted that “there are strict deadlines for filing complaints with either of these institutions.”⁷

[18] On November 15, 2019, SCP spoke by telephone with an official of the OPO to raise its concerns with respect to the solicitation process, and was told by that official that another official at the OPO would call back to pursue the matters raised by SCP. Not having heard back from the OPO, SCP telephoned the OPO on November 18, 2019, and left a voicemail. On November 19, 2019, SCP received instructions from an official at the OPO to send the solicitation documentation to the OPO.

⁴ Exhibit PR-2019-048-01B, Vol. 1 at 42-43.

⁵ Exhibit PR-2019-048-01B, Vol. 1 at 42. The original email read “complaint” rather than “compliant”, which the Tribunal has edited for ease of comprehension.

⁶ Exhibit PR-2019-048-01B, Vol. 1 at 44.

⁷ Exhibit PR-2019-048-01B, Vol. 1 at 48.

[19] On November 20, 2019, SCP sent certain documents to the OPO, but has stated that it does not have records of precisely what was sent.⁸ The Tribunal understands that these documents included a completed complaint form to the OPO.

[20] The OPO confirmed receipt of SCP's complaint on November 21, 2019, and asked for confirmation that the complaint was not before the Tribunal, and further information about SCP's objections to PWGSC. SCP has stated that it left a voicemail responding to these questions the same day.⁹

[21] On November 22, 2019, the OPO left a voicemail with SCP, asking SCP to call in order to discuss various options to pursue SCP's grievances, and to inform SCP of the OPO's mandate. SCP left a voicemail with the OPO the same day.

[22] During a telephone conversation that took place on November 26, 2019 (and in a subsequent email sent the same day to SCP confirming that conversation), the OPO explained that its complaint "falls outside [the OPO's] mandate to review" and suggested that SCP contact the Tribunal or the Business Dispute Management Group at Public Services and Procurement Canada.¹⁰

[23] SCP filed the present complaint with the Tribunal on December 2, 2019.

[24] On December 3, 2019, the Tribunal requested that SCP provide copies of its correspondence with PWGSC and the OPO, which SCP provided the same day.

[25] On December 4, 2019, the Tribunal requested that SCP give details to justify its statement that it was "incorrectly directed" to the OPO, and that it provide a copy of its complaint to the OPO and any response from the OPO.¹¹ The same day, SCP explained that it was not "misdirected" to the OPO but rather that it was "not correctly directed to CITT": in support of this statement, SCP referred to PWGSC's email of November 15, 2019, which referred to both the OPO and the Tribunal.¹²

[26] On December 5, 2019, the Tribunal requested that SCP explain why it addressed its concerns to the OPO rather than to the Tribunal. The Tribunal also requested further details about SCP's telephone communications with the OPO, and in particular whether SCP had informed the OPO that its grievances related to Solicitation No. K8A30-190862/B. The same day, SCP explained that its communications with PWGSC led it to understand that it had the option of filing a complaint with the OPO or the Tribunal, and that it chose the OPO. SCP also stated that it could not be certain whether it included a copy of the bid or the solicitation number in its complaint to the OPO.

ANALYSIS

[27] On December 6, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The Tribunal finds that although SCP made its objection to PWGSC within the deadline established by subsection 6(1) of the *Regulations*, it did not submit its complaint to the Tribunal within the deadline established by subsection 6(2) of the *Regulations*.

⁸ Exhibit PR-2019-048-01D, Vol. 1 at 18.

⁹ Exhibit PR-2019-048-01D, Vol. 1 at 17.

¹⁰ Exhibit PR-2019-048-01D, Vol. 1 at 8.

¹¹ Exhibit PR-2019-048-02A, Vol. 1 at 1.

¹² Exhibit PR-2019-048-01D, Vol. 1 at 18.

[28] Subsections 6(1) and 6(2) of the *Regulations* require a complainant to make any objection to the relevant government institution or file a complaint with the Tribunal within 10 working days of the day on which the basis of a complaint became known (or reasonably should have become known). Subsection 6(2) of the *Regulations* requires a complainant who has objected to a government institution to file its complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge that the government institution has denied relief.

[29] SCP made its objection to PWGSC within the 10-working-day deadline mandated by subsection 6(1) of the *Regulations*. SCP became aware of the grounds of its complaint on November 1, 2019, when PWGSC communicated that the winning bidder met all mandatory requirements. SCP then objected on November 3, 2019, when it outlined its views on the winning bidder's compliance with M3.

[30] However, SCP did not comply with the 10-working-day deadline in subsection 6(2) of the *Regulations*: in other words, it did not file its complaint with the Tribunal within 10 working days of becoming aware that PWGSC had denied SCP the relief it was seeking. In the Tribunal's view, SCP became aware of PWGSC's denial of relief on November 8, 2019, when PWGSC notified SCP that "all bids were evaluated in accordance with the evaluation criteria set out in the bid solicitation and the contract was awarded to the highest ranking complaint bid as per the basis of selection described in the bid solicitation."¹³ However, SCP did not file its complaint with the Tribunal until December 2, 2019, which was 15 working days after it became aware that PWGSC had denied relief.

[31] SCP has acknowledged that its complaint was late.¹⁴ Initially, SCP sought to explain this delay by claiming that it had been "incorrectly directed to the [OPO]" by PWGSC before being informed that the solicitation fell above the monetary limits of the OPO's jurisdiction.¹⁵ However, as set out above, after the Tribunal requested clarification of that allegation, SCP specified that "[p]erhaps the word 'misdirection' is a bit strong. Perhaps more appropriately, I should have said I was not correctly directed to CITT (due to the threshold of . . . the maximum contract value that [the OPO] would handle)."¹⁶

[32] The Tribunal notes the email dated November 15, 2019, in which a PWGSC official suggested "two possible avenues" for recourse, and provided hyperlinks to the websites of both the Tribunal and the OPO, and emphasized the "strict deadlines" for complaints to either institution.¹⁷ This email also referred SCP to hyperlinks for a webpage entitled "Recourse Mechanisms" on buyandsell.gc.ca and for the OPO's "Frequently Asked Questions" webpage; both webpages clearly state the monetary thresholds for the jurisdiction of the OPO.¹⁸

[33] The Tribunal finds that SCP was provided with sources of information necessary to easily determine that the solicitation fell within the jurisdiction of the Tribunal rather than the OPO. As outlined above, the Tribunal was not immediately able to ascertain why SCP chose to initially pursue

¹³ Exhibit PR-2019-048-01B, Vol. 1 at 42.

¹⁴ Exhibit PR-2019-048-01, Vol. 1 at 15.

¹⁵ Exhibit PR-2019-048-01, Vol. 1 at 8; see also Exhibit PR-2019-048-01, Vol. 1 at 15.

¹⁶ Exhibit PR-2019-048-01D, Vol. 1 at 18.

¹⁷ Exhibit PR-2019-048-01B, Vol. 1 at 48.

¹⁸ See <https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/supplier-complaint-process/recourse-mechanisms>, which states that a "supplier may have recourse with the Office of the Procurement Ombudsman" for a "complaint regarding the award of a contract with a value less than \$25,300 for goods or less than \$101,100 for services." See also <http://opo-boa.gc.ca/plainte-complaint-eng.html>.

its grievances at the OPO instead of with the Tribunal, and therefore requested that SCP explain its choice.¹⁹ SCP responded that it “did not see any reference to” the monetary threshold on the webpages provided by PWGSC.²⁰

[34] In the Tribunal’s view, this explanation is insufficient to relieve SCP from the consequences of having proceeded as it did. Potential suppliers must comply with the requirements that Parliament has set out at section 6 of the *Regulations*. SCP failed to do so despite having been provided with information that should have allowed it to file a complaint with the Tribunal in a timely manner.

[35] The Tribunal remarks that PWGSC should have provided SCP with information about recourse mechanisms much sooner than it did. SCP had to request information on how to contest PWGSC’s decision; it ought not to have had to. Rather, PWGSC should have immediately and voluntarily provided this information when it communicated to SCP that it was not the successful proponent. Worse: PWGSC again failed to volunteer information on the Tribunal’s bid challenge authority when it denied SCP the relief it had sought in its objection. Ultimately, SCP had to prompt PWGSC twice before it received the recourse information that was in the end provided. The manner in which PWGSC acted, or failed to act, at best ignores, or at worse defies, clear direction that the Tribunal has repeatedly underscored as a serious impediment to access to justice by aggrieved suppliers.²¹ As such, and to be perfectly clear, the Tribunal cannot but, again, emphatically request that government institutions systematically include the following paragraph in all communications of regret to potential suppliers:

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 Registrar of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

[36] The circumstances of this matter prompt the Tribunal to query whether it should consider that the time frame for calculating the deadlines of section 6 of the *Regulations* ought to properly start from when a government institution provides a denial of relief that includes information about recourse mechanisms. If the Tribunal were to have used that event as the starting point in the present matter, the denial of relief would have occurred on November 15, 2019, when PWGSC ended up providing information on the recourse mechanisms. Computing days forward from that date, the 10-working-day deadline for SCP to file its complaint with the Tribunal would have fallen on November 29, 2019. However, because SCP only filed its complaint on December 2, 2019, the complaint would have been late in that instance as well.

¹⁹ Exhibit PR-2019-048-02A, Vol. 1 at 1.

²⁰ Exhibit PR-2019-048-01D, Vol. 1 at 18.

²¹ *Kaméléons & cie Solutions Design Inc.* (26 November 2019), PR-2019-047 (CITT) at para. 22; *R.H. MacFarlands (1996) Ltd.* (23 December 2013), PR-2013-029 (CITT) at paras. 30-31; *ADR Education* (16 July 2013), PR-2013-009 (CITT) at para. 34.

DECISION

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

Jean Bédard

Jean Bédard, Q.C.
Presiding Member