



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-047

Kaméléons & cie Solutions Design
inc.

*Decision made
Tuesday, November 26, 2019*

*Decision and reasons issued
Monday, December 2, 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

KAMÉLÉONS & CIE SOLUTIONS DESIGN INC.

AGAINST

INNOVATION, SCIENCE AND ECONOMIC DEVELOPMENT CANADA

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 on the grounds that it is premature.

Serge Fréchette

Serge Fréchette
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 relates to a Request for a Standing Offer (RSFO) issued by Innovation, Science and Economic Development Canada (ISED) for graphic design services (Solicitation No. 800097).

3. The complainant, Kaméléons & cie Solutions Design inc. (Kaméléons), argued that ISED had not provided timely or satisfactory answers to a request for a debriefing, and alleged that its bid was not correctly evaluated.

4. On November 26, 2019, the Tribunal decided not to inquire into the complaint on the basis that it was premature.

BACKGROUND

5. The RSFO closing date was January 7, 2019. Kaméléons contacted ISED on April 25, 2019, and July 5, 2019, to obtain an update on the status of the evaluation.

6. On August 28, 2019, ISED informed Kaméléons that the results had been posted online in late June 2019. The same day, deducing that it had not been selected, Kaméléons requested a debriefing. Having received no news from ISED, Kaméléons contacted it again on September 16, 2019.

7. On September 23, 2019, ISED sent Kaméléons a summary of the points it had received in each of the five evaluation categories. The same day, Kaméléons asked for an explanation of why it had lost points in two of these categories.

8. On October 7, 2019, Kaméléons contacted the Office of the Procurement Ombudsman (OPO) to request a debriefing from ISED and potentially a re-evaluation of its bid. On October 10, 2019, the OPO informed Kaméléons that ISED wished to communicate with it to organize the debriefing.

9. On October 24, 2019, ISED informed Kaméléons of its intent to review the questions it had raised and send a response the following week, the week of October 28 to November 1, 2019.

10. On October 29, 2019, the OPO provided Kaméléons with the Tribunal's coordinates so that they could get in touch.

11. On November 13, 2019, ISED told Kaméléons that it wished to organize a debriefing meeting for the following week, that of November 18 to 22, 2019. After exchanging several emails, ISED and

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

² SOR/93-602 [*Regulations*].

Kaméléons agreed on November 25, 2019, that a debriefing meeting would take place on December 4, 2019.

12. On November 25, 2019, Kaméléons asked ISED for information about its evaluation. The same day, ISED replied that it did not normally provide such information but that they could discuss it during the debriefing meeting on December 4, 2019. Kaméléons sent ISED another email on November 25, 2019, to inform it that such information had been shared with it following previous evaluations.

13. Kaméléons filed this complaint on November 25, 2019.

ANALYSIS

14. Pursuant to subsections 6(1) and 6(2) of the *Regulations*, a potential supplier must file an objection with the relevant government institution or file a complaint with the Tribunal within 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* requires a potential supplier, who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, to file a complaint with the Tribunal within 10 working days after the day on which the potential supplier had actual or constructive knowledge of the denial of relief by the relevant government institution.

15. Based on the correspondence between ISED and Kaméléons, the Tribunal finds that ISED has not yet denied relief to Kaméléons as required by subsection 6(2) of the *Regulations*. The correspondence indicates that Kaméléons and ISED organized a debriefing meeting for December 4, 2019. Given that the complaint was filed before the debriefing meeting took place, the Tribunal is of the view that Kaméléons does not yet know whether ISED will refuse to provide the requested explanations and/or information. Furthermore, given that Kaméléons is therefore not yet able to assess the reasons for which it lost points, it may not yet be in a position to formulate the grounds for the complaint, if any, in detail.

16. Once the debriefing meeting has taken place, Kaméléons may file, within 10 working days after this meeting, a new complaint directly to the Tribunal if it still believes it has been aggrieved.

17. In the alternative, it could make a specific objection to ISED within the same timeframe of 10 working days, seeking relief (an outcome to the dispute that it considers satisfactory). If Kaméléons does not receive a reply from ISED by a deadline agreed upon by the parties, or if ISED's response to an objection made by Kaméléons is not received within a reasonable timeframe, Kaméléons may also file a new complaint with the Tribunal.

18. The Tribunal encourages the parties to agree on a reasonable timeframe for replying to any objection from Kaméléons. The Tribunal notes that the information on the record indicates that ISED has lacked promptness in responding to Kaméléons' messages to date; the Tribunal hopes that ISED will remedy this situation if this is the case.

19. If Kaméléons files a new complaint with the Tribunal, it may request that documents already filed with this complaint be joined to the new complaint.

20. Finally, two remarks are in order.

21. First, the Tribunal notes that the market value of the solicitation is above the threshold of the *Canadian Free Trade Agreement*,³ and that the complaint does not, a priori, raise issues related to contract administration. In principle, therefore, this is a situation in which the Tribunal's jurisdiction could have been immediately raised by the OPO. The Tribunal notes that the OPO's intervention seems to have facilitated ISED's involvement, but also notes that complainants' recourse can quickly become time-barred under the *Regulations* if the complainants are not immediately informed of the procurement review process before the Tribunal.

22. The second remark relates to the Tribunal's oft-repeated request to federal institutions to mention the recourse to the Tribunal in their regret letters to bidders.⁴ In this case, ISED failed to provide this information to Kaméléons in its email dated September 23, 2019. The Tribunal directs ISED to include the following paragraph in its regret letters and emails to bidders:

As a general rule, a complaint regarding any aspect of 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 timeframe, a bidder may first choose to raise its ground of complaint by way of an objection to [ISED]; if [ISED] 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 timeframe 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* (SOR/93-602).

DECISION

23. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint on the grounds that it is premature.

Serge Fréchette
Serge Fréchette
Presiding Member

³ *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).

⁴ *R.H. MacFarlands 91996 Ltd.* (23 December 2013), PR-2013-029 (CITT) at paras. 30-31; *ADR Education* (16 July 2013), PR-2013-009 (CITT) at para. 34.