



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-026

WW-ISS Solutions Canada

*Decision made
Thursday, September 10, 2020*

*Decision issued
Friday, September 11, 2020*

*Reasons issued
Friday, September 25, 2020*

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

WW-ISS SOLUTIONS CANADA

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT

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

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 relates to a request for proposal (RFP) (Solicitation No. 19-154326) issued by the Department of Foreign Affairs, Trade and Development (DFATD) for the provision of a shuttle service.³

[3] This is the second complaint filed by the complainant, WW-ISS Solutions Canada (WW-ISS), with respect to this solicitation.⁴ In the current complaint, WW-ISS alleges that DFATD did not assess the bids in accordance with the mandatory requirements of the RFP and did not do its due diligence in ensuring that the winning supplier was able to meet the requirements prior to the contract start date. WW-ISS also alleges that the winning supplier is currently not meeting the requirements of the resulting contract.

[4] Further, WW-ISS alleges that the reason its first complaint to the Tribunal regarding this solicitation was not made in a timely manner was that DFATD informed it that it could not file a complaint until after the contract start date, which was November 1, 2019, as the winning bidder would have until that date to ensure that it met the requirements.

[5] As a remedy, WW-ISS requests that it be compensated for lost opportunity and lost profits. It also requests reimbursement of its complaint and bid preparation costs.

BACKGROUND

[6] The RFP was issued on May 31, 2019, with a bid closing date of July 12, 2019.⁵ WW-ISS, who was the incumbent supplier, submitted its bid on July 11, 2019.⁶

[7] On July 24, 2019, DFATD informed WW-ISS that the contract had been awarded to Millennium Limousine Service (MLS).⁷

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

² SOR/93-602 [*Regulations*].

³ Although the department is currently known as Global Affairs Canada, its legal name remains the Department of Foreign Affairs, Trade and Development, as established in its enabling legislation. *Department of Foreign Affairs, Trade and Development Act*, S.C. 2013, c. 33, s. 174.

⁴ The first complaint was the subject of the Tribunal's decision in *WW-ISS Solutions Canada* (16 December 2019), PR-2019-050 (CITT) [PR-2019-050].

⁵ Exhibit PR-2020-026-01A at 33, Vol. 1.

⁶ Exhibit PR-2020-026-01B (protected) at 1, Vol. 2.

⁷ Exhibit PR-2020-026-01A at 71-72, Vol. 1.

[8] On July 25, 2019, WW-ISS contacted DFATD to request a debriefing meeting. An in-person debriefing was held the same day. On July 31, WW-ISS sent a written follow-up to DFATD outlining the concerns it had raised in the meeting, which were, in essence, that the winning bidder was not capable of meeting the requirements of the RFP. WW-ISS also re-iterated its opinion, expressed at the in-person debriefing, that the RFP should be re-tendered.⁸

[9] On August 1, 2019, DFATD replied that the RFP would not be re-tendered and that the contract with MLS would reflect the full extent of the requirements of the RFP.⁹

[10] On November 1, 2019, MLS began providing the shuttle service under the resulting contract with DFATD.

[11] On December 13, 2019, WW-ISS filed its first complaint with the Tribunal. WW-ISS's original grounds of complaint were that MLS's bid was not evaluated in compliance with the mandatory requirements of the RFP, and that MLS was not performing the contract in compliance with those mandatory requirements.¹⁰

[12] On December 23, 2019, the Tribunal found that WW-ISS was time-barred from raising any grounds of complaint with respect to DFATD's evaluation of the bids. Specifically, the Tribunal found that WW-ISS should have filed its complaint within 10 working days of August 1, 2019, when the procurement officer informed WW-ISS that they would not be re-tendering the solicitation.¹¹ The Tribunal also found that whether MLS was currently performing the contract in accordance with its terms was a matter of contract administration over which the Tribunal did not have jurisdiction.¹²

[13] On June 10, 2020, the owner of WW-ISS contacted his Member of Parliament to request her assistance in contacting the Minister of Foreign Affairs in order to have the Minister conduct a formal investigation into the procurement process and award of the contract.¹³

[14] On June 24, 2020, the Member of Parliament informed the owner of WW-ISS that his email had been shared with the Minister's office and requested to be kept informed of any developments.¹⁴

[15] On July 16, 2020, the owner of WW-ISS contacted his Member of Parliament again to state that he had not heard anything from the Minister's office and that he would file a complaint with the Office of the Procurement Ombudsman (OPO) if he did not hear anything by the following Monday.¹⁵

[16] On July 17, 2020, DFATD contacted the owner of WW-ISS to inform him that it had received the email sent to his Member of Parliament and that he would receive an official response by July 23, 2020.¹⁶

⁸ Exhibit PR-2020-026-01A at 73-74, Vol. 1.

⁹ Exhibit PR-2020-026-01A at 79, Vol. 1.

¹⁰ PR-2019-050 at para. 3.

¹¹ PR-2019-050 at paras. 13-14.

¹² PR-2019-050 at paras. 15-16.

¹³ Exhibit PR-2020-026-01A at 96, Vol. 1.

¹⁴ Exhibit PR-2020-026-01A at 97, Vol. 1.

¹⁵ Exhibit PR-2020-026-01A at 97, Vol. 1.

¹⁶ Exhibit PR-2020-026-01A at 100, Vol. 1.

[17] On July 23, 2020, DFATD sent a letter to WW-ISS. That letter 1) recalled that a debriefing meeting had been held between WW-ISS and DFATD on July 25, 2019, in which DFATD explained in detail the reasons WW-ISS had not been successful in the procurement process; 2) stated that DFATD was not aware of any issues with contract performance, but welcomed any further information that WW-ISS was able to provide on that point; 3) provided a comparative breakdown of WW-ISS's and MLS's scores; and 4) informed WW-ISS of possible recourse to the Tribunal.¹⁷

[18] On August 10, 2020, WW-ISS contacted the Tribunal and requested that it reconsider its original decision as the Tribunal had not been made aware of all the facts, specifically that the procurement officer had informed WW-ISS that it could not file a complaint until after November 1, 2019.¹⁸ WW-ISS alleged that the letter it received on July 23, 2020, was further evidence that proper procurement processes had not been followed.¹⁹

[19] On August 14, 2020, the Tribunal informed WW-ISS that it could not reconsider its original decision as the Tribunal's rulings are final and conclusive. The Tribunal informed WW-ISS that it would treat its correspondence as a new complaint and requested that WW-ISS provide additional documentation in order for its complaint to be considered complete as required by paragraph 30.11(2)(f) of the *CITT Act*.²⁰

[20] On or about August 20, 2020, WW-ISS attempted to hand deliver a package of documents to the Tribunal's offices but was unable to do so as the Tribunal's mailroom was closed at that time due to measures taken as part of the response to the ongoing COVID-19 pandemic. On August 22, 2020, WW-ISS requested that the Tribunal extend the deadline for it to file its additional documents until September 2, 2020, due to the need to digitize and redact these documents in order to file them electronically.²¹

[21] On August 27, 2020, the Tribunal acknowledged that the closure of the Tribunal's mailroom was an unforeseen circumstance that prevented WW-ISS from filing its documents, and that this would be taken into account when assessing the timeliness of its complaint. The Tribunal nevertheless noted that the documents filed to date were insufficient for the Tribunal to determine if the complaint would be considered timely if the documents were filed September 2, 2020, and urged WW-ISS to file its documents as soon as possible.²²

[22] On August 28 and 29 and September 2, 2020, WW-ISS provided additional information that substantially addressed the deficiencies in the complaint. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on September 2, 2020.

[23] On September 10, 2020, the Tribunal decided not to conduct an inquiry into the complaint.

¹⁷ Exhibit PR-2020-026-01A at 101-102, Vol. 1.

¹⁸ On July 28, 2020, the complainant contacted OPO to file a complaint (Exhibit PR-2020-026-01A at 131, Vol. 1). Evidence on the confidential record indicates that OPO was not conducting an investigation at the time WW-ISS filed its complaint with the Tribunal.

¹⁹ Exhibit PR-2020-026-01, Vol. 1.

²⁰ Exhibit PR-2020-026-02, Vol. 1. Paragraph 30.11(2)(f) provides that "A complaint must . . . include all information and documents relevant to the complaint that are in the complainant's possession."

²¹ Exhibit PR-2020-026-04, Vol. 1.

²² Exhibit PR-2020-026-04, Vol. 1.

ANALYSIS

[24] In PR-2019-050, the Tribunal found that WW-ISS's complaint regarding the evaluation of the bids was not filed in accordance with the timelines set out in section 6 of the *Regulations*, which requires that a complainant make an 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).

[25] In particular, 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.”

[26] The Tribunal found that, while WW-ISS had made a timely objection to DFATD, it received a denial of relief on August 1, 2019, when DFATD informed WW-ISS that it would not re-tender the solicitation and would proceed with the award of the contract to MLS. As WW-ISS did not file its first complaint with the Tribunal until December 13, 2019, the Tribunal therefore found that WW-ISS had not filed its complaint within 10 working days of receiving its denial of relief.²³

[27] The Tribunal considers that the issues raised in WW-ISS's current complaint are the same as those considered in the Tribunal's original decision, specifically, that DFATD did not verify whether MLS was capable of meeting the requirements of the RFP and so did not properly conduct the procurement process, and that MLS is not currently abiding by the terms of the contract.

[28] As set out in its letter of August 14, 2020, the Tribunal's decisions are final and conclusive and, absent exceptional circumstances, the Tribunal cannot reconsider them. This is in accordance with the general legal principle that re-litigation of issues should be discouraged, as it wastes resources, undermines certainty in the finality of litigation, and makes decisions vulnerable to continued collateral attack.²⁴ Therefore, where a potential supplier files a complaint attempting to re-litigate issues already decided by the Tribunal, the Tribunal will not accept the complaint for inquiry.

[29] A narrow exception to this rule allows for an issue to be re-litigated where a party discovers new evidence that could not, by reasonable diligence, have been produced in the first case. The Tribunal has previously stated that, where a ground of complaint has been found to be time-barred and has not been examined on the merits, the complainant would have to submit new evidence that pertains to the procedural (i.e. timeliness) aspect and not new evidence that relates to the substantive ground of complaint (in this case, whether DFATD properly conducted the procurement process) in order to invoke this exception.²⁵ In other words, the complainant would have to produce new evidence that establishes that it was, in fact, timely when it filed its first complaint.

²³ PR-2019-050 at para. 14.

²⁴ *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 SCR 125 at para. 28; *Netgear, Inc.* (16 April 2009), PR-2009-001 to PR-2009-004 (CITT) [*Netgear*] at para. 15.

²⁵ *Netgear* at paras. 9, 11-15; *TA Instruments* (15 September 2011), PR-2011-029 (CITT) at paras. 7-11.

[30] WW-ISS alleges that it did not file its first complaint in a timely manner because it was advised by DFATD at the debriefing meeting of July 25, 2019, that it could not make a complaint until after the contract performance start date of November 1, 2019, and that it therefore waited until it had evidence that allegedly established that the winning bidder was not performing the contract in accordance with its terms before filing its first complaint. This information was not disclosed to the Tribunal in the original complaint.²⁶ However, it was known to the complainant at the time the complaint was filed and could, by the exercise of reasonable diligence, have been disclosed to the Tribunal at that time. It seems that the complainant neglected to inform the Tribunal of this fact when it filed its complaint in December of 2019.

[31] As noted above, while the Tribunal can consider evidence that was not known to the complainant at the time of filing of the complaint as one of the reasons to reconsider a previous decision, this is not the situation the Tribunal is faced with in this case. Accordingly, the Tribunal cannot consider this reason as a justification to allow the complainant to re-litigate the issue of whether its initial complaint was filed in a timely manner.

[32] Furthermore, it is unlikely that the information allegedly received by WW-ISS from DFATD would have helped the complainant on the issue of the timeliness of its complaint, even if it had been brought to the Tribunal's attention when WW-ISS filed its complaint in December of 2019, as that advice was faulty. As found by the Tribunal in PR-2019-050, WW-ISS's complaint regarding the evaluation of the bids should have been filed within 10 days of receiving the denial of relief on August 1, 2019.

[33] The Tribunal has also considered WW-ISS's allegation that DFATD's letter of July 23, 2020, provides additional evidence that the procurement process was not conducted properly and, as such, whether it discloses a new ground of complaint not previously considered by the Tribunal that was discovered within the timelines set out in section 6 of the *Regulations*. As noted above, the letter of July 23, 2020, states that DFATD explained the reasons why WW-ISS was not successful in the debriefing held July 25, 2019, invites WW-ISS to provide any information that it has regarding non-performance of the contract to its attention, and provides the results of the winning bidder in comparison to WW-ISS's results, as was set out in the original letter of regret dated July 24, 2019.

[34] The Tribunal can find no new ground of complaint in this letter. The letter does not provide any additional information regarding the evaluation of the bids, but instead reiterates DFATD's original decision. Moreover, this letter cannot constitute a new denial of relief. As found by the Tribunal in PR-2019-050, the complainant received a definitive denial of relief on August 1, 2019, when it was informed that DFATD would not re-tender the solicitation.

[35] Finally, as set out in its decision in PR-2019-050, the Tribunal does not have jurisdiction over issues of contract administration and cannot conduct an inquiry into whether MLS is currently not in compliance with the terms of its contract with DFATD.

²⁶ WW-ISS referred to this information in an email to the Tribunal's Registry sent December 24, 2019 (Exhibit PR-2020-026-01A at 87, Vol. 1), but this was sent after the Tribunal had rendered its decision in PR-2019-050 and did not form part of the record of that case.

DECISION

[36] 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