



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2020-035

PricewaterhouseCoopers LLP

v.

Immigration and Refugee Board of  
Canada

*Order and reasons issued  
Friday, October 16, 2020*

**TABLE OF CONTENTS**

ORDER ..... i

STATEMENT OF REASONS ..... 1

    BACKGROUND ..... 1

    POSITION OF THE PARTIES..... 1

    ANALYSIS..... 3

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

AND FURTHER TO a decision of the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**PRICEWATERHOUSECOOPERS LLP**

**Complainant**

**AND**

**THE IMMIGRATION AND REFUGEE BOARD OF CANADA**

**Government  
Institution**

**ORDER**

WHEREAS the above-mentioned complaint was filed on September 2, 2020, by PricewaterhouseCoopers LLP;

AND WHEREAS the Canadian International Trade Tribunal decided, on September 9, 2020, to inquire into the complaint, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*;

AND WHEREAS the Immigration and Refugee Board of Canada requested, pursuant to rule 107 of the *Canadian International Trade Tribunal Rules*, that the Tribunal apply the express option for the expeditious determination of the complaint;

AND WHEREAS the Tribunal notified the parties on October 2, 2020, of its decision not to apply the express option;

AND WHEREAS the Tribunal wishes to provide reasons forthwith with respect to its decision not to apply the express option;

THEREFORE, the Tribunal hereby confirms its decision previously communicated to the parties not to apply the express option.

Susan D. Beaubien  
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Susan D. Beaubien  
Presiding Member

## STATEMENT OF REASONS

### BACKGROUND

[1] PricewaterhouseCoopers LLP (PwC) filed a complaint with the Canadian International Trade Tribunal on September 2, 2020, concerning a Request for Proposal (Solicitation No. 20191483IRB) by the Immigration and Refugee Board of Canada (IRB) for the provision of professional services under the “Business Consulting/Change Management Stream”.

[2] The Tribunal accepted the complaint for inquiry on September 9, 2020.

[3] Pursuant to section 12 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>1</sup> the Tribunal is required to issue its findings and recommendations with respect to a procurement complaint within a prescribed time. A decision is required within 90 days of the filing of the complaint, unless the Tribunal exercises its discretion to extend or abridge the 90-day period, as provided by paragraphs (b) and (c) of section 12. The relevant provisions read as follows:

**12** The Tribunal shall issue its findings and recommendations in respect of a complaint to the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party

(a) subject to paragraphs (b) and (c), within 90 days after the filing of the complaint;

(b) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal grants a request for an express option, within 45 days after it grants that request; or

(c) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal authorizes an extension of time, within 135 days after the filing of the complaint.

[4] On September 18, 2020, the IRB filed a request, pursuant to rule 107 of the *Canadian International Trade Tribunal Rules*,<sup>2</sup> that the Tribunal apply the express option provided by paragraph 12(b) of the *Regulations*.

[5] On September 25, 2020, the Tribunal sought submissions from the parties concerning the IRB’s request. The Tribunal received those submissions on September 28, 2020.

[6] On October 2, 2020, the Tribunal decided that the inquiry would not proceed using the express option and notified the parties of accordingly. The reasons for that decision are set out below.

### POSITION OF THE PARTIES

[7] The IRB contended that time was of the essence in clarifying or remedying any errors that may have been made in the procurement process:

Time is now of the essence with respect to work that needs to be completed under the resulting contract. Over the past few years, the IRB has been under significant strain as a

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<sup>1</sup> SOR/93-602 [*Regulations*].

<sup>2</sup> SOR/91-499 [*Rules*].

result of unprecedented surge of asylum claims resulting in large part by irregular border crossers. In light of reviews and audits, the IRB has set a number of key priorities to invest in modern solutions. This work and solutions are even more critical in the context of the current COVID-19 pandemic. As indicated in Appendix B a contract has been awarded. There are critical work deadlines this fall which must be met to keep my client's project on track.<sup>3</sup>

[8] The IRB asserted that lack of clarity concerning the contract award risked frustrating the required work and that the express option would minimize any liability should the complaint succeed.

[9] The IRB also submitted that PwC's complaint was lacking in complexity because it raised only two issues related to the evaluation process for decision.

[10] PwC opposed the IRB's request for an express option. PwC submitted that it would need the full seven days provided under rule 104 to provide comments in reply to the Government Institution Report (GIR).<sup>4</sup> PwC also contended that the express option would create an asymmetric and unfair allocation of time between the parties to complete further steps in these proceedings. Principally, it would have the effect of allowing the IRB more time to file its GIR than would have been allowed under the 90-day process. Meanwhile, PwC would see its time to comment on the GIR reduced.

[11] Furthermore, PwC contended that the IRB had delayed the making of its request for the express option. It also alleged that the matter was not urgent based on IRB's conduct during the procurement process and in these proceedings:

Moreover, there is also no underlying need for express process in this case. While the September 18, 2020 letter from the IRB expresses a need for rapid resolution of the Complaint, IRB's own conduct has indicated the opposite. In all of the following ways, IRB has failed to demonstrate any urgency regarding the implementation of the contract or the resolution of this matter:

- IRB extended the closing date of the RFP from February 11 to February 26, 2020;
- IRB took a full four months to evaluate the bids, which required it to request that bidders extend the bid validity period to July 12, 2020;
- After being advised that PwC had several objections to its process, IRB failed to resolve PwC's complaint in a timely manner (including scheduling the debrief for later than PwC had requested and taking almost a month to answer PwC's follow-up questions after the debrief), thus delaying PwC's ability to bring the present Complaint before the Tribunal;
- IRB waited fifteen days after receiving notice of the Complaint to request the express option;

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<sup>3</sup> Exhibit PR-2020-035-06, Vol. 1 at 1, 2.

<sup>4</sup> Required to be filed by the IRB pursuant to rule 103 of the *Rules*.

- IRB failed to file the GIR in an expeditious manner in order to expedite the resolution of the Complaint; and
- IRB failed to promptly identify relevant internal counsel and file the forms required by the Tribunal in a timely manner.<sup>5</sup>

[12] PwC also submitted that as IRB was aware of the possibility of this complaint and could have minimized the uncertainty and potential costs by waiting to issue work under the contract until the complaint was resolved. As such, the IRB should not use its own conduct as a basis for reducing timelines applicable to PwC.

## ANALYSIS

[13] The Tribunal is subject to statutory objectives which provide that the Tribunal should decide cases on their merits as informally, inexpensively, and expeditiously as the circumstances and considerations of fairness permit.<sup>6</sup> As noted above, the *Regulations* prescribe specific deadlines for the disposition of procurement complaints.

[14] A procedural timetable is designed to provide the parties with sufficient time to fully prepare their materials. This ensures that the substantive issues can be fairly considered and decided by the decision maker.<sup>7</sup> A party seeking expedition or abridgment of a prescribed procedural timeline, as is the case here, should therefore provide cogent reasons for that request.

[15] In assessing a request for the express option, the Tribunal must assess whether the complaint is suitable for the express option, taking all relevant factors into account. These include the reasons for the request, the complexity of the case, the timeliness of the request, possible prejudice to other parties and whether a shortened timetable will compromise the Tribunal's ability to fully and fairly assess the submissions of the parties.

[16] Having reviewed the record to date, including the submissions made by both parties, the Tribunal concludes that this case is not suitable for the express option. In particular, the Tribunal finds that PwC's complaint raises several complex issues for decision.

[17] PwC alleges that the IRB did not conduct an open, fair and transparent procurement. It makes allegations that, among other things, its bid was not fairly evaluated because bids were assessed having regard to other criteria that were not disclosed or published to bidders. PwC also claims that the IRB evaluated PwC's bid on the basis of an undisclosed preference for federal projects, which contradicted the content of the RFP and otherwise disregarded or overlooked important information contained within PwC's bid. All of these issues are fact-driven and will require the Tribunal to

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<sup>5</sup> Exhibit PR-2020-035-10, Vol. 1 at 2.

<sup>6</sup> See section 35, *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp); section 3 of the *Rules*.

<sup>7</sup> The principle that parties should be given sufficient time to prepare their materials has been discussed by the Federal Court in consideration of the timelines set out in the *Federal Court Rules* in *Canadian Wheat Board v. Canada (Attorney General)*, 2007 FC 39 [*Wheat Board*] at paras. 13-14; *Gordon v. Canada (Minister of National Defence)*, 2004 FC 1642 at para. 17. In the Tribunal's view, these considerations are applicable here.

review extensive material. At this stage of the proceedings, PwC's supporting material filed with the complaint comprises several hundred pages of material.<sup>8</sup>

[18] When considering the abridgment of prescribed deadlines, avoiding prejudice and possible unfairness is a highly important consideration.<sup>9</sup> The Tribunal has weighed IRB's reasons for seeking a shortened timetable as well as the likelihood of possible prejudice and unfairness. While the IRB clearly prefers a shorter timeline, it has not demonstrated urgency which justifies a departure from the usual 90-day timeline prescribed by the *Regulations*.<sup>10</sup>

[19] The IRB's reasons for seeking a shortened timetable are outweighed by possible prejudice and unfairness, having regard to the complexity and multiplicity of the issues raised by PwC's complaint and the voluminous material filed in support. In such circumstances, a shortened timetable is likely to compromise the Tribunal's ability to fully and fairly hear the parties, all the more so since, at the time of rendering the decision denying the express option, the GIR had not yet been filed.

[20] The Tribunal is also cognizant of possible unfairness to the IRB, which has replaced and added counsel of record at least twice since the proceedings began. New counsel should have an adequate opportunity to become fully familiar with the issues and materials in a complex case, all the more so where a crucial next step in the case falls upon that counsel, namely preparation and filing of the GIR.

[21] Notwithstanding, the Tribunal will endeavour, subject to any other procedural issues that may arise, to render a decision as quickly as possible within the prescribed 90-day timeline. The parties are free to facilitate such a disposition by the filing of materials in advance of prescribed deadlines, as the case unfolds. This observation is made without prejudice to any requests for extensions that may be made by either party going forward, or to any extension under paragraph 12(c) of the *Regulations*, should circumstances so require.

[22] For the above reasons, the Tribunal has decided that this inquiry will not proceed using the express option.

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Susan D. Beaubien  
Susan D. Beaubien  
Presiding Member

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<sup>8</sup> Exhibit PR-2020-035-01, Vol. 1; Exhibit PR-2020-035-01A (protected), Vol. 2.

<sup>9</sup> The Tribunal finds this principle, recognized by the Federal Court of Appeal in *May v. CBC/Radio Canada*, 2011 FCA 130 at para. 13, to be relevant to the context of considering expedited proceedings for this inquiry.

<sup>10</sup> *May v. CBC/Radio Canada*, 2011 FCA 130 at para. 14; *Wheat Board* at para. 13.