



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-072

Seacoast a division of Polifibra
Canada (1987) Inc.

*Decision made
Tuesday, January 5, 2021*

*Decision and reasons issued
Tuesday, January 12, 2021*

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

SEACOAST A DIVISION OF POLIFIBRA CANADA (1987) INC.

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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

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.

OVERVIEW

[2] This complaint relates to a Request for Proposals (RFP) by the Department of National Defence (DND) for the provision of electrical wire (Solicitation No. W8482-218004/A).

[3] The complainant, Seacoast a division of Polifibra Canada (1987) Inc. (Seacoast), alleges that the product description in the RFP was vague, that the RFP specified a proprietary part number, and that DND did not answer its technical questions. Seacoast requests that DND issue a new solicitation.

[4] For the reasons below, the Tribunal finds that Seacoast's complaint is late. Accordingly, the Tribunal cannot accept the complaint for inquiry.

BACKGROUND

[5] The solicitation was published on July 31, 2020.

[6] On August 6, 2020, Seacoast contacted DND to allege that the product description of the RFP was vague and to request clarification. DND responded on September 2, 2020.

[7] On September 9, 2020, the bid closing deadline was extended to September 30, 2020.

[8] On September 21, 2020, Seacoast requested further clarification from DND on technical elements of the product description.

[9] On September 30, 2020, the bid closing deadline was again extended until October 21, 2020.

[10] On October 21, 2020, Seacoast followed up with DND to ask whether the tender would be extended and to again request answers to its technical questions. On October 22 and 29, 2020, Seacoast again contacted DND to note that the tender had not been extended, that the deadline had now passed, and that it still had not received a reply to its technical questions. There is no indication that DND responded to any of the queries that Seacoast sent between September 21, 2020, and October 29, 2020.

[11] DND awarded the contract on December 17, 2020.

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

² SOR/93-602 [*Regulations*].

[12] On December 22, 2020, Seacoast contacted the Tribunal to indicate that it wished to dispute the contract award. The same day, the Tribunal sent Seacoast instructions on how to file a complaint and informed Seacoast of the deadlines for filing a complaint.

[13] Seacoast filed its complaint on January 4, 2021.

[14] The Tribunal decided not to conduct an inquiry into Seacoast's complaint on January 5, 2021.

ANALYSIS

[15] For the reasons below, the Tribunal finds that Seacoast's complaint was not filed within the deadlines set out in subsection 6 of the *Regulations*.³

[16] 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 (1) object to the government institution or (2) file a complaint with the Tribunal.⁴ If a complainant objects to the government institution within this time frame and is denied relief, then the complainant may file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge of the denial of relief.⁵

[17] Seacoast's initial objection to the contracting authority was timely. Seacoast's central grounds of complaint—i.e. that the product definition allegedly was vague and contained a proprietary part number—became known when the solicitation was published. Within 10 working days of the publication of the solicitation, Seacoast had objected to DND about the vagueness of the product description.⁶

[18] However, the complaint to the Tribunal was not timely. The complaint needed to be filed within 10 working days of Seacoast receiving actual or constructive knowledge that DND had denied the relief it sought in its objection.⁷

[19] The Tribunal considers Seacoast to have had constructive knowledge of the denial of relief when the solicitation closed on October 21, 2020. Previously, the Tribunal has interpreted "constructive knowledge of the denial of relief" to include instances where the complainant's objection has not been addressed by the time of bid closing.⁸ There is no indication that DND replied to any of the four emails that Seacoast sent between September 21, 2020, and October 29, 2020, in which Seacoast repeatedly requested clarification on the product description. However, by the time that the solicitation had closed on October 21, 2020, Seacoast ought to have known that it had effectively been denied relief by DND. It would have been too late for Seacoast to have received clarification on the product description after bidding had closed.

³ Because the complaint is late, the Tribunal will not consider the other conditions for inquiry.

⁴ Subsections 6(1) and 6(2) of the *Regulations*.

⁵ Subsection 6(2) of the *Regulations*.

⁶ See Seacoast's email of August 6, 2020.

⁷ Subsection 6(2) of the *Regulations*.

⁸ *Netgear, Inc.* (17 July 2008), PR-2008-019 (CITT) at para. 11. The Tribunal has also noted that a constructive denial of relief can occur when an objection is not acknowledged by the government institution after a certain time, e.g. *ATCO Structures & Logistics* (16 July 2015), PR-2015-018 (CITT) at para. 5; *Grand and Toy Limited* (16 December 2015), PR-2015-046 (CITT) at para. 19.

[20] Seacoast's deadline to complain to the Tribunal was therefore November 4, 2020, 10 working days after the solicitation closed. Seacoast did not contact the Tribunal until December 22, 2020, and it did not file its complaint until January 4, 2021. Its complaint was therefore about two months late.

[21] As the Federal Court of Appeal has stated, “[i]n procurement matters, time is of the essence. . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.”⁹

[22] The Tribunal also notes that Seacoast's complaint cannot benefit from the extended deadline in subsections 6(3) and 6(4) of the *Regulations*.¹⁰ Even if the complaint met the conditions of these subsections, it still would not have been filed within the requisite 30-day time period.

[23] Finally, the Tribunal notes that the RFP mentioned recourse to the Office of the Procurement Ombudsman (OPO), but did not mention recourse to the Tribunal. If Seacoast's estimate of the value of the contract is correct, the solicitation would meet the monetary thresholds set out in the Canadian Free Trade Agreement¹¹ and would fall within the jurisdiction of the Tribunal (as opposed to the OPO). In the future, DND should ensure that it mentions recourse to the Tribunal when the contract value is above the thresholds of any applicable trade agreements.

[24] However, if the value of the contract is in fact lower than Seacoast's estimate, it is possible that OPO could have jurisdiction. Seacoast should note that if the contract value is below the current CFTA threshold of \$26,400,¹² it may still be possible to access the recourse mechanism under the OPO process, as OPO's deadlines are longer than those of the Tribunal.

DECISION

[25] 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

⁹ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at paras. 18, 20.

¹⁰ This subsection provides that a potential supplier may file a complaint within 30 days after the basis of the complaint became known or should have become known, if the Tribunal determines that (a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier; or (b) the complaint concerns a systemic issue relating to a designated contract and to compliance with the trade agreements.

¹¹ See current thresholds at <<https://www.cfta-alec.ca/procurement/covered-procurement-thresholds/>>. Canadian Free Trade Agreement, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf> (entered into force 1 July 2017) [CFTA].

¹² See current thresholds at <<https://www.cfta-alec.ca/procurement/covered-procurement-thresholds/>>.