



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-005

9324-3566 Quebec Inc.

*Decision made
Wednesday, May 5, 2021*

*Decision and reasons issued
Wednesday, May 19, 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

9324-3566 QUEBEC INC.

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.

Cheryl Beckett

Cheryl Beckett

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.

[2] The complaint relates to a procurement (Solicitation No. Doc2485987608) by the Department of Public Works and Government Services (PWGSC) for the supply of face cloth masks as part of Canada's response to the COVID-19 pandemic.³

[3] At issue in this complaint is PWGSC's decision not to exercise its option to acquire additional units beyond the firm (minimum) number of units provided for under the contract. The complainant alleges that PWGSC unfairly rejected the sample option units it provided as non-compliant with the technical requirements specified in the contract, and that the technical specifications are impossible to meet.

[4] As a remedy, the complainant requests compensation for lost profits.

BACKGROUND

[5] On September 4, 2020, the complainant was awarded a contract resulting from the solicitation for the provision of 250,000 units (the firm quantity) with an option for the government to purchase up to two million additional units (the option quantity). Delivery of, and payment for, the firm quantity units was completed by November 2020.

[6] On November 5, 2020, the complainant proposed that PWGSC consider revising the technical specifications for the option quantity units to include an additional third layer of polypropylene, consistent with evolving public health guidance.⁴

[7] On March 9, 2021, PWGSC requested the complainant to confirm whether the complainant would accept to supply the modified three-layer mask as option quantity units at the same unit price as the two-layer units already delivered. Confidential attachments to the complaint indicate that PWGSC advised the complainant that any modified mask would still be required to meet the original technical specifications set out in the contract, with the exception of the additional polypropylene layer.⁵ The record further indicates that the complainant accepted to supply the option quantity units on these terms.⁶

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

² SOR/93-602 [*Regulations*].

³ Tender Notice, online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-20-00918955>>.

⁴ Exhibit PR-2021-005-01B at 3; Exhibit PR-2021-005-01C (protected) at 10.

⁵ Exhibit PR-2021-005-01B at 3; Exhibit PR-2021-005-01C (protected) at 12.

⁶ Exhibit PR-2021-005-01C (protected) at 14.

[8] On March 19, 2021, the complainant delivered a sample of the three-layer mask.⁷

[9] On March 25, 2021, PWGSC requested two additional samples in a different size.⁸ On March 26, 2021, the complainant delivered the two additional samples to PWGSC.

[10] On March 31, 2021, PWGSC informed the complainant that the samples provided had been evaluated as non-compliant with the technical specifications under the contract, and that an amendment to acquire the option quantity units would therefore not be issued to its company. The complainant wrote back to PWGSC the same day, requesting that it be allowed to submit different samples for retesting.⁹

[11] On April 1, 2021, the complainant emailed photographs of sample units to PWGSC, arguing that they demonstrated compliance with the specifications. PWGSC wrote back the same day informing the complainant that it was too late to submit samples for evaluation.¹⁰

[12] On April 1, 2021, the complainant contacted the Office of the Procurement Ombudsman (OPO), which referred it to PWGSC's Business Dispute Management (BDM) Program office.¹¹

[13] On April 6, 2021, the complainant contacted the BDM Program office regarding its complaint. On April 16, 2021, the BDM Program office advised the complainant that the contracting authority had declined to participate in voluntary dispute resolution.¹²

[14] Also on April 16, 2021, the complainant contacted PWGSC's Office of Small and Medium Enterprises, which advised it with regard to potential recourse to the Tribunal.

[15] On April 30 and May 3, 2021, the complainant submitted its complaint to the Tribunal. On May 3, 2021, the Tribunal wrote to the complainant requesting additional information before the complaint could be considered complete. On May 4, 2021, the complainant submitted the additional information. On May 5, 2021, the Tribunal acknowledged the complaint as complete.

ANALYSIS

The complaint relates to matters of contract administration

[16] The *CITT Act* and the *Regulations* allow a potential supplier to complain to the Tribunal about any aspect of a procurement process for a designated contract. When applying these provisions, the Tribunal has made an important distinction between the procurement process and contract administration. The procurement process begins after the government institution has decided on its procurement requirement and continues through to the awarding of the contract. Contract administration is a separate phase that takes place after the procurement process is completed. It

⁷ Exhibit PR-2021-005-01B at 3; Exhibit PR-2021-005-01C (protected) at 18.

⁸ Exhibit PR-2021-005-01B at 4.

⁹ *Ibid.*; Exhibit PR-2021-005-01C (protected) at 4.

¹⁰ Exhibit PR-2021-005-01B at 4; Exhibit PR-2021-005-01C (protected) at 5-6.

¹¹ Exhibit PR-2021-005-01B at 4; Exhibit PR-2021-005-01C (protected) at 9.

¹² Exhibit PR-2021-005-01B at 4; Exhibit PR-2021-005-01A (protected) at 27.

deals with issues that arise as a contract is performed and managed. The Tribunal has been clear that matters of contract administration are beyond the scope of its jurisdiction.¹³

[17] The Tribunal considers the present complaint to be clearly a matter of contract administration. The complaint makes clear that the complainant competed for, and was awarded, a contract under Solicitation No. Doc2485987608. The complainant delivered, and was paid for, the 250,000 firm quantity units under the contract.¹⁴ The contract also makes clear that the purchase of additional option quantity units was to be solely at the discretion of the contracting authority, and would be effected by way of contract amendment.¹⁵ Clause 6.5.1 of the contract (unchanged from Part 6 of the RFP setting out resulting contract clauses) stipulates that any changes to the contract must be authorized in writing by the contracting authority.¹⁶

[18] The complaint makes clear that the parties negotiated a potential amendment to the technical specifications set out in the contract to allow for the additional third layer, beyond the two-layer requirement under the original specifications, but otherwise conformed to the original technical specifications. The complainant delivered samples of the modified unit, and after evaluating these samples, PWGSC determined that they were not compliant with the technical specifications and declined to issue an amendment to acquire additional option quantity units.

Revisions to the technical specifications did not amount to a new procurement

[19] The Tribunal notes that, in the past, it has found that even post-award conduct by the procuring entity is not strictly a matter of contract administration. Specifically, the Tribunal has previously considered acceptance by a procuring entity of goods that were different from the mandatory requirements of the original solicitation as, in effect, a new procurement.¹⁷ The Tribunal considered this possibility but, for the following reasons, finds that the modification to the technical specifications applicable to the option quantity units did not amount to a new procurement in this case.

[20] First, the difference between the two-layer masks required by the initial contract and the three-layer masks requested by PWGSC for consideration as option quantity units under a potential amendment, represent a much less pronounced departure from the RFP specifications than in the cases cited above (e.g. plastic versus stainless steel USB drives, or I-beam support posts as opposed to round poles in compacted gravel). In fact, the request for three-layer mask samples specifically

¹³ *Newland Canada Corporation* (13 August 2020), PR-2020-011 (CITT) at para. 11, citing *Sunny Jaura o/a Jaura Enterprises v. Department of Public Works and Government Services* (21 February 2013), PR-2012-043 (CITT) at para. 10. See also *WW-ISS Solutions Canada v. Department of Foreign Affairs, Trade and Development* (16 December 2019), PR-2019-050 (CITT) at para. 15; *Vidéotron Ltée v. Shared Services Canada* (5 October 2018), PR-2018-006 (CITT) at para. 16.

¹⁴ Exhibit PR-2021-005-01B at 3.

¹⁵ *Ibid.* at 3-4; Exhibit PR-2021-005-01A (protected) at 25.

¹⁶ Exhibit PR-2021-005-01B at 83.

¹⁷ *Eclipsys Solutions Inc.* (21 March 2016), PR-2015-038 (CITT) at paras. 38-39; *Secure Computing LLC* (23 October 2012), PR-2012-006 (CITT). See also *Vidéotron Ltée v. Shared Services Canada*, 2019 FCA 307 [*Vidéotron*] at para. 30; *Bell Mobility v. Department of Public Works and Government Services* (14 July 2008), PR-2008-008 and PR 2008-009 (CITT) at para. 41; *Canyon Contracting* (19 September 2006), PR-2006-016 (CITT) at para. 25.

required the modified mask to meet the original specifications except for the additional polypropylene layer.¹⁸

[21] Second, the contract itself provides for changes to the contract if (and *only* if) they are authorized in writing by the contracting authority.¹⁹ In *Vidéotron*, the Federal Court of Appeal found reasonable the Tribunal's finding that work accepted by the government which was outside the scope of the solicitation requirements but contemplated as possibly necessary in *ad hoc* clauses contained in the contract was a matter of contract administration and did not constitute a new procurement process.²⁰

[22] The contract in the present complaint is somewhat less specific in its contemplation of possible amendments (and reasons therefore) than were the *ad hoc* clauses in *Vidéotron*. That said, the contract did contemplate changes to the scope of work if authorized by the contracting authority, and only if made via contract amendment.²¹ As stated above, exercising the option to acquire additional units could also only be done via contract amendment.

[23] The modifications to the contract contemplated by the complainant and PWGSC did not alter the price or number of option quantity units which could be acquired under the contract, nor did it alter the applicable technical requirements, with the sole exception of the additional polypropylene layer. Finally, the Tribunal notes that the complainant's samples were rejected on the basis of non-compliance with the original technical specifications, which compliance was stipulated by PWGSC when it requested sample three-ply masks.

[24] For the foregoing reasons, the Tribunal finds that the modification to the technical specifications applicable to the option quantity units did not amount to a new procurement in this case.

No reasonable indication of a breach

[25] In the alternative, even if the Tribunal were to find that the modification to the technical specifications applicable to the option quantity units constituted a new procurement, it would still decide not to conduct an inquiry because the complaint does not disclose a reasonable indication of a breach.

[26] The complainant argues that PWGSC acted unfairly in not allowing it to resubmit samples which it asserts would comply with the technical specifications if evaluated. The confidential attachments to the complaint indicate that, on multiple occasions, the complainant requested that PWGSC allow it to resubmit its samples because it had erroneously submitted the wrong ones.²²

[27] As the Tribunal has previously stated, it is a bidder's responsibility to ensure that its proposal is compliant with all essential elements of a solicitation,²³ which compliance the bidder bears the

¹⁸ Exhibit PR-2021-005-01B at 3; Exhibit PR-2021-005-01A (protected) at 30.

¹⁹ Exhibit PR-2021-005-01B at 83.

²⁰ At paras. 21-30.

²¹ Exhibit PR-2021-005-01B at 83.

²² Exhibit PR-2021-005-01C (protected) at 4, 7.

²³ *Ottawa Metro Towing/Metro Tow Trucks* (10 May 2019), PR-2019-008 (CITT) at para. 14, citing *Tektronix Canada Inc.* (20 November 2015), PR-2015-041 (CITT) at para. 16.

onus of demonstrating.²⁴ If the submission and evaluation of the three-layer masks did occur in the context of a new procurement, the complainant would bear the responsibility of ensuring that its proposals met with the terms of the solicitation. In that context, if PWGSC had allowed the complainant to resubmit different samples after the previous samples were found to be non-compliant with the technical requirements, this would likely amount to bid repair.

Grounds of complaint pertaining to the technical specifications are late

[28] Finally, the complainant argues that the technical specifications requiring a tolerance of no more than five percent variation to the required dimensions after wash testing are “impossible”,²⁵ “wrong and misleading” and “should have a **different** tolerance”,²⁶ and that “[t]here was [no] tolerance specified for [after] washing”.²⁷

[29] The Tribunal is not persuaded that these arguments would disclose a reasonable indication of a breach of the trade agreements. If the technical specifications (which also applied to the firm quantity units) were in fact “impossible” to meet, the Tribunal queries how the complainant was able to submit compliant units to fulfill the requirement for firm quantity units under the contract. This argument also seems to contradict the complainant’s request to be allowed to resubmit samples which would meet the requirements. The complainant states, “I believe that I should have been allowed to resubmit as I was sure my samples would pass [and] I would be awarded the Option Units.”²⁸ The Tribunal does not see how the complainant can be confident its samples would pass an evaluation under technical specifications which are impossible to meet.

[30] The Tribunal also does not agree with the argument that there was no tolerance specified for after washing, which appears to be contradicted by clause 5.2.2.b. of the Statement of Requirement under the contract, which provides as follows:

All materials utilized in the face covering must have the ability to be laundered in hot water (minimum 40 degrees Celsius wash temperature) and machine Tumble dried without damage or change to shape or colour for 50 launderings.

***Wash tests will be performed.**²⁹

[31] Further, the Tribunal has repeatedly stated, and the Federal Court of Appeal has reaffirmed the Tribunal’s statement,³⁰ that bidders bear the onus 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.” It is up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

[32] Pursuant to section 6 of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than

²⁴ *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para. 16.

²⁵ Exhibit PR-2021-005-01B at 1-2.

²⁶ *Ibid.* at 4.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* at 94.

³⁰ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at para. 20.

10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.³¹

[33] It is unclear when the complainant accessed the RFP containing the technical specifications in the solicitation documents, but the Tribunal considers this must have happened at some point before the time bidding closed on August 5, 2020.³² If discussions to amend the technical specifications did amount to a new procurement, the Tribunal would consider that the complainant was apprised of the technical specifications at issue when PWGSC informed it that the three-layer masks would be subject to those requirements.³³ The confidential record indicates that this information was communicated, and also that the complainant agreed to supply goods subject to those specifications,³⁴ more than 10 working days before the complainant first submitted its complaint on April 30, 2021. In either case, to the extent that these arguments constitute a distinct ground of complaint, that ground of complaint would be late.

[34] Again, the Tribunal finds that this complaint relates squarely to matters of contract administration, which are beyond the scope of its jurisdiction. For the reasons outlined above, PWGSC's willingness to accept option quantity units with amended technical specifications did not constitute a new procurement process.

[35] However, even if the modification to the technical specifications applicable to the option quantity units did amount to a new procurement, the Tribunal would find that the complaint does not disclose a reasonable indication of a breach of the trade agreements, and that any grounds of complaint regarding the technical specifications are late, as they were not filed within the 10-working-day time limit for filing a complaint under section 6 of the *Regulations*.

[36] The Tribunal notes that the OPO referred the complainant to PWGSC's BDM Program office, and that the procurement value is above the monetary thresholds governing the OPO's jurisdiction to consider the award of a contract for the acquisition of goods. As the Tribunal has found that this complaint relates to matters of contract administration, the review of which by the OPO is not subject to any monetary thresholds, it may be possible for the complainant to refer this matter back to the OPO on that basis.

DECISION

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

Cheryl Beckett
Cheryl Beckett
Presiding Member

³¹ Subsections 6(1) and (2) of the *Regulations*.

³² Exhibit PR-2021-005-01B at 48.

³³ Exhibit PR-2021-005-01C (protected) at 16.

³⁴ *Ibid.* at 14.