



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-019

Commissionaires Kingston &
Region Division

*Decision made
Wednesday, June 16, 2021*

*Decision and reasons issued
Monday, July 5, 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

COMMISSIONAIRES KINGSTON & REGION DIVISION

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.

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] This complaint concerns a Request for Proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the services of senior mentors.

[3] The complainant, Commissionaires Kingston & Region Division (Commissionaires), takes issue with an amendment to a mandatory requirement.

BACKGROUND

[4] The RFP (Solicitation No. W8160-200054/A) was published on March 9, 2021, and closed on April 23, 2021.

[5] This RFP was subject to two amendments, including Amendment 002, which was published on April 15, 2021. Amendment 002 related to mandatory requirement 5 (M5), which requires that proposed resources complete certain psychometric assessments. By virtue of Amendment 002, M5 became easier for bidders to meet because amended M5 lowered the standard that must be met by proposed resources on the psychometric assessments.

[6] That same day, Commissionaires wrote to PWGSC to raise its concerns with Amendment 002. Commissionaires explained that it had, among other things, encountered significant expenses to meet the higher standard of M5 prior to its amendment, and accordingly, it was of the view that it was unfair that M5 be amended at this stage in the process. Commissionaires requested that, if M5 could not be re-amended to its original version, additional points be awarded to the bidders that had met the requirements of M5 as previously drafted.

[7] PWGSC responded later that same day, indicating that the amended requirement was fair and providing some context. PWGSC also denied Commissionaires' request to award additional points to the bidders who had met the requirements of M5 prior to its amendment.

[8] Commissionaires submitted a bid in response to this RFP but was ultimately not the successful bidder. On June 2, 2021, an award notice was published on Canada's official electronic tendering website, Buyandsell.gc.ca, which indicated that PWGSC had awarded the contract to another supplier.

[9] Commissionaires filed the present complaint on June 14, 2021.

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

² SOR/93-602 [*Regulations*].

ANALYSIS

[10] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine whether the following four conditions are met before it launches an inquiry:

1. the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;³
2. the complainant is a potential supplier;⁴
3. the complaint is in respect of a designated contract;⁵ and
4. the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.⁶

[11] For the following reasons, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

[12] Pursuant to subsection 6(1) 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 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.

[13] Subsection 6(2) of the *Regulations*, in turn, 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.”⁷

[14] Commissionaires’ objection to PWGSC in relation to Amendment 002 was made on the day of its publication (i.e. April 15, 2021). Commissionaires’ objection therefore evidently fell within the 10-working-day time frame prescribed by subsection 6(1) of the *Regulations*.

[15] That same day, PWGSC responded by email, indicating, among other things, that “the revision is fair and will allow for enhanced competition within the supplier community, while also providing suitable resources to satisfy the requirement” and concluded that “[t]his section will not be added to the Point-rated criteria.”

[16] The Tribunal considers that Commissionaires received a clear denial of relief from PWGSC in relation to Amendment 002 on April 15, 2021. Commissionaires then had 10 working days after that date to file a complaint with the Tribunal in relation to that ground of complaint, in accordance with subsection 6(2) of the *Regulations*. As such, Commissionaires would have been required to file this ground of complaint with the Tribunal by April 29, 2021. It is clear that the prescribed time limit had long since expired when the present complaint was filed with the Tribunal.

³ Subsection 6(1) of the *Regulations*.

⁴ Paragraph 7(1)(a) of the *Regulations*.

⁵ Paragraph 7(1)(b) of the *Regulations*.

⁶ Paragraph 7(1)(c) of the *Regulations*.

⁷ Subsections 6(1) and (2) of the *Regulations*.

[17] Even if the Tribunal were to take the most generous approach and consider that Commissionaires was denied relief on the bid closing date (i.e. April 23, 2021), the fact remains that it did not file this ground of complaint within the time limits of section 6 of the *Regulations*. Indeed, the deadline to file a complaint under that timeline would have been 10 working days after April 23, 2021, or May 7, 2021.

[18] The Tribunal would also note that in procurement matters, time is of the essence and potential suppliers are required not to wait for the award of a contract before filing complaints that they may have with respect to a solicitation process. As such, a complainant may not accumulate grievances only to present them after its bid is rejected, or in other words, adopt a “wait-and-see” attitude.⁸

[19] Therefore, while the Tribunal’s preference is to dispose of complaints on their substantive merits, it has no authority to do so in cases such as this, where the complaint was clearly filed outside the mandatory time limits prescribed under section 6 of the *Regulations*.

[20] However, the Tribunal remarks that, based on copies of correspondence provided by Commissionaires, PWGSC does not appear to have provided Commissionaires with information about recourse mechanisms when it communicated to Commissionaires, on April 15, 2021, that it was denied the relief that it had sought. The Tribunal also notes that, while the RFP does contain certain information relating to the recourse mechanisms that are available to bidders, the RFP does not clearly outline the applicable deadlines for raising an objection with the government institution and a complaint with the Tribunal.

[21] The Tribunal, as it has previously done on multiple occasions,⁹ strongly encourages PWGSC to include on the cover page of each tender document and in substantive amendments the following language advising bidders of the deadlines for raising an objection with the government institution and a complaint with the Tribunal, along with the relevant link to the summary page regarding recourse mechanisms on Buyandsell.gc.ca:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade 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 time frame, a bidder may first choose to raise its ground of complaint by way of an objection to the government institution; if the government institution 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 time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal’s website (www.citt-tcce.gc.ca) or by contacting the Deputy Registrar of the Tribunal at 613-993-3595.¹⁰

⁸ *Finnie MFG Co. Ltd* (27 August 2018), PR-2018-021 (CITT) at para. 19; *J. K. Engineering* (16 December 2015), PR-2015-045 (CITT) at para. 18.; *APM Diesel 1992 Inc.* (17 February 2012), PR-2011-052 (CITT) at para. 15; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18-21.

⁹ *Kaméléons & cie Solutions Design Inc.* (26 November 2019), PR-2019-047 (CITT) at para. 22; *Les Gestions Jacques Delaney Inc.* (10 February 2017), PR-2016-050 (CITT) at para. 25; *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at para. 55; *R.H. MacFarlands (1996) Ltd.* (23 December 2013), PR-2013-029 (CITT) at paras. 30-31; *ADR Education* (16 July 2013), PR-2013-009 (CITT) at para. 34.

¹⁰ See section 6 of the *Regulations*.

[22] The Tribunal further encourages PWGSC to include the above-mentioned paragraph in communications to bidders, when PWGSC is aware or should be aware that a bidder is raising an objection or concern with the procurement process prior to bid closing.

[23] Having found that Commissionaires' complaint is time-barred by application of section 6 of the *Regulations*, the Tribunal does not need to examine the other applicable conditions when deciding whether to conduct an inquiry into a complaint filed with the Tribunal.

[24] Nonetheless, the Tribunal notes that it is well established that a government institution is entitled to require that its procured services be of the highest possible standards, provided, however, that the conditions are justified by legitimate operational requirements.¹¹ Similarly, Article 509 of the Canadian Free Trade Agreement provides that government institutions must not prepare, adopt, or apply any technical specification with the purpose or effect of creating unnecessary obstacles to trade.¹² As such, it would have been impermissible for PWGSC to have maintained higher standards than would have been necessary to achieve its legitimate operational requirements. Conversely, PWGSC is entitled to determine the appropriate standard (if lower) that will achieve the operational requirements, especially if the purpose is to remove obstacles to trade.

[25] Accordingly, the Tribunal is of the view that, even if the complaint were not time-barred, it would not conduct an inquiry because the complaint discloses no reasonable indication of a breach of the applicable trade agreements.

DECISION

[26] 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

¹¹ 2484726 *Ontario Inc. d.b.a. Brion Raffoul* (4 March 2021), PR-2020-064 (CITT) at para. 38; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at para. 62. The Tribunal has also held that legitimate operational requirements must be reasonable, i.e. not impossible to meet. See, for example, *Horizon Maritime Services Ltd. / Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 (CITT) at para. 77; *Springcrest Inc.* (21 November 2016), PR-2016-021 (CITT) at para. 53.

¹² Article 509(1) of the Canadian Free Trade Agreement provides as follows: "A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade."