Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2021-045

Asokan Business Interiors

v.

Department of Finance

Order and reasons issued
Thursday, December 9, 2021

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IN THE MATTER OF a complaint filed by Asokan Business Interiors 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 to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

ASOKAN BUSINESS INTERIORS **Complainant**

AND

THE DEPARTMENT OF FINANCE **Government Institution**

ORDER

WHEREAS Asokan Business Interiors (Asokan) filed the above-mentioned complaint on October 6, 2021;

AND WHEREAS the Canadian International Trade Tribunal decided, on October 8, 2021, to inquire into the complaint, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* (CITT Act) and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*;

AND WHEREAS, on October 29, 2021, Asokan notified the Tribunal that it was withdrawing its complaint;

AND WHEREAS subsection 30.13(5) of the CITT Act provides that the Tribunal may cease conducting the inquiry;

THEREFORE, pursuant to subsection 30.13(5) of the CITT Act, the Tribunal hereby ceases its inquiry. The Tribunal awards Asokan $500 in costs and orders the Department of Finance to take appropriate action to ensure prompt payment.

Peter Burn

Peter Burn
Presiding Member

STATEMENT OF REASONS

OVERVIEW

[1] This complaint by Asokan Business Interiors (Asokan) relates to a request for bid (RFB) issued by the Department of Finance (the Department) for the provision of rotary office chairs (Solicitation No. FIN-20210497).

[2] This RFB arose from an existing supply arrangement (E60PQ-120001/G), which contained two streams including a stream under the Procurement Strategy for Aboriginal Business (PSAB).[1] After the Tribunal commenced its inquiry in this matter, it was confirmed that the procurement at issue was conducted under the PSAB stream.

[3] Asokan argued that the Department improperly declared its bid non-compliant with a mandatory criterion of the RFB.

[4] For the reasons below, the Tribunal ceases its inquiry into this complaint.

PROCEDURAL BACKGROUND

[5] The RFB was issued on August 16, 2021. The bid closing date was originally fixed as August 31, 2021,[2] but this date was subsequently extended through an amendment to September 7, 2021.[3]

[6] Asokan was a prequalified supplier under the PSAB supply arrangement, which was a precondition to be eligible to bid on the procurement at issue. Asokan submitted a bid in response to the solicitation prior to the bid closing date.[4]

[7] On September 15, 2021, the contract was awarded to Nitam Solutions Inc. The award notice was published on Buyandsell.gc.ca on September 22, 2021. Asokan did not know about this development.

[8] On September 29, 2021, Asokan wrote to the Department to inquire into the status of the solicitation process.[5]

[9] On October 1, 2021, the Department informed Asokan of the winning bidder.[6] That same day, in response to an additional inquiry, the Department informed Asokan of the amount of the resulting contract. The Department also indicated to Asokan that its bid had been rejected because it had been considered non-compliant with a mandatory criterion (MTC1) of the solicitation.[7]

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1 Online at <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/9/40>.
2 Exhibit PR-2021-045-08 at 1.
3 *Ibid.* at 28.
4 Exhibit PR-2021-044-01 at 51.
5 *Ibid.* at 50.
6 *Ibid.* at 49–50.
7 *Ibid.* at 48–49.

[10] On October 4, 2021, Asokan responded by raising its concerns regarding the evaluation of its bid and inquired about recourse mechanisms.[8]

[11] On October 6, 2021, Asokan filed the present complaint with the Tribunal.

[12] On October 8, 2021, the Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.[9]

[13] In its letter dated October 13, 2021, informing the Department that the complaint had been accepted for inquiry, the Tribunal raised on its own motion the issue of jurisdiction that is examined below.[10]

PRELIMINARY ISSUE: JURISDICTION

[14] The solicitation documents referred to the PSAB, and a set-aside under the trade agreements, but also referred aggrieved bidders seeking redress to the Tribunal, among other possible recourse options. This was unusual and confusing. Indeed, because the Tribunal cannot inquire into matters where such a set-aside operates, it was unclear as to whether the Department intended the set-aside to operate, or not.

[15] Specifically, the RFB contained an excerpt which stated the following:

> PSAB Stream Procurement
>
> This procurement is set aside under the federal government Procurement Strategy for Aboriginal Business. For more information on Aboriginal business requirements of the Set-aside Program for Aboriginal Business, refer to Annex 9.4 of the Supply Manual.
>
> This procurement is set aside from the international trade agreements under the provision each has for measures with respect to Aboriginal peoples or for set-asides for small and minority businesses.
>
> Further to Article 800 of the Canadian Free Trade Agreement (CFTA), CFTA does not apply to this procurement.[11]

[16] The notice of proposed procurement also contained a similar excerpt.[12]

[17] However, the solicitation documents also mentioned the Tribunal as a potential recourse option under the "Bid Challenge and Recourse Mechanisms" section of the "Bidder Instructions".[13]

[18] Because of the confusion that those opposing statements created, the Tribunal requested submissions from parties on the issue of jurisdiction. The Tribunal also asked the Department to

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8 *Ibid.* at 48.
9 R.S.C., 1985, c. 47 (4th Supp.) [CITT Act].
10 Exhibit PR-2021-045-05 at 1.
11 Exhibit PR-2021-045-08 at 3.
12 Online at <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-21-00966029>.
13 Exhibit PR-2021-045-08 at 4–5.

explain where Asokan ought to address its complaint in the event that the Department truly intended that the set-aside apply. If it did, the Tribunal was necessarily without jurisdiction, but the Tribunal wanted to ensure that the complainant knew what its options were, including under any recourse mechanism within the PSAB, or the Procurement Strategy for Indigenous Business (PSIB),[14] if applicable. This is consonant with the Tribunal's long-standing caselaw requests that government institutions properly inform suppliers of their recourse rights.[15]

[19] On October 26, 2021, the Department provided submissions in response to the Tribunal's letter of October 13, 2021. These confirmed that the Department had indeed intended the PSAB and the set-aside to apply to the solicitation in issue and specified that the reference to the Tribunal as a recourse mechanism was a clerical error.[16] These clarifications confirmed that the Tribunal did not have jurisdiction.

[20] The Department provided some information on alternative recourse mechanisms and invited Asokan to seek legal counsel. However, it also added the sentence that follows: "Canada respectfully submits that the proper forum for the Complaint ought not to be a factor in determining whether the Tribunal has jurisdiction to conduct an inquiry."[17] This statement was perplexing to the Tribunal because it is of the view that nothing in its letter of October 13, 2021, ought to have been construed as an invitation to link the issue of jurisdiction with that of available recourse mechanisms. Rather, it ought simply to have been clear to the Department that it was being given the opportunity to provide corrected information to Asokan as to what its recourse options might be, as a means of correcting the impact of its clerical error on that subject. Importantly too, the Department's submissions did not address the issue of what recourse mechanisms might exist within the PSAB or the PSIB, or at the departmental level.

[21] It is for this reason that the Tribunal sought further clarification from the Department by letter dated November 5, 2021. In that letter, the Tribunal noted that the PSAB had stated, in 1997, the following:

> Options are being explored for a mechanism which will allow bidders to question the bidding and contract award process under a set-aside. Until a mechanism is in place, departments/agencies should be prepared to handle any questions themselves under their own established departmental processes.[18]

[22] In its letter of November 5, 2021, the Tribunal invited the Department to "confirm whether any such 'mechanism' has been established, or alternatively how the Department . . . is 'prepared to handle any questions . . . under [its] own established departmental processes' and what those departmental processes are."[19]

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14 Online at <https://www.sac-isc.gc.ca/eng/1617817287014/1617817368226>.

15 See *Seigniory Chemical Products Limited* (6 December 2019), PR-2019-048 (CITT) at para. 35.

16 Exhibit PR-2021-045-09 at 9.

17 *Ibid.*

18 Exhibit PR-2021-045-12 at 1. See Section 7; Dispute Mechanism, Procurement Strategy for Aboriginal Business: Guidelines for Buyers/Government Officials (Contracting Policy Notice 1997-6) at <https://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/contpolnotices/97-6-eng.asp>. See also Archived - Aboriginal Business Procurement Policy and Incentives - Contracting Policy 1996-2 at <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13706>.

19 Exhibit PR-2021-045-12 at 1.

[23] During the time that the Department took to fully respond to the issues first raised by the Tribunal in its letter of October 13, 2021, Asokan notified the Tribunal on October 29, 2021, that it "had decided not to move forward with [its] complaint as [it] did not wish to hire a private counsel nor waste any more time and energy on this matter."[20]

[24] On November 12, 2021, the Department answered the Tribunal's letter of November 5, 2021.[21] It reiterated much of what it had submitted in its letter of October 26, 2021. It also stated the following:

> [T]he Department . . . has no knowledge of a special mechanism having been established under PSAB in the past, but can confirm that no formal recourse mechanism exists under . . . PSAB at this time.
>
> . . .
>
> PSIB is (until approved by the Treasury Board) a policy being developed by Indigenous Services Canada for potential future application government-wide.

[25] When recourse to the Tribunal or to the Office of the Procurement Ombudsman is not possible for jurisdictional reasons, like in this case, "potential suppliers . . . may raise their concerns directly with the Contracting Authority and, should [they] be dissatisfied with the response received, . . . [they] may pursue recourse formally with the courts, or raise the matter to the Contracting Authority's supervisor."

ANALYSIS

The inquiry ceases because the complaint is withdrawn

[26] Asokan withdrew its complaint. As such the Tribunal ceases its inquiry.

[27] The Tribunal notes that it would have similarly ceased its inquiry, absent that withdrawal, given the Department's confirmation that the solicitation was subtracted from trade agreement coverage by reason of the invocation of set-asides for small or minority businesses[22] and Aboriginal persons or businesses[23] for each of the trade agreements to which Canada is a party.[24] The Tribunal

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20 Exhibit PR-2021-045-11.

21 Exhibit PR-2021-045-13 at 1.

22 See Canada-Honduras Free Trade Agreement, Annex 17.6 (Schedule of Canada); Canada-Chile Free Trade Agreement, Article P-01, Annex Kbis-01.1-6 (Canada's General Notes) at para. 1(d); Canada-Colombia Free Trade Agreement, Annex 1401-6 (General Notes) at para. 1(4); Canada-Peru Free Trade Agreement, Annex 1401.1-6 (General Notes, Schedule of Canada) at para. 1(d); Canada-Panama Free Trade Agreement, Annex 7: General Notes at para. 1(d); Canada-Korea Free Trade Agreement, Annex 14E: General Notes, Schedule of Canada at para. 2(a).

23 See World Trade Organization Revised Agreement on Government Procurement (WTO-AGP), Annex 7; Canada-UK Trade Continuity Agreement, which adopts the WTO-AGP; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Section G, General Notes at para. 3; Canada-Ukraine Free Trade Agreement, Annex 10-6 (General Notes) at para. 2; Canada-European Union Comprehensive Economic and Trade Agreement, Annex 19-7 (General Notes).

24 The potentially applicable trade agreements are those to which Canada is a party and are set out in section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 [Regulations].

has repeatedly had the opportunity to explain why it must decline jurisdiction in circumstances like those of the present case.[25]

The Tribunal rules on the law—it does not make policy

[28] The Tribunal is concerned, however, with the Department's position that the Tribunal's attempt to facilitate Asokan's acquisition of knowledge as to the recourse mechanisms available to it appears to have been perceived as a matter linked to the jurisdictional issue that was posed. The two issues are not linked whatsoever. Providing complete and accurate information to suppliers on what their recourse options are is a question of access to justice. It is not an issue of jurisdiction any more than it is an issue of policy. Yet, in its submissions, the Tribunal understood the Department to be taking the position that the Tribunal was engaging in policy making if it delved into the area of what recourse options were available to Asokan.

[29] The Tribunal does not engage in policy making. That is the prerogative of the Government and of Parliament. To be sure, the Tribunal is cognizant that it may, from time to time, examine issues that assuredly have perceived policy implications. But it is important to stress that the Tribunal cannot shy away from making decisions on the law out of fear of perceived policy implications whether it be for the executive, or for any other stakeholder. Access to justice is a question that goes to the foundation of the rule of law in our free and democratic society.[26] As a court of record, the Tribunal would be doing a disservice to the rule of law if it were to turn a blind eye to impediments to parties being able to have full access to justice.[27] To be very clear and emphatic, the Tribunal very carefully guards itself from *making* policy and, in fact, never does. Period. Put otherwise, it is important to stress that whatever policy implications observers may perceive as arising from Tribunal decisions are *as a result of* interpreting the law as it is; they are a by-product of applying the law to a case; they are not the product itself.

[30] One such illustrative example of the separation between, on one hand, the quasi-judicial legal interpretation function of the Tribunal and, on the other, the policy-making role of others, concerns the Tribunal's case law on the National Security Exemption (NSE). In interpreting the law, the Tribunal took the *legal* position that the Agreement on Internal Trade (now replaced by the Canadian Free Trade Agreement), allowed for properly security-cleared Canadian suppliers to have access to the Tribunal's bid challenge mechanism despite the invocation of an NSE.[28] The Tribunal does not live in a vacuum, so it was cognizant that its legal finding might have policy implications. The executive (the Governor-in-Council) then made the policy decision to adopt amendments to the

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25 See *Steeple Incorporated* (19 September 2019), PR-2019-033 (CITT) at paras. 11–16; *Miwayawin Health Care Solutions Ltd.* (22 November 2018), PR-2018-041 (CITT) at paras. 11–18 citing *LeClair INFOCOM Inc.* (26 January 2010), PR-2009-076 (CITT); *Avaya Canada Corp.* (26 October 2011), PR-2011-040 (CITT).

26 The Supreme Court of Canada has described access to justice both as a precondition to the rule of law (see *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para. 214 [*Uashaunnuat*] citing *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214 at 230) and fundamental to the rule of law (see *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31 at para. 39).

27 The Supreme Court of Canada unanimously recognized that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today." See *Hryniak v. Mauldin*, 2014 SCC 7 at para. 1.

28 *Hewlett-Packard (Canada) Co.* (20 March 2017), PR-2016-043 (CITT).

Regulations,[29] affecting the manner in which the Tribunal ought to treat cases involving an NSE.[30] The Tribunal interpreted the law. The executive then played a policy-making role. In that matter, and always, the two roles never intersect. They are contiguous and separate.

Remedying poor information on recourse mechanisms

[31] Because access to justice is a legal matter that permeates the proper functioning of our society, the Tribunal has never shied away from underscoring voids where government institutions could improve suppliers' access to justice.

[32] One such instance is whenever the Tribunal encounters a government institution that fails to candidly and completely inform suppliers of their bid challenge recourse options. The Tribunal has repeatedly pointed out those failings in the past.[31] Generally, instances of poor information giving are now less frequent than they were, but the Tribunal still encounters situations where it needs to intervene from time to time, as it does here. Specifically, in the present matter, Asokan, who "did not wish to hire a private counsel", is at least better informed now as a result of the Tribunal's insistence than it was when dealing with government officials alone.

[33] In all these occasions, the Tribunal did not make policy; rather, it did its principled duty in helping stakeholders know their rights to access to justice. The CITT Act mandates the Tribunal to make "findings and recommendations".[32] As mentioned, government institutions are now doing a better job of informing suppliers of their recourse options than they used to. The Tribunal's decisions in this area might have *caused* a measure of that improvement; but assuredly, they happened only *because* or *as a consequence* of government institutions making the *policy decision* to do a better job of letting suppliers know how to access recourse mechanisms.

Indigenous peoples and businesses have *less* access to justice than others

[34] Another such instance that requires further examination and explanation is revealed through the present matter. Indigenous peoples and businesses who participate in government procurement opportunities such as the one in issue *do not* currently have access to the Tribunal's bid challenge mechanism and can only turn to the courts when seeking a formal and impartial recourse mechanism whenever an aboriginal or minority small business set-aside is invoked.[33] As a result, Indigenous

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29 Subsections 10(2) and (3) of the Regulations were adopted in June 2019 by SOR/2019-162, s. 1.

30 See Marcia Mills, *Because We Said So: Invoking the National Security Exception to Reduce Access to Dispute Processes for Government Suppliers*, Canadian Global Affairs Institute, October 2019, online at <https://d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/4292/attachments/original/1571785929/Because_We_Said_So_Invoking_the_National_Security_Exception_to_Reduce_Access_to_Dispute_Processes_for_Government_Suppliers.pdf?1571785929>. See also *Ocalink Technologies Inc.* (24 February 2021), PR-2020-062 (CITT).

31 See *Seigniory Chemical Products Limited* (6 December 2019), PR-2019-048 (CITT) at para. 35 and footnote 21.

32 Subsection 30.15 of the CITT Act.

33 The Tribunal is mandated to conclude its inquiries within 90 or 135 days, depending on the complexity of the proceedings, or within 45 days if the express option is invoked. It typically conducts reviews on the basis of a written record without having recourse to an oral hearing. As such, bringing a procurement case to the Tribunal is typically much quicker and less costly than litigation before the courts. See *Hryniak v. Mauldin*, 2014 SCC 7 at para. 1: "Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial."

suppliers currently have *less* rights of access to justice than non-indigenous Canadians, and foreign suppliers, who can access the Tribunal when the trade agreements are applicable.

[35] The Tribunal notes that the Government of Canada has been considering "options" to remedy this situation since the mid-nineteen nineties.[34] Seemingly, no option has yet been retained. Whether one ought to be, or when and if at all, is a policy choice for policy-makers. The Tribunal's only finding here is one of law that pertains, again, to access to justice, because an important systemic differentiation in treatment available to certain suppliers and not to others was underscored by this complaint.

[36] By way of letter, pursuant to subsection 30.19(1) of the CITT Act, the Tribunal will also be providing comments and observations in relation to this matter to the deputy head of the Department.

COSTS

[37] The solicitation documents erroneously referred to the Tribunal as a potential recourse option. Asokan may well have otherwise not filed a complaint with the Tribunal.

[38] Therefore, the Tribunal awards Asokan a nominal amount of $500 in complaint costs, to be paid by the Department.

DECISION

[39] Pursuant to subsection 30.13(5) of the CITT Act, the Tribunal has decided to cease its inquiry into the complaint.

Peter Burn

Peter Burn
Presiding Member

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34 Exhibit PR-2021-045-12 at 1. See Archived - Aboriginal Business Procurement Policy and Incentives - Contracting Policy 1996-2 under section Future Initiatives, Bid Dispute Mechanism:

> 18. Discussions are now underway to develop an appropriate bid dispute mechanism which will allow bidders to challenge the bidding and contract award process under this new policy. In the interim, departments and agencies should be prepared to respond to bid challenges as appropriate.