



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-061

12363623 Canada Inc.

*Decision made and issued
Wednesday, January 5, 2022*

*Reasons issued
Tuesday, February 1, 2022*

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

12363623 CANADA INC.

AGAINST

THE DEPARTMENT OF EMPLOYMENT AND SOCIAL DEVELOPMENT

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.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

The statement of reasons will be issued at a later date.

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.

SUMMARY OF THE COMPLAINT

[2] The present complaint concerns an invitation to tender (ITT) for the printing and delivery of “Canada Pension Plan kits” (solicitation 100019767) by the Department of Employment and Social Development (ESDC). The lowest/lower bid was identified as the method to be used to select the winning bid.

[3] In its complaint to the Tribunal, the complainant, 12363623 Canada Inc., alleges that:

- (1) ESDC failed to provide adequate time to ask questions and respond to the ITT;
- (2) ESDC was inconsistent in its approach to evaluating the ITT and created a geographic advantage for some suppliers by including shipping costs in the financial evaluation of the ITT; and
- (3) ESDC unfairly included a product requirement concerning the kraft paper required for the envelopes that could only be met by one supplier, which restricted competition in the tendering procedure.³

[4] For the reasons that follow, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the Regulations. The grounds of the complaint became known or reasonably should have become known at the time that the ITT was published. The complainant received constructive denial of relief when its objection remained unaddressed at the bid closing deadline. As such, the Tribunal has decided not to conduct an inquiry into the complaint at this time.

BACKGROUND

[5] On November 8, 2021, the solicitation was published, with a bid closing date of November 18, 2021, at 2:00 p.m. EST.

[6] On November 12, 2021, 12363623 Canada Inc. requested an additional five days to review the tender and submit its bid.⁴ No response was received from ESDC.

[7] On November 15, 2021, 12363623 Canada Inc. requested additional information with respect to the procurement, as well as an extension to submit bids, as 12363623 Canada Inc. was at the time

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

² SOR/93-602 [Regulations].

³ Exhibit PR-2021-061-01 at 10–11.

⁴ *Ibid.* at 12.

in a dispute with the primary supplier of the kraft paper requested for the envelopes and the cost of this paper represented a substantial portion of the bid price.⁵ No response was received from ESDC.

[8] On or before the November 18, 2021, 12363623 Canada Inc. submitted its bid.

[9] On November 25, 2021, following bid closing, ESDC informed 12363623 Canada Inc. that it intended to reject its bid, as 12363623 Canada Inc. had failed to meet its contractual obligations on a number of recent contracts concluded with ESDC. ESDC requested that 12363623 Canada Inc. provide reasons by December 5, 2021, regarding why its bid should be accepted.⁶ The complainant provided its response on December 5, 2021.⁷

[10] On December 13, 2021, 12363623 Canada Inc. was informed that its bid was considered non-compliant, as it did not contain correct pricing information for the items, the quantity of items, the delivery address and the delivery dates specified in the solicitation documents. ESDC informed 12363623 Canada Inc. that the contract had been awarded to St-Joseph Communications in the amount of \$99,291.11.⁸

[11] On the same day, 12363623 Canada Inc. requested clarification on why its bid was considered non-compliant.⁹

[12] On December 15, 2021, 12363623 Canada Inc. filed its complaint with the Office of the Procurement Ombudsman (OPO). On December 16, 2021, the OPO's representative referred the case to the Tribunal. In a letter addressed to 12363623 Canada Inc., the OPO indicated that the complaint fell outside of its mandate.¹⁰

[13] On December 20, 2021, ESDC provided further details and screen shots of the documents required to be printed and those submitted by 12363623 Canada Inc., which showed that the quantities, items and delivery dates did not coincide with the requirements indicated in the solicitation documents.¹¹

[14] On December 24, 2021, 12363623 Canada Inc. submitted its perfected complaint following some clarifications from the Tribunal's Registry.

ANALYSIS

[15] 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 may conduct an inquiry into a complaint if the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6;¹²

⁵ *Ibid.* at 13.

⁶ Exhibit PR-2021-061-01.B (protected) at 12–15.

⁷ *Ibid.* at 10–12.

⁸ *Ibid.* at 9.

⁹ *Ibid.* at 8.

¹⁰ Exhibit PR-2021-061-01.A at 35.

¹¹ Exhibit PR-2021-061-01.B (protected) at 4–7.

¹² Subsection 6(1) of the Regulations.

- ii. the complainant is a potential supplier;¹³
- iii. the complaint is in respect of a designated contract;¹⁴ and
- iv. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹⁵

[16] In this case, the Tribunal finds that the first condition is not met, as the complaint was not filed within the time limits prescribed by section 6 of the Regulations. Accordingly, it is not necessary to examine whether the other conditions for inquiry are met.

[17] Pursuant to subsections 6(1) and (2) 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. Further, a potential supplier that has made a timely objection to the procuring government institution and is denied relief 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.

[18] In this case, 12363623 Canada Inc. raised issues with the procuring department with respect to its first and third ground of complaint on November 12 and 15, 2021, i.e. three and four working days after receiving the ITT. Not having received a response by the time bids were due, 12363623 Canada Inc. submitted a bid on or before the bid closing deadline of November 18, 2021.

[19] The Tribunal considers 12363623 Canada Inc. to have had constructive knowledge of the denial of relief when the solicitation closed on November 18, 2021. 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.¹⁶

[20] At this point, 12363623 Canada Inc. should have known that ESDC, in its silence, had refused its request to extend the submission deadline and to amend the terms of the procurement with respect to the envelope paper. From November 18, 2021, 12363623 Canada Inc. would have had 10 working days to file a complaint, which would have set a deadline of December 2, 2021.

[21] Even allowing for extenuating circumstances, subject to subsections 6(3) and 6(4) of the Regulations, the Tribunal may only permit a complaint to be filed within 30 days after the day the basis of the complaint became known or should have become known to the potential supplier. As such, the last day that 12363623 Canada Inc. could have filed a complaint based upon the first and third grounds of complaint was December 20, 2021.

¹³ Paragraph 7(1)(a) of the Regulations.

¹⁴ Paragraph 7(1)(b) of the Regulations.

¹⁵ Paragraph 7(1)(c) of the Regulations.

¹⁶ *Netgear, Inc.* (17 July 2008), PR-2008-019 (CITT) at para. 11. The Tribunal 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.

[22] With respect to the second ground of complaint, 12363623 Canada Inc. did not make any objection to ESDC with regard to the inclusion of shipping costs in the financial evaluation of the ITT. If 12363623 Canada Inc. had an issue with this matter, it could have raised it with ESDC at some point during the bidding period, in order to seek an amendment of the requirement, or with the Tribunal no later than 10 working days after the closing of the solicitation, namely December 2, 2021.

[23] As with grounds one and three of the complaint, even if ground two of the complaint had met the conditions of subsections 6(3) and 6(4) of the Regulations, it would not have been filed within the requisite 30-day time limit.

[24] As the Federal Court of Appeal 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.”¹⁷

[25] Based on the foregoing, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

DECISION

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

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

¹⁷ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at paras. 18, 20.