



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-069

Military Travel Inc.

*Decision made
Wednesday, January 26, 2022*

*Decision and reasons issued
Friday, January 28, 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

MILITARY TRAVEL INC.

AGAINST

THE DEPARTMENT OF AGRICULTURE AND AGRI-FOOD

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.

Serge Fréchette

Serge Fréchette
Presiding Member

STATEMENT OF REASONS

SUMMARY

[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 relates to a request for proposal (RFP) issued by the Department of Agriculture and Agri-Food (AAFC) for the provision of tree pruning services (solicitation 01B46-2021-139).

[3] Military Travel Inc. (MTI) disputes the addition of a new criterion related to the bidder's experience introduced following the mandatory site visit held on January 6, 2022, at which time MTI was directly asked about its experience. MTI takes the position that the additional requirement was inserted in order to exclude it from competition.

[4] However, AAFC cancelled the solicitation on or about January 24, 2022.

[5] As detailed below, in the circumstances of this matter, the Tribunal has decided not to conduct an inquiry. Irrespective of the cancellation of the solicitation, the complaint is premature.

BACKGROUND

[6] On December 17, 2021, AAFC published the RFP in question on Buyandsell.gc.ca³ for the extraction of 400 apple trees followed by the pruning of 2,668 apple trees, with proper off-site disposal of cut wood (grinding wood chips and removing mulch to disposal sites). The initial closing date was January 26, 2022, at 2:00 p.m. EST.

[7] AAFC published three amendments to the RFP on January 12, 14 and 20, 2022. Among other things, Addendum #1 added the mandatory criterion of "Project Manager Experience", Addendum #2 extended the closing date to January 31, 2022, while Addendum #3 replaced the mandatory criterion of "Project Manager Experience" with "Contractor Experience" and brought forward the closing date to January 26, 2022, at 2:00 p.m. EST.

[8] On January 6, 2022, MTI attended the mandatory site visit at the Harrow Research and Development Centre and was asked if it had done orchard pruning in the past, to which it answered that it had not.

[9] On January 11, 2022, AAFC notified MTI that the mandatory criterion of "Project Manager Experience" would be posted online the next day on Buyandsell.gc.ca.⁴ The same day, MTI emailed

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

² SOR/93-602 [Regulations].

³ Online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-21-00979050>>.

⁴ Exhibit PR-2021-069-01A at 2.

AAFC, requesting to know why the mandatory criterion had changed and when the decision to change it had been made, adding that, “[i]f the decision was only made after the site meeting; given the other things we observed at the meeting we are concerned we may not be given a fair chance on this opportunity and that Canada has already decided who they wish to work with on this contract.”⁵

[10] On January 12, 2022, MTI emailed AAFC again, following up with its questions, as January 13, 2022, would be the last day to be within the question period.

[11] On January 13, 2022, AAFC confirmed by email that the RFP would be extended to have more time to reassess the evaluation criteria.⁶

[12] On January 20, 2022, AAFC notified MTI that Addendum #3 was on Buyandsell.gc.ca and that it had moved the closing date to January 26, 2022, as well as modified the recently added experience criterion.⁷

[13] The same day, MTI filed a complaint with the Tribunal and advised AAFC about it.⁸

[14] On January 21, 2022, the Tribunal requested additional information pursuant to subsection 30.12(2) of the CITT Act. The same day, MTI filed the requested documents, and the complaint was considered complete and in compliance with subsection 30.11(2) of the CITT Act.

[15] On January 26, 2022, the Tribunal learned through MTI that AAFC cancelled the RFP on or about January 24, 2022.

ANALYSIS

[16] Pursuant to section 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 can conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

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

Cancellation of the solicitation

[18] Subsection 30.11(1) of the CITT Act provides that, subject to the Regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process

⁵ *Ibid.*

⁶ *Ibid.* at 1.

⁷ *Ibid.* at 3.

⁸ *Ibid.*

that relates to a *designated contract* and request the Tribunal to conduct an inquiry into the complaint. Likewise, paragraph 7(1)(b) of the Regulations requires that the Tribunal determine, among other things, whether the complaint is in respect of a designated contract.

[19] The expression “designated contract” is defined in section 30.1 of the CITT Act as “a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations”. Subsection 3(1) of the Regulations provides that “[f]or the purposes of the definition *designated contract* . . . any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in [the trade agreements], that has been or is proposed to be awarded by a government institution, is a designated contract.”

[20] In *Adélarde Soucy (1975) inc.*, the Tribunal indicated that “it is clear from the wording of section 30.11 that the existence of a contract that ‘. . . has been or is proposed to be awarded . . .’ is a precondition that applies only when the complaint is filed. The provision does not specify that this situation must necessarily continue at any time during the inquiry.”⁹

[21] Therefore, in order to accept a complaint for inquiry, the Tribunal has to be satisfied that it relates to a designated contract, and the question of whether a designated contract exists is considered at the time the complaint is filed.¹⁰ In *Agence Gravel Inc.*, the Tribunal stated the following:

19. Sections 30.1 and 30.11 of the *CITT Act* do not allow the Tribunal to embark on an at-large inquiry into the procurement processes of the government. However, the *Tribunal is of the opinion that these sections are not intended to deprive the Tribunal of jurisdiction to inquire into a complaint regarding a specific aspect of a procurement process.*

20. *The cancellation of a procurement process relating to a designated contract is an integral aspect of that process and, as such, must comply with the requirements of any trade agreements that may apply. . . .*¹¹

[Footnote omitted, emphasis added]

[22] In this case, MTI filed a complaint with the Tribunal on January 20, 2022, and the complaint was considered complete and in compliance with subsection 30.11(2) of the CITT Act on January 21, 2022.

⁹ *Adélarde Soucy (1975) inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) [*Adélarde Soucy (1975) inc.*] at para. 24.

¹⁰ *Agence Gravel Inc. v. Department of Public Works and Government Services* (26 January 2017), PR-2016-035 (CITT) [*Agence Gravel Inc.*] at para. 13. See also *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) at para. 8: “Contrary to PWGSC’s arguments, as explained in previous jurisprudence, the Tribunal is of the view that nothing in the *CITT Act* or its regulations suggests that Parliament contemplated that a decision by the government institution to cancel a procurement process could terminate the Tribunal’s *jurisdiction* to continue an inquiry that was commenced in accordance with the law. In particular, the Tribunal is of the view that the wording of sections 30.11 and 30.1 of the *CITT Act* and of subsection 7(1) of the *Regulations* indicates that the existence of a contract ‘. . . that has been . . .’ or ‘. . . is proposed to be . . .’ awarded is a precondition of the Tribunal’s *jurisdiction* that must exist when the complaint is filed. These provisions do not specify that this situation must necessarily persist at all times during the inquiry” [footnote omitted].

¹¹ *Agence Gravel Inc.* at paras. 19–20.

[23] According to the Buyandsell.gc.ca website, AAFC's last amendment to the RFP was made on January 24, 2022; it is therefore reasonable to believe that AAFC cancelled the procurement process on that date. Therefore, the cancellation occurred *after* MTI's complaint was filed, which means that a designated contract existed at the time of filing the complaint.

[24] For these reasons, the Tribunal has jurisdiction to conduct an inquiry into the complaint.

The complaint is premature

[25] Even if the procurement process had not been cancelled, the Tribunal would not have conducted an inquiry into the complaint, as it was premature.

[26] Section 6 of the Regulations provides that 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.

[27] MTI made a timely objection to AAFC within this window of 10 working days. Indeed, MTI was made aware of the basis of the complaint on January 11, 2022, when AAFC advised it of the addition of a new mandatory criterion, "Project Manager Experience". The same day, MTI made an objection by email.

[28] Pursuant to subsection 6(2) of the Regulations, 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.

[29] In the Tribunal's view, AAFC had not denied relief to MTI, as it had not replied to MTI's objection. The Tribunal therefore considers the complaint to be premature and will not conduct an inquiry at this time.

[30] Moreover, the Tribunal is of the view that the cancellation of the solicitation moots the need for any discussion of the issues raised by MTI in this matter. In this instance, the cancellation of the solicitation is an occasion to begin a replacement procurement process under new terms and circumstances.

[31] If MTI has issues with any aspect of the procurement process pertaining to a solicitation that replaces the cancelled one, it may file another complaint with the Tribunal.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member