



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

Files PR-2022-025 and
PR-2022-026

12363623 Canada Inc.

*Decision made
Monday, July 25, 2022*

*Decision and reasons issued
Friday, August 5, 2022*

IN THE MATTER OF two complaints filed pursuant to subsection 30.11(1) of the
Canadian International Trade Tribunal Act.

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 complaints.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations), 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] 12363623 Canada Inc. (Dingu Technologies) filed two complaints with respect to the procurement of envelopes made by the Department of Employment and Social Development (ESDC) (solicitations 100021572 and 100021574). In the two complaints, Dingu Technologies has made almost identical allegations, which can be summarized as the following:

- i. Dingu Technologies questioned the need for two separate procurements when the requirements appeared to be very similar;
- ii. Dingu Technologies alleges that ESDC's mandatory criteria M.1, which requires a minimum of seven years' experience in envelope printing and/or production within the last ten years, is discriminatory and not justified;
- iii. Dingu Technologies alleges that ESDC's approach of including shipping costs in the financial evaluation violates the intent of the Canadian Free Trade Agreement (CFTA),³ as it gives a significant advantage to printers with operations that can minimize shipping costs;
- iv. Dingu Technologies argues that changing the requirements to provide the option for suppliers to choose between brown kraft paper and white paper gives an advantage to its competitors; and
- v. Dingu Technologies suggests that the price adjustment clause included in the request for proposals (RFP) fetters its ability to make a fair profit by requiring that at least 50% of the envelopes' cost should come from the paper.

[3] As the nature of the solicitations and the grounds of complaint by Dingu Technologies are nearly identical, and pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,⁴ the Tribunal has decided to combine the proceedings.

[4] For the reasons that follow, the Tribunal has concluded that Dingu Technologies' complaints are late, do not represent complaints from a potential supplier and do not raise a reasonable indication of a breach of the applicable trade agreements.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-025-01 at 10–11; Exhibit PR-2022-026-01 at 10–11.

⁴ SOR/91-499.

BACKGROUND

[5] The two RFPs were published on June 15, 2022. The bid closing date was June 29, 2022, at 2 p.m. EST for both RFPs.

[6] On June 15, 2022, Dingu Technologies requested additional information on why a price adjustment clause had been included in the RFP in solicitation 100021572.

[7] On June 21, 2022, Dingu Technologies requested additional clarifications and questions with respect to the two solicitations.

[8] On June 21 and 23, 2022, ESDC made amendments to solicitation 100021572, first to answer questions related to Dingu Technologies' request of June 15, 2022, and second to answer questions related to its request of June 21, 2022.

[9] On June 22 and 23, 2022, ESDC made amendments to solicitation 100021574, first to increase the quantity of envelopes requested and second to answer questions related to Dingu Technologies' request of June 21, 2022.

[10] On July 14, 2022, Dingu Technologies submitted its complaints to the Tribunal.

[11] On July 18, 2022, the Tribunal requested additional information from Dingu Technologies related to its complaints.

[12] On July 20, 2022, Dingu Technologies submitted the requested information for both complaints.

[13] On July 21, 2022, the Tribunal acknowledged receipt of Dingu Technologies' complaints.

ANALYSIS

[14] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry into a complaint if all the following conditions are met:

- a. the complaint has been filed within the time limits prescribed by section 6;
- b. the complainant is a potential supplier;
- c. the complaint is in respect of a designated contract; and
- d. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

Timeliness

[15] 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 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier. Where the potential supplier first makes an objection, it

must file a complaint within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.⁵

[16] Dingu Technologies' grounds of complaint relate to the structure and content of the solicitations and should have become known at the earliest when it received the solicitation documents for the two procurements on June 15, 2022. As Dingu Technologies raised questions with ESDC about the solicitations on this date, it can be inferred that it had knowledge of the contents of the solicitation documents at this time. Dingu Technologies voiced its concerns by way of written questions to ESDC on June 15 and 21, 2022, for solicitation 100021572⁶ and June 21, 2022, for solicitation 100021574,⁷ namely within the timelines set out in the Regulations.

[17] Dingu Technologies received responses from ESDC on June 21 and 23, 2022, for solicitation 100021572 and June 22 and 23, 2022, for solicitation 100021574, by way of amendment to the solicitations.

[18] With respect to the questions raised by Dingu Technologies on June 15, 2022, for solicitation 10021572, ESDC's first amendment provided a point-by-point explanation of Dingu Technologies' questions, addressing grounds of complaint ii) through v), among others.⁸

[19] Concerning the questions raised by Dingu Technologies on June 21, 2022, with respect to solicitations 100021572 and 100021574, ESDC provided a more summary response to Dingu Technologies' first ground of complaint, indicating that, "Due to the volume and different delivery dates the decision was made to separate the requirement."⁹

[20] At that point, Dingu Technologies had actual knowledge of ESDC's denial of relief. Accordingly, Dingu Technologies' complaints should have been filed by July 8, 2022, at the latest, to be considered timely. However, Dingu Technologies' complaints were not perfected until July 20, 2022, making its complaints late.

[21] The procurement review process does not provide for grievances to be accumulated. In this regard, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, the Federal Court of Appeal provided the following guidance:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . [potential suppliers] 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. . . .¹⁰

⁵ Subsections 6(1) and (2) of the Regulations.

⁶ Exhibit PR-2022-025-01.A at 1-3.

⁷ Exhibit PR-2022-026-01.A at 1-3.

⁸ [Amendment 001](#), Printing Services for ESDC and Service Canada Envelopes (100021572), Buyandsell.gc.ca [accessed: 28 July 2022].

⁹ [Amendment 002](#), Printing Services for ESDC and Service Canada Envelopes (100021572), Buyandsell.gc.ca [accessed: 28 July 2022]; [Amendment 002](#), Printing Services for ESDC and Service Canada Envelopes (100021574), Buyandsell.gc.ca [accessed: 28 July 2022].

¹⁰ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

[22] The Court added that a bidder must not adopt a “wait-and-see” attitude and make its challenge once a definitive answer has been rendered by the procuring department. It stated that this “is precisely the type of attitude that the procurement process and Regulations seek to discourage.”¹¹

[23] In this case, Dingu Technologies filed the present complaints only some weeks after the bid closing date. By then, the time frame to complain, as set out in the Regulations, had passed, and the Tribunal finds that it cannot further consider Dingu Technologies’ complaints.

[24] In this case, Dingu Technologies should have acted, at the latest, upon the response provided by ESDC on June 23, 2022. From this point, it was made aware of ESDC’s position on its concerns and would have been in a position to put forward its complaints. However, Dingu Technologies waited until the time frame to complain, as set out in the Regulations had passed, and the Tribunal finds that it therefore cannot consider its complaints further.

Potential supplier

[25] Even if the present complaints were found to be timely, the Tribunal finds that Dingu Technologies’ complaints would still not be accepted for inquiry, as Dingu Technologies is not a potential supplier. Dingu Technologies’ complaints to the Tribunal state that “12363623 Canada Inc. did not have an offer for this procurement to offer as the mandatory criteria were too restrictive.”¹² In citing the paper requirements, the mandatory criteria related to the procurement and the geographic advantages of other bidders as impediments to it making a bid on the procurement, the Tribunal must question whether Dingu Technologies was in a position to submit a bid at all.

[26] In *Flag Connection*, the Tribunal defined two requirements that must be met for a complainant to be considered a prospective bidder:

The Tribunal is of the view that, in order to be considered a prospective bidder in relation to a particular designated contract, two requirements must necessarily be met. First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, it must have the capacity to submit a proposal in response to the solicitation.¹³

[27] In the present case, Dingu Technologies has admitted that it does not meet the technical requirements of the procurement, that it would have difficulty in procuring the paper required to meet the requirements of the RFP and that due to its geographic location, it would have difficulty in submitting a competitive bid in the procurement. Furthermore, even if Dingu Technologies had the technical and financial capabilities to fulfill the requirements of the RFP, it did not submit a proposal, nor was it prevented from doing so, and cannot therefore be considered a potential supplier.

[28] As Dingu Technologies is not a potential supplier in the solicitations at issue, the Tribunal declines Dingu Technologies’ complaints for inquiry.

¹¹ *Ibid.* at para. 28.

¹² PR-2022-025-01.A at 3; PR-2022-026-01.A at 3.

¹³ *Flag Connection Inc. v. Department of Public Works and Government Services* (2 September 2009), PR-2009-026 at para. 20 [*Flag Connection*].

No reasonable indication of a breach

[29] The Tribunal also finds that Dingu Technologies' complaints do not raise a reasonable indication of a breach of the applicable trade agreements. Notably, Dingu Technologies' grounds of complaint are highly speculative and fail to provide sufficient detail to determine if a breach of the applicable trade agreements has taken place.

[30] For the Tribunal to inquire into a procurement complaint, there must be a reasonable indication that a procuring entity has violated one of Canada's trade agreements.¹⁴

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case. . . . However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.¹⁵

[31] With respect to the first ground of complaint, the CFTA at article 503(1) bars the practice of contract splitting in cases where it is used to circumvent the application of the agreement. However, Dingu Technologies has presented no argument or evidence to indicate that ESDC split the procurements in this case to avoid the application of the provisions of the CFTA. The Tribunal has generally accorded a large measure of deference to procuring departments and evaluators in how they define a procurement and the way the requirement will be fulfilled.¹⁶ In this case, Dingu Technologies did not specify why it believed the issuance of two solicitations would have represented a barrier to it taking part in the procurements at issue.

[32] With respect to the second ground of complaint, concerning the requirement for seven years' experience for the procurement, Dingu Technologies generally alleges that the requirement is restrictive. Article 509(1) of the CFTA requires that, "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." As noted above, procuring departments are afforded discretion in how they structure and evaluate procurements. Dingu Technologies did not elaborate on why it believed that the experience requirement was an unnecessary obstacle to trade, and did not further elaborate on why this requirement was overly restrictive.

[33] Concerning Dingu Technologies' third ground of complaint, it is alleged that including the shipping cost in the financial evaluation violated the spirit of the CFTA, as it favours businesses located in regions where shipping is cheapest.¹⁷ No additional analysis of this argument was made by Dingu Technologies and no discussion was made about how ESDC's procurement choices may have impacted Dingu Technologies' ability to bid on the entirety or a portion of the procurements at issue, in contravention of the CFTA. In previous cases, the Tribunal has recognized that a procurement

¹⁴ Regulations, s. 7(c).

¹⁵ *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada v. Department of Foreign Affairs, Trade and Development* (24 September 2013), PR-2013-016 (CITT) at para. 26; *Terrapure Environmental v. Department of Public Works and Government Services* (22 June 2020), PR-2020-008 (CITT).

¹⁶ *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 58.

¹⁷ PR-2022-025-01 at 10–11; PR-2022-026-01 at 10–11.

process is not necessarily discriminatory where a supplier, including an incumbent, has a certain business advantage that gives it a competitive edge with respect to a procurement.¹⁸ However, the Tribunal has also recognized that a breach of the trade agreements occurs when procuring entities use solicitation documents to create or compound an unfair advantage to an incumbent.¹⁹

[34] Concerning the fourth and fifth grounds of complaint that relate to the choice of paper and the price escalation clause, ESDC provided clarifications to these two issues in its first amendment to solicitation 100021572. Concerning the paper, ESDC indicated that it had received permission to deviate from the Federal Identity Program due to current supply restrictions and would permit the use of white paper instead of kraft for its envelopes in the procurement. Similarly, with respect to the price adjustment clause, ESDC confirmed that it had determined the percentage, “on consultation with different stakeholders and reviewing price adjustment clauses from multiple sources.”²⁰ It therefore appears that ESDC had legitimate reasons to proceed as it did regarding these two aspects of the procurement. In accordance with the principle that procuring entities be provided with a large measure of deference, Dingu Technologies has not shown that ESDC has acted in a way that contravenes the CFTA.

[35] The Tribunal has consistently held that mere allegations of violation of the trade agreements are insufficient to substantiate a claim.²¹ Overall, the Tribunal finds that Dingu Technologies has not animated its complaints with sufficient evidence and analysis for it to be able to conclude that the solicitations were constructed to restrict competition, to favour particular bidders or discriminate against Dingu Technologies.

DECISION

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

Peter Burn
Peter Burn
Presiding Member

¹⁸ See, in particular, *CAE Inc. v. Department of Public Works and Government Services* (7 September 2004), PR-2004-008 (CITT) at para. 43; *723186 Alberta Ltd.* (12 September 2011), PR-2011-028) at para. 21.

¹⁹ See, for example, *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at paras. 44–49; *Marine International Dragage Inc. v. Department of Public Works and Government Services* (23 December 2020), PR-2020-023 at paras. 45–48.

²⁰ Amendment 001, Printing Services for ESDC and Service Canada Envelopes (100021572), Buyandsell.gc.ca, [accessed: 28 July 2022]; See for example *Grand and Toy Limited v. Department of Public Works and Government Services* (15 December 2022), PR-2015-046 at paras. 38–42; *Flag Connection* at paras. 4–9.

²¹ *Veseys Seeds Limited, doing business as Club Car Atlantic v. Department of Public Works and Government Services* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc. v. Department of Public Works and Government Services* (25 January 2013), PR-2012-040 (CITT) at para. 35; *Manitex Lifting ULC v. Department of Public Works and Government Services* (19 March 2013), PR-2012-049 (CITT) at para. 22.