



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-068

Black Opportunity Fund

*Decision made
Tuesday, February 28, 2023*

*Decision issued
Thursday, March 2, 2023*

*Reasons issued
Friday, March 10, 2023*

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

BY

BLACK OPPORTUNITY FUND

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.

Cheryl Beckett

Cheryl Beckett
Presiding Member

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

STATEMENT OF REASONS

OVERVIEW

[1] Black Opportunity Fund (BOF) of Toronto, Ontario, filed a complaint with the Canadian International Trade Tribunal with respect to a purported procurement that it has identified as an “RFP Call for Proposals” (Call for Proposals) for funding to implement the “Black-Led Philanthropic Endowment Fund”.

[2] The government institution that is the subject of BOF’s complaint is the Department of Employment and Social Development (ESDC).

[3] The Tribunal received BOF’s complaint on February 9, 2023. The solicitation documents for the purported procurement did not accompany the complaint form at the time of filing. Accordingly, the complaint was initially considered to be incomplete. By way of correspondence dated February 10, 2023, the Tribunal requested that BOF provide the documentation as well as any relevant correspondence between BOF and ESDC or Service Canada.

[4] BOF provided additional materials comprising a partial¹ PDF copy of the Call for Proposals along with other correspondence, which was received by the Tribunal on February 27, 2023. BOF’s complaint was deemed complete and considered filed on that date.

[5] After careful consideration of the information provided in BOF’s complaint as originally submitted and the additional materials provided on February 27, 2023, the Tribunal has decided it does not have jurisdiction to inquire into the complaint.

FACTUAL BACKGROUND

[6] In its complaint, BOF describes the service to be procured as the “[a]dministration of a \$200 million Black-led philanthropic endowment fund for Canada’s Black communities”.²

[7] The Call for Proposals refers to a “Black-Led Philanthropic Endowment Fund” (the Fund) and states that ESDC is “taking action to reduce anti-Black racism and improve social and economic outcomes in Black communities. As one step toward these goals, we are launching a call for proposals to implement the Black-Led Philanthropic Endowment Fund”.

[8] The Fund is described as follows: “The Black-led Philanthropic Endowment Fund seeks to create a sustainable source of funding for Black-led, Black-focused and Black-serving non-profit organizations and registered charities. Through it, the Government of Canada will provide 1 national

¹ Although BOF provided a PDF copy of the “Call for Proposals” on February 27, 2023, some of the “drop down” menus were not included and so the Tribunal exercised its discretion to review the material online as it appeared on or about the date that BOF submitted complaint documents with the Tribunal, online: <<https://www.canada.ca/en/employment-social-development/services/funding/black-led-philanthropic-fund.html>>.

² Exhibit PR-2022-068-01 at 4.

Black-led and Black-serving recipient organization with an endowment of \$199,476,227” [underlining in original].³

[9] The Call for Proposals invites Black-led organizations to submit proposals to “implement” the Fund. The implementation of the Fund by the black-led organization is described as follows:

This organization will be responsible for investing the endowment. The investment income will provide funding to Black-led, Black-focused and Black-serving non-profit organizations and registered charities across the country. It will apply a Black-centric and intersectional lens to its operations and granting strategy to ensure that they reflect and benefit the full diversity of Black communities. The organization will have support in its operations and activities from the following:

- 1 or more investment advisor(s) and/or portfolio management (firms)
- an established allied public foundation (for a period of 3 years or more)⁴

[Underlining in original]

[10] The objective of the purported procurement is described as follows:

This call for proposals will provide endowment funding to an eligible organization that would seek the broad goals of:

- reducing anti-Black racism
- improving social and economic outcomes in Black communities⁵

[11] The Call for Proposals lists several eligibility criteria, including that the applicant organizations are either not-for-profit organizations or registered charities.⁶

[12] The application period ended on November 25, 2022. Following the review of the applications, ESDC expected to “make funding decisions in early 2023”.⁷

[13] BOF submitted a proposal to ESDC and published a press release announcing the same on December 8, 2022.⁸

³ Exhibit PR-2022-068-01.A at 2.

⁴ *Ibid.*

⁵ *Ibid.* at 3.

⁶ *Ibid.* at 4.

⁷ *Ibid.* at 2, 5, 19.

⁸ Exhibit PR-2022-068-01 at 233. See, generally, BOF’s complaint and attachments at Exhibit PR-2022-068-01. The factual background set out below is taken from the complaint and attachments.

[14] The proposal describes the BOF organization as “a community-led Canadian registered charitable organization. Registered charitable #727678070 RR 0001”.⁹ BOF is described as “a new and disruptive kind of philanthropic organization.”¹⁰

[15] On January 27, 2023, ESDC notified BOF by email that, after careful review, its “request for funding” would not be retained because it scored low on the “Project Impact and Results” element.¹¹ The email indicated that the decision was final but that, if BOF had any questions, it could submit them by email.

[16] On January 30, 2023, BOF wrote to various ministers, including the Minister of Families, Children and Social Development, to “file a strong and immediate appeal” of ESDC’s decision to reject BOF’s proposal. BOF asked for a written explanation of the review process, a debriefing meeting with ESDC and the Department of Public Works and Government Services, and an independent review of the “procurement process”. BOF also asked that ESDC not announce the identity of the successful organization until all the issues it had raised were resolved.¹²

[17] On February 6, 2023, ESDC offered to have a debriefing discussion with BOF on February 7, 2023, to discuss the issues raised by BOF.¹³

[18] On February 8, 2023, ESDC announced via press release that it would be entering negotiation discussions on the administration of the Fund with the Foundation for Black Communities, the selected organization.¹⁴

[19] BOF submitted its complaint with the Tribunal the next day, and it was deemed filed on February 27, 2023. BOF’s grounds of complaint can be summarized as follows:

- (i) ESDC did not conduct “proper due diligence in the procurement process that [ESDC] has used to select an agent of the Government of Canada’s \$200 million Black-Led Philanthropic Endowment Fund”. In particular, BOF challenged ESDC’s decision not to make any inquiries with BOF regarding its proposal.
- (ii) ESDC did not conduct a thorough, rigorous and transparent process to “select the steward for the Fund” and it is “highly improbable that ESDC could select a proponent in just 8 weeks including Christmas holiday closure and without engaging applicants about their application.” In particular, BOF challenged the lack of evaluation criteria and rationale for disqualifying proposals, especially in light of Statistics Canada’s approval of BOF’s proposed pre-implementation analysis plans.

⁹ Exhibit PR-2022-068-01 at 15.

¹⁰ *Ibid.* at 23.

¹¹ *Ibid.* at 227.

¹² *Ibid.* at 225.

¹³ Exhibit PR-2022-068-01.A at 24. The information provided by BOF does not disclose whether the meeting on February 7, 2023, occurred and, if so, what was discussed.

¹⁴ Online: Government of Canada <<https://www.canada.ca/en/employment-social-development/news/2023/02/government-of-canada-selects-organization-to-administer-the-black-led-philanthropic-endowment-fund.html>>.

(iii) The disqualification of the proposal for inadequate “Project Impact and Results” makes “even less sense” in light of the substance of the proposal, which BOF states went beyond the requirements of the Call for Proposals.

[20] BOF requested as remedies the issuance of a new solicitation, the re-evaluation of its bid and the termination of the award to the Foundation for Black Communities.

ANALYSIS

[21] The Tribunal is a creature of statute, which means that the *Canadian International Trade Tribunal Act* (CITT Act)¹⁵ stipulates when the Tribunal can accept a complaint for inquiry.

[22] Subsection 30.11(1) of the CITT Act provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations),¹⁶ a potential supplier may file a complaint with the 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.

[23] The key issue in this case is whether the complaint by BOF pertains to a “designated contract” as defined by the CITT Act and Regulations.

[24] Section 30.1 of the CITT Act defines “designated contract” as follows:

designated contract means 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

[Bold and italics in original]

[25] Subsection 3(1) of the Regulations reads as follows:

For the purposes of the definition *designated contract* in section 30.1 of the Act, any contract or class of contract concerning a **procurement of goods or services or any combination of goods or services**, as described in Article II of the Agreement on Government Procurement, in Article *Kbis*-01 of Chapter *Kbis* of the CCFTA, in Article 1401 of Chapter Fourteen of the CPFTA, in Article 1401 of Chapter Fourteen of the CCOFTA, in Article 16.02 of Chapter Sixteen of the CPAFTA, in Article 17.2 of Chapter Seventeen of the CHFTA, in Article 14.3 of Chapter Fourteen of the CKFTA, in Article 19.2 of Chapter Nineteen of CETA, in Article 504 of Chapter Five of the CFTA, in Article 10.2 of Chapter Ten of CUFTA or in Article 15.2 of Chapter Fifteen of the TPP, that has been or is proposed to be awarded by a government institution, is a designated contract.

[Bold added for emphasis; italics in original]

¹⁵ R.S.C., 1985, c. 47 (4th Supp.).

¹⁶ SOR/93-602.

[26] Accordingly, the Tribunal will only have jurisdiction to conduct an inquiry if the complaint pertains to a procurement of goods or services by a government institution, as described in the various trade agreements listed in subsection 3(1) of the Regulations.

[27] BOF's complaint does not identify an applicable trade agreement. Notwithstanding, the Tribunal has considered the provisions of all the applicable trade agreements as set out in subsection 3(1) of the Regulations, including the Canadian Free Trade Agreement (CFTA),¹⁷ which it considers to be the most relevant trade agreement in the circumstances because, to the extent that BOF is a supplier, it is a Canadian one.

[28] Article 504(2) of the CFTA defines a "covered procurement" as a procurement of goods and services that is not otherwise excluded under the CFTA.

[29] Articles 504(11)(c) and (i)(v) of the CFTA provide for the following exclusions:

11. This Chapter does not apply to:

...

(c) *any form of assistance*, such as grants, loans, equity infusions, guarantees, and fiscal incentives;

...

(i) procurement of goods or services:

...

(v) from *philanthropic institutions, non-profit organizations*, prison labour, or natural persons with disabilities;

[Emphasis added]

[30] Accordingly, the CFTA's chapter on government procurement specifically excludes from coverage the procurement of goods or services from, among others, philanthropic and non-profit organizations.

[31] Equally excluded is any form of government assistance, such as grants, loans, guarantees and fiscal incentives. Likewise, the Tribunal notes that all other trade agreements listed in subsection 3(1) of the Regulations similarly limit the application of their respective procurement chapters to exclude

¹⁷ Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2023/01/CFTA-Consolidated-Version-January-31-2023.pdf>> (entered into force 1 July 2017).

government assistance and to create an exception for measures relating to goods and services procured from philanthropic institutions.¹⁸

[32] In this case, the eligibility criteria in the Call for Proposals clearly indicate that the only organizations eligible to bid are those that are either not-for-profits¹⁹ or registered charities. The Call for Proposals falls squarely into the exclusion listed in the CFTA and is related to the philanthropic exception in all the other trade agreements.

[33] In any event, the Call for Proposals read as a whole reveals that ESDC, as the funding department, is not seeking the provision of goods or services by a supplier.²⁰ Rather, the Government of Canada through ESDC is providing \$200 million in government assistance to reduce anti-Black racism and improve social and economic outcomes in Black communities and seeks, via the Call for Proposals, the services of a Black-led not-for-profit organization to receive the assistance monies and distribute them to Black-led organizations.

[34] As such, the Call for Proposals also falls into the government assistance exclusion under all trade agreements and therefore is not a “procurement” covered by them. As a result, the Tribunal finds that the complaint does not relate to a “designated contract” as is required by subsection 30.11(1) of the CITT Act. The matter is therefore outside the scope of the Tribunal’s jurisdiction.

DECISION

[35] 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

¹⁸ Articles II(3)(b) and III(2)(d) of the Agreement on Government Procurement; articles *Kbis*-01(2) and *Kbis*-16(2)(d) of Chapter *Kbis* of the Canada-Chile Free Trade Agreement; articles 1401(2)(a) and 1402(2)(d) of Chapter Fourteen of the Canada-Peru Free Trade Agreement; articles 1401(2)(a) and 1402(2)(d) of Chapter Fourteen of the Canada-Colombia Free Trade Agreement; articles 16.02(2)(b) and 16.03(2)(d) of Chapter Sixteen of the Canada-Panama Free Trade Agreement; articles 17.2(3)(b) and 17.3(2)(d) of Chapter Seventeen of the Canada-Honduras Free Trade Agreement; article 14.3 of Chapter Fourteen of the Canada-Korea Free Trade Agreement; articles 19.2(3)(b) and 19.3(2)(d) of Chapter Nineteen of Comprehensive Economic and Trade Agreement; articles 504(11)(c) and 504(11)(i)(v) of Chapter Five of the CFTA; articles 10.2(3)(b) and 10.4(2)(d) of Chapter Ten of Canada-Ukraine Free Trade Agreement; articles 15.2(3)(b) and 15.3(1)(d) of Chapter Fifteen of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

¹⁹ The Tribunal considers the terms “non-profit” and “not-for-profit” to be interchangeable in the circumstances, and those terms are used interchangeably in the Call for Proposals.

²⁰ For example, the Call for Proposals describes the assistance as “funding” and “granting” at Exhibit PR-2022-068-01.A at 2–6, 9–14, 17, 19–21.