



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-071

K. Morton

*Decision made
Tuesday, February 28, 2023*

*Decision issued
Monday, March 6, 2023*

*Reasons issued
Tuesday, March 21, 2023*

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

BY

K. MORTON

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND 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

[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.

SUMMARY OF THE COMPLAINT

[2] The complaint by K. Morton relates to a request for standing offers (RFSO) (solicitation 23-222499) issued on November 7, 2022, by the Department of Foreign Affairs, Trade and Development (DFATD). The RFSO was for the provision of editing services.

[3] At issue in this complaint is whether DFATD acted consistently with its trade agreement obligations by allocating points to bidders with translating experience. In particular, K. Morton alleges that the criteria of the RFSO requested editors to also be translators, which unfairly prevented skilled editors from bidding on the solicitation.³

[4] On February 28, 2023, the Tribunal decided not to conduct an inquiry into the complaint for the reasons set out below.

BACKGROUND

[5] The RFSO was issued on November 7, 2022. The bid closing date was initially set for December 16, 2022, and later revised to January 16, 2023.

[6] On November 11, 2022, K. Morton emailed DFATD to inquire about the RFSO's criteria related to translation capabilities.⁴ Specifically, K. Morton informed DFATD that she was interested in submitting a bid but did not meet the two criteria requiring translating experience and comparative revision from French to English. K. Morton also requested DFATD to clarify whether the solicitation sought the services of unilingual editors or bilingual editors that are also translators.⁵

[7] On November 14, 2022, DFATD explained that the criteria related to translating capabilities were not mandatory and that editors without translating experience could still submit a bid for the solicitation.⁶

[8] On February 24 and 27, 2023, K. Morton filed a complaint with the Tribunal.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-071-01 at 6.

⁴ *Ibid.*

⁵ *Ibid.* at 8.

⁶ Exhibit PR-2022-071-01.A at 1.

ANALYSIS

[9] Pursuant to sections 6 and 7 of the Regulations, upon receipt of a complaint which complies with subsection 30.11(2) of the CITT Act, the Tribunal must decide whether the following four conditions have been met before it may conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;⁷
- (ii) the complainant is a potential supplier;⁸
- (iii) the complaint is in respect of a designated contract;⁹ and
- (iv) the information provided by the complainant discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹⁰

[10] The first requirement concerns the time limits to file a complaint. More specifically, subsection 6(1) of the Regulations provides that a potential supplier has 10 working days “after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier” to file a complaint with the Tribunal.

[11] In addition, subsection 6(2) of the Regulations provides that a potential supplier that has made an objection to the relevant government institution within 10 working days, and is denied relief by that government institution, 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, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

[12] In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of a ground of complaint to either object to the government institution or file a complaint with the Tribunal.¹¹ If a complainant objects to the government institution within the designated time, the complainant will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

[13] Therefore, the first step for the Tribunal to follow is to establish the date at which the complainant became aware or reasonably should have become aware of the ground of complaint.

[14] In this case, the ground of complaint raised by K. Morton concerns requirements contained in the RFSO published on November 7, 2022. As indicated in the email exchange filed by the complainant, K. Morton contacted DFATD on November 11, 2022, to inquire about the translating experience point-rated criteria. She requested that DFATD, essentially, either confirm whether

⁷ Subsection 6(1) of the Regulations.

⁸ Paragraph 7(1)(a) of the Regulations.

⁹ Paragraph 7(1)(b) of the Regulations.

¹⁰ Paragraph 7(1)(c) of the Regulations.

¹¹ *Secunda Canada LP* (3 August 2018), PR-2018-018 (CITT) at paras. 7–9; *DMA Security Solutions Ltd.* (3 July 2018), PR-2018-009 (CITT) at para. 14.

DFATD was searching for editors/translators or, if DFATD was only searching for editors, remove the point-rated criteria related to translating experience.¹²

[15] In the Tribunal's view, there is no doubt that K. Morton had knowledge of the facts that led to the complaint on or about November 11, 2022, as the request made by K. Morton in her email to DFATD is directly related to the ground of the present complaint.

[16] Secondly, the Tribunal must establish whether an objection was made to the relevant government institution and, if so, on which date the government institution denied relief to the complainant. In this case, the Tribunal must establish whether K. Morton's email constituted an objection to DFATD.

[17] In its reply of November 14, 2022, DFATD indicated that it would not modify the tender documents nor the criteria, and it confirmed that it was searching for editing services, including the need to edit translated documents. DFATD advised that the criteria for translating (R2) and for editing translated documents (R6) were only two of the required criteria and that a bidder could gain points from other required experiences in the point-rated criteria table.¹³ K. Morton chose to not raise any further objection to DFATD. K. Morton also chose not to submit a bid, despite the indication from DFATD that she would not be disqualified on the sole basis that she did not possess translating experience.

[18] The Tribunal finds that DFATD clearly informed the complainant that it had no intention to make any changes to the RFSO. Therefore, there is no doubt that on or about November 14, 2022, K. Morton had actual knowledge of the denial of relief. From that date, she had 10 working days to file a complaint with the Tribunal.

[19] However, K. Morton waited until February 24 and 27, 2023, to file a complaint, which is well past the timeframe of 10 working days. In this respect, the Tribunal has noted before that bidders must be vigilant and react as soon as they become aware or reasonably should have become aware of a flaw in the process.¹⁴

[20] In her complaint, K. Morton argues that she waited to file the complaint because she was not aware of the possible recourse to the Tribunal. She argues that she became aware of the availability of the recourse mechanism to the Tribunal only when she was informed of the recourse mechanism by the Office of the Procurement Ombudsman on February 23 and 24, 2023.¹⁵

[21] The Tribunal does not accept this argument as a valid reason to relieve K. Morton from the consequences of failing to comply with the requirements set out by section 6 of the Regulations.¹⁶

[22] As the Tribunal has held in the past, bidders are ultimately responsible for apprising themselves of how and when to engage the bid challenge mechanism.¹⁷ The Tribunal notes that the RFSO clearly designated the Tribunal as a possible recourse mechanism option under section 2.7,

¹² Exhibit PR-2022-071-01.A at 1.

¹³ *Ibid.*

¹⁴ *Gestion Exen inc.* (2 March 2022), PR-2021-078 (CITT) at para. 29.

¹⁵ Exhibit PR-2022-071-01 at 5, 9.

¹⁶ *Seigniory Chemical Products Limited, trading as SCP SCIENCE* (13 December 2019), PR-2019-048 (CITT) at para. 34.

¹⁷ *ADR Education* (18 July 2013), PR-2013-009 (CITT) at para. 32.

entitled “Bid Challenge and Recourse Mechanisms”. It was clearly noted that there are “**strict deadlines**” (bold in original) for filing complaints and that bidders must act quickly if they wish to challenge an aspect of the procurement process.

[23] Considering the above, the Tribunal finds that K. Morton’s complaint was filed outside the time limits prescribed by the Regulations.

[24] Finally, even if K. Morton had filed the complaint in a timely manner, the Tribunal would still not have initiated an inquiry because the complaint does not provide a reasonable indication of a breach of the trade agreements. More specifically, there is no reasonable indication in this case that allocating extra points for translation experience and bilingual capacities to editors was a violation of trade agreement obligations. When establishing the terms of a solicitation, a government institution is entitled to establish the evaluation and selection criteria it deems appropriate, as long as the chosen criteria are reasonable, do not favour or discriminate particular suppliers and do not otherwise violate the requirements of the trade agreements. K. Morton’s complaint presented no argument or evidence providing a reasonable indication that the criteria chosen for the RFSO were unreasonable, discriminatory or otherwise in breach of the trade agreements.

DECISION

[25] 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