



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DECISION AND REASONS

File PR-2022-049

1138371 Alberta Ltd.

*Decision made  
Wednesday, October 26, 2022*

*Decision and reasons issued  
Tuesday, November 8, 2022*

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

**BY**

**1138371 ALBERTA LTD.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**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

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (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] This complaint by 1138371 Alberta Ltd. (Topline Drywall) relates to a procurement (solicitation WS3400170814) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for painting services at 4 Wing Cold Lake and Primrose Lake.

[3] Topline Drywall claims that, after seeking assistance from PWGSC in the preparation of its bid under the new SAP Ariba procurement system (Ariba), it was led to believe that PWGSC would provide more assistance than it was authorized to do. Specifically, Topline Drywall submits that PWGSC failed to indicate that it was unable to verify the contents uploaded with bid applications before the bid closing date or to accept missing documents for consideration after the solicitation closed, despite making assurances that it would alert Topline Drywall if anything was missing from its bid.

[4] As a remedy, Topline Drywall requests that the designated contract be terminated and that its bid be re-evaluated. If the contract is not re-awarded, Topline Drywall requests to be compensated for lost profits. Topline Drywall further requests the reimbursement of its complaint costs.

## BACKGROUND

[5] The request for proposal in question was published on April 14, 2022, and closed on May 17, 2022.<sup>3</sup>

[6] On April 29, 2022, Topline Drywall contacted PWGSC to advise that it was having issues submitting its bid under Ariba. On the same day, PWGSC answered Topline Drywall's email by providing guidance and suggesting that it contact its support team.<sup>4</sup>

[7] Prior to submitting its bid through Ariba, Topline Drywall contacted PWGSC by phone to advise that it was submitting its bid. Topline Drywall requested that PWGSC inform it if any documents were missing from its bid. Topline Drywall claims that PWGSC confirmed that it would do so.

---

<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

<sup>3</sup> Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/ws3400170814-doc3412310396>>.

<sup>4</sup> Exhibit PR-2022-049-01 at 143-144.

[8] On May 10, 2022, Topline Drywall wrote again to PWGSC following other difficulties it encountered relating to Ariba. Topline Drywall also advised that, once this issue had been resolved, it would submit its bid, and it requested once again that PWGSC inform it if any documents were missing from its bid. On the same day, PWGSC provided further guidance to solve Topline Drywall's issue with Ariba.<sup>5</sup>

[9] On May 11, 2022, PWGSC wrote to Topline Drywall to inform it that it had received notification of Topline Drywall's bid. PWGSC advised that it was unable to view any details or content of the bid until the solicitation closed.<sup>6</sup>

[10] As indicated above, the solicitation closed on May 17, 2022.

[11] On September 13, 2022, PWGSC notified Topline Drywall that the contract had been awarded to another bidder. In its letter to Topline Drywall, PWGSC stated that the evaluators determined that its offer did not comply with all the mandatory requirements of the solicitation. Specifically, Topline Drywall's bid was missing the required COVID-19 vaccination certification form.<sup>7</sup>

[12] On September 14, 2022, Topline Drywall responded to PWGSC insisting that the COVID-19 vaccination certification form was sent with its bid and requesting that PWGSC review its file once more. Topline Drywall also reminded PWGSC that it had received assurances that PWGSC would alert Topline Drywall if anything was missing from the bid.<sup>8</sup>

[13] On September 15, 2022, PWGSC confirmed that the COVID-19 vaccination certification form was not submitted with Topline Drywall's bid. PWGSC also clarified that it had mentioned it would reach out to Topline Drywall if it required anything else during the evaluation but that the vaccination certification form was a mandatory requirement to be included with the bid before its evaluation.<sup>9</sup>

[14] On September 15, 2022, Topline Drywall insisted again that its bid should be reconsidered, because it was certain that the COVID-19 vaccination certification form had been sent and because it had encountered issues with Ariba.<sup>10</sup> On the same day, PWGSC provided that, although it had received Topline Drywall's immunization records, the vaccination certification form was missing from the bid. PWGSC further explained that the vaccination certification form could not be submitted after the solicitation closed and that any bid missing this form would have been deemed non-compliant.<sup>11</sup>

[15] On September 20, 2022, PWGSC sent Topline Drywall a copy of the COVID-19 immunization records that were sent with its bid to show that the vaccination certification form was missing.<sup>12</sup>

---

<sup>5</sup> *Ibid.* at 142–143.

<sup>6</sup> *Ibid.* at 142.

<sup>7</sup> *Ibid.* at 145.

<sup>8</sup> *Ibid.* at 141.

<sup>9</sup> *Ibid.* at 140.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 139–140.

<sup>12</sup> *Ibid.* at 138.

[16] On October 12, 2022, counsel for Topline Drywall wrote to PWGSC to inform them that it would seek compensation for the damages suffered by Topline Drywall.<sup>13</sup>

[17] On October 17, 2022, PWGSC responded by referring Topline Drywall's counsel to the recourse mechanisms available.<sup>14</sup> On the same day, Topline Drywall's counsel requested PWGSC to confirm the date on which the contract was awarded. PWGSC answered that the standing offer was issued on September 9, 2022.<sup>15</sup>

[18] On October 21, 2022, Topline Drywall filed its complaint with the Tribunal.

[19] On October 26, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

## ANALYSIS

[20] 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 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 complainant 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.

[21] The Tribunal finds that the first condition is not met. For the reasons that follow, the Tribunal finds that Topline Drywall did not submit its complaint in compliance with the deadlines prescribed in the Regulations.

[22] Pursuant to subsections 6(1) and 6(2) of the Regulations, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either (1) object to the government institution or (2) file a complaint with the Tribunal. If a complainant objects to the government institution within this time frame and is denied relief, then the complainant may file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge of the denial of relief.

[23] The Tribunal finds that Topline Drywall made an initial objection to PWGSC on September 14, 2022, and that this objection was timely. Its central ground of complaint—i.e. that it was improperly guided by PWGSC—became known when it received the regret letter, dated September 13, 2022, stating that its bid was not selected for missing the required COVID-19 vaccination certification form.

---

<sup>13</sup> *Ibid.* at 132.

<sup>14</sup> *Ibid.* at 131.

<sup>15</sup> *Ibid.* at 130.

[24] However, Topline Drywall's complaint to the Tribunal was not timely. The complaint needed to be filed within 10 working days of Topline Drywall receiving knowledge that PWGSC had denied the relief it sought in its objection.

[25] The Tribunal considers Topline Drywall to have had knowledge of PWGSC's denial of relief on September 15, 2022, or, at the latest, on September 20, 2022. In its correspondence of September 15, 2022, PWGSC stated that it had not received the required COVID-19 vaccination certification form and that it could not be submitted after the solicitation closed. PWGSC therefore clearly answered Topline Drywall's objection. On September 20, 2022, PWGSC reaffirmed that it had not received Topline Drywall's vaccination certification form in its bid application by providing a screenshot of the attachments submitted by Topline Drywall with its bid.

[26] Thus, Topline Drywall would have had to file its complaint with the Tribunal by October 5, 2022, at the latest, to comply with subsection 6(2) of the Regulations.

[27] Given that Topline Drywall submitted its complaint to the Tribunal on October 21, 2022, the complaint was therefore filed outside of the time limits established in the Regulations.

[28] It should also be noted that there is a provision in subsections 6(3) and 6(4) of the Regulations which would permit, under certain circumstances, a complaint to be filed outside of the 10 working days time limit. However, this provision only allows a complaint to be filed within 30 calendar days "after the day the basis of the complaint became known or reasonably should have become known to the potential supplier." In this case, the basis of the complaint became known on September 13 or 14, 2022, when Topline Drywall received the rejection letter. The complaint was not filed until October 21, 2022, which is 37 or 38 days later. Therefore, even if there were reasons for late filing that would meet the terms of paragraphs 6(3)(a) and 6(3)(b) of the Regulations, the complaint would still be filed outside the legislated time frame.

[29] The Tribunal also wishes to remind parties that time is of the essence in procurement complaints; the time frames fixed by the Regulations, including those for filing a complaint with the Tribunal, reflect this fact.<sup>16</sup> Bidders are therefore "expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware" of the denial of relief.<sup>17</sup>

## DECISION

[30] 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

---

<sup>16</sup> *Sanjiv Gulati Medicine Professional Corporation* (22 March 2022), PR-2021-076 (CITT) at para. 20.

<sup>17</sup> *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at para. 20.