



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2023-004

Osgoode Signs and Stitches Ltd

*Decision made  
Friday, April 14, 2023*

*Decision issued  
Monday, April 24, 2023*

*Reasons issued  
Tuesday, May 9, 2023*

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

**BY**

**OSGOODE SIGNS AND STITCHES LTD**

**AGAINST**

**THE DEPARTMENT OF NATIONAL DEFENCE**

**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

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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*<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 must decide whether to conduct an inquiry into the complaint.

## SUMMARY OF THE COMPLAINT

[2] The complaint by Osgoode Signs and Stitches Ltd (Osgoode) relates to a request for standing offers (RFSO) (solicitation W6399-23-LL43/A) issued on December 21, 2022, by the Department of National Defence (DND). The RFSO invited proposals for the provision of badges and insignia.

[3] At issue in this complaint is whether DND acted inconsistently with its trade agreement obligations because it failed to provide an equal opportunity to all potential bidders to be responsive to the requirements of the RFSO, as alleged by Osgoode. In particular, Osgoode alleges that the technical indications contained in the RFSO and the samples provided were not detailed enough to allow potential bidders to meet the requirements of the RFSO.<sup>3</sup>

## BACKGROUND

[4] The RFSO was issued on December 21, 2022. The bid closing date was initially set for February 13, 2023, and later revised to February 24, 2023.<sup>4</sup>

[5] On February 13, 2023, Osgoode submitted its bid to DND, including physical pre-award samples of certain badges and insignia, as requested in the RFSO.

[6] On March 31, 2023, DND sent a regret letter informing Osgoode that the evaluation team found some of the pre-award samples provided not compliant with the RFSO's mandatory criteria. As a result, no standing offer was issued to Osgoode.<sup>5</sup>

[7] In the same letter, DND informed Osgoode that a standing offer was awarded to Apparel Trimmings Inc. (Apparel).<sup>6</sup> According to Osgoode, Apparel is the incumbent bidder.<sup>7</sup>

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

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

<sup>3</sup> Exhibit PR-2023-004-01 at 6.

<sup>4</sup> RFSO, amendment 002, online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01018266>>.

<sup>5</sup> Exhibit PR-2023-004-01 at 67-68.

<sup>6</sup> *Ibid.* at 67.

<sup>7</sup> *Ibid.* at 6.

[8] On April 13, 2023, Osgoode filed a complaint with the Tribunal.<sup>8</sup>

## 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 being able to conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed under section 6 of the Regulations;<sup>9</sup>
- (ii) the complainant is a potential supplier;<sup>10</sup>
- (iii) the complaint is in respect of a designated contract;<sup>11</sup> and
- (iv) the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.<sup>12</sup>

[10] In accordance with the fourth requirement, under paragraph 7(1)(c) of the Regulations, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal, discloses a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements. The Tribunal has previously described the threshold as follows:<sup>13</sup>

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.

[11] In this case, the Tribunal has decided not to conduct an inquiry into Osgoode's complaint, as the information provided does not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements, which, in this case, is the Canadian Free Trade Agreement (CFTA).<sup>14</sup>

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<sup>8</sup> Osgoode initially filed an incomplete complaint on April 11, 2023. Upon receiving a request for additional documents by the Tribunal, Osgoode provided the missing information and completed the filing of its complaint with the Tribunal on April 13, 2023.

<sup>9</sup> Section 6 of the Regulations.

<sup>10</sup> Paragraph 7(1)(a) of the Regulations.

<sup>11</sup> Paragraph 7(1)(b) of the Regulations.

<sup>12</sup> Paragraph 7(1)(c) of the Regulations.

<sup>13</sup> *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) [*K-Lor*].

<sup>14</sup> See [canadabuys.canada.ca](https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01018266), online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-01018266>>.

[12] Osgoode's complaint rests on allegations that DND failed to provide measurements, digital images and enough detail to make it possible for potential bidders to develop and manufacture samples that meet the technical mandatory requirements set out in the RFSO.<sup>15</sup> Osgoode further argues that the sealed samples provided to potential bidders as models to replicate were of "poor quality" and did not themselves meet certain criteria set out in the RFSO, further hindering potential bidders' task to comply with the requirements.<sup>16</sup> Finally, Osgoode argues that the winning bidder, Apparel, was unfairly advantaged and alleges that it was provided with digital files, artwork and details not provided to other bidders.<sup>17</sup>

[13] While paragraph 7(1)(c) of the Regulations does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim.<sup>18</sup> The Tribunal requires some factual evidence, beyond simple assertions made by the complainant, demonstrating that DND may have acted inconsistently with its obligations under the CFTA. For each of the three grounds of complaint raised by Osgoode, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the CFTA.

### **The RFSO and the sealed samples provided enough detail to bidders to meet all mandatory technical criteria**

[14] The first ground of complaint raised by Osgoode relates to the alleged lack of detailed technical information and instructions provided by DND. Osgoode alleges that this made it impossible for new bidders to provide badges and insignia samples meeting the mandatory criteria set out in the RFSO.

[15] At the outset, the Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluations of bids and substitutes its judgment for that of the evaluators only in exceptional circumstances, i.e., in cases where there is evidence demonstrating that their evaluation was unreasonable. In the present case, the technical evaluation of the bids was conducted in accordance with the criteria provided under section 4.1.2 (Technical Evaluation) of the RFSO. For a bid to be deemed responsive, the RFSO requested bidders to submit 14 samples for evaluation by DND which all had to meet the specifications provided in annexes B, C, D, E, F, G, H, and I of the RFSO.<sup>19</sup> The RFSO also provided that "[s]amples that do not match the sealed samples, are not manufactured to good commercial standard practices, or have imperfection or blemishes that may adversely affect its appearance, quality, serviceability and functionality, will be deemed non-compliant and given no further consideration."<sup>20</sup>

[16] The RFSO provided three sources of directives to guide bidders in preparing their pre-award samples. The RFSO included technical supplements and<sup>21</sup> specifications<sup>22</sup> as well as sealed samples. For each badge or insignia, the technical supplements and specifications provided information related to the embroidery yarn, type of stitching, type of attachment, backing, base fabric, padding, colours and dimensions. The technical supplements also provided a colour photo of each badge and insignia.

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<sup>15</sup> Exhibit PR-2023-004-01 at 6.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *K-Lor.*

<sup>19</sup> RFSO at 96.

<sup>20</sup> RFSO at 97.

<sup>21</sup> RFSO, annexes B, C, D, E, F and G.

<sup>22</sup> RFSO, annexes H and I.

For each badge and insignia, the technical supplement noted that the item “is to Match Sealed Pattern in Size, Quality, Colour and materials”. The specifications also indicated that “[b]adges and insignia must be in accordance with the applicable sealed samples except where specified otherwise in the request for proposal.”

[17] Additional guidance was provided on February 18, 2023, in the “questions and answers” (Q&A) section of amendment 002 to the RFSO.<sup>23</sup> In its answer to question 2 of the Q&A, DND specified that, while there were no specific measurement tolerances established for the dimension of each item, the pre-award samples had to be “good visual matches” to the sealed samples to be deemed acceptable.<sup>24</sup> The Tribunal understands this answer to confirm that, to the naked eye, the design of the badges and insignia should be very similar, if not identical.

[18] In its answer to question 3 of the Q&A, regarding the designs of the dagger, anchor and eagle featured on item F1, DND pointed bidders to a government website that provided detailed images of the dagger, anchor and eagle that are used in the Canadian Armed Forces.<sup>25</sup>

[19] In its regret letter, DND informed Osgoode that, following the evaluation and assessment of the 14 pre-award samples provided, the evaluators determined that 10 of the 14 samples did not comply with all the mandatory requirements of the RFSO and, specifically, that they did not match the sealed sample.<sup>26</sup> For each of the 10 non-compliant samples, DND provided details on why Osgoode’s samples did not match the sealed samples.

[20] In its complaint, Osgoode recognizes and agrees that “the level of detail is important and expected” in the evaluation of the pre-award samples.<sup>27</sup> Based on the evidence on the record, the Tribunal also observed that the evaluation was conducted according to the guidelines provided under section 4.1.2 of the RFSO, which refers to Annex J (Proposal Requirements and Evaluation Plan) of the RFSO. In its regret letter, DND clearly identified the reasons for the defects of each of Osgoode’s 10 pre-award samples that it found non-compliant.<sup>28</sup> For each of these samples, the defects clearly related to specific criteria of the RFSO.

[21] Osgoode’s complaint also raised the question of whether it was impossible for a company to bid on the RFSO and meet the technical criteria without being given the exact dimensions and scale as well as “precise [digital] images” for each badge and insignia. The question is therefore whether the factual evidence provided by Osgoode in support of its claim demonstrates that it was impossible, based on the information provided by the RFSO, for Osgoode or other potential bidders to achieve the level of detail expected by DND.

[22] In support of its complaint, Osgoode filed photos of 11 of its 14 pre-award samples next to photos of the corresponding sealed samples provided by DND.<sup>29</sup> Based on the photos provided, the Tribunal agrees that the evaluation conducted by DND was reasonable and that the samples are not a good visual match.

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<sup>23</sup> RFSO, amendment 002.

<sup>24</sup> RFSO, amendment 002 at 3.

<sup>25</sup> RFSO, amendment 002 at 3.

<sup>26</sup> Exhibit PR-2023-004-01 at 67.

<sup>27</sup> *Ibid.* at 6.

<sup>28</sup> *Ibid.* at 67–68.

<sup>29</sup> *Ibid.* at 56–64.

[23] For example, when considering Osgoode's sample of item B12 (2 Chevrons, Maple Leaf), the Tribunal finds that it is very clear that the spacing of the insignia is incorrect. Compared to the sealed sample, the maple leaf on the pre-award sample is much higher above the chevrons, and the chevrons are not the same scale or size as those on the sample. A bidder should have been able to produce a near identical sample (or a good visual match) from the information provided, as a physical sample does provide bidders with the spacing and scale of the insignia. The Tribunal finds that having additional or more precise measurements was not necessary for a bidder to meet the mandatory requirements.

[24] The evidence on the record also shows that, even when provided with precise measurements, Osgoode failed to follow the specifications and presented samples of dimensions inferior to both the dimensions provided in the technical supplements and the size of the sealed sample.<sup>30</sup> For instance, DND's evaluators assessed that the size of Osgoode's pre-sample for item G1 (National Flag) did not match the size of the sealed sample.<sup>31</sup> The Tribunal notes that, for item G1, the technical specifications provided specific measurement, requiring a 5 cm by 10 cm badge,<sup>32</sup> whereas Osgoode's pre-award sample was noted as being 1 7/8 inches by 3 7/8 inches.<sup>33</sup>

[25] Finally, the Tribunal notes that the evaluators raised no issue with respect to Osgoode's pre-award samples for items D1, D4, E1 and E6, which clearly demonstrates that Osgoode was able to provide a good visual match for these four pre-award samples based on the information provided by DND.

[26] Regarding Osgoode's argument that DND should have provided bidders with a digital file of each item, the Tribunal acknowledges that a complete digital file of the images would make the reproduction of the insignia more convenient for bidders. However, the Tribunal finds, in the context of this case, that it is not incumbent upon DND to prepare and provide digital files to bidders for every badge and insignia, nor is there any evidence that such digital files exist or are in DND's possession. The Tribunal finds that the information contained in the RFSO, the physical samples provided to bidders and the reference to the website were sufficient to allow a bidder to prepare a tender responsive to the technical requirements for the RFSO.

[27] As a last remark on this point, the Tribunal wishes to remind Osgoode that, when a potential supplier believes that the criteria set out in an RFSO are inappropriate or unfair, or if the proper indications and material needed to meet those criteria are not provided, as is claimed in the case at hand, the potential supplier must file a complaint in a timely manner. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected. In this regard, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,<sup>34</sup> the Federal Court of Appeal (FCA) provided the following guidance:

In procurement matters, time is of the essence ... Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with

<sup>30</sup> RFSO at 63; Exhibit PR-2023-004-01 at 60.

<sup>31</sup> Exhibit PR-2023-004-01 at 67.

<sup>32</sup> RFSO at 67.

<sup>33</sup> Exhibit PR-2023-004-01 at 67. The Tribunal notes that the RFSO uses metric specifications, and the rejection letter sets out the imperial measurements. The metric conversion based upon the rejection letter would indicate that the submitted sample was 4.76 cm by 9.84 cm.

<sup>34</sup> 2002 FCA 284 (CanLII) at paras. 18, 20.

respect to the process. They 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 ...

[28] In accordance with the FCA's decision, and previous Tribunal decisions, the Tribunal is of the view that Osgoode should not have adopted a "wait-and-see" attitude and waited for the outcome of the evaluation before objecting to the government institution or filing a complaint with the Tribunal regarding its grievances concerning the evaluation procedure set out in the RFSO and the adequacy of the indications and material provided to prepare the bid.

[29] Therefore, regarding Osgoode's allegation that the indications and material provided to potential bidders were inadequate and insufficient, the Tribunal cannot conduct an inquiry on that ground of complaint, as Osgoode raised these allegations more than 10 days after the basis became known or reasonably should have become known to Osgoode.<sup>35</sup> It is not relevant whether the sealed samples met the criteria of the RFSO.

[30] Osgoode alleges that the sealed samples themselves did not meet certain technical criteria set out in the RFSO. For instance, Osgoode submits that the sealed samples used gloss thread rather than matte thread as requested in the RFSO.<sup>36</sup>

[31] The fact that certain aspects of the sealed samples differed from what was required by the specifications and technical supplements is inconsequential. Annex J (Proposal Requirements and Evaluation Plan) of the RFSO clearly indicated that "specifications and technical supplements take precedence over the sealed samples, unless stated otherwise in the technical supplements".<sup>37</sup>

[32] As stated above, the Tribunal finds that the sealed samples provided sufficient detail of what DND expected for the pre-award samples and, when read in conjunction with the information provided in the technical supplements and specifications, DND provided all the information necessary to prepare the pre-award samples.

### **There are no indications that the winning bidder was unfairly advantaged**

[33] Osgoode argues that the incumbent bidder, Apparel, benefited from an unfair advantage and was provided with "digital files", artwork and details not provided to other bidders. The Tribunal also understands from the complaint that the winning bidder appears to have been the incumbent.

[34] In its complaint, Osgoode provides no evidence in support of this allegation or information explaining to the Tribunal why it formed the belief that Apparel was provided with details not provided to other bidders.

[35] Indeed, in the present case, there is no evidence provided to support the claim that the solicitation process was biased in favour of Apparel. Mere allegations are insufficient to establish a

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<sup>35</sup> The Tribunal considers that this moment was, at the very latest, when DND issued amendment 002 to the RFSO, providing answers to the questions it had received from potential bidders. At that point, Osgoode knew or ought to have known that no further indication or material would be provided and, if it deemed those inadequate and insufficient, it should have objected to DND or filed a complaint with the Tribunal within 10 working days.

<sup>36</sup> Exhibit PR-2023-004-01 at 6.

<sup>37</sup> RFSO at 96.



reasonable indication of a breach of the trade agreements.<sup>38</sup> As stated above, the Tribunal requires some factual evidence beyond simple assertions by the complainant. Osgoode did not provide any evidence supporting its allegation that DND “provided [Apparel] with the required digital files” to produce the samples as well as “[artwork] and detail” that were not provided to other bidders. Therefore, the Tribunal finds that there is no evidence to support this allegation.

[36] The Tribunal acknowledges that the incumbent bidder would already have its own digital files and artwork because it has produced badges and insignia for DND over the past few years. It is even possible that the sealed samples from DND were actually produced by the incumbent. However, the Tribunal has consistently found that, while certain situations may arise where bidders have a competitive advantage regarding a particular procurement process, it does not necessarily follow that the solicitation is biased.<sup>39</sup> The Tribunal has also stated that competitive advantages may stem from an array of different sources, including incumbency, but that this is not, in itself, considered to be unfair<sup>40</sup> and that “there is no obligation to offset the effect of incumbency in the formulation of solicitations ...”.<sup>41</sup> Similarly, in *Almon Equipment Limited v. Canada (Attorney General)*, the FCA reasoned that “the fact that one bidder is better able than another to meet the specifications of [a request for proposal] does not in itself necessarily mean that the requirements of the [request for proposal] are biased in favour of that bidder”.<sup>42</sup>

[37] In the absence of evidence demonstrating that the requirements of a procurement are “discriminatory, impossible to meet or unreasonable”, the fact that one potential supplier failed to meet them does not, in and of itself, indicate that the requirements are inconsistent with the applicable trade agreements.<sup>43</sup>

[38] For the foregoing reasons, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement process was not conducted in accordance with the obligations imposed by the CFTA.

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<sup>38</sup> *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13. See also *Manitex Lifting ULC* (20 March 2013), PR-2012-049 (CITT) at para. 22; *Vesseys Seeds Limited, doing business as Club Car Atlantic* (19 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at para. 12.

<sup>39</sup> *M.D. Charlton Co. Ltd.* (24 April 2017), PR-2017-002 (CITT) at paras. 27–28.

<sup>40</sup> *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services* (23 June 2017), PR-2016-058 (CITT) at para. 34.

<sup>41</sup> *Corel Corporation* (26 October 1998), PR-98-012 and PR-98-014 (CITT).

<sup>42</sup> 2012 FCA 318 (CanLII) at para. 11.

<sup>43</sup> *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at para. 72. See also *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at paras. 26–29; *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (18 December 2020), PR-2020-024 (CITT) at paras. 44–47, 54–57.

**DECISION**

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

Cheryl Beckett  

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Cheryl Beckett  
Presiding Member