



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-019

Édu-Performance Canada Inc.,
PME Création de Valeur Inc., in
Joint Venture

*Decision made
Monday, July 17, 2023*

*Decision issued
Tuesday, July 18, 2023*

*Reasons issued
Friday, August 4, 2023*

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

BY

**ÉDU-PERFORMANCE CANADA INC., PME CRÉATION DE VALEUR INC., IN
JOINT VENTURE**

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.

Georges Bujold

Georges Bujold
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 must decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] This complaint relates to a Request for National Master Standing Offer (RFSO) (solicitation EN578-202723/E) issued by the Department of Public Works and Government Services (PWGSC) for the award of standing offers for the provision of an online second-language self-study program and tutoring services (French and English).

[3] First, Édu-Performance Canada Inc. and PME Création de Valeur Inc. in joint venture (the complainant) alleges that PWGSC improperly set aside its standing offer due to certain breaches of the obligations set out in the standing offer. According to the complainant, PWGSC should have given it time to remedy the breaches identified before setting aside its standing offer. Secondly, the complainant submits that the breaches alleged by PWGSC should have been raised at the proposal evaluation stage.

[4] As a corrective measure, the complainant is asking the Tribunal to cancel PWGSC's decision to set aside its standing offer and to grant it a reasonable period of time to remedy the alleged breaches.

BACKGROUND

[5] On May 20, 2022, PWGSC published the RFSO on CanadaBuys, the Government of Canada's official website for the publication of its solicitations. The solicitation closed on July 11, 2022.

[6] On November 30, 2022, PWGSC awarded a standing offer to the complainant.³ On March 16, 2023, a call-up against this standing offer was awarded to the complainant for delivery of the services in question to the Department of Finance.⁴

[7] On May 25, 2023, a Department of Finance representative sent the complainant a stop-work order.⁵ On June 13, 2023, the complainant received a warning from PWGSC regarding the educational content of its self-study program. Among other things, PWGSC advised the complainant that certain portions of the program content needed to be removed immediately. In its correspondence, PWGSC also indicated that "its team had identified other issues" [translation] and

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2023-019-01.A (protected) at 510.

⁴ Exhibit PR-2023-019-01.C (protected) at 19.

⁵ Exhibit PR-2023-019-01.A (protected) at 689.

that further information would be communicated to the complainant once the team had completed its analysis.⁶

[8] On June 27, 2023, PWGSC notified the complainant that, following a thorough analysis of its self-study program, the complainant's standing offer would be set aside effective June 27 and for the duration of the entire standing offer period.⁷ In the set-aside notice, PWGSC detailed the educational content issues that, according to its judgment, constituted breaches of the terms and conditions of the complainant's standing offer and justified this decision.

[9] That same day, the complainant requested a meeting with PWGSC to discuss the decision to set its offer aside.⁸ The PWGSC representative responded that, while a meeting was possible, the decision was "final" [translation].⁹

[10] On July 6, 2023, the complainant sent documents to the Tribunal, including the complaint form and its correspondence with PWGSC, for the purpose of filing a complaint regarding the setting aside of its standing offer.¹⁰

[11] On July 10, 2023, pursuant to subsection 30.12(2) of the CITT Act, the Tribunal notified the complainant that additional information was required before its complaint could be considered filed.¹¹ The Tribunal added that the information had to be provided as quickly as possible so that the complaint could be filed within the time limits prescribed by section 6 of the Regulations.

[12] On July 13, 2023, the complainant provided the required additional information.

[13] On July 14, 2023, the Tribunal informed the complainant that its complaint was now considered filed.¹²

ANALYSIS

[14] 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 complaint 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.

⁶ Exhibit PR-2023-019-01.A (protected) at 690–692.

⁷ *Ibid.* at 696.

⁸ *Ibid.* at 700–701.

⁹ The meeting took place on June 29, 2023; Exhibit PR-2023-019-01.A (protected) at 699.

¹⁰ The letter from the Tribunal acknowledging receipt of these documents indicates July 7, 2023. This is an error.

¹¹ Exhibit PR-2023-019-02.

¹² Exhibit PR-2023-019-03.

[15] For the following reasons, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the Regulations.

[16] The Tribunal would like to point out that, even if the time limits set out in section 6 of the Regulations had been met, it would have concluded that it had no jurisdiction to deal with the first ground of complaint raised by the complainant, namely, the setting aside of the standing offer without giving the complainant time to remedy the alleged breaches. As for the second ground of complaint—PWGSC’s assessment of the educational content of the program proposed by the complainant—in any event, the Tribunal would have concluded that the information on the record did not disclose a reasonable indication that the procurement had not been conducted in accordance with the relevant trade agreements. In the interest of thoroughness, the Tribunal therefore examined the merits of the allegations raised in the complaint, even though it was filed late.

The complaint was not filed within the time limits prescribed by the Regulations

[17] Subsection 6(1) of the Regulations provides that a potential supplier may file a complaint with the Tribunal if it does “so not 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 potential supplier.” Subsection 6(2) of the Regulations provides that a potential supplier that has made an objection to the relevant government institution, 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.”

[18] The Regulations make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of the basis of the complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, it may file a complaint with the Tribunal within 10 working days after it gains actual or constructive knowledge of the denial of relief by the government institution.

[19] The basis of the complaint became known to the complainant on June 27, 2023, when PWGSC informed it that its standing offer would be set aside. In the correspondence of June 27, 2023, not only was the complainant notified of the setting aside, but PWGSC also provided the reasons for deciding that the standing offer should be set aside.

[20] That same day, in response to the set-aside notice, the complainant requested a meeting with the PWGSC representative and, among other things, indicated that it would soon have a new version of its self-study program and that it was committed to making all necessary corrections to the content. The complainant also expressed surprise at not being given any time to remedy the alleged deficiencies.¹³

[21] In light of the exchanges between the parties, as documented on the record, and the complainant’s position that it did in fact object to PWGSC’s decision on that day, the Tribunal is prepared to assume, for the purposes of its analysis, that the complainant’s request for a meeting

¹³ Exhibit PR-2023-019-01.A (protected) at 700–701.

constitutes an objection.¹⁴ Moreover, this objection was filed within the time limits, as it was filed within 10 working days of the date on which the complainant became aware of the facts forming the basis of the complaint.

[22] Also on June 27, 2023, the PWGSC representative responded that a meeting was possible, but that “the decision was final” [translation].¹⁵ The Tribunal is of the opinion that, in this response, PWGSC is unequivocally and definitively denying any relief as requested by the complainant on June 27, 2023.¹⁶ In other words, there was no indication in PWGSC’s response that it would reverse its decision to set aside the standing offer awarded to the complainant and instead allow it to modify its educational content or submit a new self-study program.

[23] Since PWGSC’s response clearly constitutes a denial of relief, the time limit of 10 working days to file a complaint is calculated from the date of that response.¹⁷ Accordingly, the Tribunal concludes that the complainant had until July 12, 2023, to file its complaint. Yet it was not until July 13, 2023, that a complaint meeting the requirements of subsection 30.11(2) of the CITT Act was filed.

[24] Although the complainant sent a complaint to the Tribunal on July 6, 2023, that complaint was incomplete. On July 10, 2023, the Tribunal informed the complainant of the deficiencies and indicated which additional information and documents it needed to provide for the complaint to be considered compliant. The Tribunal added that this information had to be provided as soon as possible, so that the complaint could be filed within the time limits prescribed by section 6 of the Regulations.

¹⁴ The Tribunal notes that the complainant did not explicitly ask PWGSC to reverse its decision to set aside the standing offer in its email of June 27, 2023. It is therefore unclear whether this email constituted an objection within the meaning of the Regulations. However, the content of the email suggests that the complainant’s objective was precisely that PWGSC give it the opportunity to remedy the problems related to the educational content of its training program by giving it a period of time in which to do so, rather than terminating the business relationship. Moreover, the email refers to the fact that PWGSC had not given the complainant time to make the necessary corrections. The Tribunal is therefore of the opinion that, beyond a simple request for a meeting with PWGSC, in its June 27 email, the complainant was expressing its disagreement with the setting aside of its standing offer and was trying to persuade PWGSC to reconsider this decision. Consequently, the Tribunal gives the complainant the benefit of the doubt and considers that, in the circumstances, the content of the June 27 email can be considered an objection.

¹⁵ Exhibit PR-2023-019-01.A (protected) at 600–700.

¹⁶ This conclusion presumes that, in its email of June 27, 2023, the complainant was, at least implicitly, asking PWGSC to reverse its decision to set aside the standing offer, and had therefore validly objected to that decision. In any event, even if this were not the case and the Tribunal had determined that the complainant had not filed an objection, subsection 6(1) of the Regulations would apply. The 10-day period for filing a complaint with the Tribunal would then be calculated from the same point in time, that is, June 27, 2023, the date on which the complainant became aware of the facts giving rise to the complaint. In this case, the complainant would also have had until July 12, 2023, at the latest, to file a complaint in accordance with the CITT Act. However, as discussed below, such a complaint was not filed with the Tribunal until July 13, 2023. In other words, whether the email of June 27, 2023, constitutes a valid objection makes no difference in this case.

¹⁷ *Dataintro Software Limited* (1 December 2010), PR-2010-077 (CITT) at para. 32.

[25] A complaint is not considered to have been filed until all the information and documents required under subsection 30.11(2) of the CITT Act have been filed with the Tribunal. This finding is consistent with the *Canadian International Trade Tribunal Rules*.¹⁸

[26] As the complaint was not filed within the prescribed time limits, the Tribunal cannot conduct an inquiry into it. Consequently, the Tribunal is not required to consider whether PWGSC had an obligation to give the complainant time to remedy the alleged deficiencies before setting aside the standing offer, nor whether PWGSC was required, at the proposal evaluation stage, to evaluate the entire educational content of the self-study program proposed by the complainant.

[27] However, the Tribunal considers it useful to comment on each of these issues. Indeed, an analysis of the complainant's allegations reveals alternative grounds supporting the Tribunal's decision.

The Tribunal does not have jurisdiction to deal with matters of contract administration

[28] As to whether PWGSC had an obligation to give the complainant time to remedy the alleged deficiencies before setting aside the standing offer, the Tribunal concludes that this is a matter of contract administration, which falls outside the Tribunal's jurisdiction to review procurement processes.

[29] Subsection 30.11(1) of the CITT Act provides that the Tribunal's jurisdiction is limited to "a complaint ... concerning any aspect of the procurement process that relates to a designated contract".

[30] Therefore, the Tribunal's jurisdiction is limited to challenges related to the procurement process, which begins after an entity has decided on its procurement requirement and continues through the contract award.¹⁹

[31] Contract administration is a separate phase that takes place after the procurement process is completed; it deals with issues that arise as a contract is executed and managed. The Tribunal has consistently held that matters of contract administration are beyond the scope of its jurisdiction.

[32] In this case, the complainant is challenging PWGSC's interpretation and application of a provision that only becomes relevant after the contract has been awarded, that is, once a bidder has been awarded a standing offer and has begun to provide the required services under a resulting contract. It is clear from the evidence that this provision does not concern the procedure to be followed by PWGSC prior to or up to contract award.

¹⁸ SOR/91-499, see paragraph 96(1)(b).

¹⁹ *Custom Power Generation* (13 February 2021), PR-2020-087 (CITT) at para. 8; *Newland Canada Corporation* (13 August 2020), PR-2020-011 (CITT) at para. 11; *WW-ISS Solutions Canada v. Department of Foreign Affairs, Trade and Development* (16 December 2019), PR-2019-050 (CITT) at para. 15; *Vidéotron Ltée v. Shared Services Canada* (5 October 2018), PR-2018-006 (CITT) at para. 16.

[33] More specifically, that complainant cites clause 13 (2014-09-25) of Section 3 – General Conditions: Standing Offers – Goods or Services of PWGSC’s Standard Acquisition Clauses and Conditions (SACC) Manual.²⁰ The relevant part of clause 13 reads as follows:

1. If the Offeror is in default in carrying out any of its obligations under the Standing Offer, the Standing Offer Authority may, by giving written notice to the Offeror, set aside the standing offer. The set aside will take effect immediately or at the expiration of a cure period specified in the notice, if the Offeror has not cured the default to the satisfaction of the Standing Offer Authority within that cure period.

[34] The complainant asserts that, under clause 13, PWGSC was required to offer the complainant a period of time to remedy the deficiencies identified by the complainant with respect to the educational content of the self-study program before setting aside the standing offer.

[35] At first glance, and according to the standing offer awarded to the complainant, this clause seems to apply to and form an integral part of the standing offer between the parties.²¹ However, clause 13 does not form an integral part of the RFSO²² and did not apply at the request for standing offer stage, that is, the procurement process stage within the meaning of subsection 30.11(1) of the CITT Act. Furthermore, it is clear that the events that gave rise to the complainant’s challenges on this issue took place during the execution and management of the contract between the complainant and the Department of Finance. In short, the complainant’s grievances do not relate to the procurement process; rather, they concern the subsequent phase in the execution of a contract in connection with this procurement.

[36] Consequently, even if the complaint had been filed in a timely manner, the Tribunal would not have had jurisdiction to examine the first ground of complaint raised by the complainant.

Based on the information on the record, the Tribunal would not have been able to conclude that the information on the record relating to the second ground of complaint disclosed a reasonable indication that the procurement was not conducted in accordance with the relevant trade agreements

[37] The complainant submits that the problems with the educational content of its self-study program raised by PWGSC in the notice setting aside their standing offer should have been raised when their offer was being evaluated.

[38] The fourth part of the RFSO sets out the evaluation procedures and selection method chosen by PWGSC.²³ The evaluation procedures comprised three stages. The first stage is relevant here. It was used to assess the technical and financial evaluation criteria.

[39] In this first stage, offerors had to, among other things, meet all the mandatory technical criteria specified in Attachment A: Statement of Requirements²⁴ (Attachment) in order for their

²⁰ See online: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2005/14>>.

²¹ See clause 1.5.1 of the Standing Offer General Conditions in question; Exhibit PR-2023-019-01.A (protected) at 518.

²² See clause 2.1 of the Standard Instructions, Clauses and Conditions of the RFSO; Exhibit PR-2023-019-01 at 13.

²³ Exhibit PR-2023-019-01 at 22–26.

²⁴ *Ibid.* at 97–118.

proposals to be considered responsive. Offerors were also required to obtain the minimum score on the rated technical criteria set out in the Attachment.

[40] A close reading of the Attachment reveals that most of the stated criteria assess the *functionality* of the proposed programs. In the Tribunal's opinion, only the following three criteria relate to the educational content of the proposals and are therefore relevant to the analysis:

MTC-02 ²⁵	Official languages	<p>The Offeror's proposed solution must respect Canada's official languages by offering a solution in both the English or French languages in use in Canada.</p> <p>In order to demonstrate this requirement, the Offeror must provide a screenshot or data sheet of the current self-study solution demonstrating French or English work expressions typically used in Canada.</p>
RTC-17 ²⁶	<p>The Offeror's proposed solution should offer:</p> <ul style="list-style-type: none"> • A full course of English or French as a second language including two skills (reading and writing) for the three levels A (basic), B (intermediate) and C (advanced) (see Appendix 1 of Annex A) for all three skills. <p>In order to demonstrate this requirement, the Offeror should provide the following information:</p> <ul style="list-style-type: none"> • A copy of a report outlining the curriculum for each full course offered by solution. 	
RTC-18 ²⁷	<p>The Offeror's proposed solution should include at least one type of appropriate learning activity (e.g., phonetic activities, text typing, interpretative reading, written production) for the language levels and skills (listening, reading, speaking and writing).</p> <p>In order to demonstrate this requirement, the Offeror should provide the following information:</p> <p>A copy of a report and/or data sheet of the current solution indicating the ability of the proposed solution to meet this described criterion and/or a screenshot illustrating the described criterion.</p>	

[41] To demonstrate compliance with the above requirements, offerors were asked to provide excerpts, data sheets or reports of the educational content of their proposed programs. Nowhere in the RFSO or the Attachment is there any mention of PWGSC evaluating the entire educational content of the proposed programs. Clearly, the evaluation method established by PWGSC did not require it to review the entire educational content of each proposal.

²⁵ *Ibid.* at 99.

²⁶ *Ibid.* at p. 110.

²⁷ *Ibid.* at p. 111.

[42] Moreover, the Tribunal has often held that the procuring entity has the right to structure a procurement, including technical evaluation criteria, in a manner which meets its legitimate operational requirements,²⁸ subject to the limits imposed by the applicable trade agreements to ensure fair competition in procurement opportunities.²⁹

[43] In this case, the methodology chosen by PWGSC was reasonable. The evaluation procedures did not require PWGSC to demand a demonstration of the programs proposed by the offerors. The Tribunal sees nothing to indicate that training activities as such or exercises for learners were the focus of the evaluation. In the absence of a requirement in the RFSO for PWGSC to evaluate the entire content of the proposed language training, the Tribunal concludes that this second ground is not well founded.

[44] In short, there is no evidence that PWGSC breached its obligation to evaluate proposals according to the criteria set out in the RFSO. The information on the record relating to the second ground of complaint therefore does not disclose a reasonable indication that the procurement was not conducted in accordance with the relevant trade agreements.³⁰

[45] Indeed, even if the Tribunal were to accept that the complainant's allegations relate to the procurement in question, that is, to the evaluation of the complainant's proposal under the RFSO, and not to a matter of contract administration, the Tribunal is of the opinion that PWGSC was not required at the proposal evaluation stage to evaluate the entire educational content of the self-study program proposed by the complainant.

[46] Accordingly, even if the complaint had been filed within the prescribed time limits, this ground of complaint would not have satisfied the conditions for inquiry set out in sections 6 and 7 of the Regulations.

DECISION

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

Georges Bujold

Georges Bujold
Presiding Member

²⁸ *Vaisala Oyj v. Department of Public Works and Government Services* (29 December 2017), PR-2017-022 (CITT) at para. 82; *FDF Group* (27 August 2014), PR-2014-024 (CITT) at para. 19; *Accent on Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at paras. 60, 65, 70; *Bajai Inc.* (7 July 2003), PR-2003-001 (CITT); *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).

²⁹ *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 318 (CanLII) at para. 11.

³⁰ For the purposes of this exercise, the Tribunal assumes that the Canadian Free Trade Agreement applies, which provides, among other things, that the government institution must evaluate proposals, and award contracts, in accordance with the criteria set out in the tender documentation.