



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-050

Les Gestions Jacques Delaney Inc.

*Decision made
Friday, January 20, 2017*

*Decision issued
Thursday, January 26, 2017*

*Reasons issued
Friday, February 10, 2017*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

BY

LES GESTIONS JACQUES DELANEY INC.

AGAINST

THE DEPARTMENT OF TRANSPORT

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.

Daniel Petit
Daniel Petit
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 provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. 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.

2. Les Gestions Jacques Delaney Inc. (GJD) filed a complaint with the Tribunal concerning a Request for Proposal (RFP) (Solicitation No. T3033-160032) issued by the Department of Transport (Transport Canada) for the administration, operation and maintenance services of the Îles-de-la-Madeleine Airport.

3. The Tribunal has determined that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*, for the reasons that follow.

SUMMARY OF RFP AND COMPLAINT

4. Transport Canada issued the RFP on September 9, 2016. GJD submitted its bid before the bid closing date of November 11, 2016.

5. On November 16, 2016, Transport Canada informed GJD that its bid had been declared non-responsive and had been rejected on the ground that its technical proposal did not demonstrate in sufficient detail that the requirements of Annex C to the RFP had been met. Specifically, its technical proposal did not demonstrate in detail how it possessed the expertise and experience in the operation and maintenance of airports by meeting all elements of the mandatory criterion.

6. GJD submitted that it voiced its objection to Transport Canada on November 18, 2016, by way of a formal demand letter, by counsel, served by e-mail, bailiff and facsimile.

7. On December 14, 2016, the regional director of Transport Canada sent a letter to GJD reiterating that Transport Canada would not change its decision of November 16, 2016. The letter listed the reasons why GJD's technical proposal had been declared non-compliant with the mandatory requirements specified in Annex C to the RFP.

8. On January 19, 2017, GJD filed its complaint with the Tribunal.³

9. GJD admitted that it had filed its complaint late,⁴ that is, more than a month after receiving the letter from Transport Canada rejecting its bid. Nonetheless, GJD submitted that it should not be penalized for this delay. In its view, the letter from Transport Canada only indicated how to dispute a contract where it is below \$100,000, by filing a complaint with the Office of the Procurement Ombudsman (OPO), which was not appropriate for the contract at issue. GJD then turned to the office of its Member of Parliament,

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. The complaint filed on January 17, 2017, was incomplete. The complete complaint was filed on January 19, 2017.

4. See the e-mail from GJD to the Tribunal dated January 19, 2017, at 11:05 a.m. and the e-mail attached to it from GJD to the Tribunal "which explains the delay of more than 10 working days" [translation].

Ms. Diane Lebouthillier, on December 17, 2016, to seek direction on the procedure for challenging a decision of the Government of Canada. According to GJD, it did not receive a response from Ms. Lebouthillier's office until January 16, 2017, which informed it that it could contact the Tribunal about its objection concerning the procurement.

10. With respect to the ground of the complaint, GJD submitted that Transport Canada's evaluation is inadequate because its technical proposal demonstrated with sufficient detail that the requirements of Annex C to the RFP concerning experience were met. GJD relied on the fact that it had been the incumbent contractor for sixteen years and that one could easily conclude that the requirements at issue were clearly met just by consulting the description of the preceding contract, which it provided in its bid ("Administration, operation and maintenance services at the Îles-de-la-Madeleine Airport" [translation]). It also argued that Transport Canada should have checked its references, which would have confirmed that the requirements at issue were met.

11. As a remedy, GJD requested that Transport Canada re-evaluate its technical proposal and declare it compliant with the requirements and the evaluation criteria in Annex C to the RFP and that Transport Canada subsequently evaluate its financial proposal.⁵ It also sought its costs incurred in filing its complaint.

ANALYSIS

12. To initiate an inquiry, the Tribunal must find that (a) the complainant is a potential supplier, (b) the complaint is in respect of a designated contract and (c) the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreement.⁶ The complaint must also be filed within the prescribed time limits.⁷

13. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... 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."

14. Subsection 6(2) of the *Regulations* states that a potential supplier who 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."

15. 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 its ground of 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, 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.

5. Since the complainant's bid was declared non-responsive, it was rejected, and Transport Canada did not evaluate the financial proposal.

6. Subsection 7(1) of the *Regulations*.

7. Section 6 of the *Regulations*.

16. In order to determine whether GJD's complaint was filed within the time limit set out in subsection 6(2) of the *Regulations*, the Tribunal will now examine whether the following two conditions are met: (1) GJD must have filed its objection to Transport Canada within 10 working days after the day on which it became aware, or reasonably should have become aware, of its ground of complaint; and (2) the complaint must have been filed with the Tribunal within 10 working days of GJD having received the denial of relief from Transport Canada.

17. With respect to the first condition, the Tribunal considers that GJD became aware, or reasonably should have become aware, of its ground of complaint on November 16, 2016, when Transport Canada informed it of the results of the evaluation of its technical proposal. In accordance with subsection 6(2) of the *Regulations*, the Tribunal finds that GJD made its objection within the prescribed time limit because the formal demand letter was sent on November 18, 2016.

18. With respect to the second condition, the Tribunal considers that the complainant had actual or constructive knowledge of the denial of relief on December 14, 2016, the date on which Transport Canada replied to the formal demand letter and reiterated its decision of November 16, 2016.

19. Given that GJD received the denial of relief from Transport Canada on December 14, 2016, and that the complaint was filed with the Tribunal on January 19, 2017, the Tribunal finds that the complaint was not filed within the time limit prescribed by subsection 6(2) of the *Regulations*. Subsection 6(2) makes it clear that a complainant has 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief. As the Tribunal has held in the past, complainants cannot take a wait-and-see approach; they must file a complaint with the Tribunal within 10 working days of receiving the first indication that they have been denied the relief they are seeking.⁸

20. In this case, GJD should have filed its complaint with the Tribunal within the prescribed time limit, that is, by December 30, 2016. Therefore, GJD's complaint was not filed in a timely manner.

21. The fact that it took Ms. Lebouthillier's office several weeks⁹ to respond to GJD's request for information does not change the fact that GJD filed its complaint with the Tribunal beyond the time limit set out in the legislation.

22. The Tribunal acknowledges that it may have been difficult for GJD to ascertain the time frame within which it had to file a complaint with the Tribunal and that this may have contributed to its complaint being filed beyond the prescribed time frame. Indeed, the body of the RFP only mentions the bidders' option of having recourse to the OPO¹⁰ but does not mention the option of filing a complaint with the Tribunal for contracts valued over \$100,000, or the very tight time frame for filing a complaint with the Tribunal.

8. *Weir Canada Inc.* (6 September 2012), PR-2012-014 (CITT) at paras. 14-16; *ADR Education* (16 July 2013), PR-2013-009 (CITT) [ADR] at para. 29.

9. A representative from Ms. Lebouthillier's office wrote to the Tribunal by e-mail on January 20, 2017, concerning the complaint. She confirmed that, after receiving GJD's request, she checked with the Minister of Transport's office to find out the procedure so as to convey the correct information. She received a response from the office on January 13, 2017, and sent it to GJD on January 14, 2017. The response indicated that it could contact the OPO or the Tribunal. The fact that the response was received on January 14, 2017, or January 16, 2017, as GJD alleges, has no impact on the Tribunal's decision.

10. RFP at p. 2, Part 1, Section 7.

23. To avoid any ambiguity, there is no doubt that bidders are ultimately responsible for apprising themselves of how and when to engage the bid challenge mechanism.¹¹ The Tribunal notes that, in this case, this information was available to bidders if they had dug deep enough into various documents incorporated by reference into the RFP. Indeed, some information regarding the possibility of filing a complaint with the Tribunal can be found by consulting the *Code of Conduct for Procurement*¹² incorporated by reference and mentioned at paragraph 25.1.1 of Annex D (General Conditions – Professional Services). In the way in which it read when the Tribunal reviewed this case, the *Code of Conduct for Procurement* contains a section entitled “Vendor Complaints and Procedural Safeguards”, where perfunctory information regarding recourse to the Tribunal is available.

24. Noting that GJD’s complaint was filed outside the prescribed time limit and, as it has done with respect to other government institutions in the past,¹³ the Tribunal invites Transport Canada to consider by what means it could better inform the bidders of their recourse to the Tribunal and, in particular, the means by which it could make them aware of the time limits for filing a complaint with the Tribunal, with a view to preventing the rejection of a complaint solely on the basis of non-compliance with the time limits.

25. Therefore, the Tribunal invites Transport Canada to include the following paragraph in the main body of its solicitations and when informing bidders of the possibility of requesting a debriefing, as well as in all letters advising bidders that they are not successful:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) **within 10 working days** from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [Transport Canada]; if [Transport Canada] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal’s Web site (www.citt-tcce.gc.ca) or by contacting the Registrar of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

26. Having found that GJD’s complaint is time-barred by application of section 6 of the *Regulations*, the Tribunal does not need to examine the other conditions that it must consider in order to decide whether to conduct an inquiry into a complaint filed with the Tribunal. Accordingly, it is not necessary for the Tribunal to examine whether the other conditions have been met.

27. In light of the above, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

11. *ADR* at para. 31.

12. Online : <http://www.tpsgc-pwgscc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>.

13. *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 63; *ADR* at para. 34; *R.H. MacFarlands (1996) Ltd.* (20 December 2013), PR-2013-029 (CITT) at para. 31; *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at para. 55; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at para. 19.

DECISION

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

Daniel Petit

Daniel Petit
Presiding Member