Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-022

Shaw Industries Inc.

Decision made
Monday, August 11, 2014

Decision issued
Tuesday, August 12, 2014

Reasons issued
Monday, August 18, 2014

Canada

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

SHAW INDUSTRIES INC.

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.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
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.

SUMMARY OF COMPLAINT

2. The complaint relates to a procurement for the provision of carpet tile replacement services by Ron Engineering and Construction (Eastern) Ltd. (Ron Engineering) in its capacity as construction manager for Brookfield Office Properties LP (Brookfield), which in turn acts as agent for BPO (Ontario Core) Ltd. (BPO), the owner of the building where the work is to be performed.[3]

3. According to the complaint, Brookfield is acting as a third party "intermediary" on behalf of the Department of Public Works and Government Services (PWGSC) for the procurement of carpet tile that is to be installed in the building in question, which is under lease for the exclusive use of various federal government departments, including the Department of Transport and the Canada Revenue Agency.[4]

4. Shaw Industries Inc. (Shaw) alleged that PWGSC acted improperly by defining the mandatory technical requirements in the tender documents in a manner that is non-compliant with Canada's obligations under Chapter 10 of the *North American Free Trade Agreement*.[5] Specifically, Shaw challenged the following technical specifications for the carpet tile to be supplied:[6]

> **10. Carpet Tile – shall meet or exceed the following characteristics:**
>
> . . .
>
> .7 Pile Fibre to CAN/CGSB 4.129 and as follows:
> 100% first quality, bulk continuous filament nylon, branded and certified, *externally extruded by a fibre producer offering a construction and performance standards testing program for the carpet specified*, either: type 6.6 or 6, Trilobal or Square Hollowfill Cross-Section. *Fibre shape to have maximum Modification Ratio of 2.6 for soil release capabilities*. Fibre identification to AATCC 20. Acceptable suppliers: Invista, Solutia, Universal, Aqaufil, Nylene, Zeftron;
>
> . . .
>
> [Emphasis added]

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Complaint at Exhibit C-1, Appendix D, "Instruction to Tenderers" (21 July 2014) at 1.
4. Complaint, "Procurement Complaint by Shaw Industries" at paras. 1, 22, 26-27.
5. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
6. Complaint, "Procurement Complaint by Shaw Industries" at paras. 35-38, 42-43; see also Complaint at Exhibit C-1, Appendix D, "Carpet Tile & Base" (21 July 2014) at para. 10.7.

5. According to Shaw, it was effectively precluded from submitting a responsive bid to the tender because it could not meet two of the technical requirements for the carpet tile, in particular (1) that the nylon be externally extruded by a fibre producer (the "external extrusion requirement") and (2) that the carpet fibre have a maximum "modification ratio" of 2.6 for soil release capabilities (the "maximum modification ratio requirement").

6. Shaw alleged that these requirements breached Article 1007 of *NAFTA* on the basis that they were unnecessarily restrictive because: (1) with respect to the external extrusion requirement, whether the fibre used is extruded externally or internally by an integrated carpet manufacturer has no impact on the performance or quality of the carpet, and (2) as regards the maximum modification ratio requirement, there is no independent evidence to support any correlation between the modification ratio of a fibre and carpet performance in terms of dirt resistance.[7] Shaw further alleged that both requirements were designed by PWGSC to prevent Shaw from participating in the solicitation, given that Shaw, as an integrated carpet manufacturer, extrudes its own fibres, and that it cannot produce fibre with a modification ratio of less than 2.8 in the required quantities for this contract.[8]

7. By way of remedy, Shaw requested that the Tribunal issue an order postponing the award of the contract, and that a new solicitation be issued with the removal of the technical requirements in question.

BACKGROUND TO THE COMPLAINT

8. According to the complaint, the call for tender was issued on July 21, 2014, with a bid closing date of July 31, 2014.[9]

9. On July 25, 2014, Shaw wrote to Ron Engineering objecting to the maximum modification ratio requirement and asking whether its proposal would be acceptable with a higher modification ratio of 2.8.[10] On the same day, Ron Engineering provided a response to Shaw, which was copied to Brookfield, indicating that the proposed change to the modification ratio had been recommended to PWGSC but was not included in the revised specification provided by PWGSC for this project.[11]

10. Shaw did not submit a bid proposal in response to the call for tender.

11. On August 6, 2014, Shaw filed its complaint with the Tribunal, in which it raised two grounds of complaint—the first being in relation to the maximum modification requirement, and the second being in relation to the external extrusion requirement.

ANALYSIS

12. Upon receipt of a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before an inquiry can be conducted:

7. Complaint, "Procurement Complaint by Shaw Industries" at paras. 39, 49.
8. *Ibid.* at paras. 43, 51.
9. Complaint Form at 3.
10. Complaint at Exhibit C-2, "Exchange of Emails Between Ms. Deanne Duncan of Shaw Industries Inc. and Mr. Bruce Thomas of Ron Engineering and Construction (Eastern) Ltd. Dated July 25, 2014".
11. *Ibid.*

(1) whether the complaint was filed within the time limits prescribed by section 6 of the *Regulations*;

(2) whether the complainant is an actual or potential supplier;

(3) whether the complaint is in respect of a designated contract; and

(4) whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of *NAFTA*, Chapter Five of the *Agreement on Internal Trade*,[12] the *Agreement on Government Procurement*,[13] Chapter K*bis* of the *Canada-Chile Free Trade Agreement*,[14] Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,[15] Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*[16] or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*[17] applies.

13. In other words, the Tribunal must examine the complaint to determine whether there is a reasonable indication that the procuring entity conducted the procurement in a manner that was in violation of one of the applicable trade agreements.

14. Given that the procurement was issued by Ron Engineering,[18] a private entity, and not by PWGSC, the Tribunal first considered whether the complaint was in respect of a designated contract.

15. Section 30.1 of the *CITT Act* defines "designated contract" as "a contract for the supply of goods or services that has been or is proposed to be awarded *by a government institution* and that is designated or of a class of contracts designated by the regulations" [emphasis added]. Subsection 3(1) of the *Regulations* in turn provides that ". . . any contract or class of contract concerning the procurement of goods or services or any combination of goods or services, as described in [the trade agreements], that has been or is proposed to be awarded *by a government institution*, is a designated contract" [emphasis added].

16. Section 30.1 of the *CITT Act* defines "government institution" as "any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations." This includes the federal government entities and enterprises set out in the relevant annexes of the applicable trade agreements, in accordance with subsection 3(2) of the *Regulations*.

12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.
13. *Protocol Amending the Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014).
14. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
15. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs, Trade and Development <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx> (entered into force 1 August 2009).
16. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs, Trade and Development <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx> (entered into force 15 August 2011).
17. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs, Trade and Development <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx> (entered into force 1 April 2013).
18. Complaint at Exhibit C-1, Carpet Tile Replacement Tender, "Part I – Tender Call" at 1.

17. While PWGSC is a covered government entity under *NAFTA*,[19] there is no question that Brookfield and Ron Engineering are private entities, neither of which qualifies as a "government institution" under *NAFTA* or, for that matter, any of the other potentially applicable trade agreements.

18. Shaw's position, however, is that PWGSC is the government institution "directing the procurement" on behalf of the federal government departments that lease the property in question. In particular, Shaw relied on Ron Engineering's e-mail of July 25, 2014, as proof that PWGSC designed the technical requirements for the carpet tile being procured and had authority to veto any changes to those requirements.[20] According to Shaw,[21] PWGSC deliberately structured the procurement through the intermediary of a third party private entity in order to avoid its obligations under Chapter 10 of *NAFTA*, which constitutes a violation of Article 1001(4).[22]

19. In light of this allegation, the Tribunal looked at whether the evidence filed with the complaint supported a finding that this procurement should be evaluated as having been by PWGSC, albeit through Brookfield and/or Ron Engineering acting as PWGSC's agent(s).[23]

20. The "Instructions to Tenderers" in the solicitation documents filed with the complaint defined the legal relationships between the private entities involved in this procurement as follows:[24]

> **3. Definitions**
>
> **.1** **Owner:** The Owner is the owner of the building and the improvement or work to be performed by the Contractor.
>
> **.2** **Owner's Agent:** The Owner has granted Brookfield Office Properties LP, the authority to act as its Owner's Agent.
>
> **.3** **Construction Manager:** The Owner's Agent has granted Ron Engineering and Construction (Eastern) Ltd. the authority, as its Construction Manager, to enter into contracts with Contractors. All contact between the Contractor, the Owner and the Construction Manager shall be through the Construction Manager.
>
> **.4** **Contractor:** Contractors are firms employed by the Construction Manager and are responsible for performing the work.
>
> **.5** **Subcontractors:** Subcontractors are firms employed by Contractors and are responsible for portions of work within the Contractor's scope.

21. Accordingly, Ron Engineering was clearly authorized by the building owner's agent to conduct the procurement process and enter into a contract for the delivery of carpet tile replacement services for the property. Furthermore, the improvement or work to be performed would clearly be owned by the building's owner, BPO. Nowhere in the tender documents is any reference to PWGSC to be found.

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19. *NAFTA*, Annex 1001.1a-1, Schedule of Canada.
20. Complaint, "Procurement Complaint by Shaw Industries" at paras. 5, 16.
21. *Ibid*. at paras. 26, 29.
22. Article 1001(4) of *NAFTA* provides as follows: "No party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter."
23. The Federal Court of Appeal has held, in *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 93 (CanLII) at paras. 16-17, that where an agency relationship exists, the procurement actions of the agent including the awarding of the contract are, as a matter of law, the actions of the principal and not the actions of the agent. See also *Canada (Attorney General) v. Davis Pontiac Buick GMC (Medicine Hat) Ltd.*, 2008 FCA 378 (CanLII) at para. 11; *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 FC 514.
24. Complaint at Exhibit C-1, Appendix D, "Instruction to Tenderers" (21 July 2014) at 1.

22. Ron Engineering's e-mail of July 25, 2014, indicates that: PWGSC provided technical specifications for the project to the procuring entity (i.e. Ron Engineering); Ron Engineering and the owner's agent (i.e. Brookfield) retained a private consultant, JVS, to review and evaluate those specifications; JVS recommended certain amendments to PWGSC; and, in light of PWGSC's rejection of the proposed change to the maximum modification requirement, Ron Engineering refused Shaw's request.

23. However, the fact that PWGSC, as representative for the building's tenants, provided technical specifications to the procuring entity and was consulted regarding proposed amendments thereto, does not, in and of itself, establish an agency relationship whereby the procurement in issue was being conducted by PWGSC albeit through private intermediaries. Indeed, the Tribunal notes that it is not uncommon for private commercial landlords, in their own procurement activities, to collaborate with, and accommodate the particular needs/wants of, reliable tenants in effecting improvements to a leased space, without relinquishing either their role as contractor or their ownership of the resulting improvements.

24. Indeed, while Brookfield/Ron Engineering may have applied the technical specifications provided by PWGSC, the complaint documentation clearly indicates that the procurement was being conducted by a private entity (i.e. Ron Engineering) for the purposes of entering into a contract with another private entity (i.e. the successful bidder) for the procurement of carpet tile, with the resulting improvements to be owned by the building's owner and lessor, BPO, itself also a private entity.

25. Nor is there anything in the complaint to suggest that PWGSC would have any involvement in the evaluation of bid proposals, the awarding of the contract, or the payment for, or ownership of, the work to be performed.

26. With the procurement concerning a contract between private entities and with the complaint not providing a reasonable indication of the existence of an agency relationship between PWGSC and Brookfield or Ron Engineering, the Tribunal concludes that the procurement in issue is not in respect of a "designated contract" as defined by the *CITT Act* and the *Regulations* and required under Chapter 10 of *NAFTA*.

27. The above being the case, the Tribunal does not have jurisdiction to conduct an inquiry into the complaint and considers the matter closed.

28. While not necessary for the disposition of this complaint, the Tribunal wishes to note that even if, *arguendo*, it had found a designated contract to exist, the complaint ultimately would have failed on the basis that the ground of complaint pertaining to the external extrusion requirement had not been filed within the time period prescribed in section 6 of the *Regulations*.

29. In this connection, subsection 6(1) of the *Regulations* provides that a potential supplier who files a complaint with the Tribunal ". . . *shall do 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" [emphasis added].

30. Subsection 6(2) of the *Regulations*, in turn, 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."

31. 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 may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

32. In the absence of evidence to the contrary, the Tribunal considers that Shaw became aware or reasonably should have become aware of its grounds of complaint in relation to the mandatory technical requirements on the date the tender documents were issued (i.e. on July 21, 2014).

33. While Shaw's objection of July 25, 2014, regarding the maximum modification ratio requirement was timely, that objection did not extend to the external extrusion requirement.[25] That being the case, when Shaw filed its complaint on August 6, 2014, it exceeded the mandatory 10-day deadline prescribed in subsection 6(1) of the *Regulations* for that particular ground of complaint.

34. As a result, regardless of the Tribunal's ultimate finding on whether there was a reasonable indication of a breach of the applicable trade agreements on the basis of the ground of complaint that was timely, i.e. in relation to the maximum modification ratio requirement, the Tribunal would have had no basis to grant the relief requested since Shaw, by its own admission,[26] would still have been unable to meet the external extrusion requirement, which it would be time-barred from challenging, by operation of law.

DECISION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

25. Complaint at Exhibit C-2, "Exchange of Emails Between Ms. Deanne Duncan of Shaw Industries Inc. and Mr. Bruce Thomas of Ron Engineering and Construction (Eastern) Ltd. Dated July 25, 2014".
26. Shaw effectively conceded in the complaint that non-compliance with the external extrusion requirement would, in and of itself, have been sufficient to defeat any proposal that it might have submitted in response to the solicitation. See Complaint, "Procurement Complaint by Shaw Industries" at para. 38.