



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-051

Strilkiwski Contracting Ltd.

*Decision made
Thursday, January 29, 2015*

*Decision issued
Thursday, February 5, 2015*

*Reasons issued
Monday, February 16, 2015*

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

STRILKIWSKI CONTRACTING LTD.

AGAINST

THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

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.

Peter Burn _____
Peter Burn
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 THE COMPLAINT

2. The complaint relates to an Invitation to Tender (ITT) (Solicitation No. 2014 2015 09 24) issued on September 23, 2014, by JR Cousin Consultants Ltd. (JR Cousin) allegedly on behalf of the Department of Indian Affairs and Northern Development (Aboriginal Affairs and Northern Development Canada) (AANDC) for the provision of construction services for a new aerated lagoon and associated works for the Lake St. Martin First Nation Chief and Council (Lake St. Martin First Nation).

3. Strilkiwski Contracting Ltd. (Strilkiwski) complained that JR Cousin's failure to award the contract and its cancellation of the procurement deviated from standard government procurement practices and violated the trade agreements because the procurement was based on factors not disclosed in the tender documents. Strilkiwski alleged that these actions may have resulted in an unfair evaluation.

BACKGROUND

4. On October 23, 2014, Strilkiwski submitted its proposal in response to the ITT. It submitted the lowest price. Strilkiwski alleges that, on November 19, 2014, AANDC verbally informed it that the bid results were over budget but that additional funding had been approved and that the project would move forward. On October 24 and November 4, 2014, Strilkiwski provided additional information with respect to some of the subcontractors at JR Cousin's request.

5. Strilkiwski alleges that, between November 19 and 21, 2014, JR Cousin, AANDC and P.M. Associates Ltd. each verbally informed it of their recommendation that it be awarded the contract. However, Strilkiwski asserts that, on November 24, 2014, JR Cousin sent a letter informing it that JR Cousin was not awarding the contract at that time. Strilkiwski states that it was informed on December 2, 2014, that the award of the contract was approved by the Lake St. Martin First Nation.

6. On January 14, 2015, JR Cousin informed Strilkiwski that AANDC had decided to re-examine the scope of the work for the project in order to achieve potential costs savings and to proceed with a new tender. It also informed Strilkiwski that the existing lagoon tender was not "... considered eligible for funding under the AANDC programs."

7. On January 20, 2015, Strilkiwski sent a letter to JR Cousin objecting to the "... non-award of the ... contract" for the above-noted solicitation.

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

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

8. On January 23, 2015, Strilkiwski filed documents regarding its complaint with the Tribunal. On January 26, 2015, the Tribunal informed Strilkiwski that additional information had to be filed before its complaint could be considered properly filed.

9. On January 28, 29 and 30, 2015, Strilkiwski filed additional documents in response to the Tribunal's letter. Although Strilkiwski filed additional documents on January 30, 2015, the Tribunal considers that all the documents necessary for a complete complaint were filed by January 29, 2015.

TRIBUNAL'S ANALYSIS

10. Strilkiwski is essentially complaining that the ITT should not have been cancelled.

11. 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) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*; (ii) whether the complainant is an actual or potential supplier; (iii) whether the complaint is in respect of a designated contract; and (iv) 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 the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,⁸ Chapter Sixteen of the *Canada-Panama Free Trade Agreement*⁹ or Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*¹⁰ applies.

12. 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." Subsection 6(2) states that "[a] potential supplier who has made an objection . . . to the relevant government institution, and is denied relief by that

3. *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).

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

5. *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).

6. *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 Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<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).

9. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

¹⁰. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014).

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” [emphasis added].

13. In other words, a complainant has 10 working days from the date on which it first becomes aware of its ground of complaint, or reasonably should have become aware of it, to either object to the government institution or to 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. By “actual knowledge of the denial of relief”, the *Regulations* contemplate explicit rejection of a complainant’s requested relief (for example, in a written reply rejecting the complainant’s position). In past instances, the Tribunal has interpreted “constructive knowledge of the denial of relief” as other non-explicit situations constituting the effective *denial of relief*, including where, after the passage of a reasonable period of time, the complainant’s position has yet to be addressed by the government institution.

14. As noted above, JR Cousin notified Strilkiwski on January 14, 2015, that AANDC wanted to re-examine the scope of the work for the project and would proceed on the basis of a new tender. On January 20, 2015, Strilkiwski objected to this decision. Accordingly, the Tribunal finds that Strilkiwski made its objection to JR Cousin within 10 working days from the date on which it first became aware of its ground of complaint, which the Tribunal considers to be January 14, 2015.

15. Once a complainant makes an objection, subsection 6(2) of the *Regulations* requires the complainant to have actual or constructive knowledge of the denial of relief by the “government institution” before filing its complaint with the Tribunal. The term “government institution” is also defined in the *Regulations*. Even assuming that JR Cousin is an agent of a “government institution”, which Strilkiwski has not established, Strilkiwski has not provided any evidence that it has been denied relief by JR Cousin or AANDC with regard to its objection. Moreover, the Tribunal does not consider that the few days between January 20 (when Strilkiwski made its objection) and 29, 2015 (when its complaint was accepted as filed by the Tribunal) to be sufficient time to establish constructive knowledge of a denial of relief.

16. As such, the Tribunal finds that Strilkiwski’s complaint is, at best, premature and, therefore, will not conduct an inquiry into the complaint and considers the matter closed.

17. In the event that Strilkiwski fails to obtain relief from either JR Cousin or AANDC that it judges to be satisfactory, it may choose to file a new complaint with the Tribunal within the time frame stipulated in the *Regulations*. However, it is important to stress that the Tribunal does not have jurisdiction to inquire into a complaint unless a complainant can demonstrate that an impugned procurement relates to a “designated contract” by a “government institution” within the meaning given to those terms by sections 30.1 and following of the *CITT Act* and by the *Regulations*.

18. Strilkiwski has failed to demonstrate that this is the case in this matter. In particular, it has not established that AANDC is the procuring entity. Indeed, on the face of the materials filed with the Tribunal, this matter appears to concern a procurement conducted not by AANDC but by the Lake St. Martin First Nation using the expertise of JR Cousin. There is no indication that the Lake St. Martin First Nation is a “government institution” within the meaning of the *Regulations*. Furthermore, Strilkiwski has not established that the proposed works are covered by any of the trade agreements. As such, Strilkiwski may want to seek independent advice as to whether a complaint in respect of the ITT (or any future re-tender) properly lies within the Tribunal’s jurisdiction or whether a possible recourse lies elsewhere.

DECISION

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

Peter Burn

Peter Burn

Presiding Member