



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-022

HeartZAP Services Inc.

*Decision made
Tuesday, July 28, 2015*

*Decision issued
Wednesday, July 29, 2015*

*Reasons issued
Wednesday, August 5, 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

HEARTZAP SERVICES INC.

AGAINST

CANADA POST CORPORATION

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.

2. This is a complaint by HeartZAP Services Inc. (HeartZAP) concerning a Request for Quote (RFQ) (Solicitation No. 415NN15SPN65) by Canada Post Corporation (Canada Post) for the supply of automatic external defibrillators.

3. HeartZAP objected to Canada Post awarding the solicitation to Rescue 7 on the grounds that Rescue 7 did not meet two specifications, that Rescue 7 may not have had the lowest overall price and that there may have been a conflict of interest between Canada Post and Rescue 7.

4. As a remedy, HeartZAP requested that Canada Post re-evaluate the bids.

PROCUREMENT PROCESS

5. On May 15, 2015, Canada Post issued the RFQ.

6. On May 21, 2015, HeartZAP submitted its proposal to Canada Post.

7. On May 22, 2015, the RFQ closed.

8. On June 15, 2015, Canada Post awarded the contract to Rescue 7.

9. On June 25, 2015, on the basis of the grounds cited above, HeartZAP objected to Canada Post's award of the contract to Rescue 7.

10. On June 29, 2015, HeartZAP filed a complaint with the Tribunal but did not include a response from Canada Post to its objection. On July 7, 2015, the Tribunal found that its complaint was premature and informed HeartZAP that it could file a new complaint once it received a denial of relief from Canada Post.

11. By way of letter dated July 14, 2015, HeartZAP received a response to its objection from Canada Post. In this letter, Canada Post addressed HeartZAP's grounds of objection and denied HeartZAP relief.

12. Having received this denial of relief, HeartZAP filed a new complaint with the Tribunal on July 23, 2015, which is within 10 working days of the denial of relief and, thus, in compliance with subsection 6(2) of the *Regulations*. Accordingly, the complaint filed on July 23, 2015, is timely.

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

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

ANALYSIS

13. For the reasons detailed below, the Tribunal has decided that it does not have jurisdiction to inquire into HeartZAP's complaint.

14. Subsection 30.11(1) of the *CITT Act* states that, “[s]ubject to the regulations, a potential supplier may file a complaint with 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.” [Emphasis added] Likewise, paragraph 7(1)(b) of the *Regulations* requires that the Tribunal determine, amongst other things, whether the complaint is in respect of a designated contract.

15. Section 30.1 of the *CITT Act* defines the terms “designated contract” and “government institution” with reference to the *Regulations*.

16. A “designated contract” is any contract or class of contract that is or has been proposed to be awarded by a *government institution* concerning a procurement of goods or services or any combination thereof and that is designated under 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 Article 17.2 of Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*¹⁰ or Article 14.3 of Chapter Fourteen of the *Canada-Korea Free Trade Agreement*.¹¹

17. A “government institution” is any department or ministry of state of the Government of Canada, or any other body or office that is designated by the *Regulations*. Subsection 3(2) of the *Regulations* provides

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) [NAFTA].

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

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) [AGP].

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) [CCFTA]. 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) [CPFTA].

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) [CCOFTA].

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) [CPAFTA].

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) [CHFTA].

11. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-corea/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015) [CKFTA].

that the name of a given government institution must appear in one or another of the various schedules or annexes contained in a series of trade agreements in order to fall within the Tribunal's jurisdiction.¹²

18. In its complaint, HeartZAP alleged that Canada Post breached provisions of the *AIT*. The Tribunal has considered whether the RFQ is a designated contract under the *AIT* and whether the RFQ is a designated contract under the other trade agreements listed above.

19. The Tribunal notes that Canada Post is not listed as a government entity under Annex 502.1A of the *AIT*. In fact, Canada Post is specifically excluded from the *AIT*, based on Articles 502(2) and (3), which provide as follows:

Subject to paragraphs 3, 3P6 and 4 and Article 517, entities listed in Annexes 502.2A and 502.2B are excluded from this Chapter.

The entities listed in Annex 502.2B shall be free to pursue commercial procurement practices that may otherwise not comply with this Chapter. Nevertheless, the Parties shall not direct those entities to discriminate against the goods, services or suppliers of goods or services of any Party, including those related to construction.

20. Canada Post is listed in Annex 502.2B. Thus, it is not considered a "government institution" pursuant to the *Regulations*. For this reason, the RFQ is not considered a designated contract under the *AIT*.

21. Although Canada Post is not subject to the *AIT*, it is subject to the other agreements listed under subsection 3(2) of the *Regulations*, as it appears in the relevant schedules of those agreements.¹³ However, this fact alone does not settle the matter. In addition, the estimated value of the contract must be at or above the monetary thresholds established under the applicable trade agreements.

22. In its response to HeartZAP's objection, dated July 14, 2015, Canada Post stated that the value of the contract is below the threshold required for it to be reviewable under *NAFTA*. If it is true that the contract is valued at less than the monetary thresholds established under *NAFTA* and the various other trade agreements under which Canada Post is considered a government institution, the Tribunal will not have jurisdiction to inquire into the complaint.

23. Canada Post refused to provide HeartZAP with the exact monetary value of the contract into which it entered with Rescue 7 and, thus, HeartZAP was not able to submit this information as part of the complaint. Nonetheless, an analysis of HeartZAP's bid enables the Tribunal to estimate the value of the contract for the purpose of determining whether it meets the monetary thresholds.

24. The letter from Canada Post, dated July 14, 2015, states that HeartZAP was not selected for the contract on the basis that it did not have the lowest price. Canada Post states that the successful proponent had bid the lowest price. Thus, it is a reasonable assumption that Rescue 7's total bid price was lower than that of HeartZAP. It follows that, if HeartZAP's bid was lower than the applicable monetary thresholds, then Rescue 7's bid, and the ensuing contract between Rescue 7 and Canada Post, would also be less than these minimum amounts.

25. Section 3.2.2.1 of the RFQ required proponents to provide the per unit price of automatic external defibrillators. The instructions for this section also required proponents to stipulate whether there were any

12. See paragraphs 3(2)(a) and (b) of the *Regulations*.

13. With the exception of the *CKFTA*, which does not list Canada Post in the relevant annex.

costs that were not included in the per unit pricing. HeartZAP's bid does not indicate that there were any additional costs.

26. Appendix 3 of the RFQ lists the locations for which Canada Post intended to procure automatic external defibrillators, generating a total quantity of 85 defibrillators.

27. When HeartZAP's unit price is multiplied by 85, the result is far less than the monetary thresholds for the procurement of goods by Canada Post under the aforementioned trade agreements. As indicated above, it is reasonable to presume that, if HeartZAP's price is below the monetary thresholds in the applicable trade agreements, then Rescue 7's (lower) price also falls below those thresholds.

28. As the estimated value of the contract is below the monetary thresholds specified in *NAFTA*, the *AGP*, the *CCFTA*, the *CPFTA*, the *CPAFTA*, the *CCOFTA* and the *CHFTA*, the Tribunal finds that none of these agreements apply and that the complaint therefore does not relate to a "designated contract". For the reasons described earlier, the contract is also not a designated contract under the *AIT*. Accordingly, the Tribunal lacks jurisdiction to conduct an inquiry into the complaint.

DECISION

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

Peter Burn

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Presiding Member