



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-034

Strength Tek Fitness and Wellness
Consulting

*Decision made
Thursday, October 22, 2015*

*Decision issued
Friday, October 23, 2015*

*Reasons issued
Thursday, November 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

STRENGTH TEK FITNESS AND WELLNESS CONSULTING

AGAINST

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

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.

Ann Penner
Ann Penner
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. On October 19, 2015, Strength Tek Fitness and Wellness Consulting (Strength Tek) filed the present complaint with the Tribunal regarding the operation of a fitness facility by Employment and Social Development Canada (ESDC) in one of its facilities in Gatineau, Quebec. According to the complaint, the fitness facility is operated by the Recreation Association of the Public Service of Canada (RA Centre), a not-for-profit corporation located in Ottawa, Ontario.

3. Strength Tek alleged that ESDC entered into an agreement with various operators, most recently the RA Centre, as early as 1997, regarding the operation of the fitness facility on its premises even though a competitive bidding process had never been undertaken. According to Strength Tek, the terms of the agreement provided that neither ESDC nor the RA Centre would pay any funds to each other for the rental of the premises, the operation of the facility and/or the provision of related fitness services. Instead, the RA Centre would generate revenue by enrolling members (government employees or members of the public) and collecting fees for the use of its facilities. This agreement remained in force from April 1, 1997, to August 31, 2001. Although the agreement was not renewed from August 31, 2001, to April 1, 2015, the parties continued their arrangement on the basis of the terms stipulated in the initial agreement.

4. On April 1, 2015, ESDC and the RA Centre renewed their initial agreement for the current fiscal year.³

5. According to Strength Tek, the agreement and arrangement between ESDC and the RA Centre violated the *Agreement on Procurement*⁴ and the contracting policy of the Treasury Board Secretariat. Furthermore, they were attempts to circumvent the relevant provisions of the trade agreements. Accordingly, Strength Tek requested that the agreement for the current fiscal year be terminated and that it be awarded a contract, along with compensation (including complaint costs) in the amount of \$6,992,000—an amount that it estimated it has lost since ESDC entered into the agreement with the RA Centre in 1997.

BACKGROUND TO THE COMPLAINT

6. Strength Tek explained that it operates other fitness facilities on the premises of government departments, including the Department of the Environment and the Department of Agriculture and Agri-food. Services provided in these facilities were procured through open tendering processes.

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

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

3. Complaint, Renewal Agreement dated April 1, 2015.

4. *Revised 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*].

7. Strength Tek was thereby concerned with the “inconsistent” practice employed by ESDC in the operation of its fitness facility, especially given the supposed closed nature of the process. Strength Tek addressed its concerns to the Office of the Procurement Ombudsman (OPO). On September 21, 2010, the OPO wrote to the Department of Public Works and Government Services directing its attention to Strength Tek’s complaint but indicating that the matter was outside the OPO’s jurisdiction, as a contract had not been awarded.

ANALYSIS

8. On October 22, 2015, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for that decision are as follows.

9. As stipulated in subsection 7(1) of the *Regulations*, a complaint must meet three conditions before the Tribunal can accept it for inquiry: the complainant must be a potential supplier; the complaint must be in respect of a designated contract; and the information provided by the complainant must disclose a reasonable indication that the procurement has not been conducted in accordance with the governing trade agreement.⁵

10. In this case, the complaint does not meet these conditions, as the arrangement between the parties and the agreement for the current fiscal year do not constitute “designated contracts”. As such, the Tribunal does not have jurisdiction to initiate an inquiry.

Designated Contract

11. Among other considerations, a designated contract must meet certain minimum monetary thresholds, as prescribed by the trade agreements. For instance, under the *Agreement on Internal Trade*,⁶ the procurement will constitute a designated contract only if the requisition value is \$25,000 or greater where the largest portion of the procurement is for goods, or \$100,000 or greater in cases where the largest portion of the procurement is for services.⁷

12. In this case, however, Strength Tek acknowledged that neither ESDC nor the RA Centre have financial obligations according to the terms of the agreement.⁸ In other words, there is no procurement value in the present case. As noted above, since 1997, the RA Centre has generated its own revenue by enrolling members on its own accord. Therefore, the minimum monetary thresholds of the relevant trade agreements are not and cannot be met.

13. In *Bce Nexxia Inc. v. Canada (Commissioner of Corrections)*,⁹ the Federal Court of Appeal held that the Tribunal did not have jurisdiction to inquire into the complaint, as the contract did not have a “procurement value” as defined in Article 502(1) of the *AIT*.¹⁰ In that case, the Corrections Service of

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

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

7. Articles 502(1)(a) and (b) of the *AIT*.

8. Complaint at 1.

9. 2002 FCA 9 (CanLII) [*Nexxia*].

10. Article 502(1) of the *AIT* defines procurement value as “. . . the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one year’s duration”.

Canada (CSC) had selected BCE Nexxia Inc. to be the supplier of telephone services to inmates in Canadian prisons administered by the CSC.

14. The Federal Court of Appeal held that, as there was no payment of money from the government department to the supplier, there was no “financial commitment” resulting from the procurement by either the government department or the prisoners; thus, there was no “procurement value”.¹¹ The Federal Court of Appeal noted that the “financial commitment” must be that of the procuring entity. The supplier’s cost of providing the service cannot constitute the “financial commitment” to which the definition of “procurement value” refers.¹²

15. The Federal Court of Appeal’s reasoning applies to this case, as well. Although Strength Tek’s complaint raises issues concerning access to business opportunities within the federal government, the complaint does not involve a financial commitment or procurement value and cannot therefore be considered a designated contract. Simply put, ESDC chose to enter into the agreement and not to make a financial commitment concerning the fitness facility. While one may question the efficacy and cost-effectiveness of such a practice, it is not within the Tribunal’s jurisdiction under the relevant provisions of the *CITT Act* and *Regulations*.

Circumvention

16. Strength Tek alleged that “. . . ESDC has used [the agreement] to circumvent contracting rules” Furthermore, Strength Tek suggested that, even though “[t]here is no money changing hands . . .”, ESDC provided “. . . taxpayer funded space to deliver a requested service to its employees”, in contravention of the trade agreements.¹³

17. No specific facts as to any alleged circumvention were provided, notwithstanding Strength Tek’s general claim of circumvention. Strength Tek provided no evidence to demonstrate that ESDC took steps to structure the procurement to avoid or circumvent its obligations under the relevant trade agreements. In any event, the Tribunal finds that the arrangements being questioned by Strength Tek are not designated contracts and that the concept of circumvention of the relevant trade agreements cannot arise as a result.

SUMMARY

18. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

DECISION

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

Ann Penner
Ann Penner
Presiding Member

11. *Nexxia* at para. 22.

12. *Nexxia* at para. 26.

13. Complaint at 7.