



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2017-024

Titan Boats Ltd.

*Decision made  
Tuesday, September 5, 2017*

*Decision issued  
Wednesday, September 6, 2017*

*Reasons issued  
Thursday, September 13, 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**

**TITAN BOATS LTD.**

**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.

Jason W. Downey  
Jason W. Downey  
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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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. The complaint by Titan Boats Ltd. (Titan) concerns a Request for Proposal (RFP) (Solicitation No. F7044-170019/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Canadian Coast Guard and the Department of Fisheries and Oceans for the provision of one 8.3-8.6 m aluminum rigid inflatable boat with T-Top and trailer.

3. The Tribunal has decided not to conduct an inquiry into Titan's complaint because it does not disclose a reasonable indication that the procurement process violated the applicable trade agreement. In particular, Titan's complaint did not include any information to support its allegation that the contract was improperly awarded to a non-compliant bidder.

## BACKGROUND

4. On July 6, 2017, PWGSC issued the RFP. Titan submitted a bid in response to the RFP by the bid closing date of August 16, 2017.

5. On August 22, 2017, PWGSC notified Titan that a contract was awarded to Liquid Metal Marine (LMM). Although Titan's bid complied with the mandatory requirements of the RFP, it was not the lowest-priced.

6. On August 23, 2017, Titan objected, in writing, to PWGSC regarding the contract award to LMM. On August 24, 2017, its objection was denied by PWGSC.

7. On August 29, 2017, Titan filed the present complaint. It alleges that LMM was non-compliant with a mandatory technical requirement that bids must include "objective evidence of experience in the construction of vessels of the size, type and complexity which are the subject of this RFP".<sup>3</sup> According to Titan, LMM's proposal could not have met this requirement as it "has not built a vessel with a proven hull, of the size and complexity, being requested". Titan submitted that the award of contract to LMM, a non-compliant bidder, constituted a breach of article 506 of the *Agreement on Internal Trade*.<sup>4</sup>

## ANALYSIS

8. Subsection 7(1) of the *Regulations* sets out the following three conditions that must be satisfied in order for the Tribunal to accept a complaint for inquiry:

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
  2. S.O.R./93-602 [*Regulations*].
  3. RFP, section 3.2.6, "Vessel Construction Experience".
  4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/agreement-on-internal-trade/>> [*AIT*].

- 1) the complainant is a potential supplier;
- 2) the complaint is in respect of a designated contract; and
- 3) the information provided discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

9. The complaint meets the first condition because Titan submitted a bid in response to the RFP and is, therefore, a potential supplier. The Tribunal's analysis of the second and third conditions is provided below; the Tribunal concludes that the second condition is met, but not the third.

### Designated Contract

10. To be considered a "designated contract" for the purposes of the second condition, a contract must concern the supply of goods or services, as described in the trade agreements.<sup>5</sup>

11. The complaint alleges that the procurement has not been conducted in accordance with article 506 of the *AIT*. Although the RFP indicates that the requirement is subject to the *AIT*,<sup>6</sup> the tender notice published online (<https://buyandsell.gc.ca>) lists the *Canadian Free Trade Agreement*<sup>7</sup> instead of the *AIT*.

12. The *CFTA* entered into force on July 1, 2017, and replaced the *AIT*. Since the RFP was issued on July 6, 2017, the *CFTA* (and not the *AIT*) is applicable, as indicated in the tender notice.

13. The *CFTA* contains an exclusion for shipbuilding.<sup>8</sup> This raises a question, in the Tribunal's view, as to whether the shipbuilding exclusion would apply to the good being procured in this case, that is, an aluminum rigid inflatable boat.<sup>9</sup> The RFP does not use the terms "ship" or "shipbuilding" but it does refer to the good as a "boat" or "vessel" to be designed and built by the contractor. Whether this boat qualifies as a ship for the purposes of the trade agreements is unclear at this stage.

14. However, *even if* the rigid inflatable boat in question was considered to be a "ship", the Tribunal finds that it would still be covered under the *CFTA*.<sup>10</sup> The exclusion under the *CFTA* is limited to

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5. 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." Subsection 3(1) of the *Regulations* provides, in turn, that "[f]or the purposes of the definition *designated contract* in section 30.1 of the Act, 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."

6. RFP, section 1.4, "Trade Agreements".

7. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force July 1, 2017) [*CFTA*].

8. *CFTA*, Annexe 520.1, Schedule of Canada, section B(1)(h).

9. The Tribunal considered a similar issue in *McNally Construction Inc.* (6 December 2001), PR-2001-026 (CITT).

10. On the contrary, the other trade agreements listed in the RFP include exclusions for shipbuilding that would apply to procurements by the Department of Fisheries and Oceans. See, for example: *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, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994), Annex 1001.2b, General Notes, Schedule of Canada, paragraph 1(a); *Canada-Peru Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009), Annex 1401.1-6, General Notes, Schedule of Canada, paragraphs 1(a) and (e).

“shipbuilding and repair, including related architectural and engineering services, *by any Crown corporation for which the Minister of Transport is specified, or was specified on the effective date, as the appropriate Minister in respect of that corporation*” [emphasis added].<sup>11</sup> Since the present RFP was issued by PWGSC on behalf of the Canadian Coast Guard and the Department of Fisheries Oceans, and does not involve the Minister of Transport, the Tribunal is satisfied that it is outside the scope of this exclusion.

15. In light of the above, the Tribunal finds that the good being procured is covered under the *CFTA* and, therefore, the complaint is in respect of a designated contract.

### Reasonable Indication of a Breach

16. Turning to the third condition, the Tribunal considered whether the complaint discloses a reasonable indication that the contract was improperly awarded to a non-compliant bidder.

17. The complaint refers to article 506 of the *AIT*.<sup>12</sup> As discussed above, the *AIT* does not apply and so the Tribunal considered relevant provision under the *CFTA*. Article 515 of the *CFTA* provides, in part, as follows:

#### Treatment of Tenders and Award of Contracts

...

##### *Evaluation and Award of Contract*

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

...

18. The RFP indicated that a “bid must . . . meet all mandatory technical evaluation criteria to be declared responsive” and that the “responsive bid with the lowest evaluated price will be recommended for award of a contract.”<sup>13</sup> In order to be compliant with the mandatory technical criteria, bids had to provide all the information requested in the bid preparation instructions (i.e. Part 3 of the RFP).<sup>14</sup>

19. Titan alleged that the contract awardee, LMM, could not have met the following mandatory technical requirement set out in the RFP’s bid preparation instructions:

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11. *CFTA*, Annex 520.1, Schedule of Canada, section B(1)(h).

12. Subsection 506(6) of the *AIT* provides as follows: “In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

13. RFP, section 4.2, “Basis of Selection”.

14. RFP, section 4.1.1.1, “Mandatory Technical Criteria”.

### 3.2 Section I – Technical Bid

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#### 3.2.6 Vessel Construction Experience

As part of their technical bid, *the Bidder must provide objective evidence of experience in the construction of vessels of the size, type and complexity which are the subject of the RFP*. To demonstrate this experience, the Bidder must provide

- (a) detailed list of such vessels built pursuant to TP 1332, Construction Standards for Small Vessels, Non-pleasure craft latest edition, within the last 5 years;
- (b) photographs of vessels of [*sic*] listed;
- (c) (for listed TP 1332, non-pleasure craft sold within the last 5 years only) purchaser's name and contact information, and the date of sale.

[Emphasis added]

20. Titan states in its complaint that “it is believed” LMM has not manufactured a vessel with a proven hull, of the size and complexity that would meet the requirement. However, Titan did not explain the basis for this assertion, nor did it provide any supporting information with the complaint, such as information on LMM’s business and the type of boats it has manufactured.

21. Similarly, in its written objection to PWGSC, Titan simply asserted that LMM “has not built an 8.5 model proven hull as identified in Section 3.2.6 Vessel Construction Experience” without explaining the basis for its belief that LMM’s technical bid could not have met this requirement. PWGSC responded that the Canadian Coast Guard’s technical authority had determined that all bidders, including LMM, had met the mandatory technical requirements of the RFP.<sup>15</sup> There is no indication on the record of a further response from Titan to PWGSC.

22. As Titan has not filed any information with the complaint to explain or support its assertion that LMM could not have met this technical requirement, there is no evidentiary basis for the Tribunal to question the conclusion of the evaluators that LMM’s technical bid was compliant.

23. A complainant is not required, at the complaint stage, to prove its allegations in order for the Tribunal to conduct an inquiry. The relevant threshold, as indicated above, is whether the complaint discloses a *reasonable indication* that the procurement process has not been conducted properly, in accordance with the applicable trade agreements. Although this is a low threshold, a complainant must provide a reasonable foundation upon which the Tribunal can anchor its analysis; in the present case, all that is present is an unsubstantiated assertion, which is insufficient to establish a reasonable indication that LMM’s bid was non-compliant. The Tribunal finds that Titan has not met this low initiation threshold as it did not provide any supporting information or evidence indicating that its allegation may be true.

24. The Tribunal therefore concludes that the complaint does not disclose a reasonable indication that the contract was improperly awarded to a non-compliant bidder resulting in a breach of the trade agreements.<sup>16</sup> As a result, the third condition for conducting an inquiry is not met.

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15. E-mails exchanged between P. Smith of Titan and D. Castle of PWGSC dated August 23 and 24, 2017.

16. It is unclear whether the requirement in this RFP would be covered under any of the trade agreements set out in the RFP other than the *CFTA* (see footnote 10). However, even if the requirement was covered by any of the other listed trade agreements, the Tribunal would have reached the same conclusion with respect to the third condition for inquiry given that the complaint did not disclose a reasonable indication of an improper award of contract to a non-compliant bidder.

**DECISION**

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

Jason W. Downey \_\_\_\_\_

Jason W. Downey  
Presiding Member