



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2017-054

Strength Tek Fitness

v.

Department of Employment and
Social Development

*Order and reasons issued
Monday, April 23, 2018*

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IN THE MATTER OF a complaint filed by Strength Tek Fitness on February 8, 2018, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision of the Canadian International Trade Tribunal, on February 15, 2018, to inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

BETWEEN

STRENGTH TEK FITNESS

Complainant

AND

**THE DEPARTMENT OF EMPLOYMENT AND SOCIAL
DEVELOPMENT**

**Government
Institution**

ORDER

The Canadian International Trade Tribunal grants the motion filed by the Department of Employment and Social Development and hereby ceases its inquiry pursuant to section 10 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

Peter Burn

Peter Burn
Presiding Member

STATEMENT OF REASONS

1. On February 8 and 12, 2018, Strength Tek Fitness (Strength Tek) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposal (RFP) (Solicitation No. 100006330) issued by Employment and Social Development Canada (ESDC) for the provision of workplace fitness centre services.

2. The Tribunal accepted the complaint for inquiry on February 15, 2018, as it appeared to meet the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

3. In its letter forwarding the complaint, the Tribunal instructed the government institution (ESDC) to address the following preliminary issues:

- Whether there was a procurement value within the meaning of the trade agreements, specifically the *Canadian Free Trade Agreement*,³
- Whether the services contemplated in the RFP were covered by the trade agreements; and
- Whether the arrangement constituted circumvention of the trade agreements.

4. For the reasons set out below, the Tribunal finds that it does not have jurisdiction to inquire into Strength Tek's complaint.

BACKGROUND

5. ESDC issued an RFP on September 12, 2017, later re-issuing an amended version of the RFP in its entirety on December 5, 2017.

6. The solicitation eventually closed on December 29, 2017. ESDC received two bids (both compliant), those of Strength Tek and the Recreation Association of the Public Service of Canada (RA Centre). The evaluators determined that both bids were compliant with the mandatory requirements of the RFP, and that the RA Centre's bid contained the lowest evaluated price and was therefore the successful bid. On January 26, 2018, a regret letter was sent to Strength Tek, which responded the same day with concerns about the award.⁴

7. Strength Tek communicated several objections regarding the RFP process to ESDC between September 12, 2017, and January 26, 2018, both before and after the bid closing date.

8. On February 8, 2018, Strength Tek filed the present complaint with the Tribunal.⁵ In light of some facts differentiating the present complaint from Strength Tek's previous one (including that ESDC

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

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

3. *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 1 July 2017) [*CFTA*].

4. Exhibit PR-2017-054-01 at 40-41 of 226, Vol. 1.

5. Exhibit PR-2017-054-01, Vol. 1.

conducted an RFP process in the present complaint), the Tribunal decided to initiate an inquiry on February 15, 2018.

9. On March 6, 2018, the RA Centre requested to be granted intervener status in the complaint.⁶ The Tribunal granted the request on March 13, 2018.⁷

10. On March 12, 2018, ESDC brought a motion for the Tribunal to cease its inquiry into the complaint.⁸ In the motion, ESDC submitted that:

- a. the facts of this complaint remain essentially the same as in a previous complaint, where the Tribunal decided not to conduct an inquiry;⁹ and
- b. the arrangement at issue is not a covered procurement under the relevant trade agreements.

11. On April 2, 2018, Strength Tek filed its response. Among other arguments, Strength Tek submitted that the Tribunal had jurisdiction over the subject matter of its complaint.

TERMS OF THE PROCUREMENT

12. Under the RFP, suppliers were required to demonstrate compliance with three mandatory requirements, as well as submit a “financial bid” proposing membership pricing for ESDC employees for financial evaluation purposes. The successful supplier would be identified on the basis of compliance with the mandatory criteria and the lowest evaluated financial bid (i.e. the proposed membership price).¹⁰

13. The successful supplier would be entirely responsible for the collection of membership revenue (dues) from employees.¹¹ Suppliers were advised that the space made available for the operation of the fitness centre was owned by Public Services and Procurement Canada and occupied by ESDC through an occupancy instrument, with ESDC responsible for occupancy fees and certain costs.¹²

ANALYSIS

14. At the outset, the Tribunal wishes to express its considerable concern in respect of the events which led to the complaint. This dispute has had a long history dating back to at least 2010¹³ and it seems that the government institution has perpetuated rather than resolved the dispute in conducting the present RFP.

15. Specifically, the Tribunal is greatly concerned with the process used to solicit the services in question as well as the substantive results concerning the usage of Crown assets, the impact on tax revenues, and so on.

16. Firstly, the process was a flawed one.

6. Exhibit PR-2017-054-09, Vol. 1A.

7. Exhibit PR-2017-054-11, Vol. 1A.

8. Exhibit PR-2017-054-10, Vol. 1A.

9. *Strength Tek Fitness and Wellness Consulting* (23 October 2015), PR-2015-034 (CITT) [*Strength Tek 1*].

10. RFP, Part 4.

11. *Ibid.*, Part 7, article 8.1.1 and Annex A, article 3.1.4(d).

12. *Ibid.*, Annex A, article 1.3.

13. See *Strength Tek 1* at para. 7.

17. The choice of an RFP to conduct non-procurement activities is not an issue in itself, as set out by the Tribunal in *Canadian Maritime Engineering*:¹⁴

While a government procurement process necessarily involves the *acquisition* of goods or services by any means, a similar process may be used for other public policy purposes, given the benefits of applying a recognized methodology that is competitive, transparent, merit-based, etc. For example, a competitive, evaluation-based process is typically involved in the selection of public grant recipients, which is essentially the giving of monies by the government with no acquisition of goods or services in return.

[Emphasis in original]

18. However, in this case, conducting the process through an RFP *without clearly acknowledging that the process was not subject to the Tribunal's jurisdiction* was misleading, as evidenced by the complainant's submission and written documents from ESDC employees.¹⁵

19. Such a process was not what was envisaged by Strength Tek, who has complained of unfair, arbitrary and non-transparent arrangements in the past. Its concerns were met with an alternative process, which, albeit more objective and transparent, nonetheless resulted in one not subject to any review by the Tribunal.

20. In the Tribunal's view, in spite of well-meaning intentions, ESDC launched a process that could not be subject to an outside review and that, thus, did not achieve the goals proposed by the complainant. That being so, the particular result of the choice of process, i.e. that the outcome was not subject to the Tribunal's review, should have been clearly explained to the complainant at the outset. No such explanation was given at the time at which the RFP was issued.

21. While there is no evidence that this process constituted deliberate circumvention of the trade agreements, it closely borders on such behaviour. The Tribunal will remain vigilant that such arrangements are not used to circumvent its legislative mandate. In this regard, absent some compelling reasons to the contrary, the Tribunal is of the view that ESDC should have conducted a genuine RFP for the provision of fitness services where there is a payment to the supplier and where the premises are leased to the supplier for purposes of conducting those services.

22. Secondly, the process produced a number of substantive issues, such as the following, which should trouble the government institution, as they do the Tribunal:

- Failure to structure the process as a genuine provision of services and lease results in a loss to the Crown of any rental income which could have otherwise been accrued. It is not clear that the reduction in the membership fees enabled by the Crown foregoing rent on the space is equivalent to or greater than the foregone rental income.
- The arrangement raises the issue of potential taxable benefits to employees.
- The arrangement may result in unfair competition between this subsidized facility and a nearby operator.
- There is an issue as to equity between members of the public service.

14. *Canadian Maritime Engineering Ltd. v. Department of Transport* (8 September 2016), PR-2016-020 (CITT) [CME] at para. 30.

15. Exhibit PR-2017-054-01 at 73 of 226, Vol. 1.

23. These are all problematic results of the fact that premises which are owned and maintained by all taxpayers are being used free of charge by a supplier for the benefit of a limited group of government employees in a non-transparent manner.

24. While maintaining healthy employees is a laudable purpose, the present approach by ESDC is a problematic method of achieving that purpose.

25. However, as explained below, the Tribunal finds that it does not have jurisdiction to inquire into the matters raised in Strength Tek's complaint.

The Tribunal's Jurisdiction in This Inquiry

General Principles

26. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. At the conclusion of the inquiry, the Tribunal must determine whether a complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

27. Subsection 30.11(1) of the *CITT Act* provides that the above jurisdiction is limited to "any aspect of the procurement process that relates to a *designated contract*" [emphasis added].

28. Among other considerations, a designated contract must meet certain minimum monetary thresholds, as prescribed by the trade agreements. For instance, under the *CFTA*, the procurement will constitute a designated contract only if the requisition value is \$25,300 or greater where the largest portion of the procurement is for goods, or \$101,100 or greater in cases where the largest portion of the procurement is for services.¹⁶

29. As outlined below, the RFP process in question did not entail a procurement value within the meaning of the trade agreements. The monetary thresholds are therefore not met, meaning the RFP process does not relate to a designated contract.

30. As such, and despite its grave misgivings regarding the conduct of this RFP process, the Tribunal is without jurisdiction to inquire into the complaint.

The Tribunal's Jurisdiction Where There is no Procurement Value

31. The trade agreements outline what may be included in the calculation of procurement value for the purpose of determining whether it meets the monetary thresholds and is therefore a designated contract.

32. Article 505(1) of the *CFTA* provides as follows:

1. In estimating the value of a procurement for the purpose of determining whether it is a covered procurement, a procuring entity shall:
 - (a) estimate what the value would be as of the date the tender notice will be published; and

16. Articles 504(3) and (4) of the *CFTA*.

- (b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
- (i) premiums, fees, commissions, and interest; and
 - (ii) the total value of options if the procurement provides for the possibility of options.

33. Similar language is found in the *North American Free Trade Agreement*,¹⁷ the *Agreement on Government Procurement*,¹⁸ the *Canada-European Union Comprehensive Economic and Trade Agreement*¹⁹ and the other trade agreements.

34. In *BCE Nexxia v. Canada (Commissioner of Corrections)*,²⁰ The Federal Court of Appeal overturned a determination by the Tribunal that it had jurisdiction to hear a complaint involving the Corrections Service of Canada (CSC). The contract was found not to be a designated contract because the CSC was not paying any money for the service to be provided, i.e. the provision of telephone services for prisoners in CSC facilities by BCE Nexxia Inc. The complainant, Telus, argued that consideration flowed from the value of the “exclusive franchise” given to the supplier to charge for telephone services, and from the value provided to the CSC of being able to monitor and control inmate telephone usage.

35. The Federal Court of Appeal found that the Tribunal improperly interpreted the term “estimated financial commitment resulting from the procurement” in the definition of “procurement value” in Article 518 of the *Agreement on Internal Trade*,²¹ the precursor of the *CFTA*. The Court accepted that the successful supplier would be obtaining something of value, but that “broad concepts of value or consideration in a contractual sense are not found in the definition of ‘procurement value’” as defined under Article 518.²² The Court found “financial commitment” to mean payment of money, and that “[w]hile the granting of an ‘exclusive franchise’, as Telus characterizes the arrangement in this case, may have value to a supplier, it is not an obligation to pay money by the government entity to the supplier.”²³

36. The Federal Court of Appeal then referred to Article 505(2) of the *AIT*, which provided that “procurement value” is to be calculated taking into account “all forms of remuneration including premiums, fees, commissions and interest”. The Court found that the terms “premiums, fees, commissions and interest” all refer to monetary obligations and that Article 502(2) must therefore be referring to remuneration calculated in terms of money. The Court found the lack of monetary remuneration flowing from the CSC to the supplier precluded a “financial commitment” by either the CSC or the prisoners, although it

17. *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).

18. *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).

19. *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017), Article 19.2(6).

20. 2002 FCA 9 (CanLII) [*BCE Nexxia*].

21. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-internal-trade/>> [*AIT*].

22. *BCE Nexxia* at para. 16.

23. *Ibid.* at para. 19.

acknowledged that *remuneration would flow to the supplier from the prisoners in the form of telephone tolls and charges.*²⁴

37. The Federal Court of Appeal therefore found that there was no procurement value, as required to ground the Tribunal's jurisdiction to consider the complaint, and allowed the application for judicial review.

38. In *CME*, the Tribunal confirmed the approach used in *BCE Nexxia* and *Strength Tek 1*. In *CME*, the Tribunal considered a complaint involving the leasing of Crown-owned dry docks to a company, which would then operate commercial ship repair services to the shipping industry using the Great Lakes St. Lawrence seaway system. As such, the purpose of the lease was to provide services to a third party—the shipping industry—not services to government.

39. The Tribunal found that the value to the company entailed in the lease did not involve any money to be paid by the procuring entity. Nor did any potential “forgone revenue”, which the government might have received had it leased the property at market rates, represent remuneration to the supplier. The Tribunal therefore determined that any costs to be incurred by the procuring entity pursuant to the lease did not constitute a monetary obligation involving remuneration of the successful proponent. As such, there was no procurement value, no designated contract, and no jurisdiction for the Tribunal to conduct an inquiry into the complaint.²⁵

40. Based on the submissions of the parties, the Tribunal has determined that the reasoning in these previous decisions, based on the Federal Court of Appeal's decision in *BCE Nexxia*, applies to the present complaint.

The Tribunal Has no Jurisdiction in the Present Inquiry

41. Unlike the *AIT*, no definition of “procurement value” is included in the *CFTA*, in which the reference to “financial commitment” is not present. However, as noted above, the direction to value contracts based on “remuneration”, using the examples of premiums, fees, commissions and interest, appears in the *CFTA* and the other trade agreements.

42. As *BCE Nexxia* turned crucially on the interpretation of those terms as requiring *monetary* remuneration to flow from the procuring entity to the supplier, the Tribunal concludes that the Federal Court of Appeal's reasoning applies to the present case as well.

43. Strength Tek correctly observed that this was a contract to provide services at the designated ESDC location to service ESDC employees exclusively. However, this was not a contract to provide services to ESDC itself and, more importantly, no remuneration was to flow from ESDC to the successful bidder within the meaning of the trade agreements.

44. Strength Tek submitted, and ESDC acknowledged, that the cover page of the RFP contained the following statement:

Proposal To: Employment and Social Development Canada. We hereby offer to sell to Her Majesty the Queen in right of Canada, in accordance with the terms and conditions set out herein, referred to herein or attached hereto, the goods, services, and construction listed herein and on any attached sheets at the price(s) set out thereof.

24. *Ibid.* at paras. 20-22.

25. *CME* at paras. 44-47.

45. ESDC submitted that this statement was in the nature of a standard form used in procurement RFPs but was included in the present document inadvertently. ESDC submitted that the unintended statement was inconsistent with the actual terms of the RFP, since no goods or services are being acquired by ESDC in this matter.

46. The Tribunal is sympathetic to Strength Tek's submission that, despite ESDC's claim of a simple error, this statement could create a misapprehension in bidders that the proposed contract was to provide services to ESDC. Such ambiguity might give bidders the impression that the procurement was subject to the Tribunal's jurisdiction, as argued by Strength Tek, which greatly amplifies the Tribunal's concern in this regard.

47. Strength Tek also alleged that the procurement at issue constitutes a circumvention of the trade agreements. However, the Tribunal notes that internal communications, submitted by Strength Tek, suggest that certain ESDC personnel expected the process to be subject to the trade agreements.²⁶ In any event, the Tribunal is not persuaded that ESDC intentionally structured the process to avoid obligations under the trade agreements, especially while simultaneously assuming such obligations would apply.

48. At any rate, the fact remains that the Tribunal lacks jurisdiction in the present complaint. As such, it is strictly not necessary to determine the second jurisdictional issue, as raised by ESDC, that the services contemplated in the RFP are not covered by the trade agreements in and of themselves. The Tribunal does not wish this decision to be taken as giving any credence to ESDC's position on this issue. In fact, it is likely that fitness centre services are indeed covered by the trade agreements. The Tribunal would likely require much more complete and persuasive arguments on this issue than were provided by ESDC to conclude otherwise in any future proceedings.

49. The Tribunal reiterates that this finding of lack of jurisdiction is based on the Federal Court of Appeal's reasoning in *BCE Nexxia*. Strength Tek is, of course, within its rights to appeal this determination to that Court on the basis of challenging either the reasoning in *BCE Nexxia* or its application to the present case. Strength Tek may also have some independent recourse to the courts based on breach of contract or another cause of action.

Conclusion

50. Given the above, the Tribunal finds that it has no jurisdiction to inquire into Strength Tek's complaint. Therefore, the Tribunal grants the motion and dismisses Strength Tek's complaint for lack of jurisdiction.

COSTS

51. ESDC did not request its costs incurred in responding to this complaint. Given its comments above and the Tribunal's opinion that the process undertaken to conduct the RFP was misleading and had appearances of unfairness, each party will bear its own costs.

26. Exhibit PR-2017-054-01 at 73 of 226, Vol. 1.

DETERMINATION

52. Pursuant to section 10 of the *Regulations*, the Tribunal dismisses the complaint for lack of jurisdiction.

Peter Burn _____
Peter Burn
Presiding Member