



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-021

Finnie MFG Co. Ltd.

*Decision made
Friday, August 24, 2018*

*Decision issued
Monday, August 27, 2018*

*Reasons issued
Thursday, August 30, 2018*

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

FINNIE MFG CO. LTD.

AGAINST

THE NATIONAL RESEARCH COUNCIL 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.

Jean Bédard

Jean Bédard

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. This complaint by Finnie MFG Co. Ltd. (Finnie MFG) of Lacolle, Quebec, concerns a request for quotation (RFQ) (procurement identification No. 909499) by the National Research Council Canada (NRCC) issued on May 31, 2018, for the provision of engineering services to validate technical drawings for the fabrication of an extreme cold weather tent.³

3. Finnie MFG alleges that the NRCC erred in selecting another supplier, Tulmar Safety Systems Inc. (Tulmar), to validate the technical drawings because it was the same company that developed the prototype tent. According to Finnie MFG, an independent, third party should have been selected to validate the drawings, as they were sourced for use in a future solicitation process in which Tulmar will now have an unfair competitive advantage as a potential supplier. In particular, Finnie MFG alleges that Tulmar will have an inherent bias (or incentive) to validate the drawings in a non-transparent manner in order to give itself a competitive advantage over other bidders in the anticipated solicitation, which it believes will be valued over \$1 million.

4. In addition, Finnie MFG submits that it was unable to submit a quote in response to the RFQ within the tight deadline of June 15, 2018, (i.e. approximately two weeks) that was required by the NRCC. In its view, this was an unreasonable timeframe given the complexity of the technical drawings; at least six weeks should have been provided for an independent company to take a fresh look and validate the drawings.

5. Finnie MFG asks that a new RFQ be issued.

PROCEDURAL BACKGROUND

6. Finnie MFG made an objection, via telephone, to Mr. Conquer of the NRCC on August 8, 2018. According to the complaint, that objection was denied during the same phone call.

7. On August 8, 2018, Finnie MFG contacted the Office of the Procurement Ombudsman (OPO) concerning its complaint. The OPO replied that it could not consider the allegations raised in the complaint, since the anticipated solicitation in which the drawings will be used has not yet been issued and no resulting contract has been awarded. The OPO suggested that once the actual solicitation is issued, Finnie MFG should then raise any questions it may have with respect to the drawings with the contracting authority at

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

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

3. The RFQ included with the complaint is an e-mail from Mr. A. Conquer of the NRCC to Mr. C. Latincic of Finnie MFG dated May 31, 2018. The Tribunal notes that as of the time of making this decision there is no indication of any tender notice or notice of contract award published on Buyandsell.gc.ca in relation to this RFQ.

that stage.⁴ The OPO further indicated that Finnie MFG may want to contact the Tribunal in relation to the anticipated solicitation, which Finnie MFG indicated will be worth over \$1 million.⁵

8. On August 13, 2018, Finnie MFG filed a deficient complaint with the Tribunal. It filed additional information on August 15, 21 and 22, 2018, at which point the complaint was considered complete.⁶

ANALYSIS

9. On August 24, 2018, the Tribunal decided not to conduct an inquiry into the complaint.

10. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;⁷
- the complainant is an actual or potential supplier;⁸
- the complaint is in respect of a designated contract;⁹ and
- the information discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹⁰

11. If one or more of the above conditions are not satisfied, the Tribunal cannot conduct an inquiry into the complaint. In this case, the Tribunal has determined for the reasons below that the complaint does not relate to a designated contract.

12. For a contract to be considered a “designated contract” for the purposes of the *Canadian Free Trade Agreement*,¹¹ the services being procured must be valued at equal to or greater than \$101,100.¹² Contracts valued at less than this threshold amount are not subject to the disciplines of the *CFTA*. The monetary threshold is higher for other trade agreements to which the Government of Canada is a party, with the exception of the *Canada-Korea Free Trade Agreement*.¹³

4. See e-mail from Mr. P. Menard of the OPO to Mr. C. Latincic of Finnie MFG dated August 10, 2018, included in the additional documents filed with the Tribunal by Finnie MFG on August 15, 2018.

5. See e-mail from Mr. P. Menard of the OPO to Mr. C. Latincic of Finnie MFG dated August 9, 2018, included in the additional documents filed with the Tribunal by Finnie MFG on August 15, 2018.

6. Subsection 30.11(2) of the *CITT Act* requires that a complaint include, among other things, all information and documents relevant to the complaint that are in the complainant’s possession. After Finnie MFG filed additional information on August 22, 2018, the complaint was found to be compliant with subsection 30.11(2).

7. Subsection 6(1) of the *Regulations*.

8. Paragraph 7(1)(a) of the *Regulations*.

9. Paragraph 7(1)(b) of the *Regulations*.

10. Paragraph 7(1)(c) of the *Regulations*.

11. *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*].

12. <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html>. The Tribunal notes that under the *CFTA*, goods procured must be valued at equal to or greater than \$25,300.

13. *Canada-Korea Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 2015) [*CKFTA*]. Under the *CKFTA*, the monetary threshold for services is \$100,000.

13. Based on the information supplied with the complaint, the value of the contract award in relation to the RFQ was \$23,594.40.¹⁴ Accordingly, the procurement value is below the monetary thresholds for services under the relevant trade agreements.

14. Finnie MFG does not dispute the above amount of the contract award. Rather, it submits that the Tribunal should take into account the fact that the technical drawings in question are to be used in a future solicitation with an expected value of over \$1 million.

15. It is entirely possible that such a solicitation by the NRCC is forthcoming; however, in the absence of any evidence on the record to that effect, the Tribunal considers Finnie MFG's assertion to be speculative. At this stage, there is no indication that the contract award resulting from the RFQ is related to a higher value solicitation that would satisfy the monetary threshold under the trade agreements.

16. In light of the above, the Tribunal finds that the complaint is not in respect of a designated contract.

17. The Tribunal's finding does not, however, preclude Finnie MFG from filing a complaint in the future if and when a solicitation that uses the technical drawings in question is issued and Finnie MFG has concerns related to that solicitation process. In the event that Finnie MFG does file a new complaint, it must do so within the time limits specified in section 6 of the *Regulations*.

18. According to subsections 6(1) and (2) of the *Regulations*, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint, to either object to the government institution or 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.¹⁵ In other words, a complainant must file an objection or complaint as soon as it becomes aware of the issues at stake.

19. The *Regulations* include timelines for complaints to safeguard the integrity and fairness of the procurement process. They are intentionally designed to be expeditious and are strictly enforced. Accordingly, potential suppliers are expected to keep a constant vigil and to react, by an objection and/or complaint, as soon as they become aware of a potential flaw in a solicitation.¹⁶ Adopting a wait-and-see attitude is precisely what the process and the *Regulations* seek to discourage in the interests of fairness to all potential suppliers.¹⁷

20. For example, Finnie MFG's complaint alleged that the two-week deadline to respond to the RFQ issued on May 31, 2018, was unreasonably short. Yet, it did not raise this concern with the NRCC until

14. See notice of contract award to Tulmar dated June 20, 2018, included with the complaint.

15. Subsection 6(1) of the *Regulations* provides as follows: "Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so 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) provides as follows: "A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that 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."

16. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

17. *Ibid.* at para. 28; *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10.

August 8, 2018. Had the RFQ met the monetary threshold in order for the Tribunal to consider the merits of the complaint, it would have determined this particular allegation to be filed outside the prescribed time limits (i.e. more than two months after Finnie MFG received notice of the June 15 deadline for quotes).

DECISION

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

Jean Bédard

Jean Bédard

Presiding Member