



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2013-023

M. Ball

*Decision made  
Friday, November 29, 2013*

*Decision issued  
Friday, November 29, 2013*

*Reasons issued  
Monday, December 16, 2013*

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**

**M. BALL**

**AGAINST**

**THE DEPARTMENT OF TRANSPORT**

**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

Dominique Laporte  
Dominique Laporte  
Secretary

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.

### SUMMARY OF THE COMPLAINT

2. The complaint relates to a procurement (Solicitation No. T2065-130022) by the Department of Transport (Transport Canada) for the provision of cleaning and snow clearing services for St. Anthony Airport in Newfoundland and Labrador.

3. The complainant, Ms. M. Ball, alleged that Transport Canada awarded the contract to a bidder whose bid was too low to be compliant with the requirement, in the tender documentation, to pay employees at least the minimum wage in Newfoundland and Labrador and to provide the equipment, materials and supplies set out in the tender documentation.

### BACKGROUND INFORMATION

4. On October 3, 2013, Transport Canada issued a solicitation for the provision of cleaning and snow clearing services. The tender closed on November 14, 2013.

5. On November 15, 2013, Transport Canada advised Ms. Ball that the winning bidder was G & M Enterprises Limited. On November 18, 2013, Ms. Ball e-mailed an objection to Transport Canada contesting the compliance of the winning bidder with the tender requirements. On November 22, 2013, Transport Canada replied, advising Ms. Ball that the contract had not yet been awarded and that her “. . . avenue for dispute resolution on the award of a contract [was] through the Canadian International Trade Tribunal and not internally through Transport Canada.”

6. On November 24, 2013, Ms. Ball filed the complaint with the Tribunal.

### TRIBUNAL ANALYSIS

7. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before being able to conduct an inquiry: (i) whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*; (ii) whether the complainant is an actual or potential supplier; (iii) whether the complaint is in respect of a designated contract; and (iv) whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five

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

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

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*].

of the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> Chapter Kb1s of the *Canada-Chile Free Trade Agreement*,<sup>6</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,<sup>7</sup> Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>8</sup> or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*<sup>9</sup> applies.

8. In the Tribunal's view, the first three conditions have been met: the complaint has been filed within the prescribed time limits; the complainant is an actual bidder; and the complaint is in respect of a contract covered by each of the trade agreements listed in section 7 of the *Regulations*.<sup>10</sup> The analysis will therefore focus on the last condition, namely, whether the complaint discloses a reasonable indication of a breach of an applicable trade agreement.

## ANALYSIS

9. Ms. Ball alleged that Transport Canada breached an applicable trade agreement by accepting an offer in which the total contract value was insufficient to meet the minimum wage requirements set out in the tender documentation and to cover the associated cost requirements for equipment, materials and supplies.

10. The Tribunal has determined that the procurement that is the subject of this complaint is covered by the applicable trade agreements, including *NAFTA*, the *AIT* and the *AGP*. These agreements require a procuring entity to award a contract in accordance with the essential requirements of the tender documentation.<sup>11</sup>

11. For example, Article 1015(4)(d) of *NAFTA* provides as follows:

4. An entity shall award contracts in accordance with the following:

...

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4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*].
  5. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*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 Kb1s, 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. Annex 502.1B of the *AIT*, Annex 1001.1b-2 of *NAFTA*, Annex Kb1s-01.1-4 of the *CCFTA*, Annex 1401.1-4 of the *CPFTA*, Annex 1401-4 of the *CCOFTA*, Annex 5 of Chapter 16 of the *CPAFTA*, which all use the Common Classification System for classifying services, do not exclude Class K100A, "Cleaning and Maintenance, Janitorial". In addition, Annex 4 to Canada's Appendix 1 to the *AGP* includes CPC Class 874, "Building-cleaning services". In addition, Transport Canada is a successor to the Department of Transportation, and the Tribunal is satisfied that the value of the contract exceeds the thresholds set out in the above-mentioned trade agreements. Therefore, the procurement is covered by each of these trade agreements.
  11. See Article 1015(4)(d) of *NAFTA*, Article XIII(4)(c) of the *AGP*, Article 506(6) of the *AIT*, Article Kb1s-10 of the *CCFTA*, Article 1410:4 of the *CPFTA*, Article 1410:4 of the *CCOFTA* and Article 16.11:4 of the *CPAFTA*.

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; . . .

12. In this case, the tender documentation did not clearly indicate the requirements that a bid had to meet in order to be considered for an award. However, in the Notice of Proposed Procurement (NPP), Transport Canada stated that its “competitive procurement strategy” would be the “[l]owest/[l]ower [b]id meeting all the mandatory requirements.” Further, with regard to the “nature of requirements”, the NPP stated that “[t]he Contractor is to supply all labour, materials, equipment and supervision necessary to perform Cleaning and Snow Clearing duties at the St. Anthony Airport, St. Anthony, Newfoundland and Labrador, as specified in the Terms of Reference provided.” The Terms of Reference contained the following two requirements relevant to the alleged misconduct of the contracting authority: “The contractor shall comply with all provincial and federal legislation affecting conditions of work and wage rates”;<sup>12</sup> and “All persons in the employ of the contractor . . . shall during the continuance of the work: . . . be paid no less than the minimum hourly rate of pay established by the Labour Program of the Department of Human Resources Development in the Fair Wage Schedules which form a part of this contract as Appendix A to these Labour Conditions”.<sup>13</sup>

13. On the basis of the above, the Tribunal concludes that the domestic employment and labour statutory obligations highlighted above are “essential requirements” specified in the tender documentation.

14. In her complaint, Ms. Ball asserted that the contract required the bidder to provide a total of 152 hours per week of services (i.e. 76 hours per week each by a cleaner and a supervisor). She also asserted that the minimum wage in Newfoundland and Labrador is \$10 per hour. On the basis of these assertions, she calculated that the amount bid per year by the winning bidder was less than the total cost of the wages to be provided to the cleaner and the supervisor. In addition, she asserted that the amount bid would be insufficient to provide the required equipment, materials and supplies for cleaning and snow clearing or to cover contractor overhead and profit.

15. The initial question before the Tribunal is whether Ms. Ball’s complaint discloses a reasonable indication that Transport Canada did not award the contract on the basis of the essential criteria in the tender documentation. In order to show a reasonable indication of a breach, it is incumbent on the complainant to establish a *prima facie* case by submitting “some proof” or “sufficient facts or arguments” demonstrating a possible breach of an applicable trade agreement.<sup>14</sup>

16. In her complaint, Ms. Ball did not support her assertions with any evidence indicating that the winning bidder would not pay its cleaner and supervisor at least the minimum wage in Newfoundland and Labrador. Rather, she supported her assertions with mere speculative arithmetical calculations. Furthermore, in the Tribunal’s view, she based her calculations on an assumption regarding the number of hours of services required to be provided by the winning bidder that is unsupported by the tender documentation. For example, nowhere in the tender documentation did it require both the cleaner and the supervisor to be working 76 hours per week at the same time.

17. Moreover, in previous cases, the Tribunal has determined that “. . . nothing precludes a bidder from bidding aggressively, and even at a loss, in hopes of winning a contract.”<sup>15</sup> Therefore, the mere fact of a low

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12. NPP, Appendix B at para. 13.

13. NPP, Appendix F at para. 2.

14. *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6. The Tribunal similarly stated the need for supportive proof in *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT).

15. *1091847 Ontario Ltd.* (12 March 2013), PR-2012-046 (CITT) at para. 29.

bid amount is insufficient to provide a reasonable indication that Transport Canada did not award the contract consistently with the essential requirements of the tender documentation.

## **DECISION**

18. 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