



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2013-018

Tiree Facility Solutions Inc.

v.

Defence Construction Canada

*Order and reasons issued
Tuesday, November 19, 2013*

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IN THE MATTER OF a complaint filed by Tiree Facility Solutions Inc. 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 to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

TIREE FACILITY SOLUTIONS INC.

Complainant

AND

DEFENCE CONSTRUCTION CANADA

**Government
Institution**

ORDER

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

COMPLAINT

1. On October 10, 2013, Tiree Facility Solutions Inc. (Tiree) 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 procurement (Solicitation No. NCR1007) by Defence Construction Canada (DCC) for the provision of professional services specific to the Canadian Forces Housing Agency project, located in Edmonton, Cold Lake and Wainwright, Alberta.
2. Tiree alleged that DCC evaluated its proposal on the basis of evaluation criteria that were not published or part of the Request for Abbreviated Proposals (RFAP) and that DCC improperly determined, on the basis of these unpublished criteria, that Tiree's proposal should receive a lower score on one of the mandatory technical requirements in the solicitation.
3. As a remedy, Tiree requested that it be compensated for its lost profit, as well as for its complaint costs. Tiree also requested that DCC change the evaluation criteria in the RFAP to include and describe the project evaluation criteria and scoring.
4. On October 18, 2013, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
5. On October 28, 2013, DCC requested that the Tribunal dismiss the complaint for lack of jurisdiction. On November 4, 2013, Tiree filed comments on DCC's submission. On November 13, 2013, DCC informed the Tribunal it had no intention of replying to Tiree's comments.

PROCUREMENT PROCESS

6. On August 14, 2013, DCC published the RFAP for the provision of professional services specific to the Canadian Forces Housing Agency project, located in Edmonton, Cold Lake and Wainwright. The bid closing date was September 5, 2013.
7. On September 19, 2013, DCC returned Tiree's "Offer of Services" envelope because Tiree's proposal did not receive a technical score within 10 points of the highest-ranked technical score in accordance with item 3.3.1 of the RFAP.
8. On September 19, 2013, Tiree wrote to DCC to express its disagreement over its technical score and requested a re-evaluation. Later that day, DCC provided Tiree with its technical debrief.
9. On October 1, 2013, DCC informed Tiree that, after reviewing the file, no changes would be made to its decision about the evaluation, debriefing, scoring and the comments that it provided to Tiree.
10. On October 10, 2013, Tiree filed its complaint with the Tribunal.
11. On October 10, 2013, the Tribunal requested additional documents because the complaint was deemed deficient, as it did not comply with the requirements of subsection 30.11(2) of the *CITT Act*.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

12. On October 11, 2013, Tiree filed additional documents in accordance with subrule 96(1) of the *Canadian International Trade Tribunal Rules*;³ the complaint was therefore considered to have been filed on October 11, 2013.

TRIBUNAL'S ANALYSIS

Jurisdictional Issue

13. On October 28, 2013, DCC raised the Tribunal's jurisdiction as a preliminary issue. It submitted that, pursuant to paragraph 7(1)(c) of the *Regulations*, the Tribunal may only initiate inquiries where a complaint 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*,⁴ Chapter Five of the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁸ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁹ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹⁰ applies. According to DCC, in this case, it is Chapter Five of the *AIT* that applies.

14. DCC submitted that, in its procurement complaint form, Tiree stated that the procurement at issue was for "Consultant Services – Market and Industry Analysis" valued at \$85,000. According to DCC, since the procurement was for services valued at less than \$100,000, the procurement does not meet the minimum monetary threshold in Chapter Five of the *AIT*, and the Tribunal therefore lacks jurisdiction to conduct an inquiry into the complaint. In addition, DCC submitted that the value of the procurement is too low to invoke any of the other trade agreements, to the extent that they can be said to apply. Therefore, DCC requested that the complaint be dismissed pursuant to paragraph 10(a) of the *Regulations*.

15. In its comments on DCC's submission on the Tribunal's jurisdiction, Tiree submitted that the true dollar value of the procurement at issue is much higher than the identified \$85,000, because DCC used the same flawed technical evaluation process in a second procurement (Solicitation No. NCR1005), the value of which is estimated to be \$850,000. Tiree also indicated that its proposal in respect of this second procurement was required to be submitted before the results of the first procurement became known; therefore, it had no basis or opportunity to adjust its bidding approach. Accordingly, it argues that its true losses far exceeded \$85,000.

3. S.O.R./91-499.

4. *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].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

7. *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 Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

8. *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].

9. *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].

10. *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].

16. In addition, Tiree submitted that the value difference of \$15,000 (between \$85,000 and \$100,000) is immaterial and insufficient to justify the dismissal of the complaint, particularly considering the additional costs that Tiree has incurred in preparing its proposal and challenging the result. For these reasons, Tiree respectfully requested that the Tribunal continue its inquiry into this matter and not dismiss the complaint on the grounds raised by DCC.

17. Subsection 30.11(1) of the *CITT Act* provides that “. . . a potential supplier may file a complaint with 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.”

18. In addition, subsection 7(1) of the *Regulations* sets out three conditions which must be met for the Tribunal to decide to conduct an inquiry in respect of a complaint. One of the conditions is that the complaint be in respect of a designated contract.

19. Section 30.1 of the *CITT Act* defines a “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”.

20. Subsection 3(1) of the *Regulations* provides that “. . . any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the [AIT], in Article I of the [AGP], in Article *Kbis*-01 of Chapter *Kbis* of the [CCFTA], in Article 1401 of Chapter Fourteen of the [CPFTA], in Article 1401 of Chapter Fourteen of the [CCOFTA] or in Article 16.02 of Chapter Sixteen of the [CPAFTA] that has been or is proposed to be awarded by a government institution, is a designated contract.”

21. A contract concerning the procurement of services by a government enterprises,¹¹ in order to be considered a “designated contract” must have a value equal to or greater than \$100,000 (the *AIT*), \$392,700 (*NAFTA*, the *CCFTA*, the *CPFTA*, *CCOFTA* and the *CPAFTA*) and \$560,300 (the *AGP*).

22. Section 5 of the *Regulations* provides that the value of a contract is deemed to be the value established by the government institution when the NPP was published or when the solicitation documentation was made available to potential suppliers.¹² The trade agreements similarly provide that the value of a contract is the value estimated by the government institution at the time of publication of an NPP or at the outset of the procurement process.¹³

23. Although there is some jurisprudence indicating that the Tribunal may conduct an inquiry into a complaint when it appears that the value of the procurement is lower than the thresholds of the relevant trade agreements, the Tribunal could only do so if it were in possession of evidence clearly indicating that the valuation method selected by the government institution was intended to avoid the obligations of the

11. For lists of the covered government enterprises, see the following: *NAFTA*, Annex 1001.1a-2; *AIT*, Annex 502.1A; *CCFTA*, Annex K bis-01.1-2; *CPFTA*, Annex 1401.1-2; *CCOFTA*, Annex 1401-2; *CPAFTA*, Chapter 16, Annex 2; and *AGP*, Annex 3.

12. The Tribunal notes that relying on the estimated value of a contract at the time of publication of an NPP makes inherent sense, given that, as a practical matter, the final awarded contract value is not available to a government institution until the procurement process is completed and that a government institution, as well as potential bidders, must know at the outset of the process whether or not any of the trade agreements will apply.

13. See Article 1002(2) of *NAFTA*, Article 505(1) of the *AIT* and footnote 2 to Article II(1) of the *AGP*. Article *Kbis*-01(5) of the *CCFTA*, Article 1401(5) of the *CPFTA* and Article 1401(5) of the *CCOFTA* imply that the estimate is to be made at the outset of the procurement process.

agreements.¹⁴ The Tribunal is of the view that no such evidence has been presented in this case. Accordingly, the Tribunal is satisfied that the estimated value of \$85,000 for the contract at issue was not unreasonable.

24. Having reviewed all of the information on the record, the Tribunal is satisfied that the procurement at issue does not meet the minimum monetary threshold required by the *AIT* or the other agreements. The evidence on file indicates that DCC is a crown corporation. Since the monetary threshold for a crown corporation is higher than the monetary threshold for federal government entities and the estimated value of the contract is below the monetary thresholds set by *NAFTA*, the *AIT*, the *AGP*, the *CCFTA*, the *CPFTA*, the *CPAFTA* and the *CCOFTA*, the Tribunal finds that none of these agreements apply and that the complaint therefore does not relate to a “designated contract”. Accordingly, the Tribunal is without jurisdiction to conduct an inquiry into the complaint. Under these circumstances, the complaint cannot be said to have a valid basis and must therefore be dismissed pursuant to paragraph 10(a) of the *Regulations*.

Costs

25. Section 30.16 of the *CITT Act* allows the Tribunal to award costs to complainants or government institutions. In determining whether costs should be awarded in this case, the Tribunal considers that, while Tiree’s complaint is dismissed, the arguments that it raised were not without merit. Moreover, the Tribunal has taken into consideration the early stage at which this matter was resolved. Accordingly, the circumstances of this case do not warrant an award of costs to either party.

ORDER OF THE TRIBUNAL

26. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

14. *Sunny Jaura d.b.a. Jaura Enterprises v. Department of Public Works and Government Services* (5 September 2012), PR-2012-007 (CITT) at para. 22.