



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-041

Miwayawin Health Care
Solutions Ltd.

*Decision made
Thursday, November 22, 2018*

*Decision issued
Friday, November 23, 2018*

*Reasons issued
Friday, November 30, 2018*

*Corrigendum issued
2019*

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

MIWAYAWIN HEALTH CARE SOLUTIONS 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.

Georges Bujold

Georges Bujold
Presiding Member

The statement of reasons will be issued at a later date.

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.).

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AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

CORRIGENDUM

The reference to Article 503(13) of the CFTA in paragraph 16 should have read Article 504(13).

By order of the Tribunal

Georges Bujold

Georges Bujold
Presiding Member

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 relates to a Request for Proposals (RFP) (Solicitation No. HT434-173724/A) by the Department of Public Works and Government Services (PWGSC) on behalf of Indigenous Services Canada, First Nations and Inuit Health Branch for the provision of paramedical services to First Nations peoples and communities in isolated and semi-isolated locations in Northern Alberta on an “as and when requested” basis.

[3] This solicitation was issued on March 29, 2018, and closed on May 7, 2018. Miwayawin Health Care Solutions Ltd. (Miwayawin) submitted a bid for this RFP and was informed on September 14, 2018, that it was not the successful bidder. Miwayawin formulated an objection to this decision but received denial of relief from PWGSC on November 2, 2018. On November 16, 2018, Miwayawin filed its complaint with the Tribunal.

[4] Miwayawin’s complaint can be summarized in three allegations:

- The evaluation of the bid was not conducted properly, in that information in Miwayawin’s bid was either overlooked or not considered, that the evaluation team was inconsistent and incomplete and that there was possible prejudice on the part of one of the evaluators.
- The feedback received was insufficient in that appropriate level of detail on scoring was not provided to it and that PWGSC did not provide sufficient information in reply to Miwayawin’s request to reassess the bid award to justify the decision to not re-evaluate the proposals.
- A non-Aboriginal company was improperly approached to submit a proposal when the RFP contained a set-aside for aboriginal businesses.

ANALYSIS

[5] On November 22, 2018, the Tribunal decided not to conduct an inquiry into the complaint, pursuant to subsection 30.13(1) of the *CITT Act*.

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

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

- the complaint has been filed within the time limits prescribed by section 6;³
- the complainant is a potential supplier;⁴
- the complaint is in respect of a designated contract;⁵ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁶

[7] In this case, the Tribunal has determined that the complaint is not in respect of a designated contract and therefore does not meet the third condition of inquiry.

[8] Section 30.1 of the *CITT Act* defines the term “designated contract” as follows:

designated contract means 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.

[9] Subsection 3(1) of the *Regulations* reads as follows:

For the purposes of the definition *designated contract* in section 30.1 of the Act, 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 II of the Agreement on Government Procurement, 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, in Article 16.02 of Chapter Sixteen of the CPAFTA, in Article 17.2 of Chapter Seventeen of the CHFTA, in Article 14.3 of Chapter Fourteen of the CKFTA, in Article 19.2 of Chapter Nineteen of CETA, in Article 504 of Chapter Five of the CFTA or in Article 10.2 of Chapter Ten of CUFTA, that has been or is proposed to be awarded by a government institution, is a designated contract.

[10] In this regard, the Tribunal finds that this complaint is not in respect of a contract subject to any of the trade agreements for the following reasons.

Aboriginal Set-asides

[11] Article 800 of the *Canadian Free Trade Agreement* (CFTA) reads as follows:

This Agreement does not apply to any measure adopted or maintained by a Party with respect to Aboriginal peoples.

[12] Similar language with respect to Aboriginal peoples and/or small and minority businesses is found in paragraph 1(d) of Annex 1001.2b to NAFTA, paragraph 1(d) of the General Notes for Canada to the AGP, paragraph 1(d) of Chapter *Kbis*-01.1-6 to the CCFTA, paragraph 1(d) of Annex

3. Subsection 6(1) of the *Regulations*.
4. Paragraph 7(1)(a) of the *Regulations*.
5. Paragraph 7(1)(b) of the *Regulations*.
6. Paragraph 7(1)(c) of the *Regulations*.

1401.1.-6 to the CPFTA and paragraph 1(d) of Annex 1401-06 to the CCOFTA, paragraph 1(d) of Annex 7 to the CPAFTA, paragraph 1(d) of Annex 17.6 to the CHFTA, section 14.3 of Chapter 14 of the CKFTA, paragraph 1(d) of Annex 19-7 of the General Notes for Canada to CETA and Article 10.3 of Chapter 10 of the CUFTA, excluding these procurements from their scope of coverage.

[13] The solicitation documents⁷ make it clear that “[t]his procurement is set aside under the federal government Procurement Strategy for Aboriginal Business” and that it “is set aside from the international trade agreements under the provision each has for measures with respect to Aboriginal peoples or for set-asides for small and minority businesses.”

[14] As the Tribunal has ruled in the past,⁸ a procurement made in the context of a set-aside program for aboriginal businesses constitutes a procurement for small and minority businesses. The Tribunal has also previously determined that a procurement set aside for aboriginal businesses is clearly part of measures adopted or maintained with respect to Aboriginal peoples.⁹

[15] Pursuant to Article 800 of the CFTA, the Tribunal finds that there is no provision of that trade agreement, including the provisions of Chapter Five on government procurement, that applies when such a set-aside is invoked. Therefore, the Tribunal finds that the procurement at issue is not subject to the CFTA.

[16] In addition, the Tribunal examined the potential relevance of Article 503(13) of the CFTA, which provides that Chapter Five governing government procurement does not apply to procurement that is part of a small business set-aside program *provided that the program is fair, open, transparent, and does not discriminate on the basis of origin or location within Canada of goods, services or supplies*. To the extent that this provision sets out a caveat to the application of Article 800 to measures in respect of government procurement, in this case, there is no information in the complaint or solicitation documents that would indicate that the Set-Aside Program for Aboriginal Business¹⁰ under which this procurement process was made contravenes this provision. To the contrary, the tendering procedure was opened to all interested suppliers. This further confirms that Chapter Five of the CFTA does not apply in this case.

[17] As for other potentially applicable trade agreements, they all exclude “set-asides for small and minority businesses” from their scopes of coverage. As such, by virtue of paragraph 1(d) of Annex 1001.2b to NAFTA, paragraph 1(d) of the General Notes for Canada to the AGP, paragraph 1(d) of Chapter Kbis-01.1-6 to the CCFTA, paragraph 1(d) of Annex 1401.1.-6 to the CPFTA and paragraph 1(d) of Annex 1401-06 to the CCOFTA, paragraph 1(d) of Annex 7 to the CPAFTA, paragraph 1(d) of Annex 17.6 to the CHFTA, section 14.3 of Chapter 14 of the CKFTA, paragraph 1(d) of Annex 19-7 of the General Notes for Canada to CETA and Article 10.3 of Chapter 10 of the CUFTA, the Tribunal finds that the procurement is not covered by any of the other relevant trade agreements.

7. RFP, solicitation No. HT434-173724, section 1.2.

8. *LeClair INFOCOM Inc.* (26 January 2010), PR-2009-076 (CITT).

9. *Tritech Group Ltd.* (31 January 2014), PR-2013-036 (CITT). While this decision concerned the application of Article 1802 of the *Agreement on Internal Trade*, the Tribunal notes that this provision, which is no longer in force, and Article 800 of the CFTA are virtually identical provisions.

10. Supply Manual, Annex 9.4, Version 2018-1 (2018-06-21), PWGSC.

[18] Given that none of the trade agreements applies to the procurement at issue, the Tribunal finds that the procurement process at issue does not relate to a “designated contract” as is required by subsection 30.11(1) of the *CITT Act*. Accordingly, the Tribunal does not have jurisdiction to inquire into this complaint.

Health Services

[19] As previously mentioned, this procurement was for paramedical services, which are included in the broad class of health services. Section 2 of the RFP outlines the required tasks, which includes client encounters, the management of emergency rooms, management of medication and “other medical-related tasks” as well as the details of the deliverables, including the provision of paramedical services. Annex A of the RFP also outlines that “[a] national shortage of registered nurses in Canada and the aging workforce has led to significant challenges to maintain access to primary care services for First Nations living in isolated communities.”

[20] The tender notice provides the Goods and Services Identification Number (GSIN) for the services at issue, that is, G009E: Medical/Dental Clinic Services. As such, the services at issue are part of the GSIN Class description for Health Services and the broader GSIN Group description for Health and Social Services. For these reasons, there is no doubt that they are properly classified as “health services”, even in the absence of an explicit definition of health services in the CFTA or the other trade agreements.

[21] Health services are not covered under any of the potentially applicable trade agreements.

[22] For example, Annex 1001.1b-2 of NAFTA makes it clear that all services included in GSIN Group G (Health and Social Services) are excluded from Canada’s list of covered services.

[23] The CFTA, at section 504(11)(h)(ii), reads as follows:

11. This Chapter does not apply to:

(h) procurement of:

(ii) health services or social services;

[24] Such services are similarly excluded from all other applicable trade agreements.¹¹ The Tribunal has found, in the past, in similar circumstances,¹² that it did not have jurisdiction to conduct inquiries in matters related to health services. Of note, in *Workplace Medical Corp.*,¹³ the Tribunal stated as follows:

11. Article 1001 of NAFTA; Article II of the AGP, schedule of Canada, section G.; Article *Kbis*-01 of Chapter *Kbis* of the CCFTA; Article 1401 of Chapter Fourteen of the CPFTA, Part 1(g); Article 1401 of Chapter Fourteen of the CCOFTA, Annex 1401-4, section B, Part 1(g); Article 16.02 of Chapter Sixteen of the CPAFTA; Article 17.2 of Chapter Seventeen of the CHFTA; Article 14.3 of Chapter Fourteen of the CKFTA; Article 19.2 of Chapter Nineteen of CETA, Annex 19-5; Article 10.2 of Chapter Ten of CUFTA, Annex 10-4.

12. *Workplace Medical Corp.* (17 July 2015), PR-2015-014 and PR-2015-016 (CITT); *A. Salari* (26 April 2011), PR-2011-001 (CITT); *D. Chaaban* (2 May 2011), PR-2001-004 (CITT).

13. *Workplace Medical Corp.* at para. 6.

Each of the trade agreements include either positive or negative lists of services that are covered (or not covered). In each of those lists, health-related services are identified as not covered under the trade agreements.

[25] Thus, the contract that was awarded as a result of the procurement at issue is for services that are not subject to any of the trade agreements. This provides additional support for the Tribunal's conclusion that the complaint is not in respect of a designated contract. As such, even if the procurement process at issue had not been set aside under the federal government Procurement Strategy for Aboriginal Business or there was information casting doubt on the legitimacy of the Aboriginal set-aside in this case,¹⁴ the Tribunal would remain without jurisdiction to conduct an inquiry into the complaint.

DECISION

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

Georges Bujold

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Presiding Member

14. There is no such information and the complainant appears to have acknowledged that the procurement was validly set aside. Indeed, as previously mentioned, one of the complainant's allegations rests on the premise that the RFP is a set-aside for aboriginal businesses. Accordingly, the Aboriginal set-aside provides, in itself, a sufficient basis for the Tribunal to conclude that it does not have jurisdiction to inquire into this complaint.