



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-033

Steeple Incorporated

*Decision made
Tuesday, September 17, 2019*

*Decision issued
Thursday, September 19, 2019*

*Reasons issued
Tuesday, October 1, 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

STEEPLE INCORPORATED

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.

Peter Burn
Peter Burn
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 is a complaint filed by Steeple Industries (Steeple) regarding a Request for Proposal (Solicitation No. W8476-196066/A) (the RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of hardware brackets.

3. The RFP was published on June 6, 2019, and, after several amendments, closed on August 15, 2019. The RFP provides that the procurement is set aside under the federal government Procurement Strategy for Aboriginal Business and is therefore excluded from the applicable international trade agreements under the provisions in each for measures with respect to Aboriginal people or for small and minority businesses (the “set-aside”). The RFP also provides that the *Canadian Free Trade Agreement*³ does not apply to the procurement.

4. On July 20, 2019, Steeple objected to the set-aside. On July 30, 2019, Steeple contacted PWGSC to again object to the set-aside, arguing that the fourth amendment to the RFP, which clarified that certified Aboriginal businesses may choose to use a non-Aboriginal reseller, defeated the policy purposes of the set-aside program. Steeple requested that the RFP be cancelled and retendered in an open competition. On August 6, 2019, PWGSC responded to state that PWGSC recognized reselling as a legitimate business opportunity. On August 13, 2019, Steeple reiterated its objection to PWGSC.

5. By an undated email, PWGSC informed Steeple that its objection had been escalated to PWGSC’s Special Investigations and Internal Disclosure Unit (SIID). On August 23, 2019, Steeple responded to request that no contract be awarded until SIID’s investigation was complete and Steeple had reviewed the findings. Steeple also indicated that it had been advised by an analyst at the Canadian Human Rights Commission that the procurement was discriminatory to non-Aboriginal businesses.

6. On September 16, 2019, Steeple filed the present complaint with the Tribunal. Steeple claimed that the set-aside is discriminatory to non-Aboriginal businesses.

ANALYSIS

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

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 2. SOR/93-602 [*Regulations*].
 3. Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wpcontent/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

- the complaint has been filed within the time limits prescribed by section 6;⁴
- the complainant is a potential supplier;⁵
- the complaint is in respect of a designated contract;⁶ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁷

8. A “designated contract”, as set out in the third condition of inquiry, is defined in section 30.1 of the *CITT Act* 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* provides 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 or in Article 15.2 of Chapter Fifteen of the TPP, that has been or is proposed to be awarded by a government institution, is a designated contract.⁸

10. The Tribunal finds that this complaint is not in respect of a “designated contract” subject to any of the trade agreements, for the following reasons.

Aboriginal set-asides

11. The Tribunal has established that procurements set aside for Aboriginal business are not subject to the applicable trade agreements.⁹

12. The *CFTA* and the *Canada-European Union Comprehensive Economic Trade Agreement* each provide that the agreement does not apply to “any measure adopted or maintained with respect to Aboriginal peoples”.¹⁰ In this regard, the Tribunal has previously determined that a procurement made in the context of a set-aside program is part of measures adopted or maintained with respect to Aboriginal peoples.¹¹

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

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

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

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

8. The Tribunal notes that the TPP, i.e. the *Trans-Pacific Partnership*, is not currently in force.

9. See *Miwayawin Health Care Solutions Ltd.* (22 November 2018), PR-2018-041 (CITT) [*Miwayawin*].

10. Paragraph 2(a) of Annex 19-7 of the General Notes for Canada to *CETA*. See also Article 800 of the *CFTA*, which provides that the agreement “does not apply to any measure adopted or maintained by a Party with respect to Aboriginal peoples”.

11. *Miwayawin* at para. 14, citing *Tritech Group Ltd.* (31 January 2014), PR-2013-036 (CITT) [*Tritech*]. While *Tritech* concerned the application of Article 1802 of the *Agreement on Internal Trade*, the Tribunal noted that this provision, which is no longer in force, and Article 800 of the *CFTA*, are virtually identical provisions.

13. The remaining international trade agreements each provide that the agreement does not apply to procurements in respect of set-asides for small and minority businesses.¹² In this regard, the Tribunal has established that a procurement made in the context of a set-aside program constitutes a procurement for small and minority businesses.¹³

14. In the Tribunal's view, the terms of the RFP clearly provide that this procurement is set aside for Aboriginal business. Clause 1.3 of the RFP provides as follows:

This procurement is set aside under the federal government Procurement Strategy for Aboriginal Business. . . .

This procurement is set aside from the international trade agreements under the provision each has for measures with respect to Aboriginal people or for set-asides for small and minority businesses.

Further to Article 800 of the Canadian Free Trade Agreement (CFTA), CFTA does not apply to this procurement.

15. Accordingly, the Tribunal finds that the procurement at issue is not subject to any applicable trade agreement, pursuant to the respective provisions regarding set-asides for small and minority businesses, and for measures adopted or maintained with respect to Aboriginal peoples.

16. As no applicable trade agreement applies to the procurement at issue, the Tribunal finds that the procurement does not relate to a "designated contract" as required by subsection 30.11(1) of the *CITT Act*. As such, the Tribunal does not have jurisdiction to inquire into this complaint.

DECISION

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

Peter Burn
Peter Burn
Presiding Member

12. See paragraph 1(d) of Annex 1001.2(b) to the *North American Free Trade Agreement*; paragraph 1(d) of Annex 1401-06 to the *Canada-Colombia Free Trade Agreement*; paragraph 1(d) of Annex Kbis-01.1-6 to the *Canada-Chile Free Trade Agreement*; paragraph 1(d) of Annex 17.6 to the *Canada-Honduras Free Trade Agreement*; paragraph 1(d) of Annex 7 to the *Canada-Panama Free Trade Agreement*; and paragraph 1(d) of Annex 1401.1-6 to the *Canada-Peru Free Trade Agreement*. See also paragraph 2 of Annex 7 of the General Notes for Canada to the *Agreement on Government Procurement*, which provides that this agreement does not apply to set-asides for small and minority-owned businesses, and paragraph 3, which provides that this agreement does not apply to measures adopted or maintained with respect to Aboriginal peoples. These provisions are incorporated by reference into the *Canada-Korea Free Trade Agreement* (see section 14.3 of Chapter 14) and into the *Canada-Ukraine Free Trade Agreement* (see article 10.3 of Chapter 10).

13. See *Miwayain* at para. 14, citing *LeClair INFOCOM Inc.* (26 January 2010), PR-2009-076 (CITT). See also *Avaya Canada Corp.* (26 October 2011), PR-2011-040 (CITT) at para. 14.