



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-049

Heddle Marine Service Inc.

*Decision made
Friday, October 9, 2020*

*Decision and reasons issued
Wednesday, October 14, 2020*

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

HEDDLE MARINE SERVICE INC.

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.

Randolph W. Heggart

Randolph W. Heggart

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 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.

OVERVIEW

[2] This complaint concerns an Invitation to Tender (ITT) by the Department of Fisheries and Oceans for the annual dry-docking of a Canadian Coast Guard ship, the *Molly Kool* (Solicitation No. F6855-200842).

[3] Heddle Marine Service Inc. (Heddle Marine) alleged that the solicitation was improperly cancelled, and may have been cancelled in order to award the work to Chantier Davie Canada Inc. (Davie) under a pre-existing contract.

[4] The complaint is not accepted for inquiry as the information provided by the complainant fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

SUMMARY OF FACTS

[5] On August 25, 2020, PWGSC published the ITT. On the very next day PWGSC issued an amendment that canceled the ITT in its entirety. These notices were published on the publicly accessible website buyandsell.gc.ca.³ There is no indication that the notices were concealed in any manner.

[6] On October 1, 2020, Heddle Marine submitted its initial complaint documents to the Tribunal. In summary, its complaint read as follows: “No justification for cancellation of ITT. Indications that contract will not be properly publicly tendered for competitive bidding process.”⁴

[7] In its complaint, Heddle Marine also provided a “Detailed Statement of Facts and Argument”, that listed the grounds of complaint in detail as follows:⁵

(a) PWGSC has breached its duty, under statute and common law, to conduct a fair competition and solicitation by:

(i) In contravention of Article 502 of the CFTA, *failing to provide open, transparent, and non-discriminatory access to the ITT*;

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

² SOR/93-602 [*Regulations*].

³ See Solicitation No. F6855-200842 at <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-OLZ-008-7472>.

⁴ Exhibit PR-2020-049-01, Vol. 1 at 7.

⁵ Exhibit PR-2020-049-01, Vol. 1 at 12-13.

(ii) In contravention of Article 503 of the CFTA, *cancelling a procurement*, in a manner that circumvents provisions of the CFTA, including by:

- A. limiting participation in a procurement only to suppliers that have previously been awarded one or more contracts by a procuring entity;
- B. providing information to one supplier in order to give that supplier an advantage over other suppliers;
- C. adopting or applying any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers of any other Party in its procurement.

(iii) In contravention of Article 510 of the CFTA, *failing to make available to all suppliers* any new information or clarification of the original information set out in the tender documentation provided in response to questions from one or more suppliers, in an open, fair, and timely manner;

(iv) In contravention of Article 511 of the CFTA, *failing to provide a reasonable period of time* for suppliers to prepare and submit responsive tenders;

(v) In contravention of Article 516 of the CFTA, by failing to:

- A. *promptly inform participating suppliers of its contract award decisions*, and, on the request of a supplier, shall do so in writing;
- B. *provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender*;

(b) such further and other grounds as the Complainant may advise.

[Emphasis added]

[8] On October 2, 2020, the Tribunal requested that the complaint provide additional information, as follows:

[Y]ou have submitted that you received indications of the reason for the solicitation's cancellation on September 17, 2020 and that you requested disclosure from PWGSC on September 23, 2020. Please provide a copy of these communications, as well as a copy of any other communications with PWGSC in [regard] to this procurement. Please also confirm whether PWGSC has responded to your request for disclosure.⁶

[9] In response to this request, Heddle Marine provided copies of two emails it sent to PWGSC dated September 18, 2020, and September 23, 2020. Neither of these emails indicated what PWGSC has done since the cancellation of the ITT. The email of September 23 reads in part as follows:

I understand that Canada's position is that the Annual survey work is included in Davie's contract for the conversion of the three Viking vessels.⁷

⁶ Exhibit PR-2020-049-02, Vol. 1.

⁷ Exhibit PR-2020-049-01A, Vol. 1 at 2.

[10] The complaint was considered to be filed in accordance with subsection 30.11(2) of the *CITT Act* on October 2, 2020.

ANALYSIS

[11] For the Tribunal to inquire into a complaint, there must be a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements,⁸ including the *Canadian Free Trade Agreement*.⁹ For the reasons below, the Tribunal finds that Heddle Marine's complaint does not meet this requirement.

[12] Heddle Marine alleged that PWGSC failed to provide open, transparent, and non-discriminatory access to the ITT, in contravention of Article 502 of the *CFTA*. Heddle Marine has not explained how the initial publication of the ITT did not meet the requirements of the *CFTA*. The ITT was issued publicly and appears to contain all information necessary to bid. Therefore, this ground of complaint does not provide a reasonable indication that PWGSC failed to meet its obligations under the *CFTA*.

[13] Heddle Marine complained that PWGSC cancelled the procurement in a manner that circumvents provisions of the *CFTA* and detailed three reasons why. According to Heddle Marine, the cancellation (1) limited participation in a procurement only to suppliers that had previously been awarded one or more contracts by a procuring entity; (2) provided information to one supplier in order to give that supplier an advantage over other suppliers; and (3) adopted or applied a registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of suppliers. The Tribunal finds that canceling the ITT in the manner that is described by Heddle Marine is not an indication that PWGSC did not follow its obligations under the trade agreements. The cancellation occurred one day after the initial ITT was published and was published in the same manner as the original ITT. The detailed reasons Heddle Marine has given are completely speculative and no evidence whatsoever has been presented that gives rise to a reasonable indication that any of these actions has occurred. In particular, Heddle has provided no evidence that the solicitation was cancelled in order to improperly favour Davie. The Tribunal also notes that the standard clauses applicable to the RFP¹⁰ provide that "Canada reserves the right to . . . cancel the bid solicitation at any time".¹¹

[14] Heddle Marine has complained that there were contraventions of Articles 510, 511 and 516 of the *CFTA*. These articles describe obligations in the conduct of an ongoing procurement process and no evidence has been presented that provides even a reasonable indication that these obligations have not been followed. Given that the ITT was cancelled only one day after its initial publication and that the cancellation was done publicly for all to see, these actions do not constitute a breach of obligations. In addition, there is no indication that any suppliers asked any questions between the time the ITT was published and the time it was cancelled.

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

⁹ Online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf> (entered into force 1 July 2017) [*CFTA*].

¹⁰ The RFP provides that the 2003 (2018-05-22) *Standard Instructions – Goods or Services – Competitive Requirements* form part of the solicitation (Exhibit PR-2020-049-01, Vol. 1, at 21).

¹¹ Subsection 11(d) (2007-11-30) Rights of Canada, 2003 (2018-05-22) *Standard Instructions – Goods or Services – Competitive Requirements*.

[15] Finally, in its detailed statement of facts and argument, Heddle Marine has indicated “such further and other grounds as the Complainant may advise.” The Tribunal wishes to point out that there is an obligation on the complainant to ensure its grounds of complaint are complete and supported by enough facts and evidence to allow the Tribunal to envision a reasonable indication that PWGSC did not conduct a procurement in accordance with any applicable trade agreements. In other words, a complaint cannot be simply based on speculation or conjecture. A complaint must be filed within 10 working days from the time the complainant knew or reasonably should have known of the grounds of complaint, and it is not open for a complainant to later supplement its grounds in a manner that would violate this time limit.

DECISION

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

Randolph W. Heggart

Randolph W. Heggart

Presiding Member