



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2020-063

Newland USA Corporation

*Decision made
Friday, December 4, 2020*

*Decision and reasons issued
Monday, December 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

NEWLAND USA CORPORATION

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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

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 relates to a solicitation by the Department of National Defence (DND) for the provision of accommodations for members of the Canadian Armed Forces in Seville, Spain (Solicitation No. W847A-210304).

[3] Newland USA Corporation (Newland) has challenged DND's decision to disqualify its bid on the basis of security concerns. Newland argued that, contrary to the evaluators' conclusion, its bid met all security requirements and had a lower price than the winning bid. Newland requested that it be awarded the contract, as well as compensation, complaint costs, and bid preparation costs.

BACKGROUND

[4] DND issued the solicitation on October 27, 2020.

[5] Newland submitted its bid on November 12, 2020, and was notified that it was not the successful bidder on November 23, 2020. The same day, Newland requested clarification on why its bid was disqualified and DND responded that the bid did not meet its security requirements.

[6] Newland then requested a re-evaluation on November 25, 2020. DND notified Newland that its bid remained non-compliant on November 26, 2020.

[7] Newland filed its initial complaint documents with the Tribunal on December 2, 2020, but the complaint was deemed incomplete. The Tribunal requested additional information on December 3, 2020, which Newland filed the next day. Newland's complaint was therefore considered to have been filed on December 4, 2020.³

ANALYSIS

[8] In order for the Tribunal to conduct an inquiry into a complaint, the complaint must be in respect of a designated contract,⁴ which means that the solicitation at issue must be covered by the

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

² SOR/93-602 [*Regulations*].

³ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499) provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed "... on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection."

⁴ Paragraph 7(1)(b) of the *Regulations*.

relevant provisions of at least one of the trade agreements specified in the *Regulations*.⁵ In addition, for a complainant that is not a Canadian supplier, as is the case here,⁶ to have standing before the Tribunal to invoke an international trade agreement listed in the *Regulations*, its government and the government of Canada must be parties to that agreement.⁷ For the reasons below, the Tribunal finds that the procurement process at issue in this complaint is not covered by any trade agreement which may be invoked by Newland, whether because the services are excluded from the agreement or because Newland lacks standing under the agreement. Therefore, the Tribunal does not have jurisdiction to conduct an inquiry.

[9] Newland made its complaint under the North American Free Trade Agreement.⁸ However, NAFTA is no longer in force, and it does not apply to procurements commenced on or after July 1, 2020.⁹ In the agreement that has replaced NAFTA, the Canada-United States-Mexico Agreement,¹⁰ Canada is not a party to the government procurement chapter.¹¹ Therefore, neither NAFTA nor CUSMA is included in the list of applicable trade agreements found in subsection 3(1) of the *Regulations*.

[10] Given that, as noted above, Newland is domiciled in the United States,¹² it does not have the benefit of any of Canada's bilateral trade agreements with other countries. Furthermore, Newland does not have standing to bring a complaint pursuant to the Canadian Free Trade Agreement, which is for Canadian suppliers only.¹³

[11] Therefore, the only potentially applicable trade agreement is the World Trade Organization's Revised Agreement on Government Procurement.¹⁴ However, services procured in support of military forces located overseas are excluded from the WTO-AGP, and indeed from all of Canada's

⁵ Subsection 3(1) of the *Regulations*.

⁶ The complaint indicates that Newland is a corporation located in Newport Beach, California. There is no evidence that it has a place of business in Canada.

⁷ To quote the Supreme Court of Canada, "[i]f the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them." *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 at paras. 32, 44.

⁸ 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA].

⁹ *Regulations Amending the Canadian International Trade Tribunal Procurement Inquiry Regulations (Miscellaneous Program)*, SOR/2020-66, online: <<http://gazette.gc.ca/rp-pr/p2/2020/2020-04-29/html/sor-dors66-eng.html>>. See also Contracting Policy Notice 2020-2: Replacement of the North American Free Trade Agreement (NAFTA), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2020-2-replacement-north-american-free-trade-agreement-nafta.html>>.

¹⁰ 13 March 2020, SC 2020, c 1, online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 July 2020) [CUSMA].

¹¹ Contracting Policy Notice 2020-2: Replacement of the North American Free Trade Agreement (NAFTA), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2020-2-replacement-north-american-free-trade-agreement-nafta.html>>.

¹² Exhibit PR-2020-063-01 at 2.

¹³ *Newland Canada Corporation v. Department of National Defence* (29 April 2020), PR-2019-054 and PR-2019-055 (CITT) [*Newland*] at para. 42.

¹⁴ World Trade Organization <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm> (entered into force 6 April 2014) [WTO-AGP].

international trade agreements listed in subsection 3(1) of the *Regulations*.¹⁵ As this procurement is for the provision of accommodations for members of the Canadian Armed Forces in Seville, Spain, the procurement manifestly falls within the scope of this exclusion.

[12] For these reasons, none of the trade agreements listed in subsection 3(1) of the *Regulations* apply to Newland's complaint, and the Tribunal therefore does not have the jurisdiction to conduct an inquiry. In light of this conclusion, there is no need for the Tribunal to consider whether Newland's complaint meets the other conditions for inquiry.¹⁶

DECISION

[13] 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

¹⁵ *Newland* at para. 34, citing note 3(f) to Annex 5 of Canada's coverage schedule under the WTO-AGP.

¹⁶ Namely, the other conditions set out in sections 6 and 7 of the *Regulations*.