



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-051

Ten Barrel Inc. dba Nomad Air

v.

Department of Public Works and
Government Services

*Determination issued
Monday, January 4, 2021*

*Reasons issued
Tuesday, January 19, 2021*

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IN THE MATTER OF a complaint filed by Ten Barrel Inc. dba Nomad Air 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

TEN BARREL INC. DBA NOMAD AIR

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act (CITT Act)* the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Ten Barrel Inc. dba Nomad Air. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Procurement Costs Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

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

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STATEMENT OF REASONS

[1] On August 12, 2020, the Department of Public Works and Government Services (PWGSC) issued a Request for Proposals (RFP) (Solicitation No. W3048-21-KJ25) on behalf of the Department of National Defence (DND).¹ The objective of the RFP is to procure the services of aircraft rental for parachutists.

[2] The RFP was issued under the ambit of a pre-existing supply arrangement (SA), File No. W6399-18KA26/B, which served to pre-qualify potential suppliers able to supply aircraft rental services, responsive to bid solicitations that would be subsequently issued, such as the RFP.²

[3] The nature of the procurement was characterized as follows:

The intent of this requirement is to secure air support to Canadian Armed Forces (CAF) parachute operations and training when it is not possible to use military air resources. The aircraft will primarily be used by Department of National Defence (DND), the Canadian Special Operation Forces Command (CANSOFCOM), and the Canadian Army Advanced Warfare Centre (CAAWC) at Canadian Forces Base (CFB) Trenton, Ontario. The aircraft will be used in support of parachute training at various locations within Canada and the United States. The aircraft will also be used to support the Canadian Forces Parachute Team (CFPT), the SkyHawks or other DND/CAF Units or Groups at various locations within Canada and the United States throughout the year.³

[4] The RFP prescribed specifications for the specific type of aircraft needed to meet DND's particular operational requirements.⁴ During the course of the tender, questions were posed by prospective bidders to which PWGSC replied.⁵

[5] Four companies submitted bids in response to the RFP, which had a closing date of August 19, 2020.⁶ All four bidders had been pre-qualified by PWGSC/DND as prospective suppliers pursuant to the SA.⁷

[6] One of the bidders was Ten Barrel Inc. dba Nomad Air (Ten Barrel)⁸ who has filed a complaint with the Tribunal concerning the outcome of the tender.⁹

[7] Following the tender, Ten Barrel was informed that it had been unsuccessful and that the contract would be awarded to another bidder, namely Reticle Ventures Canada Inc. (Reticle).¹⁰

¹ Exhibit PR-2020-051-21 at 66.

² Exhibit PR-2020-051-21 at 24.

³ Exhibit PR-2020-051-21 at 39.

⁴ Exhibit PR-2020-051-21 at 76-77.

⁵ Exhibit PR-2020-051-21 at 85-87.

⁶ Exhibit PR-2020-051-21 at 66, 88.

⁷ Exhibit PR-2020-051-21 at 7, 9.

⁸ Exhibit PR-2020-051-01A (protected) at 3-12.

⁹ Exhibit PR-2020-051-01.

¹⁰ Exhibit PR-2020-051-01A at 22.

[8] Ten Barrel requested a post-tender debrief.¹¹ Written and oral discussions between Ten Barrel and PWGSC took place from August 26, 2020, and at least until September 10, 2020.¹²

[9] On September 22, 2020, Reticle contacted Ten Barrel to inquire whether Ten Barrel could provide air crews that Reticle would need to supply the services specified in the RFP, namely aircraft rental for parachutists.¹³ This caused Ten Barrel to conduct online investigations concerning Reticle's licensing status and regulatory compliance with respect to the operation of aircraft.¹⁴

[10] As a result of this research, Ten Barrel formed the conclusion that Reticle lacked authority from Transport Canada, the United States Federal Aviation Administration (FAA), or any other governmental authority that would be needed to operate and maintain aircraft, or to provide licenced and qualified air crews required for the lawful operation of aircraft in Canada. As such, Ten Barrel contended that Reticle was inherently incapable of lawfully providing the services specified in the RFP.¹⁵

[11] Ten Barrel filed a complaint with the Tribunal on October 6, 2020, alleging that DND had awarded a contract arising from the RFP to an unqualified bidder.¹⁶

[12] Ten Barrel asserted that, unlike Reticle, it was in regulatory compliance and held all of the requisite licences to provide the services specified in the RFP.¹⁷

[13] In its complaint, Ten Barrel requested the following relief:

- (a) Cancellation of the contract awarded to Reticle;
- (b) Awarding of the contract arising from the RFP to Ten Barrel;
- (c) Financial compensation for lost opportunity and lost profits from the date of the contract award to Reticle to the date that the contract is awarded to Ten Barrel;
- (d) Reimbursement of Ten Barrel's complaint costs;
- (e) Reimbursement for litigation costs; and
- (f) Review by the Tribunal of the award holders under the SA to confirm their compliance with the conditions and constraints of the SA.¹⁸

¹¹ Exhibit PR-2020-051-01A (protected) at 23.

¹² Exhibit PR-2020-051-01A (protected) at 23-27.

¹³ Exhibit PR-2020-051-01 at 18.

¹⁴ Exhibit PR-2020-051-01 at 15-17, 121, 136.

¹⁵ Exhibit PR-2020-051-01 at 15-17.

¹⁶ Exhibit PR-2020-051-01 at 7.

¹⁷ Exhibit PR-2020-051-01 at 18, 123, 125-132, 138, 140.

¹⁸ Exhibit PR-2020-051-01 at 18.

[14] The Tribunal accepted Ten Barrel's complaint for inquiry on October 13, 2020.¹⁹ The prescribed notice was published in the *Canada Gazette* dated October 24, 2020.²⁰

[15] On October 26, 2020, Ten Barrel sought expedited disposition of its complaint. It asked the Tribunal to abridge the 90-day timeline prescribed by section 12(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*²¹ by invoking the express 45-day timeline provided by subsection 12(b).²²

[16] After considering factors relevant to the abridgment of the schedule prescribed by section 12 of the *Regulations*,²³ the Tribunal declined to invoke the shortened 45-day timeline. According to its terms, the contract to Reticle was to be fully performed shortly *before* any due date for disposition that would arise using the timeline prescribed by subsection 12(b). Abridgment of a timeline requires the imposition of timeline restrictions on other parties to the proceedings, with the possibility of prejudice. In the circumstances of this case, the Tribunal found insufficient grounds to justify abridgment of the 90-day timeline, all the more so since the contract would be fully performed by Reticle before expiration of the timelines under either subsection 12(a) or 12(b).²⁴

[17] On November 3, 2020, Reticle sought to be added as an intervener, indicating that it wished to participate in the proceedings.²⁵

[18] The decision to grant leave to intervene is discretionary. After giving due consideration to relevant factors²⁶ and in the absence of any objection to the joinder of Reticle as an intervener,²⁷ the Tribunal concluded on November 6, 2020, that Reticle should be added as a party intervener.²⁸

[19] PWGSC filed a Government Institution Report (GIR) on November 16, 2020.²⁹

[20] Neither Ten Barrel nor Reticle provided any comments in reply to the GIR.³⁰ Beyond its initial request for intervener status, Reticle otherwise filed no submissions with the Tribunal.

POSITIONS OF THE PARTIES

Ten Barrel

[21] The crux of Ten Barrel's complaint is that PWGSC awarded the contract to an unqualified and non-compliant bidder.

¹⁹ Exhibit PR-2020-051-03; Exhibit PR-2020-051-04.

²⁰ Exhibit PR-2020-051-03 at 3.

²¹ SOR/93-602 [*Regulations*].

²² Exhibit PR-2020-051-11.

²³ See *PricewaterhouseCoopers LLP v. Immigration and Refugee Board of Canada* (16 October 2020), PR-2020-035 (CITT) at paras. 13-15.

²⁴ Exhibit PR-2020-051-19.

²⁵ Exhibit PR-2020-051-13; Exhibit PR-2020-051-15.

²⁶ See *NISIT International Ltd. v. Department of Public Works and Government Services* (20 July 2020), PR-2019-067 (CITT) at paras. 12-26.

²⁷ Exhibit PR-2020-051-17, Exhibit PR-2020-051-18.

²⁸ Exhibit PR-2020-051-20.

²⁹ Exhibit PR-2020-051-21.

³⁰ Exhibit PR-2020-051-23; Exhibit PR-2020-051-27.

[22] More particularly, Ten Barrel says that Reticle does not hold an Air Operators Certificate (AOC) and was consequently non-compliant with the *Canadian Aviation Regulations*³¹ because Reticle purported to operate a commercial air service in Canada, as defined by the *Aeronautics Act*, without the lawful authority conferred by an AOC. It further alleges that Reticle does not hold a Private Operator Certificate issued by Transport Canada, a Temporary Authority to Operate (TAO) from DND or an FAA Private Operators licence.

[23] Ten Barrel also asserts that the *Canadian Aviation Regulations* require commercial operators of civil aircraft to conduct aircraft maintenance at a Transport Canada Approved Maintenance Organization (AMO). As a result of its online research of various databases, Ten Barrel alleges that Reticle does not hold an AMO certificate.

[24] Ten Barrel claims that Reticle intends to provide aircraft owned and operated by an American company that is a third party to the contract issued by DND. Accordingly, Ten Barrel says that Reticle functions solely as an intermediary and provides no added value for the purposes of the contract. In addition, Ten Barrel claims that Canadian immigration laws would be contravened if U.S. aircraft crews were supplied, without work permits, to provide the services described in the RFP.

[25] Ten Barrel further contends that American regulatory and safety standards, including requirements for aircraft maintenance, are less stringent than Canadian standards. This is said to create an unfair financial advantage for American operators, with respect to the hourly cost of operation of the aircraft.

[26] Unlike Reticle, Ten Barrel asserts that it holds a current AOC from Transport Canada; has direct possession and operational control of the aircraft needed to deliver the services; has access to crew with special training for the specific parachute operations prescribed by the contract; and further holds an AMO certificate and a TAO issued by DND.

PWGSC

[27] PWGSC submits that Ten Barrel's complaint is out of time. It says that Ten Barrel was making inquiries about bidder qualifications³² on August 14, 2020, and knew that the contract had been awarded to Reticle at least as early as August 25, 2020. Notwithstanding, Ten Barrel's complaint was only filed on October 6, 2020, well beyond the statutory 10-day period prescribed by section 6 of the *Regulations*.

[28] Further, Reticle was found to qualify under the SA on April 26, 2019. This award of supplier status to Reticle was published through the Government Electronic Tendering Service on April 26, 2019.³³ As such, had Ten Barrel wished to challenge the process of qualifying Reticle as a prospective supplier or Reticle's qualifications to be a prospective supplier, Ten Barrel should have objected or otherwise acted no later than 10 working days after Reticle's approval was made public, i.e. no later than May 10, 2019.

³¹ SOR/96-433.

³² Concerning necessary certificates, licences and crew requirements as prescribed by paragraphs 3.4 and 3.6 of Annex "A" - Statement of Work of the RFP.

³³ Exhibit PR-2020-051-21 at 122-123.

[29] In the alternative, PWGSC submits that the evaluation of Reticle's bid under the SA was conducted reasonably. The SA prescribed only one mandatory technical requirement, namely that the contractor state which model of aircraft that it proposed to supply under three different types of aircraft requirements. Reticle proposed aircraft models acceptable to DND. It otherwise provided other documents prescribed by the SA.

[30] As the Tribunal should only interfere where bid evaluation is unreasonable, PWGSC says that this standard is not met, on the circumstances of this case. Reticle was awarded the contract because it submitted a responsive bid with the lowest evaluated price.

[31] Moreover, PWGSC points out that the SA explicitly permits prospective suppliers to use subcontractors, in accordance with the General Conditions to be incorporated into the resultant contract.

[32] PWGSC asserts that the aviation law requirements described in Ten Barrel's complaint are imposed upon the winning contractor and thus form part of contract administration. Consequently, Ten Barrel's complaint that Reticle does not (and cannot) hold an AOC, TAO or AMO and does not exercise direct operational oversight over the aircraft and crew are all downstream compliance issues pertaining to the performance of the contract, and not to the awarding of the contract. As such, PWGSC claims that these issues fall outside the procurement and bid evaluation process and are consequently beyond the Tribunal's jurisdiction.

[33] In any event, PWGSC contends that flights operated for military purposes (as would be the case for the services described in the RFP) fall solely within the authority of DND who may issue a TAO, even if the operator does not hold an AOC from Transport Canada. Similarly, issues of aircraft maintenance likewise fall within the oversight of DND. Reticle's subcontractor holds a TAO issued by DND.

[34] In answer to Ten Barrel's complaint that U.S. aircraft operators have an unfair cost advantage, PWGSC submits that the terms of the SA did not limit bids to Canadian suppliers. Bidders were permitted to use subcontractors so long as they are located within a NATO country, the European Union or a country with which Canada has an international bilateral industrial security instrument.

[35] PWGSC contends that other aspects of Ten Barrel's complaint pertaining to allegations of non-compliance with immigration and aviation laws of Canada fall outside the Tribunal's jurisdiction or otherwise pertain to contract administration.

ANALYSIS

[36] There is no dispute that the RFP pertains to a "designated contract" within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act (CITT Act)*.

[37] Subsection 6(1) of the *Regulations* provides that a complaint must be filed no later than 10 working days after the basis of the complaint became known or reasonably should have become known to the complainant.

[38] Ten Barrel did seek general information from PWGSC during August and September 2020 concerning bidder qualification in the overall context of the procurement process. Those requests for assurances were answered by PWGSC.³⁴

[39] The evidence further demonstrates that Ten Barrel was aware, by August 25, 2020, that the contract was to be awarded to Reticle.³⁵ However, the Tribunal finds that until Reticle contacted Ten Barrel on September 22, 2020, seeking an air crew, Ten Barrel was unaware of specific grounds by which it could contest the award of the contract to Reticle on the basis that Reticle was a non-compliant bidder.

[40] As a result of the conversation with Reticle on September 22, 2020, Ten Barrel began to research Reticle's licences and its regulatory standing to provide the services described in the RFP. The Tribunal finds that when Ten Barrel determined that Reticle itself did not hold an AOC, TAO or AMO, this newly acquired information caused Ten Barrel to complain to the Tribunal.

[41] Ten Barrel's complaint to the Tribunal is much narrower than the queries posed by Ten Barrel concerning the RFP process during August and September 2020.³⁶ Indeed, Ten Barrel's complaint to the Tribunal was discrete and confined to the issue of whether Reticle was a compliant bidder, having regard to Reticle's apparent regulatory standing with Transport Canada, as revealed by Ten Barrel's queries to various online databases. As the complaint was filed within ten working days of Ten Barrel's investigation of Reticle's regulatory standing, the Tribunal finds that Ten Barrel's complaint is timely.

[42] Upon reviewing the GIR and all other evidence of record, the Tribunal agrees with PWGSC that Ten Barrel's complaint is answered by the provisions of the RFP permitting the use of subcontractors.³⁷ In submitting a bid in response to the RFP, Reticle did so as a pre-qualified bidder pursuant to the SA.³⁸

[43] Even if Ten Barrel's complaint could be deemed as extending to challenging the original decision to award Reticle's standing as a pre-qualified bidder (and the Tribunal makes no such finding), the Tribunal's conclusion concerning the merits of the complaint would be unchanged. Reticle notified DND of its intent to use a U.S. subcontractor and provided DND with requisite information concerning the identity and qualifications of the subcontractor, all of which was accepted by DND in the course of the evaluation process with respect to the SA.³⁹

[44] Although arguments can be made that the use of subcontractors may be disadvantageous (as Ten Barrel has done), such issues do not fall to be adjudicated by the Tribunal. The decision to permit the use of subcontractors is a procurement policy decision of DND. As a general rule, the Tribunal will defer to such decisions. In this case, there are no grounds upon which the Tribunal could override or otherwise interfere with the decision to accept a bid responsive to the RFP where the services are to be provided by a subcontractor. To the extent that Ten Barrel holds the view that operational or safety requirements for the provision of aircraft rental for parachutists are potentially

³⁴ Exhibit PR-2020-051-21A (protected) at 27-32.

³⁵ Exhibit PR-2020-051-01A (protected) at 22.

³⁶ Exhibit PR-2020-051-21A (protected) at 27-32.

³⁷ Exhibit PR-2020-051-21 at 73, 112.

³⁸ Exhibit PR-2020-051-21A (protected) at 63-76.

³⁹ *Ibid.*

compromised by the use of subcontractors, it is free to make that case directly to DND for possible consideration by DND in the preparation of any future tenders for such services.

[45] The RFP contains numerous provisions that impose operational requirements with respect to the provision of the services. As noted by Ten Barrel, these include the necessity of obtaining at least a TAO and otherwise complying with Canadian aviation law and regulations. The Tribunal further notes that the RFP includes provisions that require the contractor to provide proof of insurance, among other requirements.⁴⁰ Presumably, a contractor unable to demonstrate lawful authority to operate an aircraft might well have difficulty in securing the requisite insurance as prescribed by the RFP. However, the Tribunal agrees with PWGSC that such issues pertain to contract administration.

[46] The Tribunal will review complaints arising from a procurement process to ensure that the procurement, including the evaluation of received bids, is conducted fairly, openly and transparently in accordance with the terms of the tender as provided to prospective bidders. That inquiry comes to a close once a winning bid has been selected. At that point, the terms and conditions of the RFP are carried forward into the contract that is awarded to the successful bidder. If the contractor is unable to comply with its obligations under the contract, the procuring entity may decide to terminate the contract. However, evaluation of the contractor's prospective ability to comply and its actual compliance with the terms of the contract are issues of contract administration falling outside the Tribunal's mandate.⁴¹

[47] In this case, the Tribunal is satisfied from the evidence⁴² that the procurement was conducted in accordance with the published terms of the RFP.

[48] PWGSC argues that Ten Barrel has raised issues of Canadian law, notably compliance with aviation and immigration law and regulations, which are beyond the scope of the Tribunal's jurisdiction. Ten Barrel's allegations that Reticle will be unable to secure the requisite regulatory and immigration approvals to lawfully provide operational aircraft staffed by a qualified crew pertain to contract administration. Moreover, such allegations are speculative.

[49] Consequently, the Tribunal declines to address the substantive legal and regulatory issues raised by Ten Barrel. However, in doing so, the Tribunal should not be taken as agreeing with PWGSC that the Tribunal is necessarily precluded, as a general principle, from considering questions of substantive law that may bear directly on requirements prescribed by an RFP or that may arise in the context of bid evaluation. Such issues do not arise in the context of this proceeding.

[50] For all of the above reasons, the complaint is dismissed.

DETERMINATION

[51] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

⁴⁰ Exhibit PR-2020-051-21 at 82-83.

⁴¹ *Sepha Catering Ltd.* (13 November 2014), PR-2014-038 (CITT).

⁴² Exhibit PR-2020-051-21A (protected) at 24-25, 34-37.

[52] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Ten Barrel. In accordance with the *Procurement Costs Guideline (the Guideline)*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

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