Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2020-062

Ocalink Technologies Inc.

v.

Department of Public Works and Government Services

Order issued
Wednesday, February 24, 2021

Reasons issued
Thursday, March 11, 2021

Canada

TABLE OF CONTENTS

IN THE MATTER OF a complaint filed by Ocalink Technologies Inc. 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 by the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

AND FURTHER TO a motion by the Department of Public Works and Government Services to dismiss the complaint pursuant to subsections 10(2) and (3) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602.

BETWEEN

OCALINK TECHNOLOGIES INC.	**Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES	**Government Institution**

ORDER

WHEREAS Ocalink Technologies Inc. (Ocalink) filed this complaint on November 28, 2020, December 2, 2020, and December 7, 2020;

AND WHEREAS the Canadian International Trade Tribunal accepted the complaint for inquiry on December 14, 2020, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* (*CITT Act*) and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (*Regulations*);

AND WHEREAS, on January 13, 2021, the Department of Public Works and Government Services (PWGSC) requested that the Tribunal dismiss the complaint pursuant to subsections 10(2) and (3) of the *Regulations* because a national security exception had been invoked to remove the procurement from the coverage of the trade agreements;

AND WHEREAS the exception from the trade agreements is, in this case, properly qualified as an exception for the protection of human life and health, as set out in Article III(2)(b) of the World Trade Organization's Revised Agreement on Government Procurement and Articles 202 and 501 of the Canadian Free Trade Agreement;

AND WHEREAS the exception for the protection of human life and health places the procurement outside of the jurisdiction of the Tribunal;

AND WHEREAS subsection 10(1) of the *Regulations* provides that the Tribunal may dismiss a complaint where it has no valid basis in light of the *CITT Act*, the *Regulations*, and any applicable trade agreements;

THEREFORE, pursuant to subsection 10(1) of the *Regulations*, the Tribunal hereby dismisses Ocalink's complaint. The Tribunal awards complaint costs to Ocalink in the amount of $500, to be paid by PWGSC.

Peter Burn

Peter Burn
Presiding Member

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

STATEMENT OF REASONS

OVERVIEW

[1] This complaint by Ocalink Technologies Inc. (Ocalink) relates to a procurement by the Department of Public Works and Government Services (PWGSC) for the Public Health Agency of Canada in collaboration with the Department of Industry.[1] The procurement was a "Call to Action" for the provision of ventilators in response to the COVID-19 pandemic.

[2] Ocalink argued that the government institutions involved in this procurement breached the duty of fairness and that their conduct raised a reasonable apprehension of bias.

[3] PWGSC brought a motion to dismiss Ocalink's complaint pursuant to subsections 10(2) and (3) of the *Procurement Inquiry Regulations*,[2] on the grounds that a national security exception had been invoked to exclude the procurement from any applicable trade agreements and therefore remove the Tribunal's jurisdiction to conduct an inquiry.

[4] For the reasons below, the Tribunal finds that the exception from the trade agreements is, in this case, properly qualified as an exception for the protection of human life and health. Therefore, the Tribunal dismisses Ocalink's complaint pursuant to subsection 10(1) of the *Regulations*.

PROCEDURAL BACKGROUND

[5] On March 31, 2020, Ocalink received a Call to Action from the Industrial Research Assistance Program at National Research Council Canada, looking for organizations to develop and manufacture made-in-Canada ventilators in response to the COVID-19 pandemic.

[6] On April 1, 2020, Ocalink submitted its response to the Call to Action.

[7] On April 2, 2020, Ocalink participated in a virtual interview with an expert review panel.

[8] On April 4, 2020, Ocalink was informed that it had not been selected by the expert review panel, who had chosen the three companies whose ventilators they considered the most appropriate for use with COVID-19 patients and most ready to move to manufacturing and distribution within four weeks.

[9] PWGSC issued sole-source contracts for ventilators to three companies on April 10, 2020. PWGSC issued an additional sole-source contract for ventilators on May 22, 2020.

[10] Over several months, Ocalink continued to communicate with various government officials regarding its proposed ventilators. On November 16, 2020, the Department of Industry provided Ocalink with further details on its evaluation under the Call to Action, including the names of the members of the expert review panel.

[11] Ocalink filed its complaint with the Tribunal on November 28, 2020, December 2, 2020, and December 7, 2020.

---

1 The Department of Industry is the legal name for Innovation, Science and Economic Development Canada.

2 SOR/93-602 [*Regulations*].

[12] On December 7, 2020, Ocalink requested that the Tribunal use the express option procedure set out in section 107 of the *Canadian International Trade Tribunal Rules*.[3]

[13] The Tribunal accepted the complaint for inquiry on December 14, 2020.

[14] On December 18, 2020, PWGSC opposed Ocalink's request to use the express option procedure. Ocalink responded to this objection on December 24, 2020.

[15] PWGSC requested an extension of time to file its Government Institution Report (GIR) on December 24, 2020, and Ocalink objected to this extension on the same day.

[16] On December 30, 2020, the Tribunal granted PWGSC's request for an extension to file the GIR and denied Ocalink's request to use the express option procedure.

[17] On January 13, 2021, PWGSC requested that the Tribunal dismiss the complaint pursuant to subsections 10(2) and (3) of the *Regulations* because a national security exception had been invoked.

[18] On January 14, 2021, the Tribunal granted a request for intervener status by FTI Professional Grade Inc. (FTI).

[19] On January 15, 2021, the Tribunal requested comments from Ocalink and FTI on the motion to dismiss the complaint. The Tribunal also extended its inquiry to 135 days pursuant to paragraph 12(c) of the *Regulations* and suspended the deadline for filing the GIR.

[20] On January 22, 2021, Ocalink made comments opposing the motion to dismiss the complaint, and FTI made comments supporting the motion.

[21] On January 27, 2021, PWGSC replied to Ocalink's comments opposing the motion to dismiss the complaint.

OCALINK'S COMPLAINT

[22] Ocalink argued that PWGSC and the Department of Industry breached the duty of fairness and that their conduct raised a reasonable apprehension of bias. Specifically, Ocalink argued the following:

- The evaluation criteria were not communicated to Ocalink in full at the time the solicitation was issued, and Ocalink was required to answer to additional criteria that were not required of other suppliers.

- The expert review panel included evaluators who were employed or contracted by industry advocacy groups and manufacturers of ventilator parts, which raised a reasonable apprehension of bias.

- Ocalink's proposal was rejected based on a four-week manufacturing and distribution requirement, whereas the successful bidders were not required to perform the contract under the same timeframe.

---

3 SOR/91-499.

- The evaluation criteria were improper, unfairly applied, and extended into the regulatory process of Health Canada without authority from Health Canada.

- The evaluation process lacked intellectual property safeguards.

- A contract was awarded to FTI, where Mr. Frank Baylis, a former and recent Member of Parliament, is a director.

[23] In its initial complaint, Ocalink submitted that it believed that no national security exception had been invoked for this procurement, as neither the procurement documentation, nor any correspondence with government officials, had included any such mention.

[24] Ocalink argued that it should have been a successful bidder and therefore requested its lost profit.

MOTION TO DISMISS THE COMPLAINT

[25] PWGSC brought a motion to dismiss Ocalink's complaint on the grounds that a national security exception had been properly invoked pursuant to subsections 10(2) and (3) of the *Regulations.* PWGSC submitted that a national security exception is properly invoked when an assistant deputy minister or a person of equivalent rank, who is responsible for awarding the contract, has signed a letter approving the invocation of the exception prior to contract award.

[26] In support of its motion, PWGSC provided a letter dated March 14, 2020, which approved the invocation of the national security exception for procurements of goods and services required in order to respond to the COVID-19 pandemic. This letter applies until the World Health Organization (WHO) no longer declares the COVID-19 pandemic a "Public Health Emergency of International Concern." The letter was signed by three PWGSC officials: Arianne Reza, the Assistant Deputy Minister of Procurement; André Fillion, the Assistant Deputy Minister of Defence and Marine Procurement; and Stéphane Déry, the Assistant Deputy Minister of Real Property Services.

[27] Ocalink argued that the national security exception should not apply because there had been no publicly available document invoking the exception at the time it made its bid or submitted its complaint. Additionally, no government officials had mentioned a national security exception to Ocalink during the procurement process or in their correspondence between April and October 2020. Ocalink argued that this contravened the requirement to insert a statement concerning the national security exception in all notifications to suppliers and all tender documents, as set out in section 3.105.5.e of the PWGSC Supply Manual.

[28] In response, PWGSC acknowledged that it did not advise potential suppliers that a national security exception had been invoked. However, it argued that the trade agreements do not require that a national security exception be announced publicly. It also argued that the Tribunal's mandate does not extend to reviewing compliance with procurement policies that have not been expressly incorporated by reference into the bid solicitation, such as the PWGSC Supply Manual.

TRIBUNAL'S ANALYSIS

[29] Subsections 10(2) and (3) of the *Regulations* came into force on June 3, 2019,[4] (the 2019 amendments to the *Regulations*) removing the Tribunal's jurisdiction to investigate procurement complaints when a national security exception has been properly invoked. The Tribunal has not had occasion to consider these amendments until recently.[5] Under the 2019 amendments to the *Regulations*, a national security exception is deemed to have been properly invoked when an assistant deputy minister (or a person of equivalent rank), who is responsible for awarding the contract, has signed a letter approving the invocation of the exception prior to the date of contract award.

[30] The 2019 amendments to the *Regulations* purport to overturn existing Canadian law on national security exceptions in procurement complaints before the Tribunal, having removed the requirement that a government institution must justify its use of the national security exception and invoke it only to the extent necessary to protect Canada's national security interests.[6]

[31] The 2019 amendments to the *Regulations* stand in contrast not only to recent World Trade Organization (WTO) jurisprudence, but also to Canada's own position before the WTO. In April 2019, the WTO ruled that a state seeking to invoke a national security exception must demonstrate the existence of a valid national security concern, and that any measure taken under the guise of the exception be truly necessary to protect the invoking state's security interests.[7] During the course of this litigation, Russia and the United States claimed that sovereign states could invoke the national security exception at their sole discretion (i.e. that the exception is "self-justifying"), but Canada argued that states must provide reasons to justify use of the exception, and that those reasons must stand up to scrutiny.[8]

[32] There is accordingly a stark disconnect between the position taken by the Government of Canada at the WTO (which prevailed and therefore constitutes the current state of international law), and the position that Canada adopted domestically, just weeks after the WTO's decision, when the Governor in Council adopted the 2019 amendments to the *Regulations.*

---

4 SOR/2019-162, s. 1, June 3, 2019, *Canada Gazette*, Part II, Volume 153, Number 12, online at: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-06-12/html/sor-dors162-eng.html>.

5 The first time that the Tribunal considered these provisions was in *Vesta Health Systems Inc. v. Department of Public Works and Government Services* (6 January 2021), PR-2020-057 (CITT) [*Vesta*]. The Presiding Member in the present matter does not share the view of the Presiding Member in *Vesta* as to the applicability of the national security exception to essentially identical situations.

6 See *Harris Corporation* (23 August 2018), PR-2018-001 (CITT) at paras. 57-60, 80; *Canada (Attorney General) v. Harris Corporation*, 2018 FCA 130 [*Harris FCA*]; *Hewlett-Packard (Canada) Co.* (20 March 2017), PR-2016-043 (CITT) [*Hewlett-Packard*] at paras. 54-68; *Eclipsys Solutions Inc.* (4 February 2016), PR-2015-039 (CITT) [*Eclipsys*] at paras. 18-21.

7 *Russia – Measures Concerning Traffic in Transit* (5 April 2019), WT/DS512/R, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True>.

8 See Marcia Mills, *Because We Said So: Invoking the National Security Exception to Reduce Access to Dispute Processes for Government Suppliers*, Canadian Global Affairs Institute, October 2019, online: <https://d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/4292/attachments/original/1571785929/Because_We_Said_So_Invoking_the_National_Security_Exception_to_Reduce_Access_to_Dispute_Processes_for_Government_Suppliers.pdf?1571785929>.

[33] The WTO Revised Agreement on Government Procurement and the Canadian Free Trade Agreement both provide for exceptions based on national security. However, they both also provide for exceptions based on the protection of human life and health.[9]

[34] In the Tribunal's view, the current state of the law allows it to recognize a validly invoked national security exception only in circumstances where national security (e.g. matters involving a state's borders, its armed forces, its information technology infrastructure, or generally its sovereignty) is truly at stake.[10] In contrast, because the current COVID-19 pandemic is a WHO-mandated "Public Health Emergency of International Concern", it ought properly to be recognized as such. It follows that any exception to recognized trade rules when procuring pandemic-related supplies ought to be done, not under the guise of a national security exception, but rather under the exceptions to the trade agreements relating to the protection of human life and health.

[35] The ventilators in issue in this matter were procured in response to the COVID-19 pandemic. This situation does not arise from a matter of national security in the sense recognized by international law.[11]

[36] The COVID-19 pandemic is a threat to the life and health of Canadians. The procurement at issue in this case was designed to obtain ventilators as quickly as possible in order to protect human life and health.

[37] It follows that the more properly invoked applicable trade agreement exception made by the government institutions in this matter is to be identified as the exception relating to the protection of human life and health, and not the national security exception. Irrespective, it remains that the government institutions involved in this matter have chosen to remove this procurement from review by the Tribunal, even in respect of qualified Canadian suppliers who otherwise would have had the benefit of the Canadian Free Trade Agreement, and of the bid challenge mechanism administered by the Tribunal.

[38] In response to Ocalink's argument that PWGSC was required to notify bidders that an exception to the trade agreements had been invoked, the Tribunal can only conclude that its role does not extend to enforcing notice requirements set out in the PWGSC Supply Manual. As the Tribunal

---

9 Article III(2)(b) of the Revised Agreement on Government Procurement states that, "[s]ubject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures . . . necessary to protect human, animal or plant life or health". World Trade Organization <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [WTO-AGP].
Article 202 of the Canadian Free Trade Agreement provides an exception for measures that are necessary to achieve a legitimate objective. Chapter 13 defines "legitimate objective" as including the "protection of human, animal, or plant life or health". Article 501 provides that ". . . Article 202 (Legitimate Objectives) applies to measures regarding covered procurement." 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 See *Russia – Measures Concerning Traffic in Transit* at para. 7.130, where the Panel defines "essential security interests" as "those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally", and notes (at footnote 211) that the term "national security" is used in the WTO-AGP.

11 See *Russia – Measures Concerning Traffic in Transit* at para. 7.130.

has previously stated, "a failure on the part of a government institution to follow the guidelines outlined in the PWGSC Supply Manual would not, in and of itself, amount to a violation of the trade agreements unless following the procedures specified by the guidelines were required by the tender documents."[12] Nevertheless, the lack of notification is reflected in the Tribunal's cost award, as explained below.

[39] Finally, although the issue is not squarely before the Tribunal because of the outcome of this matter, the Tribunal queries whether the 2019 amendments to the *Regulations* are properly *intra vires*[13] the powers afforded by Parliament to the Governor in Council, when examined under the statutory provisions pursuant to which they were promulgated[14] and general principles of the common law.[15]

[40] Moreover, the Tribunal recalls that "Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly."[16] Yet the Tribunal cannot but remark that (as outlined above) the state of international law at the time of the 2019 amendments to the *Regulations* was and remains that the use of a national security exception must be rationally connected to *bona fide* national security concerns; invoking that exception cannot, either, constitute a disguised trade-limiting measure.[17] The Tribunal queries whether the 2019 amendments to the *Regulations* have the effect of limiting trade, by comprehensively ousting security-cleared Canadian domestic suppliers from access to the Tribunal. As such, the Tribunal also queries whether the 2019 amendments to the *Regulations* are consonant with Canada's federal-provincial obligations under the CFTA.

---

12 *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 41.

13 As the Federal Court of Appeal has stated: "It is a well-established tenet of administrative law that subordinate legislation may be challenged on several grounds. Subordinate legislation must be within the boundary of the legislative grant, both as to the content and purpose . . . . The short-hand label for this type of challenge is the '*ultra vires*' ground of review. Subordinate legislation may also be challenged on judicial review where the Governor in Council did not comply with statutory pre-conditions to promulgation . . . . Even decisions of broad social and economic public policy may be subject to a limited review on the basis of bad faith, no reasonable basis in fact or that the regulation was motivated by or directed to ulterior or collateral purposes . . . . Subordinate legislation may be attacked for reasonableness, albeit according to the decision-maker a broad margin of appreciation . . . . As noted by this Court . . . the fact that the subordinate legislation may reflect a broader policy or economic decision goes to the degree of deference, not to the question whether the regulation is subject to review." *Goodyear Canada Inc. v. Canada (Environment)*, 2017 FCA 149 at paras. 51-52. See also Paul Daly, *Regulations and Reasonableness Review* (29 January 2021), online: <https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/>.

14 According to the announcement of the regulatory amendment in the *Canada Gazette*, the new regulations were promulgated pursuant to paragraphs 40(a) and (i) of the *Canadian International Trade Tribunal Act.* See SOR/2019-162, s. 1, June 3, 2019, *Canada Gazette*, Part II, Volume 153, Number 12, online at: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-06-12/html/sor-dors162-eng.html>.

15 The principles of the common law include, for example, the principle of Parliamentary sovereignty, according to which the executive's prerogative powers cannot be used to alter the law of the land. See *R (Miller) v. Prime Minister*, [2019] UKSC 41 at para. 41, citing the *Case of Proclamations* (1611) 12 Co Rep 74. The state of Canadian law on the use of national security exceptions was, as cited above, *Harris FCA*, *Hewlett-Packard*, and *Eclipsys.*

16 *R. v. Hape*, 2007 SCC 26 at para. 39.

17 *Russia – Measures Concerning Traffic in Transit.*

COSTS

[41] Ocalink was not made aware that any exception to the trade agreements applied to this procurement before filing its complaint with the Tribunal. Therefore, the Tribunal awards Ocalink a nominal amount of $500 in complaint costs, to be paid by PWGSC.

CONCLUSION

[42] For the reasons above, the Tribunal hereby dismisses the complaint.

Peter Burn

Peter Burn
Presiding Member