



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2020-057

Vesta Health Systems Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Wednesday, January 6, 2021*

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IN THE MATTER OF a complaint filed by Vesta Health Systems 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 cease the Tribunal's inquiry pursuant to subsections 10(2) and (3) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602.

BETWEEN

VESTA HEALTH SYSTEMS INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

WHEREAS Vesta Health Systems Inc. (Vesta) filed this complaint on November 2, 2020;

AND WHEREAS the Canadian International Trade Tribunal decided, on November 7, 2020, to inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations (Regulations)*;

AND WHEREAS the Department of Public Works and Government Services (PWGSC) requested, on December 3, 2020, that the Tribunal cease its inquiry pursuant to subsections 10(2) and (3) of the *Regulations* because a national security exception had been invoked;

AND WHEREAS, on December 11, 2020, Vesta submitted its opposition to the motion to cease the inquiry;

AND WHEREAS, on December 16, 2020, PWGSC replied to Vesta's response to the motion to cease the inquiry;

AND WHEREAS subsection 10(2) obligates the Tribunal to order the dismissal of a complaint where a national security exception has been properly invoked;

THEREFORE, the Tribunal hereby ceases its inquiry into this complaint. The Tribunal awards complaint costs to Vesta in the amount of \$500.

Randolph W. Heggart

Randolph W. Heggart

Presiding Member

STATEMENT OF REASONS

OVERVIEW

[1] This complaint by Vesta Health Systems Inc. (Vesta) relates to a call for proposals (CFP) for research and development of innovative solutions for Canada's response to the COVID-19 pandemic. The CFP was issued by the Department of Public Works and Government Services (PWGSC) (Solicitation No. EN578-20ISCD/01).

[2] After the Tribunal had decided to conduct an inquiry into Vesta's complaint, PWGSC filed a motion requesting that the Tribunal cease its inquiry. PWGSC submitted that it had invoked a national security exception (NSE) for all solicitations related to the government's needs having to do with COVID-19, to which the solicitation at issue is related, and it argued that this NSE removed the Tribunal's jurisdiction to inquire into the complaint. Vesta opposed this motion, arguing that the NSE had been improperly invoked.

[3] For the reasons below, the Tribunal has decided to cease its inquiry into the complaint.

PROCEDURAL BACKGROUND

[4] PWGSC published the CFP on April 9, 2020.

[5] PWGSC notified Vesta that its bid was not successful on August 14, 2020. After corresponding with the Office of the Procurement Ombudsman (OPO), Vesta objected to PWGSC on August 28, 2020.

[6] More correspondence between PWGSC, Vesta, and OPO ensued. On October 19, 2020, PWGSC told Vesta that its technical team had re-evaluated Vesta's proposal but that the results were unchanged.

[7] Vesta filed its complaint with the Tribunal on November 2, 2020. The Tribunal accepted the complaint for inquiry on November 7, 2020.

[8] On December 3, 2020, PWGSC filed a motion requesting that the Tribunal cease its inquiry pursuant to subsections 10(2) and 10(3) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.¹

[9] On December 11, 2020, Vesta submitted its response to PWGSC's motion, opposing PWGSC's request to cease the inquiry. PWGSC replied on December 16, 2020.

POSITIONS OF PARTIES

[10] PWGSC has requested that the Tribunal cease its inquiry, on the grounds that an NSE has been invoked to remove the Tribunal's jurisdiction to inquire into the complaint. PWGSC relies on subsections 10(2) and 10(3) of the *Regulations*, which read as follows:

¹ SOR/93-602 [*Regulations*].

(2) The Tribunal shall order the dismissal of a complaint in respect of which a national security exception set out in the [applicable trade agreements] has been properly invoked by the relevant government institution.

(3) The national security exception is properly invoked when an assistant deputy minister, or a person of equivalent rank, who is responsible for awarding the designated contract has signed a letter approving that the national security exception be invoked and the letter is dated prior to the day on which the designated contract is awarded.

[11] In support of its motion, PWGSC submitted a letter dated March 14, 2020, which approved the invocation of the national security exception for procurements for goods and services required in order to respond to the COVID-19 pandemic.² This letter covers procurements conducted by PWGSC, and it applies until the World Health Organization (WHO) no longer declares the COVID-19 pandemic a “Public Health Emergency of International Concern”.³ 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 Stéphan Déry, the Assistant Deputy Minister of Real Property Services.⁴

[12] PWGSC argued that the NSE has been “properly invoked” according to the *Regulations*, because the Assistant Deputy Minister of Procurement is responsible for awarding the designated contract at issue in this complaint, and because the letter was signed before a contract was awarded. PWGSC admitted that the CFP made no mention of the NSE; however, PWGSC argued that this has no bearing on whether the Tribunal must cease its inquiry pursuant to subsections 10(2) and 10(3) of the *Regulations*, which do not require the NSE to be announced in advance.

[13] Vesta requested that PWGSC be estopped from using the NSE, arguing that PWGSC improperly engaged in spurious dispute resolution procedures, that disclosure of the NSE was untimely, and that the use of the NSE is contrary to good public policy and transparency. According to Vesta, PWGSC must inform bidders of the NSE in its tender documents, which it did not. Vesta submitted that it was given no notice of the NSE, either in its discussions with PWGSC officials or in the CFP, which indicated that the Canadian Free Trade Agreement⁵ applied to the procurement.⁶ Additionally, Vesta argued that the World Trade Organization and the Tribunal have both previously ruled that the invocation of an NSE must be justified by valid national security concerns.

ANALYSIS

[14] The Tribunal has decided to cease its inquiry under subsections 10(2) and 10(3) of the *Regulations*, as well as the NSE set out in Article 801(b) of the CFTA.⁷

² Exhibit PR-2020-057-20 at 55-60.

³ *Ibid.*

⁴ *Ibid.*

⁵ 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].

⁶ Exhibit PR-2020-057-20 at 8-9.

⁷ Article 801(b) of the CFTA reads as follows: “Nothing in this Agreement shall be construed to: . . . (b) prevent the Government of Canada from taking any action that it considers necessary to protect national security interests or, pursuant to its international obligations, for the maintenance of international peace and security.”

[15] The Tribunal finds that PWGSC has produced a letter which properly invokes the NSE, according to the requirements in subsection 10(3) of the *Regulations*. The letter predates the awarding of any contract resulting from the solicitation at issue, and it is signed by the appropriate official (i.e. the Assistant Deputy Minister of Procurement at PWGSC). Although the letter is conditional on the continued existence of the COVID-19 pandemic as per the WHO, it is common knowledge that the pandemic is ongoing. The solicitation in issue is aimed at responding to the COVID-19 pandemic, as the letter requires.

[16] Finally, the Tribunal also wishes to note that its decision to cease this inquiry does not necessarily foreclose all avenues of recourse, as Vesta may have the courts⁸ and/or OPO as alternatives to the Tribunal. Indeed, the record shows that Vesta has already been in communication with OPO.

COSTS

[17] Given PWGSC's untimely disclosure of the NSE to Vesta, the Tribunal awards Vesta a nominal amount of \$500 in complaint costs, to be paid by PWGSC. The Tribunal considers that Vesta could not have known about the NSE in advance of filing its complaint, as PWGSC did not disclose the NSE until after the complaint had been accepted for inquiry.

CONCLUSION

[18] For the reasons above, the Tribunal hereby ceases its inquiry into the complaint.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

⁸ For example, see the the doctrines of contract breach and duty of fairness to bidders under the “Contract A” and “Contract B” paradigm, adopted by the Supreme Court of Canada in *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111, 1981 CanLII 17 (SCC). See also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4.