



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2020-089

NUA Office Inc.

*Decision made  
Wednesday, February 17, 2021*

*Decision and reasons issued  
Wednesday, March 3, 2021*

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**

**NUA OFFICE INC.**

**AGAINST**

**THE DEPARTMENT OF HEALTH**

**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.

Frédéric Seppey  
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Frédéric Seppey  
Presiding Member

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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 procurement by the Department of Health (Health Canada) for the provision of office chairs (Solicitation No. 1000227978) through a Request for Bids (RFB) under the Department of Public Works and Government Services' Supply Arrangement (SA) E60PQ-120001/xxx/PQ.<sup>3</sup>

[3] NUA Office Inc. (NUA) has challenged Health Canada's decision not to award it the contract under the above-noted procurement process. NUA argues that its bid was inappropriately rejected due to incorrect evaluations of its bid, first that its bid was not the lowest-priced compliant bid and, subsequently, that its bid did not comply with all mandatory criteria, notably Mandatory Technical Criteria (MTC) 1 which required specific dimensions for the chairs to be procured (notably that the backrest be between 17.7 and 26 inches in height).<sup>4</sup> These allegations are against the backdrop of debriefings from Health Canada which appeared to NUA to repeatedly alter the basis of the decision not to award it the contract.

### BACKGROUND

[4] The following series of events took place on February 10, 2021:

- NUA received an email from Health Canada stating that, although its proposal was found to be responsive to the mandatory requirements of the RFB, it was not the lowest-priced compliant bid and so NUA would not be awarded the contract;<sup>5</sup>
- NUA replied to Health Canada that its bid was in fact priced lower than the amount Health Canada had indicated for the winning bid;<sup>6</sup>
- Health Canada wrote back to NUA acknowledging that its bid was in fact the lowest-priced, but indicating that the bid did not comply with one of the mandatory criteria (MTC 1) and therefore could not be considered;<sup>7</sup>

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

<sup>2</sup> SOR/93-602 [*Regulations*].

<sup>3</sup> Various suppliers appear to have previously been awarded individual SAs for office chairs, each with three-digit identifiers following the initial SA number. Information on [Buyandsell.gc.ca](http://Buyandsell.gc.ca) identifies NUA Office Inc.'s SA as E60PQ-120001/044/PQ.

<sup>4</sup> Exhibit PR-2020-089-01B at 18.

<sup>5</sup> *Ibid.* at 29.

<sup>6</sup> *Ibid.* at 28.

<sup>7</sup> *Ibid.* at 28.

- NUA responded to Health Canada's conclusion that its bid was not compliant with MTC 1, pointing to certified test results from its bid documents which it argued demonstrated compliance.<sup>8</sup>

[5] On February 12, 2021, Health Canada wrote to NUA via email stating that it had reviewed NUA's bid and found that it was non-compliant with a different mandatory criterion, MTC 2, which required the submission of a test report that confirms compliance for stability of the proposed product.<sup>9</sup> More specifically, Health Canada requested NUA to identify where, in the lab reports submitted with its bid, could be found confirmation that the lab reports were for the specific model of chair proposed by NUA (namely, the HON Ignition 2.0 HIWMM chair model). Health Canada also noted that the HON Ignition 2.0 HIWMM chair was not a product approved under the SA, and therefore could not be considered.

[6] NUA responded that the inconsistent reasons provided for rejecting its bid (first, by saying it was not the lowest one, then by noting it was non-compliant with MTC 1 and, finally, with MTC 2) disclosed a flawed evaluation process and stated its intention to file a complaint with the Tribunal, which it did the same day.<sup>10</sup>

## ANALYSIS

[7] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry into a complaint if all of the following conditions are met:

- a. the complaint has been filed within the time limits prescribed by section 6;
- b. the complainant is a potential supplier;
- c. the complaint is in respect of a designated contract; and
- d. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

[8] Based on the timeline of events in NUA's complaint outlined above, the complaint is timely as it was filed within the time limits required under section 6 of the *Regulations*. However, for the reasons set out below, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the applicable trade agreements, including the Canadian Free Trade Agreement (CFTA).<sup>11</sup>

### **No reasonable indication of a breach of the applicable trade agreements**

[9] Pursuant to subsection 7(1) of the *Regulations*, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal, discloses a reasonable indication that the procurement was not conducted in accordance with any of

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<sup>8</sup> Exhibit PR-2020-089-01 at 41.

<sup>9</sup> *Ibid.* at 37-38.

<sup>10</sup> *Ibid.* at 37.

<sup>11</sup> According to the Notice of Proposed Procurement for this solicitation available on Buyandsell.gc.ca, several of Canada's trade agreements apply to this procurement, including the Canadian Free Trade Agreement, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

the applicable trade agreements set out in that subsection. The Tribunal has previously described the “reasonable indication” threshold as follows:

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case. . . . However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.<sup>12</sup>

[10] In its complaint form, in the section where complainants are invited to provide a detailed statement of facts and arguments supporting the complaint, NUA wrote simply “see attached emails,” referring to the email correspondence between itself and Health Canada referred to above. While this correspondence record appears to indicate at times inconsistent (and arguably disorganized) communication by Health Canada of the results of the solicitation, the Tribunal finds, for the reasons outlined below, that it does not disclose a reasonable indication of a breach of the applicable trade agreements.

[11] NUA’s grounds of complaint must be inferred from the email correspondence between itself and Health Canada which it submitted in its complaint. These grounds would appear to be as follows: first, that Health Canada incorrectly determined that NUA’s bid was not responsive to the mandatory criteria contained in the RFB, specifically MTC 1 and MTC 2, including by refusing to consider whether the specific model of chair submitted in NUA’s bid could be considered for acceptance; and, second, that Health Canada did not provide NUA with a sufficient explanation for why its bid was not selected for award of the resulting contract.

[12] As indicated above, the CFTA applies to this procurement process. While NUA did not cite specific trade agreement provisions in its complaint, the most relevant provisions of the CFTA would appear to be Articles 509.3, 515.5 and 516.1.

[13] Article 509.3 provides as follows:

A procuring entity should avoid the use of technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier. If the technical specifications are used in that manner, a procuring entity shall indicate that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirement of the procurement by including words such as “or equivalent” in the tender documentation.

[14] Article 515.5 provides as follows:

Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

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<sup>12</sup> *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6.

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

[15] Article 516.1 provides as follows:

A procuring entity shall promptly inform participating suppliers of its contract award decisions, and, on the request of a supplier, shall do so in writing. Subject to Article 517, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender.

#### Compliance with mandatory criteria

[16] At different times, Health Canada indicated to NUA that its bid was not compliant with MTC 1 and MTC 2. The Tribunal will examine in turn the issue of compliance of NUA's bid under these two criteria.

#### **Compliance with MTC 1**

[17] MTC 1 provides as follows:

The Bidder must provide a line drawing and/or a 3-D with dimensions of product "A1" as described at Annex A of this solicitation.

To demonstrate compliance with MTC 1, the Bidder must submit a drawing and/or 3-D of product "A1" that substantiates, at a minimum:

- Depth
- Width
- Height<sup>13</sup>

[18] Annex A of the RFB contains a table laying out requirements for different components of the chairs to be procured, with each component identified by a letter of the alphabet. It also presents a visual diagram of a chair, with individual components labelled with the letters corresponding to those components as listed in the table. For components for which the table sets out a required size, or a range of sizes, the diagram provides a visual indication of how that component is to be measured in the form of a straight horizontal or vertical line whose ends form the points between which measurement is to be taken. The table contains two rows setting out requirements for the backrest, both designated with the letter "B", with the first row titled "Backrest Height" indicating a requirement for a "standard" backrest height range of between 450 mm (17.7 inches) and 660 mm (26.0 inches). The diagram, in which the backrest of the chair is clearly labelled with the letter "B", includes a vertical line indicating that the backrest is to be measured from the bottom of the chair's seat to the top of the backrest component, excluding any headrest.<sup>14</sup>

[19] NUA's bid included several pages of technical specifications for five different models of the HON HIWMM Ignition chair. The first page of these specifications contains a diagram of a chair with alphabetically labelled lines demonstrating how each component should be measured, similar to

<sup>13</sup> Exhibit PR-2020-089-01B at 10.

<sup>14</sup> *Ibid.* at 18.

the diagram in Annex A of the RFB.<sup>15</sup> The second page of the specifications includes a table listing the “key dimensions” of the components of five different models of the HON HIWMM Ignition chair, with alphabetically labelled rows for each component, again similar to the table laid out at Annex A of the RFB.<sup>16</sup> In NUA’s specifications, the table row providing dimensions for “Back Size – Height” is labelled with the letter “J”, and corresponds to a vertical arrow in the diagram, also labelled with the letter “J”, which illustrates measurement from the bottom to the top of the backrest component of the diagrammed chair. Row “J” of the table indicates the height of the backrest of every chair model as “29.0 in.” (twenty-nine inches). The measurement diagram in the specifications also indicates that this measurement seems to be taken from the top of the seat component, not the bottom as indicated in the RFB diagram, indicating that the back height of the various models of HON Ignition HIWMM may be greater than 29 inches when measured according to the instructions in the RFB.

[20] In its email of February 10, 2021 (3:24 p.m.), NUA objected to Health Canada’s finding of non-compliance with MTC 1 on the basis that the lab tests included with its bid indicate a backrest height of 640 mm, or approximately 25.2 inches, within the acceptable range set out in Annex A of the RFB.<sup>17</sup> However, as it will be reviewed under the analysis of MTC 2, it remains unclear whether the test results provided by NUA with the bid are for the HON Ignition HIWMM chair, the report being silent in this regard. When asked by Health Canada to clarify whether the test reports were, in fact, for the HON Ignition HIWMM chair, NUA elected not to provide an answer and to proceed with its complaint to the Tribunal.<sup>18</sup>

[21] Against this analysis, and especially upon review of the specification sheet from the manufacturer provided as part of NUA’s bid, which in the Tribunal’s view was reasonable for the evaluators to consider as an authoritative and accurate source of information about the product offered by NUA, the Tribunal comes to the conclusion that NUA failed to demonstrate in a convincing way that its product met MTC 1.

## Compliance with MTC 2

[22] MTC 2 provides as follows:

The Bidder must offer products that have successfully passed all the testing as detailed in Annex A of the Office Seating Supply Arrangement E60PQ-120001

To demonstrate compliance with MTC 2, the Bidder must submit a copy of the test report that confirms compliance for **stability** for product “A1”. At a minimum, the test report must substantiate the following:

- Name and address of lab
- Date of report
- Description of the test item
- Test Results (compliant)

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<sup>15</sup> Exhibit PR-2020-089-01 at 20.

<sup>16</sup> *Ibid.* at 21.

<sup>17</sup> *Ibid.* at 26, 41.

<sup>18</sup> *Ibid.* at 37-38.

[23] On February 12, 2021, Health Canada informed NUA that a team of Health Canada representatives had reviewed its bid and found it not to be compliant with MTC 2.<sup>19</sup> This email requested NUA to identify where, in the lab reports submitted with its bid, could be found confirmation that the lab reports were for the HON Ignition 2.0 HIWMM chair model. Health Canada further noted that the HON Ignition 2.0 HIWMM chair model, the model listed in NUA's bid under "Annex B – Pricing."<sup>20</sup> was not approved under the SA and therefore could not be considered. It was in response to this email that NUA ended the discussion and informed Health Canada of its intention to file the present complaint to the Tribunal.<sup>21</sup>

[24] NUA states the following in its complaint without further elaboration: "we are compliant for MTC 2". The Tribunal can find nothing in NUA's complaint which appears to confirm that the three test reports included in its bid pertain to the chair model in question.<sup>22</sup> Nor does its complaint include the SA documentation or provide some alternative evidentiary basis for determining whether its bid met the requirements of MTC 2, or that the solicitation imposed improper technical specifications such as might indicate a breach of Article 509 of the CFTA. Without such evidence, the Tribunal fails to see on what basis it can be argued that Health Canada incorrectly evaluated NUA's bid against the requirement to demonstrate the requisite back height under MTC 1, or that it had undergone successful testing based on MTC 2.

[25] In its final email to Health Canada,<sup>23</sup> NUA stated that it has successfully supplied the same chairs to other government departments without such explicit demonstration. This does not mean it was unreasonable for Health Canada to request documentation confirming the compliance of NUA's bid with the mandatory criteria. This is especially so considering the explicit instructions to "provide a line drawing and/or a 3-D with dimensions of product" to demonstrate compliance with MTC 1, and to "submit a copy of the test report that confirms compliance for **stability**" including a "[d]escription of the test item," in MTC 2. As the Tribunal has previously stated, it is a bidder's responsibility to ensure that its proposal is compliant with all essential elements of a solicitation,<sup>24</sup> which compliance the bidder bears the onus of demonstrating.<sup>25</sup>

[26] In the Tribunal's view, NUA's frustration with the inconsistent information from Health Canada as to the reasons its bid was not selected is understandable. Whether any deficiencies in Health Canada's communication of these reasons disclose a reasonable indication of a breach of the applicable trade agreements is discussed below. However, it is difficult to see what in NUA's complaint the Tribunal could point to in deciding that Health Canada's rejection of its bid, on the basis of non-compliance with the mandatory criteria, might reasonably indicate a breach of the CFTA or other trade agreements.

#### Sufficiency of the debriefing process

[27] Health Canada provided various reasons as to why NUA's bid was not selected: first that it was compliant with the terms of the procurement but not the lowest-priced; then, that it was the

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<sup>19</sup> *Ibid.* at 37-38.

<sup>20</sup> Exhibit PR-2020-089-01B at 20.

<sup>21</sup> Exhibit PR-2020-089-01 at 37-38.

<sup>22</sup> *Ibid.* at 23-36.

<sup>23</sup> *Ibid.* at 37.

<sup>24</sup> *Ottawa Metro towing/Metro Tow Trucks* (2 May 2019), PR-2019-008 (CITT) at para. 14, citing *Tektronix Canada Inc.* (20 November 2015), PR-2015-041 (CITT) at para. 16.

<sup>25</sup> *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para. 16.



lowest-priced but not compliant with MTC 1; and finally that it was non-compliant with MTC 2. It might be argued, although NUA's complaint does not explicitly do so, that this reflects a breach of the government's obligation to provide an explanation of the reasons why NUA's bid was not selected.

[28] However, in the Tribunal's view, Health Canada's ongoing discussion on the evaluation can more accurately be viewed as providing NUA an opportunity to ensure that the evaluation of its bid was thorough and complete. This is evidenced by Health Canada's acknowledgment that NUA's bid was the lowest-priced when presented with information confirming that fact. Health Canada then requested further information which might confirm the compliance of NUA's bid with MTC 1 and MTC 2. As outlined above, the Tribunal does not view this request as unreasonable.

[29] NUA could at any time have requested a formal debriefing, as provided for in clause 1.5 of the RFB.<sup>26</sup> It could also have lodged an objection with Health Canada if it considered the debriefing to disclose impropriety in the conduct or outcome of the evaluation. This would have preserved NUA's ability to pursue recourse to the Tribunal, the time limits for which would not have begun until it received a reply from Health Canada denying the relief it sought. If it had then filed a complaint, the Tribunal would have had the benefit of Health Canada's full explanation and NUA's response thereto.

[30] Instead, NUA ended its discussions with Health Canada and submitted its complaint to the Tribunal. The Tribunal must therefore make a decision based on the information contained in NUA's complaint. That information does not appear to suggest that Health Canada at any point refused to provide NUA with a debriefing, or that it failed to meaningfully respond to NUA's questions regarding the outcome of the solicitation. As such, the Tribunal finds no reasonable indication that Health Canada breached its obligation to provide NUA with the reasons for which its bid was not selected.

## **Conclusion**

[31] In the Tribunal's view, the information in NUA's complaint suggests that the manner in which Health Canada communicated the results of the procurement to NUA was flawed, but also that Health Canada was seriously engaging with NUA's concerns until NUA ended the discussion. For the reasons outlined above, the Tribunal finds that such flaws as can be found in Health Canada's actions do not rise to a level which reasonably indicates a breach of the applicable trade agreements. That being said, in the Tribunal's view, this complaint raises several points worthy of comment.

[32] First, it is important for complainants to be as clear and specific as possible in demonstrating how their bid meets the requirements of a solicitation, both in their bid documentation and in any subsequent complaint to the Tribunal.

[33] Second, it behooves unsuccessful bidders to consider available recourse with the procuring entity such as requesting a formal debriefing and making a formal objection thereto, although the Tribunal is careful to emphasize that doing so is in no way a precondition for filing a complaint. In this case, a formal debriefing and objection regarding the evaluation of NUA's bid might have provided additional evidence informing the Tribunal's decision as to whether to conduct an inquiry.

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<sup>26</sup> Exhibit PR-2020-089-01B at 5.

[34] Third, the Tribunal does wish to emphasize the obligation of procuring entities, when requested, to provide unsuccessful bidders with an accurate explanation as to why they were not successful, as required under Article 516.1 of the CFTA and comparable provisions of the other trade agreements. In this case, at least one error occurred in this regard, namely the initial communication by Health Canada that NUA's bid was rejected on the basis that it did not contain the lowest evaluated price. Health Canada subsequently corrected that error and indicated that it had rejected NUA's bid on other grounds which, based on the evidence and for the reasons outlined above, the Tribunal finds were reasonable. As such, the Tribunal does not consider that error alone to reasonably indicate a breach of obligation under the CFTA. However, the Tribunal will look carefully at both the accuracy and clarity of such communications in assessing claims of such a breach.

[35] Finally, although the complainant in this case appears to have been aware of the Tribunal's procedures, the Tribunal notes that Health Canada's regret letter informing NUA that it was not the successful bidder did not indicate potential recourse to the Tribunal. While acknowledging that Health Canada directed NUA to the Office of the Procurement Ombudsman (OPO),<sup>27</sup> and that the solicitation documents effectively outline recourse to both the OPO and the Tribunal,<sup>28</sup> the Tribunal takes this opportunity to reiterate its position that procuring entities should immediately and voluntarily provide such information in communicating the results of a solicitation process to unsuccessful bidders.<sup>29</sup>

## DECISION

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

Frédéric Seppey  
Frédéric Seppey  
Presiding Member

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<sup>27</sup> *Ibid.* at 29.

<sup>28</sup> *Ibid.* at 8.

<sup>29</sup> See, for example, *Expert Systèmes (148650 Canada Inc.)* (20 August 2020), PR-2020-027 (CITT) at paras. 20-24; *Seignior Chemical Products Limited, trading as SCP SCIENCE* (6 December 2019), PR-2019-048 (CITT) at para. 35; *Kaméléons & cie Solutions Design Inc.* (26 November 2019), PR-2019-047 (CITT) at para. 22; *R.H. MacFarlands (1996) Ltd.* (23 December 2013), PR-2013-029 (CITT) at paras. 30-31; *ADR Education* (18 July 2013), PR-2013-009 (CITT) at para. 34.