



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2021-006

Wärtsilä Canada Incorporated

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, August 3, 2021*

*Reasons issued
Monday, August 16, 2021*

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IN THE MATTER OF a complaint filed by Wärtsilä Canada Incorporated 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

WÄRTSILÄ CANADA INCORPORATED

Complainant

AND

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

**Government
Institution**

DETERMINATION

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint, ceases its inquiry and terminates all proceedings related thereto.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal 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 Wärtsilä Canada Incorporated. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the cost award is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal's Statement of Reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

The intervener, Madsen Power Systems Inc., shall bear its own costs.

Frédéric Seppey

Frédéric Seppey
Presiding Member

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

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STATEMENT OF REASONS

OVERVIEW

[1] The complaint concerns a procurement (Solicitation No. F7049-200079/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO). The Invitation to Tender (ITT) is for the docking, inspection, repair, and maintenance and alterations of the Canadian Coast Guard Vessels CCGS Cygnus and CCGS Cape Roger (the vessels).

[2] The complainant, Wärtsilä Canada Incorporated (Wärtsilä Canada), alleges that PWGSC awarded the contract to a non-compliant bidder. Wärtsilä Canada seeks that the designated contract be terminated and that the contract be awarded to a compliant bidder.

[3] For the reasons below, the Tribunal ceases its inquiry into the complaint, having determined that Wärtsilä Canada does not have standing to bring a complaint before the Tribunal.

BACKGROUND

[4] On December 7, 2020, PWGSC published the ITT on Buyandsell.gc.ca. The ITT was subject to fifteen amendments. The bid closing date was March 5, 2021.¹

[5] The ITT covered a range of alterations and repairs to the vessels ranging from renewals of the washrooms, mast repairs, inspections and cleaning of various parts of each vessel.

[6] The ITT contained a specification which required that the contractor obtain the services of an Original Equipment Manufacturer (OEM) representative to oversee and perform an overhaul on both the port and starboard (Stbd) engines of the vessels.

[7] This specification (Specification H-18) reads, in relevant part, as follows:

1.1 The intent of this specification is for The Contractor to obtain the services of an OEM Representative to oversee and perform a 40,000 hr overhaul on both Port and Stbd Main Engines for each of the two vessels.²

[8] The equipment specification described the engines of the vessels as follows:

CCGS Cygnus

Polar Nohab F212V

Serial Numbers 3111 and 3112

CCGS Cape Roger

Polar Nohab F212C

Serial Numbers 2704 and 2705

¹ Exhibit PR-2021-006-07.

² Exhibit PR-2021-006-01 at 231.

[9] Wärtsilä Canada is a marine diesel engine manufacturer, rebuilder and supplier and is a subsidiary of Wärtsilä Corporation. Wärtsilä Corporation, a company based in Finland, is the sole shareholder of Nohab, a diesel engine manufacturer based in Sweden.

[10] Wärtsilä Canada submitted proposals to St John's Dockyard Limited (Newdock) and other shipyards for OEM Services required by Specification H-18 of the ITT.³ Newdock ultimately did not retain Wärtsilä Canada's services.

[11] Newdock submitted a bid in response to the solicitation. In its bid, Newdock indicated that Madsen Power Systems Inc. (Madsen) would be retained for the purposes of Specification H-18.⁴

[12] On March 18, 2021, the contract was awarded to Newdock.⁵

[13] On April 8, 2021, Wärtsilä Canada contacted the Canadian Coast Guard (CCG) to raise certain concerns with respect to Newdock's ability to comply with Specification H-18.⁶ Wärtsilä Canada was informed that Madsen was retained by the winning bidder to provide the services to be performed by an OEM representative.

[14] On April 9, 2021, Newdock provided PWGSC with a letter containing information in relation to its ability to fulfill Specification H-18.⁷

[15] From April 8 to April 20, 2021, Wärtsilä Canada, the CCG and the DFO held written and oral discussions.⁸

[16] On April 30, 2021, Wärtsilä Canada wrote to PWGSC to protest the contract award to Newdock on the basis that Wärtsilä Canada was the only OEM for the engines of the vessels, and therefore, the only supplier that could comply with Specification H-18.⁹

[17] On May 3, 2021, Wärtsilä Canada filed the present complaint.

[18] On May 10, 2021, the Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.¹⁰

[19] On June 11, 2021, Madsen was granted leave to intervene, after the Tribunal gave due consideration to relevant factors.

³ Exhibit PR-2021-006-01 at 10.

⁴ Exhibit PR-2021-006-12.C at 8.

⁵ Exhibit PR-2021-006-01 at 814.

⁶ *Ibid.* at 822.

⁷ Exhibit PR-2021-006-12.C at 9; Exhibit PR-2021-006-17 at 2.

⁸ Exhibit PR-2021-006-01 at 816.

⁹ Exhibit PR-2021-006-12.C at 9.

¹⁰ R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

POSITION OF THE PARTIES

Wärtsilä Canada

Compliance with the trade agreements

[20] The crux of Wärtsilä Canada's complaint concerns Madsen's ability to fulfill Specification H-18. Wärtsilä Canada takes the position that Madsen is not an OEM representative for the engines of the Vessels, as contemplated by Specification H-18.¹¹

[21] Wärtsilä Canada asserts that it is the only OEM for the engines of the vessels, and therefore, the only supplier that could comply with Specification H-18. In support of its assertion, Wärtsilä Canada argues that it is the only supplier to hold the relevant intellectual property rights as a subsidiary of the sole shareholder of Nohab, the Swedish manufacturer of the Port and Stbd main engines of the vessels covered by the ITT.¹²

Standing

[22] Wärtsilä Canada asserts that it has public interest standing to bring the complaint. Wärtsilä Canada alleges that it meets the public interest criteria established in *Delta Air Lines Inc v. Lukács*¹³ and in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*.¹⁴

[23] First, Wärtsilä Canada submits that it has a clear legal right to ensure that its intellectual property is recognized, protected and enforced. Second, it argues that it has a genuine interest as a corporate citizen to ensure that procurement processes are conducted in a fair and legal manner. Third, it alleges that there is a public interest concern that allowing such work to be carried out by what it alleges to be a non-OEM representative creates a risk for public safety.¹⁵

Timeliness

[24] Wärtsilä Canada takes the position that its complaint is timely. It argues that it was made aware that Madsen had been retained by Newdock on April 8, 2021. Wärtsilä Canada submits that it filed its objection on April 12, 2021, and received a response to such objection on April 20, 2021. Wärtsilä Canada therefore argued that it filed its complaint on May 4, 2021, within 10 working days of PWGSC's response to the objection.¹⁶

¹¹ Exhibit PR-2021-006-01 at 14.

¹² *Ibid.* at 13.

¹³ 2018 SCC 2, [2018] 1 S.C.R. 6 [*Delta Air Lines*].

¹⁴ 2012 SCC 45, [2012] 2 S.C.R. 524 [*Downtown Eastside*].

¹⁵ Exhibit PR-2021-006-01 at 13.

¹⁶ *Ibid.* at 15.

PWGSCCompliance with the trade agreements

[25] PWGSC submits that it conducted a fair evaluation of the bids. As such, it contends that Newdock's bid met the mandatory requirements of the ITT and it was reasonably evaluated as the successful bid.¹⁷

[26] PWGSC states that Specification H-18 of the ITT required that the successful bidder contract with an OEM capable of providing the requested overhaul services. It was open to bidders to specify which subcontractor they intended to use and to supply the requisite certifications of OEM status to PWGSC if requested.

[27] PWGSC states that Newdock provided the requisite certifications. PWGSC contends that it was entitled to rely on such certifications.

[28] PWGSC further argues that to the extent that there may, in the future, be any problems with the performance of the work, this is a matter of contract administration, which is outside the Tribunal's jurisdiction.

Standing

[29] PWGSC submitted that Wärtsilä Canada does not have standing to bring the complaint. PWGSC argued that Wärtsilä Canada, as a potential subcontractor to a bidder, cannot qualify as a bidder or a prospective bidder as it does not have the demonstrated capacity to fulfill the requirements of the procurement.¹⁸

[30] PWGSC takes the position that there is no public interest standing before the Tribunal.

[31] PWGSC submits that the Supreme Court of Canada's decision in *Delta Air Lines* is inapplicable to this case. PWGSC argues that in *Delta Air Lines*, the Court held that the availability of public interest standing before a statutory tribunal depended on a reasonable interpretation of the legislative scheme. Applying these principles to the present complaint, PWGSC argues that unlike the statute at issue in *Delta Air Lines*, the Tribunal's statute does not import broad discretion to hear complaints brought by parties who do not meet the exacting standing requirements.

[32] Finally, PWGSC argues that any recognition of public interest standing before the Tribunal would be inconsistent with the purpose of the Tribunal's statutory regime.

MadsenCompliance with the trade agreements

[33] Madsen argues that Newdock is fully compliant with Specification H-18. Madsen puts forward similar arguments to those of PWGSC. Madsen takes issue with Wärtsilä Canada's allegations concerning its intellectual property rights and contends that Wärtsilä Canada has provided

¹⁷ Exhibit PR-2021-006-12.C at 15-17.

¹⁸ *Ibid.* at 12-14.

no evidence to support its claims. Madsen further contends that British Polar Engines Limited has been supplying parts associated with Specification H-18 for decades.¹⁹

Standing

[34] Madsen argues that Wärtsilä Canada is not a potential supplier. Madsen makes similar arguments to those of PWGSC.

Timeliness

[35] Madsen further argues that Wärtsilä Canada's complaint is untimely. Madsen submits that the closing of the solicitation is considered deemed denial of any protest. In this case, the solicitation closed on March 5, 2021. Madsen therefore argues that to be considered timely, Wärtsilä Canada should have filed its complaint within 10 working days of the bid closing date (i.e. March 19, 2021).²⁰

ANALYSIS

Preliminary issue: does Wärtsilä Canada have standing?

[36] The crux of the issue before the Tribunal is whether Wärtsilä Canada has public interest standing to bring the present complaint.

[37] Wärtsilä Canada does not argue that it is a potential supplier within the meaning of section 30.11 of the *CITT Act*. Rather, Wärtsilä Canada refers to the Supreme Court of Canada's decision in *Delta Air Lines*²¹ in support of its contention that it should be granted public interest standing.

[38] PWGSC argues that *Delta Air Lines* is not relevant to the present complaint. The Tribunal agrees.

[39] In *Delta Air Lines*, the issue was whether the Canadian Transportation Agency (Agency)'s approach to standing was a reasonable exercise of its discretion under the *Canadian Transportation Act (CTA Act)*.²² The Court reasoned that the Agency presumed public interest standing was available and then applied a test that could never be met, which could not be what Parliament intended.²³ The Court found that the total denial of public interest standing was inconsistent with a reasonable interpretation of the *CTA Act*, which conferred a broad discretion to the Agency to hear complaints. The Court therefore held that the Agency's approach to standing unreasonably fettered its discretion.

[40] Drawing on these principles, it is clear that *Delta Air Lines* does not stand for the proposition that administrative decision makers should approach the standing question as if bound by the test for

¹⁹ Exhibit PR-2021-006-17 at 3-5.

²⁰ *Ibid.* at 2-3.

²¹ In its comments to the Government Institution Report, Wärtsilä Canada also refers to the Supreme Court of Canada's decision in *Downtown Eastside*. The Tribunal notes that *Delta Airlines* refers to the public interest standing test that was set out in *Downtown Eastside*.

²² *Delta Air Lines* at para. 13.

²³ *Ibid.* at paras. 13-20.

standing as applied in the civil courts. In fact, in *Delta Air Lines*, the Court found that it was unreasonable for the Agency to do so considering its discretion under the *CTA Act*.²⁴

[41] It is a well-established principle that an administrative tribunal is bound to look to its enabling statute for the limits of its jurisdiction.²⁵ *Delta Air Lines* does not put into question this principle. Fundamentally, in *Delta Air Lines*, the Court examined the *CTA Act* with a view of assessing whether the Agency had reasonably interpreted it.

[42] The Tribunal's enabling legislation is the *CITT Act*. Access to the Tribunal is governed by subsection 30.11(1) of the *CITT Act*, which provides that "a potential supplier may file a complaint with the 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."

[43] A "potential supplier" is defined at section 30.1 of the *CITT Act* as "a bidder or prospective bidder on a designated contract."

[44] The Tribunal has previously found that a plain and ordinary reading of the definition of "potential supplier" in section 30.1 of the *CITT Act* requires that the phrase "a bidder or prospective bidder" not be read in isolation, but rather in reference to a particular "designated contract".²⁶ Section 30.1 of the *CITT Act* defines a "designated contract" as "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations."

[45] Nothing in these provisions imports broad discretion for the Tribunal to hear complaints brought by parties who do not meet the standing requirements specified by Parliament. Instead, Parliament expressly limited standing before the Tribunal to "potential suppliers" within the meaning of the *CITT Act*.

[46] As such, the *CITT Act* cannot be reasonably interpreted to mean that persons who are not potential suppliers (i.e. neither bidders nor prospective bidders on a designated contract) have standing to bring complaints before the Tribunal. In enacting the procurement review scheme under the *CITT Act*, Parliament left no room for discretion to the Tribunal to hear complaints from anyone other than a "potential supplier" within the meaning of the *CITT Act*. A contrary interpretation would amount to a misguided application of the principles set out in *Delta Air Lines* and would be at odds with the Tribunal's governing legislative scheme.

[47] The Tribunal therefore finds that no public interest standing exists before the Tribunal having regard to the relevant provisions of the *CITT Act*. Rather, Parliament expressly, and specifically,

²⁴ *Ibid.* at para. 14.

²⁵ *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*] at paras. 45 and 57. In *Cooper*, the Supreme Court of Canada confirmed that no administrative tribunal has an independent source of jurisdiction pursuant to subsection 52(1) of the Constitution. The Court also held that when deciding whether a complaint falls within its jurisdiction, an administrative tribunal is bound to look to its enabling statute for the limits of that jurisdiction. This principle was espoused by the Supreme Court of Canada in *Northrop Grumman Overseas Services Corp v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309 [*Northrop Grumman*] at para. 44, where the Court held that the Tribunal is "a statutory tribunal and access to it must be found in the relevant statutory instruments."

²⁶ *Flag Connection Inc. v. Department of Public Works and Government Services* (3 September 2009) PR-2009-026 (CITT) [*Flag*] at para. 17.

provided a mechanism for “potential suppliers”, a defined term, to bring complaints to the Tribunal concerning any aspect of the procurement process that relates to a designated contract.

[48] The foregoing is sufficient to conclude that Wärtsilä Canada does not have standing to file this complaint. As noted above, Wärtsilä Canada does not take the position that it is a potential supplier within the meaning of section 30.1 of the *CITT Act*.

[49] For completeness, however, the Tribunal will examine whether Wärtsilä Canada can be considered a potential supplier within the meaning of section 30.1 of the *CITT Act*.

[50] Wärtsilä Canada did not submit a bid in relation to the designated contract in issue; it is therefore not a bidder. It is also not a prospective bidder. In this regard, the Tribunal has held that two requirements must be met in order to be considered a prospective bidder in relation to a particular designated contract. First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, the complainant must be capable of submitting a proposal for the procurement at issue.²⁷

[51] The Tribunal has also held that subcontractors or suppliers capable of fulfilling only a portion of the requirement do not have standing as potential suppliers to bring a complaint before the Tribunal.²⁸

[52] It is uncontested that Wärtsilä Canada does not have the technical and financial capability of fulfilling the requirements of the contract at issue, which contains a vast range of work which the Tribunal understands can be performed by shipyards with the assistance of various subcontractors. In this vein, Wärtsilä Canada does not, as a remedy, request to be awarded the designated contract.

[53] The Tribunal does not consider Wärtsilä Canada, as a potential subcontractor to the winning bidder, to be a “potential supplier” within the meaning of the *CITT Act*. Finally, given that the solicitation has closed, Wärtsilä Canada would not, in any event, be capable of submitting a proposal for the procurement at issue.

[54] In response to PWGSC and Madsen’s arguments, Wärtsilä Canada argued that PWGSC is estopped from challenging Wärtsilä Canada’s standing.²⁹ The Tribunal understands that the crux of Wärtsilä Canada’s argument is that because PWGSC did not oppose that Madsen can be granted intervenor status, and that, having recognized that Madsen was an interested party in relation to the subject matter of the complaint, PWGSC cannot challenge that Wärtsilä Canada has public interest standing to bring a complaint. The Tribunal disagrees.

[55] Section 30.17 of the *CITT Act* provides that an interested party may seek leave to intervene in Tribunal proceedings in relation to a complaint. The notion of interested party is defined at section 30.1 of the *CITT Act* as “. . . a potential supplier *or* any person who has a material and direct interest in any matter that is the subject of a complaint” [emphasis added].

²⁷ *Flag* at para. 20.

²⁸ *Shaw Industries Inc.* (26 February 2015), PR-2014-059 (CITT) at para. 14.

²⁹ Exhibit PR-2021-006-19 at paras. 45-48.

[56] Therefore, “potential supplier” and “interested party” have distinct statutory definitions. The statutory definition of “interested party” includes potential suppliers, but not *vice versa*. The definition of “interested party” is broader than that of “potential supplier”.

[57] In the Tribunal’s view, the fact that PWGSC did not challenge Madsen’s status as an “interested party” as defined in the *CITT Act* has no bearing on whether PWGSC was entitled to challenge Wärtsilä Canada’s status as a “potential supplier”. The Tribunal therefore finds that PWGSC is not estopped or otherwise prevented from challenging Wärtsilä Canada’s standing.

[58] In response to PWGSC and Madsen’s arguments, Wärtsilä Canada also argued that the issue of whether it has standing to bring the present complaint is irretrievably “moot” on the basis that the Tribunal has commenced an inquiry.³⁰ Wärtsilä Canada contends that pursuant to section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,³¹ the Tribunal was required to determine whether the complainant had standing prior to deciding to conduct an inquiry.

[59] The Tribunal disagrees with this argument. The Tribunal has previously held that an initial determination that the conditions for inquiry in subsection 7(1) of the *Regulations* have been met does not represent a final ruling on the question of whether a complainant is a “potential supplier”.³² In addition, as previously mentioned, the Tribunal is a statutory tribunal. Therefore, where the Tribunal determines at any time on the basis of evidence and arguments before it that a complainant does not meet the statutory definition of “potential supplier”, the Tribunal is required, as a matter of law, to dismiss the complaint for lack of jurisdiction.³³

[60] Finally, Wärtsilä Canada further contends that PWGSC’s conduct cannot be shielded from public scrutiny for procedural reasons. Again, this argument cannot succeed. Access to a statutory tribunal is governed by the relevant legislation.³⁴ In any event, the Tribunal notes that its decision to cease this inquiry does not foreclose all avenues of recourse. To the extent that Wärtsilä Canada alleges that its intellectual property rights or other rights are infringed, it may have a recourse before the courts.

[61] In sum, the Tribunal finds that Wärtsilä Canada does not have standing to bring this complaint, as it is not a potential supplier within the meaning of section 30.11 of the *CITT Act*.

[62] Having so found, the Tribunal does not find it necessary to address the issue of timeliness and the substantive merits of the grounds of complaints.

³⁰ Exhibit PR-2021-006-19 at para. 44.

³¹ SOR/93-602 [*Regulations*].

³² *Alion Science and Technology Corporation and Alion Science and Technology Canada Corporation* (30 January 2019), PR-2018-043 (CITT) [*Alion*] at para. 6. In *Alion*, the Tribunal reasoned that “its initial ruling on these conditions is made for gatekeeping purposes, as it is only based on the evidence and arguments of one party (the complainant) rather than the full record. These conditions are subject to further review during an inquiry, on the basis of a complete record of evidence and submissions from the parties. Where the Tribunal determines that a particular condition has not been satisfied it will cease its inquiry pursuant to section 10 of the *Regulations*.”

³³ *Canada (Attorney General) v. Siemens Enterprise Communications Inc.*, 2011 FCA 251 at para. 5; *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207 at para. 16.

³⁴ *Northrop Grumman* at para. 44.

DETERMINATION

[63] Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint, ceases its inquiry and terminates all proceedings related thereto.

[64] 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 Wärtsilä Canada. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the cost award is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal's Statement of Reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

[65] The intervener, Madsen Power Systems Inc., shall bear its own costs.

Frédéric Seppey

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