



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2021-025

73719 Newfoundland  
& Labrador Inc.

*Decision made  
Thursday, July 22, 2021*

*Decision and reasons issued  
Friday, July 30, 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**

**73719 NEWFOUNDLAND & LABRADOR INC.**

**AGAINST**

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

**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.

Georges Bujold  
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Georges Bujold  
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.

### SUMMARY OF THE COMPLAINT

[2] This complaint by 73719 Newfoundland & Labrador Inc. (NL) concerns a Request for Proposal (RFP), Solicitation No. W8484-219861/A, issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND), for the provision of deployed logistics support services (DLSS).

[3] NL believes that the financial bid of the successful bidder is “not true to complete the work”<sup>3</sup> and requests that the bids be re-evaluated, that the designated contract be awarded to the complainant, and that an independent review of the financial proposals be conducted to confirm that the rates are accurate.

[4] The Tribunal has decided not to conduct an inquiry into the complaint. For the reasons outlined below, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

### BACKGROUND

[5] On February 8, 2021, PWGSC, on behalf of DND, issued an RFP for DLSS within the Island of Jamaica or within the Caribbean and Central America, during the period of April 1, 2021, until March 31, 2024. The closing date for bid submissions was May 17, 2021, at 5 a.m. Central European Time (CET).

[6] On June 28, 2021, PWGSC informed NL that its bid had been unsuccessful. PWGSC indicated in its regret letter that, although NL’s bid was found to be responsive to the mandatory requirements of the solicitation, it did not achieve the highest ranking under the evaluation methodology described in the solicitation. PWGSC also informed NL that it had awarded the contract to Shipping Consultants Associated Ltd.

[7] On June 29, 2021, NL contacted PWGSC asking if the financial score of 0.5614 points out of 40 was indeed correct. PWGSC replied on the same day confirming the score. PWGSC further explained that the reason for this low score came from the way the financial score was calculated as shown in the sample financial calculation of the RFP, adding that a bidder with a very low financial offer compared to other bidders had the effect of lowering the scores for the other bidders, as this low offer represented the lowest-priced offer used for the calculation of all bids.

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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> Exhibit PR-2021-025-01 at 7.

[8] On July 2, 2021, NL contacted the Office of the Procurement Ombudsman (OPO). OPO and NL discussed the option of filing a complaint with the Tribunal, due to both NL's bid and the winning bid falling above the Canadian Free Trade Agreement thresholds.

[9] On July 3, 2021, NL emailed the Tribunal, requesting to open a complaint in relation to the RFP. NL alleged that the winning bidder would be unable to complete the contract at its proposed rates.

[10] On July 5, 2021, the Tribunal acknowledged receipt of NL's correspondence and provided the relevant links if NL wished to file a complaint. The Tribunal further indicated to NL that it be mindful to file its complaint as soon as possible, in order to comply with the time limits prescribed by section 6 of the *Regulations*, and provided a copy of the section.<sup>4</sup>

[11] On July 8, 2021, OPO, with NL's consent, referred certain public information regarding NL's complaint to the Tribunal, as contemplated under the Memorandum of Understanding between OPO and the Tribunal. In response to the email, the Tribunal emailed NL on July 9, 2021, providing the same information as in the email dated July 5, 2021.

[12] On July 21, 2021, the Tribunal received a procurement complaint form from NL.

## ANALYSIS

[13] On July 22, 2021, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

[14] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must determine that the following four conditions are met for it to conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[15] In this case, the Tribunal finds that the first condition is not met, as the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*. Accordingly, it is not necessary to examine whether the other conditions for inquiry are met.

### The complaint is time-barred

[16] Pursuant to section 6 of the *Regulations*, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or to file a complaint with the Tribunal. If a complainant

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<sup>4</sup> Email from the Tribunal dated July 5, 2021.

objects to the government institution within the designated time and the government institution denies it relief, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

[17] In this case, NL claimed to have objected to the government institution before filing its complaint on June 29, 2021, when, as is confirmed by the information contained in the complaint form filed on July 21, 2021, it contacted PWGSC to request a confirmation of its financial score. Therefore, the Tribunal finds that, at the latest, the basis of the complaint became known, or reasonably should have become known, to NL on June 29, 2021. Indeed, one cannot object to the relevant government institution without first having knowledge of its grievances in respect of the procurement process.

[18] Assuming that NL's email dated June 29, 2021, was sufficiently detailed to alert PWGSC to NL's concerns about its evaluation and the process, subsection 6(2) of the *Regulations* would apply. This provision makes it clear that, in such cases, a potential supplier wishing to file a complaint with the Tribunal "shall do so not later than 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

[19] Applying this provision, the Tribunal finds that, at the latest, NL had actual knowledge of PWGSC's denial of relief on the same day: PWGSC replied to NL's email in the evening of June 29, 2021, unequivocally confirming its financial score and explaining the reason for this low score.

[20] The above response by PWGSC confirmed that the results of the evaluation would be maintained and, by implication, that NL's or the winning bidder's proposal would not be re-evaluated. In other words, PWGSC reaffirmed its reason for rejecting NL's bid and did not indicate that it would reconsider its evaluation or take any further action. Accordingly, were the Tribunal to accept NL's position that it made an objection, this response would constitute a "denial of relief" for the purposes of subsection 6(2) of the *Regulations*. NL was therefore required to file a complaint with the Tribunal no later than 10 working days after June 29, 2021 (i.e. by July 14, 2021). However, NL did not file the present complaint until July 21, 2021.

[21] In any case, the Tribunal is of the view that the email dated June 29, 2021, did not constitute an objection with respect to the evaluation of the proposals and the awarding of the contract to another bidder. Indeed, for this to be considered an objection pursuant to subsection 6(2) of the *Regulations*, NL would have had to, at the very least, object to something, set out the grounds of its objection, even summarily, and demand a form of relief. It did none of those things. The simple request to "clarify what the financial score for [a] proposal was" cannot be considered an objection. Moreover, NL's actual ground of complaint about the alleged inability of the winning bidder to perform the work at its proposed rate was clearly not raised with PWGSC in its email dated June 29, 2021.

[22] As a result, pursuant to subsection 6(1) of the *Regulations*, the issue becomes whether NL filed its complaint "... not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." In this regard, in its regret letter dated June 28, 2021, PWGSC provided detailed comments explaining the results of the evaluation. As discussed above, in its email dated June 29, 2021, sent to NL, PWGSC also provided additional information about the financial scores awarded to NL and to the winning

bidder. As such, it is undeniable that the basis of the complaint became known, or reasonably should have become known, to NL on June 29, 2021. On the facts of this case, applying subsection 6(1), NL was thus required to file a complaint with the Tribunal no later than 10 working days after June 29, 2021 (i.e. by July 14, 2021).<sup>5</sup>

[23] Therefore, the complaint filed on July 21, 2021, is not timely, as it was filed 5 working days late.

[24] The Tribunal notes that the complaint filed by NL on July 21, 2021, was non-compliant, as some documents were missing, such as a copy of the solicitation document and a copy of NL's bid. However, because it was clear from the information provided by NL that its complaint was filed late and would be dismissed on this basis, it would have been unnecessary and inefficient to ask NL to provide the missing information in the circumstances.<sup>6</sup> In the matter at hand, it was clear that the Tribunal would have to dismiss the complaint on the basis of the complainant's failure to act within the time limits prescribed by the *Regulations*, and without having to rule or even consider the merits of the case.

[25] The Tribunal further notes that NL was informed on several occasions of the strict deadlines for filing complaints with the Tribunal, as follows:

- the regret email from PWGSC dated June 28, 2021, stating: "Please note that there are strict deadlines for filing complaints with the Canadian International Trade Tribunal (CITT)";
- the email from OPO, dated July 2, 2021, stating: "The CITT has specific timelines for filing a complaint so you should contact them as soon as possible to start the process";
- the email from the Tribunal, dated July 5, 2021, stating: "Please also note that you must be mindful to file any complaint as soon as possible in order to comply with the deadlines of section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, which reads as follows . . ."; and
- the email from the Tribunal, dated July 9, 2021, stating: "Please also note that you must be mindful to file any complaint as soon as possible in order to comply with the deadlines of section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, which reads as follows . . .".

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<sup>5</sup> Even if the Tribunal were to give NL the benefit of the doubt and consider that it only had knowledge of its ground of complaint on July 3, 2021, when it indicated in an email to the Tribunal that it believed that the winning bidder would be unable to complete the contract at its proposed rates, the complaint would still be time-barred. In this scenario, the deadline to file the complaint would have been July 16, 2021 (10 working days after July 3, 2021).

<sup>6</sup> Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed "on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection." For this reason, had the Tribunal requested NL to provide information to correct the deficiencies in the complaint, this would have had the effect of postponing the date of the filing of the complaint and thereby caused it to be even more late. In these circumstances, requesting NL to provide the additional information required for its complaint to be determined compliant with subsection 30.11(2) of the *CITT Act* would have served no useful purpose.

[26] Despite the fact that NL knew since June 28, 2021, that there were strict deadlines to file a complaint with the Tribunal, and that it was informed as such on four occasions, NL did not comply with the prescribed time limits set out in the *Regulations*.

[27] Accordingly, having been filed outside the time limit set out in subsection 6(1) of the *Regulations*, the complaint does not meet one of the mandatory conditions for inquiry. The Tribunal further notes that, while the onus to comply with the time limits prescribed by the *Regulations* is stringent and forces potential suppliers to act swiftly, the procurement review process is meant to be expeditious. It is focussed on achieving finality of contracts in the shortest possible time. As stated by the Federal Court of Appeal in *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*:

Short limitation periods for making an objection and filing a complaint help to ensure that delays in the supply of goods and services are minimized, and that the successful bidder's need for certainty is met. Hence, the Tribunal is entirely justified in regarding these time limits as important aspects of the regulatory scheme and in not investigating complaints that are out of time.<sup>7</sup>

[28] Based on the foregoing, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

## DECISION

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

[30] Georges Bujold

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Georges Bujold  
Presiding Member

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<sup>7</sup> 2005 FCA 177 at para. 3.