



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2021-037

Nacris Inc.



Canadian International  
Trade Tribunal

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commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

*Decision made  
Friday, August 20, 2021*

*Decision issued  
Wednesday, August 25, 2021*

*Reasons issued  
Thursday, September 2, 2021*

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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**

**NACRIS INC.**

**AGAINST**

**THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT**

### **DECISION**

With regard to Nacris Inc.'s grounds of complaint relating to the request for proposal's lack of transparency and failure to take into account global pandemic restrictions, as well as to the requirement that the accommodations be located within a 1-mile radius of the *Permanent Mission* of Canada to the United Nations in New York City, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act* (*CITT Act*), the Canadian International Trade Tribunal has decided not to conduct an inquiry.

With regard to Nacris Inc.'s grounds of complaint relating to preference or help being given to the winning bidder, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry on the basis that the grounds of complaint are premature, the complainant having not yet received a definitive response to its objection to the government institution. Nacris Inc. can file a new complaint within 10 working days of receiving a denial of relief regarding these grounds of complaint. If Nacris Inc. does not receive a response within 30 days following the date of issuance of this decision, the Tribunal could consider the Department of Foreign Affairs, Trade and Development's silence as an implicit denial of relief. Nacris Inc. could then file a complaint with the Tribunal within 10 working days of that deadline.

Peter Burn

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Peter Burn

Presiding Member

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

## 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.

## SUMMARY OF THE COMPLAINT

[2] This complaint relates to a Request for Proposal (RFP) issued by the Department of Foreign Affairs, Trade and Development (DFATD) for the provision of long-term apartment hotel accommodations for the Permanent Mission of Canada to the United Nations in New York City (Permanent Mission) [Solicitation No. 22-196854].

[3] In its complaint to the Tribunal, the complainant, Nacris Inc. (Nacris), alleges that:

- (1) the requirements of the RFP did not take into account the global pandemic restrictions;
- (2) the requirement that the accommodations be located within a one-mile radius of the Permanent Mission was not justified;
- (3) the RFP process lacked transparency and full disclosure of the current living arrangements of the employees of the Permanent Mission;
- (4) the requirements of the RFP were drafted to cater to the services offered by the winning bidder, The Beekman Tower (Beekman); and
- (5) Beekman was coached in the submission process by DFATD.<sup>3</sup>

[4] For the reasons that follow, the Tribunal finds that the complaint is not timely. The first, second and third grounds of the complaint were not filed in a timely manner, while the fourth and fifth grounds are premature because DFATD has not yet replied to the objection made by the complainant. As such, the Tribunal has decided not to conduct an inquiry into the complaint at this time.

## BACKGROUND

[5] On June 24, 2021, the solicitation was published, with a closing date of July 26, 2021.

[6] On June 29, 2021, a first addendum was published to answer questions regarding extending the required one-mile radius between the requested accommodations and the Permanent Mission, which DFATD refused to do.

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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-2021-037-01 at 7-8; Exhibit PR-2021-037-01A at 1.

[7] On July 7, 2021, Nacris submitted two questions to DFATD, namely whether it was possible to propose (i) studio suites; and (ii) multiple locations to meet the demands of nine people at the same time.<sup>4</sup>

[8] On July 9, 2021, DFATD released a second addendum that addressed, among other things, Nacris's question on the suitability of studio suites, stating that the offered apartments were required to meet all specifications of the RFP.

[9] Nacris submitted a bid dated July 21, 2021.<sup>5</sup>

[10] On July 30, 2021, DFATD sent a regret letter to Nacris indicating that, although Nacris's bid was found to be responsive to the mandatory requirements of the solicitation, it was not the bid with the lowest evaluated price and was therefore not selected for contract award. A contract was awarded to Beekman in the amount of USD\$180,675.<sup>6</sup>

[11] On August 6, 2021, Nacris emailed DFATD, stating that "On further review of the terms of the RFP, it was evidently clear that this RFP was strictly written with the Beekman Towers in mind." Nacris also alleged that the RFP lacked transparency and that preference was given to Beekman, alleging further that the RFP requirements were shared with it and that it was coached during the RFP response period.<sup>7</sup>

[12] On August 13, 2021, Nacris submitted its complaint to the Tribunal. The same day, the Tribunal requested that additional information be provided before the complaint could be considered complete, pursuant to subsection 30.11(2) of the *CITT Act*. On August 16 and 17, 2021, Nacris filed the requested information. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on August 17, 2021.

[13] On August 20, 2021, the Tribunal decided not to conduct an inquiry into the complaint.

## ANALYSIS

[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 may conduct an inquiry into a complaint if the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6;<sup>8</sup>
- ii. the complainant is a potential supplier;<sup>9</sup>
- iii. the complaint is in respect of a designated contract;<sup>10</sup> and

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<sup>4</sup> Exhibit PR-2021-037-01A at 23.

<sup>5</sup> *Ibid.* at 3–4; Exhibit PR-2021-037-01B at 1.

<sup>6</sup> Exhibit PR-2021-037-01C at 1.

<sup>7</sup> Exhibit PR-2021-037-01 at 11.

<sup>8</sup> Subsection 6(1) of the *Regulations*.

<sup>9</sup> Paragraph 7(1)(a) of the *Regulations*.

<sup>10</sup> Paragraph 7(1)(b) of the *Regulations*.

- iv. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.<sup>11</sup>

[15] For the following reasons, the Tribunal finds that the complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

### **Timeliness**

[16] Pursuant to subsections 6(1) and (2) of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no 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 supplier. Further, a potential supplier who has made a timely objection to the procuring government institution and is denied relief may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.

[17] As indicated above, Nacris made an objection to DFATD regarding its grounds of complaint on August 6, 2021.

[18] For the reasons outlined below, the Tribunal finds that Nacris's first, second and third grounds of complaint are late. The Tribunal also finds that the fourth and fifth grounds of complaint are premature. The Tribunal therefore will not conduct an inquiry at this time.

#### The first, second and third grounds of complaint are late

[19] Nacris argues that the RFP requirements did not make sense in the circumstances brought about by the COVID-19 pandemic. For example, Nacris submits that the laundry services required in the RFP should not have been communal.

[20] Nacris also believes that limiting the location of the accommodations to a one-mile radius from the Permanent Mission was not justified, as apartment hotels located within a two- to three-mile radius have substantially lower rates and are still within an accessible distance thanks to Manhattan's subway system.

[21] Finally, Nacris submits that the RFP lacked transparency and did not provide full disclosure of the current living arrangements for the employees of the Permanent Mission.<sup>12</sup>

[22] The Tribunal finds that the alleged shortcomings of the published RFP criteria should have been apparent to Nacris upon reading the RFP. In this regard, the Tribunal considers that Nacris should have known of these grounds of complaint at the earliest at the time the RFP was published (June 24, 2021), or in the case of the second ground, at the time the first addendum was published (June 29, 2021), and, in any event, at the latest when Nacris submitted questions to DFATD (July 7, 2021), as it is clear that, by such time, Nacris had taken cognizance of the RFP.

[23] Accordingly, the deadline for Nacris to make an objection to DFATD would have been, at the very latest, July 21, 2021 (10 working days from July 7, 2021).

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<sup>11</sup> Paragraph 7(1)(c) of the *Regulations*.

<sup>12</sup> Exhibit PR-2021-037-01A at 1.

[24] Nacris only brought its objection to DFATD's attention on August 6, 2021, after the RFP had already been awarded to the winning bidder, and past the latest deadline. However, as the Federal Court of Appeal has stated, "potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process."<sup>13</sup>

[25] In light of the above, the Tribunal finds that Nacris's first three grounds of complaint were filed beyond the deadline set out in the *Regulations* and, therefore, cannot be further considered by the Tribunal.

[26] However, even if the first and second grounds of complaint had been timely, the Tribunal finds that they did not raise a reasonable indication that a trade agreement has been breached.<sup>14</sup> It is well established that a "procuring entity is entitled to structure the RFP . . . in a manner which fulfills its legitimate operational requirements"<sup>15</sup> [footnotes omitted]. As such, procuring entities can set their own requirements according to their needs, regardless of whether the bidders consider these requirements to be the appropriate standard or not. In this case, Nacris offered no information that could reasonably indicate that these requirements were not legitimate, and Nacris even acknowledges that the one-mile radius requirement could be justifiable for employees to be walking distance from their workplace.<sup>16</sup>

#### The fourth and fifth grounds of complaint are premature

[27] On August 6, 2021, in its objection to DFATD, Nacris also alleged that the requirements of the RFP were drafted to meet Beekman's offer,<sup>17</sup> and that DFATD helped the winning bidder respond to the RFP.<sup>18</sup>

[28] The Tribunal finds that Nacris would have only become aware of these grounds of complaint when it knew of Beekman's participation in the RFP process. The only evidence of this knowledge appears to be the regret letter provided to Nacris on July 30, 2021.<sup>19</sup>

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<sup>13</sup> *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at para. 20.

<sup>14</sup> Canada-Chile Free Trade Agreement, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>> (entered into force 5 July 1997); Canada-Korea Free Trade Agreement, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 2015).

<sup>15</sup> *Vaisala Oyj v. Department of Public Works and Government Services* (29 December 2017), PR-2017-022 (CITT) at para. 82; *2040077 Ontario Inc. o/a FDF Group* (27 August 2014), PR-2014-024 (CITT) at para. 19; *Accent On Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at paras. 60, 65, 70; *Bajaj Inc.* (7 July 2003), PR-2003-001 (CITT); *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).

<sup>16</sup> Exhibit PR-2021-037-01A at 1.

<sup>17</sup> Nacris notes as evidence the required one-mile maximum radius from the Permanent Mission, the requirement for on-site laundry rather than in-suite, and the twice-monthly cleaning services, which are as offered by Beekman.

<sup>18</sup> Nacris submits that the strict requirements of the submission process would have made it difficult for Beekman to submit a response without stumbling.

<sup>19</sup> Exhibit PR-2021-037-01C at 1.



[29] Nacris therefore had until August 13, 2021, to present an objection based on these grounds to the procuring government institution. Accordingly, Nacris's objection to DFATD of August 6, 2021, was made in a timely manner.

[30] In accordance with subsection 6(2) of the *Regulations*, a potential supplier who has made a timely objection to the procuring government institution *and is denied relief* may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.<sup>20</sup>

[31] In the Tribunal's view, DFATD has not yet denied relief to Nacris. There is no indication that DFATD has provided a response to Nacris's objection of August 6, 2021. Accordingly, Nacris does not yet know whether DFATD will provide a response and/or deny the relief it seeks. As such, the Tribunal considers the fourth and fifth grounds of complaint premature.

[32] The Tribunal's decision does not preclude Nacris from filing a new complaint within 10 working days of receiving a denial of relief from DFATD, if it still feels aggrieved.

[33] Alternatively, if DFATD fails to respond to Nacris's fourth and fifth grounds of complaint within 30 days of the issuance of the Tribunal's decision, Nacris may consider the lack of response as a denial of relief.

[34] Nacris would therefore have 10 working days from the 30th day following the date of issuance of the Tribunal's decision to file a new complaint with the Tribunal should DFATD fail to answer.

[35] In either case, if Nacris decides to file a new complaint, it may request that documents already filed with this complaint be joined to the new complaint.

## DECISION

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

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Peter Burn  
Presiding Member

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<sup>20</sup> Subsection 6(2) of the *Regulations*.