



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2021-051

Nacris Inc.

*Decision made  
Tuesday, November 23, 2021*

*Decision issued  
Friday, November 26, 2021*

*Reasons issued  
Wednesday, December 8, 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**

**NACRIS 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.

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.

[2] The complaint relates to a request for proposal (RFP) (Solicitation No. W0772-22AM01/A) issued on September 27, 2021, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence. The RFP invited proposals for the provision of accommodations and hotel amenities services in the Greater Phoenix Area, Arizona, United States of America.

[3] At issue in this complaint is whether the winning bid satisfied the requirements of the RFP. The complainant, Nacris Inc. (Nacris), requested that it be awarded the contract or, in the alternative, that the bids be re-evaluated on the basis that it believes the winning bidder, Masud Siddique (Masud), is incapable of fulfilling the terms of the resulting contract. In particular, the complaint alleges that Masud's facilities do not have the required number of washing machines or drying machines. The complainant also requested a postponement of the contract award.

[4] The complainant submitted a bid and was informed by PWGSC on October 27, 2021, that it would not be awarded the contract because its bid was found to be non-compliant with the mandatory requirements of the solicitation, specifically, that it did not provide all accommodations under one establishment.<sup>3</sup>

[5] On the same day, the complainant sent an email to PWGSC objecting to PWGSC's decision.<sup>4</sup> The complainant explained that its bid was compliant with all mandatory criteria because its two proposed establishments were located on the same premises and shared some facilities (e.g. parking and meeting rooms).

[6] On November 3, 2021, the complainant received another letter from PWGSC replacing the letter received on October 27.<sup>5</sup> This letter no longer referred to the issue of non-compliance previously identified by PWGSC. The complaint was now found to be responsive. However, the complainant was informed that it would not be awarded the contract because its bid was not the highest-ranking under the evaluation methodology set out in the solicitation documents;<sup>6</sup> its bid was ranked behind other proponents on the basis that another responsive proponent (Masud) had the lowest evaluated price.<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> Exhibit PR-2021-051-01 at 73.

<sup>4</sup> *Ibid.* at 72.

<sup>5</sup> *Ibid.* at 70.

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

<sup>7</sup> *Ibid.* at 40.

[7] On November 4, 2021, the complainant contacted PWGSC by email to inquire about which of Masud's hotels PWGSC will be working with. In its reply email, PWGSC informed the complainant that this information was confidential and could not be shared. As a response, the complainant objected to this outcome to PWGSC by email on the basis that two of Masud's facilities, Springhill Suites and the Residence Inn, were both allegedly unqualified, and requested a postponement of the contract award.

[8] On November 9, 2021, PWGSC responded that it had reviewed the evaluation process for the solicitation and that the results remained unchanged, effectively denying the relief sought in the complainant's objection. The complainant filed its properly documented complaint with the Tribunal on November 16, 2021. The complaint is therefore timely, as it was filed within the time limits required under section 6 of the Regulations.

[9] The Tribunal did not issue a postponement of award of contract order because a contract had already been awarded at the time the complaint was filed.

[10] 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 whether the following four conditions are met before it launches an inquiry:

- (i) the complaint has been filed within the prescribed time limits;<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
- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.<sup>11</sup>

[11] Under paragraph 7(1)(c) 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 the applicable trade agreements set out in that paragraph.<sup>12</sup> The Tribunal has previously described the 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

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<sup>8</sup> Section 6 of the Regulations.

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

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

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

<sup>12</sup> The solicitation description on Buyandsell.gc.ca (online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-LP-003-80433>>) indicates that several of Canada's trade agreements apply to this procurement, including, *inter alia*, the Canadian Free Trade Agreement [CFTA], 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).

demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.<sup>13</sup>

[12] In this case, the Tribunal has decided not to conduct an inquiry into Nacris' complaint, as the information provided does not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements, which, in this case, include the CFTA.<sup>14</sup> The Tribunal comes to this conclusion for two reasons.

[13] First, the Tribunal has previously held that a procuring entity has the discretion to rely upon certifications provided by bidders.<sup>15</sup> In the present case, PWGSC relied on Masud's certification at the time of bid closing and was satisfied that all the mandatory requirements of the solicitation were met, including the requirement regarding the available number of washing machines and drying machines. Such reliance is *prima facie* and necessarily rests on the presumption that the content of the certification is true. As such, this presumption is rebuttable. However, as discussed in more detail below, in the present case, there was no evidence to suggest that the bid was non-compliant or that PWGSC knew that the bid was non-compliant and, therefore, there was nothing unfair about the procurement process itself.

[14] Second, the complaint rests on an allegation unsupported by evidence. Indeed, in its complaint, the complainant does not present any factual evidence to support its allegation apart from asserting that the complainant "took it upon itself to conduct an investigation" and "found" that two hotels it believes to be owned by Masud are short of one washing machine and one drying machine to meet the mandatory criteria of the RFP.<sup>16</sup> While paragraph 7(1)(c) of the Regulations does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim.<sup>17</sup> Mere allegations are insufficient to establish a reasonable indication of a breach of the trade agreements.<sup>18</sup> The Tribunal requires some factual evidence demonstrating the inadequate characteristics of Masud's business beyond simple assertions by the complainant.

[15] As such, Nacris has failed to raise an issue that pertains to the conduct of the procurement process. If at a later date Masud fails to deliver what it has undertaken to provide, the issue will be

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<sup>13</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) [*K-Lor*] at 6.

<sup>14</sup> The Tribunal notes that the complainant omitted to mention under which agreement its complaint was made.

<sup>15</sup> See for instance, *Access Corporate Technologies Inc.* (14 November 2013), PR-2013-012 (CITT) at para. 39; *Central Automotive Inspections Records & Standards Services (CAIRSS) Corp.* (31 October 2012), PR-2012-025 (CITT) at paras. 24–25. See also *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT) at paras. 22–23; *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at para. 11; *J.A. Larue inc.* (7 August 2020), PR-2020-004 (CITT) at para. 46; *Atlantic Catch Data Ltd.* (29 March 2018), PR-2017-040 (CITT) at para. 44.

<sup>16</sup> Exhibit PR-2021-051-01B at 8.

<sup>17</sup> *K-Lor*.

<sup>18</sup> *Smiths Detection Montreal Inc.* (14 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13. See also *Manitex Lifting ULC* (19 March 2013), PR-2012-049 (CITT) at para. 22; *Veseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (4 April 2014), PR-2013-048 (CITT) at para. 12.

regarding contract administration and performance. It is well established that the Tribunal's jurisdiction does not extend to matters of contract administration or performance.<sup>19</sup>

[16] For the foregoing reasons, the Tribunal finds that the complaint discloses no reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

## DECISION

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

Peter Burn  
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Peter Burn  
Presiding Member

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<sup>19</sup> *Newland Canada Corporation* (13 August 2020), PR-2020-011 (CITT) at para. 11, citing *Sunny Jaura o/a Jaura Enterprises v. Department of Public Works and Government Services* (22 February 2013), PR-2012-043 (CITT) at para. 10. See also *Custom Power Generation v. Department of Public Works and Government Services* (23 February 2021), PR-2020-087 (CITT) at para. 8; *WW-ISS Solutions Canada v. Department of Foreign Affairs, Trade and Development* (16 December 2019), PR-2019-050 (CITT) at para. 15; *Vidéotron Ltée v. Shared Services Canada* (5 October 2018), PR-2018-006 (CITT) at para. 16.