



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2021-052

Nacris Inc.

*Decision made
Tuesday, November 23, 2021*

*Decision issued
Friday, November 26, 2021*

*Reasons issued
Friday, December 10, 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.

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

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² 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. W0134-22R005/B) issued on October 13, 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 rental vehicles, without drivers, in Marine Corps Air Station Miramar, California, 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 compensated by an amount specified by the Tribunal for the profit that it could reasonably have expected to have made, on the basis that it believes the winning bidder, Enterprise Rent-A-Car Canada Limited (Enterprise), is incapable of fulfilling the terms of the resulting contract. In particular, the complaint alleges that Enterprise's rental vehicles offered in its bid are not covered by the minimum insurance amount for public liability and property damage requested in the RFP, are not delivered at the requested location, and cannot be available for Canadian Armed Forces personnel under 21 years old.

[4] The complainant submitted a bid and was informed by PWGSC on November 3, 2021, 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;³ its bid was ranked behind other proponents on the basis that another responsive proponent (Enterprise) had the lowest evaluated price.⁴

[5] On the same day, the complainant twice contacted PWGSC by email and objected to this outcome on the basis that Enterprise's offer was unqualified, as it allegedly did not meet all the requirements of the solicitation RFP.

[6] On November 9, 2021, PWGSC responded that it had reviewed the evaluation process for the solicitation and that the results remained unchanged,⁵ effectively denying the relief sought in the complainant's objection. The complainant filed its properly documented complaint with the Tribunal on November 19, 2021, thereby complying with subsection 30.11(2) of the CITT Act. The complaint was timely, as it was filed within the time limits required under section 6 of the Regulations.

¹ R.S.C., 1985, c. 47 (4th Supp.) [CITT Act].

² SOR/93-602 [Regulations].

³ Exhibit PR-2021-052-01 at 45.

⁴ *Ibid.*

⁵ *Ibid.* at 47.

[7] Before an inquiry can begin, the Tribunal must determine whether a complaint that is timely under section 6 of the Regulations also meets the following requirements of section 7 of the Regulations:

- (i) the complainant is a potential supplier;⁶
- (ii) the complaint is in respect of a designated contract;⁷ and
- (iii) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.⁸

[8] The Tribunal has no reason to doubt Nacris's status as a potential supplier and therefore finds that paragraph 7(1)(a) of the Regulations is met.

[9] The information on file casts doubt, however, as to whether the solicitation in issue is with respect to a designated contract because the solicitation documents,⁹ as well as the tender award notice on Buyandsell.gc.ca,¹⁰ indicate that the procurement is not subject to any trade agreement. The Tribunal has reason to believe those indications to be erroneous, since the motor vehicle rental services being procured are subject, at a minimum, to the Canadian Free Trade Agreement (CFTA).¹¹ As such, the Tribunal is prepared to find that the solicitation in issue is a designated contract and that it would therefore meet the condition of paragraph 7(1)(b) of the Regulations.

[10] Regardless of whether or not the Tribunal is correct in respect of that conclusion, the outcome of this complaint is the same given the Tribunal's conclusion that follows in respect of the condition set out in paragraph 7(1)(c) of the Regulations: the complaint does not disclose a reasonable indication that the procurement was conducted in violation of a trade agreement obligation. The Tribunal comes to this conclusion for two reasons.

[11] First, the Tribunal has previously described the threshold for a complainant to indicate a reasonable indication that the procurement was not conducted in accordance with any of the applicable trade agreements 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

⁶ Paragraph 7(1)(a) of the Regulations.

⁷ Paragraph 7(1)(b) of the Regulations.

⁸ Paragraph 7(1)(c) of the Regulations.

⁹ Exhibit PR-2021-052-01A at 2.

¹⁰ See description on Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/procurement-data/award-notice/PW-LP-003-80541-001>>.

¹¹ See 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). The CFTA does not exclude the services in issue.

demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.¹²

[Footnote omitted]

[12] The Tribunal has previously held that a procuring entity has the discretion to rely upon certifications provided by bidders.¹³ In the present case, PWGSC relied on Enterprise'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 insurance coverage, the delivery location of the rental vehicles, and the authorization for drivers under 21 years old to drive the rental vehicles. Such reliance 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.

[13] Second, the complaint rests on an allegation unsupported by evidence. Indeed, in its complaint, Nacris does not present any factual evidence to support its allegations apart from asserting that the complainant "investigat[ed] the detailed nature of the rental" and "determined" that Enterprise's bid did not meet all the mandatory requirements of the RFP.¹⁴ 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.¹⁵ Mere allegations are insufficient to establish a reasonable indication of a breach of the trade agreements.¹⁶ The Tribunal requires some factual evidence demonstrating purported inadequate characteristics of a bid; mere assertions by a complainant are insufficient.

[14] As such, Nacris has failed to raise an issue that pertains to the conduct of the procurement process. If at a later date Enterprise fails to deliver what it has undertaken to provide, the issue will become one of contract administration or performance. It is well established that the Tribunal's jurisdiction does not extend to matters of contract administration or performance.¹⁷

¹² *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.

¹³ 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.

¹⁴ Exhibit PR-2021-052-01 at 8.

¹⁵ *K-Lor*.

¹⁶ *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; *Vesey's 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.

¹⁷ *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* (21 February 2013), PR-2012-043 (CITT) at para. 10. See also *Custom Power Generation v. Department of Public Works and Government Services* (11 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.

[15] 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

[16] 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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Presiding Member