



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-020

Baja Construction Canada Inc.

*Decision made  
Monday, July 4, 2022*

*Decision issued  
Monday, July 11, 2022*

*Reasons issued  
Tuesday, July 19, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

**BY**

**BAJA CONSTRUCTION CANADA INC.**

**AGAINST**

**DEFENCE CONSTRUCTION (1951) LIMITED**

**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 as it concerns a matter of contract administration.

Frédéric Seppey  
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Frédéric Seppey  
Presiding Member

The statement of reasons will be issued at a later date

## STATEMENT OF REASONS

### THE COMPLAINT

[1] The complainant, Baja Construction Canada Inc. (Baja), responded to a solicitation (HAXED34-CN77641) issued by Defence Construction (1951) Limited (DCC) for roof replacement of housing units at a Canadian Armed Forces base in Edmonton, Alberta. The solicitation was posted on the MERX electronic bidding system on April 27, 2022, with a closing date of May 18, 2022.<sup>1</sup> Among other conditions, the solicitation required the use of material from specific manufacturers.<sup>2</sup> The solicitation also provided a mechanism for bidders to seek approval of alternative materials prior to the tender closing date.<sup>3</sup>

[2] Baja submitted its bid on May 16, 2022.<sup>4</sup> Baja was awarded the contract on June 10, 2022.<sup>5</sup> On June 14, 2022, Baja submitted for review by DCC a shop drawing indicating the material it intended to use to perform the contract.<sup>6</sup> On June 15, 2022, DCC requested that Baja revise and resubmit the shop drawing, as several materials did not match the manufacturers listed in the specifications. DCC also noted that Baja did not seek the use of alternative materials during the tender period.<sup>7</sup> In response, Baja argued that the proposed material met performance specifications.<sup>8</sup> In a subsequent email sent that same day, Baja expressed concerns that DCC seemed to be excluding suppliers from the solicitation without valid reasons. DCC reiterated the terms of the contract, pointing to the mechanism for requesting acceptance of alternative materials.<sup>9</sup>

[3] On June 20, 2022, DCC indicated that it had reviewed the concerns raised by Baja and that it maintained its position. It also requested that Baja resubmit its shop drawing.<sup>10</sup> Baja then indicated that it would file a complaint with the Canadian International Trade Tribunal.<sup>11</sup> Baja filed its complaint on June 24, 2022.<sup>12</sup> Baja described the nature of its complaint as relating to “unfair tender practices that exclude specific manufacturers from participating in the tenders for CFB [E]dmonton and potential for monetary gain for members of DCC”.<sup>13</sup>

[4] For the reasons set out below, the Tribunal has decided that it will not conduct an inquiry into the complaint, as it concerns a matter of contract administration.

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<sup>1</sup> Exhibit PR-2022-020-01.B at 3.

<sup>2</sup> Exhibit PR-2022-020-01 at 128–130.

<sup>3</sup> *Ibid.* at 127–128.

<sup>4</sup> Exhibit PR-2022-020-01.D at 1–2.

<sup>5</sup> Exhibit PR-2022-020-01.B at 5.

<sup>6</sup> Exhibit PR-2022-020-01 at 9–46.

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

<sup>8</sup> *Ibid.* at 47.

<sup>9</sup> *Ibid.* at 51–52.

<sup>10</sup> *Ibid.* at 57.

<sup>11</sup> *Ibid.* at 74–75.

<sup>12</sup> Baja submitted its complaint on June 22, 2022, and provided additional documents at the request of the Tribunal on June 24, 2022. The complaint was considered filed on June 24, 2022. Exhibit PR-2022-020-01.B at 10–12; Exhibit PR-2022-020-02.

<sup>13</sup> Exhibit PR-2022-020-01.B at 7.

## ANALYSIS

### **The complaint concerns a matter of contract administration**

[5] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>14</sup> (CITT Act) and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>15</sup> (Regulations) allow potential suppliers to file complaints with the Tribunal concerning an aspect of the *procurement process* that relates to a designated contract. Thus, for the Tribunal to have jurisdiction to inquire into a complaint, the issues raised by the complainant *must* concern the procurement process that relates to a designated contract. When applying these provisions, the Tribunal has made an important distinction between the *procurement process* and *contract administration*.

[6] The Tribunal has held that the procurement process begins after the government institution has decided on its procurement requirement and continues through to the awarding of the contract. Contract administration is a separate phase that takes place after the procurement process is completed and the designated contract is awarded. It deals with issues that arise as a contract is performed and managed. It is well established that matters of contract administration are beyond the scope of the Tribunal's jurisdiction.<sup>16</sup>

[7] Here, the present complaint arose after the completion of the procurement process. Baja had been awarded the contract and took issue with the requirements of the contract that resulted from the procurement process. In particular, it objected to the requirement to use materials manufactured by specific suppliers, which was set out in the solicitation. There is no evidence on the record showing that Baja availed itself of the possibility to seek authorization for using alternative materials before the closing of bids.<sup>17</sup>

[8] As the matter is one of contract administration, the complaint is outside the jurisdiction of the Tribunal. This fact is determinative and sufficient for the Tribunal to decide not to conduct an inquiry into the complaint. The Tribunal will nevertheless briefly review certain conditions of inquiry.

### **The complaint does not concern a designated contract, as it is below the monetary thresholds for procurement processes led by DCC**

[9] Subsection 7(1) of the Regulations set out the conditions of inquiry, which must be met in order for the Tribunal to decide to conduct an inquiry. In particular, paragraph 7(1)(b) requires that the complaint be "in respect of a designated contract".

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<sup>14</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>15</sup> SOR/93-602.

<sup>16</sup> See, for example, *9324-3566 Quebec Inc.* (19 May 2021), PR-2021-005 (CITT) at para. 16; *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; *Custom Power Generation* (23 February 2021), PR-2020-087 (CITT) at para. 8.

<sup>17</sup> Exhibit PR-2022-020-01 at 127–128.

[10] In order to be a designated contract, a procurement must, among other things, meet the monetary thresholds set out in the trade agreements.<sup>18</sup> The thresholds in effect for each trade agreement, for the period of January 1, 2022, to December 31, 2023, including any adjustment for inflation, are published by the Treasury Board Secretariat.<sup>19</sup>

[11] The procuring entity in this case is DCC, which is a Crown corporation. The contract awarded to Baja is valued at \$169,000, which is less than the monetary thresholds set out for Crown corporations under any of the trade agreements.<sup>20</sup> Accordingly, the Tribunal finds that the procurement in question does not relate to a designated contract as defined by section 30.1 of the CITT Act and subsection 3(1) of the Regulations and, therefore, would not have met the condition for inquiry set out in paragraph 7(1)(b) of the Regulations.

[12] In this case, Baja should have availed itself of the procedure set out in the solicitation for the approval of alternative materials or otherwise raised its concerns with DCC during the procurement process. If Baja were not satisfied with the outcome of this action, Baja could have then raised an objection with DCC or filed a complaint with the Tribunal within the time limits set out in section 6 of the Regulations.<sup>21</sup>

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<sup>18</sup> Section 30.1 of the CITT Act defines “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; (*contrat spécifique*)”. In addition, subsection 3(1) of the Regulations provides as follows: “For the purposes of the definition *designated contract* in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article II of the Agreement on Government Procurement, in Article *Kbis*-01 of Chapter *Kbis* of the CCFTA, in Article 1401 of Chapter Fourteen of the CPFTA, in Article 1401 of Chapter Fourteen of the CCOFTA, in Article 16.02 of Chapter Sixteen of the CPAFTA, in Article 17.2 of Chapter Seventeen of the CHFTA, in Article 14.3 of Chapter Fourteen of the CKFTA, in Article 19.2 of Chapter Nineteen of CETA, in Article 504 of Chapter Five of the CFTA, in Article 10.2 of Chapter Ten of CUFTA or in Article 15.2 of Chapter Fifteen of the TPP, that has been or is proposed to be awarded by a government institution, is a designated contract.” The trade agreements impose monetary thresholds that must be met for a procurement to be covered under their respective chapters. See, for example, articles 504(3) and (4) of the Canadian Free Trade Agreement.

<sup>19</sup> Contracting Policy Notice 2021-6 Trade Agreements: Thresholds Update, online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2021-6.html>>.

<sup>20</sup> Exhibit PR-2022-020-01.B at 5; Exhibit PR-2022-020-01.D.

<sup>21</sup> 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.

**DECISION**

[13] For the reasons stated above, pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to conduct an inquiry into the complaint, as it concerns a matter of contract administration.

Frédéric Seppey  
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Frédéric Seppey  
Presiding Member