



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-008

East Coast Hydraulics & Machinery  
(2009) Ltd.

*Decision made  
Tuesday, May 10, 2022*

*Decision and reasons issued  
Friday, May 20, 2022*

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

**BY**

**EAST COAST HYDRAULICS & MACHINERY (2009) LTD.**

**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

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (Regulations), 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] East Coast Hydraulics & Machinery (2009) Ltd.'s (East Coast Hydraulics) complaint concerns a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of Marine Atlantic Inc. (Marine Atlantic) for the provision of on-demand and preventative maintenance services and replacement parts for the hydraulic equipment located on Marine Atlantic's vessels (solicitation MA021-210071/A).

[3] East Coast Hydraulics's complaint centres on its assertion that its financial bid was compliant with the requirements of the solicitation and that, in the event that it was not, PWGSC should have made use of the Phased Bid Compliance Process included in the solicitation to allow East Coast Hydraulics to clarify its bid.

### BACKGROUND

[4] The solicitation was published on January 12, 2022, and closed on February 8, 2022, at 2:00 p.m. AST.

[5] On or before the deadline of February 8, 2022, East Coast Hydraulics submitted its bid.

[6] On March 18, 2022, PWGSC communicated the results of the solicitation to East Coast Hydraulics, finding that its financial bid did not comply with Annex B of the solicitation and that the offer contained terms and conditions in addition to the ones outlined in the solicitation. Accordingly, PWGSC concluded that the bid was non-compliant and would not be considered. A contract was awarded to Target Hydraulics and Machine Works Ltd. in the amount of \$1,840,000.00.

[7] On March 24, 2022, East Coast Hydraulics provided PWGSC with clarifications on its bid, disputed PWGSC's conclusion and requested a debrief and additional information concerning why it was not offered the opportunity to complete a compliance assessment report, if its financial bid was found to be non-compliant. East Coast Hydraulics followed up on April 1, 2022.

[8] On April 27, 2022, PWGSC provided a more detailed explanation of its reasons for finding East Coast Hydraulics's bid non-compliant.

[9] On May 2, 2022, East Coast Hydraulics submitted its complaint to the Tribunal.

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

[10] On May 3, 2022, the Tribunal requested that additional information be provided.

[11] On May 5, 2022, East Coast Hydraulics filed the requested information.

[12] On May 6, 2022, the Tribunal confirmed receipt of East Coast Hydraulics's complaint.

## ANALYSIS

[13] Pursuant to sections 6 and 7 of the Regulations, the Tribunal may conduct an inquiry into a complaint if all of the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6;
- 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 government institution did not conduct the procurement in accordance with the applicable trade agreements.

[14] For the reasons that follow, the Tribunal finds that it lacks jurisdiction to consider the complaint, as the procurement process does not relate to a designated contract.

### **The procurement process does not relate to a designated contract**

[15] For the Tribunal to be able to hear a complaint, the complaint must concern a "procurement process that relates to a designated contract".<sup>3</sup>

[16] Section 30.1 of the CITT Act defines the term "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".

[17] Subsection 3(1) of the Regulations, concerning such designated contracts, reads 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.

[18] For the Tribunal to have jurisdiction to conduct an inquiry, the complaint must be in respect of a designated contract. This means that it must concern a procurement of goods or services, or any

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<sup>3</sup> CITT Act, s. 30.11(1).

combination thereof, as described in the provisions of the trade agreements that are listed in subsection 3(1) of the Regulations, of which there are currently 11. These provisions are the “scope and coverage” articles of the agreements. The Federal Court of Appeal and the Supreme Court of Canada have analogized the trade agreements as “doors” into the jurisdiction of the Tribunal.

[19] The Tribunal lacks jurisdiction to hear this complaint, as the services being procured are excluded from Canada’s domestic and international trade agreements.

[20] With respect to Canada’s domestic trade agreement, Annex 519.1 to the Canadian Free Trade Agreement (CFTA) lists party-specific exceptions to the CFTA. In the Schedule to Canada, under Part B(1)(h), the following procurements are excluded:

in respect of shipbuilding and repair, including related architectural and engineering services, by any Crown corporation for which the Minister of Transport is specified, or was specified on the effective date, as the appropriate Minister in respect of that corporation;

[21] Marine Atlantic falls within the Minister of Transport’s portfolio of Crown Corporations.<sup>4</sup>

[22] As the services being procured are repair and maintenance services for the hydraulic equipment on Marine Atlantic’s fleet of vessels, the above-noted exception applies. A previous decision of the Tribunal in *Scotia Crane Rentals Limited* also found that Marine Atlantic fell outside of the Tribunal’s jurisdiction under the Agreement on Internal Trade, which the CFTA has now replaced.<sup>5</sup>

[23] In Canada’s international trade agreements, shipbuilding and maintenance are excluded from the chapter on procurement. For example, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)<sup>6</sup> adopts the following language when excluding shipbuilding at Annex 19-7:

1. This Chapter does not cover procurement:

- a. in respect of shipbuilding and repair, including related architectural and engineering services, for central entities in Annex 19-1 and Section A of Annex 19-3; and for sub-central entities in British Columbia, Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, and Québec covered by Annex 19-2 and Section A of Annex 19-3;

[24] Marine Atlantic is a Crown corporation within the meaning of Part X of the *Financial Administration Act*<sup>7</sup> and is covered under Section A of Annex 19-3 of CETA.

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<sup>4</sup> Transport Canada, [The Transport Canada Portfolio](#), 21 June 2019. Other Crown corporations in that portfolio are Canada’s Pilotage Authorities, VIA Rail Canada Inc., the Canadian Air Transport Security Authority and Federal Bridge Corporation Ltd.

<sup>5</sup> *Scotia Crane Rentals Limited* (21 March 2014), PR-2013-045 at paras. 20–21.

<sup>6</sup> Online: Global Affairs Canada <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017).

<sup>7</sup> R.S.C., 1985, c. F-11.

[25] Based on the above, the Tribunal concludes that the procurement of vessel maintenance services, such as in this case, is not subject to any of the trade agreements identified in subsection 3(1) of the Regulations.

[26] The Tribunal reminds PWGSC that it has an obligation to conduct procurement processes in good faith and ensure that the information provided to potential suppliers with respect to available recourse mechanisms is accurate. Solicitation documents and correspondence from the responsible procurement officer in this matter incorrectly identified the Tribunal as a mechanism of recourse open to aggrieved suppliers. In procurement complaints where the Tribunal lacks jurisdiction to investigate, other recourse mechanisms, including the courts, may be available. East Coast Hydraulics may wish to seek legal advice on this subject.

## **DECISION**

[27] 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