



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-027

Newland Canada Corporation

*Decision made  
Tuesday, July 26, 2022*

*Decision and reasons issued  
Thursday, August 4, 2022*

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

**BY**

**NEWLAND CANADA CORPORATION**

**AGAINST**

**THE DEPARTMENT OF NATIONAL DEFENCE**

**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.

Eric Wildhaber  
Eric Wildhaber  
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] The complaint by Newland Canada Corporation (Newland) relates to a request for proposal (RFP) (solicitation W8484-23-0296/A) issued by the Department of National Defence (DND) for hotel accommodation services in Romania.

[3] Newland claims that DND did not award the contract in accordance with the terms of the RFP. According to Newland, the terms of the RFP indicated that the responsive bid with the lowest evaluated price would be awarded the contract. Newland argues that its bid price was lower than that of the winning bid and, therefore, it should have been awarded the contract.

[4] For the reasons set out below, the Tribunal finds that this complaint raises no reasonable indication that DND breached its trade agreement obligations. As such, the Tribunal has decided not to conduct an inquiry into the complaint.

### BACKGROUND

[5] The RFP in question was published on June 17, 2022, and closed on June 24, 2022.

[6] On June 28, 2022, DND notified Newland that the contract had been awarded to another bidder for \$531,426. DND stated that, while Newland's proposal had met the mandatory requirements of the solicitation, it did not achieve the highest ranking under the RFP's evaluation methodology.<sup>3</sup>

[7] On June 28, 2022, Newland asked DND to explain why it had not received the highest ranking, as its bid was lower in price than the winning bid.<sup>4</sup> That same day, in response, DND stated that the winning bid had offered all required accommodations at one establishment, as set out in section 4.2.1 of the RFP, which provided that priority for contract award would be given to proposals providing all accommodations at the same establishment.<sup>5</sup> Newland and DND exchanged additional emails that day, with Newland requesting further information and raising concerns about the winning bidder. On June 28, 2022, DND informed Newland that it was unable to provide the requested

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

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

<sup>3</sup> Exhibit PR-2022-027-01.A at 32.

<sup>4</sup> *Ibid.* at 25.

<sup>5</sup> *Ibid.* at 24–25.

information and on July 4, 2022, DND confirmed that no changes had been made to the award as a result of Newland's concerns.

[8] On July 6, 2022, DND informed Newland that the contract had been re-awarded to another bidder due to "unforeseen booking circumstances".<sup>6</sup> The new award was valued at 866,560 euros.

[9] The same day, Newland asked DND if its bid had been the lowest-priced offer and requested information on the new winning bidder.<sup>7</sup> In response, DND referred to sections 4.2.1 and 4.2.2 of the RFP to explain that Newland's proposal was not the lowest-cost compliant bid, as it had offered multiple establishments, and that the contract had been awarded to a bidder providing all required accommodations at one establishment.<sup>8</sup>

[10] On July 7, 2022, Newland again requested information regarding its bid price and asked if DND had made amendments to the RFP after the first award was cancelled.<sup>9</sup>

[11] On July 8, 2022, DND reiterated that Newland's bid was not the lowest compliant proposal and stated that it was unable to provide information other than the total price of the winning bid. DND also confirmed that no changes were made to the RFP after the first award was cancelled.<sup>10</sup>

[12] On July 21, 2022, Newland filed its complaint with the Tribunal.<sup>11</sup>

[13] On July 26, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

## ANALYSIS

### The complaint

[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 must determine whether the following four conditions are met before it can conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;
- (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 procurement has not been conducted in accordance with the relevant trade agreements.

[15] The Tribunal finds that the first three conditions are met. However, the Tribunal determines that the fourth is not met. For the reasons that follow, the Tribunal finds that Newland's ground of

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<sup>6</sup> *Ibid.* at 33.

<sup>7</sup> *Ibid.* at 29.

<sup>8</sup> *Ibid.* at 28.

<sup>9</sup> *Ibid.* at 27–28.

<sup>10</sup> *Ibid.* at 27.

<sup>11</sup> Newland submitted documents on July 20 and 21, 2022. The complaint was considered filed on July 21, 2022.

complaint does not disclose a reasonable indication that the procurement was conducted in violation of the applicable trade agreements.

[16] Newland based its complaint on the belief that the terms of the RFP made lowest price the determining factor in contract award.<sup>12</sup> That view, however, is incorrect.

[17] Part 4 (Evaluation Procedures and Basis of Selection) of the RFP provided the following:

#### **4.2 Basis of Selection**

A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

##### **4.2.1 One Establishment**

Priority for contract award will be given to full bids providing all accommodations at one (1) establishment.

##### **4.2.2 Multiple Establishments**

Should there be no single establishment capable of complying with the requirements, multiple establishments could be used to provide the required accommodations. Each establishment must provide accommodations for at least one (1) group, as outlined in Annex “B” – Basis of Payment.<sup>13</sup>

[18] Understood as a whole, and according to their ordinary meaning, the Tribunal reads these clauses as establishing a “[p]riority for contract award” to “full bids providing all accommodations at one (1) establishment”. In other words, this opportunity clearly prioritized bids accommodating DND personnel at one establishment.

[19] The RFP also provided that “multiple establishments could be used” but allowed for that option only, “[s]hould there be no single establishment capable of complying with the requirements”.

[20] DND would therefore award the contract to the lowest-priced bid with multiple establishments only if there were no compliant proposals offering accommodation at one establishment. In other words, responsive bids with multiple establishments, such as Newland’s, would automatically rank lower than all other responsive bids offering accommodations at one establishment, regardless of price, creating a two-tiered selection system.

[21] In this case, the winning bidder offered accommodations at one establishment, whereas Newland’s bid offered two establishments. Newland’s bid therefore automatically ranked below the winning bid, despite being lower in price.

[22] Newland’s bid would only have been assessed for price if there had been no responsive bids proposing a “single establishment capable of complying with the requirements”. In such an instance, Newland’s bid would have then been assessed for price against other responsive bids that proposed multiple establishments. Of course, this was not necessary because DND had already found a

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<sup>12</sup> Exhibit PR-2022-027-01 at 7.

<sup>13</sup> *Ibid.*

responsive bidder proposing all accommodations at one establishment, according to DND's priority preference.

[23] Clearly, DND set its mind to lodging its personnel at one establishment, for logistical or other operational reasons, to the extent possible. In the Tribunal's view, there was no ambiguity whatsoever in the terms of the RFP in establishing this priority for a "one-establishment" solution. In the Tribunal's view, this priority consideration for contract award over other considerations, including price, was clearly expressed in the RFP by the term "priority". This important element of the basis of selection was overlooked by Newland. If Newland had any uncertainties about the terms of the RFP, it should have sought clarification during the bidding process.<sup>14</sup>

[24] The Tribunal therefore finds that DND did not breach its trade agreement obligations by awarding the contract to a bidder that was not the lowest-priced bid.

[25] For the foregoing reasons, the complaint does not contain a reasonable indication of a breach of a trade agreement obligation.

### Observations

[26] Two observations about this RFP are warranted.

[27] First, the Tribunal notes that neither the solicitation documents nor the regret letters nor any communication from DND officials contained reference to recourse mechanisms for unsatisfied bidders, i.e. the ability to bring complaints to the Tribunal. A best practice in this area has been

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<sup>14</sup> The Tribunal has previously found that bidders should not make assumptions about the terms of an RFP; see *Tritech Group Ltd.* (1 August 2014), PR-2013-035 (CITT) at para. 29. It is the bidder's responsibility to ensure that its proposal is compliant with all essential elements of the RFP (see *Trans-Sol Aviation Service Inc.* (13 May 2008), PR-2008-010 (CITT) at para. 11). If there is any doubt about the essential elements of a solicitation, the Tribunal encourages bidders to pose questions and to seek clarification during the bidding process. Understanding the fundamentals of an RFP ought to be achieved during the bidding period, not after, and bidders can avert disappointment and provide better responses to published opportunities if they carefully consider all terms of a solicitation and pose questions instead of making assumptions. Unfortunately, Newland assumed that section 4.2 of the RFP could be read in isolation, despite the fact that it was immediately followed by the one-establishment priority-setting clause of 4.2.1 and the second-tier multiple-establishment clause of 4.2.2. Based on Newland's arguments at paragraph 2 of its Detailed Statement of Facts and Arguments, the Tribunal also considers that Newland would have benefited from asking DND during the bidding period how to reconcile section 2.1.3 of Annex A of the RFP (the Statement of Work) with section 4.2.1. Section 2.1.3 of Annex A sets out the requirement that each detachment be lodged together in one and only one facility. Section 4.2.1, as examined above, sets out the overarching prioritization of one establishment for the totality of the requirement. The Tribunal sees no confusion or contradiction within these terms. If no award could be made under section 4.2.1, DND would turn to consider bids offering multiple establishments pursuant to section 4.2.2, which specified that "each establishment must provide accommodations for at least one (1) group, as outlined in Annex 'B'". The words "group" and "detachment" are used synonymously throughout the RFP. In particular, the Tribunal notes that section 1.2 of Annex A states that six "detachments" will be sent to Romania and provides the required accommodations for each in a table at section 2.1.6. This table forms the Basis of Payment at Annex B, which requires estimated costs for each of the six "groups". As such, section 2.1.3 of Annex A and section 4.2.2 simply repeat the same message: *no* detachment can be split up between establishments.

identified by the Tribunal on numerous occasions previously.<sup>15</sup> Systematic adherence to that best practice is encouraged.

[28] Second, the Tribunal remarks that this solicitation contained only one means of bid transmittal (by email). In a recent case, the Tribunal found that the Department of Public Works and Government Services (PWGSC), the contracting authority, “correctly identified that it had not provided sufficient means to the bidding community by restricting bid transmission to epost Connect alone.”<sup>16</sup> The Tribunal notes that, in the RFP in question in the present complaint, the standard clause providing for both epost Connect and facsimile transmission was *deleted* and replaced with a clause allowing for bids to be transmitted only by email. The Tribunal encourages DND, and all government institutions, to adopt PWGSC’s policy of systematically providing for at least two means of bid transmission, no matter what they are. This will mitigate the failure of, or technical difficulties with, one system by allowing bidders to turn to the second system if need be. Allowing for two means of bid transmission increases the efficacy and integrity of the competitive procurement system for the benefit of suppliers, Government of Canada purchasers, and ultimately the taxpayer.

## DECISION

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

Eric Wildhaber

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Eric Wildhaber

Presiding Member

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<sup>15</sup> The Tribunal has, on multiple occasions, strongly encouraged government institutions to include in tender documents and regret letters the following language advising bidders of the deadlines for raising an objection with the government institution and a complaint with the Tribunal: “As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal within 10 working days from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to the government institution; if the government institution denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal’s website ([www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca)) or by contacting the Registry of the Tribunal.” See *Commissionaires Kingston & Region Division* (5 July 2021), PR-2021-019 (CITT) at paras. 20–21; *Sigma Risk Management Inc.* (12 February 2021), PR-2020-082 (CITT) at paras. 27–29; *Paul McDonald Trucking & Backhoe Ltd.* (21 January 2021), PR-2020-075 (CITT) at paras. 26–29; *Kaméléons & cie Solutions Design Inc.* (26 November 2019), PR-2019-047 (CITT) at para. 22; *Les Gestions Jacques Delaney Inc.* (10 February 2017), PR-2016-050 (CITT) at para. 25; *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at para. 55; *R.H. MacFarlands (1996) Ltd.* (23 December 2013), PR-2013-029 (CITT) at paras. 30–31; *ADR Education* (16 July 2013), PR-2013-009 (CITT) at para. 34.

<sup>16</sup> *S.i. Systems* (27 July 2022), PR-2021-082 (CITT) at para. 51.