



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-062

ECA Robotics Canada Inc.

*Decision made  
Wednesday, January 25, 2023*

*Decision issued  
Tuesday, January 31, 2023*

*Reasons issued  
Friday, February 3, 2023*

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

**BY**

**ECA ROBOTICS CANADA 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 information provided by ECA Robotics Canada Inc. fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the Canadian Free Trade Agreement.

Frédéric Seppey

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Frédéric Seppey

Presiding Member

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

## STATEMENT OF REASONS

### SUMMARY OF THE COMPLAINT

[1] The complainant, ECA Robotics Canada Inc. (ECA Canada), responded to a request for proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence, for a “Remote Minehunting and Disposal System” (RMDS). The RFP (solicitation W8472-105270/C) was issued on June 29, 2021, and closed on November 10, 2021.<sup>1</sup> One of the mandatory requirements of the RFP was that one of the components of the RMDS, the “mine disposal vehicle – combat”, must have a probability of successfully completing a disposal mission of at least 95%.<sup>2</sup>

[2] PWGSC informed ECA Canada on December 7, 2022, that, as a result of the RFP in question, a contract was awarded to Kraken Robotics Inc. (Kraken). While ECA Canada’s proposal was found to be compliant with the mandatory and point-rated requirements of the RFP, it did not achieve the highest score under the evaluation methodology of the RFP.<sup>3</sup>

[3] By a letter dated December 21, 2022, ECA Canada objected to the awarding of the contract to Kraken, as it alleged that the product offered by Kraken could not meet certain requirements of the RFP. In support of its allegation, ECA Canada provided PWGSC with third-party information, which it claimed demonstrated that the product offered by Kraken could not meet certain requirements.<sup>4</sup>

[4] PWGSC responded by letter on January 5, 2023, to ECA Canada’s objection, indicating that it carefully considered the information provided by ECA Canada and that it decided to maintain the contract with Kraken. The letter also confirmed that a debriefing session was scheduled for January 12, 2023, which would provide an opportunity to further discuss the evaluation of ECA Canada’s bid and the evaluation process.<sup>5</sup> The debriefing session took place as scheduled, but the allegations raised by ECA Canada regarding Kraken’s ability to meet the mandatory requirements of the RFP were not discussed.<sup>6</sup>

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<sup>1</sup> Exhibit PR-2022-062-01 at 12, 18. The Tribunal notes that the correspondence between the parties refers to a different solicitation number; however, the RFP documentation submitted with the complaint and the corresponding award notices available online identify the solicitation as W8472-105270/C. See the Notice of Contract Award, online: <<https://canadabuys.canada.ca/en/tender-opportunities/award-notice/w8472-105270001qf>>.

<sup>2</sup> Exhibit PR-2022-062-01 at 87.

<sup>3</sup> *Ibid.* at 12; Exhibit PR-2022-062-01.A (protected) at 122.

<sup>4</sup> Exhibit PR-2022-062-01 at 12; Exhibit PR-2022-062-01.A (protected) at 125–127; Unfortunately, the Tribunal cannot offer more specificity as to ECA Canada’s allegations in the context of these reasons, as ECA Canada elected to designate as “protected” many elements of the document in support of its complaints, notably the entirety of its correspondence with PWGSC. The Tribunal’s summary of the complaint is based on public elements of the detailed statement of facts and argument provided as part of the complaint.

<sup>5</sup> Exhibit PR-2022-062-01 at 13; Exhibit PR-2022-062-01.A (protected) at 128. Although the letter is dated January 7, 2023, ECA Canada indicates in its complaint that the letter was effectively communicated on January 5, 2023.

<sup>6</sup> Exhibit PR-2022-062-01 at 13.

[5] ECA Canada filed its complaint with the Canadian International Trade Tribunal on January 19, 2023. The Tribunal deemed it to be complete as of that date. ECA Canada's stated grounds of complaint are as follows:

- (i) Kraken's proposal does not meet one or more of the mandatory criteria of the RFP; and
- (ii) PWGSC's lack of verification (of Kraken's stated compliance with the mandatory criteria) was unreasonable and in breach of obligations under the Canadian Free Trade Agreement (CFTA).

[6] Accordingly, ECA Canada seeks the following remedies:

- (i) that the awarded contract be cancelled and instead awarded to ECA Canada;
- (ii) alternatively, that ECA Canada be awarded the profits it reasonably could have expected to earn from the contract to be awarded pursuant to the RFP;
- (iii) in the further alternative, that a new solicitation be issued, including "meaningful validation of the 95% success probability criterion";
- (iv) that ECA Canada be awarded its proposal preparation costs associated with participating in the RFP; and
- (v) that ECA Canada be awarded its costs of bringing this complaint.

[7] For the reasons below, the Tribunal finds that the information provided by ECA Canada fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the CFTA.<sup>7</sup> Accordingly, the Tribunal has decided not to conduct an inquiry.

## ANALYSIS

### First ground of complaint: No reasonable indication of a breach of the CFTA

[8] Paragraph 7(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>8</sup> (Regulations) requires that the Tribunal determine whether the information provided in a complaint discloses a reasonable indication that the procurement for which the complaint is brought forward has not been conducted in accordance with the obligations contained within any of the applicable trade agreements, in this case the CFTA.

[9] The requirement of "reasonable indication" does not impose a high threshold. However, as it has been stated by the Tribunal on several occasions in the past, a party challenging a procurement must provide some sufficient evidence to establish a reasonable indication that the procurement process was conducted in breach of the trade agreements. In the present case, the Tribunal does not consider that the detailed statement of facts and arguments presented by ECA Canada met that threshold.

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<sup>7</sup> The RFP states that the procurement is subject to the CFTA; Exhibit PR-2022-062-01 at 5.

<sup>8</sup> SOR/93-602.

[10] In support of its first ground of complaint, ECA Canada makes the following assertions:

- (i) The product proposed by Kraken as part of its bid is the “Seafox MK2” model;
- (ii) This model has been available since 2006;
- (iii) Success rate data reported by ECA Canada in its December 21, 2022, objection letter would still be current and relevant, since it relates to the same product version;
- (iv) It is reasonable to conclude that the effectiveness of the Seafox MK2 model has not materially changed over the years and, hence, success rate data reported are still relevant;
- (v) From the points above, “the only reasonable conclusion is that Kraken’s proposed solution did not meet the mandatory requirement prescribed by Appendix 1, section 4.4.6 of the RFP” (Mandatory SRD Requirement 4.4.6).<sup>9</sup>

[11] In support of its claim, ECA Canada refers to the Tribunal’s reasons in *Medi+Sure Canada Inc. v. Department of Public Works and Government Services*<sup>10</sup> and states that “the award of a contract to a bidder who demonstrably does not meet the requirements of a solicitation is in violation of the applicable trade agreements”.<sup>11</sup> Article 515.4 of CFTA, which in the Tribunal’s view relates most closely to the assertion made by ECA Canada, provides as follows:

**Article 515: Treatment of Tenders and Award of Contracts**

...

*Evaluation and Award of Contract*

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.

[Underline added; bold and italics in original]

[12] The Tribunal considers that ECA Canada did not provide information which reasonably indicates that the procurement was not conducted in accordance with the CFTA, including Article 515.4. There is no information in ECA Canada’s complaint regarding the actual content of Kraken’s bid, or the process of evaluating bids, to suggest that Kraken’s bid did not comply with the essential requirements set out in the RFP or that PWGSC erred in assessing such compliance.

[13] ECA Canada’s complaint asserts several inferences which the Tribunal considers to have very little, if any, evidentiary support: first, that the goods proposed in Kraken’s proposal relevant to Mandatory SRD Requirement 4.4.6 are the “Seafox MK2” model; second, that the “Seafox MK2”

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<sup>9</sup> For greater clarity, the Tribunal notes that the 95% likelihood of success requirement for the MDV-Subsystem appears in Appendix B of the RFP, titled “RMDS Compliance Matrix”, at item 4.4.6 of Table 2, titled “Mandatory SRD Requirements”; see Exhibit PR-2022-062-01 at 15–16, 87.

<sup>10</sup> (19 January 2017), PR-2016-031 (CITT) [*Medi+Sure Canada*].

<sup>11</sup> Exhibit PR-2022-062-01 at 16, at para. 23.

model is the subject of the information presented to PWGSC in ECA Canada's objection letter;<sup>12</sup> third, that the performance of the "Seafox MK2" model relevant to Mandatory SRD Requirement 4.4.6 can be assumed to have stayed the same over the years because the "MK2" model type designation has remained unchanged;<sup>13</sup> fourth, that the information in the objection letter can therefore be assumed to remain applicable to current versions of the Seafox MK2, despite ECA Canada's admission regarding the age of the information in its objection;<sup>14</sup> and finally, therefore, that the only reasonable inference is that "Kraken's proposed solution did not meet" Mandatory SRD Requirement 4.4.6.

[14] In the Tribunal's view, the very limited evidentiary support for these assertions by ECA renders its first ground of complaint tenuous at best. Paragraph 7(1)(c) of the Regulations does not require complainants to actually demonstrate a breach of the obligations in the relevant trade agreements in order for a complaint to be accepted for inquiry. They need only present enough evidence to provide a reasonable indication of such a breach. The Tribunal in this case finds that ECA Canada's evidence, regarding the compliance of the winning proposal with Mandatory SRD Requirement 4.4.6, does not meet that threshold.

[15] For these reasons, the Tribunal does not consider that the information presented by ECA Canada with respect to its first ground of complaint discloses a reasonable indication that the procurement was not conducted in accordance with applicable trade agreements, notably the CFTA. The Tribunal therefore decides not to conduct an inquiry in connection with this first ground of complaint.

### **Second ground of complaint: PWGSC had no obligation to verify information in the proposals beyond what is required under the RFP**

[16] As repeatedly noted in the Tribunal's jurisprudence, when considering the way bids are evaluated, the Tribunal applies the standard of reasonableness. As a result, the Tribunal does not generally substitute its judgments for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>15</sup>

[17] In support of this ground of complaint, ECA Canada notes that "PWGSC's Rejection Letter suggests that it chose not to verify any information regarding the required 95% success rate."<sup>16</sup> The Tribunal does not interpret PWGSC's letter to make such a suggestion. The letter makes it clear that the information provided by ECA Canada was carefully reviewed. Furthermore, PWGSC makes it clear in its letter that its treatment of the information provided by ECA Canada was guided by a

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<sup>12</sup> The Tribunal finds the evidence on this point to be ambiguous, as the information in question makes no reference to a model type or product version; Exhibit PR-2022-062-01.A (protected) at 126.

<sup>13</sup> Exhibit PR-2022-062-01 at 137–152.

<sup>14</sup> The Tribunal also notes that there is no evidence, either in ECA Canada's objection to PWGSC or its complaint to the Tribunal, which might confirm the age of that information stated in its arguments. See Exhibit PR-2022-062-01.A (protected) at 5–6, 129–130, at paras. 21–22.

<sup>15</sup> *Medi+Sure Canada* at para. 29. See also *Unincorporated joint venture between BEVA Global Management Inc., Enterprise Information Systems, Inc., Franco-Expert Inc. and ABCE Language School Inc.* (21 June 2022), PR-2022-014 (CITT) at para. 31; *Krav Maga Ottawa* (1 June 2022), PR-2022-010 (CITT) at para. 24; *E-Safe Pest Control Inc.* (3 March 2020), PR-2019-062 (CITT) at para. 15.

<sup>16</sup> Exhibit PR-2022-062-01 at 16.

desire to ensure that all bids receive the same treatment in their evaluation.<sup>17</sup> The Tribunal considers such an approach by PWGSC to be in line with Article 515.1 of the CFTA, which stipulates that “[a] procuring entity shall ... treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process”.

[18] As noted by the Tribunal in the past, a procuring entity is entitled to rely on the information provided in bids to evaluate the conformity of a bid with the mandatory requirements of a solicitation.<sup>18</sup> This conclusion is consistent with the Supreme Court of Canada’s decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, where it was held that procuring entities are under no obligation to verify the information and certifications submitted by potential suppliers.<sup>19</sup> Although the decision in *Double N* was decided under the common law, the Tribunal considers it a useful guide in informing its analysis of obligations under the trade agreements.<sup>20</sup>

[19] The principle that procuring entities are entitled, but not obligated, to verify the information and certifications submitted in a bid might be displaced if such verification is specifically required under the terms of the solicitation.<sup>21</sup> In this case, the Tribunal notes that clause 2.1 of the RFP incorporates by reference the Standard Acquisition Clauses and Conditions Manual issued by PWGSC, including the clause 2003 (2020-05-28) Standard Instructions - Goods or Services - Competitive Requirements.<sup>22</sup> Section 16 of that document provides that, in conducting its evaluation of bids, Canada may, but will have no obligation to, *inter alia*:

- seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;
- contact any or all references supplied by bidders to verify and validate any information submitted by them; and
- verify any information provided by bidders through independent research, use of any government resources or by contacting third parties.

[20] In its complaint, ECA Canada questions the ability of Kraken to offer a solution meeting Mandatory SRD Requirement 4.4.6. The RFP required bidders to demonstrate compliance with this requirement by providing both: 1) a compliance statement which clearly demonstrates that the solution proposed for the RMDS fully complies with the requirement; and 2) an analysis or

<sup>17</sup> Exhibit PR-2022-062-01.A (protected) at 128.

<sup>18</sup> *Enveloppe Concept Inc. v. Department of Public Works and Government Services* (14 January 2022), PR-2021-042 (CITT) [*Enveloppe Concept*] at paras. 24, 31; *Newland Canada Corporation v. Department of National Defence* (19 December 2022), PR-2022-037 (CITT) at para. 41. See also *Airsolid Inc.* (12 March 2010), PR-2009-089 (CITT) at paras. 11–12, 16; *3202488 Canada Inc. o/a Kinetic Solutions* (3 March 2011), PR-2010-089 (CITT) at paras. 18–19; *SoftSim Technologies Inc. v. Department of National Defence* (19 December 2018), PR-2018-032 (CITT) at paras. 36–37.

<sup>19</sup> [2007] 1 SCR 116, 2007 SCC 3 [*Double N*].

<sup>20</sup> See *TPG Technology Consulting Ltd.* (5 December 2016), PR-2016-045 (CITT) at para. 10.

<sup>21</sup> In contrast, see *Double N* at para. 47, where the Court found that the solicitation documents provided the right of, but did not impose a duty on, the procuring entity to inspect the proposed goods for compliance with the requirements.

<sup>22</sup> Exhibit PR-2022-062-01 at 24. The Standard Instructions - Goods or Services - Competitive Requirements are available online: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/26>>.

simulation predicting the performance of solution(s) proposed for the RMDS, which demonstrates full compliance with the requirement.<sup>23</sup>

[21] ECA Canada did not provide any information that disclosed a reasonable indication that PWGSC did not conduct the evaluation of bids (notably Kraken's bid) in accordance with the requirements of the RFP and the CFTA, including Article 515.1. As PWGSC was not required to verify the information presented in Kraken's proposal, the Tribunal does not see how failing to do so would be unreasonable or would suggest bias in favour of Kraken, as argued by ECA Canada.

[22] In the present case, the information regarding the alleged performance of Kraken's product was transmitted to PWGSC once the procurement was completed and the contract was awarded. After the award of the contract and after the procurement process is completed, if it becomes known that the contract awardee is not able to meet the requirements of the RFP, the issue becomes one of contract administration that is beyond the Tribunal's jurisdiction to review.<sup>24</sup>

[23] For these reasons, the Tribunal does not accept this second ground of complaint for inquiry.

## DECISION

[24] Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Tribunal has decided not to conduct an inquiry into this complaint. The information provided by ECA Canada fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the CFTA.

Frédéric Seppey

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Presiding Member

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<sup>23</sup> These compliance methods correspond to those identified in the "Compliance Method" column of Mandatory SRT Requirement 4.4.6; see Exhibit PR-2022-062-01 at 68–69, 87.

<sup>24</sup> *SoftSim Technologies Inc.* (27 September 2021), PR-2021-041 (CITT) at paras. 21–25. See also *Aqua Valley Water v. Department of Public Works and Government Services* (6 August 2021), PR-2020-098 (CITT) at paras. 55–56; *Enveloppe Concept* at paras. 33–34; *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at para. 17.