



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-070

TK Elevator (Canada) Limited

*Decision made  
Thursday, February 23, 2023*

*Decision issued  
Friday, February 24, 2023*

*Reasons issued  
Monday, March 6, 2023*

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

**BY**

**TK ELEVATOR (CANADA) LIMITED**

**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. The information provided by TK Elevator (Canada) Limited fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the relevant trade agreements.

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, TK Elevator (Canada) Limited (TKE), responded to an invitation to tender (ITT) issued by Defence Construction (1951) Limited operating as Defence Construction Canada (DCC) for the provision of inspection, testing and maintenance (ITM) services related to elevators at Canadian Forces Base Halifax, Nova Scotia (NS), and at Canadian Forces Station St. John's, Newfoundland and Labrador (NL). As a result of the ITT, KONE, Inc. (KONE) was awarded the contract as the lowest bidder. TKE claims that KONE is non-compliant with the terms of the ITT, as it does not have staff presently located in either NS or NL. TKE seeks termination of the contract awarded to KONE.

[2] For reasons detailed below, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint, as the information provided by TKE fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the relevant trade agreements, notably the Canadian Free Trade Agreement (CFTA).<sup>1</sup>

### THE PROCUREMENT PROCESS

[3] The ITT (project HX245015\_77652) was issued on MERX on December 12, 2022, with one amendment dated December 12, 2022. The solicitation was also published on the CanadaBuys website two days later. The ITT closed on January 24, 2023, at 2:00 p.m. AT. TKE submitted its bid on January 23, 2023.

[4] In advance of the ITT closing date, on January 16, 2023, TKE submitted three questions to DCC, seeking clarifications on various aspects of the ITT. Most relevant to the current complaint was TKE seeking confirmation that contractors were “required to be working presently in the provinces of NL and NS to ensure contract response times, the safety of the public and contractual obligations are met”.<sup>2</sup> In its question, TKE did not specifically refer to a provision of the solicitation documents.

[5] DCC responded to TKE's questions on January 17, 2023. With respect to TKE's question on a potential requirement for contractors to be located in NL and NS, DCC responded that it did “not see a requirement to be ‘working presently in the province of NL and NS’ in the Statement of Work” and sought further details from TKE as to the section of the ITT on which it was basing its interpretation.<sup>3</sup> The information on the record does not indicate that TKE followed up with DCC prior to bid closing as to whether there was a location requirement.

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<sup>1</sup> 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). Also referenced in the ITT as posted on MERX are the Canada-Chile Free Trade Agreement (CCFTA) and the World Trade Organization Agreement on Government Procurement; online: Global Affairs Canada <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>> (entered into force 5 July 1997) (CCFTA) (Chapter *Kbis*, entitled “Government Procurement”, came into effect 5 September 2008 and the “modernized” CCFTA entered into force 5 February 2019); online: World Trade Organization <[https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)> (entered into force 6 April 2014).

<sup>2</sup> Exhibit PR-2022-070-01.A at 82.

<sup>3</sup> *Ibid.* at 85.

[6] Upon publication of the unofficial results of the ITT on the MERX website, TKE contacted DCC by email on January 25, 2023, and requested clarification as to how DCC determined bidders' capability to provide services as required by the statement of work, notably with respect to response time. TKE specifically alleged that "KONE Inc. does not currently provide service in NL".<sup>4</sup> TKE urged DCC to not base its decision solely on cost. In the same communication, TKE implied that its questions posed while the ITT was still open were not answered properly.

[7] DCC responded on January 26, 2023, stating that "DCC must award to the lowest compliant bidder".<sup>5</sup> TKE replied on the following day arguing that, as per section 8 of the instructions to tenderers, DCC was allowed to reject a tender under certain conditions.<sup>6</sup> TKE added that "the unofficial low bidder" (referring to the only other bidder, KONE) "has continually proven they low ball public tenders and do not fulfil the criteria laid out and procurement divisions seem to ignore crucial items laid out in the [solicitation] documents which impact risk to the owners and the public from a health and safety perspective".<sup>7</sup>

[8] DCC escalated the issue to its regional service line leader who responded to TKE on January 30, 2023, that "DCC has proceeded with a lump sum tender ... and cannot, for reason of fairness and transparency, introduce at this point new evaluation criteria". TKE replied on January 31, 2023, citing clause 3.17.1 of Annex C, titled "ITM Requirements", of the Statement of Work, which provides as follows:

The Contractor agrees that all work shall be performed by and under the supervision of skilled, experienced elevator service and repairmen directly employed and supervised by the Contractor and certified by the applicable provincial elevator inspection authority.

[9] In the same communication, TKE stated its interpretation that "a contractor clearly does need to be in both provinces and subcontractors are not an option, from an elevator work basis that is" (underline in original).<sup>8</sup>

[10] Following the official tender results being posted on or around February 7, 2023, TKE reiterated its request to understand how DCC could deem KONE compliant with the tender requirements and sought information on recourse to challenge the award.<sup>9</sup> On the same day, DCC replied regarding the recourse mechanisms available.<sup>10</sup>

[11] DCC provided a formal response to TKE's concerns in the form of a letter dated February 13, 2023, signed by the National Director, Contract Services.<sup>11</sup> The letter stated the following:

- The solicitation was tendered as a lump sum contract, not as an evaluated tender based on a pre-defined set of evaluation criteria;

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<sup>4</sup> *Ibid.* at 90.

<sup>5</sup> *Ibid.* at 94.

<sup>6</sup> *Ibid.* at 96–98.

<sup>7</sup> *Ibid.* at 96.

<sup>8</sup> *Ibid.* at 113–120.

<sup>9</sup> *Ibid.* at 129.

<sup>10</sup> *Ibid.* at 138.

<sup>11</sup> *Ibid.* at 168–169.

- The lowest bidder is compliant with DCC’s contractual documents;
- All bidders, including the lowest bidder, had to acknowledge that they had carefully reviewed the documents forming part of the ITT and agreed to complete the work in strict accordance with those documents;
- In due diligence, DCC reviewed the lowest bidder’s performance in past contracts awarded for similar work and found that it had passed all previous performance evaluation; and
- As a result, DCC saw no reason not to award the contract to the lowest bidder.

## THE COMPLAINT

[12] Following DCC’s letter of February 13, 2023, TKE submitted a complaint to the Tribunal on February 14, 2023.<sup>12</sup> On February 15, 2023, the Tribunal asked for additional information before the complaint could be considered to have been filed.<sup>13</sup> TKE provided the requested information on February 17, 2023,<sup>14</sup> and the Tribunal acknowledged receipt of the complaint on the same day.<sup>15</sup>

[13] TKE’s stated ground of complaint is that the awarded bidder, KONE, is not compliant on the basis of clause 3.17.1 of Annex C, ITM Requirements, of the Statement of Work.<sup>16</sup> For the reasons below, the Tribunal has decided not to conduct an inquiry into the complaint.

## ANALYSIS

### **The complaint failed to disclose a reasonable indication of a breach of a trade agreement by DCC**

[14] Paragraph 7(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>17</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, which, in this case, includes the CFTA.<sup>18</sup>

[15] The requirement of “reasonable indication” does not impose a high threshold. As stated by the Tribunal in past decisions, a party challenging a procurement process must provide sufficient evidence that discloses a reasonable indication that the procurement process was conducted in breach of the trade agreements. Mere allegations made by a complainant that are unsupported by evidence are insufficient to establish a reasonable indication that the procurement process was conducted in

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<sup>12</sup> Exhibit PR-2022-070-01.

<sup>13</sup> Exhibit PR-2022-070-02.

<sup>14</sup> Exhibit PR-2022-070-01.A

<sup>15</sup> Exhibit PR-2022-070-03.

<sup>16</sup> Exhibit PR-2022-070-01 at 6–8, 56.

<sup>17</sup> SOR/93-602.

<sup>18</sup> See, e.g., articles 307.2, 515.4 and 515.5 of the CFTA.

breach of the trade agreements.<sup>19</sup> In the present case, the Tribunal does not consider that the detailed statement of facts and arguments and supporting documents provided by TKE met that threshold.

[16] Based on its examination of the evidence provided by TKE, the Tribunal understands TKE's argument to be summarized as the following:

- (i) KONE does not currently provide service in NL.
- (ii) Clause 3.17.1 of Annex C, ITM Requirements, of the Statement of Work stipulates that all work shall be performed by and under the supervision of skilled, experienced elevator service and repairmen directly employed and supervised by the contractor and certified by the applicable provincial elevator inspection authority; this provision necessarily requires that the contractor have operations and/or employees in both NL and NS.
- (iii) Hence, KONE cannot perform the work as specified by clause 3.17.1 and, therefore, cannot be awarded the contract.

[17] The Tribunal will examine each of the points above. With respect to the first point, there is no evidence on the record as to whether KONE is in a position (or not) to provide, either currently or in the future, ITM services in NL. In the Tribunal's view, TKE's assertions amount to mere allegations.

[18] With respect to the second point of TKE's argument, the Tribunal considers that TKE's interpretation of clause 3.17.1 of Annex C, ITM Requirements, of the Statement of Work is speculative. A plain reading of the requirement indicates that it specifies: a) who shall perform the work; b) under the supervision of whom such work is to be performed; and c) the necessary certification held by those performing the work. It does not specify anything with respect to the permanent or temporary location of either those performing the duties or their supervisors. The Tribunal fails to see how this section *necessarily* implies that the contractor must *currently* operate in a given province to be in compliance with the terms of the ITT, as TKE seems to argue.

[19] The Tribunal's interpretation is consistent with the response that TKE obtained from DCC on January 16, 2023, before bid closing. At that time, DCC specified that it did "not see a requirement [for contractors] to be 'working presently in the province of NL and NS' in the Statement of Work". Despite being invited by DCC to elaborate on its question, TKE seems to have elected to not pursue this matter further.

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<sup>19</sup> *The Braintree Group Inc* (5 May 2022), PR-2022-005 (CITT) at para. 27; *Akimbo Technologies Inc.* (2 August 2022), PR-2022-024 (CITT) at para. 33; *Smiths Detection Montreal Inc.* (5 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* (20 March 2013), PR-2012-049 (CITT) at para. 22; *Veseys Seeds Limited, doing business as Club Car Atlantic* (19 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at para. 12.

[20] The third leg of TKE's argument raises the question of the evaluation of the bids received by DCC. The relevant provisions of the CFTA in this regard, articles 515.4 and 515.5, provide 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.

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

[Underline added; bold and italics in original]

[21] TKE did not provide information which reasonably indicates that the procurement was not conducted in accordance with the CFTA, including articles 515.4 and 515.5. Subsection 8.1, titled "Acceptance of Tender", of the Instructions to Tenderers for Electronic Bidding made clear that DCC's intent was to award the contract to "the lowest compliant tender".<sup>20</sup> Under subsection 8.2, DCC had the right to reject a compliant tender for a variety of reasons; however, it did not have to do so.<sup>21</sup>

[22] As such, DCC's decision to award the contract to the lowest bidder deemed capable of performing the work based on its submission is in line with the letter of articles 515.4 and 515.5 of the CFTA, as it is founded solely on the criteria specified in the ITT. DCC confirmed this in its letter to TKE on February 13, 2023, as follows:

Since the low bidder has:

- confirmed that they have carefully reviewed the plans and specifications and agreed to complete the work in strict accordance with those documents as per paragraph 2 of DCC's Acknowledgement Documents, and
- performed on previous contracts,

<sup>20</sup> Exhibit PR-2022-070-01.A at 25.

<sup>21</sup> *Ibid.* at 25–27. The Tribunal notes that DCC's letter of February 13, 2023, indicates that it, in fact, undertook to review KONE's evaluation scores for past contracts, as contemplated under clauses 8.2.5.4 and 8.3 of the Instructions to Tenderers, and found that it had passed all previous performance evaluations.

DCC has no reasons to question the low bidder's ability to perform the work and will not invoke section 8 as a reason not to award this contract...<sup>22</sup>

[23] The Tribunal finds reasonable DCC's rationale of its award decision. Nothing in the complaint indicates that DCC had any reason to reject the winning bid.

[24] In the alternative, even if the solicitation documents imposed the requirement suggested by TKE, the government would be entitled to rely upon the certification provided by KONE, in paragraph 2 of the Acknowledgement Form, stating that it would complete the work in strict accordance with the representations.<sup>23</sup> In other words, there is nothing in the solicitation documents imposing an obligation on the part of DCC to evaluate or to conduct investigations into the basis of a bidder certifying their ability to complete the work in strict accordance with the ITT.

[25] In that case, if it became known after the award of the contract (that is, after the procurement process is completed) that the contract awardee (in this case, KONE) were unable to meet the requirements of the ITT, the issue would become one of contract administration, which is beyond the Tribunal's jurisdiction to review.<sup>24</sup>

[26] For these reasons, the Tribunal does not consider that the information presented by TKE in support of its complaint discloses a reasonable indication that the procurement was not conducted in accordance with applicable trade agreements, notably the CFTA. The Tribunal therefore does not accept TKE's complaint for inquiry.

## DECISION

[27] 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 TKE fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the relevant trade agreements.

Frédéric Seppey  
Frédéric Seppey  
Presiding Member

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<sup>22</sup> Exhibit PR-2022-070-01.A at 169.

<sup>23</sup> This was part of the explanation provided in DCC's letter of February 13, 2023; Exhibit PR-2022-070-01.A at 19, 168–169.

<sup>24</sup> See *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 Inc.* (14 January 2022), PR-2021-042 (CITT) at paras. 33–34; *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at para. 17.