



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File PR-2022-035

Star-Ting Incorporated

v.

Department of Fisheries and  
Oceans

*Order issued  
Friday, October 7, 2022*

*Reasons issued  
Friday, October 21, 2022*

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IN THE MATTER OF a complaint filed by Star-Ting Incorporated, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a motion filed by the Department of Fisheries and Oceans on August 31, 2022, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, requesting that the Canadian International Trade Tribunal cease to conduct the inquiry on the ground that the complaint does not concern a designated contract.

**BETWEEN**

**STAR-TING INCORPORATED**

**Complainant**

**AND**

**THE DEPARTMENT OF FISHERIES AND OCEANS**

**Government  
Institution**

**ORDER**

The motion filed by the Department of Fisheries and Oceans is allowed. Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act* and paragraph 10(1)(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby ceases its inquiry into the complaint on the ground that the complaint does not concern a designated contract, given that the value of the procurement is below the monetary threshold for services prescribed under any of the trade agreements. Each party shall bear its own costs in this matter.

Serge Fréchette  
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Serge Fréchette  
Presiding Member

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

## STATEMENT OF REASONS

### SUMMARY

[1] Star-Ting Incorporated (Star-Ting) filed three procurement complaints with the Canadian International Trade Tribunal (respectively, PR-2022-030, PR-2022-032 and PR-2022-035). This complaint is the third of the three complaints filed by Star-Ting.

[2] In this complaint, Star-Ting essentially alleges that the Department of Fisheries and Oceans (DFO) improperly evaluated its bid.

[3] Following the Tribunal's decision to conduct an inquiry into Star-Ting's complaint, DFO filed a motion requesting that the Tribunal cease its inquiry on the basis that the Tribunal lacks jurisdiction to consider the complaint because it does not relate to a designated contract as required by the *Canadian International Tribunal Act*<sup>1</sup> (CITT Act) and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (Regulations). Star-Ting opposed DFO's motion.

[4] For the reasons that follow, and having considered submissions from both parties with respect to DFO's motion as well as the evidence on record, the Tribunal has decided to cease its inquiry into the present complaint. The Tribunal is satisfied, on balance, that the value of the procurement is below the monetary threshold for services prescribed under any of the trade agreements and, as a result, it lacks jurisdiction to consider the merits of the complaint.

### PROCEDURAL BACKGROUND

[5] On June 7, 2022, the request for proposal (RFP) was issued and sent to Star-Ting, as well as other prequalified bidders, by way of email.<sup>3</sup>

[6] The RFP arose from an existing supply arrangement, namely the ProServices supply arrangement (E60ZT-1800) (SA). Various "ProServices" streams and categories are covered under the SA.<sup>4</sup>

[7] DFO was seeking, in this solicitation, the provision of professional services for one senior facilitator consultant, under the "ProServices Stream 9.15", to support it with research, development, and facilitation work.<sup>5</sup> The estimated level of effort required to perform the services was identified in the RFP as "[u]p to 54 days *maximum*" [emphasis added].<sup>6</sup>

[8] On June 13, 2022, Star-Ting sent an email to DFO to inquire about the services being procured.<sup>7</sup>

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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-2022-030-01.A at 1, 6, 56-57.

<sup>4</sup> Exhibit PR-2022-035-13.A at 9, 38.

<sup>5</sup> *Ibid.* at 61.

<sup>6</sup> *Ibid.* at 62.

<sup>7</sup> *Ibid.* at 82.

[9] The next day, Star-Ting decided to submit its bid.<sup>8</sup>

[10] On June 16, 2022, the RFP closed. Star-Ting was the only bidder who submitted a proposal.<sup>9</sup>

[11] On July 28, 2022, Star-Ting received a regret letter from DFO informing it that its bid had been found to be non-compliant with mandatory criteria M2 and M3.<sup>10</sup> No contracts were awarded as a result of this solicitation process.<sup>11</sup>

[12] On the same day, Star-Ting made an objection to DFO by way of email and filed a first complaint with the Tribunal, which was ultimately found to be premature by the Tribunal given that an objection was still pending before DFO.<sup>12</sup>

[13] On August 9, 2022, DFO responded to Star-Ting's objection<sup>13</sup> and Star-Ting filed the present complaint with the Tribunal.<sup>14</sup>

[14] On August 11, 2022, the Tribunal granted Star-Ting's request to incorporate the documents filed before the Tribunal in the first complaint (PR-2022-030) into the record of the present complaint (PR-2022-035).<sup>15</sup>

[15] On August 15, 2022, the Tribunal informed the parties that the complaint had been accepted for inquiry in accordance with subsection 30.13(1) of the CITT Act and subsection 7(1) of the Regulations,<sup>16</sup> as it was satisfied that, at the time the complaint was filed, all conditions necessary for the Tribunal to initiate and proceed with an inquiry were met.

[16] On August 31, 2022, DFO filed its motion,<sup>17</sup> under rule 24 of the *Canadian International Trade Tribunal Rules*,<sup>18</sup> requesting that the Tribunal cease its inquiry into the matter on the ground that the complaint does not concern a designated contract, as the estimated value of the procurement is below the applicable monetary thresholds of the trade agreements.

[17] On September 6, 2022, the Tribunal directed DFO to comply with section 46 of the CITT Act in order to ensure, among other things, that public edited versions or public summaries of information that were designated as confidential contained sufficient information to allow non-represented parties, such as in this case, to present their cases.<sup>19</sup>

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<sup>8</sup> Exhibit PR-2022-035-16 at 7.

<sup>9</sup> Exhibit PR-2022-035-13.D at 4.

<sup>10</sup> Exhibit PR-2022-035-13.A at 80.

<sup>11</sup> Exhibit PR-2022-035-13.D at 5.

<sup>12</sup> PR-2022-030.

<sup>13</sup> Exhibit PR-2022-030-04.01.

<sup>14</sup> Exhibit PR-2022-035-01.

<sup>15</sup> Exhibit PR-2022-035-04.

<sup>16</sup> Exhibit PR-2022-035-08; Exhibit PR-2022-035-09.

<sup>17</sup> Exhibit PR-2022-035-13.A; Exhibit PR-2022-035-13.B, vol. 2 (protected); Exhibit PR-2022-035-13.C, vol. 2 (protected).

<sup>18</sup> SOR/91-499.

<sup>19</sup> Exhibit PR-2022-035-15.

[18] On September 8, 2022, DFO complied with the Tribunal's directive and filed revised versions of its motion and exhibit that had been initially filed in support of its motion.<sup>20</sup>

[19] On August 31 and September 13, 2022, Star-Ting submitted its response to DFO's motion, opposing DFO's request to cease the inquiry.<sup>21</sup>

[20] On September 22, 2022, DFO filed a reply.<sup>22</sup>

[21] On September 23, 2022, Star-Ting filed a sur-reply.<sup>23</sup>

## ANALYSIS

### The Tribunal lacks jurisdiction to pursue an inquiry into the complaint

[22] The CITT Act and the Regulations prescribe conditions that must be present for the Tribunal to conduct an inquiry into a complaint. One of these conditions is that the complaint be in respect of a "designated contract".<sup>24</sup>

[23] 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".

[24] In order for the Tribunal to have jurisdiction, the complaint must concern a procurement of goods or services, the value of which meet minimum monetary thresholds, as described in the provisions of the trade agreements that are listed in subsection 3(1) of the Regulations. The lowest monetary threshold currently prescribed under the trade agreements for services procured by the federal government is \$100,000 under the Canada-Korea Free Trade Agreement (CKFTA).<sup>25</sup>

[25] Section 5 of the Regulations, for its part, provides that, "where the Tribunal requires that the value of a designated contract be determined", the value of a designated contract is deemed to be the value established by the government institution at the time when the notice of proposed procurement (NPP) was published or, where a NPP has not been published, when the solicitation documentation was made available to potential suppliers. The trade agreements similarly provide that the value of a contract is the value estimated by the government institution at the time of publication of a NPP or at

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<sup>20</sup> Exhibit PR-2022-035-13.D; Exhibit PR-2022-035-13.F, vol. 2 (protected); Exhibit PR-2022-035-13.E, vol. 2 (protected).

<sup>21</sup> Exhibit PR-2022-035-14.A; Exhibit PR-2022-035-14.B, vol. 2 (protected); Exhibit PR-2022-035-14.C; Exhibit PR-2022-035-14.D, vol. 2 (protected).

<sup>22</sup> Exhibit PR-2022-035-16; Exhibit PR-2022-035-16.A, vol. 2 (protected).

<sup>23</sup> Exhibit PR-2022-035-17; Exhibit PR-2022-035-17.A, vol. 2 (protected).

<sup>24</sup> Paragraph 7(1)b of the Regulations.

<sup>25</sup> The thresholds for the period of January 1, 2022, to December 31, 2023, are stated in the following contracting policy notice, online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2021-6.html>>.

the outset of the procurement process.<sup>26</sup> In the matter at hand, given that there was no NPP that was published, the value of the procurement would be deemed to be the value estimated by the government institution when the solicitation documents were made available to potential suppliers, i.e. on or around the day the RFP was issued and sent to the prequalified bidders (June 7, 2022).

[26] While several issues were raised and discussed among the parties in their submissions,<sup>27</sup> the sole issue to be determined on the motion is one of jurisdiction, that is, whether the estimated value of the procurement meets any of the monetary thresholds prescribed under the trade agreements.

[27] When the Tribunal initially accepted Star-Ting's complaint for inquiry, it did so based on the evidence placed on the record. The information available at the time suggested that the monetary thresholds prescribed under the trade agreements were met. Indeed, while the solicitation appeared to have been issued as part of a supply arrangement covering requirements valued below the prescribed monetary threshold of \$100,000 under the CKFTA, the total amount of Star-Ting's proposal was not reflective of that, as it was well above the said monetary threshold.<sup>28</sup>

[28] DFO has since, as part of its motion, presented corroborating evidence demonstrating, to the satisfaction of the Tribunal, that the estimated procurement value established by DFO at the outset of the procurement process was well below the monetary thresholds prescribed under the trade agreements.<sup>29</sup>

[29] The evidence filed in support of DFO's motion reveals that DFO's estimated procurement value was based on an industry price quote from a contractor that was awarded a sole source contract for work that was purportedly identical to the services sought under the RFP in question.<sup>30</sup> The Tribunal notes that the evidence also reveals that DFO's estimated procurement value may have been

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<sup>26</sup> See, for example, article 505(1) of the Canadian Free Trade Agreement, article II(2)(c) of the World Trade Organization Agreement on Government Procurement, article 10.2(2)(c) of the Canada-Ukraine Free Trade Agreement, article 19.2(2)(c) of the Canada-European Union Comprehensive Economic and Trade Agreement, article 15.2(2)(c) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and article 17.2(2)(c) of the Canada-Honduras Free Trade Agreement. Article Kb1s-01(5) of the Canada-Chile Free Trade Agreement, article 1401(5) of the Canada-Peru Free Trade Agreement, article 1401(5) of the Canada-Colombia Free Trade Agreement, and article 16.02(5) of the Canada-Panama Free Trade Agreement imply that the estimate is to be made at the outset of the procurement process. These trade agreements are accessible via the Tribunal's website, online: <<https://www.citt-tcce.gc.ca/en/procurement-inquiries/legislation-and-trade-agreements>>.

<sup>27</sup> Notably, issues raised concerned an alleged failure on DFO's part to follow up with Star-Ting's inquiry prior to the bid closing date, as well as issues related to fairness. These issues would be immaterial should the Tribunal find that it lacks jurisdiction. Indeed, for the Tribunal to be able to consider the substance and the merits of a complaint, it must have jurisdiction.

<sup>28</sup> Exhibit PR-2022-030-01.D, vol. 2 (protected), at 4; Exhibit PR-2022-035-14.D, vol. 2 (protected), at 6.

<sup>29</sup> The Tribunal has, in the past, dismissed complaints in circumstances where, after it had initiated an inquiry, it obtained information indicating that, at the time that the solicitation documents were made available, the estimated value of the procurement was below the applicable monetary thresholds. See, for example, *Digital Direct Multimedia v. Canadian International Development Agency* (22 June 2018), PR-2018-004 (CITT); *Tiree Facility Solutions Inc. v. Defence Construction Canada* (19 November 2013), PR-2013-018 (CITT); *Sunny Jaura d.b.a. Jaura Enterprises v. Department of Public Works and Government Services* (5 September 2012), PR-2012-007 (CITT); *Marathon Management Company v. Department of Public Works and Government Services* (12 September 2001), PR-2001-019 (CITT).

<sup>30</sup> Exhibit PR-2022-035-13.D at 8; Exhibit PR-2022-035-13.F, vol. 2 (protected), at 8, 10–13.

based on past year prices, as the work reflected in the industry price quote appears to have been performed in or around the period of 2021–2022.<sup>31</sup>

[30] While there is an element of contemporaneity that the Tribunal should consider in assessing the probative value of the government institution's estimation, the Tribunal must also consider whether corroborative evidence in the record reasonably indicates that, in the relevant moment in time, i.e. at the outset of the procurement process, DFO estimated a contract value that was below the monetary threshold of \$100,000 under the CKFTA, notwithstanding the fact, for example, that it based its estimated value on past year prices.

[31] In doing so in this case, the Tribunal took a close look at the work outlined in the industry price quote and assessed whether it was similar or, as alleged by DFO, identical to the services being procured under the RFP. Upon a careful examination and review of the evidence, the Tribunal is satisfied that both the work outlined in the industry price quote<sup>32</sup> as well as the services described in the Statement of Work annexed to the RFP<sup>33</sup> are similar, which supports DFO's estimated value.<sup>34</sup> Star-Ting did not present, for that matter, any arguments explaining why the estimated level of effort established by DFO was not appropriate or any evidence demonstrating that DFO's estimated procurement value was erroneous or not reflective of the requirement.

[32] The Tribunal also finds the context under which the RFP arose probative. Indeed, the RFP was issued as part of the SA, an existing method of supply arrangement for the provision of professional services which specifically covered requirements valued below the prescribed monetary threshold of \$100,000 under the CKFTA.<sup>35</sup> In that respect, section 2.1 of the SA provides the following:<sup>36</sup>

*. . . The value of any bid, at the time of bid closing, must not exceed the Canada-Korea Free Trade Agreement (CKFTA) threshold (including all taxes, travel and living, amendments, etc.).*

*It is the responsibility of the contracting authority to determine if any trade agreements will apply to their requirement based on their requirement's associated dollar value. If it is determined that a trade agreement does apply to their requirement the contracting officer will prepare and publish a bilingual notice of proposed procurement on Buy and Sell for a minimum of 5 calendar days . . .*

[Emphasis added]

[33] The Tribunal also notes that the RFP specifically indicated that the requirement is not subject to the provision of any trade agreements,<sup>37</sup> which is consistent with the findings above.

<sup>31</sup> See, for example, the industry price quote, which includes a table titled "Stakeholder Engagement: Planning and Budget for [ . . . ] 2021-22"; Exhibit PR-2022-035-13.F, vol. 2 (protected), at 12.

<sup>32</sup> Exhibit PR-2022-035-13.D at 12–13; Exhibit PR-2022-035-13.F, vol. 2 (protected), at 12–13.

<sup>33</sup> Exhibit PR-2022-035-13.A at 62–65.

<sup>34</sup> See also, for example, *P&L Communications Inc.* (24 July 2001), PR-2000-073 (CITT) at 7, where the Tribunal compared the designated contract at issue to "a recent contract . . . offering a service similar to the one at issue" in assessing the reasonableness of the government institution's estimated procurement value.

<sup>35</sup> See section 1.2 (under Part 1) and section 6.2 (under Part 6) of the RFP; Exhibit PR-2022-035-13.A at 38, 53.

<sup>36</sup> Exhibit PR-2022-035-13.A at 21.

<sup>37</sup> See section 1.5 (under Part 1) of the RFP; Exhibit PR-2022-035-13.A at 38.



[34] In light of the above, the Tribunal is thus satisfied that DFO's estimated procurement value is below the monetary thresholds of any of the trade agreements. As a result, the Tribunal does not have jurisdiction to continue its inquiry into the matter.

[35] Furthermore, the Tribunal cannot endorse the arguments raised by Star-Ting with respect to the proposed interpretations drawn from specific clauses contained in the RFP or the SA. The arguments presented by Star-Ting in response to DFO's motion misinterpret or mischaracterize the terms provided under both the RFP and the SA.

[36] For example, while Star-Ting argues that the term of the contract period provided under the RFP is what constitutes a reasonable estimation of time for the delivery of the work or the services being sought by DFO, the terms of the RFP are unambiguous: the level of effort required to perform the services was limited to a *maximum* level of effort of 54 days.<sup>38</sup> In the Tribunal's view, this level of effort alone is demonstrative of an estimated procurement value that goes well below any of the monetary thresholds prescribed under the trade agreements.

[37] The Tribunal further finds that Star-Ting's reliance on contract clauses with blanks to be filled out does not persuasively substantiate its position that the estimated level of effort went beyond what was indicated in the RFP or that the monetary threshold of a contract award amount under the RFP was unlimited.

[38] In the Tribunal's view, Star-Ting's interpretation of the terms of the RFP and the SA could potentially explain why the value of its financial proposal<sup>39</sup> was well above DFO's estimated value.<sup>40</sup>

[39] Finally, there is no evidence in this case suggesting that the valuation method selected by the government institution was intended to avoid the obligations of the agreements. As noted by DFO, no such evidence was presented in this case.

**The RFP designated the Tribunal as a possible option for recourse under the "Bid Challenge and Recourse Mechanisms" section**

[40] The Tribunal remarks, as did Star-Ting, that the RFP mentioned recourse to the Tribunal,<sup>41</sup> despite the Tribunal not having jurisdiction to conduct an inquiry into this complaint. It is clear that the Tribunal's powers and jurisdiction derive from the CITT Act and the Regulations, and not by a designation that may have been provided in the solicitation documents.

[41] That said, for reasons related to access to justice, the Tribunal would remind DFO that it should ensure that the information provided to potential suppliers with respect to available recourse mechanisms is accurate.

[42] In conclusion, the Tribunal finds that, for the reasons mentioned above, the complaint does not relate to a "designated contract" under subsection 3(1) of the Regulations, as the estimated value of the procurement is below the monetary threshold for services prescribed under any of the trade agreements, the lowest being the CKFTA monetary threshold for services of \$100,000.

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<sup>38</sup> Exhibit PR-2022-035-13.A at 62.

<sup>39</sup> Exhibit PR-2022-035-14.D, vol. 2 (protected), at 6.

<sup>40</sup> Exhibit PR-2022-035-13.F, vol. 2 (protected), at 10–13.

<sup>41</sup> See section 2.5 (under Part 2) of the RFP; Exhibit PR-2022-035-13.A at 41.

## COMPLAINT COSTS

[43] Pursuant to section 30.16 of the CITT Act, the Tribunal may award costs of, and incidental to, any procurement complaint proceedings.

[44] While Star-Ting did request, in its initial complaint,<sup>42</sup> the reimbursement of its complaint costs, DFO, for its part, did not request the award of its costs on the motion.

[45] The Tribunal is conferred with a broad statutory discretion with respect to the allocation of costs. As a general rule, costs will usually follow the event.<sup>43</sup> In that regard, DFO was successful on its motion. However, DFO did not request to be awarded its costs in the matter.

[46] In view of these circumstances, the Tribunal finds it appropriate that each party will bear their own costs in this matter.<sup>44</sup>

## DECISION

[47] The motion filed by DFO is allowed.

[48] Pursuant to subsection 30.13(5) of the CITT Act and paragraph 10(1)(a) of the Regulations, the Tribunal terminates its inquiry on the ground that the complaint does not concern a designated contract, given that the value of the procurement that is the subject of the complaint is below the monetary threshold for services prescribed under any of the trade agreements and, in particular, the CKFTA monetary threshold for services of \$100,000.

[49] Each party will bear its own costs in this matter.

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Serge Fréchette  
Serge Fréchette  
Presiding Member

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<sup>42</sup> PR-2022-030.

<sup>43</sup> *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 at paras. 26, 28; *Canada (Attorney General) v. Educom TS Inc.*, 2004 FCA 130 at para. 11.

<sup>44</sup> See, for example, *Exeter v. Canada (Attorney General)*, 2013 FCA 134 (CanLII).