



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File PR-2022-037

Newland Canada Corporation

v.

Department of National Defence

*Determination and reasons issued
Monday, December 19, 2022*

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IN THE MATTER OF a complaint filed by Newland Canada Corporation pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

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*.

BETWEEN

NEWLAND CANADA CORPORATION

Complainant

AND

THE DEPARTMENT OF NATIONAL DEFENCE

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part. Each party will bear its own costs.

Cheryl Beckett

Cheryl Beckett

Presiding Member

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STATEMENT OF REASONS

SUMMARY OF THE COMPLAINT

[1] 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 Constanta, Romania for DND personnel.

[2] This is the second complaint by Newland with respect to the procurement at issue. In the first complaint (PR-2022-027), the Tribunal concluded that the complaint did not disclose a reasonable indication of a breach of a trade agreement obligation.¹

[3] In this second complaint, after discovering new facts related to the case, Newland claims that DND failed to award the contract in accordance with the terms of the RFP. More specifically, Newland alleges that the winning bid was not the lowest compliant bid because:

- (a) the hotel provided by the winning bidder, as well as the second hotel occupied by DND personnel, failed to meet some of the mandatory requirements contained in the RFP; and
- (b) although the contract stated that the winning bidder would provide accommodation at one establishment, Newland claims that DND personnel were found to be staying at two different hotels.

[4] As a remedy, Newland requests to be compensated for its lost profits. Newland further requests the reimbursement of its complaint costs.

[5] Having determined that the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations) had been met in respect of the complaint, the Tribunal decided, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*³ (CITT Act), to conduct an inquiry into the complaint.

[6] The Tribunal conducted the inquiry into the validity of the complaint as required by sections 30.14 and 30.15 of the CITT Act. For the reasons provided below, the Tribunal finds that the complaint is valid in part.

BACKGROUND

Procurement process and contract award

[7] The RFP in question was published on June 17, 2022, and closed on June 24, 2022.⁴ The hotel rooms were needed for varying dates between July 4 and August 15, 2022. The timing between the contract award date and the need to fulfill the contract was tight, with only two weeks from bid closing to the first date when DND personnel required hotel rooms.

¹ See *Newland Canada Corporation v. Department of National Defence* (26 July 2022), PR-2022-027 (CITT).

² SOR/93-602.

³ R.S.C., 1985, c. 47 (4th Supp.).

⁴ Online: <<https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-00998724>>.

[8] On June 28, 2022, DND notified Newland that the contract had been awarded to Travel Lodging Group (TLG) for €531,426.⁵ 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.⁶

[9] On June 28, 2022, Newland asked DND to explain why it had not received the highest ranking, as its bid was lower than the winning bid.⁷ That same day, DND responded that the winning bid had offered all required accommodations at one establishment, and, as set out in section 4.2.1 of the RFP, priority for contract award would be given to proposals providing all accommodations at the same establishment.⁸ Newland and DND exchanged 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 information and on July 4, 2022, DND confirmed that no changes had been made to the award as a result of Newland's concerns.

[10] On June 29, 2022, TLG communicated to DND that it would be unable to fulfill the requirement related to housing all personnel at the same establishment. DND decided to cancel its contract with TLG and proceed with the next bid providing accommodations at the same establishment.⁹

[11] On June 30, 2022, G+ Industries was awarded the contract, with the new contract valued at €866,560.¹⁰ Shortly thereafter, on July 2, 2022, G+ Industries communicated to DND that it would also be unable to secure all of the rooms required under the contract at one establishment.¹¹ As this news was communicated two days before the first group of DND personnel were set to arrive and DND had provided G+ Industries with a 50% deposit, DND did not believe it was in a position to cancel the contract with G+ Industries and try to go with the lowest priced bidder providing accommodations at multiple establishments.¹²

[12] On July 6, 2022, in a letter dated June 30, 2022, DND informed Newland that the contract had been re-awarded to another bidder due to "unforeseen booking circumstances".¹³

[13] The same day, Newland asked DND if its bid had been the lowest and requested information on the new winning bidder.¹⁴ 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 among the bidders who had bid multiple establishments, and that the contract had been awarded to a bidder providing all required accommodations at one establishment.¹⁵

⁵ The regret letter appears to be erroneous, as the bid and communications between Travel Lodging Group and DND quote Euro.

⁶ Exhibit PR-2022-037-01.A at 62.

⁷ Exhibit PR-2022-037-03 at 25.

⁸ *Ibid.* at 24.

⁹ Exhibit PR-2022-037-15.A at para.17.

¹⁰ *Ibid.* at 123.

¹¹ *Ibid.* at para. 24.

¹² *Ibid.* at paras. 24-28.

¹³ Exhibit PR-2022-037-01.A at 63.

¹⁴ *Ibid.* at 66.

¹⁵ *Ibid.* at 65.

[14] 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.¹⁶

[15] On July 8, 2022, DND reiterated that Newland's bid was not the lowest-priced compliant proposal of the multiple establishment bids and stated that it was unable to provide information other than the total price of the winning bid and the winning supplier. DND also confirmed that no changes were made to the RFP after the first award was cancelled.¹⁷

Complaint proceedings

[16] On July 21, 2022, Newland filed its first complaint with the Tribunal. On July 26, 2022, the Tribunal decided not to conduct an inquiry into this first complaint, as the complaint did not disclose a reasonable indication of a breach of a trade agreement obligation.¹⁸

[17] Between August 12 and 15, 2022, a Newland representative travelled to Constanta, Romania and obtained what it believed was evidence that the winning bidder was performing the contract by accommodating DND personnel at two different establishments, which, according to Newland, called into question the evaluation of the bids by DND and the subsequent award.¹⁹

[18] On August 17, 2022, Newland filed its second complaint with the Tribunal.²⁰

[19] On August 22, 2022, the Tribunal advised Newland and DND that, on August 19, 2022, the present complaint had been accepted for inquiry.²¹

[20] On October 4, 2022, after requesting an extension to file its Government Institution Report (GIR), DND filed public and confidential versions of its GIR with the Tribunal.²²

[21] On November 14, 2022, Newland filed its comments on the GIR.²³

ANALYSIS

Timeliness of Newland's complaint

[22] DND submits that Newland did not file the complaint in accordance with the time limits prescribed by section 6 of the Regulations. DND claims that the grounds of complaint became known to Newland on July 6, 2022, and that, on the same day, Newland made a formal objection and was denied relief. Accordingly, DND argues that Newland had until July 18, 2022, to file its complaint, but did not do so until August 17, 2022.

¹⁶ *Ibid.* at 64–65.

¹⁷ *Ibid.* at 64.

¹⁸ Exhibit PR-2022-037-05 at para. 4.

¹⁹ Exhibit PR-2022-037-01 at 1.

²⁰ Newland submitted documents on August 16 and 17, 2022. The complaint was considered filed on August 17, 2022.

²¹ Exhibit PR-2022-037-02 and PR-2022-037-08.

²² Exhibit PR-2022-037-15.A.

²³ Exhibit PR-2022-037-18.B. Newland filed previous versions of its comments on the GIR, which had to be revised and resubmitted because they contained references to privileged communications.

[23] Pursuant to subsections 6(1) and 6(2) of the Regulations, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either (1) object to the government institution or (2) file a complaint with the Tribunal. If a complainant objects to the government institution within this time frame and is denied relief, then the complainant may file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge of the denial of relief.

[24] Although DND claims that both grounds of complaint became known to Newland on July 6, 2022, the Tribunal finds that Newland's grounds of complaint—i.e. the fact that the DND personnel were being accommodated at two establishments and that these establishments did not meet all of the requirements of the RFP—were discovered by Newland when its representative travelled to Romania between August 12 and August 15, 2022.²⁴ The Tribunal notes that, before then, Newland could not have reasonably known which hotel was being used by the winning bidder, as DND had indicated that it does not normally communicate this information following the contract award.²⁵

[25] Newland's complaint was considered filed with the Tribunal on August 17, 2022, and, therefore, was submitted two working days after it determined which hotels had been awarded the contract, falling well within the time limits established by the Regulations.

DND's evaluation of the bids

[26] Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint. The Tribunal must determine whether a complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the Canadian Free Trade Agreement (CFTA).

[27] The relevant provisions of the CFTA raised by the allegations made by Newland can be summarized as follows:

- Article 507(3)b) provides that a procuring entity must base its evaluation on the conditions that it has specified in advance in its tender notices or tender documentation; and
- Article 515(4) requires that, to be considered for an award, a tender must comply with the essential requirements set out in the tender notices and tender documentation.

[28] When considering whether bids are evaluated and contracts awarded in keeping with these provisions, the Tribunal applies the standard of reasonableness, typically affording a great deal of deference to an evaluation panel with respect to its evaluation of proposals. The Tribunal does not, therefore, generally substitute its judgment 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. The government institution's determination will be considered

²⁴ Exhibit PR-2022-037-01.A at 8.

²⁵ Exhibit PR-2022-037-15.A at 128.

reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal finds that explanation compelling.²⁶

Ground 1: DND's evaluation of the bids was not conducted in accordance with the terms of the RFP

[29] Newland argues that both hotels it found to be used by DND personnel failed to meet some of the mandatory requirements of the RFP. More specifically, Newland claims that neither hotel provided appropriate facilities for personnel to be self-catering with respect to meals, that Hotel Parc did not provide a conference space that met the requirements of the RFP, and that the hotel used for Group F did not have a sports or fitness centre.

[30] DND submits that G+ Industries informed DND only two days before the arrival of the first group of DND personnel that it would not be able to accommodate all six groups at one establishment. DND responded to these operational requirements by agreeing to amend the call-ups under which it confirmed hotel accommodations to cover groups A through E through the contract with G+ Industries. DND made the decision to accommodate Group F in different accommodations, paid for by ATF-Romania, a local procuring entity of the Canadian Armed Forces, outside of the scope of the G+ Industries contract.²⁷ DND argues that the award of the Group F contract was completed separately to the procurement at issue and that the Tribunal should only consider the compliance of Parc Hotel, which was the establishment provided by G+ Industries under the designated contract.

[31] DND further argues that the Tribunal does not have jurisdiction to inquire into these irregularities because the post-contract award modifications to the contract related solely to the performance of the contract and did not lead to DND accepting services so different from the mandatory requirements of the RFP as to constitute a new procurement. Similarly, the modification to the contract contemplated by DND related to the work G+ Industries was required to perform after contract award.

[32] Concerning the accommodation for Group F, the Tribunal will address this matter in the second ground of complaint and will focus its analysis in this part on the compliance of Parc Hotel with the mandatory requirements. This portion of Newland's complaint is therefore limited to determining whether DND arrived at a reasonable conclusion finding G+ Industries' bid compliant with the mandatory requirements concerning self-catering facilities and the conference space.

²⁶ *Toromont Material Handling, a division of Toromont Industries Ltd.* (11 March 2020), PR-2019-063 (CITT) at para. 19; *Heiltsuk Horizon Maritime Service Ltd. and Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (18 October 2019), PR-2019-020 (CITT) at para. 47; *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52; *J.A. Larue inc. v. Department of Public Works and Government Services* (7 August 2020), PR-2020-004 (CITT) at para. 26; *Enveloppe Concept* at para. 19, quoting *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55.

²⁷ Exhibit PR-2022-037-15.A at para. 28.

Technical requirement 2.1.5: Self-catering facilities

[33] With regard to technical requirement 2.1.5, which required accommodations to provide DND personnel with self-catering facilities, the Tribunal finds that, in their evaluation of G+ Industries' technical bid, the evaluators did not apply a reasonable interpretation of the term "self-catering facilities". According to the Cambridge dictionary, having access to self-catering facilities is defined as "having cooking facilities available so that you can cook meals for yourself rather than having them provided for you."²⁸ A common interpretation of the meaning of "self-catering facilities" when booking accommodations is having access to a kitchen, such as may be included in a hotel suite. The evaluators made an error in accepting G+ Industries' bid as being compliant with this requirement, as the bid did not contain access to cooking or kitchen facilities for DND personnel to cook their own meals. Therefore, the Tribunal finds that DND's evaluation of the requirement with respect to self-catering facilities was not reasonable.

[34] The Tribunal notes that Newland's bid also failed to demonstrate compliance with this requirement, as one of the hotels it put forward proposed access to an on-site restaurant, which does not correspond to the definition of "self-catering facilities".²⁹ Newland's bid was accepted as compliant by DND as well; therefore, DND's evaluation of this requirement did not result in unfairness with respect to the evaluation of Newland's bid.

[35] To avoid confusion in future solicitations, the Tribunal invites DND to more clearly describe its needs and cautions DND to avoid the use of requirements that it does not intend to evaluate as mandatory.

Technical requirement 2.7.1: Conference space

[36] With regard to technical requirement 2.7.1 requiring an available conference space, it appears that the information contained in G+ Industries' bid did meet this requirement, but also included a typographical error with respect to the facilities provided.³⁰ This error is separate from Newland's allegation that the facilities provided at Parc Hotel failed to meet the RFP requirements and does not appear to have been taken into consideration by DND in its evaluation. Upon Newland's further investigation of the facilities at Parc Hotel, it alleged that in fact Parc Hotel does not meet the requirements, even though G+ Industries' bid stated that it did.

[37] The Tribunal has previously found that, at the time of evaluating the proposals and awarding the contract, the government institution is entitled to rely on the information provided in the bids to assess compliance with the mandatory requirements.³¹ If, after the award of the contract and after the procurement process is completed, it becomes known that the contract awardee is not able to meet the requirements of the RFP or provided goods or services other than those required, the issue becomes one of contract administration and falls outside of the Tribunal's jurisdiction. With respect to technical requirement 2.7.1, the Tribunal finds the evaluation by DND was reasonable based on the information contained in G+ Industries' bid.

²⁸ Online: <<https://dictionary.cambridge.org/dictionary/english/self-catering>>.

²⁹ Exhibit PR-2022-037-01.A at 27.

³⁰ Exhibit PR-2022-037-15.C at 213 (protected).

³¹ *Airsolid Inc.* (12 March 2010), PR-2009-089 (CITT) [*Airsolid*], at paras. 11–12 and 16. See also *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.

[38] In short, the Tribunal finds that DND's evaluation of the bids was not reasonable with regard to the self-catering facilities requirement of the solicitation, as DND's evaluation of this requirement was not consistent with the terms of the RFP. With respect to the conference space, based on the information contained in G+ Industries' bid, the Tribunal concludes DND's assessment was reasonable.

Ground 2: DND's decision to provide accommodations for Group F in a separate contract was a matter of contract administration

[39] Newland also submits that DND did not award the contract in accordance with the terms of the RFP, which stated that the bid with the lowest evaluated price would be selected, and that priority would be given to bids providing all accommodations at one establishment.³²

[40] DND argues that it was entitled to rely on the contents of G+ Industries' bid in deciding on contract award, and that its decision to accommodate Group F at a second establishment, under a separate contract, was a matter of contract administration. When it learned, on July 2, 2022—i.e. after the contract award and only two days before the first group of DND personnel would need accommodations in Romania—that G+ Industries would not be able to accommodate all DND personnel at one establishment, it argued that the short time frame did not allow it to select another bidder for the execution of the contract.

[41] As explained above, the Tribunal agrees that DND was entitled to rely on the information provided in the bid at the time of the evaluation of the proposals, unless there was a clear reason to believe otherwise. On its face, G+ Industries' bid provided accommodations at one establishment and was awarded the contract in the procurement for this reason. Based on the evidence before it, the Tribunal finds no fault with DND taking G+ Industries' bid at face value and awarding the contract based on it being the lowest-priced compliant bid. This conclusion is consistent with the Supreme Court of Canada's decision in *Double N Earthmovers Ltd.*, where it was held that procuring entities are under no obligation to verify the information and certifications submitted by potential suppliers.³³

[42] The Tribunal would note that the RFP did not ask bidders to provide confirmation that the rooms were booked and being held by the hotel. Thus, it was not a requirement of the RFP that either TLG (the original contract awardee) or G+ Industries include supporting documentation or information to prove that the rooms were reserved. The Tribunal invites DND to consider whether requiring booking confirmations pending bid evaluations might allow it to avoid such difficulties in future procurements when it learns at the last minute that the bidders were not in fact able to perform the contract as required.

[43] Moreover, the Tribunal notes that DND was operating under short time limits and found out that G+ Industries would be unable to meet the requirements of the RFP two days before the accommodation services were needed. It was not unreasonable for DND, due to the time constraints and the deposit it had already paid,³⁴ to go ahead with the contract awarded to G+ Industries.

³² Exhibit PR-2022-037-01.A at 39. See paragraphs 4.2, 4.2.1 and 4.2.2 of the RFP.

³³ *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 SCR 116, 2007 SCC 3 (CanLII) [*Double N Earthmovers Ltd.*]. In this case, even though the winning bidder was found to be deceitful, which the City of Edmonton only discovered after contract award, it was its intentions at the time when its bid was accepted that were relevant. Accordingly, the City did not breach any obligation of fairness to the other bidders; see also *SoftSim Technologies Inc. v. Department of National Defence* (19 December 2018), PR-2018-032.

³⁴ The Tribunal notes that, in a separate complaint filed with the Tribunal by Newland (PR-2022-050) regarding the same procurement, Newland raised as a ground of complaint that DND acted against the terms of the RFP when

[44] In light of the above, the Tribunal finds that, when DND decided to separate the accommodations for Group F from the designated contract, the procurement process was complete and DND was simply managing the contract as it was being performed. Accordingly, this is a matter of contract administration that falls outside of the Tribunal's jurisdiction. As such, it is not relevant whether the accommodations for Group F met all the mandatory technical requirements under the RFP.

Conclusion

[45] For the above reasons, the Tribunal concludes that the complaint is valid in part, specifically, with regard to the ground of complaint relating to the evaluation of the self-catering facilities requirement.

REMEDY

[46] In recommending a remedy, the Tribunal is guided by subsection 30.15(3) of the CITT Act, which states:

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

[47] In the present case, Newland was not the lowest-priced bid behind G+ Industries and, accordingly, it would not have been awarded the contract had it not been for the error committed by DND. On a related note, Newland's bid would have also been found to be non-compliant had the term "self-catering facilities" been applied in the manner set out above. Accordingly, Newland was not prejudiced by DND's assessment of this requirement and, as such, the Tribunal finds that Newland is not entitled to its lost profits or any other remedy contemplated by the CITT Act.

it made a 50 percent deposit payment to G+ Industries. This ground of complaint was not accepted for inquiry by the Tribunal because it was not filed within the time limits prescribed by section 6 of the Regulations. The Tribunal further notes that DND's decision to make a deposit payment occurred as the contract was being performed and managed, after the procurement process was completed and, therefore, falls outside of the Tribunal's jurisdiction as it is a matter of contract administration.

COSTS

[48] Both Newland and DND have requested their costs relating to the complaint.

[49] Pursuant to the *Procurement Costs Guidelines*³⁵ and given the divided success of the parties, the Tribunal does not see a reason to award costs in this matter. In keeping with its discretion as a court of record and master of its own procedure,³⁶ the Tribunal finds it appropriate for each party to bear its own costs.

DETERMINATION

[50] Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid in part. Each party will bear its own costs.

Cheryl Beckett
Cheryl Beckett
Presiding Member

³⁵ Online: <<https://www.citt-tcce.gc.ca/en/procurement-inquiries/procurement-costs-guidelines>>.

³⁶ *Pacific Northwest Raptors Ltd. v. The Department of Public Works and Government Services* (21 February 2022), PR-2021-046 (CITT) at para. 72; *Francis H.V.A.C. Services Ltd. v. Department of Public Works and Government Services* (2 September 2016), PR-2016-003 (CITT) at para. 53.