



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2016-020

Canadian Maritime
Engineering Ltd.

v.

Department of Transport

*Order issued
Thursday, September 8, 2016*

*Reasons issued
Monday, September 26, 2016*

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IN THE MATTER OF a complaint filed by Canadian Maritime Engineering Ltd. 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 of the Canadian International Trade Tribunal 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 Transport on July 27, 2016, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the ground that the Canadian International Trade Tribunal does not have jurisdiction to conduct the inquiry.

BETWEEN

CANADIAN MARITIME ENGINEERING LTD.

Complainant

AND

THE DEPARTMENT OF TRANSPORT

**Government
Institution**

ORDER

The Canadian International Trade Tribunal hereby grants the motion filed by the Department of Transport and, pursuant to subsection 10(b) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, hereby dismisses the complaint and terminates all proceedings relating thereto.

Consequently, the postponement of award of contract order made by the Canadian International Trade Tribunal on July 14, 2016, is hereby rescinded.

Peter Burn
Peter Burn
Presiding Member

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

STATEMENT OF REASONS

INTRODUCTION

1. This inquiry concerns a complaint filed by Canadian Maritime Engineering Ltd. (CME) in relation to a Request for Proposal (RFP) issued by the St. Lawrence Seaway Management Corporation (SLSMC) to enter into a long-term lease for the operation of the Port Weller dry dock and marine facilities. The complaint alleged that the SLSMC was conducting a procurement on behalf of the Department of Transport (Transport Canada).

2. The Canadian International Trade Tribunal (the Tribunal) accepted the complaint, in part, for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.¹ Subsequently, Transport Canada filed a motion asking the Tribunal to dismiss the complaint for lack of jurisdiction.

3. Having considered the motion, and the related submissions made by the parties and the SLSMC,² the Tribunal finds that it does not have jurisdiction to inquire into the complaint because it is not in respect of a designated contract, for the reasons provided below. As a result, the Tribunal has decided to dismiss the complaint and cease the inquiry.

COMPLAINT

4. On July 8, 2016, CME filed the complaint on the basis that the procurement process in relation to the RFP was not conducted in accordance with the provisions of Chapter Five of the *Agreement on Internal Trade*.³ CME made several specific allegations, which can be summarized as follows:

- the SLSMC evaluated bids on the basis of undisclosed criteria and weighting methodology and engaged in bid repair, in breach of Article 506(6) of the *AIT*;
- the SLSMC failed to provide equal access to the procurement, in breach of Article 501 of the *AIT*;
- the terms of the RFP and the evaluation of bids were tainted by a reasonable apprehension of bias; and
- the SLSMC conducted a procurement process that was not fair, open and transparent, in breach of Articles 506(1) and 518 of the *AIT*.

5. As a remedy, CME asked the Tribunal to recommend that CME be identified as the successful bidder and to direct the SLSMC to engage in lease negotiations with CME. In the alternative, CME requested a recommendation that the RFP be cancelled, amended to meet the requirements of the *AIT* and re-tendered. CME also requested that the Tribunal issue an order postponing the contract award until after the completion of the inquiry into its complaint.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. The SLSMC did not file a notice of participation but provided a response to the Tribunal's request for information in relation to the motion filed by Transport Canada.

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

SCOPE OF THE INQUIRY

6. On July 14, 2016, the Tribunal accepted the complaint, in part, for inquiry and issued an order pursuant to subsection 30.13(3) of the *CITT Act* postponing the award of any contract in relation to the procurement until the Tribunal determined the validity of the complaint.

7. The scope of the inquiry was limited to certain aspects of the complaint. To the extent that the above grounds of complaint consisted of allegations that the terms of the RFP itself were not in accordance with provisions of the *AIT*, the Tribunal found that CME did not make an objection to the SLSMC or file its complaint with the Tribunal within the time limit required by section 6 of the *Regulations*.⁴

8. For example, CME alleged that the RFP violated the requirements of Article 506(6) of the *AIT* by “. . . failing to clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of the bids and the method of weighting and evaluating the criteria.”⁵ In particular, it referred to issues with clause 5.9 of the RFP, which set out the SLSMC’s rights in relation to the RFP and the evaluation process. Given that CME filed a bid on or before the closing date of May 10, 2016,⁶ the Tribunal is of the view that CME knew or ought to have known by that date if it had any concerns about the terms of clause 5.9. However, CME did not make an objection to the SLSMC on those grounds and only raised its concerns in its complaint filed with the Tribunal on July 14, 2016.⁷ Such allegations clearly fall outside the prescribed time limit for making an objection or filing a complaint under section 6 of the *Regulations*.

9. The Tribunal is of the view that the core of CME’s complaint focused on how the evaluation of bids was conducted by the SLSMC, as opposed to the terms of the RFP itself. To this effect, CME stated that “. . . while a government entity can issue an RFP that includes reservations that could be interpreted to allow it to take action that is contrary to the obligations in the trade agreements, it cannot exercise that discretion in a manner that violates the trade agreements.”⁸

10. Accordingly, the Tribunal limited the scope of the inquiry to the grounds of complaint relating to the SLSMC’s alleged misconduct of the procurement process and bid evaluation, with the exception of the allegation of bid repair. The Tribunal rejected the bid repair ground of complaint in its entirety because CME did not actually claim that bid repair had occurred, but rather stated that, “[i]n light of the evaluation of the bids that it conducted, the SLSMC *could have* engaged in bid repair in violation of the trade agreements”⁹ [emphasis added]. This assertion was unsupported. As a result, the Tribunal found no reasonable indication of a breach of the *AIT* in respect of that ground of complaint. To the extent that CME

4. Subsection 6(2) of the *Regulations* provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

5. Exhibit PR-2016-020-01 at para. 119, Vol. 1.

6. *Ibid.*, Exhibit 1.

7. There is no indication that CME made an objection concerning the terms of the RFP to the SLSMC. The supporting documentation shows that CME requested a debriefing in respect of the *evaluation* of its bid on June 7, 2016 (Exhibit PR-2016-020-01, Exhibit 15, Vol. 1) and then, on June 16, 2016, made an objection in relation to the procurement process, the evaluation of bids and the acceptance of another bidder (Exhibit PR-2016-020-01, Exhibit 19, Vol. 1).

8. Exhibit PR-2016-020-01 at para. 122, Vol. 1.

9. *Ibid.* at para. 127.

alleged that the terms of the RFP allowed for the possibility of bid repair,¹⁰ this ground was late for the same reasons provided above.

INTERVENER

11. On July 26, 2016, the Tribunal received a request for intervener status in the inquiry from Heddle Marine Service Inc. (Heddle), the successful proponent selected to negotiate a lease agreement with the SLSMC.¹¹ The request was unopposed, and the Tribunal granted the request pursuant to 30.17 of the *CITT Act* on the basis that Heddle is an “interested party” within the meaning of section 30.1.¹²

MOTION TO DISMISS

12. On July 27, 2016, Transport Canada filed a motion¹³ with the Tribunal requesting an order dismissing the complaint on the basis that it is not in respect of a “designated contract” within the meaning of paragraph 7(1)(b) of the *Regulations*.¹⁴ Transport Canada submitted that there is no designated contract because the RFP does not meet the applicable monetary thresholds for the *AIT* to apply, meaning that the Tribunal does not have jurisdiction to conduct an inquiry into the complaint.¹⁵ Specifically, it argued that the RFP issued by the SLSMC relates to a lease whereby the successful proponent will pay the SLSMC to rent certain facilities and lands, with no monetary obligation flowing from the SLSMC or Transport Canada to the successful proponent. The motion was supported by Heddle.¹⁶

13. On August 9, 2016, CME filed its response and requested that the Tribunal dismiss the motion.¹⁷ CME submitted that the RFP and the “Summary of Lease Agreement” in Appendix B to the RFP set out various financial commitments by the SLSMC to the successful proponent (other than direct payments) that, when quantified, would exceed the minimum monetary thresholds of the *AIT*. The financial commitments alleged by CME are summarized as follows:¹⁸

- the forgone revenue to the SLSMC given that it will (allegedly) be leasing land and facilities to the successful proponent at less than fair market value; and
- the cost of capital improvements and other expenses related to the facilities to be incurred by the SLSMC during the lease term (e.g. demolition of a building, decontamination of the facilities, installation of a fence and a new electrical substation).

14. The fact that such financial commitments were *not* quantified in the RFP is, in CME’s submission, a breach of Article 505(1) of the *AIT*, which requires the procuring entity to estimate the value when a notice of procurement is published.

10. CME asserted that clause 4.5 of the RFP could be interpreted to allow for improper bid repair on the basis that it gave the SLSMC the sole discretion to request clarification and corrections from bidders.

11. Exhibit PR-2016-020-07, Vol. 1A.

12. Exhibit PR-2016-020-15, Vol. 1A.

13. The motion was filed pursuant to subrule 24(1) of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499.

14. Exhibit PR-2016-020-08A, Vol. 1A.

15. The Tribunal notes that the question of whether the complaint was in respect of a procurement that met the required monetary thresholds under the applicable trade agreements had been identified by the Tribunal as an important threshold issue in its notice of inquiry letter to Transport Canada, copying CME, dated July 14, 2016. Exhibit PR-2016-020-06, Vol. 1.

16. Exhibit PR-2016-020-17, Vol. 1A.

17. Exhibit PR-2016-020-18, Vol. 1A.

18. *Ibid.* at paras. 34-66.

15. Furthermore, CME submitted that Transport Canada's reliance on the terms of the RFP is insufficient to establish that it fails to meet the minimum monetary thresholds of the *AIT*, since the SLSMC could have prepared other documents concerning the valuation of the lease agreement. Given Transport Canada's admission that it did not have access to the SLSMC's records that could potentially be relevant to this matter,¹⁹ CME argued that the Tribunal cannot rely solely on the RFP to make a determination on whether the procurement meets the minimum monetary thresholds set out in the *AIT*.

16. On August 11, 2016, Transport Canada filed a reply maintaining its position that neither the RFP nor the resulting lease agreement involves any form of remuneration (whether direct or indirect) flowing from either the SLSMC or Transport Canada to the successful proponent and that, thus, the applicable monetary thresholds are not met.²⁰

17. On August 12, 2016, the Tribunal requested that the SLSMC, a non-party in these proceedings, provide information to the Tribunal concerning the RFP and the resulting lease agreement.²¹ In particular, the SLSMC was asked to answer the following questions and to include any relevant supporting documentation:

- (1) Is the RFP for SLSMC's acquisition, by any means, of goods, services or construction? If "yes", please specify the nature of the goods, services or construction to be acquired by SLSMC from the successful proponent.
- (2) Do the terms of the RFP and the resulting lease agreement include any financial commitment by SLSMC to pay the successful proponent for the provision of goods, services or construction? If "yes", please provide an estimate of the total value.
- (3) Articles 1.1 and 3.3 of the RFP indicate that the successful proponent "must... [o]ffer commercial ship repair to the market (non-exclusive use) in the case of the Dry Docks". Who will be responsible for paying the successful proponent for the provision of such services? To what extent, if any, will SLSMC have an obligation to pay the successful proponent for the provision of such services?²²

18. On August 19, 2016, the Tribunal received a response from the SLSMC.²³ As will be discussed in more detail below, the SLSMC responded to questions (1) and (2) in the negative and to question (3) by indicating that it would have no obligation to provide "... any payment, subsidy, guarantee or any other financial benefit to the lessee of the facilities in exchange for ship repair services",²⁴ as such services would be entirely paid for by the ship owners/operators that need those services. The SLSMC also indicated that, other than the RFP and the "Summary of Lease Agreement" in Appendix B to the RFP, which are already on the record, it has no further documentation relevant to the above questions.

19. On August 26, 2016, CME filed comments on the SLSMC's response to the Tribunal's questions.²⁵ In general, it maintained that the RFP and the resulting lease agreement include financial commitments by the SLSMC for the procurement of services from the successful proponent that will, in return, receive economic benefits that should be considered part of the procurement value. CME's specific arguments will be addressed below.

19. Exhibit PR-2016-020-08A at 10, Vol. 1A.

20. Exhibit PR-2016-020-19, Vol. 1B.

21. Exhibit PR-2016-020-20, Vol. 1B.

22. *Ibid.* at 2.

23. Exhibit PR-2016-020-21, Vol. 1B.

24. *Ibid.* at 3.

25. Exhibit PR-2016-020-23, Vol. 1B.

RELEVANT TERMS OF THE RFP

20. The RFP issued by the SLSMC describes its mandate and the purpose of the RFP as follows:

1. Introduction

SLSMC is a not-for-profit corporation responsible, pursuant to an agreement with Transport Canada, for the safe and efficient movement of marine traffic through the Canadian Seaway facilities, which consists of 13 of the 15 locks between Montréal and Lake Erie. It plays a pivotal role in ensuring that the waterway remains a safe and well-managed system . . . SLSMC also acts on behalf of Transport Canada for the management of certain lands owned by the Crown in the vicinity of the St. Lawrence Seaway.

SLSMC's mandate is to promote efficiency and responsiveness to the needs of shipping interests, ports, marine agencies, and provincial and state jurisdictions.

1.1 Business opportunity

SLSMC is seeking a company (or companies) to enter into a long-term Lease Agreement for the operation of the Port Weller Facilities.

21. Essentially, the RFP pertains to a lease of federal land and facilities by the successful proponent. The relevant terms of the lease with respect to the structure of the transaction, payments and conditions for the successful proponent's use of the facilities and adjoining land are set out in the RFP as follows:

3. Principal Lease Terms

...

3.1 Structure of the Transaction

...

The lease will be "triple net" whereby the Successful Proponent will be responsible for all costs, including taxes, insurance and capital maintenance expenses that will arise from the use of the Facilities. If Proponents are interested in contributing to the demolition of the buildings as part of a capital improvement plan, SLSMC will consider this contribution in assessing the overall economic benefit of the Proponent's offer. . . .

Proponents are required to specify the term of the lease (plus options) they would like to sign with SLSMC.

Following the execution of the Lease Agreement, SLSMC will act solely as the administrator of the buildings and the land owned by the Crown, collecting rent for the lease of the Facilities.

...

3.3 Description of use of the Facilities

SLSMC is willing to lease the Dry Docks (and adjoining land) and the Berthing Wall (and adjoining land) to one or more Proponents. Proponents are required to clearly state if they would like to lease the Dry Docks and Berthing Wall separately or together.

SLSMC has determined that the Successful Proponent(s) must:

- √ Offer commercial ship repair to the market (non-exclusive use) . . .
- √ Invest in the facility to increase its value and efficiency . . .
- √ Increase cargo movement through the Great Lakes St. Lawrence System . . .
- √ Repair and maintain the facility on an ongoing basis, to accepted industry standards in the case of the entire Facility

√ Provide commercial sustainability for the Facility, while providing an economic contribution to the region in the case of the entire Facility

...

4. Request for Proposals Process

...

4.3 Content of the Proposal

...

Lease Payment

The Proponent shall indicate the monthly lease payment that it is offering for the Transaction. The amount indicated must be in Canadian dollars, be firm and include all cost and benefit components. . . .

22. The RFP further provides that the full terms of the lease agreement will be negotiated by the SLSMC and the successful proponent.²⁶

TRIBUNAL ANALYSIS

23. In order for the Tribunal to conduct an inquiry in relation to a procurement complaint, it must be satisfied that the complaint is in respect of a “designated contract”.²⁷ Furthermore, it may, at any time, order the dismissal of a complaint that is not in respect of a designated contract.²⁸

24. Section 30.1 of the *CITT Act* defines a “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”.

25. Subsection 3(1) of the *Regulations* further provides that “. . . any contract or class of contracts concerning the procurement of goods or services or any combination of goods or services, as described in . . . Article 502 of the [AIT], . . . that has been or is proposed to be awarded by a government institution, is a designated contract”.

26. Article 518 of the *AIT* defines the term “procurement” as “. . . the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services”

27. Accordingly, in order to be considered a “designated contract” under the *AIT* (i.e. the only trade agreement upon which CME relied in this case), a contract that has been or is proposed to be awarded by a government institution must concern the procurement of goods and/or services.

26. Section 4.1 of the RFP.

27. Section 6 and subsection 7(1) of the *Regulations* set out four conditions that must be met in order for the Tribunal conduct an inquiry into a procurement complaint, which can be summarized as follows: (1) the complaint was submitted in a timely manner; (2) the complainant is a potential supplier; (3) the complaint is in respect of a designated contract; and (4) the complaint discloses a reasonable indication that the procurement has not been conducted in accordance with an applicable trade agreement.

28. Paragraph 10(b) of the *Regulations*.

28. The Tribunal finds that the evidence on the record clearly establishes that the RFP does not involve a government procurement of goods or services.²⁹

29. In its response to the Tribunal's request for information, the SLSMC stated that it "... issued the RFP in order to identify the best potential tenant to enter into a long-term lease of the Port Weller Dry Docks and Berthing Wall facilities ... to sustain operations and continue to make lease payments."³⁰ The SLSMC went on to explain that, while it used the "[RFP] process and format, allowing interested parties to put forward proposals that would demonstrate their qualifications, business proposals and financial sustainability ... [it] did not, and does not, consider the RFP to be for the acquisition of any goods, services or construction from proponents."³¹

30. While a government procurement process necessarily involves the *acquisition* of goods or services by any means, a similar process may be used for other public policy purposes, given the benefits of applying a recognized methodology that is competitive, transparent, merit-based, etc. For example, a competitive, evaluation-based process is typically involved in the selection of public grant recipients, which is essentially the giving of monies by the government with no acquisition of goods or services in return.

31. In this case, the SLSMC employed the RFP process in order to identify a qualified tenant to occupy the Port Weller dry docks and marine facilities and deliver services *to the public* in accordance with the SLSMC's responsibility of ensuring the safe and efficient movement of marine traffic through the St. Lawrence Seaway.

32. The Tribunal is not persuaded by CME's characterization of the RFP as a solicitation for services. While the RFP sets out several responsibilities of the successful proponent pertaining to the operation of the property that will form part of the lease agreement, the Tribunal considers such terms and conditions to fall in one of the following two categories: (1) the provision of services by the lessee to third parties (i.e. users of the dry docks and marine facilities); and (2) investments by the lessee in leasehold improvements and costs of repair and maintenance of the facilities.

33. The first category includes the provision of commercial ship repair to the market. The Tribunal accepts the SLSMC's undisputed evidence that such services "... will be exclusively between the lessee, as operator of the facilities, and a ship owner/operator needing the services."³² In terms of the second category, such investments or expenses relate to the lessee's cost of doing business in the leased facilities. In other words, the lease agreement is intended to give the successful proponent a business opportunity to lease the facilities and provide services to third parties in the marketplace. In the Tribunal's view, the fact that those services are in the public interest does not make this type of leasing arrangement a procurement, or acquisition, of services *by* the government.

34. Even if the Tribunal were to accept that the RFP is in respect of a procurement, it would still have reached the conclusion that the complaint is not in respect of a "designated contract" because the lease agreement has no "procurement value".

29. The Tribunal notes that this conclusion renders moot CME's allegation that the SLSMC failed to include in the RFP an estimate of the value of the procurement, in breach of Article 505(1) of *AIT*. In any event, that allegation was not included in the original complaint and is thus time-barred, pursuant to section 6 of the *Regulations*, as it was only raised by CME in response to the motion. Exhibit PR-2016-020-18, Vol. 1A.

30. Exhibit PR-2016-020-21 at 1, Vol. 1B.

31. *Ibid.*

32. *Ibid.* at 2; Exhibit PR-2016-020-23 at para. 12, Vol. 1B.

35. A procurement of goods and/or services must meet the minimum monetary thresholds set out in Article 502 of the *AIT* as follows:

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the *procurement value* is:
 - (a) \$25,000 or greater, in cases where the largest portion of the procurement is for goods;
 - (b) \$100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B; or
 - (c) \$100,000 or greater, in the case of construction.

[Emphasis added]

36. Article 518 of the *AIT* defines the term “procurement value” as “. . . the estimated total *financial commitment* resulting from a procurement, not taking into account optional renewals . . .” [emphasis added].

37. Article 505(2) of the *AIT* requires that, “[a]n entity shall, in calculating the procurement value, take into account *all forms of remuneration* including premiums, fees, commissions and interest” [emphasis added].

38. CME did not deny that the RFP provides for lease payments to be made by the successful proponent to the SLSMC pursuant to the resulting lease agreement. However, as indicated above, it submitted that there would be various indirect forms of remuneration provided by the SLSMC to the successful proponent, which should be considered “financial commitments” for the purposes of valuing the procurement.

39. In support of a broad interpretation of the term “remuneration”, CME pointed to Article 505(2) of the *AIT*, which refers to “. . . *all forms of remuneration* . . .” as indicative that it includes more than direct payments and the phrase “. . . *including* premiums, fees, commissions and interest” as a non-exhaustive list. In addition, CME relied on definitions of the word “remuneration” from various other sources, including *Investopedia.com*, as follows: “Remuneration is payment or compensation received for services or employment. This includes the base salary and any bonuses or other economic benefits that an employee or executive receives during employment.”³³

40. CME further argued that the term “financial commitment” should be read to include any form of remuneration for services that is measurable in monetary terms and provides an economic benefit to the potential supplier. In support, CME referred to Article 1.1 of the World Trade Organization (WTO) *Agreement on Subsidies and Countervailing Measures*, which defines a “subsidy”, in part, as a “financial contribution by government” that confers a benefit on the recipient.³⁴ CME equated the terms “financial commitment” and “financial contribution” on the basis that both involve a government entity providing a benefit to a recipient that is measurable in monetary terms.

41. Transport Canada, in reply, argued that, while the successful proponent may receive value from the resulting lease agreement (for example, in the form of an opportunity to provide services to third parties), that does not amount to a financial commitment by the procuring entity to provide “remuneration” to the successful proponent. It further stated that, “[a]s with any lease transaction, the landlord may have costs

33. <http://www.investopedia.com/terms/r/remuneration.asp>. Exhibit PR-2016-020-23 at paras. 16-18, Vol. 1B.

34. Exhibit PR-2016-020-18 at paras. 21-23, Vol. 1A.

associated with the development and maintenance of its land. However, this does not make the lease a procurement of services, and it does not make the costs ‘procurement value’.”³⁵

42. The definition of “procurement value” in Article 518 of the *AIT*, set out above, has been interpreted by the Federal Court of Appeal in *Bce Nexxia Inc. v. Canada (Commissioner of Corrections)*³⁶ to mean a “monetary obligation” that the procuring entity will incur for the acquisition of services.³⁷

43. In *Bce Nexxia*, the Corrections Service of Canada (CSC) had selected the appellant as the exclusive franchisee for the supply of telephone services to inmates in Canadian prisons administered by the CSC. The Federal Court of Appeal held that the Tribunal did not have jurisdiction to inquire into the complaint, as the contract did not have a “procurement value” for the purposes of Article 502(1) of the *AIT*, on the basis that there was no payment of money or “financial commitment” from the government institution to the supplier.³⁸ In its judgment, the Federal Court of Appeal distinguished the broad concepts of value or consideration in a contractual sense from the definition of “procurement value” in the *AIT* as follows:³⁹

[16] We agree that the supplier of telephone services is obtaining something of value in being awarded a contract for the exclusive supply of those services. However, broad concepts of value or consideration in a contractual sense are not found in the [*AIT*] definition of “procurement value”. “Procurement value” is specifically defined to mean only the “estimated financial commitment resulting from the procurement”. . . .

[17] The critical words are “financial commitment”. Generally, this term connotes a monetary obligation. (See, for example, “financial” in *The Encyclopedia of Words and Phrases Legal Maxims Canada*, 40th Cumulative Supplement at 2-231; and “commitment” in *Black’s Law Dictionary*, 7th ed., at 266.) While a general definition is of limited assistance, the context in which the definition of “procurement value” is used supports the construction that a monetary obligation is what is intended by the term “financial commitment”.

[18] “Procurement value” is used to determine whether the monetary thresholds in Article 502(1) are met for application of Chapter 5. The thresholds are set forth as simple monetary amounts. The intention is that the procuring entity [estimates] **the monetary obligation it will incur for the goods, services or construction it is acquiring**.

[19] In this case, there is no payment of money from CSC to the supplier. While the granting of an “exclusive franchise”, as Telus characterises the arrangement in this case, **may have value to a supplier, it is not an obligation to pay money by the government entity to the supplier**.

[Italics in original, bold added for emphasis]

44. In the present case, the Tribunal finds that none of the “financial commitments” alleged by CME equate to a monetary obligation for the SLSMC to pay the successful proponent for the acquisition of services. Nor does it consider the lease agreement to involve any form of “remuneration” of the same nature with the other words used to describe remuneration in Article 505(2) of the *AIT*, i.e. premiums, fees, commissions and interest. As recognized by the Federal Court of Appeal, all those terms refer to monetary obligations.⁴⁰ To the contrary, the alleged forms of remuneration on which CME relied consist of either a cost to be incurred by the SLSMC to improve its own property—a standard term of any lease agreement

35. Exhibit PR-2016-020-19 at para. 7, Vol. 1B.

36. 2002 FCA 9 (CanLII) [*Bce Nexxia*].

37. *Bce Nexxia* at paras. 17-18.

38. *Bce Nexxia* at para. 22.

39. *Bce Nexxia* at paras. 18-19.

40. *Bce Nexxia* at para. 20.

which, in some cases, may involve payment to a third party⁴¹—or some degree of “forgone revenue” that, even if it were the case (which was disputed), would not constitute an obligation to pay money to the successful proponent.

45. To be sure, the investments in capital improvements to be made by the SLSMC and the possibility of securing a rental rate below the property’s market value would (if realized in relation to the lease agreement) undoubtedly represent a value to the successful proponent. However, such benefits do not entail any obligation for the SLSMC to pay money to the successful proponent. In the Tribunal’s view, to consider any form of economic benefit that is measurable in monetary terms for the purposes of determining the “procurement value” would go beyond the scope of the related terms “remuneration” and “financial commitment” set out in the *AIT*, as interpreted by the Federal Court of Appeal.⁴²

46. CME sought to distinguish the facts in *BCE Nexxia* by arguing that the procurement in that case involved no remuneration flowing from the procuring entity to the winning bidder, because it was just granting an exclusive franchise that had no value to the CSC and the CSC incurred no cost in granting the exclusive franchise. Conversely, in this case, CME argued that costs to be incurred by the SLSMC represent a quantifiable value to the successful proponent that should be considered “financial commitments”. The Tribunal disagrees. Much like the exclusive franchise awarded to the successful bidder in *Bce Nexxia*, the RFP in the present case involves the selection of a lessee that will be given the exclusive right to operate the Port Weller docks and facilities and profit from that operation by way of market-based transactions with third parties. Furthermore, for the reasons stated above, the Tribunal has found that the costs to be incurred by the SLSMC pursuant to the lease agreement do not constitute a monetary obligation, or “financial commitment”, involving remuneration of the successful proponent.

47. In light of the foregoing, the Tribunal finds that the RFP and the related lease agreement do not relate to a procurement and that, even if it had concluded otherwise, they do not involve any “financial commitment” flowing from the SLSMC to the successful proponent. As there is no “procurement value” of which to speak, the minimum monetary thresholds under the *AIT* have not been met. Therefore, the Tribunal concludes that it has no jurisdiction to conduct the inquiry because the complaint is not in respect of a “designated contract”.

ORDER

48. The Tribunal grants the motion filed by Transport Canada and, pursuant to paragraph 10(b) of the *Regulations*, dismisses the complaint and terminates all proceedings relating thereto.

49. Consequently, the postponement of award of contract order made by the Tribunal on July 14, 2016, is rescinded.

Peter Burn
Peter Burn
Presiding Member

41. To the extent that the SLSMC will be responsible under the lease agreement for making investments in capital improvements or incurring other costs related to the facilities, it was an undisputed fact that a third party (and not the successful proponent) would be providing and paid for those services, such as the building demolition, fence construction, installation of a new electrical substation and the decontamination of the facilities.

42. That those or similar terms may have a broader meaning outside the procurement context, such as the WTO’s countervailing measures regime, is no relevance.