



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-070

Park Air Systems Ltd.

*Decision made
Wednesday, April 5, 2017*

*Decision issued
Friday, April 7, 2017*

*Reasons issued
Thursday, April 13, 2017*

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

BY

PARK AIR SYSTEMS LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Jean Bédard, Q.C.
Jean Bédard, Q.C.
Presiding Member

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

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a request for standing offers (Solicitation No. W8474-156921/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the supply of very high frequency and ultra-high frequency radio systems to be used in air traffic control at DND sites (the RFSO).

3. Park Air Systems Ltd. (Park Air) alleges that the procurement process suffered from several irregularities throughout its course, that its bid was improperly deemed non-compliant with certain technical requirements, and that it was not provided with sufficient information concerning the procurement process, including the evaluation of its bid.

4. As indicated above, subsection 30.11(1) of the *CITT Act* provides that, “[s]ubject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.” Section 30.1 of the *CITT Act* defines “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.”

5. The *Regulations* further provide that a “designated contract” is any contract or class of contract concerning a procurement of goods or services, or any combination of goods or services, by a government institution, as described in the provisions of the trade agreements listed in the *Regulations*, namely, Article 1001 of the *North American Free Trade Agreement*,³ Article 502 of the *Agreement on Internal Trade*,⁴ Article II of the *Agreement on Government Procurement*,⁵ Article *Kbis*-01 of the *Canada-Chile Free Trade Agreement*,⁶ Article 1401 of the *Canada-Peru Free Trade Agreement*,⁷ Article 1401 of the

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

2. S.O.R./93-602 [*Regulations*].

3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-internal-trade/>> [*AIT*].

5. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*AGP*].

6. *Free Trade Agreement between Canada and the Republic of Chile*, online: Global Affairs Canada <<http://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*, titled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009) [*CPFTA*].

Canada-Colombia Free Trade Agreement,⁸ Article 16.02 of the *Canada-Panama Free Trade Agreement*,⁹ Article 17.2 of the *Canada-Honduras Free Trade Agreement*¹⁰ or Article 14.3 of the *Canada-Korea Free Trade Agreement*.¹¹

6. The RFSO concerns the procurement by DND of very high frequency and ultra-high frequency radio systems to be used in air traffic control.¹² Such goods, when procured by DND, are not included in the coverage of the *AGP*, *NAFTA*, the *CCFTA*, the *CPFTA*, the *CCOFTA*, the *CPAFTA*, the *CHFTA* or the *CKFTA*, as all of these agreements cover only specific goods procured by DND. For example, in the case of the *AGP*, Canada's Annex 4 provides that, "with respect to procurement by [DND], this Agreement covers only the goods described in the Federal Supply Classifications (FSC) listed" in that Annex. The goods in issue are not described in any of the listed categories. The other trade agreements include similar provisions in respect of purchases by DND, and consequently, the goods in issue are not included in the coverage of those agreements.¹³

7. The RFSO therefore does not relate to a contract designated under any of the foregoing agreements.

8. As for the *AIT*, while it does generally cover all types of goods procured by DND, Article 502 of the *AIT* further provides that the procurement chapter of the *AIT* "applies to measures adopted or maintained by a Party [to the *AIT*] relating to *procurement within Canada . . .*" [emphasis added].

9. In this regard, the Supreme Court of Canada held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*¹⁴ that the expression "procurement within Canada" in Article 502 of the *AIT* refers to procurements between a government entity of a party to the *AIT* and a supplier within the jurisdiction of one of the parties to the *AIT* – that is, of the federal government of Canada or of the government of one of the Canadian provinces or territories. More specifically, the Supreme Court of Canada held that only suppliers with a place of business in Canada qualify as Canadian suppliers, in accordance with the definition of "Canadian supplier" in Article 518 of the *AIT*. It further held that a supplier that does not have a place of business in Canada is *not* entitled to invoke the provisions of the *AIT* in order to have standing before the Tribunal.¹⁵

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng>> (entered into force 15 August 2011) [*CCOFTA*].

9. *Free Trade Agreement between Canada and the Republic of Panama*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>> (entered into force 1 April 2013) [*CPAFTA*].

10. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng>> (entered into force 1 October 2014) [*CHFTA*].

11. *Free Trade Agreement between Canada and the Republic of Korea*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=fra>> (entered into force 1 January 2015) [*CKFTA*].

12. The Notice of Proposed Procurement published on <https://buyandsell.gc.ca> indicates the Goods and Services Identification Number (GSIN) as being "N5821: Radio and Television Communications Equipment, Airborne".

13. See the schedules of Canada in Annex 1001.1b-1 of *NAFTA*; Annex Kbis-01.1-3 of the *CCFTA*; Annex 1401.1-3 of the *CPFTA*; Annex 1401-3 of the *CCOFTA*; Annex 4 of the *CPAFTA*; Annex 17.3 of the *CHFTA*; and Annex 14-B of the *CKFTA*.

14. 2009 SCC 50 (CanLII), at paras. 19-29 [*Northrop Grumman*]; the Supreme Court of Canada was affirming the judgment of the Federal Court of Appeal in *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.*, [2009] 1 FCR 688, 2008 FCA 187 (CanLII).

15. *Northrop Grumman* at para. 30.

10. By letter dated March 31, 2017, the Tribunal requested that Park Air “provide proof that [it] is a ‘Canadian supplier’ within the meaning of Article 518 of the Agreement on Internal Trade, i.e. that it ‘has a place of business in Canada’” or alternatively, to state that it does not have such a place of business. In its response to the Tribunal dated April 4, 2017, Park Air confirmed that it is a company registered in England and Wales with no place of business in Canada. As such, the Tribunal finds that Park Air is not a “Canadian supplier” within the meaning of Article 518 of the *AIT*.

11. Therefore, Park Air does not have standing to file a complaint pursuant to the *AIT*. As a result, the Tribunal cannot inquire into the complaint and considers the matter closed.

DECISION

12. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Jean Bédard, Q.C.
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Presiding Member