



Ottawa, Wednesday, July 18, 2001

File No. PR-2000-071

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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

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.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Correctional Service of Canada ensure that all future procurements by CORCAN comply with the obligations contained in the *Agreement on Internal Trade*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards TAB Canada its reasonable costs incurred in filing and proceeding with the complaint.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: July 18, 2001
Date of Reasons: August 15, 2001

Tribunal Member: Ellen Fry, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Marie-France Dagenais
Eric Wildhaber

Complainant: TAB Canada

Government Institution: Correctional Service of Canada

Counsel for the Government Institution: Lynne Soublière



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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On March 14, 2001, TAB Canada (TAB) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the acquisition, delivery and installation of a high-density mobile filing system (filing system) by the Department of Public Works and Government Services (PWGSC) by means of a stores transfer order (STO) (Requisition No. V3191-000020) from CORCAN² for the Department of Human Resources Development (HRDC).

TAB alleged that there was no Request for Proposal (RFP) published for this requirement and that, therefore, it was deprived of an opportunity to participate in this solicitation. It further alleged that CORCAN is not a manufacturer of filing systems and that, therefore, CORCAN's exclusive contract with Spacesaver Mobile Storage Systems Corporation (Spacesaver) is an outsourcing arrangement, which was also established without the publication of an RFP.

TAB requested, as a remedy, that the Tribunal clarify whether a situation such as the one described above is permissible under the trade agreements.

On March 19, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ That same day, the Tribunal requested comments from PWGSC on Articles 507(c) and (d) of the *Agreement on Internal Trade*,⁴ Article 1018(2)(d) of the *North American Free Trade Agreement*⁵ and Article XXIII(2) of

1. R.S.C.1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. CORCAN is a special operating agency of the Correctional Service of Canada (CSC). As such, it forms part of a federal government entity, as contemplated by the trade agreements. CORCAN's mandate is to provide inmates with work-related training and services to facilitate their re-entry into the labour market. CORCAN operates a number of services and factories, such as farming and agricultural services, the manufacture of office furniture, the manufacture of textiles, such as commercial clothing, industrial laundry and industrial fabrics, and employment opportunities in construction.
3. S.O.R./93-602 [hereinafter Regulations].
4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

the *Agreement on Government Procurement*,⁶ as these provisions relate to the solicitation at issue. The Tribunal further requested, if PWGSC's position was that these provisions applied to this procurement, that PWGSC explain in detail how prison labour was a factor in the order placed with CORCAN. On March 30, 2001, PWGSC filed submissions with the Tribunal in response and, on April 11, 2001, TAB filed comments on PWGSC's response with the Tribunal. On April 20, 2001, the Tribunal issued an order dismissing the portions of the complaint that related to the transaction described in the complaint as the acquisition of goods by HRDC from CORCAN and the application of NAFTA and the AGP to the transaction described in the complaint as the acquisition of goods by CORCAN from Spacesaver pursuant to an exclusive agreement.

That same day, the Tribunal informed the parties of its decision to seek further comments from the CSC on the applicability of the AIT to the transaction for the supply of goods to CORCAN by Spacesaver. On April 27, 2001, the CSC filed submissions with the Tribunal. On May 1, 2001, the Tribunal requested that TAB and PWGSC file comments in response. On May 23, 2001, the Tribunal wrote PWGSC requesting that it coordinate a response with the CSC and HRDC to reply to five specific questions of interest to the Tribunal. On June 4, 2001, PWGSC responded to the Tribunal's letter of May 23, 2001. On June 8, 2001, the Tribunal wrote to CORCAN requesting that it produce a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*⁷ in relation to the transaction that took place between Spacesaver and CORCAN. On June 28, 2001, CORCAN filed a GIR with the Tribunal. On July 6, 2001, the Tribunal wrote to CORCAN requesting information on how participants in marketing alignment agreements such as the one referred to in the GIR are identified and whether, in this particular instance, any form of competitive process had taken place to select Spacesaver. CORCAN answered the Tribunal's request on July 9, 2001. On July 10, 2001, TAB filed comments on the GIR with the Tribunal.

PROCUREMENT PROCESS

On September 6, 2000, HRDC sent a requisition to PWGSC for a filing system. Later in September 2000, HRDC advised PWGSC that discussions had been initiated between CORCAN and HRDC with respect to the supply of the required filing system. On October 16, 2000, CORCAN and Spacesaver entered into a marketing alignment agreement whereby Spacesaver would obtain early access to potential government-funded high-density storage projects and CORCAN would make a value-added contribution by supplying services or components. On November 1, 2000, HRDC advised PWGSC that it had agreed to acquire the filing system from CORCAN. As a result, an amended requisition dated November 2, 2000, was forwarded by HRDC to PWGSC requesting the issuance of an STO to CORCAN. On January 18, 2001, an STO for the filing system was issued to CORCAN. On January 31 and February 13, 2001, CORCAN issued two purchase orders to Spacesaver for the filing system in issue. The filing system was then delivered to CORCAN's warehouse in Kingston, Ontario, at which point CORCAN acquired ownership. The filing system was then delivered over several days by CORCAN to the installation site in Scarborough, Ontario, where it was received by HRDC staff. Title to the filing system was transferred to HRDC upon acceptance of delivery.

6. April 15, 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

7. S.O.R./91-499.

Preliminary Matters

In its submissions of March 30, 2001, PWGSC submitted that the intra-governmental transaction pursuant to which it acquired a filing system from CORCAN on behalf of HRDC is not a “procurement” for purposes of the application of the trade agreements. It submitted that Article 1001(5)(a) of NAFTA and paragraph 2 of the General Notes for Canada in Appendix I to the AGP direct that procurement does not include “non-contractual arrangements”. Article I(2) of the AGP also states that the agreement “applies to procurement by any contractual means”. PWGSC submitted that the STO, which governs the requirement, is not a contract in any sense of the legal term. An STO, PWGSC submitted, is a confirmation document used within government with respect to transactions between departments or government agencies.

Furthermore, PWGSC submitted that the acquisition of the filing system constitutes the provision by a government entity of goods and services to other government organizations within the meaning of Article 518⁸ of the AIT and that, as such, it does not fall within the meaning of “procurement” for purposes of coverage under this agreement. In any event, PWGSC added, contracts between public bodies, such as PWGSC and CORCAN, would not be subject to the AIT by virtue of Article 507(d).

PWGSC submitted that, pursuant to sections 30.1 and 30.11 of the CITT Act and subsection 3(1) of the Regulations, the Tribunal’s procurement review jurisdiction is limited to “any aspect of the procurement process . . . that relates to a designated contract”. PWGSC argued that, because the STO is not a contract and because the acquisition at issue is not a procurement for purposes of coverage under the trade agreements, the Tribunal has no jurisdiction in the matter of the STO.

In the alternative, PWGSC submitted that Articles 507(c) and (d) of the AIT, Article 1018(2)(d) of NAFTA and Article XXIII(2) of the AGP relating to “prison labour” exclude this acquisition from the application of the trade agreements and the jurisdiction of the Tribunal. PWGSC argued that the acquisition at issue constitutes a “measure” relating to goods (products) or services of prison labour or a “procurement from . . . prison labour”, as contemplated by the trade agreements. PWGSC submitted that this is so because the filing system was acquired by CORCAN for purposes of inmate work activity and that its installation generated work experience for inmates and subsequently led to the participation of inmates in the manufacture of shelving systems.

In its response of April 11, 2001, TAB asked why CORCAN did not use the RFP process to establish its partnership with a manufacturer in the private sector and whether CORCAN was entitled to sign exclusive contracts without using an RFP. TAB further queried what PWGSC would do in the future when faced with a similar situation. TAB submitted that it had difficulty understanding PWGSC’s submission that this acquisition is not a contractual agreement or procurement, since the STO document itself reads, in part: “You are requested to sell to Her Majesty the Queen . . . the goods, services, . . . on any attached sheets at the price or prices set out therefor. . . . The Vendor/Firm hereby accepts/acknowledges this contract.”

The Tribunal determined that the transaction between HRDC and CORCAN for the acquisition of a filing system is, in fact, a transaction between entities (HRDC and the CSC) listed in the Annexes to Chapter Five of the AIT, as set out in Article 507(d) of the AIT and is the government provision of goods to

8. Article 518 of the AIT states, in part, as follows: “**procurement** means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

...

(b) government provision of goods and services to persons or other government organizations.”

another government organization as contemplated by Article 518 of the AIT. Therefore, this transaction is excluded from the application of Chapter Five of the AIT. The Tribunal further determined that the transaction between HRDC and CORCAN is a procurement excluded from the application of NAFTA and the AGP by Article 1001(5) of NAFTA and Article I(2) of the AGP.

The Tribunal determined that the acquisition of goods by CORCAN from Spacesaver is a procurement within the meaning of Article 1001(5) of NAFTA, Article I(2) of the AGP and Article 518 of the AIT. However, in the Tribunal's opinion, this procurement benefits from the provisions of Article 1018(2)(d) of NAFTA and Article XXIII(2) of the AGP, in that it constitutes a measure relating to prison labour within the meaning of the said agreements. Therefore, the Tribunal determined that the acquisition of goods by CORCAN from Spacesaver is excluded from the application of Chapter 10 of NAFTA and the AGP.

PARTIES' POSITIONS

CORCAN's Position

CORCAN indicated in its April 27, 2001, submissions that it never purchased nor acquired the Spacesaver products. Accordingly, CORCAN submitted that, in the absence of an acquisition by it of the Spacesaver products, there is no "procurement" as defined in Article 518 of the AIT. Therefore, CORCAN argued, the AIT does not apply. Moreover, CORCAN submitted that, although the acquisition, as required by the definition of "procurement" at Article 518 of the AIT, in its view, occurred between HRDC and Spacesaver under the CORCAN-Spacesaver marketing alignment agreement, this procurement escapes the application of the AIT by virtue of Article 507(c), which specifically excludes procurement from prison labour.

In its response of May 25, 2001, to the Tribunal's questions of May 23, 2001, CORCAN modified and supplemented the information in its April 27, 2001 submission, indicating that CORCAN paid Spacesaver for the product, acquired ownership of the product and is obliged to honour the warranty on the product.

CORCAN's mandate is to provide offenders with work-related training and services to facilitate their re-entry into the labour market and to facilitate their re-integration into society. CORCAN submitted that it is authorized by its charter and the *Corrections and Conditional Release Regulations*⁹ to enter into agreements with private sector enterprises to further this mandate. In this context, it submitted that it lawfully entered into a marketing alignment agreement with Spacesaver. CORCAN submitted that many factors influence private sector companies and their willingness to enter into alliances with CORCAN. As such, CORCAN submitted, it must establish ties with private sector enterprises that are interested in collaborating with CORCAN.

CORCAN submitted that its marketing alignment agreement with Spacesaver is intended to provide employment opportunities for inmates in regard to the manufacture and installation of Spacesaver filing systems. CORCAN submitted that through the HRDC purchase in issue, the inmates gained enough experience with Spacesaver filing systems that they subsequently participated in the manufacture of the filing systems, and that this initial purchase order was a stepping stone for further inmate involvement in the manufacture and installation of Spacesaver filing systems.

9. S.O.R./92-620.

CORCAN submitted that the inmates' involvement in the acquisition of a filing system by HRDC from Spacesaver was substantial. The inmates processed the purchase order, packaged the filing systems for the intended recipient, dismantled the existing filing systems, arranged the layout and subsequently installed the new filing system for the intended recipient.

Relying on Article 507(c) of the AIT concerning prison labour, CORCAN submitted that the transaction that took place between Spacesaver and CORCAN, although a procurement, nonetheless was a procurement flowing from an agreement concluded for the purpose of providing training and employment opportunities for inmates, hence, prison labour. Therefore, CORCAN submitted, this procurement is excluded from the general application of the AIT by virtue of Article 507(c).

CORCAN submitted that, but for the involvement of inmates in this transaction, there would have been neither a marketing alignment agreement nor any transaction between CORCAN and Spacesaver. In fact, CORCAN submitted that involving prison labour is the purpose and the essence of the agreement between CORCAN and Spacesaver. Recognizing that it acquired the filing system from Spacesaver and then invoiced HRDC for the filing system, CORCAN submitted that these facts do not change the nature of the transaction, which remains a transaction "solely founded, and entirely dependent, on prison labour."

In its answer to the Tribunal's request of July 6, 2001, CORCAN submitted that it selects potential participants in market alignment agreements on an invitation basis. CORCAN continuously seeks business partners through discussions with business communities in various parts of the country. CORCAN indicated that, for its manufacturing business line, it has approached a number of manufacturers to solicit their interest in working with CORCAN to transfer knowledge, train inmates and instructors, and share business risks. However, CORCAN submitted that, given the nature of its workforce and work environment, it has proven to be extremely difficult to attract such business. CORCAN submitted that it is willing and available to work with any credible entities that are willing to do business with it.

TAB's Position

TAB submitted that nothing in the documentation produced by CORCAN shows that it is within CORCAN's mandate to sign exclusive agreements with the private sector. In fact, TAB submitted, the documentation that it has examined proved the contrary. Essentially, TAB reiterated its original query as to why an RFP process was not used to conduct this procurement.

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the 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 further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements; in this instance, only the AIT applies.

Article 507(c) of the AIT provides, in part, that Chapter Five does not apply to "procurement from . . . prison labour". The Tribunal accepts the submissions of CORCAN that, from CORCAN's perspective, the acquisition by CORCAN from Spacesaver was made exclusively for the purposes of creating work-related training and services for inmates. However, there is no evidence on the record to indicate that Spacesaver, a private sector enterprise, could constitute "prison labour". Hence, the acquisition by CORCAN from Spacesaver does not constitute "procurement from . . . prison labour" within the

meaning of Article 507(c) of the AIT, and Article 507(c) does not exempt this procurement from the application of the AIT.

Article 501 of the AIT provides that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurement to all Canadian suppliers. Against this backdrop and unless circumstances set out in Article 506(11) or (12) apply, Chapter Five of the AIT provides that, in conducting procurement, open tendering is the norm. There is no evidence on the record that any such circumstances exist and CORCAN has not submitted that any such circumstances apply in this instance. Therefore, it was incumbent on CORCAN to use open tendering procedures to acquire the filing system as an input to meeting HRDC's requirement.

This was not done. Instead, CORCAN entered into a contract with Spacesaver without offering any other potential supplier, such as TAB, an opportunity to compete. This action is a breach of Article 506 of the AIT.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the provisions of the AIT and that the complaint, therefore, is valid in part.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the CSC ensure that all future procurements by CORCAN comply with the obligations contained in the AIT.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards TAB its reasonable costs incurred in filing and proceeding with the complaint.

Ellen Fry
Ellen Fry
Presiding Member