



Ottawa, Wednesday, May 29, 2002

File No. PR-2001-067

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

AND FURTHER TO 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 10(b) of the *Canadian International Trade Tribunal Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: May 29, 2002
Date of Reasons: July 16, 2002

Tribunal Member: Pierre Gosselin, Presiding Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Georgian College of Arts and Technologies

Government Institution: Department of Human Resources and Development

Counsel for the Government Institution: Susanne Pereira

Ottawa, Tuesday, July 16, 2002

File No. PR-2001-067

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

AND FURTHER TO 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 February 28, 2002, Georgian College of Applied Arts and Technologies (Georgian College) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned an Expression of Interest (EOI) by the Barrie Human Resource Centre of Canada (the Centre) dated November 30, 2001, with regard to the administration and provision of one or more services² to help unemployed individuals obtain employment or self employment. The Centre, located in Barrie, Ontario, is a constituent of the Department of Human Resources and Development (HRDC).

Georgian College alleged that HRDC did not conduct a fair and transparent bid process for this requirement, resulting in several breaches of the *North American Free Trade Agreement*³ and of the *Agreement on Internal Trade*.⁴

Georgian College requested, as a remedy, that the Tribunal delay the award of any contract in relation to this procurement until the validity of the complaint was determined. It also requested that a competitive procurement process be conducted in compliance with the applicable rules.

On March 6, 2002, 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*.⁵ That same day, the Tribunal issued an order postponing the award of any contract in connection with the EOI until the Tribunal determined the validity of the complaint. On April 4, 2002, HRDC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. Workshops for Job-Ready Clients; Employment and Training Information Sessions, Needs Determination/Case Management, Employment Counselling; Self-Employment Assistance Services; and Self-Employment Resource Centre.
 3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 4. July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 5. S.O.R./93-602 [hereinafter Regulations].

*Tribunal Rules.*⁶ On April 16, 2002, Georgian College filed comments on the GIR with the Tribunal. On May 2, 2002, the Tribunal requested in writing that HRDC provide additional information on the legal relationship between HRDC and the Employment Insurance Commission (the Commission). On May 7, 2002, Georgian College filed additional information with the Tribunal. On May 13, 2002, the Tribunal asked for additional clarifications from HRDC.

PROCUREMENT PROCESS

HRDC, through its Human Resource Centres, has established employment assistance services (EAS) programs to assist unemployed persons in the community in securing and maintaining employment.

In November 2001, the Centre published the subject EOI in local newspapers, inviting submissions from potential service providers with respect to the administration and provision of those specified programs for the 2002-2003 fiscal year. The EAS programs are implemented directly for eligible individuals by service providers selected through EOIs. The EOI contains the following excerpts relevant to this case:

The Barrie Human Resource Centre of Canada (HRCC) invites an Expression of Interest to administer and provide one or more of the following services to help unemployed individuals obtain employment/self employment.

2. Employment & Training Information Sessions, Needs Determination/Case Management, Employment Counselling: effective September 2002

(Barrie HRCC catchment area, excluding South Simcoe)

The Coordinator will be required to provide services under the Employment Assisted Services program to unemployed Canadian citizens and permanent residents, who are destined for the labour market and who need assistance to prepare for, find and keep employment.

Submissions will be reviewed and assessed against a rating guide, current budgets and HRCC operational priorities. Not all submissions will proceed to the proposal or contract stage.

Georgian College, a previous service provider on other similar EAS programs, made submissions with respect to the above-mentioned program. Three submissions were received by the Centre with respect to this program, and the Simcoe County District School Board (SCDSB) was selected as the service provider. On December 14, 2001, the Centre advised Georgian College by telephone that it would not be invited to submit a full proposal. On January 9, 2002, representatives from the Centre and Georgian College met to discuss the rationale for selecting SCDSB, the application of the government's contracting regulations (GCRs) and the Treasury Board Policy on Transfer Payments⁷ as it applies to this case.

On January 17, 2002, Georgian College advised the Centre that it objected to the process used in selecting EAS providers and indicated its intention to file a formal complaint on the matter with the Tribunal. By letter dated January 22, 2002, the Centre informed Georgian College that it was seeking further clarification that the selection process used was appropriate, and would provide a response by February 15, 2002. On January 23, 2002, Georgian College filed a complaint with the Tribunal on the matter. On February 5, 2002, the Tribunal advised Georgian College, in writing, that it would not initiate an inquiry, as the complaint was premature in the circumstances. By letter dated February 14, 2002, the Centre confirmed to Georgian College its position that the EAS program is not subject to the GCRs, but rather to the Policy on Transfer Payments, which does not require competitive tendering. On February 28, 2002, Georgian College filed a complaint with the Tribunal.

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

7. Effective 1 June 2000 [hereinafter Policy on Transfer Payments], GIR, Tab 5.

POSITION OF PARTIES

HRDC's Position

HRDC submitted that Part II of the *Employment Insurance Act*⁸ sets out a comprehensive scheme for the provision of funding of employment assistance programs such as the one indicated in the EOI. According to section 56⁹ of the EI Act, the “purpose of [Part II] is to help maintain a sustainable employment insurance system through the establishment of employment benefits for insured participants and the maintenance of a national employment service.” Pursuant to the EI Act, the Commission is required to maintain a national employment service¹⁰ (NES) to provide information on employment opportunities across Canada. In furtherance of the NES and pursuant to paragraph 60(4)(a),¹¹ HRDC, through its centres, has established EAS programs to assist unemployed persons in the community in securing and maintaining employment.

HRDC submitted that the programs specified in the EOI are established pursuant to and fall squarely within the criteria of Part II of the EI Act. The EOI itself clearly states that the programs for which service providers are sought will be provided pursuant to EAS, which is a support measure under paragraph 60(4)(a) of the EI Act. HRDC further submitted that the support measures consist of government financial assistance in the form of a contribution toward the implementation and administration of the programs. In the present case, the contribution is paid to the service provider pursuant to a contribution agreement,¹² as set out in the Policy on Transfer Payments. Finally, HRDC submitted that the direct beneficiaries of the AES are individuals in the community. HRDC submitted that financial assistance in the form of a contribution, pursuant to subsection 61(1) of the EI Act and article 7 of the Employment Benefits and Support Measures,¹³ is a transfer payment, as defined in the Policy on Transfer Payments.

2.1 Transfer payments are transfers of money, goods, services or assets made from an appropriation to individuals, organizations or other levels of government, without federal government directly receiving goods or services in return.

Contribution (*contribution*) – is a conditional transfer payment to an individual or organization for a specified purpose pursuant to a contribution agreement that is subject to being accounted for and audited.

Contribution agreements (*accords concernant une contribution*) – are undertakings between a donor department and a prospective recipient of a contribution which describe the obligations of each.

HRDC submitted that financial assistance in the form of a contribution, as provided for by the EI Act, is excluded from the definition of procurement in Article 1001(5)(a) of NAFTA and Article 518 of the AIT, as “procurement” does not include any form of government assistance, and that, therefore, the Tribunal does not have jurisdiction to deal with this complaint.

8. S.C. 1996, c. 23 [hereinafter EI Act].

9. GIR, Tab 10.

10. “60.(1) The Commission shall maintain a national employment service to provide information on employment opportunities across Canada to help workers find suitable employment and help employers find suitable workers.”

11. “In support of the national employment service, the Commission may establish support measures to support (a) organizations that provide employment assistance services to unemployed persons.”

12. GIR, Tab 6.

13. GIR, Tab 4.

HRDC argued that, although the exclusion does not specify the recipient of the government assistance, in the absence of a contrary indication, this exclusion should be read broadly to contemplate any government assistance, including funding provided to a private organization for the purpose of delivering services to a third party, as in the present case. It submitted that the list of exclusions to the definition of procurement is not exhaustive and clearly encompasses government contributions such as those found here. This is evident from the fact that government assistance includes contributions pursuant to section 61 of the EI Act, and contributions are similar to grants, which are specifically listed in the exclusions. The list of exclusions should also be read broadly to give effect to the intent of the provision, which is to exclude any form of government assistance from the requirements of a competitive bid process. Furthermore, HRDC submitted that the Treasury Board Contracting Policy,¹⁴ which governs most government contracts for the purchase or acquisition of goods and services, specifically excludes grants and contributions.

HRDC submitted that Georgian College ignores or mischaracterizes the nature of the subject matter of the EOI. It argued that Georgian College provides no support other than the estimated value of the requirement for its position that the EOI is a procurement subject to the open tendering procedures of the trade agreements.

For the above reasons, HRDC submitted that the complaint does not pertain to any aspect of procurement. Alternatively, should the Tribunal find that it has jurisdiction in the matter, HRDC requested a reasonable period of time to make additional submissions on the merits of the complaint. It also requested its costs.

In its response of May 13, 2002, HRDC submitted that, under the EAS program, the Commission does not acquire services pursuant to a contribution agreement with a third party. Rather, the Commission provides financial assistance (a contribution) to unemployed persons in the community. HRDC further submitted that the Commission does not benefit directly from the contribution agreement, as no services are being provided to the Commission. The direct beneficiaries of the contribution agreement are the third party, through receipt of financial assistance, and the unemployed persons in the community who receive services directly from the third party. HRDC added that the third party does not act on behalf or as an agent of the Commission. Rather, the relationship is a financial one involving the provision of financial assistance to the third party, in the form of a contribution, to support and promote a program for the benefit of unemployed persons. Finally, HRDC indicated that the source of funding for financial assistance programs under Part II of the EI Act is the Consolidated Revenue Fund, pursuant to paragraph 77(1)(b) of the EI Act, which constitutes a statutory appropriation of funds.

Georgian College's Position

Georgian College submitted that the Tribunal's decision to accept this complaint for inquiry makes the Centre's argument about the Tribunal's jurisdiction moot. In the alternative, it submitted that its complaint relates to the procurement process used by the Centre to select a service provider for administrative purposes and the fact that the contract deals with EAS services is irrelevant.

Georgian College added that the Policy on Transfer Payments cannot unilaterally create an exemption to NAFTA and the AIT. In the alternative, it submitted that, if the EAS contract can be characterized as part of a transfer payment program, then, the EAS contract is a sub-contract to deliver part of the transfer program and is, therefore, subject to the government contracting policies, as set out in

14. Effective 15 November 1999 [hereinafter Contracting Policy], GIR, Tab 9.

article 8.4¹⁵ of the Policy on Transfer Payments. Georgian College further submitted that article 2.4 of the Contracting Policy states that government contracting shall be conducted in a manner that will comply with the government's obligations under NAFTA, the AIT and the *Agreement on Government Procurement*.¹⁶

Georgian College further submitted that nothing in the EOI issued by the Centre limits eligible participants to government-funded entities, or states that the EAS contract is intended to be a transfer payment. The EAS contract could have been awarded to any private entity. Thus, Georgian College submitted, it cannot be characterized as a transaction between government entities after the fact.

Georgian College submitted that the EAS contract does not fall within any of the headings of Article 1001(5)(a) of NAFTA. Furthermore, since the EAS contract contemplates payment for the provision of EAS services, it cannot be characterized as anything but contractual compensation for services rendered.

Georgian College added that, while the Centre may be providing a social service to unemployed individuals by providing EAS services, the SCDSB is not providing a social service, but rather an input so that the Centre may provide a social service. Since the EAS contract concerns the provision of services by the Centre to unemployed individuals, it cannot be characterized as anything but a contract for services.

TRIBUNAL'S DECISION

The Tribunal will address the issue raised by HRDC that goes to the Tribunal's jurisdiction to decide this complaint. HRDC alleged that the Tribunal does not have jurisdiction to deal with this complaint, as the complaint does not concern any aspect of the procurement process.

Subsection 30.11(1) of the CITT Act provides:

Subject 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 the term "designated contract" as follows:

"[D]esignated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution or that is designated or of a class of contracts designated by the regulations.

Subsection 3(1) of the Regulations provides, in part, that, for the purposes of the definition "designated contract" in section 30.1 of the CITT Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA and Article 502 of the AIT, is a designated contract.

Article 1001 of NAFTA states that Chapter Ten applies to measures adopted or maintained by a party relating to procurement for goods and/or services by listed entities that exceed certain monetary thresholds. Article 1001(5) provides, in part, as follows:

15. "Departments may contract with a contractor, through a service contract **subject to policies related to contracting (Contracting Policy,...)** to administer, manage or deliver a grant or contribution program whereby the contractor carries out activities such as a review of applications for grants or contributions or the pre-audit of claims for payment. The contribution agreements with the recipients are signed by the department and payments are made by the department." [Emphasis added.]

16. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:

- (a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments.

Article 502 of the AIT states that Chapter Five applies to measures adopted or maintained by a party relating to procurement within Canada for goods and/or services by listed entities that exceed certain monetary thresholds.

Article 518 of the AIT reads, in part, as follows:

[P]rocurement means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

- a. any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives.

HRDC submitted that the subject matter of the EOI does not fall within the definition of procurement, as contemplated by the trade agreements.

Georgian College submitted that the Tribunal's decision to accept this complaint for inquiry makes HRDC's arguments about the Tribunal's jurisdiction moot.

On March 6, 2002, the Tribunal accepted the complaint for inquiry, as it was persuaded on the basis of the record, as it existed then, that all the conditions set out in section 7 of the Regulations had been met and that Georgian College's complaint was properly filed. It made this preliminary decision based on the understanding that the complaint was in respect of a designated contract. The Tribunal now finds, on the basis of a more complete record, that it must address the question of whether it has jurisdiction to deal with this complaint.

Therefore, in this instance, the Tribunal must consider whether the complaint is in relation to a designated contract, i.e. procurement within the meaning of Article 1001 of NAFTA and Article 502 of the AIT.

By their wording, Article 1001(5)(a) of NAFTA and 518 of the AIT indicate that any form of government assistance is excluded from the definition of procurement.

In the present case, the programs that are subject to the EOI are EAS programs created pursuant to subsection 60(4) of the EI Act. Subsection 61(1) specifically provides that the Commission may provide financial assistance for implementing support measures in the form of grants or contributions.

Having carefully examined the evidence and the applicable legislative provisions of the EI Act, the Tribunal concluded that the programs in issue are funded through government financial assistance in the form of a contribution, which is paid to the service provider pursuant to a contribution agreement.

The Tribunal also finds that financing by way of a contribution agreement is a form of government assistance of the type enumerated in Article 1001(5)(a) of NAFTA and Article 518 of the AIT, such as grants, and clearly encompasses government contributions such as those in issue.

In light of the foregoing, the Tribunal finds that government financial assistance by way of a contribution, as specifically provided for in the EI Act, is excluded from the definition of procurement in NAFTA and the AIT. Therefore, the Tribunal is of the view that it does not have jurisdiction to continue its inquiry in this case. Consequently, the complaint is dismissed.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Ottawa, Friday, August 9, 2002

File No. PR-2001-067

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

ADDENDUM

On May 29, 2002, the Canadian International Trade Tribunal (the Tribunal) rendered a decision with respect to a complaint filed by Georgian College of Applied Arts and Technology (Georgian College) under section 30.14 of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned an Expression of Interest (EOI) by the Barrie Human Resource Centre of Canada (the Centre) dated November 30, 2001, with regard to the administration and provision of one or more services to help unemployed individuals obtain employment or self-employment. The Centre, located in Barrie, Ontario, is a constituent of the Department of Human Resources and Development (HRDC). Georgian College alleged that HRDC did not conduct a fair and transparent bid process for this requirement, resulting in several breaches of the *North American Free Trade Agreement*² and of the *Agreement on Internal Trade*.³

On July 17, 2002, the Tribunal received a letter⁴ from HRDC, stating that the Tribunal had omitted to address the issue of costs, which had been requested by HRDC in the course of the investigation. The letter went on to request that the Tribunal make an order as to costs in favour of HRDC.

Subsection 30.16(1) of the CITT Act provides that the Tribunal may award “costs of, and incidental to, any proceedings before it in relation to a complaint”. When a complainant is successful, the Tribunal usually awards the complainant its reasonable costs, in a manner consistent with the Tribunal’s *Procurement Cost Guidelines*.

At times, a complaint is so apparently without merit that the Tribunal does not even commence an investigation. At other times, a complaint demonstrates a reasonable indication of a breach at the initiation stage, but, upon further investigation, it becomes clear that the complaint lacks merit. Also, a complaint may be seemingly meritorious, but, for “technical” reasons, the Tribunal cannot conclude that there has been a breach of any of the relevant agreements, or there is simply insufficient evidence to satisfy it that an agreement has been breached.

In the Tribunal’s experience, most complaints have a degree of merit and are pursued by the complainants in a forthright and candid manner. Though complainants present their cases in the most

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>>.
4. The letter was received from the Department of Justice, which acted for HRDC in this matter.

favourable light possible, the Tribunal rarely sees them acting in a way that would indicate that the complaints are improper or abusive or that the complainants lack candour.

Complainants may range from very small to very large organizations. They devote time, money and resources in preparing a bid. When they feel aggrieved and decide to file a complaint, they devote more time, money and resources. It is not unusual for complainants to retain outside counsel to assist them navigate the world of procurement law and procedures. In addition to the costs and time that they have expended, they may have lost the opportunity to win a government contract.

On the one hand, HRDC was represented by salaried counsel from the Department of Justice whose responsibilities included representing HRDC's interests in this matter. On the other hand, the complainant often not only faces a difficult decision with regard to filing a complaint but must also incur additional costs in pursuing its complaint.

Generally speaking, little purpose would be served by awarding costs to HRDC and thereby adding to the burden that a complainant already bears, except in those cases where a complainant's conduct demands it. This may arise, for example, where it becomes clear that a complaint was frivolous or vexatious, where a complainant was not candid and forthright before or during the investigation or where a complainant acted in a way that amounts to an abuse of process. This is not an exhaustive list of the circumstances in which the Tribunal may award complaint costs to a government department, but it does indicate the type of conduct that would generally warrant the award of costs.

In the present case, Georgian College presented its case in a forthright and professional manner. While Georgian College was ultimately unsuccessful, in the Tribunal's opinion, it acted in good faith. The Tribunal sees no reason why, in the circumstances of this case, costs should be awarded to HRDC. Consequently, HRDC's request for costs is denied.

Pierre Gosselin

Pierre Gosselin
Member

Michel P. Granger

Michel P. Granger
Secretary