Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Monday, November 3, 2003

File No. PR-2001-067R

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 IN THE MATTER OF a decision, by way of addendum dated August 9, 2002, not to award costs in favour of the successful party;

AND FURTHER TO a decision of the Federal Court of Appeal, which set aside the decision of the Canadian International Trade Tribunal made on August 9, 2002, and referred the matter back to the Canadian International Trade Tribunal so that it could address the issue of costs on proper principle, in light of the reasons for judgment.

DETERMINATION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby denies the Department of Human Resources and Development's request for costs.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
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Secretary

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Date of Determination and Reasons:	November 3, 2003
Tribunal Member:	Pierre Gosselin, Presiding Member
Investigation Officer:	Peter Rakowski
Counsel for the Tribunal:	Marie-France Dagenais Reagan Walker Roger Nassrallah
Complainant:	Georgian College of Applied Arts and Technologies
Government Institution:	Department of Human Resources and Development
Counsel for the Government Institution:	Susanne Pereira

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STATEMENT OF REASONS

BACKGROUND

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 local office of the Department of Human Resources and Development (HRDC).

The Centre published the EOI in local newspapers, inviting submissions from potential service providers. The relevant excerpts from the EOI state that:

> **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.

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

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> 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 contended, unsuccessfully, that the above notice constituted a tender document that attracted the disciplines of the *North American Free Trade Agreement*[2] and the *Agreement on Internal Trade*.[3] HRDC's position was that the "process was not a procurement for goods or services, but rather a means of notifying the community at large that the department was seeking an appropriate sponsor for a community activity, to be funded pursuant to a transfer payment made from an appropriation."[4]

Nothing in the notice stated that the EOI was *not* a procurement; nor was there any mention that the final outcome of the EOI process would be a contribution agreement to be funded pursuant to a transfer payment, as opposed to a contract for services. No reference was made to the fact that the EOI was governed by the Treasury Board Policy on Transfer Payments and *not* the trade agreements and *Government Contract Regulations*. Instead, the notice contained important hallmarks of a procurement solicitation, e.g., the phrase "[n]ot all submissions will proceed to the *proposal* or *contract* stage" (emphasis added). In the Tribunal's experience, "proposal" and "contract" are terms that are ordinarily associated with public procurement of goods and services.

In considering the complaint, the Tribunal was still uncertain how to characterize the EOI after receiving the Government Institution Report (GIR) and had to resort to the unusual step of asking a series of additional questions of HRDC, including: "When the Commission enters into an agreement with a third party for the provision of services to assist unemployed persons in the community in securing and maintaining employment, is the Commission acquiring those services in order to implement the programs and deliver part of its mandate?" Only after receiving answers to these questions, including relevant portions of parliamentary estimates, was the Tribunal able to satisfy itself that the EOI was for a financial assistance agreement and not the procurement of services.

In corresponding with Georgian College, HRDC took the position that the financial assistance "process is well known within the service provider community".[5] No evidence was offered to support that statement and, in any event, the very fact that Georgian College objected to the process and filed a complaint, absent evidence of bad faith, negates HRDC's position.

The Tribunal ultimately determined that, since government financial assistance by way of a contribution, as specifically provided for in the *Employment Insurance Act*,[6] was excluded from the definition of procurement in *NAFTA* and the *AIT*, it did not have jurisdiction to continue its inquiry in this case. Consequently, the complaint was dismissed.

On July 17, 2002, the Tribunal received a letter 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. In that letter, HRDC went on to request that the Tribunal make an order as to costs in its favour.

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2. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].
4. GIR, Tab 2, Attachment Number 8.
5. *Ibid.*
6. S.C. 1996, c. 23.

On August 9, 2002, by way of addendum to its May 29, 2002, decision, the Tribunal denied HRDC's request for costs. The Attorney General of Canada, on behalf of HRDC, then applied to the Federal Court of Appeal (the Court) for judicial review of the Tribunal's August 9, 2002, addendum, alleging that the Tribunal's practice of only allowing costs against the complainant in exceptional circumstances constituted a fetter on its discretion that deprived the Tribunal of jurisdiction. The Tribunal filed an application for leave to intervene in the above court proceedings in order to defend its jurisdiction under section 30.16 of the *CITT Act*, but its application was denied.

On May 2, 2003, the Court allowed the application for judicial review and remanded the matter back to the Tribunal so that it could exercise its discretion anew on proper principle.[7]

ANALYSIS

In its decision, the Court concluded that the Tribunal had fettered its discretion, in this instance, by adhering to a predetermined practice of denying costs to the Crown in procurement inquiries despite the latter's success.[8] The Tribunal's discretionary authority is derived from section 30.16 of the *CITT Act*, which reads as follows:

> 30.16(1) Subject to the regulations, the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.
>
> (2) Subject to the regulations, the Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

The above provision was added by the *North American Free Trade Agreement Implementation Act*,[9] which came into effect on January 1, 1994. Before that time, the Tribunal's predecessor, the Procurement Review Board, had no discretion to award costs against a complainant, even when the complainant acted in a way that amounted to an abuse of the complaint process.[10]

The above-quoted provision, which corrected the last-mentioned defect, must be interpreted in its proper context, i.e. the establishment of a bid challenge system that would promote "fair, open and impartial procurement procedures", in accordance with Canada's *NAFTA* obligations.[11] The Tribunal believes that the intent of the above provision was to ensure that Canada's bid challenge authority would act as a "court" of easy access for the purpose of assuring, via the trade agreements, the integrity of the public procurement process.

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7. *Attorney General of Canada v. Georgian College of Applied Arts*, 2003 FCA 199.
8. *Ibid.* at para. 38.
9. S.C. 1993, c. 44.
10. The *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, subsection 19(1), in part, states:
    "Where the Board determines that a procurement by a governmental institution does not comply with any of the requirements referred to in [Article 1305 of the *Free Trade Agreement* dealing with expanded procedural obligations of the government procuring entity], it may
    (*b*) award the *complainant* reasonable costs relating to
    (i) the filing and proceeding with the complaint, including solicitor's fees and disbursements, and
    (ii) the preparation of a bid." [Emphasis added]
11. Supra note 9, Article 1017, Bid Challenge.

Transparency and efficiency in the procurement process are advanced when there is a bid challenge system in place that allows suppliers to question procurement decisions that were made *sub rosa* or otherwise unfairly. Such a system makes a large pool of competitive bidders available to government buyers, thereby ensuring that the government receives the best value for its money. To discourage potential bidders from full participation in the procurement process by imposing costs that would deter them from challenging that process would defeat the above purpose of the *NAFTA* chapter on procurement.

Unlike the judicial system, where costs serve as a deterrent against bringing actions based on weak or incredible grounds, there is no need for costs to serve as such a deterrent in procurement review. Under section 30.13 of the *CITT Act*, upon receipt of a complaint, the Tribunal has discretion to conduct an inquiry. Moreover, it cannot accept for inquiry any complaint that fails to disclose a reasonable indication of a breach of the trade agreements. Historically, the Tribunal has not accepted half of all complaints for inquiry. Adding a further deterrent in the form of costs where cases have already passed this vetting procedure would risk creating an access barrier to procurement review.

The other trade agreements have similar purposes to *NAFTA*'s chapter on procurement. The preamble to the *Agreement on Government Procurement*[12] recognizes "that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement". Article 501 of the *AIT* states that "the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

In interpreting section 30.16 of the *CITT Act*, the Tribunal must be mindful of the above international obligations. In interpreting its own legislation, the Tribunal follows the modern contextual approach to statutory interpretation, which holds that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the sections of the act, the object of the act and the intention of Parliament.[13]

As stated in *Sullivan and Dreidger on the Construction of Statutes*:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, an interpretation that reflects these values and principles is preferred*.[14] [Emphasis added]

Support for the above opinion is found in a number of Supreme Court decisions. In *Baker v. Canada (Minister of Citizenship and Immigration)*,[15] the Supreme Court held that, in applying the contextual approach to statutory interpretation, international human rights law plays an important role as an aid in interpreting domestic law. In *National Corn Growers Assn. v. Canada (Import Tribunal)*,[16] it was held that it was not patently unreasonable for the Canadian Import Tribunal to give consideration to the

12. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
13. *Western Construction Company Limited v. MNR* (20 November 2000), AP-99-093 (CITT) at 6.
14. Ruth Sullivan, 4th ed. (Toronto: Butterworths, 2002) at 422.
15. [1999] 2 S.C.R. 817.
16. [1990] 2 S.C.R. 1324.

terms of GATT obligations in interpreting sections of the *Special Import Measures Act*,[17] since the Canadian legislation was designed to implement Canada's GATT obligations.

In the Tribunal's opinion, section 30.16 of the *CITT Act* is similar to *SIMA* in this respect, in that the Tribunal must give consideration to the terms of Canada's obligations under the *AGP*, the *AIT* and *NAFTA* in interpreting the procurement provisions of the *CITT Act*. As mentioned, this section was part of the *NAFTA* implementation legislation and should be interpreted with this context in mind.

Such an approach would indicate that the Tribunal's discretion to award costs against complainants should be exercised sparingly in the course of a dispute. As stated previously, the express purpose of the trade agreements is to promote the transparency and efficiency of the procurement process by, among other things, making independent bid challenge available and accessible. This approach has been consistent with the practice of the other parties to *NAFTA*.

Under U.S. legislation, only the complainant is allowed its costs in a procurement inquiry before the federal government's bid challenge authority, i.e. the General Accounting Office (GAO). As stated in relevant U.S. legislation:

> 21.8 Remedies.
>
> . . .
>
> (d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting agency pay the *protester* the costs of:
>
> (1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and
>
> (2) Bid and proposal preparation.
>
> (e) If the contracting agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the *protester* the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. [Emphasis added]

Similarly, in Mexico, according to the *Secretaría de la Función Pública* (formerly *Secretaría de Contraloría y Desarrollo Administrativo*), the national bid challenge authority, consistent with Mexican civil law of not imposing costs against either party in a procurement inquiry, the practice is followed.[18]

The fact that all three *NAFTA* bid challenge authorities have followed a similar practice, in the sense of not imposing costs on complainants, is no accident. All three member states have an obligation to make a bid challenge mechanism accessible to suppliers from each other's territories.

The Tribunal does not read the Court's decision as prohibiting it from having regard to these broader trade policy concerns when exercising its discretion in individual procurement inquiries, provided that the discretion is actively exercised each time and not merely pre-empted by a predetermined outcome through some policy or practice.

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17. R.S.C. 1985, c. S-15 [*SIMA*].
18. E-mail dated September 25, 2003, from J.J. Larrazolo Carrasco, *Jefe de Departamento, Dirección General de Inconformidades, Secretaría de la Función Pública*.

TRIBUNAL'S DECISION

The Tribunal is firmly of the view that, in light of the circumstances of this case, it should not award HRDC its costs in this instance.

Based on the facts contained in the Background portion of these reasons, the Tribunal concludes that Georgian College was induced, at least in part, to reply to the EOI on the basis, as inferred from the final sentence in the EOI, that it was for a public procurement to which the rules of transparency and fair play contained in the trade agreements would apply. Georgian College expended time and resources preparing its response and raising its concerns over the fairness and transparency of HRDC's alleged "procurement" process.[19] By its own words, HRDC was not totally certain that it had followed the appropriate process for the EOI and felt the need for "seeking further clarification" before replying to those concerns.[20] In the Tribunal's opinion, given this lack of clarity associated with the EOI, it was reasonable for Georgian College to make the above inference. Furthermore, the Tribunal could not have allowed the complaint to go forward if the wording of the EOI had not, on its face, indicated that it was for a public procurement and hence, that the Tribunal had jurisdiction.

In its review of the Tribunal's determination, the Court stated that "*[i]n the normal course*, and *absent indications to the contrary*, costs usually go to the successful party"[21] (emphasis added). In the Tribunal's opinion, there *were* indications to the contrary of awarding HRDC its costs in this instance. Such an award would condone HRDC's carelessness in issuing the EOI.

But for the phrase "[n]ot all submissions will proceed to the proposal or contract stage" and the lack of any indication that it was for a funding arrangement only, Georgian College would not have thought that the EOI was for a public procurement and might have taken another approach to the EOI, such as choosing not to respond at all. Furthermore, but for the wording of the EOI, the Tribunal would not have accepted the complaint for inquiry. Therefore, even though the Tribunal ultimately determined that HRDC's position was justified, the fact remains that a shortcoming in HRDC's conduct was a major factor in causing the complaint to go forward. The prime cause of the complaint was a misunderstanding that was wholly caused by HRDC's carelessness in drafting the misleading wording of the EOI.

Under the circumstances, the Tribunal is of the view that a decision not to award costs to HRDC is consistent with the Court's direction that such a decision must be based on "facts connected with or leading up to the litigation".[22] Moreover, the Tribunal finds that it would be contrary to the intent of the trade agreements quoted above to award HRDC its costs.

Furthermore, the courts have recognized misleading governmental communications as a legitimate basis for denying costs or even awarding them against the government where the government is victorious in litigation. In *Brennan v. Canada (Royal Canadian Mounted Police)*,[23] the Court stated: "costs would normally follow the event. … I am satisfied that a different result regarding costs is here justified. I cannot but conclude that the applicant acted entirely reasonably in pursuing this matter to the level of this Court and

19. GIR, Tab 2, Attachment Number 3.
20. GIR, Tab 2, Attachment Number 4.
21. *Supra* note 7 at para. 28.
22. *Supra* note 7 at para. 27.
23. [1998] F.C.J. No. 1629 (F.C.T.D.) (QL).

was induced into so doing by the failure of the RCMP to clarify its policies and Administrative Bulletins, as they applied to the request by the applicant for promotion to the rank of S/S/M."[24]

In *Isnana v. Canada (Minister of Indian and Northern Affairs)*,[25] the Court went even further: "The Plaintiff asks for costs of this application. I have considered that even though this application has not succeeded, the root of the controversy is that the March 17 letter was worded in a way that misled the members of the Standing Buffalo Dakota Nation into believing that the Minister had or had exercised authority over the election for Chief. That misunderstanding may well have led to difficulties in the governance of Standing Buffalo Dakota Nation that could have been avoided. For that reason I consider it appropriate to order the costs of this application to be borne by the Minister."[26]

The Tribunal considers this complaint to be "on all fours" with the above cases and, therefore, for this reason as well, denies HRDC's request for costs.

Pierre Gosselin
Pierre Gosselin
Presiding Member

24. *Ibid.* at para. 24.
25. [1999]] F.C.J. No. 513 (F.C.T.D.) (QL).
26. *Ibid.* at para. 15.