



Ottawa, Monday, August 11, 2003

**File No. PR-2002-074**

IN THE MATTER OF a complaint filed by Consortium Genivar — M3E — Université d'Ottawa 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 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Canadian International Development Agency undertake negotiations with Consortium Genivar — M3E — Université d'Ottawa with a view to awarding it the contract.

Pursuant to subsections 30.16(1) and (2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Consortium Genivar — M3E — Université d'Ottawa its reasonable costs incurred in preparing and proceeding with the complaint.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

Patricia M. Close

Patricia M. Close  
Member

Michel P. Granger

Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Decision:	August 11, 2003
Date of Reasons:	September 3, 2003
Tribunal Members:	Richard Lafontaine, Presiding Member Pierre Gosselin, Member Patricia M. Close, Member
Senior Investigation Officer:	Daniel Chamaillard
Counsel for the Tribunal:	Eric Wildhaber
Complainant:	Consortium Genivar — M3E — Université d'Ottawa
Counsel for the Complainant:	André Joli-Cœur Marie-Eve Vézina
Intervener:	Groupe Conseil CAC International inc.
Government Institution:	Canadian International Development Agency
Counsel for the Government Institution:	Marie-Josée Bertrand



Ottawa, Wednesday, September 3, 2003

**File No. PR-2002-074**

IN THE MATTER OF a complaint filed by Consortium Genivar — M3E — Université d'Ottawa, 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

Consortium Genivar — M3E — Université d'Ottawa (the Consortium) alleged that the Canadian International Development Agency (CIDA) used an improper evaluation process, by accepting a bidder associated with a consultant (the Associated Consultant) who performed work that was used to define the support project (the second support project) for implementing the Programme décennal de développement de la justice (PRODEJ) Implementation Support Project in Mali described in the Request for Proposal (RFP) and for establishing strategies for delivery, and developing an important part of the terms of reference for the support project, as the author of the Institutional Study of the Ministry of Justice of Mali (the Institutional Study). Furthermore, the Consortium submitted that the Associated Consultant made submissions to the various design and planning teams of CIDA's second support project when two members of the RFP evaluation committee were present.

The Consortium also alleged that the Associated Consultant's work was used directly in the designing and planning of the RFP and its terms of reference, contrary to clause 2.3 of the RFP.

The Consortium asked the Canadian International Trade Tribunal (the Tribunal) to review the evaluation committee's decision on the eligibility of the successful bidder and find the bidder ineligible for this contract. The Consortium also asks that the Tribunal recommend to CIDA that it award the contract to the Consortium.

On April 8, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry.

On April 30, 2003, the Tribunal granted intervener status to the Groupe Conseil CAC International inc. (CAC).

On May 21, 2003, CIDA filed a Government Institution Report (GIR), which was distributed to the parties on May 22, 2003.

On May 30, 2003, the Consortium informed the Tribunal that it had filed a request with CIDA to obtain certain documents pursuant to the *Access to Information Act*<sup>1</sup> and to request an extension for providing its comments on the GIR.

On June 2, 2003, the Tribunal informed the Consortium that it had until June 5, 2003, to explain in detail the relevance of each document that it believed was necessary for preparing its comments on the GIR. In addition, the Tribunal notified CIDA and CAC that they had until June 10, 2003, to file with the Tribunal, where required, their comments relating to the Consortium's submissions and that the Tribunal would then decide if there was good reason to issue an order for the production of additional documents.

On June 23, 2003, the Tribunal ordered CIDA to file with the Tribunal certain documents relating to the complaint no later than June 26, 2003.

On June 26, 2003, CIDA filed the documents in question. The Tribunal informed the parties that the deadline for filing comments on the GIR was now July 3, 2003.

The Consortium and CAC filed comments on the GIR with the Tribunal on July 3, 2003.

On July 16, 2003, CIDA filed a notice of motion with the Tribunal requesting the filing of additional comments on those submitted by the Consortium on July 3, 2003, in response to the GIR. On the same day, the Tribunal informed CIDA that it would accept CIDA's filing of additional comments only where they dealt with new facts or grounds raised by the Consortium in its comments of July 3, 2003. The Tribunal then informed the parties that it would grant the Consortium and CAC the right to a final reply on CIDA's additional comments and that this reply was to be filed no later than July 18, 2003.

On July 18, 2003, the Consortium filed with the Tribunal its final comments on those received from CIDA on July 16, 2003.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

In October 2001, CIDA initiated the preparation of the documents relating to the RFP with a view to selecting a Canadian support agency for implementing the second support project.

On April 30, 2002, CIDA published the RFP, Solicitation No. SEL-2001-A-31398, on MERX, Canada's Electronic Tendering Service. The bid closing date was June 21, 2002.

The RFP was developed to retain a Associated Consultant to participate in negotiations with CIDA in order to enter into a contractual agreement for delivering the services set out in Annex A, "Terms of Reference and Services Description" [translation]. The purpose of the second support project is to help implement the PRODEJ, which seeks to strengthen the securing of the rule of law, ensure social peace and promote development in the Republic of Mali (Mali). This project has three main objectives:

- to improve the capabilities of the responsibility centre of the Ministry of Justice that is charged with coordinating the PRODEJ, so that it can adequately fill its role of coordinating and successfully implementing the PRODEJ;

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1. R.S.C. 1985, c. A-1.

- to improve the capabilities of civil society for actively participating in the reform project;
- to develop a tangible model for operating the judiciary that reflects the ideals of transparency, integrity, effectiveness, equity, accessibility and the ability to adapt to people's needs.

The second support project is taking an iterative and comprehensive approach by offering to support several aspects and players in Mali's justice system.

The purpose and objectives of the second support project will be achieved through three major areas of activity as follows:

Area 1: Supporting the enhancement of local capacity for effectively implementing the PRODEJ

In particular, this area will include the following activities:

- providing support to the responsibility centre of the Ministry of Justice charged with co-ordinating the reform;
- providing support for conducting feasibility studies and developing strategies;
- providing support to local justice reform initiatives.

Area 2: Establishing a model court house integrated into the community (Commune III, Bamako)

In particular, this area will include the following activities:

- carrying out a complete diagnostic of the current system;
- renovating the court house facilities;
- providing management and workplace training to court house staff;
- information system and records management;
- providing information services and legal assistance on two levels (setting up a reception service at the court house and developing a complementary legal aid centre outside the court house);
- informing and educating the public on the operations of the court house and the justice system.

Area 3: Reinforcing the courts' capacities in the Mopti region and developing the skills for integrating and using the systems of traditional and customary law

This area will mainly build on certain activities already developed in areas 1 and 2.

The project will be implemented over a five-year period. The project will be carried out in two phases: a launching and planning phase and an implementation phase.

Clause 2.3 of the mandatory requirements of the RFP, "Non-participation in Project Planning and Implementation" [translation], reads as follows:

Where this RFP relates to the implementation of the first or only phase of the current project, the Consultant, including EACH member of a consortium, joint venture or any other type of association, its personnel and subcontractors, must not have been involved, jointly or individually, in the planning (i.e. conceptualization, feasibility studies, specifications, or design) of this project, nor have been

assisted in the preparation of the proposal by any third party who has been involved in the planning of this project.

Where this RFP relates to the monitoring, evaluation, or audit of a project, the Consultant, including EACH member of a consortium, joint venture or association, its personnel and subcontractors, must not have been involved, jointly or individually, in the implementation of this project, nor have been assisted in the preparation of the proposal by any third party who has been involved in the implementation of the project to be monitored, evaluated or audited.<sup>2</sup>

[Translation]

On June 21, 2002, the Consortium submitted its proposal to CIDA. On October 22, 2002, CIDA informed the Consortium that CAC's proposal had been selected. On October 30, 2002, the Consortium contacted CIDA to ask for the evaluation committee's scoring and results. On November 4, 2002, CIDA sent this information to the Consortium.

On November 11, 2002, the Consortium informed CIDA of its objection to the evaluation committee's findings. On December 24, 2002, CIDA informed the Consortium that its bid was rejected and responded to the allegations submitted by the Consortium in its objection.

On January 8, 2003, the Consortium informed CIDA that it was maintaining its objection to the connection between the work done by the Associated Consultant on behalf of CIDA and the support project covered in the RFP, which gave her an unfair comparative advantage with respect to the contract in question.

On January 9, 2003, the Consortium restated its objection to CIDA, in accordance with CIDA's appeal mechanism policy.<sup>3</sup>

On March 18, 2003, the Consortium received CIDA's final decision, dated March 12, 2003, that it was rejecting its objection. On March 25, 2003, the Consortium informed CIDA that it was going to ask the Tribunal to examine the issue, since, according to the Consortium, CIDA had not examined the merits of its objection.

On March 28, 2003, the Consortium filed its complaint with the Tribunal.

On April 3, 2003, the Tribunal asked the Consortium to clarify certain information no later than April 4, 2003, which was done.

## **JURISDICTIONAL ISSUE**

### **CIDA's Position on Jurisdiction**

CIDA submitted that the service contract covered in the RFP is part of a treaty between the Government of Canada and the Government of Mali regarding development co-operation that was signed on June 21, 1984. CIDA maintained that the proposed contract was for government development assistance financed by funds from CIDA that are reserved for this purpose and not from its own operating budget.

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2. GIR, Annex 1, tab 1 at 6.

3. Online: Canadian International Development Agency <<http://www.acdi-cida.gc.ca>>.

CIDA stated that the Tribunal does not have jurisdiction to conduct an inquiry into the complaint, given that the expression “procurement”, as defined in the trade agreements, does not refer to contracts relating to government development assistance. According to CIDA, the procurement in issue is therefore not a “designated contract” within the meaning of subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>4</sup> or of sections 3 and 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup>

In particular, CIDA submitted that the *Agreement on Government Procurement*<sup>6</sup> does not apply to this procurement in view of sections 2 and 7 of the General Notes for Canada<sup>7</sup> and because the *AGP* applies only to procurements made by entities referred to in Appendix I of the *AGP*. However, since CIDA appears there only “on its own account”, CIDA alleges that only the acquiring of property and services for direct benefit to or use by it are subject to the *AGP*. CIDA submitted the same argument under the *North American Free Trade Agreement*.<sup>8</sup>

CIDA also submitted that the *Agreement on Internal Trade*,<sup>9</sup> although it mentions CIDA in its Annex 502.1A, covers only CIDA’s procurements that are financed by its operating budget and not those financed from funds allocated to it for international government development assistance.<sup>10</sup> CIDA added that Article 506(11)(c) of the *AIT* confirms its argument about this contract being excluded from this agreement;

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

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

6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

7. Item 2 in the General Notes for Canada is as follows: “Procurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services for the direct benefit or use of the government. The procurement process is the process that begins after an entity has decided on its requirement and continues through to and including contract award. It does not include non-contractual agreements or any form of government assistance, including but not limited to, cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments. It does not include procurements made with a view to commercial resale or made by one entity or enterprise from another entity or enterprise of Canada.” Item 7 in the General Notes for Canada states: “The Agreement shall not apply to contracts under an international agreement and intended for the joint implementation or exploitation of a project.”

8. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*]. Article 1001(5)(a) provides, in part, for the following:

5. . . . 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”.

Annex 1001.1a-1, states, in part, the following: “Schedule of Canada . . . 12. Canadian International Development Agency (on its own account)”.

9. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

10. In support of this argument, CIDA alleges that the definition of “procurement” in Article 518 of the *AIT* excludes government development assistance. That article provides for the following: “procurement means the acquisition by any means, including 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; or

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

according to CIDA, this article provides for a certain relaxation in the procurement process where a contract is financed by an international co-operation organization.<sup>11</sup>

Finally, CIDA submitted that the Tribunal's jurisdiction in this inquiry cannot be determined solely on the fact that the RFP refers to the document entitled "CIDA 102 - General Conditions (RFP)" (CIDA 102), a document providing that this contract would be under the Tribunal's jurisdiction.

### **Consortium's Position on Jurisdiction**

The Consortium submitted that the RFP is subject to the *AIT*.

The Consortium submitted that the service contract covered in the RFP is not a contract for procuring government development assistance but rather for hiring a consultant with a view to providing services to CIDA. The Consortium submitted that the co-operative agreement between Canada and Mali is not relevant to this case, which pits CIDA against a potential supplier within a normal procurement process.

The Consortium submitted that the examples of government assistance set out in Article 518 of the *AIT* refer to direct financial assistance. According to the Consortium, the services proposed in the RFP do not constitute such "government assistance" within the meaning of the *AIT*. The Consortium also submitted that Article 506(11)(c) of the *AIT* is not applicable in this case.

The Consortium also submitted that CIDA had already recognized the Tribunal's jurisdiction by referring to CIDA 102 in the RFP. CIDA made it an essential component of the RFP, which creates a legitimate expectation, which it is in the public interest to meet. Therefore, CIDA cannot seek to amend the rules that it chose to impose on suppliers. According to the Consortium, the *Government Contracts Regulations*<sup>12</sup> demonstrated the express legislative intent to subject CIDA to a strict competitive procurement process as soon as the procurements exceed a certain threshold, even in the case of an international development assistance project.

### **Tribunal's Decision on Jurisdiction**

Article 502(1)(b) of the *AIT* provides that Chapter Five on the specific rules regarding procurement applies to measures adopted or maintained by a Party relative to procurement within Canada by any of its

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11. Article 506(11)(c) of the *AIT* states the following: "11. An entity of a Party may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances, provided that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of any other Party:

(c) where a contract is to be awarded under a cooperation agreement that is financed, in whole or in part, by an international cooperation organization, only to the extent that the agreement between the Party and the organization includes rules for awarding contracts that differ from the obligations set out in this Chapter".

12. S.O.R./87-402. Subsection 6(b)(iii) is as follows: "Notwithstanding section 5, a contracting authority may enter into a contract without soliciting bids where

(b) the estimated expenditure does not exceed

(iii) \$100,000, where the contract is to be entered into by the member of the Queen's Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project".



entities listed in Annex 502.1A, where a procurement dealing mainly with services has a value of at least \$100,000. It is the Tribunal's view that the RFP is a contract for services with a value greater than this amount. This contract was entered into in Canada by CIDA, an entity listed in Annex 502.1A of the *AIT*. This contract is therefore subject to this agreement since it involves a designated contract within the meaning of section 30.1 of the *CITT Act*. The complainant is a potential supplier within the meaning of the same section of the *CITT Act*. The Tribunal decided that the conditions for inquiry set out in subsection 7(1) of the *Regulations* were met. As a result, the Tribunal has jurisdiction to conduct an inquiry in this matter pursuant to subsection 30.13(1) of the *CITT Act*.

The Tribunal does not agree with CIDA's claim that the *AIT* covers only CIDA's contracts that are financed by its operating budget and not those that constitute international government development assistance. This claim is erroneous because it includes this latter form of assistance with those in Article 518 of the *AIT*. However, international government development assistance is not the same as "any form of government assistance" contemplated in this article. In fact, the Tribunal is of the view that Article 518, as the name of the agreement indicates, contemplates only those forms of government assistance relating to internal or domestic trade, i.e. given by a government somewhere in Canada in order to provide assistance in the form of a grant, loan, equity infusion, guarantees or fiscal incentives. In the Tribunal's view, without explicitly stating such, international government development assistance cannot be included with the forms of government assistance contemplated in Article 518. The fact that CIDA is included in Annex 502.1A, without explicit mention of inclusion "on its own account" only, such as is the case in the *AGP* and *NAFTA*, satisfies the Tribunal that the contracting parties to the *AIT* wanted to subject CIDA to its rules.<sup>13</sup>

Furthermore, the Tribunal rejects CIDA's argument that Article 506(11)(c) of the *AIT* confirms its claim that procurements it carries out with respect to its mandate of government development assistance are not subject to the *AIT*. In the Tribunal's view, the text in Article 506(11)(c) is to the contrary. First, the introduction to Article 506(11) indicates that an "entity of a Party may use procurement procedures that are different from those [in the *AIT*] . . . *provided* that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of another Party" [emphasis added]. The Tribunal notes that, under Article 506(1), those procurements are still covered by Chapter Five of the *AIT*. Second, the Tribunal notes that Article 506(11)(c) allows procurement procedures that are different from those set out in paragraphs 1 through 10 of Article 506, but only to the extent that a co-operative agreement between one Party and an international co-operation organization includes rules for awarding contracts that differ from the obligations set out in the *AIT* and that the contract is financed, in whole or in part, by the international co-operation organization. In the Tribunal's view, this is not the case here.

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13. In this regard, authors G. Bruce Doern and Mark MacDonald, in *Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: University of Toronto Press Incorporated, 1999), write the following, at 86: "Annex 502.1A presents an impressive list that includes all government departments 'proper' and a wide-ranging number of agencies, boards, corporations, and commissions that are involved in procurement within Canada, even if the good or service is intended for use outside Canada, such as the purchases made by the federal Canadian International Development Agency (CIDA)".

## VALIDITY OF THE COMPLAINT

### CIDA's Position on the Validity of the Complaint

According to CIDA, the nature of the services rendered by the Associated Consultant as part of the first support project for PRODEJ did not result in an unfair comparative advantage for the successful bidder with respect to CIDA's handling of the proposals for implementing the support project in question.

In this context, CIDA stated that the Associated Consultant rendered services to it and then to the Government of Mali as part of the first support project. In her capacity as follow-up officer and expert advisor, CIDA claimed that the Associated Consultant could not help but acquire knowledge and experience on Mali and its Ministry of Justice.

According to CIDA, it is often called upon to deal with proposals that involve individuals with knowledge and experience on the country and sector targeted by a project. CIDA submitted that it eliminates any proposal involving an individual whose experience or knowledge were obtained through designing or planning a project to be implemented, but does not eliminate a proposal from an individual whose experience or knowledge were obtained outside the designing or planning of a project to be implemented. According to CIDA, it provided the bidders with the conditions for healthy competition, putting them all on an equal footing.

CIDA submitted that the work done by the Associated Consultant as follow-up officer and expert advisor in the first support project for PRODEJ was not used for developing the terms of reference of the RFP and could therefore not have been used to develop and plan the terms. Furthermore, CIDA submitted that the duties of the Service de la coopération canadienne (SCC) and those of the Associated Consultant as follow-up officer were not a duplication of effort; the SCC, despite its follow-up role in the first Canadian support project, was chiefly involved in financially supporting work in Mali.

CIDA submitted that the designing and planning of the support project in question were the result of work done by teams set up by CIDA and work by CIDA's team at head office and in the field. CIDA also submitted that the Associated Consultant giving PRODEJ information to the design and planning teams did not constitute an act of participation or influence on these teams. CIDA is of the view that the Associated Consultant did not influence or try to influence the work of CIDA's team at head office or in the field.

According to CIDA, the Associated Consultant's activities and work included her assistance in preparing and drafting the Institutional Study, and this constituted a PRODEJ implementation activity and its purpose was to strengthen the Ministry of Justice of Mali. According to CIDA, including excerpts from this study in the terms of reference of the RFP does not prove that this study constitutes the terms of reference.

Furthermore, CIDA submitted that, where the Consortium claims that the word "planning" in clause 2.3 of the RFP must be interpreted in light of Chapter 6 of CIDA's Roadmap, it broadens the scope of the clause such that any involvement in a CIDA project in a given sector and country is cause for ineligibility from implementing a subsequent project in the same sector and country. CIDA claims that, even if it had to consider Chapter 6 when interpreting clause 2.3, it demonstrated that the Associated Consultant was not involved in identifying or selecting the second support project through her services for CIDA's team at head office or in the field, within the meaning of Chapters 7 through 10 of the Roadmap.

CIDA also submitted that CIDA's evaluation committee did not interpret the items in the evaluation grid in a way that promotes the advantages that the Associated Consultant has gained as a result of her services and work on the first support project, and has therefore not distorted the bid selection process.

According to CIDA, the evaluation committee used an evaluation grid consistent with CIDA's standards and practices and related to lessons it has learned, and this evaluation grid was fair, appropriate and transparent. It submitted that the detailed evaluation grid containing subcriteria was not a new grid. In this case, CIDA noted that the subcriteria and their weighting could be easily anticipated by the bidders and deduced from the general grid that was sent to them. According to CIDA, this use is not contrary to Article 506(6) of the *AIT* or the general requirements of the *AIT* regarding transparency and is supported by precedent.<sup>14</sup> In addition, CIDA submitted that the evaluation grid (short or long version) did not bend the rules as a result of taking into account the scarcity of resources in the justice sector when it was prepared and that the resources presented by the bidders are part of this limited base.

CIDA also submitted that the Consortium's allegation in its comments on the GIR, relating to CIDA's alleged failure to accept a proposal from a group made up in part by CAC without the experience required under clause 3.2.1 of the RFP, is a new ground of complaint. The Consortium in fact alleged that CAC's experience had been obtained by CAC International, an organization separate from CAC. According to CIDA, this ground of complaint is not part of the Consortium's original complaint and, as a result, the Tribunal does not have to examine this new ground of complaint.

In the alternative, CIDA stated that, if the Tribunal decided to consider this new item, CIDA would call its attention to the fact that clause 3.2.1 of the RFP deals in part with the experience of the consultant, since this clause is written in broad terms and allows the bidder to emphasize experience of a comparable nature obtained by members of its key personnel that normally collaborate with it. According to CIDA, the three projects mentioned by CAC were carried out on behalf of CAC International by CAC's key staff members who normally collaborate with it. CIDA submitted that CAC International and its members, individually or as sole shareholder, hold 20 percent and 60 percent of CAC's shares respectively. CIDA submitted that, in light of the wording of clause 3.2.1 of the RFP, the key staff members who normally collaborate with CAC International and with CAC are the same people and, considering that CAC International and CAC are associated entities, CIDA could not disregard the experience acquired as part of the three projects mentioned by CAC.

In conclusion, CIDA asks the Tribunal to dismiss the Consortium's complaint and, given the frivolous and vexatious allegations in the complaint, to order the Consortium to bear the costs.

### **CAC's Position on the Validity of the Complaint**

According to CAC, from 1998 to February 2000, the Associated Consultant acted as follow-up officer for CIDA's first support project for PRODEJ. CAC therefore alleges that, contrary to what the Consortium claimed, the Associated Consultant did not have an expert-advisor's mandate. CAC submitted that, in these circumstances, the nature of the Associated Consultant's duties did not give her an unfair comparative advantage and does not make her ineligible for a service proposal for the project in question.

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14. *Re Complaint Filed by Siemens Westinghouse Incorporated* (19 March 2001), PR-2000-39 (CITT), aff'd [2002] 1 F.C. 292.

CAC submitted that the work done between 1998 and 2000 cannot in fact be connected with the PRODEJ design and planning work, nor with the designing and planning of the project in question since the planning work for this project was done by completely independent teams having no connection with the Associated Consultant. CAC also submitted that it was not the Associated Consultant who determined the activities of the project in question and that she did not try to do so. Furthermore, CAC claims that it acted transparently from the beginning of the process by contacting CIDA to verify CAC's eligibility to respond to a solicitation for the project in question.

CAC noted that the work done by the Associated Consultant between August 2001 and May 2002 does not constitute activities falling within the definition of clause 2.3 of the RFP. During this period, according to CAC, the Associated Consultant acted as an expert advisor to Mali and, in this role, she first helped in the preparation and drafting of the Institutional Study and then was involved in providing results-based management training to Malian executives. CAC submitted that the Institutional Study began after CIDA had practically completed the planning process for the support project in question and it is clear, according to CAC, that this study was not commissioned by CIDA as part of its design and planning process for the said project.

In conclusion, CAC dismisses the Consortium's claims that the Associated Consultant's work was directly used to develop an important part of the terms of reference of the RFP and used to design and plan this project.

### **Consortium's Position on the Validity of the Complaint**

The Consortium contended that Canada's contribution was by far the most significant in the work of planning justice reform in Mali and developing its implementation strategy.

According to the Consortium, despite attempts to downplay the Associated Consultant's contribution to the role of follow-up officer, CIDA confirms in the GIR the importance and diversity of duties that she performed ahead of the project in question. In its opinion, CIDA admits that it awarded four contracts to the Associated Consultant; this represented half of the fees and expenses budgeted for Canadian specialists. The GIR admits that not only did the Associated Consultant act as follow-up officer but she also addressed the Malians' discrete requests, provided advice on the development of PRODEJ, helped train Malian managers and executives, acted as resource person for the people appointed to design and plan the support project in question, was involved in drafting the Institutional Study, which was reproduced to a large extent in the terms of reference of the support project in question and was used to define the context and activities of this project.

The Consortium submitted that CIDA is attempting to avoid a review of the mandatory requirement set out in clause 2.3 of the RFP. According to the Consortium, in the GIR, CIDA sought to "obfuscate" the application of clause 2.3. The Consortium contended that this issue is essential because it has been determined that the Associated Consultant collaborated in the design and planning work for the support project in question and that large portions of the terms of reference of the RFP were derived from work that she had done, as the Consortium's complaint and comments indicate.

The Consortium submitted that the minutes of the preparatory meeting for the planning mission state that a meeting was held in CAC International's offices, where the Associated Consultant gave three presentations on the background of PRODEJ. The first presentation was an overview of the justice system in Mali (consultation, action plan, implementation strategy). The second presentation was a report on the

1998-2001 PRODEJ support project (project descriptions, lessons learned, proposed activities as part of the project extension). The third presentation dealt with the Ministry of Justice of Mali and the August 2001 organizational audit. According to the Consortium, these presentations were given to members of the planning team and two members of the proposal evaluation committee. The Consortium also submitted that the planning mission report indicates that the planning strategy for the support project in question and its major components were established at this meeting and were reproduced in the terms of reference of the RFP. Consequently, the Consortium alleged that the Associated Consultant's participation at this meeting gave her an unacceptable advantage that should have excluded from the contract the involvement of the group with which she is associated.

The Consortium referred to the Institutional Study, in which the Associated Consultant was largely involved, as essential evidence supporting its complaint. It submitted that the Institutional Study was not a PRODEJ implementation activity for CIDA, but was intended to identify an effective co-ordination mechanism for PRODEJ because CIDA had doubts about the ability of the Malian Ministry of Justice to carry out the reform. According to the Consortium, certain CIDA representatives had revealed that the Institutional Study was developed to determine certain PRODEJ implementation strategies. The Consortium submitted that the Institutional Study acts as a capability analysis, which was considered essential for the approval and project planning process. According to the Consortium, CIDA clearly establishes the connection between the Institutional Study and the analyses required by it for approving and planning the project in question.

The Consortium is of the view that the multiple references to and material excerpted from the Institutional Study for developing the terms of reference of the RFP are evidence of the relevance that this work has in the design and implementation strategies. CIDA admits that the RFP makes particular reference to the Institutional Study in at least four instances and indicates that the excerpted information sets the context for the project.

The Consortium reports that the President of CAC stated that she had doubts about CAC's eligibility with respect to the project in question and had asked the opinion of a CIDA officer about it. According to the Consortium, CIDA confirmed this action to the Consortium at a meeting held in its offices on December 17, 2002, where CIDA reportedly stated that it had taken measures to ensure that the Associated Consultant be eligible for the procurement by giving to two specialists a specific planning mandate.

In respect of the ground of complaint regarding the evaluation grid used by CIDA, the Consortium submitted that the evaluation committee had interpreted items from the recognized evaluation grid in such a way that it valued the advantages of the group with which the Associated Consultant is involved, as a result of her previous mandates. According to the Consortium, it is immaterial whether the bias was the result of the evaluators or the detailed evaluation grid; in the end, the group with which the Associated Consultant is involved continued to benefit from unfair comparative advantages, due particularly to the fact that the Institutional Study was incorporated into the terms of reference of the RFP and due to the PRODEJ context-setting work done by the Associated Consultant before the planners and especially before the evaluation committee members who had to rate this item in the proposals.

Regarding the eligibility of the projects offered as CAC's experience, the Consortium submitted that the provisions of the RFP are clear about bidders and the projects that they must present showing their relevant experience. According to the Consortium, the projects presented were carried out by CAC International and not by CAC. The Consortium is of the view that the procurement rules cannot

authorize a corporation to establish its experience by referring to the experience of another corporation that is not a member of a consortium identified in the proposal. Therefore, according to the Consortium, the evaluation committee should have rejected these projects and voided the bid filed by CAC and the University of Sherbrooke.

### **Tribunal's Decision on the Validity of the Complaint**

Pursuant to section 30.14 of the *CITT Act*, where the Tribunal has decided to conduct an inquiry, it must limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, it 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

The dispute centres primarily on the effect of clause 2.3 of the RFP. This key clause states, in part, the following:

The Consultant, including EACH member of a consortium, [...] its personnel and subcontractors, must not have been involved, jointly or individually, in the planning (e.g. conceptualization, feasibility studies, specifications, or design) of this project, nor have been assisted in the preparation of the proposal by any third party who has been involved in the planning of this project.

[Translation]

In respect of the Associated Consultant's involvement in the development of the support project in question, the Tribunal notes that CIDA confirms in several places in the GIR that the Associated Consultant was involved, in one way or another, in this PRODEJ implementation project. For example, at paragraph 67 of the GIR, CIDA submitted that, in her capacity as follow-up officer, the Associated Consultant presented an overview of the Malian PRODEJ development exercise to the design team and then to the planning team of the project in question. At paragraph 69 of the GIR, CIDA submitted that the Associated Consultant helped to prepare and draft the Institutional Study. At paragraph 88 of the GIR, CIDA indicates that it prepared the RFP documents between October 2001 and February 2002, a time frame that allowed it to refer to the Institutional Study's texts and orientations. At paragraph 109 of the GIR, CIDA confirmed that the Associated Consultant provided general information on PRODEJ to the design team and then to the planning team of the project in question before their respective missions to Mali. At paragraph 135 of the GIR, CIDA submitted that the terms of reference of the RFP referred to the Institutional Study, in which the Associated Consultant had been involved to a great degree. As a result, CIDA does not contest, as such, the Consortium's claims about the Associated Consultant's involvement. The issue to resolve, therefore, is the degree to which the Associated Consultant played a role that matches what is set out in clause 2.3 of the RFP.

The Tribunal considers that clause 2.3 of the RFP contains an essential component: the concept of "participating" in the "planning" of the project in question. In general, the verb "*participer*" (participate) is defined as "to take part in something" in the sense of to join, get involved in; collaborate, co-operate; assist [translation].<sup>15</sup>

The evidence on the record shows that the work and activities of the Associated Consultant and her contribution in her consultations with the various development teams for the second support project have had an impact on the planning of the support project in question.

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15. *Le Nouveau Petit Robert*, 1996, s.v. "*participer*".

The Tribunal considers that CIDA's claim regarding the Associated Consultant not being directly involved in planning the support project in question begs the issue of any involvement on the part of the Associated Consultant in the project in question regardless of its nature. The Tribunal notes that clause 2.3 of the RFP does not indicate direct or indirect involvement. According to the Tribunal, the restriction of not having been involved, jointly or individually, in the planning of this project is general in scope.

The Tribunal considers that the activities and work carried out by the Associated Consultant as part of the various mandates given to her by CIDA caused the Associated Consultant to gain such experience, with respect to PRODEJ, that her contribution to their work was of appreciable value to the design and planning teams of the support project covered in the RFP.

The Tribunal notes that the Associated Consultant's activities were those set out in clause 2.3 of the RFP and are therefore prohibited. The fact that CIDA chose to negotiate with CAC with a view to granting it the contract knowing that the Associated Consultant had not only helped prepare and draft the Institutional Study, which was subsequently reproduced in part in the terms of reference of the RFP, but had also in effect acted as resource person for the various design and planning teams of the support project in question, is, according to the Tribunal, unacceptable under clause 2.3 of the RFP and contrary to the provisions of the *AIT* given, among other things, the privileged access granted to the Associated Consultant. Furthermore, the Tribunal is troubled by the fact that CIDA does not seem to recognize the unique advantage that was given to the Associated Consultant by allowing her the opportunity to give a presentation to the project planning team when two members of the CIDA evaluation team were present.

Furthermore, in light of the provisions in clause 2.3 of the RFP, the Tribunal cannot accept that CIDA is attempting to exonerate its acceptance of CAC by relying on a lack of potential suppliers, since there was at least one other, namely the Consortium, whose conduct had not contravened clause 2.3. In addition, if CIDA was wishing to override certain provisions of the *AIT*, it should have done so by complying with the provisions of the *AIT* in that connection. Such a departure, for example, is permitted under the circumstances stipulated in Article 506(12). However, that article does not apply in this case; neither does Article 506(11)(c), as already mentioned. Except for this last provision, the Tribunal notes that CIDA did not rely on any provision allowing it to depart from paragraphs 1 through 10 of Article 506. The Tribunal is therefore of the view that CIDA contravened the restriction set out in clause 2.3 of the RFP by conducting negotiations with the group with which the Associated Consultant is involved. It is the Tribunal's view that, by acting in this fashion, CIDA contravened Article 506(6).

For these reasons, the Tribunal finds that the Consortium's complaint is valid.

With respect to the new grounds of complaint raised by the Consortium in its comments on the GIR, one relating to the projects submitted by CAC in its bid and the other regarding the evaluation grid, the Tribunal does not consider it necessary to make a determination on these in light of its determination regarding the main ground of complaint.

In formulating its recommendations, the Tribunal must, pursuant to subsection 30.15(3) of the *CITT Act*, consider all the factors coming into play in the procurement covered in the RFP, particularly the following:

- the seriousness of the deficiency found in the procurement process;
- the degree to which the complainant and all other interested parties have been prejudiced;
- the degree to which the integrity and efficiency of the competitive procurement system were prejudiced;

- the issue of whether the parties acted in good faith; and
- the extent to which the contract was performed.

In light of CIDA's negotiations with the group associated with the Associated Consultant who, in the Tribunal's opinion, was involved in planning the project in question, which is contrary to clause 2.3 of the RFP, and considering the degree to which the Consortium and the integrity of the competitive procurement system have been prejudiced, and given the seriousness of the deficiency found in the procurement process, the Tribunal recommends that CIDA undertake negotiations with the Consortium with a view to awarding it the procurement in question. Although the Tribunal is of the view that CIDA tried to ensure the Associated Consultant's eligibility to bid and that its efforts in this regard were out of the ordinary, the Tribunal is not of the view that CIDA's good faith ought to be questioned.

The Tribunal also awards the Consortium its reasonable costs incurred in preparing and proceeding with its complaint.

#### **DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that CIDA undertake negotiations with the Consortium with a view to awarding it the contract.

Pursuant to subsections 30.16(1) and (2) of the *CITT Act*, the Tribunal awards the Consortium its reasonable costs incurred in preparing and proceeding with the complaint.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

Patricia M. Close

Patricia M. Close  
Member