CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, June 13, 2003

File No. PR-2002-063

IN THE MATTER OF a complaint filed by FELLFAB Limited 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 paragraph 10(*b*) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations,* the Canadian International Trade Tribunal hereby dismisses the complaint.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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Date of Determination and Reasons:	June 13, 2003
Tribunal Member:	Ellen Fry, Presiding Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	FELLFAB Limited
Counsel for the Complainant:	John V. Kranjc
Government Institution:	VIA Rail Canada Inc.
Counsel for the Government Institution:	John A. Campion

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STATEMENT OF REASONS

COMPLAINT

On February 14, 2003, FELLFAB Limited (FELLFAB) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*[1] concerning a procurement (Solicitation No. 200301002) by VIA Rail Canada Inc. (VIA) for the refurbishment of coach seats.

FELLFAB alleged that, contrary to the provisions of the *North American Free Trade Agreement*,[2] VIA has not made the price of the winning bid public knowledge. It also alleged that VIA had constructed the procurement so as to be an improper sole source.

FELLFAB submitted that it understood, through communications with VIA procurement personnel, that there were at least three foam companies with the necessary qualifications to supply a product suitable for the application for which it was bidding. It further submitted that, during the preparation of its bid, two of the companies informed it that they were unable to supply the approved products and that the other company would not respond to FELLFAB's emails and phone calls. Therefore, FELLFAB submitted, its only recourse was to submit a bid using a foam supplier that had not yet been approved for VIA's application.

FELLFAB requested, as a remedy, that the Tribunal recommend that it be compensated for its lost profit opportunity.

On February 21, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] On March 13, 2003, VIA requested an extension for the filing of the Government Institution Report (GIR). On March 17, 2003, the Tribunal granted an extension for the filing of the GIR to April 4, 2003, on which date VIA filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] In the GIR, VIA informed the Tribunal that a contract had been awarded to Mirabel Aero Service, Inc., a division of Avianor Group. On April 16, 2003, FELLFAB requested an extension for the

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
3. S.O.R./93-602 [*Regulations*].
4. S.O.R./91-499.

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filing of its comments on the GIR to May 2, 2003. On April 17, 2003, the Tribunal granted the extension. FELLFAB filed its comments on the GIR with the Tribunal on May 2, 2003.

PROCUREMENT PROCESS

On January 9, 2003, an advance advertisement of an invitation to tender (ITT) for the refurbishment of coach seat pairs was placed by VIA in *La Presse* and *The Globe and Mail*. On January 17, 2003, an informal meeting was held between VIA personnel and representatives of interested parties and prospective bidders. According to VIA, 11 parties expressed interest, and tender packages were issued to those parties.

The ITT closed at noon, Halifax time, on January 30, 2003. According to VIA, four compliant bids were received. On February 3, 2003, VIA announced that Mirabel Aero Service, Inc., a division of Avianor Group, was the successful bidder. On February 12, 2003, FELLFAB filed an objection with VIA about an improper sole source in the procurement process and was verbally denied relief by VIA. On February 14, 2003, FELLFAB filed its complaint with the Tribunal.

POSITION OF PARTIES

FELLFAB's Position

Regarding the issue of the Tribunal's jurisdiction raised in the GIR, FELLFAB submitted that any provisions that would render *NAFTA* provisions with respect to procurement inapplicable and defeat the intent of the agreements should be narrowly construed. It further submitted that, as a result, the term "services with respect to transportation equipment" ought to be narrowly interpreted with a view to the general purposes of *NAFTA* and any potential reasons for justifying an exclusion to the norm of competition and the Tribunal's jurisdiction to oversee it. It contended that the contract provides for the refurbishment of passenger railway car seats and that the seats are to be delivered to the location of the company doing the refurbishment on a regularly scheduled basis. FELLFAB argued that the provision of railway car seat refurbishment does not provide a service so vital as to take it out of the ordinary requirements of fairness, effectiveness and transparency in the procurement process. It argued that reasons that might justify an exclusion, such as a requirement for immediate refurbishment or a requirement that refurbishment be done locally, do not exist. It further argued that there are no national security issues involved and that this is not a case where a locomotive needs repair immediately in order to complete its route, requiring immediate work unfettered by the administration of the procurement process, nor is it a case where the security of the national rail system is at issue.

VIA's Position

VIA argued that the Tribunal is without jurisdiction to determine the complaint because (a) the contract at issue is not a "designated contract" under *NAFTA*; and (b) there is no issue of national treatment in the tendering process or the award of the contract.

With respect to the definition of a "designated contract", VIA argued that the contract at issue falls within the terms of the excluded services listed in Annex 1001.1b-2, Section B - Excluded Coverage, of *NAFTA*, specifically, category J, "Maintenance, Repair, Modification, Rebuilding and Installation of Equipment", as it pertains to "[s]ervices with reference to transportation equipment". It submitted that "transportation" must be given its natural broad meaning that pertains to the movement of persons or things from one place to another, which, it further submitted, is the function of the railway cars to be refurbished,

maintained and repaired under the contract. It therefore submitted that the Tribunal has no jurisdiction to inquire into the complaint and that the complaint should be dismissed.

TRIBUNAL'S DECISION

VIA submitted that the Tribunal does not have jurisdiction to deal with this complaint, because the contract at issue is not a "designated contract" under the provisions of *NAFTA*.[5]

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:

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

Subsection 3(1) of the *Regulations* provides, in part, that, "[f]or the purposes of the definition 'designated contract' in section 30.1 of the 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 . . . is a designated contract."

As indicated above, the procurement at issue is for the refurbishment of train coach seats. The procurement involves the supply of both labour and materials (i.e. both services and goods). However, the Tribunal considers that the essence of the procurement is to supply services and that the supply of the goods required to perform the services, such as seat foam, is merely incidental to this purpose. Consequently, the Tribunal considers that this is a procurement for services. The Tribunal notes that neither party made submissions to the contrary.

Article 1001(1)(b) of *NAFTA* provides that the procurement of services covered by Chapter Ten (Government Procurement) are "services in accordance with Annex 1001.1b-2". The relevant portions of Annex 1001.1b-2 provide as follows:

Annex 1001.1b-2

Services

Section B - Excluded Coverage

Schedule of Canada

Services Exclusions
by Major Service Category

The following service contracts are excluded:

. . .

J. Maintenance, Repair, Modification, Rebuilding and Installation of Equipment

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5. VIA is not subject to the *Agreement on Internal Trade*—reference Article 502(3) and Annex 502.2B. VIA is not subject to the *Agreement on Government Procurement*—reference Annex 3.

. . .

Services with reference to transportation equipment

In the Tribunal's view, it is clear that trains are "transportation equipment", within the ordinary meaning of that expression. It is also clear that coach seats are an integral part of train cars used for transporting passengers. Therefore, the Tribunal considers that the refurbishment of coach seats falls clearly into the category of "services with reference to transportation equipment" and is excluded from coverage under *NAFTA*.

FELLFAB argued that this exemption should not apply because it should be narrowly construed. It is true that, in previous cases, in instances where it was unclear whether an exemption should apply, the Tribunal has chosen a narrow interpretation as the interpretation most consistent with the intent of the trade agreements.[6] However, it would be inappropriate to apply such an approach in this case, given that it is clear from the facts of the case that the exemption should apply.

In light of the foregoing, the Tribunal finds that the complaint does not relate to a designated contract under *NAFTA*. Therefore, the Tribunal is of the view that it does not have jurisdiction to continue its inquiry in this case, and the complaint is dismissed.

DETERMINATION OF THE TRIBUNAL

Pursuant to paragraph 10(*b*) of the *Regulations*, the Tribunal hereby dismisses the complaint.

Ellen Fry
Ellen Fry
Presiding Member

6. *Re Complaint Filed by McNally Construction Inc.* (6 December 2001), PR-2001-026 (CITT) at 7.