



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-008

Calian Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, July 21, 2006*

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IN THE MATTER OF a complaint filed by Calian Ltd. 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*;

BETWEEN

CALIAN LTD.

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

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, as a remedy, that the Department of Public Works and Government Services not exercise the option to extend the contract for the additional two one-year periods and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Calian Ltd. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Elaine Feldman
Elaine Feldman
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On April 25, 2006, Calian Ltd. (Calian) 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 the procurement (Solicitation No. W0114-050005/A) by the Department of Public Works and Government Services (PWGSC) for the provision of training services relating to basic military driving and vehicle maintenance for the Department of National Defence (DND).

2. Calian alleged that Valcom Consulting Group Inc. (Valcom), a competitor of Calian, improperly used serving Canadian Forces (CF) members attached to the unit that developed the statement of work (SOW) for the subject solicitation to serve as its recruiters and to screen résumés relating to the subject solicitation. Calian alleged that the CF members actively attempted to convince prospective employees not to work with Calian and that Valcom received information not available to other bidders as a result of this relationship. Calian alleged that, as a result, there was a clear conflict of interest and a reasonable apprehension of bias in respect of the procurement process. As relief, Calian requested that the Tribunal determine that Valcom's activities resulted in a conflict of interest, that Valcom's behaviour is sufficient for its bid to be declared non-compliant and that Calian should be awarded its costs for bringing the complaint before the Tribunal.

3. On May 2, 2006, the Tribunal informed the parties that it had accepted the complaint 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*.² On May 2, 2006, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of a contract until the Tribunal had concluded its inquiry and had determined the validity of the complaint. On May 4, 2006, PWGSC advised the Tribunal that a contract had been awarded to Valcom prior to the receipt of the postponement of award order. As a result, on May 29, 2006, the Tribunal issued an order rescinding the postponement order. On May 29, 2006, PWGSC submitted the Government Institution Report (GIR). On June 8, 2006, Calian submitted its comments on the GIR.

4. 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 written information on the record.

PROCUREMENT PROCESS

5. The SOW, which contains the technical requirements of the Request for Proposal (RFP), was the responsibility of DND's Combat Training Centre (CTC) located in Canadian Forces Base (CFB) Gagetown, New Brunswick. The unit that released the SOW was located in CFB Kingston, Ontario, but it had solicited input from each of the Land Force Areas (Atlantic, Quebec, Central and Western) and from the CTC's own headquarters' Logistics component. The RFP was part of a larger contracting out initiative, the Training Capacity Enhancement Project (TCEP), which contained three main training elements—Driver Wheeled Training, Light Armoured Vehicle Gunnery Training and Administrative Support to Training. In August 2005, a draft SOW for the overall TCEP was provided to Calian, to Valcom and to all other known interested companies. In November and December 2005, the SOW for the Driver Wheeled Training and

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

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

evaluation criteria were drafted by DND and provided to PWGSC. On February 10, 2006, the RFP was made available through MERX. Between its release and the closing date for the receipt of bids of March 27, 2006, eight amendments to the RFP were issued.

6. The RFP contained the following clauses that are relevant to the complaint:

1. Standard Instructions, Conditions and Clauses

...

The standard instructions and conditions 9403 (04/12/10) are incorporated by reference into and form part of the bid solicitation.

1.1 General Conditions

General Conditions 9676 (2005-12-16) - Services shall apply to any resulting Contract.

...

2.4 SACC [Standard Acquisition Clauses and Conditions] Manual Clauses

...

Civil Employment of Military Personnel A9107T (2005/06/10)

...

3. Communications - Solicitation Period

To ensure the integrity of the competitive bid process, enquiries and other communications regarding the bid solicitation, must be directed ONLY to the Contracting Authority identified in the bid solicitation. Failure to comply can (for that reason alone) result in the disqualification of the bid.

...

7. SACC clause A9107T (2005/06/10) reads as follows:

...

Article 19.42 of the Queen's Regulations and Orders for the Canadian Forces is reproduced below:

"19.42 CIVIL EMPLOYMENT

1. Subject to paragraph (3), no officer or non-commissioned member on full-time service shall engage in any civil employment or undertaking that in the opinion of the member's commanding officer:

- (a) is or is likely to be detrimental to the interests of the Canadian Forces;
- (b) reflects or is likely to reflect discredit upon the Canadian Forces; or
- (c) in the case of members of the Regular Force, is continuous.

...

3. Except that an officer or non-commissioned member shall not engage in any civil employment or undertaking that reflects or is likely to reflect discredit upon the Canadian Forces, this article does not apply to a member who is:

- (a) on leave immediately preceding release; or
- (b) on leave without pay."

...

8. According to PWGSC, three bids were received in response to the RFP, the evaluations of which were concluded on March 30, 2006. On May 2, 2006, the contract was awarded to Valcom.

9. The following chronology of events is relevant to the complaint:

- February 7, 2006—Calian communicated with PWGSC, alleging a conflict of interest involving Valcom. According to Calian, at that time, it was advised by PWGSC to raise this matter directly with DND.
- February 8, 2006—Calian spoke with the PWGSC contracting officer about the same issues. According to PWGSC, Calian would not provide details and was told to put its concerns in writing.
- February 10, 2006—Procurement initiated with the posting of the Notice of Proposed Procurement.
- February 28, 2006—DND e-mailed PWGSC indicating Calian's contacts with DND personnel.
- March 6, 2006—Mr. Jerry Johnston, Calian's Vice-President, Outsourcing Services Department, wrote a letter to the PWGSC contracting authority, alleging that Valcom had two serving CF members recruiting personnel for it who were also trying to convince prospective employees not to work for Calian. The letter also stated that Calian had made DND aware of the allegations and that it had requested that Valcom be barred from submitting a bid, as it may have been privy to insider information through its association with the two CF members.
- March 8, 2006—In a letter dated that day, PWGSC acknowledged receipt of Calian's letter dated March 6, 2006.
- March 21, 2006—In a letter dated that day, PWGSC informed Mr. Johnston that DND had conducted an investigation into the matter and was satisfied that there did not appear to be any conflict on interest on the part of Valcom. PWGSC also informed Mr. Johnston that, if he had any questions, he should contact Lieutenant-Commander McNeil at DND, whose telephone number and address were provided.
- March 23, 2006—In a letter dated that day, Mr. Johnston wrote again to PWGSC, requesting information about PWGSC's role in the investigation and other issues regarding its investigative process, specifically regarding the subject RFP, and its general practices.
- March 24, 2006—The PWGSC contracting authority acknowledged receipt of Mr. Johnston's letter dated March 23, 2006.
- April 4, 2006—By e-mail dated that day, Mr. Johnston asked the PWGSC contracting authority when he might expect a response to his letter dated March 23, 2006.
- April 7, 2006—In response to Mr. Johnston's e-mail dated April 4, 2006, the PWGSC contracting authority advised that she had been out of the office and had not been able to respond. She also advised that she did not know when a response would be forthcoming, or whether the response would originate from her office or that of the Deputy Minister of PWGSC.
- April 7, 2006—Mr. Johnston e-mailed the Deputy Minister of PWGSC asking when he could expect a response to his letter dated March 23, 2006.
- April 10, 2006—By letter dated that day, Mr. Chris Maltas, PWGSC Ontario Region, Regional Director, Acquisitions and Compensation, wrote to Mr. Johnston in response to Calian's letter

dated March 23, 2006. That letter advised Calian that DND was satisfied that there did not appear to be a conflict of interest and that PWGSC would not be pursuing any further investigation into the matter. The letter also advised Calian of the Tribunal's complaint process.

10. On April 25, 2006, Calian filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

PWGSC's Position

11. PWGSC submitted that Calian's complaint was filed outside of the time limit established by section 6 of the *Regulations*. It submitted that potential suppliers are required to make an objection to the relevant government institution, or to file a complaint with the Tribunal, within 10 working days after the day on which the basis of its objection or complaint became known or reasonably should have become known to that potential supplier. PWGSC submitted that, where an objection has been properly made, and subsequently denied, the potential supplier then has 10 working days from the date of that denial to file its complaint with the Tribunal.

12. PWGSC submitted that Calian first spoke with PWGSC on February 7, 2006, when it telephoned PWGSC's office and spoke with a staff member with respect to the alleged conflict of interest involving the CF members purportedly working for Valcom. On February 8, 2006, Calian spoke directly with the contracting officer regarding the same issue. PWGSC submitted that during neither of the telephone conversations noted in Calian's letter of March 6, 2006,³ were specifics provided as to the activities that Calian was calling into question or as to the individuals involved. PWGSC submitted that it advised Calian on both occasions to submit its concerns in writing.

13. PWGSC submitted that the Federal Court of Appeal has ruled that for "... the informal procedure for settling complaints ... to be effective, an objection must be described with sufficient specificity as to enable the Department to deal with it" ⁴ It submitted that Calian's conversations with PWGSC lacked sufficient specificity for it to act and, therefore, cannot be considered as objections. It submitted therefore that Calian did not make its objection to PWGSC until it was raised in the letter dated March 6, 2006, which was delivered to PWGSC on March 7, 2006. According to PWGSC, as Calian was aware of its basis of objection as early as February 7, 2006, its objection of March 6, 2006, was filed outside of the time frame provided in subsection 6(2) of the *Regulations*.

14. Furthermore, even if Calian's letter of March 6, 2006, were to be considered as the filing of its objection, PWGSC submitted that Calian's objection was denied in PWGSC's letter of March 21, 2006,⁵ which stated as follows:

... the Department of National Defence (DND) instigated an internal review into the matters you have raised and that their investigation has now been completed. DND is satisfied that there does not appear to be any conflict of interest on the part of Valcom.

...

3. Complaint, Tab 4 at 2.

4. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.), para 74.

5. Complaint, Tab 5.

15. PWGSC submitted that this letter did not agree to further consider Calian's objection or indicate that DND was continuing with its investigation. PWGSC submitted that Calian's next correspondence, its letter dated March 23, 2006, gave no indication that Calian thought PWGSC might still grant it relief on the basis of its objection. PWGSC submitted that, to the contrary, the letter suggested that Calian had abandoned its objection.

16. PWGSC submitted that its invitation to Calian to direct questions to DND in its letter of March 21, 2006, did not alter the finality of its denial. According to PWGSC, to find otherwise could discourage PWGSC contracting officers from communicating with bidders, after the denial of an objection, in order to provide them with further information. PWGSC also submitted that, when it denies an objection, it is under no obligation to direct an objecting bidder to the bid challenge procedures provided for in the *CITT Act*, as it nevertheless did in its letter dated April 10, 2006. It submitted that Calian had 10 working days from March 21, 2006, to file the complaint with the Tribunal and that, since Calian filed the complaint on April 25, 2006, it was filed outside of the time period specified in the *Regulations*.

17. PWGSC also submitted that Calian misled the Tribunal as to which of PWGSC's standard instructions and conditions applied to the bid solicitation. PWGSC submitted that Calian claimed that General Conditions 9676 (2005-12-16)—Services (GC 9676), including its "Conflict of Interest" clause,⁶ were incorporated into the RFP. According to PWGSC, the RFP incorporated Standard Instructions and Conditions 9403 (04/12/10), which do not include provisions relating to conflict of interest and non-discrimination. It submitted that GC 9676 applies only to the resulting contract, not the bid solicitation.

18. PWGSC submitted that, in a previous case, the Tribunal wrote that "... [t]he Tribunal finds that the clause [at issue] ... deals with matters after contract award, which are beyond the Tribunal's jurisdiction and, accordingly, will not deal with this issue ..."⁷ PWGSC submitted that the consideration and application of GC 9676 to the bid solicitation are similarly beyond the Tribunal's jurisdiction in this case.

19. PWGSC submitted that the RFP was structured to make currently serving CF members accessible to bidders, recognizing that much of the required expertise may be supplied by current and former CF members. It submitted that, for this reason, SACC clause A9107T (2005/06/10) was included. PWGSC submitted that this clause clearly implies that currently serving CF members may, in certain circumstances, engage in civil employment or an undertaking on behalf of a bidder. PWGSC submitted that, in addition, bidders were informed in amendment No. 007 to the RFP that CF members who are eligible for release from the CF upon 30 days notice are not referred to in SACC clause A9107T (2005/06/10). PWGSC also noted that the statement of requirements on page 17 of the RFP allowed that course call-ups would be made at least 30 working days prior to the course date "... in order to allow the contractor to have sufficient time to prepare for specific local requirements ..."⁸ PWGSC submitted that both named CF members were eligible for release from the CF on 30 days' notice and were therefore not bound by SACC clause A9107T (2005/06/10).

20. Regarding the named members' activities, PWGSC submitted that Calian's allegations are wholly based on an e-mail from early November 2005,⁸ involving one of the named CF members and that Calian had provided no evidence in respect to any alleged involvement of the other named CF member. PWGSC submitted that the named CF members lacked access and opportunity to obtain "insider information", if any

6. Clause 28.

7. *Re Complaint Filed by SNC Technologies Inc.* (16 September 2005), PR-2005-010 (CITT), para. 37 [*SNC Technologies*].

8. Complaint, Tab 3.

such information existed at all. It further submitted that Calian failed to identify any “insider information” that could have been given to Valcom or how such information could or did preclude competition or create a competitive advantage in breach of the trade agreements. PWGSC submitted that both members were stationed in CFB Gagetown when work on the early draft of the SOW for the Driver Wheeled Training was undertaken, but that neither member actually worked on the SOW. In addition, PWGSC submitted that neither member worked in the CTC armoured squadron that was responsible for the SOW, that both Calian and Valcom were provided with a draft of the consolidated TCEP SOW in August 2005, that the CF member responsible for the SOW for the Driver Wheeled Training rigidly controlled access to it subsequent to its release as a draft in August 2005 and that neither named member had access to drafts of the SOW. PWGSC also submitted that the lead for the TCEP switched from CFB Gagetown, where the named members were posted, to CFB Kingston over seven months prior to the release of the SOW in February 2006.

21. PWGSC also submitted that Calian’s technical proposal received the highest score, which contradicted the suggestion that competition was precluded for Calian or that Valcom was provided an unfair competitive advantage. PWGSC submitted that Calian’s technical score (out of 100) was more than 10 points higher than Valcom’s score, but that Valcom was awarded the contract because its “best value” score was higher than Calian’s score. The “best value” score was determined according to the evaluation procedures outlined in Annex G to the RFP; these take into account technical points and bid price.

22. PWGSC requested its costs in the event that the Tribunal dismisses the complaint on jurisdictional grounds or after an inquiry into the substance of Calian’s allegations. In the event that the complaint is valid in part only, it requested that no party receive its costs.

Calian’s Position

23. Calian submitted that both its objection to PWGSC and its subsequent filing of the complaint with the Tribunal respected the time frame set out in section 6 of the *Regulations*.

24. Specifically regarding its objection, Calian submitted that, when it contacted PWGSC on February 7, 2006, it was advised to contact DND regarding the allegations because the RFP had not yet been released and that PWGSC therefore considered it a matter internal to DND, upon which it could not take action. Calian submitted that, as a result, it contacted DND and made DND aware of its concerns, including sending DND the documentation regarding the activities of one of the named CF members, which was included as Exhibit 3 to its complaint to the Tribunal. Calian submitted that its objection took place when it spoke to PWGSC on February 7 and 8, 2006, as well as when it sent DND the information soon thereafter. It submitted that its objection was therefore on time.

25. Calian also submitted that PWGSC is incorrect in contending that its letter of March 21, 2006, should constitute the denial of its requested relief. Calian submitted that that letter could not reasonably be considered as such because it provided neither an explanation of PWGSC’s or DND’s conclusions regarding Valcom’s behaviour nor a response to whether the fairness of the procurement process had been compromised by reason of Valcom being privy to “insider information”. Calian submitted that PWGSC’s letter of April 10, 2006, should be considered the Government’s denial of relief. Since its complaint was filed within 10 working days of April 10, 2006, Calian submitted that the complaint was filed on time.

26. Calian submitted that the instructions to bidders in the RFP indicated that GC 9676 applied to any resulting contract.⁹ Calian argued that this provision must be read in conjunction with section 1 of Part 1 of Annex D to the RFP, which required the bidder to acknowledge that it "... accepts all the terms and conditions in their entirety as they appear in this RFP and its annexes..." Calian submitted that, if PWGSC's argument regarding the applicability of GC 9676 were to be accepted, a contract could be awarded to an entity that was, at the date of contract award, already in breach of the provisions of that contract. Calian submitted that it would not make sense for a bidder that could not comply with GC 9676, based on actions taken prior to bid award, to be awarded the contract. According to Calian, the circumstances in this complaint are different from those pointed to by PWGSC in *SNC Technologies* because the provision in that matter dealt with the replacement of personnel after contract award, whereas the present case deals with issues that occurred prior to the contract award.

27. With respect to its allegations of conflicts of interest, Calian submitted that the overall obligations of the trade agreements require that government procurement be conducted in a fair, unbiased, non-discriminatory and transparent manner. It submitted that this procurement did not meet those obligations. Calian submitted that DND's and PWGSC's refusals to address the claims that it made regarding what it felt were clear conflicts of interest by Valcom and the two serving CF members that were employed by that company constitute a failure of such magnitude as to prejudice the integrity and efficiency of the competitive procurement system. Calian submitted that it is difficult to imagine a more fundamental conflict of interest than the case at hand: active CF members enter into a relationship with a potential supplier that results in those same CF members actively promoting the bid and capabilities of one potential supplier, to the detriment of another bidder.

28. Calian submitted that it is unreasonable to expect it to have any detailed information about the actual activities of the two serving CF members, but stands on its claim that it was informed, by more than one party, that the CF members actively tried to discourage personnel from signing up with Calian.

29. Calian submitted that it is not disputing the general right of military personnel to hold civil employment while working full-time in the CF. It submitted that article 19.42 of the Queen's Regulations and Orders (QR&O) was reproduced in SACC clause A9107T and included in the RFP. Calian argued that article 19.42 restricts CF members' right to hold civil employment under certain circumstances. According to Calian, those circumstances are where, in the opinion of the member's commanding officer, that civil employment is or is likely to be detrimental to the interests of the CF or if it reflects or is likely to reflect discredit on the CF. It submitted that the civil employment in this complaint would not have been permitted pursuant to article 19.42.

30. Calian submitted that there is strong reason for concern that the named CF members had access to information in the course of their official duties regarding this procurement, information that was not generally available to the public. Calian argued that the named CF members were knowingly taking advantage of such information, principally through their screening of résumés for Calian's competitor. Calian submitted that, because the named CF members had conflicting interests, Valcom was therefore not

9. Clause 28 of GC 9676 reads as follows:

... Conflict of Interest

The Contractor agrees that it is a term of the Contract that no person who is not in compliance with the provisions of the Conflict of Interest and Post-Employment Code for Public Office Holders, the Values and Ethics Code for the Public Service, or the Defence Administrative Orders and Directives governing Conflict of Interest and Post-Employment, shall derive any direct benefit from this Contract.

in compliance with the terms and conditions of the RFP and that its bid should have been deemed non-compliant.

31. Calian submitted that the refusals of DND and PWGSC to recognize or address the real conflict of interest created by Valcom's actions in using CF members from the same unit that developed the SOW resulted in the tendering process being applied in a discriminatory manner. It submitted that DND and PWGSC have therefore failed in their obligation to ensure equal access to the procurement process, as required by the trade agreements.

32. With respect to its allegation of a reasonable apprehension of bias, Calian submitted that the Tribunal has previously applied¹⁰ the "informed person test" as follows:

[W]hat would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly.¹¹

33. Calian submitted that the facts in this case raise a reasonable apprehension of bias. It submitted that this conclusion is based on the potential for the active CF members, acting for Calian's competitor, to influence the outcome of the procurement due to their proximity to the decision maker and the decision-making process. It submitted that, in addition, the CF members' active involvement in the recruitment of personnel, on the base where the procurement was being decided, causes real concerns of undue influence. It also submitted that DND's and PWGSC's decisions not to intervene after receiving a complaint from Calian compound these concerns.

TRIBUNAL'S ANALYSIS

34. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*,¹² the *North American Free Trade Agreement*¹³ and the *Agreement on Government Procurement*.¹⁴

35. The Tribunal will first address whether the complaint was filed in a timely manner. Because Calian made an objection to the government institution, the Tribunal will discuss two distinct elements: (1) the timeliness of Calian's objection to the government institution; and (2) the timeliness of Calian's complaint.

10. *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-007 (CITT); *Re Complaint Filed by Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT); *Re Complaint Filed by Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT).

11. [1978] 1 S.C.R. 369 at 394.

12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [AIT].

13. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].

14. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

Timeliness of Calian's Objection

36. The requirements regarding the time to file a complaint preceded by an objection are found in subsection 6(2) of the *Regulations* which reads as follows:

A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

37. Subsection 6(2) of the *Regulations* provides that, once a potential supplier discovers or reasonably should have discovered the basis of its complaint, if it chooses to make an objection, it must do so to the relevant government institution as a first step toward resolving the issue. If the objection is subsequently denied (or the potential supplier can construe denial of relief), the complainant then has 10 working days from the day on which actual (or constructive) denial of relief was given (or can be construed) to file its complaint with the Tribunal.

38. PWGSC has submitted that Calian's complaint was filed late because its objection was not filed within 10 working days of it discovering the grounds of its complaint and because, in any event, its complaint to the Tribunal itself was filed beyond the 10-day deadline following the denial of the relief that it was seeking.

39. The following is a consolidated timeline assembled from the parties' submissions.

Date	Event
February 7, 2006	Calian informed PWGSC that it believed that Valcom was in a situation of conflict of interest. According to PWGSC, Calian would not provide details and was told to put its concerns in writing. According to Calian, it was told to contact DND directly.
February 8, 2006	Calian spoke again with the PWGSC contracting officer about the same issues. Calian did not provide any additional details.
February 10, 2006	The Notice of Proposed Procurement was posted on MERX.
February 28, 2006	DND e-mailed the PWGSC contracting officer advising her that Calian had twice called DND staff at CFB Gagetown to complain about Valcom's alleged conflicts of interest.
March 6, 2006 (received via e-mail at PWGSC on March 7, 2006)	Calian wrote a letter to the PWGSC contracting officer alleging that Valcom was employing two serving CF members as recruiting personnel who were dissuading prospective employees from working for Calian and providing Valcom access to information not available to other bidders. It stated that it had forwarded this information, as per PWGSC's instruction, to DND. It requested that Valcom be barred from submitting a bid.
March 8, 2006	PWGSC acknowledged Calian's letter dated March 6, 2006.

March 21, 2006	PWGSC wrote to Calian informing it that DND had conducted an investigation into the matter and was satisfied that there did not appear to be any conflict of interest on the part of Valcom. It also advised Calian to contact DND should it have any questions concerning this matter.
March 23, 2006	Calian wrote another letter to PWGSC requesting information about its role in the investigation and other issues regarding its investigative process, specifically regarding the subject RFP, and its general practices.
March 24, 2006	PWGSC acknowledged receipt of Calian's letter dated March 23, 2006.
April 10, 2006	PWGSC wrote to Calian advising it that, because of the conclusions reached by DND, PWGSC did not intend to further pursue an investigation into Calian's allegations.

40. PWGSC argued that Calian first became aware of the basis of the complaint no later than the date of its first oral objections (February 7 and 8, 2006). PWGSC also noted that almost a month went by before Calian made these objections in writing in its letter dated March 6, 2006. In PWGSC's view, the time that elapsed between the oral objections of February 7 and 8, 2006, and Calian's letter dated March 6, 2006, is beyond what is provided for in subsection 6(2) of the *Regulations*. Calian argued that it followed PWGSC's advice and objected to DND soon after it made its objections known to PWGSC and that, therefore, it objected within the applicable time limit set out in the *Regulations*.

41. In the Tribunal's view, strictly speaking, Calian's communications to PWGSC on February 7 and 8, 2006, cannot be considered as an objection relative to the solicitation because the solicitation was not published as of those dates.

42. Nevertheless, the Tribunal cannot ignore that Calian alleged that, on February 7 and 8, 2006, PWGSC directed it to formulate any concerns that it had to DND. The GIR alleges that PWGSC directed Calian to make its concerns known in writing. In the Tribunal's view, even though these conversations took place prior to the issuance of the RFP, PWGSC was therefore, as of February 7 and 8, 2006, informed that Calian was raising serious allegations with respect to the involvement of certain, unnamed CF members within Valcom's team.

43. The Tribunal has no reason to doubt Calian's word that it communicated its objection directly to DND within the permitted time frame. In doing so, the Tribunal notes that Calian took the risk of being disqualified for having violated the RFP prohibition of communicating with someone other than PWGSC.¹⁵

44. As of the date of issuance of the RFP, i.e. February 10, 2006, Calian knew the grounds of its complaint, i.e. that the RFP seemingly permitted the behaviour in which it alleged Valcom was engaged, and, therefore, Calian had 10 working days as of that date, or until February 24, 2006, to make its objection known to the Government. In the Tribunal's view, the record shows that it did.

45. The record indicates that the Government knew of Calian's concerns within the permitted time frame after the issuance of the RFP. Lieutenant-Commander McNeil's e-mail dated February 28, 2006, testifies to the fact that Calian had called the CTC Chief of Staff (COS) at CFB Gagetown "... twice now to

15. RFP at 5.

complain about [Valcom] . . . ”¹⁶ This shows that the lines of communication had been established between Calian and DND some time before February 28, 2006.

46. The Tribunal is therefore satisfied that Calian communicated its objection to DND at least once during the time frame provided for at subsection 6(2) of the *Regulations*, i.e. before February 24, 2006. The approach to DND was prompted by PWGSC’s alleged response that it could not take action. Furthermore, during that time, the Tribunal believes that Calian made its objection known to the Government with sufficient specificity for it to know the nature of the objection.

47. Whether Calian was told by PWGSC to communicate its concerns to DND directly is not of prime importance to the Tribunal for the purposes of this inquiry. What is relevant is when these concerns were made known to PWGSC or to DND. That they were made to the former or to the latter is also not of prime concern to the Tribunal.

48. Indeed, in the Tribunal’s view, when PWGSC conducts a procurement process on behalf of a client government department, it acts as the agent of that department. As such, when a supplier formulates an objection directly to PWGSC, the client department is served of that objection via its agent. Conversely, if an objection is made by a supplier directly to the appropriate official involved in the subject procurement within the client department, the Tribunal is of the opinion that a valid objection would have been made. In the Tribunal’s view, as is often the case, the lines are blurred between PWGSC and its client department in the eyes of even the most sophisticated bidders. In this matter, for some time already, PWGSC and DND had been acting together, if not as one, in the eyes of the supplier community, or at least, as agent and principal, as evidenced by the series of events and consultations leading up to the solicitation being posted on MERX. What is important for the Tribunal’s purposes is that the supplier made an objection known to the government departments involved in a given procurement process in a timely manner.

Timeliness of Calian’s Complaint

49. PWGSC submitted that Calian received a denial of the relief that it was seeking on March 21, 2006, and, as it did not file its complaint with the Tribunal until April 25, 2006, its complaint was filed outside of the time frame contemplated by subsection 6(2) of the *Regulations*. Calian argued that PWGSC’s letter dated March 21, 2006, did not respond to the issues contained in its objection and, unlike PWGSC’s letter of April 10, 2006, does not advise Calian that PWGSC will “. . . not [be] pursuing any further investigation into this matter . . . ” Calian submitted that PWGSC’s letter dated April 10, 2006, constituted the “denial of relief” contemplated in subsection 6(2) and that, therefore, its complaint was filed in a timely manner.

50. The Tribunal considers that a potential supplier must be able to determine with sufficient clarity that it is in receipt of a communication denying it the relief that it has sought. In considering the two PWGSC letters in question (March 21 and April 10, 2006), the Tribunal notes that the one dated March 21, 2006, simply stated that “. . . DND [not PWGSC] is satisfied that there does not appear to be any conflict of interest on the part of Valcom . . . ” The letter further suggested that Mr. Johnston contact Lieutenant-Commander McNeil from DND “. . . should [he] have any questions concerning this matter . . . ” The Tribunal considers that the invitation to contact DND directly gives credence to Calian’s allegation (addressed in paragraph 24 above) that it was told by PWGSC on February 7 and 8, 2006, to contact DND directly. In any event, the Tribunal reads this letter as informing Calian of the outcome of a DND investigation, not of PWGSC’s decision on Calian’s objection. In the Tribunal’s view, the distinction is crucial because that letter contrasts with PWGSC’s previous letter dated March 8, 2006, that acknowledges

16. Confidential GIR, Exhibit 6.

the receipt of "... very important issues which will require review ..." and assures Mr. Johnston "... that [his] letter will be brought to the Deputy Minister's attention ..."

51. Because PWGSC's letter dated March 21, 2006, contained no results of a PWGSC investigation and did not appear to have been written on behalf of the Deputy Minister of PWGSC, the Tribunal believes that Calian was reasonable in its interpretation that its objection had not yet been denied. It was clearly the influence of that interpretation that prompted Calian to write to PWGSC again on March 23, 2006. The following day, PWGSC acknowledged receipt of Calian's letter of the previous day regarding the solicitation "and [its] related conflict of interest concerns ..." and stated that "[it was] reviewing the concerns that [it had] raised ...". The Tribunal can easily understand how this letter contributed to the circumstances already described in letting Calian believe that PWGSC itself, not DND this time, was still investigating its objection, particularly since, again, this letter gives assurances that Mr. Johnston's letter "... will be brought to the Deputy Minister's attention ...". After having received these assurances, however, Mr. Johnston appears to have sensed that a reply would not be forthcoming, so much so that he appealed to the Deputy Minister of PWGSC directly by e-mail dated April 7, 2006, to enquire as to when he might receive a reply to the response. Three days later, by letter dated April 10, 2006, the PWGSC Ontario Regional Director, Acquisitions and Compensation, wrote to Calian giving it what the Tribunal considers to be an appropriate and clear denial of its objection by the government institution, as contemplated in section 6 of the *Regulations*.

52. Accordingly, as Calian's complaint was filed on April 25, 2006, the Tribunal finds that it was filed within the 10-working-day time frame.¹⁷

Trade Agreements

53. The following articles of the trade agreements are relevant to this inquiry. Articles 504(1) and 504(2) of the *AIT* provide for reciprocal non-discriminatory treatment in the context of procurement activities of the Federal Government. They read as follows:

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:
 - (a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own such goods and services; and
 - (b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.
2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:
 - (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
 - (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

17. April 14 and 17, 2006, respectively Good Friday and Easter Monday, were not "working days" and were therefore not included in the computation of time.

54. Article 1008 of *NAFTA* also provides for reciprocal non-discriminatory treatment. It reads as follows:

1. Each Party shall ensure that the tendering procedures of its entities are:
 - (a) applied in a nondiscriminatory manner; and
 - (b) consistent with this Article and Articles 1009 through 1016.
2. In this regard, each Party shall ensure that its entities:
 - (a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and
 - (b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation

55. Finally, Article VII of the *AGP* reads as follows:

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.
2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

...

56. The Tribunal believes that the issues raised in this matter constitute a violation of Article 504 of the *AIT*, Article 1008 of the *NAFTA* and Article VII of the *AGP*.

57. These violations arise from the fact that: Valcom hired and/or obtained the services of the two named serving CF members, employees of DND; Valcom was actively trying to obtain a contract with DND; and the two named serving CF members performed a service connected with that procurement. In and of itself, this creates a situation that violates the spirit of the trade agreements and the letter of the above-mentioned articles.

58. The Tribunal notes that the two named serving CF members were not involved in the evaluation of the proposals. Consequently, the Tribunal does not find that the circumstances surrounding this matter have given rise to a reasonable apprehension of bias in the sense of having had an influence on the evaluation committee.

59. However, in the Tribunal's opinion, a conflict of interest or, at minimum, an appearance of conflict of interest, exists when active CF members enter into a relationship with a potential supplier to DND because those CF members will be actively promoting the bid and capabilities of one potential supplier over those of another. The Tribunal wishes to emphasize that this behaviour is also potentially to DND's disadvantage. Such activities, even though they appear to be permitted under current DND practices,¹⁸ provided an advantage to Valcom over Calian. It is in that sense that DND's practice resulted in a violation of the non-discriminatory provisions of the three trade agreements. This conclusion is in line with the intent and purpose of those agreements which, as the Tribunal has stated on numerous occasions,¹⁹ is so aptly put

18. SACC clause A9107T (2005/06/10) and article 19.42 of the QR&O.

19. *Re Complaint Filed by Westcam Inc.* (19 April 1999), PR-98-039 (CITT); *Re Complaint Filed by Entreprise Aérologique Rafale O Nord.* (23 May 2006), PR-2005-054 (CITT); *Re Complaint Filed by AT&T Canada Corp.* (27 November 2000), PR-2000-024 (CITT).

in Article 501 of the *AIT*, which reads as follows: "...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."

60. More precisely, the Tribunal finds that the conflict of interest of the named CF members, in and of itself, raises concerns relative to the information that they could provide to the potential suppliers for which they are working and would have no interest in making available to all other potential suppliers. To cite but one example, current internal knowledge of training regimes might allow a bidder to bid unduly low on the portions of the financial proposal being evaluated, while adding significant extra profit on those portions of the proposal that were not being evaluated but were more likely to be called up.

61. The Tribunal does not agree with PWGSC's argument that the CF members did not have access to information that would have precluded competition or provided an unfair competitive advantage to Valcom. Rather, the Tribunal believes that the conflicts of interest tolerated by DND's practice and, more particularly, by the scheme of this procurement were enough to poison the procurement process. In fact, allegations surfaced in documents provided to the Tribunal with the GIR that Calian itself was vying for, and had allegedly hired, "inside help" of its own. In the Tribunal's view, this potential second wrong cannot be viewed as cancelling out the one attributed to Valcom, nor can it be seen as having levelled the playing field among those bidders, let alone with respect to the other members of the supplier community. Rather, if true, it would appear to be further evidence of a culture that permits bid applicants to hire serving CF members to improve their chances of submitting the winning bid.

62. The Tribunal considers that such hiring, in and of itself, provides at least the appearance of a conflict of interest that should have been sufficient to vitiate the winning bid by Valcom. This constituted discriminatory treatment, in that Valcom had or could have had access to information relevant to the procurement that was not otherwise available to the other potential suppliers. Such a result is specifically prohibited by the language of Article 1008 of *NAFTA*. It is also inherently prohibited under Articles 504(1) and 504(2) of the *AIT* and under Article VII of the *AGP* even though the language of those provisions is not as precise. It is clear to the Tribunal that, as a result of this procurement scheme, Calian ended up, in fact, receiving a treatment that was less favourable than the treatment received by Valcom, and this is precisely what these provisions are prohibiting.

63. Conflict of interest or appearance of conflict of interest that may result in an advantage to certain potential suppliers over others cannot be tolerated by a framework that is intended to provide equal access to all suppliers. The Tribunal therefore concludes that the complaint is valid.

64. This conclusion having been reached, the Tribunal recognizes that the trade agreements do not specifically prohibit the hiring of former government employees or military members by suppliers for the execution of a contract. Indeed, the provisions of the RFP in this case make it clear that such post-military employment is contemplated and permitted. Whether such practices constitute a violation of the trade agreements are not at issue in this complaint.

Remedy

65. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the harm to Calian as a result of the deficiencies in the procurement process.

66. In this connection, the relevant part of section 30.15 of the *CITT Act* reads as follows:

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

67. The Tribunal considers that creating an unequal bidding situation is a serious deficiency in the procurement process. Although there is no evidence of bad faith, this does not diminish the impact that the breach had on all suppliers save, in this case, the winning bidder. The Tribunal is also mindful that this seems to have been a practice tolerated by DND and, for the most part, accepted by the supplier community, until now. Accordingly, the Tribunal has decided not to recommend the immediate cancellation of the contract but instead to recommend that the contract not be extended with respect to the option years and, should DND wish to proceed in those years, it should carry out a new procurement process.

Costs

68. The Tribunal will award Calian its reasonable costs, in accordance with the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), incurred in preparing and proceeding with the complaint.

69. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it involved a defined service project on an as-required basis. The complexity of the complaint was medium in that the issue was not straightforward and could have serious implications involving the conduct of certain practices at DND. Finally, the complexity of the complaint proceedings was low, as there were no interveners or motions, no public hearing was held, and the 90-day time frame was respected. Accordingly, the Tribunal is of the preliminary view that this complaint case has an overall complexity level corresponding to the middle level of complexity referred to in Appendix A of the *Guideline* (Level 2). As contemplated by the *Guideline*, the

Tribunal's preliminary indication of the amount of the cost award is \$2,400. The Tribunal reserves jurisdiction to establish the final amount of the award.

DETERMINATION OF THE TRIBUNAL

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

71. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC not exercise the option to extend the contract for the additional two one-year periods and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

72. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Calian its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Elaine Feldman
Elaine Feldman
Member

Serge Fréchette
Serge Fréchette
Member