



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2006-003

The Alliance agricole
internationale, made up of the
Centre canadien d'étude et de
coopération internationale, the
Société de coopération pour le
développement international and
L'Union des producteurs
agricoles—Développement
international

v.

Canadian International
Development Agency

*Order and reasons issued
Monday, August 21, 2006*

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IN THE MATTER OF a complaint filed by the Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles—Développement international, pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

**THE ALLIANCE AGRICOLE INTERNATIONALE, MADE UP OF
THE CENTRE CANADIEN D'ÉTUDE ET DE COOPÉRATION
INTERNATIONALE, THE SOCIÉTÉ DE COOPÉRATION POUR
LE DÉVELOPPEMENT INTERNATIONAL AND L'UNION DES
PRODUCTEURS AGRICOLES—DÉVELOPPEMENT
INTERNATIONAL**

Complainant

AND

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

**Government
Institution**

AND

SNC-LAVALIN INC.

Intervener

ORDER

The Canadian International Trade Tribunal finds that it does not have jurisdiction to proceed with its inquiry into the complaint (dissenting opinion of Member Fréchette). Therefore, the complaint is dismissed.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards to the Canadian International Development Agency its reasonable costs incurred in responding to the complaint, which costs are to be paid by the Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles—Développement international. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is between Levels 1 and 2, and its preliminary indication of the amount of the cost award is \$1,700. If any party disagrees with the preliminary indication of the degree of complexity or the preliminary indication

of the amount of the award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford

Meriel V. M. Bradford
Presiding Member

Ellen Fry

Ellen Fry
Member

Serge Fréchette

Serge Fréchette
Member

Susanne Grimes

Susanne Grimes
Acting Secretary

Tribunal Members: Meriel V. M. Bradford, Presiding Member
Ellen Fry, Member
Serge Fréchette, Member

Director: Marie-France Dagenais

Senior Investigator: Cathy Turner

Counsel for the Tribunal: Dominique Laporte

Complainant: The Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles—Développement international

Counsel for the Complainant: François l'Heureux
Denis Blanchette

Intervener: SNC-Lavalin Inc.

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Government Institution: Canadian International Development Agency

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STATEMENT OF REASONS

COMPLAINT

1. On April 11, 2006, the Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles—Développement international (collectively the Alliance), filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. 2004-A-32242) by the Canadian International Development Agency (CIDA) for the provision of services for a project in support of the Support for the Development of Agricultural Productions in Mali project, for which a consortium, formed by the Alliance and Tecsuit Inc. (Tecsult), made a bid.

2. The Alliance alleged that it was not treated fairly during the tendering process, the bid evaluation and the award of the contract in respect of the solicitation. It alleged that, contrary to CIDA's directives and without the knowledge of the other bidders, an internal review and appeal procedure had been initiated during the tendering process, aimed at reversing CIDA's initial decision regarding the ineligibility of the proposal of a consortium formed by SNC-Lavalin Inc. (SNC), Géomar International inc. and the Fédération des Agriculteurs et Agricultrices Francophones du Nouveau-Brunswick (collectively SNC/Géomar).

3. As a remedy, the Alliance requested the cancellation of the contract awarded to SNC/Géomar and the award of the contract to the Alliance. In the alternative, the Alliance requested compensation for lost opportunity in the amount of \$1 million. It also requested its reasonable costs incurred in preparing its bid and its complaint.

4. On April 21, 2006, the Tribunal informed the parties that it had accepted the complaint, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On that same date, the Tribunal also decided to issue a postponement of award order in respect of the contract. On May 3, 2006, the Tribunal allowed SNC's request to intervene in the matter. On May 31, 2006, CIDA filed the Government Institution Report (GIR). On June 12, 2006, SNC filed its comments on the GIR. On June 13, 2006, the Alliance filed its comments on the GIR.

POSITIONS OF THE PARTIES

CIDA's Position

5. CIDA alleged that the Alliance is not a "potential supplier". In this case, the Alliance is made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles—Développement international. Indeed, the proposal submitted in the context of the selection process in question was submitted by the Alliance and Tecsuit. CIDA therefore argued that the Alliance, on its own, is not a bidder on the contract in question. It argued that the Alliance could not be considered a "prospective" bidder since it had actually bid in consortium with Tecsuit and had filed its complaint with the Tribunal after the bid closing period.

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

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

6. CIDA argued that, previously, in *COGNOS Incorporated*,³ the Tribunal had determined that a bidder is a “prospective” bidder, before the close of the tendering period, or after the close of the tendering period if, had the alleged breach not occurred, it had been able to submit a bid. CIDA argued that, in the present case, there is no allegation that the Alliance was prevented from bidding on its own because of any breach by CIDA. The bid period having closed, the Alliance lost its standing as a “prospective” bidder. Consequently, as it was not a “prospective” bidder or the bidder on the designated contract, the Alliance is not a “potential supplier” within the meaning of subsection 30.11(1) of the *CITT Act*.

Alliance’s Position

7. The Alliance argued that the expression “potential supplier” ought to be given a less restrictive interpretation, based more on the common meaning of the words, according to which anyone participating in the submission of a proposal is considered to be a “potential supplier,” at least for the purposes of “sufficient interest” within the meaning of section 30.1, with regard to filing a complaint under section 30.11 of the *CITT Act*. It further argued that there is nothing in the definition of the expression “potential supplier” or in the *CITT Act* to indicate that the “bidder” in question is the one that must perform the entire contract. It argued that, on the contrary, anyone who participates in bidding on a designated contract is a bidder.

8. The Alliance argued that it should be noted that, in the circumstances, it alone must perform over 85 percent, that is to say, nearly all, or at least a substantial part, of the project to which the designated contract pertains. It further argued that it would be unfair to prevent it from appealing before the Tribunal simply because Tecsumt, which is responsible for performing less than 15 percent of the project, is not a party to this complaint.

SNC’s Position

9. SNC supported CIDA’s arguments that the Tribunal does not have jurisdiction because the Alliance is not a potential supplier. In its view, since Tecsumt did not see fit to participate in this complaint, the Alliance on its own does not have the legal standing required to initiate this inquiry.

ANALYSIS

10. Subsection 7(1) of the *Regulations* stipulates that, before deciding to conduct an inquiry into the complaint, the Tribunal must determine, *inter alia*, whether the complainant is a potential supplier.

11. Section 30.1 of the *CITT Act* defines “potential supplier” (*fournisseur potentiel*) as follows:

subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract	Sous réserve des règlements pris en vertu de l’alinéa 40f.1), tout soumissionnaire — même potentiel — d’un contrat spécifique.[...]
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12. In the present case, the complainant and the bidder are not one and the same, since the bidder is a consortium made up of the Alliance and Tecsumt but the complainant is only the Alliance. The complaint and the notice of participation⁴ required by the Tribunal were signed only by Mr. Michel Charette, representative of the “Alliance agricole internationale”. The Alliance did not file its complaint on behalf of the consortium and never claimed to have had Tecsumt’s support. The Tribunal notes that there is no

3. *Re Complaint Filed by COGNOS Incorporated* (23 August 2002), PR-2002-004 (CITT) [*Cognos Incorporated*].

4. Form I entitled “Notice of Participation (Party)” must be signed by the complainant’s representative and indicate whether it will be represented by counsel.

evidence on the record to indicate that Tecsumt supports the complaint in principle. It is even entirely possible that, despite having participated in the bid, Tecsumt, for commercial reasons, decided not to support the complaint.

13. Article 3.1 of the solicitation clearly states that, when submitting the bid and performing the resulting contract, the business dealings will be between the Government and all the members of the consortium, since each member of the consortium must sign the bid and all related documents and undertake to be jointly and severally liable for the performance of the contract. The bid submitted by the Alliance and Tecsumt contains Form H titled “Mandatory Certifications”⁵ [translation], which must be signed by all the members of the consortium and which was also signed by Mr. André Lauzon, Director of Tecsumt’s agriculture division,⁶ on November 9, 2004. The bid shows that each of the three organizations that joined together to form the Alliance, namely, the Centre canadien d’étude et de coopération internationale, the Société de coopération pour le développement international and L’Union des producteurs agricoles—Développement international, as well as Tecsumt, signed the bid and is jointly and severally liable for the implementation and success of the project.

14. Accordingly, the complainant and the “bidder”, as contemplated by the definition of “potential supplier”, are clearly not one and the same.

15. Having determined that the Alliance is not, on its own, a bidder, the Tribunal will now consider whether it qualifies as a prospective bidder in accordance with the definition of “potential supplier” set out in section 30.11 of the *CITT Act*. In the Tribunal’s opinion, one of the essential requirements to qualify as a “prospective bidder” is to have the technical capacity to perform the contract in question.

16. According to the evidence on the record, when its bid was evaluated, the Alliance was awarded points for personnel proposed by Tecsumt, as well as for Tecsumt’s project, submitted to show comparable experience. Even though, according to the Alliance, Tecsumt represents less than 15 percent of the project, its participation was nevertheless essential to the project. The Tribunal therefore believes that the Alliance, on its own, would not have been considered capable of carrying out the procurement contract in question, and, had the Alliance bid entirely on its own, its bid would likely have been deemed non-compliant. Therefore, in the Tribunal’s opinion, the Alliance is not a prospective bidder according to the definition of “potential supplier” in the *CITT Act*.

17. If the Tribunal were to accept that a single member of a consortium could constitute a potential supplier, while the bidder on the contract in question was a consortium made up of more than one entity, namely, the Alliance and Tecsumt, the entity submitting a bid and the entity filing a complaint with the Tribunal would not be one and the same.

18. In the Tribunal’s opinion, according to the spirit of the *CITT Act*, there must be concordance between the identity of the supplier and that of the complainant. If the Tribunal accepted the possibility of asymmetry between these two entities, this could result in an absurd situation in which a company that belongs to a consortium and never objected to the procurement process finds itself, against its will, party to a complaint before the Tribunal.

5. Form H certifies that each member of the consortium fulfils the mandatory requirements set out in the Request for Proposal.

6. Complaint, tab 8.

19. One can only imagine the possible consequences if one of the members of a consortium that submitted a bid objects to the complaint. For example, who would benefit from the remedy if the Tribunal declared a complaint valid? Would the objecting member of the consortium benefit from a remedy that it opposed, or would it be excluded from it, even if trade agreements were breached? Any interpretation that results in a disparity between the identity of the supplier and that of the complainant will inevitably create considerable problems with regard to the Tribunal's complaint resolution process.

20. In the Tribunal's opinion, this situation is not in keeping with the spirit of the *CITT Act*, which provides remedies for the same entities that made, or could have made, a bid in response to any solicitation.

21. The Tribunal notes that a party that does not meet the definition of "potential supplier" may, however, intervene in a matter before the Tribunal. Once the Tribunal has decided to conduct an inquiry into the complaint, section 30.17 of the *CITT Act* permits the Tribunal to give any "interested" party an opportunity to intervene in the complaint proceeding. Whereas a potential supplier will be required to meet certain conditions to be able to file a complaint with the Tribunal (as discussed earlier), in order to qualify as an "interested party" (*intéressée*) a party may, under section 30.1 of the *CITT Act*, either be a potential supplier or merely have a material and direct interest in the matter in question. It follows that it is therefore easier to meet the definition of "interested party" than that of "potential supplier".

22. For these reasons, the majority finds that the Tribunal does not have jurisdiction to conduct an inquiry into this complaint and, therefore, dismisses the complaint.

23. The Tribunal awards CIDA its reasonable costs incurred in responding to the complaint. To determine the amount of the award in this case, it considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of a case based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. The Tribunal's preliminary view is that the level of complexity for this complaint case is between Levels 1 and 2, as stipulated in Appendix A of the *Guideline*. While the nature of the procurement was moderately complex, since it concerned the provision of services for the Support for the Development of Agricultural Productions in Mali project, the level of complexity of the complaint was low, because the Tribunal could decide the complaint on the basis of a single issue, namely, its jurisdiction. The proceedings were moderately complex since it involved one intervener and no motion. However, CIDA could have filed a motion before filing its GIR had it wished to raise the issue of potential supplier, which would have eliminated the need for all the work done on the merits of the complaint in the GIR. Therefore, in accordance with its *Guideline* and owing to the fact that the preliminary indication of the level of complexity of the complaint is between Levels 1 and 2, the Tribunal exercises its discretion, and its preliminary indication of the amount of the award is \$1,700.

Meriel V. M. Bradford

Meriel V. M. Bradford

Presiding Member

Ellen Fry

Ellen Fry

Member

DISSENTING OPINION OF MEMBER FRÉCHETTE

24. With all due respect to my colleagues, I must express my dissent from the foregoing majority order and state the reasons hereunder.

25. It is clear that the definition of the expression “potential supplier” used in section 30.1 of the *CITT Act* is the starting point for the Tribunal’s analysis. On that point, my colleagues and I concur. We do, however, disagree on the meaning and scope of the expression and on how it applies in this case.

26. As has been established many times in Canadian law, the starting point for interpreting and applying the law is the actual wording of the applicable provision, examined in its context in light of the purpose and intent of the law.⁷

27. Section 30.1 of the *CITT Act* actually states that “potential supplier” means the following: “. . . subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.” The regulations made under paragraph 40(f.1) are not relevant here. As to whether the procurement in question constitutes a “designated contract” within the meaning of the *CITT Act*, the question arises, logically, only if the Tribunal determines that it has jurisdiction to continue its analysis beyond the issue that is currently under review. Therefore, in my opinion, the expression “a bidder or prospective bidder” is the part of the definition on which this review turns.

28. Literally, the word “*soumissionnaire*” (bidder) means the following: “. . . *Personne qui fait une soumission . . .*”⁸ (person who makes a bid). The qualifier “*tout*” (a), used immediately before the word “*soumissionnaire*”, should be understood as lending inclusiveness to the expression “*tout soumissionnaire*” (a bidder), within the meaning of “*quelconque soumissionnaire*” (any bidder). The expression “*même potentiel*” (or prospective bidder) that follows the word “*soumissionnaire*” is used to broaden the scope⁹ to include bidders that potentially exist,¹⁰ that is, individuals or companies that have the potential capacity to bid.

29. It follows from the literal meaning of the expression “a bidder or prospective bidder” that any individual or company that has made a bid or that has the potential capacity to do so is a “potential supplier” within the meaning of the *CITT Act*.

30. In my view, nothing in the general context of the *CITT Act* or the *Regulations* militates in favour of an interpretation of the expression that differs from its literal meaning. As for the purpose and intent of the *CITT Act*, it is important to remember that their purpose is to ensure that a procurement review process is put in place, with a view to the transparency, equity and efficiency of the procurement process, so as to further economic development and the federal government’s access to optimal procurement conditions.

31. On that basis, and applying the meaning of the expression “a bidder or prospective bidder” to the facts of this case, it is my opinion that the Alliance constitutes a “bidder” for the purposes of the *CITT Act*, that it has the standing required to file a complaint under section 30.11 and that, therefore, the Tribunal has jurisdiction to continue its analysis of the matter.

7. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002) at 197. See *R. v. Z. (D.A.)*, [1992] 2 S.C.R.C. 1025 at 1042.

8. *Le Petit Robert*, 2002, s.v. “*soumissionnaire*”.

9. *Ibid.*, s.v. “*même*”.

10. *Ibid.*, s. v. “*potentiel*”.

32. It is clearly established that the Alliance is one of the parties that participated in the consortium's bid. The consortium is a group of separate companies that combined their resources and skills for the purposes of the solicitation and the performance of the contract that could result. The complaint was filed by the Alliance without the express participation or authorization of Tecsumt, the other member of the consortium.

33. The question that arises from the review of these facts is whether the Alliance, on its own, without Tecsumt's participation or authorization, has the standing to file the complaint pursuant to section 30.11 of the *CITT Act*.

34. In my opinion, nothing in the *CITT Act* requires the participation of all members of the consortium in order for one of its members, in this case the Alliance, to have sufficient interest to file the complaint in question. The concept of "bidder or prospective bidder" inherently includes the concept of sufficient interest that is at the very root of the processes for triggering judicial and quasi-judicial proceedings in Canada. In employing this concept, the legislator simply wanted to ensure that a party that had participated in a solicitation, or had the potential capacity to do so, would have an appropriate remedy should the solicitation or the contract award not comply with the applicable rules. It is important to point out, for the purposes of this case, that nothing in the concept of "bidder or prospective bidder" or elsewhere in the *CITT Act* or *Regulations* makes this concept conditional on the internal rules of the solicitation.

35. The fact that CIDA imposes specific commitments between the participants to manage its business dealings with the parties that are to perform the contract in no way affects the commercial, economic or legal interest that one of these parties may have in the contract. The joint and several commitment of the members of the consortium to perform the contract is nothing more than what it purports to be, namely, a contractual commitment to CIDA in the event of non-performance of the contract by one of the parties. In fact, one could even conclude that this clause indirectly confirms the separate legal nature of each member of the consortium in every other regard for the purposes of the relationship among the parties.

36. Unlike my colleagues, I believe that the nature of the contractual relationship between the members of the consortium, on the one hand, and between the consortium and CIDA, on the other, is of no relevance for determining whether the Alliance is a "bidder or prospective bidder" and therefore a "potential supplier" for the purposes of the *CITT Act*. It is important only to determine whether the Alliance made a bid. On this question, I agree with the Alliance, namely, that it is one of the parties that made a bid and, in that sense, it is a "bidder".¹¹ The existence of the consortium does not at all change the fact that, from a legal standpoint, the Alliance is one of the participating members which, in the context of the bid, contributes the majority of the resources. In this sense, it has the commercial, economic and legal interest inherent in the concept of "bidder or prospective bidder" and therefore of "potential supplier". Needless to say, in view of this interest, the Alliance has an interest in filing the complaint with the Tribunal, that being said irrespective of the merits of the complaint.

37. Finally, it is my opinion that a contrary interpretation is counter to the purpose and intent of the *CITT Act*. To prevent the Alliance from pursuing a remedy before the Tribunal on the sole ground that the other member of the consortium, Tecsumt, is not participating in it, or even on the ground that it has not specifically authorized it, to my mind deprives the Alliance of a legitimate right to a transparent and equitable procurement process. This strikes me as especially significant given that Tecsumt has never objected to the complaint filed by the Alliance with the Tribunal or to the preliminary internal review procedure initiated at CIDA. Moreover, the fact that Tecsumt is not participating in the Tribunal's

11. There is therefore no need to ask whether it is a "prospective" bidder.

proceedings and the possible impact on the performance of the contract are factors that the Tribunal should not consider, since that issue would arise in the period subsequent to the contract award. In any case, in this regard, one can conclude that Tecsalt has done nothing to indicate any intention of not honouring its commitment to its partners should the Tribunal uphold the complaint.

38. For all these reasons, it is my opinion that the Alliance has the standing of “bidder or prospective bidder” required to file a complaint pursuant to section 30.11 of the *CITT Act* and that, consequently, the Tribunal has jurisdiction to conduct an inquiry into this complaint.

Serge Fréchette

Serge Fréchette

Member