



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-044

Chaussures Régence inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Thursday, April 26, 2007*

*Reasons issued  
Wednesday, June 20, 2007*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS .....1

    COMPLAINT .....1

    PROCUREMENT PROCESS.....1

    TRIBUNAL’S ANALYSIS.....3

        Terminology.....3

        Canadian Content Provision .....4

        Supplementary Question.....5

DETERMINATION OF THE TRIBUNAL .....5

IN THE MATTER OF a complaint filed by Chaussures Régence inc. 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**

**CHAUSSURES RÉGENCE INC.**

**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 not valid.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

The statement of reasons will be issued at a later date.

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## STATEMENT OF REASONS

### COMPLAINT

1. On February 5, 2007, Chaussures Régences inc. (Régence) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. W8486-072900/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of extreme cold weather boots.
2. Régence alleged that PWGSC incorrectly awarded the contract to another bidder and incorrectly applied the Canadian content provision. Régence requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with the successful bidder and issue a new solicitation without the Canadian content provision. It also requested its costs incurred in relation to the complaint and to the preparation of the proposal.
3. On February 12, 2007, 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*.<sup>2</sup>
4. On February 14, 2007, PWGSC informed the Tribunal that a contract had been awarded to AirBoss Engineered Products Inc. (AirBoss). On March 8, 2007, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On March 20, 2007, Régence filed its comments on the GIR.
5. 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

6. On October 26, 2006, PWGSC issued a Notice of Proposed Procurement (NPP) and, on November 2, 2006, issued a Request for Proposal (RFP). On December 2, 2006, Régence communicated with PWGSC to ask why a Canadian content provision had been added to the RFP, since there was none in the previous RFP which was for the provision of boots based on a competitive bidding process. On December 5, 2006, PWGSC responded to Régence, informing it that RFPs are issued on an individual basis and that, in this procurement, it had been decided that this conditional Canadian content provision would be included. PWGSC informed Régence that, if three suppliers submitted bids with valid Canadian content certifications, only those bids would be considered. If not, then all bids received would be considered.
7. The bid closing date was December 14, 2006. PWGSC submitted that five proposals were received in response to the RFP.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

8. The NPP reads as follows:

...

If 3+ bids offer Canadian goods/services other bids will not be considered.

...

9. The RFP reads as follows:

...

**CANADIAN CONTENT CERTIFICATION – CONDITIONALLY LIMITED – SINGLE ITEM OR AGGREGATE BASIS**

1. This procurement is subject to a preference for Canadian Goods and/or Services as defined in clause K4000D.
2. Bids that include this representation and warranty will be given preference over other bids, if there are three or more suppliers who have submitted bids with valid certification.
3. The Bidder represents and warrants that, of the goods and/or services being offered, no less than 80 percent of the bid price consists of Canadian Goods and/or Services, as defined in the clause K4000D, Canadian Content Definition.
4. The Bidder acknowledges that the Minister relies upon such representation and warranty to evaluate bids and to enter into any contract resulting from this bid. Such representation and warranty of Canadian content may be verified in such manner as the Minister may reasonably require.
5. Should a verification by the Minister disclose a breach of such covenant, the Minister shall have the right to treat any contract resulting from this bid as being in default.
6. Failure to execute this representation and warranty on the signature block immediately following this paragraph and to include it with the bid will result in the Goods and/or Services offered being treated as non-Canadian.

10. Clause K4000D, “Canadian Content Definition”,<sup>4</sup> reads as follows:

...

Canadian good: A good wholly manufactured or originating in Canada is considered a Canadian good. A product containing imported components may also be considered Canadian for the purpose of this policy when it has undergone sufficient change in Canada, in a manner that satisfies the definition specified under the North American Free Trade Agreement Rules of Origin (see Supply Manual, Annex 5.5:

<http://www.pwgsc.gc.ca/acquisitions/text/sm/chapter05-e.html#annex5.5>).

...

11. According to PWGSC, AirBoss, Levitt-Safety Limited and Allen-Vanguard Corporation submitted proposals that included signed Canadian content certification statements. Régence and Marathon Management Company (Marathon) did not include signed Canadian content certification statements with their proposals. Pursuant to the Canadian content provision of the RFP, PWGSC determined that, since three bids were submitted with Canadian content certifications, these bids were to be given preference. As a result, PWGSC set aside the bids from Régence and Marathon. On January 25, 2007, the contract was awarded to AirBoss and PWGSC informed Régence of the outcome of the solicitation.

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4. GIR, Exhibit 4.

12. On January 29, 2007, Régence raised concerns about the results of the RFP process. Following discussions with PWGSC, Régence obtained the names of the bidders that had responded to the RFP.

13. On February 5, 2007, Régence filed its complaint with the Tribunal.

### TRIBUNAL'S ANALYSIS

14. 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. In this instance, only the *Agreement on Internal Trade*<sup>5</sup> applies.

### Terminology

15. Régence submitted that there are fewer than three shoe manufacturers in Canada that can manufacture the requested goods. In fact, there is only one, specifically AirBoss, since the three other bidders do not manufacture the requested product but are distributors that offered the same product as AirBoss.

16. Régence submitted that, in her letter to AirBoss dated December 8, 2006, the PWGSC Supply Specialist specifically admitted the following: "To the best of my knowledge, based on previous history, and in discussion with DND I am not aware that three or more Canadian manufacturers exist for this requirement".<sup>6</sup> Given this statement, Régence believes that the contracting officer for this RFP was "of the opinion that there were not at least three Canadian suppliers of goods and/or services" [translation] and that, therefore, the RFP should have been addressed to all bidders.

17. PWGSC submitted that, according to Régence, in giving preference to the three bids with Canadian content certifications, PWGSC did not adhere to the requirements of the RFP because the term "suppliers" in the certification clause must be interpreted as being restricted to "manufacturers" and that the three bidders in question were not all manufacturers.

18. PWGSC submitted that the term "suppliers" is of common usage in procurement matters and is well understood to be broadly inclusive of all parties able to supply the required goods or services, including manufacturers, distributors, dealers, wholesalers and retailers. Accordingly, PWGSC submitted, the onus lies with Régence to demonstrate that the RFP contained clear and sufficient directions to impose on this term, as it is used in the RFP, a special restrictive meaning limiting it to manufacturers.

19. The term "supplier" is defined in Article 518 of the *AIT* as follows:

[S]upplier means a person who, based on an assessment of that person's financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement.

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5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

6. GIR, Exhibit 8.

20. The *CITT Act* states that “potential supplier” means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

21. In the Tribunal’s view, Régence understood the term “supplier” as meaning “manufacturer”. The view that a supplier must be a manufacturer is not supported by the usage of the term in the *AIT*, which, in this case, is the sole trade agreement that applies, nor is it consistent with either common usage or Tribunal jurisprudence. A supplier or potential supplier is an entity that is capable of fulfilling the terms of an RFP. In the Tribunal’s view, this could include distributors, wholesalers, retailers and other potential vendors, in addition to manufacturers. The complaint therefore fails on this ground.

### **Canadian Content Provision**

22. Régence submitted that there has been no change over the past few years in the shoe industry concerning Canadian manufacturers of the requested goods. Therefore, the Canadian content provision should not have been included and, above all, should not have applied to the contract award process.

23. PWGSC submitted that the requirement for bids from a minimum of three “suppliers” of “Canadian goods” is a proper and reasonable requirement, since it reflects a balance, for procurement purposes, between the requirement to restrict the required goods to “Canadian goods” and the need for competition by requiring bids from multiple bidders in order to encourage price competition.

24. PWGSC submitted that the terms of the RFP provided that it was entitled to rely on the validity of the certification of bidders. It further submitted that the RFP required that bidders submit certification of the Canadian content of their goods, that it did not require that bidders provide substantiation of the validity of their certification and that it did not require an evaluation process that would independently determine whether the offered goods did in fact qualify as “Canadian goods”. According to PWGSC, such a verification process would only be initiated where the available information called a certification into question.

25. Article 506(6) of the *AIT* provides the following:

In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

26. The Canadian content provision, which was used as one of the bases for evaluation, was accessible to all bidders, as the pertinent portions were either reproduced in the RFP or incorporated into the RFP by reference.

27. PWGSC received five bids in all. In its GIR, PWGSC provided adequate evidence that three of these included the requisite certification of Canadian content for the goods being offered. In the Tribunal’s view, PWGSC, working within the terms of the RFP, was justified in applying the Canadian content provision and in setting aside those proposals that did not have the certification of Canadian content. The Tribunal is also of the view that PWGSC was not obligated to verify the validity of the certification provided by each bidder and could accept each one at face value. Accordingly, the Tribunal is satisfied that there is no evidence to indicate that, once the Canadian content provision was brought into play, the evaluation was conducted in any manner that was in violation of the terms of the RFP.



28. The Tribunal will not make a determination on the question of whether the Canadian content provision was a reasonable requirement to include within the terms of the RFP. The Canadian content provision would have been known to all bidders before the closing date for the RFP, that is, before December 14, 2006, at the very latest, and any complaint on this ground is long out of time.

29. Accordingly, the Tribunal finds that PWGSC did not breach Article 506(6) of the *AIT*.

### Supplementary Question

30. In its confidential comments on the GIR, Régence's representative raised another question concerning certain characteristics of the bids of certain qualified bidders.<sup>7</sup> This issue was raised in a timely fashion, since its basis was discovered only when the GIR was filed. However, since the Tribunal considers that consideration of this issue does not fall within its jurisdiction nor within the provisions of the *AIT*, the Tribunal cannot make a determination regarding it.

31. In light of the foregoing, the Tribunal determines that Régence's complaint is not valid.

32. In this case, since PWGSC did not request its costs associated with responding to the complaint, the Tribunal will not award costs to PWGSC.

### DETERMINATION OF THE TRIBUNAL

33. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

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7. Confidential comments on the GIR.