



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-007

Valcom Consulting Group Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, June 20, 2007*

*Determination on costs issued
Monday, June 25, 2007*

*Reasons issued
Tuesday, September 18, 2007*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....	i
STATEMENT OF REASONS	1
COMPLAINT	1
PROCUREMENT PROCESS.....	1
TRIBUNAL'S ANALYSIS.....	2
Contracting Consultant—Mr. Delanghe.....	3
Technical Consultant—Mr. Mitton	3
Relationship Between Co Tal Co and Calian	5
Relationship Between Mr. Delanghe and Co Tal Co and Calian.....	5
Relationship Between Mr. Mitton and Co Tal Co and Calian	6
Conclusion.....	6
Costs	6
DETERMINATION OF THE TRIBUNAL	7

IN THE MATTER OF a complaint filed by Valcom Consulting Group 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*;

AND FURTHER TO a hearing held on June 20, 2007, pursuant to subrule 105(1) of the *Canadian International Trade Tribunal Rules*.

BETWEEN

VALCOM CONSULTING GROUP INC.

Complainant

AND

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

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

Merits of the Complaint

(Delivered from the bench at Ottawa, Ontario, on Wednesday, June 20, 2007)

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.

Costs

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Valcom Consulting Group Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is between Levels 2 and 3, and its preliminary indication of the amount of the cost award is \$3,250. 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 in the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 20, 2007
Tribunal Members:	Ellen Fry, Presiding Member Serge Fréchette, Member Zdenek Kvarda, Member
Director:	Randolph W. Heggart
Senior Investigator:	Cathy Turner
Counsel for the Tribunal:	Alain Xatruch
Assistant Registrar:	Marija Renic
Complainant:	Valcom Consulting Group Inc.
Counsel for the Complainant:	Paul Lalonde Martha L. Harrison Judith Parisien Rajeev Sharma
Intervener:	Calian Ltd.
Counsel for the Intervener:	Justine Whitehead Nicholas P. McHaffie
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Christianne M. Laizner Susan D. Clarke Ian McLeod

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On April 16, 2007, Valcom Consulting Group Inc. (Valcom) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W0114-060900/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of driver wheeled training to military personnel.

2. Valcom alleged that the procurement process was compromised by conflicts of interest and a reasonable apprehension of bias involving both the contracting authority (PWGSC) and the technical authority (DND).

3. Valcom requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with Calian Ltd. (Calian) and that it award the contract to Valcom. In the alternative, Valcom requested that the Tribunal recommend that PWGSC compensate it for the profit that it would have received over the course of the contract. In the further alternative, Valcom requested that the Tribunal recommend that PWGSC re-issue the solicitation with a new team to evaluate the proposals. Valcom also requested its costs incurred in preparing and proceeding with the complaint and its bid preparation costs.

4. On April 25, 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*.²

5. On April 27, 2007, PWGSC informed the Tribunal that a contract had been awarded to Calian. On May 14, 2007, the Tribunal granted intervener status to Calian. On May 22, 2007, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 1, 2007, both Valcom and Calian filed their comments on the GIR. On June 7, 2007, Valcom filed its comments on Calian's submission.

6. On June 11, 2007, the Tribunal notified the parties that it would hold a hearing concerning the relationships involving any or all of Mr. Frank Delanghe, Mr. Lorne Mitton, DND, PWGSC, Co Tal Co Inc. (Co Tal Co), Calian and Valcom. The hearing was held on June 20, 2007. On that date, the Tribunal delivered from the bench its determination concerning the validity of the complaint, indicating that reasons and its determination on costs would follow.

PROCUREMENT PROCESS

7. On January 22, 2007, PWGSC issued a Request for Proposal (RFP) for the provision of driver wheeled training to military personnel. The bid closing date was March 5, 2007. PWGSC submitted that, in response to the RFP, three proposals were received. According to PWGSC, the technical evaluation was conducted between March 12 and 16, 2007. The proposals submitted by Valcom and Calian were both deemed compliant. On March 23, 2007, PWGSC informed Valcom that a contract had been awarded to Calian.

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. According to Valcom, on April 3, 2007, it received information that the procurement process had been compromised during the bid preparation stage. On April 9, 2007, Valcom made an objection to PWGSC regarding the award of the contract. On April 16, 2007, Valcom filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

9. 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 instance, are the *Agreement on Internal Trade*,⁴ the *North American Free Trade Agreement*⁵ and the *Agreement on Government Procurement*.⁶

10. Valcom complained that two key individuals involved in the solicitation compromised the bidding process because of an actual or apparent conflict of interest and a reasonable apprehension of bias. Valcom hypothesized that this conflict of interest and reasonable apprehension of bias could have led to improper handling of Valcom's questions during the bidding process, improper handling of Valcom's information, improper influence on the pricing grids and failure of the Crown to disqualify Calian as a non-compliant bidder on the basis that Calian failed to disclose the conflict of interest.

11. If Valcom's allegations proved to be well founded, there would be a violation of the non-discrimination provisions of the trade agreements.

12. In *Prudential Relocation Canada Ltd.*,⁷ the Tribunal set out the test for analysing an allegation of reasonable apprehension of bias:

...

In *Cougar Aviation Ltd. v. Canada*, the Federal Court of Appeal found that, under the *AIT*, the Tribunal's jurisdiction was not limited to complaints of actual bias, but also included the adjudication of allegations of reasonable apprehension of bias. The test applied by the Tribunal in order to determine if the circumstances of this case give rise to a reasonable apprehension of bias is the one set out by de Grandpré, J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*, as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*, which reads 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.

...

[Footnotes omitted]

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

5. *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*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. *Re Complaint Filed by Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT) at 12.

13. Accordingly, the Tribunal will examine the relevant relationships of the two key individuals and their participation in the procurement process to determine whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that, as a result, it was more likely than not that the decision makers in the procurement process would not decide fairly.

Contracting Consultant—Mr. Delanghe

14. At the hearing, the Tribunal heard that, during the period from October 10, 2006, to April 7, 2007, Mr. Delanghe worked under contract with Co Tal Co, which, in turn, was a subcontractor of DAMA Consulting Services Limited (DAMA).⁸ Mr. Delanghe acted as the overall project coordinator for the solicitation and was involved in the preparation of the RFP and the entire tendering process. The evidence did not indicate the specifics of any involvement by Mr. Delanghe in the evaluation process.

15. Valcom alleged that Mr. Delanghe's conflict of interest arose because he was employed by Co Tal Co, which, in turn, had an interest in the success of Calian, a competitor of Valcom, and that Mr. Delanghe therefore had an interest in Co Tal Co's success and an interest in Calian's success.

16. Valcom submitted that, as part of his duties, Mr. Delanghe would have been involved in the question and answer process during the solicitation period and likely was party to the development of responses to bidder questions. Valcom submitted that question and answer No. 11, which is reflected in amendment No. 004, and question and answer Nos. 3, 4 and 5, which are reflected in amendment No. 006,⁹ provide reasonable grounds to believe that the conflict of interest had an effect on decisions made in the solicitation process.

17. Valcom submitted that one of the fundamental requirements of the previous solicitation (which was serviced by Valcom) required that bidders include the résumés of specific individuals who would deliver the training. According to Valcom, the purpose of this requirement was to demonstrate that a company had the qualified resources necessary to undertake the work. Under the circumstances, Valcom submitted that it seems highly suspect that the Crown would initially require this demonstration of capability in the previous solicitation, but exclude it in the subsequent solicitation. In the context of the question and answer process for the solicitation at issue, Valcom questioned the removal of this requirement, as it provided Calian with the advantage of presenting hypothetical capabilities, without having to show that it actually had access to qualified personnel.

Technical Consultant—Mr. Mitton

18. At the hearing, the Tribunal heard that Mr. Mitton provided technical support for the solicitation under a contract with the Crown, but that he did not participate as an evaluator during the bid evaluation process. Mr. Mitton wrote the statement of work for the RFP at issue, which was largely an update of a previous statement of work, and also assisted in answering some of the technical questions posed by bidders during the solicitation process.

19. Valcom submitted that, for the solicitation at issue, bidders were required to complete a pricing table that provided a variety of unit prices for training modules for various vehicles. However, the evaluations were not based on a comprehensive analysis of all items in the table. Only certain selected items in the table would be taken into consideration for the financial evaluation of the proposal. Other items, while

8. PWGSC's submission dated June 15, 2007, Tab 3.

9. Complaint, Exhibit 1.

not evaluated as part of the financial assessment of the bid, would form part of the resulting contract. While the bidders were informed as to which items would be selected for evaluation, key strategic information, such as the actual loading and choice of courses that would be selected by DND, was not known by bidders. Valcom submitted that, having previously contracted with DND, it knows that DND generally operates under an annual plan and that, if a bidder had access to such a plan, it would have had major implications in the bidder's pricing strategy, including where the prices needed to be low to win the contract and where prices could have been higher to make the contract financially viable.

20. Valcom contended that, as members of the solicitation team, Messrs. Mitton and Delanghe were in possession of information such as DND's annual plan for course loading and that, given their relationships with Co Tal Co and Calian, it is also reasonable to conclude that they would have an interest in this information being transmitted to Calian.

21. PWGSC submitted that, with respect to DND's annual course plan, Valcom, as an incumbent provider of the services, had a natural advantage over non-incumbent bidders in terms of assessing future loading and choice of courses.

22. Valcom submitted that it became aware during the solicitation process that copies of its current contract with the Crown were made available to personnel outside of the Technical Authority's office. Valcom contended that, as a result of the Crown's failure to properly secure this information and in light of the information that Valcom received relating to Messrs. Delanghe and Mitton and their close affiliation with Co Tal Co and Calian, there are reasonable grounds to suspect that Valcom's sensitive pricing data may have been provided to Calian, which would have provided it with a significant and unfair advantage in bidding on the solicitation at issue. However, Valcom did not submit evidence that supported these allegations.

23. PWGSC submitted that it has no knowledge of any improper release of Valcom's pricing data. It further submitted that the total evaluated contract price is public information in any solicitation.

24. Valcom submitted that sensitive pricing information must have been discussed between the end user and Mr. Mitton, and it referred to correspondence that it attached in support of its submission.¹⁰

25. Calian submitted that it did not have access to Valcom's confidential pricing information, either directly or indirectly.

26. Valcom alleged that a conflict of interest and a reasonable apprehension of bias arose in relation to Mr. Mitton because Co Tal Co was involved in preparing Mr. Mitton's proposal in response to a solicitation for a project manager position very soon after the closing of the RFP in question and that, therefore, Mr. Mitton has an ongoing relationship with or debt of gratitude to Co Tal Co. Furthermore, Mr. Mitton indicated that, during the solicitation process at issue, he had discussed the upcoming competition for the project manager position with Mr. Delanghe, since he had enquired how things were going with his contract.¹¹ Valcom alleges that Co Tal Co has an interest in Calian's success and, therefore, that Mr. Mitton's relationship with Co Tal Co means that Mr. Mitton has an interest in Calian's success.

10. Confidential comments on the GIR, Exhibit 4.

11. *Transcript of Public Evidence*, 20 June 2007, at 144.

27. PWGSC submitted that Mr. Mitton was unfamiliar with proposal writing and the process of submitting a response to a competitive requirement and that, consequently, he learned about several organizations, including DAMA and Co Tal Co, which could assist him. According to PWGSC, Mr. Mitton selected Co Tal Co because he was previously acquainted with Co Tal Co's President.

Relationship Between Co Tal Co and Calian

28. Neither party submitted that Co Tal Co was a potential bidder on the solicitation at issue. Therefore, any relationship between Mr. Delanghe or Mr. Mitton and Co Tal Co could only be relevant if there were also a relevant relationship between Co Tal Co and Calian, who was the successful bidder. The evidence indicated that both companies, Co Tal Co and Calian, believed that they had good business relationships with each other. However, the evidence indicates that, from 2002 to 2005, Co Tal Co and Calian have only had business relationships on three projects: Co Tal Co acted as Calian's supplier twice, for which the total billing was \$285,000, and Calian acted as Co Tal Co's supplier once, for which the total billing was \$125,000. These amounts are very small in relation to Calian's total revenues.¹² The Tribunal notes that the last contract between Co Tal Co and Calian was for the period from January to March 2005, involving approximately \$8,800 in revenue, of which Co Tal Co's share was \$880, representing 10 percent.

29. Calian does not consider Co Tal Co to be one of its most important business partners. However, Mr. Charles MacDonald, Contract Manager for Calian in the Kingston area, does consider Co Tal Co to be somewhat more important to Calian than the above revenue amounts would suggest, because of Mr. Gerry Coady's¹³ usefulness in providing Kingston business information.¹⁴

30. The Tribunal heard that Co Tal Co, on occasion, referred potential suppliers to Calian, as it did to other companies. About 60 percent of Co Tal Co's business is with government and institutions; the other 40 percent is with private companies such as Calian. Although Co Tal Co has not contracted with Valcom, it has on occasion steered resources in Valcom's direction.¹⁵ Valcom alleged that, in at least one instance, Mr. MacDonald, a Calian employee, also acted on behalf of Co Tal Co. However, in the Tribunal's view, the evidence¹⁶ did not support this allegation.

31. Accordingly, the Tribunal does not consider that the evidence indicates that, during the relevant period, there was a relationship between Co Tal Co and Calian of a closeness that would lead Co Tal Co to have or be likely to have a particular interest in Calian's success, or would make an informed person conclude that Co Tal Co was likely to have a particular interest in Calian's success.

Relationship Between Mr. Delanghe and Co Tal Co and Calian

32. Mr. Delanghe has had no business relationship with Calian. He stated that he owns no shares in Calian or Co Tal Co. Starting in October 2006, Mr. Delanghe worked for Co Tal Co and DAMA, as previously stated. He first met Mr. Coady of Co Tal Co in the fall of 2006. According to Mr. Delanghe, he is listed as a potential resource with two other companies, as well as Co Tal Co. Mr. Delanghe was paid by Co Tal Co for his work concerning the solicitation at issue and had contact with Mr. Coady about twice a month to file a report and to pick up his pay cheque.

12. *Transcript of In Camera Hearing*, 20 June 2007, at 1, 2.

13. Mr. Coady is the President of Co Tal Co.

14. *Transcript of Public Hearing*, 20 June 2007, at 209.

15. *Transcript of Public Hearing*, 20 June 2007, at 80.

16. Public e-mail and attachment submitted during the course of the hearing on June 20, 2007, from Mr. Nicholas P. McHaffie, counsel for Calian.

33. The Tribunal heard that Mr. Delanghe has no financial need to work. He testified that he plans to take the summer off and that, in the fall, he has a job with no connection to Co Tal Co, Calian or DAMA.

34. Accordingly, the Tribunal does not consider that the evidence indicates a relationship between Mr. Delanghe and Co Tal Co or Calian of a closeness that would cause an informed person to conclude that Mr. Delanghe had or was likely to have a particular interest in Co Tal Co's or Calian's success.

Relationship Between Mr. Mitton and Co Tal Co and Calian

35. Mr. Mitton stated that he owns no shares in Calian or Co Tal Co and that he has no relationship with DAMA. According to Mr. Mitton, he met Mr. Coady of Co Tal Co briefly in the time frame 1978 to 1982. He had a short contract with Calian in late 2002, around September until early in 2003. The Tribunal heard that Mr. Mitton was paid small amounts by Calian for work performed in the reasonably recent past, \$3,600 in 2002 and \$500 in 2005.

36. Mr. Mitton's first business communication with Co Tal Co was after the contract award for the solicitation that is the subject of the complaint, around the end of March or early April 2007. Mr. Delanghe testified that he suggested to Mr. Mitton that Co Tal Co could help him with the paperwork for the upcoming competition for the project manager position. Mr. Mitton is now working through Co Tal Co.

37. Accordingly, the Tribunal does not consider that the evidence indicates a relationship between Mr. Mitton and Co Tal Co or Calian of a closeness that would lead an informed person to conclude that Mr. Mitton had or was likely to have a particular interest in Co Tal Co's or Calian's success.

Conclusion

38. Given its conclusions above with respect to the relationships that existed between any and all of Mr. Delanghe, Mr. Mitton, Co Tal Co. and Calian, the Tribunal is unable to conclude that, in the circumstances, the participation of Messrs. Delanghe and Mitton in the current procurement process gave rise to a reasonable apprehension of bias.

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

Costs

40. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that the level of complexity for this complaint case is between Levels 2 and 3, as stipulated in Appendix A of the *Guideline*. The procurement was simple, as it involved the provision of training services for DND. The complaint was of medium complexity, as it dealt with matters of conflict of interest regarding two individuals. The complaint proceedings were complex, as there were multiple submissions from parties and an intervener, and the Tribunal held an oral hearing. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$3,250.

DETERMINATION OF THE TRIBUNAL

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

42. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Valcom. The Tribunal's preliminary indication of the level of complexity for this complaint case is between Levels 2 and 3, and its preliminary indication of the amount of the cost award is \$3,250. 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 in the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Zdenek Kvarda
Zdenek Kvarda
Member