



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2008-002

Colley Motorships Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, August 5, 2008*

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IN THE MATTER OF a complaint filed by Colley Motorships 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

COLLEY MOTORSHIPS 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 compensate Colley Motorships Ltd. for its lost opportunity by an amount equal to one third of the profit that it would have reasonably earned had it been the successful bidder for the provision of private motor vehicle relocation services for the 2008 posting period. The Canadian International Trade Tribunal recommends that, using the average revenue from Colley Motorships Ltd.'s last two years of contracted private motor vehicle relocation services for the Department of National Defence as a base, and then applying a reasonable profit margin, Colley Motorships Ltd. and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, Colley Motorships Ltd. will file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of Colley Motorships Ltd.'s submission to file a response. Colley Motorships Ltd. will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

The Canadian International Trade Tribunal also recommends that the Department of Public Works and Government Services conduct, on behalf of the Department of National Defence, a competitive procurement process, in accordance with the applicable trade agreements, for private motor vehicle relocation services for the 2009 posting period.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Colley Motorships 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 1 and its preliminary indication of the amount of the cost award is \$1,000. 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.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Tribunal Member:	Pasquale Michael Saroli, Presiding Member
Director:	Randolph W. Heggart
Senior Investigator:	Cathy Turner
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Complainant:	Colley Motorships Ltd.
Intervener:	SIRVA Canada LP
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STATEMENT OF REASONS

COMPLAINT

1. On April 2, 2008, Colley Motorships Ltd. (Colley) 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 the addition, by the Department of Public Works and Government Services (PWGSC), of private motor vehicles (PMV) relocation services to an existing contract for the provision of transportation management services on behalf of the Department of National Defence (DND).

2. Colley alleged that PWGSC improperly amended an existing contract pertaining to the provision of personal household goods relocation services to include the provision of PMV relocation services, which had the effect of precluding competition. Colley requested, as a remedy, that the Tribunal recommend that PWGSC terminate the amendment to the existing contract and issue a new competitive solicitation. In the alternative, Colley requested that the Tribunal recommend that PWGSC compensate it for its lost opportunity to profit. Colley also requested its reasonable costs incurred in preparing and proceeding with the complaint.

3. On April 8, 2008, 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

4. On April 10, 2008, PWGSC informed the Tribunal that its existing contract with SIRVA Canada LP (SIRVA) had been amended to provide for the overseas shipment of PMVs. On April 29, 2008, the Tribunal informed SIRVA that it had been granted leave to intervene in the matter. On May 22, 2008, 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 12, 2008, Colley filed its comments on the GIR. On June 13, 2008, SIRVA 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 March 31, 2006, as a result of a competitive process, DND awarded Colley a contract to provide for the overseas shipment of PMVs for DND personnel. This contract expired on February 29, 2008.

7. On May 29, 2006, PWGSC issued a Request for Proposal (RFP) (Solicitation No. W8488-06BBZZ/A) for the execution and management of transportation services in support of the physical movement of the personal household goods of DND personnel. Bids closed on July 17, 2006. On August 28, 2006, PWGSC awarded a contract to SIRVA. This contract is due to expire on October 31, 2009, however, PWGSC has the option to extend the period of the contract by up to three additional one-year periods.

8. On February 29, 2008, SIRVA and PWGSC exchanged correspondence that amended SIRVA's existing contract so as to add the overseas shipment, using containers, of PMVs for DND as a pilot project for one year.

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

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

3. S.O.R./91-499.

9. According to Colley, it learned on March 3, 2008, that DND was going to obtain PMV relocation services from SIRVA. On March 11, 2008, Colley made an objection to DND. On March 19, 2008, DND advised Colley of the amendment to SIRVA's contract.

10. On April 2, 2008, Colley filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

11. 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, is the *Agreement on Internal Trade*.⁴

12. Paragraph 11 of Article 506 of the *AIT* provides that “[a]n entity of a Party may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances, provided that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of any other Party” Subparagraphs 11(a) to (f) of Article 506 go on to describe the circumstances under which a party may use procurement procedures that differ from those described in paragraphs 1 through 10 of Article 506.

13. In its complaint, Colley stated that, when its contract to provide PMV relocation services for DND expired on February 29, 2008, it was expecting that the requirement would be procured through a competition conducted in an open manner. However, it was subsequently advised by DND that, since PMVs were considered personal household goods, for relocation purposes, it had been decided to add the overseas shipment of PMVs to the existing contract with SIRVA for the provision of personal household goods relocation services.

14. In its GIR, PWGSC acknowledged that Colley's complaint respecting the failure to submit the requirement for the overseas shipment of PMVs to competition had merit. To redress the situation, PWGSC submitted that the Tribunal ought to recommend reasonable compensation for Colley's lost opportunity to profit and award Colley its complaint costs.

15. The Tribunal agrees with both Colley and PWGSC that the requirement for PMV relocation services ought to have been the subject of a competition. Based upon a review of the solicitation documents for the procurement process which led to the award of the existing contract between PWGSC and SIRVA for the provision of personal household goods relocation services, it is clear to the Tribunal that the provision of the overseas shipment of PMVs was not contemplated.⁵ As such, the Tribunal is of the view that the addition of a requirement to provide PMV relocation services to SIRVA's existing contract with PWGSC constituted a new procurement that was awarded without competition.

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

5. While the solicitation documents do not appear to contain a definition of the term “personal household goods”, section 2.17 of Annex A, Statement of Work, of the resulting contract attached to the RFP lists automobiles as “. . . non-admissible items . . .”, which are not to be packed or transported by the contractor. The Tribunal notes that paragraph 2.13(b) of Annex A of the resulting contract allows for the transportation of automobiles, but only in respect of their onward transportation from a port of entry into Canada to their final destination and only when other specified conditions are met.

16. By proceeding in the manner in which it did, PWGSC effectively negotiated a sole-source contract with SIRVA for the provision of PMV relocation services, thereby depriving potential suppliers, including Colley, of the opportunity to bid. The Tribunal notes that none of the circumstances described in subparagraphs 11(a) to (f) of Article 506 of the *AIT* exist in the current case. Accordingly, the Tribunal finds that the procurement was not conducted in accordance with Article 506 of the *AIT*.

17. In light of the foregoing, the Tribunal determines that the complaint is valid.

Remedy

18. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the resulting harm to Colley.

19. In recommending a remedy, the Tribunal is governed by subsections 30.15(2) and (3) of the *CITT Act*, which stipulate 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.

20. Therefore, in recommending an appropriate remedy in this case, the Tribunal considered, in accordance with subsection 30.15(3) of the *CITT Act*, all the circumstances relevant to the procurement at issue. In doing so, the Tribunal also considered the submissions made by Colley, PWGSC and SIRVA with respect to possible remedies.

21. In the Tribunal's opinion, the fact that PWGSC decided not to contest, but instead acknowledged, the validity of the complaint is indicative of the seriousness of the deficiency in the procurement process in this case. Moreover, while PWGSC and DND should not be precluded, *a priori*, from maximizing "value for money" through the appropriate consolidation of procurement requirements, including through the use of existing contract vehicles where the scope of such vehicles legitimately encompasses the procurement requirements in question, this is not the case here, given that a violation of the *AIT* has occurred, with the integrity of the competitive procurement system having been brought into question as a result.

22. With respect to the prejudice caused to Colley, the Tribunal firmly believes that, based on the parties' submissions, PWGSC knew that Colley's PMV relocation business with DND represented a significant part of the company's revenue base and that unfairly depriving it of this business would likely be seriously prejudicial to the company's financial interests.

23. In its GIR, PWGSC submitted that Government of Canada officials acted in good faith and that PWGSC issued the contract amendment to SIRVA in an attempt to address certain concerns in the context of an essential and increasingly urgent operational requirement. In response, Colley submitted that Government of Canada officials did not act in good faith and that PWGSC issued the impugned amendment to SIRVA's contract as a result of inadequate advance planning by DND, in spite of the fact that it had two years of lead time to prepare a competitive procurement process. Although it is clear that mistakes were made, the Tribunal is unable to conclude, on the basis of the evidence before it, that there was a lack of good faith on the part of PWGSC or DND.

24. With respect to the current provision of PMV relocation services by SIRVA, PWGSC submitted that the posting period for the movement of DND personnel runs approximately from May to October and that, as such, it is a vital operational requirement for the Crown that PMV relocation services be available for DND personnel throughout this period, i.e. from May 2008 to October 2008. Therefore, PWGSC requested that the Tribunal recommend that existing operational arrangements through the amendment to SIRVA's contract remain in place until the end of the 2008 posting period. For its part, SIRVA submitted that it had already performed a substantial amount of work under the amended contract and that termination of the amendment would cause significant service interruption and disruption to DND personnel, as well as prejudice to itself. Colley agreed that the termination of the contract amendment is no longer realistic, as the posting period is already well under way. The Tribunal agrees and, therefore, will not recommend that the contract amendment be terminated.

25. In their submissions, both PWGSC and Colley agreed that, for the 2009 posting period, the procurement of PMV relocation services on behalf of DND should be conducted through a competitive process. The Tribunal also agrees. Accordingly, the Tribunal recommends that PWGSC conduct, on behalf of DND, a competitive procurement process, in accordance with the applicable trade agreements, for PMV relocation services for the 2009 posting period.

26. In light of the above considerations, the Tribunal recommends that PWGSC compensate Colley for its lost opportunity to profit on the provision of PMV relocation services for the 2008 posting period. The Tribunal notes that, according to PWGSC, in the last competitive process for the provision of PMV relocation services which resulted in a contract with Colley, there were three bidders. However, PWGSC submitted that there may be more bidders interested in the new solicitation as two methods of shipment will be allowed.⁶ In the absence of any supporting information or evidence in this respect, the Tribunal will not speculate as to the number of potential bidders for the future competitive procurement process and, therefore, will rely on the known number of bidders from the last competitive process. While Colley argued that compensation that is based on the likely number of bidders is unfair, the Tribunal is of the view that such an approach is appropriate in the circumstances and adequately reflects what would have been Colley's probability of success. As such, the Tribunal recommends that PWGSC compensate Colley for its lost opportunity by an amount equal to one third of the profit that it would have reasonably earned had it been the successful bidder for the provision of PMV relocation services for the 2008 posting period.

6. GIR at 6.

27. PWGSC submitted that, had a competitive process been carried out with respect to DND's requirements for the 2008 posting period, it would have allowed for two methods of overseas shipment of PMVs. In its view, this would have resulted in cost savings to the Crown. Again, in the absence of any supporting information or evidence to this effect, the Tribunal will not speculate as to the amount of savings which potentially could have been realized had PWGSC proceeded with a competitive process.

28. Finally, it may be that, had the DND requirement for PMV relocation services been made the subject of a competition, and had Colley been the successful bidder, it would have garnered a certain amount of additional spin-off business relating to the transfer of secondary vehicles at the private expense of DND personnel. However, given that any revenue deriving from such spin-off business activity involves transactions falling outside the government-contracted services in dispute and that Colley was not precluded from pursuing this other business, the Tribunal is not prepared to consider the loss of these other anticipated gains as compensable.

29. Consequently, the Tribunal recommends that, using the average revenue from Colley's last two years of contracted PMV relocation services for DND as a base, and then applying a reasonable profit margin, Colley and PWGSC negotiate the amount of compensation and, within 30 days of the date of the determination, report back to the Tribunal on the outcome.

Costs

30. The Tribunal awards Colley its reasonable costs incurred in preparing and proceeding with 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 this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The complexity of the procurement was low, in that it related to the provision of PMV relocation services by way of an amendment to an existing contract. The complexity of the complaint was low, as it only dealt with the matter of whether or not PWGSC improperly amended the contract with SIRVA. Finally, the complexity of the complaint proceedings were also low, as PWGSC agreed that the complaint had merit, there was only one intervener, and no additional submissions from parties were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

32. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC compensate Colley for its lost opportunity by an amount equal to one third of the profit that it would have reasonably earned had it been the successful bidder for the provision of PMV relocation services for the 2008 posting period. The Tribunal recommends that, using the average revenue from Colley's last two years of contracted PMV relocation services for DND as a base, and then applying a reasonable profit margin, Colley and PWGSC negotiate the amount of compensation and, within 30 days of the date of the determination, report back to the Tribunal on the outcome.

33. Should the parties be unable to agree on the amount of compensation, Colley will file with the Tribunal, within 40 days of the date of the determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of Colley's submission to file a response. Colley will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

34. The Tribunal also recommends that PWGSC conduct, on behalf of DND, a competitive procurement process, in accordance with the applicable trade agreements, for PMV relocation services for the 2009 posting period.

35. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Colley 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 1 and its preliminary indication of the amount of the cost award is \$1,000. 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.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member