Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-008R

Northrop Grumman Overseas Services Corporation

v.

Department of Public Works and Government Services

Determination and reasons issued Wednesday, December 2, 2009

Canada

TABLE OF CONTENTS

IN THE MATTER OF a complaint filed by Northrop Grumman Overseas Services Corporation 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*;

AND FURTHER TO a determination of the Canadian International Trade Tribunal dated August 30, 2007, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act* relative to the complaint;

AND FURTHER TO an order of the Canadian International Trade Tribunal dated June 8, 2007, dismissing the motion filed by the Department of Public Works and Government Services on May 2, 2007, for an order dismissing the complaint on the ground that Northrop Grumman Overseas Services Corporation does not have standing to file a complaint under the *Agreement on Internal Trade*;

AND FURTHER TO a judgment of the Federal Court of Appeal dated May 22, 2008, that set aside the Canadian International Trade Tribunal's determination dated August 30, 2007, and that referred the matter back to the Canadian International Trade Tribunal instructing it to determine whether Northrop Grumman Overseas Services Corporation is a "Canadian supplier" under the *Agreement on Internal Trade*;

AND FURTHER TO a decision of the Supreme Court of Canada dated November 27, 2008, granting Northrop Grumman Overseas Services Corporation leave to appeal from the judgment of the Federal Court of Appeal dated May 22, 2008;

AND FURTHER TO a decision of the Supreme Court of Canada dated November 5, 2009, upholding the judgment of the Federal Court of Appeal dated May 22, 2008.

BETWEEN

NORTHROP GRUMMAN OVERSEAS SERVICES CORPORATION	**Complainant**

AND

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

DETERMINATION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby determines that Northrop Grumman Overseas Services Corporation is not a "Canadian supplier" under the *Agreement on Internal Trade*. Consequently, Northrop Grumman Overseas Services Corporation cannot claim the benefit of the *Agreement on Internal Trade*. Therefore, the Canadian International Trade Tribunal concludes that it did not have jurisdiction to commence an inquiry into the complaint.

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 Northrop Grumman Overseas Services Corporation. 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.

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André F. Scott
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Dominique Laporte
Dominique Laporte
Secretary

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STATEMENT OF REASONS

SUMMARY

1. This determination on remand is further to a judgment of the Federal Court of Appeal,[1] which was upheld by the Supreme Court of Canada in its decision dated November 5, 2009.[2] The issue in this matter is whether Northrop Grumman Overseas Services Corporation (Northrop) is a "Canadian supplier" under the *Agreement on Internal Trade*.[3] As explained below, in accordance with the instructions and guidance received from the Federal Court of Appeal, the Canadian International Trade Tribunal (the Tribunal) has determined that Northrop is not a "Canadian supplier" under the *AIT* and, consequently, that the Tribunal did not have jurisdiction to commence an inquiry in File No. PR-2007-008. Accordingly, the complaint is dismissed with costs awarded to the Department of Public Works and Government Services (PWGSC) in accordance with the Tribunal's preliminary indication of the amount of the cost award.

BACKGROUD

Tribunal's Inquiry in File No. PR-2007-008

2. On April 17, 2007, Northrop filed a complaint with the Tribunal pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[4] The complaint concerned the procurement by PWGSC (Solicitation No. W8475-02BA01/C), on behalf of the Department of National Defence (DND), for the initial supply of 36 advanced multi-role infrared sensor targeting pods for DND's CF-18s and 13 years of in-service support for the pods.

3. On April 25, 2007, the Tribunal informed the parties that it had accepted the complaint for inquiry, 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*.[5] It is not disputed that the solicitation, while not covered by the *Agreement on Government Procurement*[6] or the *North American Free Trade Agreement*,[7] was covered by the *AIT*. A preliminary question arose, however, as to whether Northrop had standing to file a complaint under section 30.11 of the *CITT Act*, alleging a violation of Article 506(6) of the *AIT*.

4. In its letter to PWGSC dated April 25, 2007, the Tribunal requested that PWGSC provide a submission regarding the Tribunal's jurisdiction, given that the only relevant trade agreement was the *AIT* and that Northrop appeared to be a company based in the United States. On May 2, 2007, PWGSC provided the Tribunal with its comments and brought a motion requesting an order of the Tribunal dismissing the complaint, on the basis that Northrop did not have standing to file such a complaint under the *AIT*. On May 7, 2007, Northrop filed its comments on PWGSC's submission. On May 9, 2007, PWGSC filed its final comments on the matter. On June 8, 2007, the Tribunal determined that it had jurisdiction to conduct

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1. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.*, [2009] 1 F.C.R. 688 [*Northrop*].
2. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII).
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
4. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
5. S.O.R./93-602 [*Regulations*].
6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.
7. *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).

an inquiry and issued an order dismissing PWGSC's motion. The reasons for that order were issued on September 12, 2007, as part of the Tribunal's statement of reasons relating to its determination on the merits of the complaint.[8]

5. Subsequently, the Attorney General of Canada made an application for judicial review to the Federal Court of Appeal on behalf of PWGSC.

Judgment of the Federal Court of Appeal

6. The sole issue before the Federal Court of Appeal dealt with whether the Tribunal had jurisdiction to hear the complaint. The majority of the Federal Court of Appeal likened the trade agreements to "doors" into the Tribunal's jurisdiction. According to the Federal Court of Appeal, "[a] potential complainant in respect of a procurement may pass through a 'door' and thereby gain access to the [Tribunal's] complaint procedure, by demonstrating that the subject matter of the procurement is within the scope of one of the trade agreements and that the activity contemplated by that potential complainant is covered by, or within the scope of, that agreement." The Federal Court of Appeal stated that the "door" to the only applicable trade agreement in issue, the *AIT*, ". . . will only be open to [Northrop] if it can demonstrate that it is a Canadian supplier that would be engaged in a procurement within Canada, as required by Article 502(1), if it were to be awarded the contract contemplated by the [Request for Proposal]."[9]

7. The judgment of the Federal Court of Appeal set out the legal framework for its analysis as follows. Section 30.11 of the *CITT Act* provides for the filing of a complaint by a "potential supplier" relative to a "designated contract". Subsection 3(1) of the *Regulations* defines a "designated contract" as ". . . any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described . . . in Article 502 of the [*AIT*] . . . by a government institution . . . ." Article 502 of the *AIT* states that Chapter Five of the *AIT* concerning "Procurement" ". . . applies to measures adopted or maintained by a Party [to the *AIT*] relating to procurement within Canada . . . ." The Federal Court of Appeal stated that ". . . the 'within Canada' requirement in Article 502 will be met by any entity that meets the requirements of the definition of Canadian supplier", which is defined by Article 518 of the *AIT* as ". . . a supplier that has a place of business in Canada". According to the Federal Court of Appeal, that definition does not contain a nationality requirement and, therefore, Canadian ownership and control are not necessary for establishing status as a "Canadian supplier" but rather only establish a geographical requirement of a "place of business" in Canada, a notion akin to the concept of "permanent establishment" in tax law.[10]

8. The Federal Court of Appeal addressed the consequences for Northrop in the event that the Tribunal were to determine, on remand, that Northrop did not meet the definition of "Canadian supplier". The consequences would be as follows: (1) Northrop would not be able to meet the "within Canada" requirement of Articles 101(1) and 502(1) of the *AIT*; (2) as a result of (1), Northrop would not be able to demonstrate that, in these circumstances, the "designated contract" requirement was met; and (3) as a result of (2), it would follow that Northrop would not meet the definition of "potential supplier", since that definition contemplates an actual or prospective bid on a "designated contract".[11]

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8. *Re Complaint Filed by Northrop Grumman Overseas Services Corporation* (30 August 2007), PR-2007-008 (CITT). On the jurisdictional issue, see paras. 9-47; on the merits, the Tribunal found the complaint valid in part. On May 1 and 21, 2007, respectively, Lockheed Martin Corporation (Lockheed) and Raytheon Company (Raytheon) requested intervener status in the proceedings. The Tribunal granted both requests. On July 3, 2007, PWGSC filed the Government Institution Report (GIR). On July 13, 2007, Northrop and Lockheed submitted their comments on the GIR. On July 19, 2007, PWGSC requested that it be allowed to submit additional comments, arguing that Northrop had introduced new arguments in its comments on the GIR. On July 23, 2007, Northrop filed its final comments.
9. *Northrop* at para. 85.
10. *Northrop* at para. 61.
11. *Northrop* at para. 81.

9. The judgment of the Federal Court of Appeal was as follows:

> . . . set aside the decision of the [Tribunal] and refer the matter referred back to the [Tribunal] to determine whether Northrop Overseas is a Canadian supplier.[12]

Tribunal's Inquiry on Remand and Proceedings in the Supreme Court of Canada

10. On June 5, 2008, the Tribunal received correspondence from Northrop requesting an opportunity to make submissions further to the judgment of the Federal Court of Appeal, as well as correspondence from PWGSC dated June 9, 2008, opposing this request. Northrop replied to PWGSC on June 10, 2008. Lockheed and Raytheon made no submissions.

11. On June 12, 2008, the Tribunal wrote the parties granting them the opportunity to make submissions and setting out filing deadlines in relation to the specific direction given to the Tribunal by the Federal Court of Appeal, i.e. with respect only to whether Northrop is a "Canadian supplier". Northrop filed submissions on June 18, 2008. PWGSC filed submissions on June 25, 2008. Lockheed filed submissions on June 26, 2008. No submissions were received from Raytheon. Northrop filed reply submissions on July 2, 2008.

12. The Tribunal transferred the record of its inquiry in File No. PR-2007-008 to the file in this matter.

13. On August 20, 2008, Northrop filed an application under section 40 of the *Supreme Court Act*[13] for leave to appeal from the judgment of the Federal Court of Appeal. The Supreme Court of Canada granted this application on November 27, 2008. The Tribunal therefore held its inquiry on remand in abeyance pending the disposition of the proceeding in the Supreme Court of Canada. With the Supreme Court of Canada having upheld the judgment of the Federal Court of Appeal in its decision dated November 5, 2009,[14] the Tribunal resumed its inquiry on remand.

ANALYSIS

14. According to the evidence presented by Northrop, Northrop is a U.S. corporation incorporated in Delaware; it is a wholly owned subsidiary of Northrop Grumman Corporation (Northrop Parent). Northrop Parent is also a U.S. corporation incorporated in Delaware. Northrop Grumman Canada (2004) Inc. (Northrop Canada) is a Canadian corporation that is a subsidiary of Northrop Parent. Northrop and Northrop Canada are therefore sister corporations within the Northrop Parent.

15. Of the members of the Northrop group of companies alluded to in this matter, only Northrop submitted a bid with respect to the solicitation. In this regard, the Tribunal notes that, while Northrop is a wholly owned subsidiary of Northrop Parent, the two are distinct legal entities. The Tribunal further notes that Northrop did not allege that its sister company, Northrop Canada, had any involvement whatsoever in its bid relative to the solicitation, or any prospective role in the delivery of the goods and services in issue.[15] In this regard, Northrop and Northrop Canada are also distinct legal entities.

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12. *Northrop* at para. 86.
13. R.S.C. 1985, c. S-26.
14. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII).
15. A reference is made to Contract No. W8482-071072/001/QC, dated December 20, 2006, between PWGSC and Northrop that Northrop Canada and Northrop entered into an agreement, which provided that equipment that was the subject of that contract could be delivered to the Government of Canada through Northrop Canada. However, there is no reference to any similar type of agreement between Northrop and Northrop Canada in relation to the provision of the goods and services that are the subject of the procurement in issue.

16. The Tribunal also noted that it was not alleged that Northrop Parent had a "place of business" in Canada. The Tribunal also finds that there was no possibility of Northrop claiming a place of business in Canada by virtue of its relationship with its sister company, Northrop Canada, and their common filiations with Northrop Parent. The Tribunal finds that the record contains no indication whatsoever that Northrop has a "place of business" in Canada, as defined by the *AIT*. Indeed, never, either during these remand proceedings, before the Federal Court of Appeal or during the inquiry in File No. PR-2007-008, did Northrop submit evidence to the contrary.

17. Northrop first argued that it has standing ". . . on the grounds that, if it were the successful bidder in the procurement, the resulting contracts [would] constitute a 'procurement in Canada' and that Northrop would sufficiently effectuate its obligations under the procurement in Canada so as to meet the 'procurement in Canada' criteria under the *AIT*."[16] As to the particular measures that would have been taken to "effectuate its obligations" had it been the successful bidder, Northrop pointed to various elements of its proposal relative to the "Acquisition Contract", the "In-Service Support Contract—Support for Pylon", employees to be located in Canada and its "Industrial Regional Benefits" commitments.[17]

18. In the alternative, Northrop also argued that standing ". . . should be determined on the basis of whether or not a 'Canadian Supplier' is adversely affected by the alleged breach of the *AIT*. In the present case, Canadian Suppliers, *other than Northrop*, are adversely affected by the Government of Canada's [alleged] breach of the *AIT*" [emphasis added].[18]

19. In the Tribunal's view, these arguments by Northrop do not address the Federal Court of Appeal's direction to the Tribunal and the Tribunal's related direction to the parties with respect to these remand proceedings and must therefore be rejected.

20. First, the submissions made by Northrop relating to the possibility of it being able to "effectuate its obligations" so as to meet the "procurement in Canada" criteria of the *AIT* ignores the clear indication given by the Federal Court of Appeal that the only "door" to the *AIT* is a "place of business" in Canada.

21. Second, with respect to Northrop's alternative argument, even if Northrop entered into subcontracts with suppliers that meet the definition of "Canadian supplier", as it claims it would have done had it been the successful bidder, this would still not confer upon Northrop a "place of business" in Canada pursuant to the definition in Article 518 of the *AIT*. The Tribunal is of the view that the rights and obligations created by the *AIT* only extend to the government institution and Canadian suppliers directly involved. Consequently, any detrimental effect on subcontractors would not bear upon the matter in issue.

22. Accordingly, in the absence of a "place of business" in Canada at the time of the bidding process, the Tribunal finds that Northrop *is not* a "Canadian supplier" and, therefore, determines that it did not have the jurisdiction to commence an inquiry into Northrop's complaint.

COSTS

23. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the medium level of complexity referred to in Appendix A of the

16. Submission by Northrop dated June 18, 2008, at 2.
17. Submission by Northrop dated June 18, 2008.
18. *Ibid.* at 2.

Guideline (Level 2). 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 high, in that it involved the procurement of a complex item and included elements of installation and maintenance. The complexity of the complaint was medium, in that it involved ambiguous specifications. Finally, the complexity of the complaint proceedings was medium, as there was one motion, there were two interveners, there was no public hearing, a 135-day time frame was required, and the parties were given permission to file information beyond the normal scope of proceedings. On remand, although the parties had already had ample opportunity to address the issue previously, the parties were afforded the opportunity to make additional submissions with respect to the very circumscribed question that arose from the judgment of the Federal Court of Appeal. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $2,400.

DETERMINATION OF THE TRIBUNAL

24. The Tribunal hereby determines that Northrop is not a "Canadian supplier" pursuant to the *AIT*. Therefore, Northrop cannot claim the benefit of the *AIT*. Accordingly, the Tribunal concludes that it did not have jurisdiction to commence an inquiry into the complaint.

25. 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 Northrop. 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.

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