



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## ORDER AND REASONS

File No. PR-2007-087

Canadian Bio Services (Groupe  
Bio Services Inc.)

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Monday, May 12, 2008*

**TABLE OF CONTENTS**

ORDER .....i

STATEMENT OF REASONS .....1

    COMPLAINT .....1

    MOTION .....2

    ANALYSIS .....3

IN THE MATTER OF a complaint filed by Canadian Bio Services (Groupe Bio Services 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 IN THE MATTER OF a motion filed by the Department of Public Works and Government Services for an order dismissing the complaint on the ground that the Canadian International Trade Tribunal does not have jurisdiction to conduct an inquiry into the procurement at issue.

**BETWEEN**

**CANADIAN BIO SERVICES (GROUPE BIO SERVICES INC.)**

**Complainant**

**AND**

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

**Government Institution**

**ORDER**

Pursuant to paragraph 10(b) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

---

Tribunal Member:	Serge Fréchette, Presiding Member
Research Director:	Randolph W. Heggart
Senior Investigator:	Michael W. Morden
Investigator:	Josée B. Leblanc
Counsel for the Tribunal:	Dominique Laporte
Complainant:	Canadian Bio Services (Groupe Bio Services Inc.)
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Alexandre Kaufman Alexander Gay 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](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### COMPLAINT

1. On February 22, 2008, Canadian Bio Services (Groupe Bio Services Inc.) (CBS) 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 for the biological control of biting insects that it believed had been conducted by Defence Construction Canada (DCC).
2. CBS alleged that DCC had awarded a contract without notice and without an invitation to tender. As a remedy, CBS asked that a fair invitation to tender be conducted and that an external, impartial evaluation committee be formed to ensure the proper conduct of a public tendering process.
3. On February 27, 2008, the Tribunal notified 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> The Tribunal also issued, pursuant to subsection 30.13(3) of the *CITT Act*, a postponement of award order pertaining to this procurement until it could determine the validity of the complaint.
4. On March 3, 2008, DCC informed the Tribunal that it was not the contracting authority for this procurement.
5. On March 5, 2008, the Tribunal issued a rescission of the postponement of award order issued on February 27, 2008.
6. On March 5, 2008, the Tribunal asked CBS which government institution, in its opinion, was responsible for this procurement. On March 10, 2008, CBS responded that DCC had informed it that the contracting authority was the Department of Public Works and Government Services (PWGSC) and that PWGSC had awarded a contract to Serco Facilities Management Inc. (Serco).
7. Thus, on March 11, 2008, the Tribunal informed PWGSC 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 *Regulations*. It also issued, pursuant to subsection 30.13(3) of the *CITT Act*, a postponement of award order pertaining to this procurement until it could determine the validity of the complaint.
8. On March 19, 2008, PWGSC informed the Tribunal that the complaint did not involve a procurement by a government institution, but was instead a contract between two private companies, namely, Serco and GDG Environnement Ltée.
9. On March 25, 2008, the Tribunal issued a rescission of the postponement of award order issued on March 11, 2008, further to a request from PWGSC under subsection 30.13(4) of the *CITT Act*, asserting that delivery of the biting insect control program was urgent and that a delay would be contrary to the public interest.

---

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

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

**MOTION**

10. On April 2, 2008, PWGSC filed a motion with the Tribunal, pursuant to section 24 of the *Canadian International Trade Tribunal Rules*,<sup>3</sup> requesting that the Tribunal dismiss the complaint on the basis that this procurement was not a procurement relating to a "... designated contract ..." within the meaning of subsection 30.11(1) of the *CITT Act* and under the definition of the expression "designated contract" in subsection 3(1) of the *Regulations*, referring to Article 1001 of the *North American Free Trade Agreement*,<sup>4</sup> Article 1 of the *Agreement on Government Procurement*<sup>5</sup> and Article 502 of the *Agreement on Internal Trade*.<sup>6</sup>

11. PWGSC submitted that, on February 24, 2003, it had awarded a competitive contract for the management of facilities at the Goose Bay military base in Labrador. According to PWGSC, the contract was large-scale and included the management of almost all the services required for the operation of the military base, including food, snow removal, janitorial and other services. PWGSC stated that the contract, with an 11-year term, was awarded to Serco.

12. PWGSC submitted that section 2.0 of Annex B of the contract, Basis of Payment, provided that certain services required approval from the Department of National Defence (DND) before delivery. According to PWGSC, the contract specifically set out that the contractor could carry out this work by either using its own staff or hiring subcontractors:

**2.0 Indefinite Quantities**

At DND's discretion, IQ [indefinite quantities] could be carried out in one of two ways under the contract, namely: using the Contractor's staff or by subcontracting.

13. PWGSC submitted that, according to the contract, DND must authorize biological spraying against biting insects once a year. Again according to PWGSC, if the authorization is given, DND cannot tell Serco by whom the work is to be done; it can only authorize the biological spraying if it is required, from year to year.

14. According to PWGSC, Serco had entered into a private competitive contract before the closing date of the aforementioned competitive contract to retain the services of a subcontractor able to deliver the biting insect control program. According to PWGSC, this contract was carried out without any participation by a government institution referred to in the trade agreements. According to PWGSC, it is not a designated contract within the meaning of the *CITT Act*.

15. PWGSC also relied on section 3 of the *Regulations*, which reads as follows:

3. (1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

---

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

4. *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].

5. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [AGP].

6. 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].

(2) For the purposes of the definition “government institution” in section 30.1 of the Act, the following are designated as government institutions:

a) the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of NAFTA, under the heading “CANADA” in Annex 502.1A of the Agreement on Internal Trade or under the heading “CANADA” in Annex 1 of the Agreement on Government Procurement;

...

16. CBS argued that, even though PWGSC contracted the private company Serco for management of facilities and purchasing services at the Goose Bay military base for an 11-year period, this does not release PWGSC from enforcing the Canadian procurement rules when giving subcontractors a contract to manage public funds. According to CBS, it is unacceptable for a contract of this extent to be renewed every year for 11 years without the slightest compliance with the rules of contract awarding and healthy competition. Again according to CBS, this monopoly situation runs counter to Canadian laws by allowing a single firm to obtain the experience and expertise in carrying out this contract.

## ANALYSIS

17. Subsection 7(1) of the *Regulations* sets out three conditions that must be satisfied before the Tribunal may conduct an inquiry in respect of a complaint. One of the conditions is that the complaint be in respect of a designated contract.

18. A designated contract, according to section 3 of the *Regulations*, is defined in part as a contract concerning a procurement of goods or services by a government institution. In addition, subsection 3(2) defines a government institution, in part, as one of the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of *NAFTA*, in Annex 502.1A of the *AIT* under the heading “CANADA” or in Annex 1 of the *AGP* under the heading “CANADA”.

19. Pursuant to paragraph 10(b) of the *Regulations*, the Tribunal may, at any time, order the dismissal of a complaint on the grounds that it is not in respect of a procurement by a government institution.

20. Subsection 30.11(1) of the *CITT Act* reads as follows:

Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

21. The *CITT Act* defines “designated contract” as a “contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contract designated by the Regulations”.

22. Subsection 3(1) of the *Regulations* reads as follows:

For the purposes of the definition “designated contract” in section 30.1 of the [CITT] Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

23. It is important to point out that the contract awarded for the management of facilities at the Goose Bay military base is a “designated contract”, but it is clear from the facts in the case that Serco relied on a subcontractor for delivery of the services relating to the control of biting insects, and that this second contract is not a “designated contract”. The Tribunal is of the opinion that using a subcontractor is common practice and awarding such a contract is in no way a violation of the applicable trade agreements.

24. Moreover, there is no evidence on the record indicating that Serco was acting as PWGSC’s agent when contracting for the portion of the services relating to the control of biting insects. The Tribunal must point out that the principal procurement contract, which included the biting insect control component, was awarded pursuant to a competitive tendering process.

25. In light of the foregoing, it is clear to the Tribunal that the contract in question is between two private companies and cannot be considered a “designated contract” as defined by the *CITT Act* and in accordance with the requirements of Chapter Ten of *NAFTA*, the *AGP* or Chapter 5 of the *AIT*.

26. Consequently, the Tribunal does not have jurisdiction to conduct an inquiry into this procurement and hereby dismisses the complaint.

Serge Fréchette  
Serge Fréchette  
Presiding Member