



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-013

Siva & Associates Inc.

*Decision issued  
Thursday, May 15, 2008*

*Reasons issued  
Thursday, May 29, 2008*

IN THE MATTER OF a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

**BY**

**SIVA & ASSOCIATES INC.**

**AGAINST**

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

**DECISION**

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

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

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint.
2. The complaint relates to a procurement (Solicitation No. W8482-087067/A) by the Department of Public Works and Government Services (PWGSC) for the provision of gate valves on behalf of the Department of National Defence.
3. Siva & Associates Inc. (Siva) alleged that PWGSC improperly restricted competition to those suppliers that had already obtained a certificate of shock testing for the required products.
4. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.” Subsection 6(2) provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”
5. In other words, a complainant has 10 working days from the date on which it first becomes aware (or reasonably should have become aware) of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.
6. PWGSC issued the Request for Proposal (RFP) on March 27, 2008. It was mandatory that all products proposed successfully meet the testing requirements of specification D-03-003-007/SG-000 Grade 1 Type A prior to bid closing. If a bidder proposed an equivalent product, it was to provide a copy of the successful certificate of shock testing and an acceptable drawing with certification of shock testing with the bid or within seven calendar days upon written request of the contracting authority.
7. On April 4, 2008, Siva requested that PWGSC amend the RFP to allow for the provision of the shock test specifications with the supply of the product and for the provision of proof of previous shock test reports for a different size of valve. On April 14, 2008, PWGSC advised Siva that the mandatory requirement relating to the submission of a certificate of shock testing would not be changed.
8. In order for a complaint to have been filed with the Tribunal in accordance with the time frame provided for in subsection 6(2) of the *Regulations*, Siva would have needed to file a complaint with the Tribunal within 10 working days from the date on which it received its denial of relief, which was

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

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

April 14, 2008, the date on which PWGSC advised Siva that the mandatory requirement would not be changed. Siva filed its complaint with the Tribunal on May 9, 2008, 19 working days after receiving denial of relief from PWGSC. Consequently, the Tribunal is of the view that Siva failed to file its complaint with the Tribunal within the prescribed time limit.

9. Even if the complaint were not time-barred, the information before the Tribunal does not disclose a reasonable indication, within the meaning of paragraph 7(1)(c) of the *Regulations*, that the procurement was not conducted in accordance with the trade agreements (as applicable, Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*<sup>4</sup> or the *Agreement on Government Procurement*<sup>5</sup>).

10. The Tribunal has stated in a previous decision that, “. . . while PWGSC has the right to establish the parameters of an RFP, it must do so reasonably. PWGSC does not have licence to establish conditions that are impossible to meet . . . .”<sup>6</sup> In the present circumstances, the Tribunal is of the view that PWGSC’s requirement for the shock test certification of the actual valve being procured is not unreasonable, as it should not be expected to accept parts whose operational performance is unproven, especially in light of safety, environmental and related considerations. PWGSC’s refusal to accept proof of a previous shock test report for a different size of valve is therefore not unreasonable.

11. As to the process in place, PWGSC required bidders either to provide shock test certification when their proposals were submitted or to provide the certification within seven days of being requested to do so. The Tribunal finds that this is not an unreasonable requirement, as it allows for the consideration of equivalent products that meet the mandatory requirements.

12. In light of the above, the Tribunal is of the opinion that the circumstances of this case do not suggest that PWGSC is favouring a particular supplier. The Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

## DECISION

13. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

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3. *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).  
4. 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)>.  
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)>.  
6. *Re Complaint Filed by MTS Allstream Inc.* (5 August 2005), PR-2004-061 (CITT) at para. 67.