



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-045

Siva & Associates Inc.

*Decision made  
Tuesday, January 27, 2009*

*Decision and reasons issued  
Wednesday, February 4, 2009*

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.

Ellen Fry  
Ellen Fry  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

## 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. 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) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a procurement (Solicitation No. W8482-090043/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. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of 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> applies.

5. Article 504(3)(b) of the *AIT* provides that “the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of Chapter [Five]” is inconsistent with the principle of non-discrimination.

6. Article 504(3)(c) of the *AIT* prohibits “the timing of events in the tender process so as to prevent suppliers from submitting bids”.

7. Article 506(6) of the *AIT* provides that “... [t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

8. The following mandatory criterion is included in the Request for Proposal (RFP):

Submission of certificate of shock testing and drawing: all products proposed must have successfully met the testing requirements of Specification D-03-003-007/SG-000 Grade 1 Type A, prior to bid closing. If bidder is offering substitute products that are equivalent in form, fit, function and quality to the Original Equipment Manufacturer (OEM) parts specified herein, the bidder must provide proof by submitting a copy of the successful certificate of shock testing including the serial numbers of the proposed products and an acceptable drawing with certification of shock testing with their bid or within seven (7) calendar days upon written request of the contracting authority. Bids unable to meet this requirement will be given no further consideration.

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

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

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)> [*AIT*].

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)>.

9. On January 9, 2009, Siva made an objection to PWGSC. It argued that there was not enough time to have the valves manufactured and tested within the time limits imposed by the RFP. It requested that suppliers be allowed “to give the shock test specifications **along with the supply** so that all suppliers confident of providing [the valves could] quote this requirement.” According to the complaint, on January 21, 2009, PWGSC advised Siva that the requirements of the RFP would not change.

10. In the Tribunal’s view, the information in the complaint does not indicate that PWGSC’s requirement for the shock test certification is unreasonable. Generally speaking, it is reasonable to consider that a buyer should not be obligated to accept parts whose operational performance has not yet been proven, as this could potentially lead to delays in the event that, for any reason, the specification is not ultimately met. The Tribunal notes that Siva did not provide evidence in support of its allegation that there was insufficient time to have the valves manufactured and tested within the time limits imposed by the RFP.

11. In light of the above, the Tribunal is of the opinion that the complaint does not provide a reasonable indication that PWGSC has not followed the provisions of the applicable trade agreements.

12. In light of the foregoing, 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.

Ellen Fry  
Ellen Fry  
Presiding Member