



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-008

Geophysical Service Incorporated

*Decision made
Tuesday, May 19, 2009*

*Decision and reasons issued
Monday, May 25, 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

GEOPHYSICAL SERVICE INCORPORATED

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.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² 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) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a procurement by the Department of Public Works and Government Services (PWGSC) for the provision of 2D multichannel seismic data on behalf of the Department of Natural Resources (NRCan).

3. Geophysical Service Incorporated (Geophysical) alleges the following:

- “The two agencies [PWGSC and NRCan] did not seek to obtain competitive bids where there were a very limited number of contractors.”
- “The award amount [of the contract] was 50-80% higher than current market rates for such services as evidence of a flawed competitive process.”
- “No effort was made to contact the complainant although inconsistently on other projects NRCan did informally contact the complainant.”
- “It is believed that the two agencies [PWGSC and NRCan] modified the survey between the RFP and final contract stages to avoid an application by the awarded contractor/supplier under the Coasting Trade Act for this work.”
- “Contrary to current [government] policy and mandates these agencies [PWGSC and NRCan] avoided notification to the only Canadian headquartered, Canadian owned, and Canadian flagged seismic vessel capable of conducting this work.”

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*,³ Chapter Five of the *Agreement on Internal Trade*⁴, the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies. In this case, only the *AIT* applies as the research services for this type of requirement are excluded from *NAFTA* and the *AGP*.

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) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <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> [*AGP*].

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 5 December 1996, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*].

5. Regarding the first three as well as the last of Geophysical's grounds of complaint, on May 5, 2009, Geophysical made an objection to PWGSC regarding the procurement process and the award of the contract to a foreign-based company. In particular, Geophysical stated that "... GSI was not directly notified or offered the opportunity to bid on the work."⁷

6. Geophysical submitted that PWGSC and NRCan apparently did put the Notice of Proposed Procurement on MERX⁸ but did not otherwise seek to solicit a bid from Geophysical. In an e-mail from Geophysical to PWGSC dated May 6, 2009, Geophysical stated that "[t]he excuse of using MERX is obscene as GSI is the only Canadian headquartered and owned company and owns the only Canadian seismic ship."⁹

7. On May 14, 2009, PWGSC responded to Geophysical's objection by stating that "...the requirement was subject to the Agreement on Internal Trade (AIT) and was competitively tendered under these auspices. Part of the requirement is to post to the public, and the conduit to the public for these postings is via Merx, which was done."¹⁰

8. Article 506(2) of the *AIT* reads as follows:

A call for tenders shall be made through one or more of the following methods:

- (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers;
- (b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or
- (c) the use of source lists, provided that, in respect of any source list:
 - (i) registration on the source list is consistent with Article 504;
 - (ii) all registered suppliers in a given category are invited to respond to all calls for tenders in that category; and
 - (iii) a supplier that meets the conditions for registration on the source list is able to register at any time.

9. The Tribunal notes that there is no dispute between the parties that the Notice of Proposed Procurement was published on MERX. It is well established that such a publication respects fully the obligation provided for under Article 506(2). As to the fact that PWGSC did not directly notify Geophysical or offer Geophysical the opportunity to bid on the work, the Tribunal notes that there is no obligation under the *AIT* for a government institution to provide specific notice of a procurement to a Canadian potential supplier. In fact, providing personal notification to one supplier over others could result in a violation of the *AIT*. Not providing a preferential notification to Geophysical cannot therefore constitute a violation of the *AIT*.

10. Regarding Geophysical's fourth ground of complaint, with respect to Geophysical's belief that PWGSC and NRCan modified the requirements between the solicitation and the final contract in order to avoid an application by the contract awardee under the *Coasting Trade Act*, the Tribunal finds that this allegation remains a mere suspicion on the part of Geophysical. Subsection 6(1) of the *Regulations* requires that a potential supplier file a complaint "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." Geophysical has not provided any indication that it is in possession of actual or constructive knowledge regarding the basis of this ground of complaint.

7. E-mail from Geophysical to PWGSC dated May 5, 2009.

8. Canada's Electronic Tendering Service.

9. E-mail from Geophysical to PWGSC dated May 6, 2009.

10. E-mail from PWGSC to Geophysical dated May 14, 2009.

11. Therefore, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreement.

12. As the Tribunal has concluded that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreement, and in the interest of judicial economy, the Tribunal will not consider the question of Geophysical's standing as a "potential supplier" with regard to the procurement.

13. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member