



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-076

LeClair INFOCOM Inc.

*Decision made
Tuesday, January 26, 2010*

*Decision and reasons issued
Friday, February 12, 2010*

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

BY

LECLAIR INFOCOM INC.

AGAINST

THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

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.

Jason W. Downey
Jason W. Downey
Presiding Member

Susanne Grimes
Susanne Grimes
Acting 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. 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. 20-08-6005) by the Department of Indian Affairs and Northern Development (DIAND) for the provision of professional services relating to aboriginal community infrastructure. The solicitation documents indicate that this procurement is set aside for aboriginal suppliers in accordance with the Government's Procurement Strategy for Aboriginal Business.

3. LeClair INFOCOM Inc. (LeClair) alleged that DIAND improperly declared its proposal non-compliant. It also alleged that the solicitation documents were poorly worded and that the process was improperly re-opened after the closing date for the receipt of proposals.

4. Subsection 30.11(1) of the *CITT Act* provides that "... 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."

5. Section 30.1 of the *CITT Act* defines the term "designated contract" as follows:

"designated contract" means 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 contracts designated by the regulations.

6. Subsection 3(1) of the *Regulations* provides the following:

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, in Article I of the Agreement on Government Procurement or in Article *Kbis*-01 of Chapter *Kbis* of the CCFTA, by a government institution, is a designated contract.

7. Subsection 7(1) of the *Regulations* states that three conditions must be met before the Tribunal can inquire into a complaint. According to one of these conditions, a complaint must be in respect of a "designated contract" (i.e. a contract subject to at least one of the trade agreements, as is made clear by subsection 3(1)).

8. According to the complaint, the procurement at issue is open to aboriginal firms or joint ventures as part of a measure known as the "Set-Aside Program for Aboriginal Business".

9. Article 1802 of the *Agreement on Internal Trade*³ reads as follows:

This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples.

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

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

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

10. Paragraph 1(d) of Annex 1001.2b to the *North American Free Trade Agreement*⁴ excludes “set-asides for small and minority businesses” from its scope of coverage.

11. Paragraph 1(d) of the General Notes for Canada to the *Agreement on Government Procurement*⁵ also excludes “set-asides for small and minority businesses” from its scope of coverage.

12. Similarly, paragraph 1(d) of Annex *Kbis-01.1-6* to the *Canada-Chile Free Trade Agreement*⁶ excludes “set-asides for small and minority businesses” from its scope of coverage.

13. The procurement process that is the subject of this complaint is clearly part of measures adopted or maintained with respect to Aboriginal peoples. Pursuant to Article 1802 of the *AIT*, no provision of this trade agreement, including the provisions of Chapter Five on government procurement, applies to such measures. Thus, the procurement at issue is not subject to the *AIT*.

14. The solicitation documents also make it clear that this procurement constitutes a set-aside for aboriginal business. As such, in the Tribunal’s opinion, it is a procurement in respect of set-asides for small and minority businesses. By virtue of the aforementioned provisions, the procurement at issue is not covered by *NAFTA*, the *AGP* or the *CCFTA*.

15. Given that none of the trade agreements applies to the procurement at issue, the Tribunal finds that the procurement process at issue does not relate to a “designated contract”, as is required by subsection 30.11(1) of the *CITT Act*. Accordingly, the Tribunal does not have jurisdiction to inquire into this complaint.

16. In view of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member

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> [*AGP*].

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.