Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

**CANADIAN
INTERNATIONAL
TRADE TRIBUNAL**

Procurement

DECISION
AND REASONS

File No. PR-2009-071

Avalon Controls Ltd.

Decision made
Wednesday, January 6, 2010

Decision and reasons issued
Friday, January 15, 2010

Canada

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

AVALON CONTROLS LTD.

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.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
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 Request for Proposal (RFP) (Solicitation No. F5561-092004/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Canadian Coast Guard for the upgrade of the propulsion control and telegraph systems on board the Canadian Coast Guard Ship Hudson.

3.   Avalon Controls Ltd. (Avalon) alleged that PWGSC exhibited bias towards one of Avalon's competitors and did not properly evaluate Avalon's proposal.

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) of the *Regulations* states 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" [emphasis added].

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. By "actual knowledge of the denial of relief", the *Regulations* contemplate explicit rejection of a complainant's requested relief (for example in a written reply rejecting the complainant's position). In past instances, the Tribunal has interpreted "constructive knowledge of the denial of relief" as other non-explicit situations, including where, after the passage of a reasonable period of time, the complainant's position has yet to be addressed by the government institution.

6.   According to the complaint, on October 15, 2009, PWGSC made the RFP available through MERX. The bid closing date was November 12, 2009. PWGSC received two compliant proposals, one each from Avalon and Siemens Canada Limited (Siemens). On December 7, 2009. Avalon mentioned, in an e-mail to PWGSC, that it was made aware that it was not to be awarded the contract and expressed its concerns regarding the contract award process. On December 8, 2009, PWGSC confirmed to Avalon that the contract was to be awarded to Siemens and provided Avalon with a partial listing of the comments

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1.   R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2.   S.O.R./93-602 [*Regulations*].

provided by the evaluators regarding its proposal. On December 11, 2009, Avalon objected to PWGSC and provided point-by-point arguments regarding PWGSC's comments. According to the information in the complaint, the contract was awarded to Siemens on December 14, 2009. On December 30, 2009, Avalon filed its complaint with the Tribunal.

7.   The Tribunal finds that, as prescribed by subsection 6(2) of the *Regulations*, Avalon made an objection to PWGSC regarding the procurement at issue within 10 working days from the date on which it became aware of its ground of complaint, which the Tribunal considers to be December 7, 2009. However, as of the date on which the complaint was filed, Avalon's objection of December 11, 2009, appeared to be pending before PWGSC, as no "denial of relief" or copy of any response was provided to the Tribunal. Therefore, in this case, in the absence of a denial of relief as prescribed by subsection 6(2), the Tribunal does not have jurisdiction to commence an inquiry, and the complaint is determined to be premature.

8.   The Tribunal's decision does not preclude any future complaint on the ground objected by Avalon once PWGSC has responded to its arguments or if it fails to do so within a reasonable amount of time. In the event that Avalon does file a new complaint, it must do so within the time limits prescribed by subsection 6(2) of the *Regulations*.

DECISION

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

Diane Vincent
Diane Vincent
Presiding Member