



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2009-026

Flag Connection Inc.

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Thursday, September 3, 2009*

**TABLE OF CONTENTS**

ORDER .....i

STATEMENT OF REASONS .....1

    COMPLAINT .....1

    POSITION OF PARTIES .....1

        PWGSC .....1

        Tobermory .....2

        FCI .....2

ANALYSIS .....2

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

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND IN THE MATTER OF a motion filed by the Department of Public Works and Government Services under rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the basis that Flag Connection Inc. is not a potential supplier and, therefore, does not have standing to file a complaint under section 30.11 of the *Canadian International Trade Tribunal Act* and that the complaint was filed beyond the deadline prescribed by the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

**BETWEEN**

**FLAG CONNECTION INC.**

**Complainant**

**AND**

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

**Government Institution**

**ORDER**

The Canadian International Trade Tribunal finds that Flag Connection Inc. is not a potential supplier in respect of the designated contract that is the subject of this inquiry and, therefore, does not have standing to file this complaint. The Canadian International Trade Tribunal hereby terminates this inquiry and dismisses the complaint.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Flag Connection Inc. The Canadian International Trade Tribunal's preliminary indication of the amount of the cost award is \$500. If any party disagrees with the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On July 9, 2009, Flag Connection Inc. (FCI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Canadian Heritage for the provision of hand-held paper flags.

2. FCI alleged that PWGSC improperly awarded a contract to a non-compliant bidder.

3. On July 14, 2009, the Tribunal notified the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

4. On July 24, 2009, Tobermory Press Inc. (Tobermory), the contract awardee, requested intervener status, which was granted by the Tribunal.

5. Also on July 24, 2009, PWGSC filed a motion under rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the basis that FCI was not a potential supplier and, therefore, did not have standing to file a complaint under section 30.11 of the *CITT Act* and that the complaint was filed beyond the deadline prescribed by the *Regulations*.

6. On August 3 and 6, 2009, Tobermory and FCI respectively filed responses to the motion and, on August 11, 2009, PWGSC submitted its final comments.

### POSITION OF PARTIES

#### PWGSC

7. PWGSC's motion for an order dismissing the complaint was based on two grounds.

8. The first ground was that FCI was not a potential supplier and, therefore, did not have standing to file the complaint. According to PWGSC, FCI did not submit a proposal in response to the Request for Proposal (RFP).<sup>3</sup> PWGSC submitted that, with the bidding period now closed, FCI has lost the capacity to bid and, therefore, is not a potential supplier in respect of the procurement in issue. That being the case, it has no standing to file a complaint.

9. The second ground was that FCI's complaint was filed late. According to PWGSC, the basis of the complaint first became known or reasonably should have become known to FCI on June 5, 2009, when it acquired flags stated to have been manufactured from the production of flags shipped against Tobermory's contract. PWGSC also submitted that the subsequent acquisition by FCI of additional flags allegedly produced by Tobermory under the subject contract did not provide any information to FCI that was previously unknown. Therefore, according to PWGSC, as FCI's objection of June 8, 2009, was denied by PWGSC on June 10, 2009, the deadline for filing a complaint would have been June 24, 2009. That being the case, the complaint, which was filed on July 9, 2009, was filed late and should be dismissed.

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

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

3. The Tribunal notes that FCI does not allege that it intended to submit a proposal but was prevented from so doing by the terms of the procurement.

## Tobermory

10. In addition to the grounds cited by PWGSC in support of its motion, with which Tobermory agrees, Tobermory further submits that FCI is not a potential supplier because it lacks both the capacity to produce the hand-held flags procured by PWGSC and the resources and facilities required to produce the hand-held flags.

## FCI

11. According to FCI, it has both the financial and technical capability to produce the flags in issue.<sup>4</sup> It has supplied the flags to PWGSC and other government agencies in the past,<sup>5</sup> and there is nothing preventing it from being a future bidder.<sup>6</sup> FCI argued that, because it has “. . . neither lost the capacity nor the status as ‘**Prospective**’ bidder”, it should be considered a “potential supplier” within the meaning of subsection 30.11(1) of the *CITT Act* for the purposes of the subject procurement.<sup>7</sup>

12. The Tribunal notes that FCI has not contested PWGSC’s assertion that FCI failed to submit a proposal in response to the RFP that is the subject of this complaint. It further notes that FCI is not alleging that it was effectively precluded from bidding by any element of the specifications of the procurement or breach of the trade agreements.

13. On the issue of timeliness, FCI submits that, whereas the prior complaint focused on the issue of the alleged non-conformity of the “colour” used on the sample flags, the present complaint focuses on the issue of “artwork”,<sup>8</sup> the implication being that the basis of its complaint in respect of the latter was not known to FCI until the acquisition of the additional flags on June 30, 2009, thus rendering its complaint timely.

## ANALYSIS

14. As mentioned above, this motion is founded on two grounds: first, that FCI is not a potential supplier within the meaning of the *CITT Act* and, therefore, does not have standing to file a complaint, and, second, that the complaint was filed outside the time limit prescribed by the *Regulations*.

15. Turning to the first ground, subsection 30.11(1) of the *CITT Act* provides as follows:

Subject to the regulations, 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.

[Emphasis added]

16. The term “potential supplier” is defined in section 30.1 of the *CITT Act* as follows:

“potential supplier” means, subject to any regulations made under paragraph 40(f.1), a *bidder or prospective bidder on a designated contract*.

[Emphasis added]

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4. First affidavit of Mr. Randy W.D. Sloane, para. 26.

5. *Ibid.*, para. 12.

6. *Ibid.*, para. 25.

7. *Ibid.*, para. 26.

8. *Ibid.*, paras. 33, 34.

17. A plain and ordinary reading of the definition of “potential supplier” in section 30.1 of the *CITT Act* requires that the phrase “a bidder or prospective bidder” not be read in isolation, but rather in reference to a particular “designated contract”.

18. The Tribunal has examined this issue in several previous cases. In *1091847 Ontario Limited*,<sup>9</sup> the Tribunal described how a company could lose its status as a potential supplier with respect to a designated contract after the bid closing date:

The Tribunal notes that the solicitation document was available on MERX on July 8, 2003, with an original bid closing date of August 21, 2003. The deadline for receipt of proposals was subsequently amended to September 29, 2003. The complaint indicates that 1091847 Ontario Limited became aware of the solicitation on September 29, 2003, and ordered a copy as a pick-up from the MERX Distribution Unit that same day. The Tribunal is of the opinion that, given the circumstances of this case, it would not have been possible for 1091847 Ontario Limited to submit a bid. The bid was ordered at 10:23 am on September 29, 2003, and proposals had to be submitted by 2:00 p.m. that same day. According to the complaint, 1091847 Ontario Limited only finished its review of the solicitation document three days after the bid closing date. Therefore, in the view of the Tribunal, it would have been unable to submit a bid on the subject procurement by bid closing time. As a result of these factors, the Tribunal is of the view that 1091847 Ontario Limited was therefore, not a potential supplier with respect to that procurement.

19. In *COGNOS Incorporated*,<sup>10</sup> the Tribunal described how a company would *not* lose its status as a potential supplier after the bid closing date as follows:

In the Tribunal’s mind, a potential supplier is a supplier that could have bid on a contract, had an alleged breach not occurred. A potential supplier, according to the Tribunal, is one that would have or could have been a bidder, were it not for the alleged restrictive nature of the procurement process.<sup>11</sup>

20. These two views are easily reconciled by an understanding of the principle underlying the above definition. The Tribunal is of the view that, in order to be considered a prospective bidder in relation to a particular designated contract, two requirements must necessarily be met. First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, it must have the capacity to submit a proposal in response to the solicitation.<sup>12</sup>

21. As to the first requirement, Tobermory alleged that “. . . Flag Connection Inc. is not a potential supplier because it does not have the capacity to produce the hand flags being procured by PWGSC nor does it have the ability to acquire the resources and facilities required to produce hand flags.”<sup>13</sup> FCI, for its part, claims that it has the requisite technical and financial capability, “. . . [having] supplied the item to PWGSC and other Government agencies in the past.”<sup>14</sup> In this regard, it indicates, among other things, that its manufacturing space includes approximately 1,500 square feet used for the stapling and packaging of hand-held flags. Based on the evidence before it, the Tribunal is not satisfied that FCI does not have, or cannot otherwise secure, the necessary technical and financial capability to fulfill the procurement requirement.

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9. *Re Complaint Filed by 1091847 Ontario Limited* (24 October 2003), PR-2003-057 (CITT).

10. *Re Complaint Filed by GOGNOS Incorporated* (23 August 2002), PR-2002-004 (CITT).

11. *Ibid.* at 10.

12. An exception is made where the complainant is effectively deprived of that capacity as a result of a breach of the trade agreements by the government institution in the procurement process.

13. Tobermory’s comments on the motion filed by PWGSC at 2.

14. First affidavit of Mr. Sloane, para. 12.

22. As to the second requirement, it is not contested that the bidding period for the designated contract in question had closed by the time FCI filed its complaint, and FCI does not allege that it had been effectively precluded from bidding by restrictive terms of the procurement itself. The Tribunal finds that, even though FCI may have had both the technical and financial capability to supply the flags, it ceased to be a prospective bidder in relation to the designated contract once the bidding period expired. At that point, FCI lost the capacity to submit a proposal because PWGSC could no longer have accepted one without putting itself in breach of its own procurement terms.

23. The Tribunal therefore finds that FCI is not a potential supplier in respect of the designated contract that is the subject of this inquiry and, therefore, does not have standing to file this complaint.

24. Having so found, the Tribunal does not find it necessary to address the remaining ground of the motion and hereby terminates this inquiry and dismisses the complaint.

25. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

26. The Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. As this case has been dismissed before a significant level of effort has been expended in answering the complaint, the Tribunal finds that the level of complexity is very low. Accordingly, the Tribunal's preliminary indication of the amount of the cost award is \$500. The Tribunal reserves jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member