



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-091

W. Davis

*Decision made
Tuesday, March 15, 2011*

*Decision and reasons issued
Thursday, March 31, 2011*

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

W. DAVIS

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.

Stephen A. Leach _____

Stephen A. Leach
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 procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of support services for the Canadian Forces CH146 Griffon fleet of helicopters. According to the information provided in the complaint, the awarded contract, known as the CH146 Optimized Weapon System Support (OWSS) contract, includes aspects of management services, engineering and technical publications, aircraft maintenance services, and spare and consumable parts.

3. Mr. W. Davis alleges that PWGSC improperly awarded a sole-source contract to Bell Helicopter Textron Canada Limited (Bell Helicopter) without allowing Canadian companies to submit bids in response to the requirement. Additionally, Mr. Davis alleges that an Advance Contract Award Notice was not posted on MERX³ for this requirement.

4. On May 4, 2010, Mr. Davis received an e-mail from a PWGSC official advising that competition for the OWSS initiative was not possible because Canada did not own any of the required intellectual property (IP) rights for the initiative and that Bell Helicopter had stated that it would not release these IP rights to third parties. According to the e-mail, it was providing Mr. Davis with a response to an e-mail he had sent on April 8, 2010. That e-mail was not included as part of the complaint.

5. On October 5, 2010, Mr. Davis sent an e-mail to various Members of Parliament (MP), including, among other Ministers, the Minister of Public Works and Government Services, requesting that the proposed sole-source contract with Bell Helicopter be stopped and the requirement be competed.

6. On December 2, 2010, Mr. Davis received an e-mail from a senior PWGSC official advising that Bell Helicopter, as the owner of the IP rights for the CH146 Griffon helicopter, was the only company that could perform the work and that Bell Helicopter would not license the IP rights to any other company. According to the e-mail, it was providing Mr. Davis with a response to his e-mails of October 5, 2010, and November 4, 7, and 25, 2010. The e-mails of November 4, 7 and 25, 2010, were not included as part of the complaint.

7. On December 2 and 3, 2010, Mr. Davis sent further e-mails to PWGSC reiterating some of the previous points he had made, namely, that Canada did have access to the IP rights associated with the CH146 Griffon helicopter, that other companies were capable of providing the requested services and that PWGSC had been misled in this respect.

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

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

3. Canada's electronic tendering service (see <http://www.merx.com>).

8. On January 14, 2011, Bell Helicopter issued a press release indicating that it had been awarded a 10-year, \$640-million contract to provide support services for the Canadian Forces CH146 Griffon fleet of helicopters. On January 16, 2011, Mr. Davis sent an e-mail to an MP concerning the contract awarded to Bell Helicopter. On January 31, 2011, the MP replied to Mr. Davis's e-mail and advised that the contract had been awarded to Bell Helicopter on a sole-source basis, as Bell Helicopter was the original equipment manufacturer and owned the IP rights for the CH146 Griffon helicopter. On the same day, Mr. Davis sent another e-mail to the same MP reiterating his views. On February 4, 2011, the MP replied to Mr. Davis by simply thanking him for his comments.

9. On March 2, 2011, Mr. Davis filed a letter of complaint with the Tribunal. On March 7, 2011, the Tribunal, pursuant to subsection 30.12(2) of the *CITT Act*, notified Mr. Davis that his complaint did not comply with the informational requirements set out in subsection 30.11(2) and that additional information was therefore required before his complaint could be considered filed. On March 9, 2011, Mr. Davis filed additional information with the Tribunal.

10. 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."

11. Subsection 6(2) of the *Regulations* states that "[a] potential supplier who 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."

12. 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.

13. Although the information provided with the complaint appears to indicate that Mr. Davis first made an objection to PWGSC on April 8, 2010, there is no information to indicate when or how he first became aware that support services for the Canadian Forces CH146 Griffon fleet of helicopters would not be procured competitively. As a result, the Tribunal has no factual grounds upon which to determine the starting point of the limitation period stipulated in section 6 of the *Regulations*.

14. Even if the Tribunal were to assume that the apparent objection made to PWGSC on April 8, 2010, (or subsequent objections, including the one made on October 5, 2010) were made within the time limit prescribed in subsection 6(2) of the *Regulations*, it would nonetheless conclude that the complaint was not filed with the Tribunal in a timely manner. The information provided with the complaint clearly indicates that Mr. Davis was advised on May 4, 2010, and again on December 2, 2010, that the requested support services could not be procured competitively because Bell Helicopter was the only company that could perform the work due to IP rights issues. If Mr. Davis had any remaining doubts regarding PWGSC's intention to procure the support services on a sole-source basis, these should clearly have been dispelled when he took notice of Bell Helicopter's announcement, on January 14, 2011, that it had been awarded a 10-year contract. Therefore, the Tribunal considers that Mr. Davis knew, at the absolute latest, on January 14, 2011, that it had been denied relief by PWGSC. As the complaint was only considered filed on March 9, 2011, (i.e. more than 10 working days after January 14, 2011), the Tribunal is of the opinion that the complaint was not filed in a timely manner.

15. In addition, the Tribunal notes that 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]

17. As the Tribunal has previously stated, the definition of “potential supplier” in section 30.1 of the *CITT Act* requires that the words “a bidder or prospective bidder” not be read in isolation, but rather in reference to a particular “designated contract”.⁴

18. The complaint in this case was filed by Mr. Davis on his own behalf. Although the information contained in the complaint indicates that Mr. Davis worked in the industry for a number of years and now provides helicopter support services in his own name, there is no evidence to suggest that, had the procurement been open to competitive bidding, he would have been a bidder or prospective bidder and could have supplied the requested support services for the Canadian Forces CH146 Griffon fleet of helicopters. Therefore, even if the Tribunal had determined that the complaint had been filed in a timely manner, it appears likely that Mr. Davis would not have had standing to file a complaint with the Tribunal concerning this procurement.

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

DECISION

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

Stephen A. Leach
Stephen A. Leach
Presiding Member

4. *Re Complaint Filed by Flag Connection Inc.* (3 September 2009), PR-2009-026 (CITT) at para. 17.