



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-082

MDA Systems Ltd.

*Decision made
Thursday, January 13, 2011*

*Decision and reasons issued
Tuesday, January 25, 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

MDA SYSTEMS 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. 9F063-100210/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Canadian Space Agency (CSA), for the development and advancement of certain space technologies, more specifically technologies for highly elliptical orbit and geosynchronous earth orbit future missions.

3. MDA Systems Ltd. (MDA) alleged that PWGSC improperly declared its proposal non-compliant with certain terms and conditions of the RFP that, according to MDA, were not designated as mandatory requirements of the RFP.

4. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "... complaint[s] ... concerning any aspect of the procurement process that relates to a designated contract ..."

5. Subsection 7(1) of the *Regulations* sets out three conditions which must be met for the Tribunal to decide to conduct an inquiry in respect of a complaint. One of the conditions is that the complaint be in respect of a designated contract.

6. Section 30.1 of the *CITT Act* defines "designated contract" as "... 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".

7. A designated contract, pursuant to section 30.1 of the *CITT Act*, is thus defined in part as a contract concerning the procurement of goods or services by a government institution. In turn, section 30.1 defines "government institution" as "... any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations".

8. In this respect, subsection 3(2) of the *Regulations* designates as government institutions the federal government entities or government enterprises set out in the following parts of potentially applicable trade agreements: the Schedule of Canada in Annex 1001.1a-1 and Annex 1001.1a-2 of the *North American Free Trade Agreement*,³ Annex 502.1A of the *Agreement on Internal Trade*,⁴ under the heading "CANADA" in Annex 1 of the *Agreement on Government Procurement*,⁵ the Schedule of Canada in Annex Kbis-01.1-1

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).

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>.

and Annex *Kbis*-01.1-2 of Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*,⁶ and the Schedule of Canada in Annex 1401.1-1 and Annex 1401.1-2 of Chapter Fourteen of the *Canada-Peru Free Trade Agreement*.⁷

9. The Tribunal notes that the RFP at issue concerns a contract for the procurement of goods or services by the CSA. The Tribunal further notes that the CSA is not listed in any of the relevant schedules or annexes of any of the trade agreements. In addition, the CSA is expressly excluded from the coverage of Chapter Five of the *AIT* pursuant to Annex 502.2A of the *AIT*.⁸ The Tribunal therefore finds that the CSA is not a covered federal government entity or government enterprise as described in the agreements and, as such, is not a “government institution” within the meaning of section 30.1 of the *CITT Act*.

10. For this reason, the Tribunal finds that the contract to which this procurement process relates is not a designated contract.

11. Given that the procurement at issue does not relate to a designated contract, the Tribunal does not have jurisdiction to inquire into the complaint and considers the matter closed.

DECISION

12. 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

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) Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

8. Annex 502.2A of the *AIT* expressly excludes from the coverage of the *AIT* certain entities, including entities that are not accountable to executive branches of governments and entities whose objective is national security. The CSA is an entity that is covered by this annex. See *Re Complaint Filed by CPI Canada Inc.* (18 July 2006), PR-2006-017 (CITT).