CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 17, 1999

File No.: PR-99-026

IN THE MATTER OF a complaint filed by Mason·Shaw·Andrew Management Consultants under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services present to the Canadian International Trade Tribunal a proposal, developed jointly with Mason·Shaw·Andrew Management Consultants, to compensate Mason·Shaw·Andrew Management Consultants for the opportunity that it lost to compete for this requirement, to be awarded the contracts and to profit therefrom. The basis for the compensation will be half the profit that Mason·Shaw·Andrew Management Consultants would have made, had it been awarded the contracts for Solicitation Nos. H4097-8-0041 and H4097-9-0011/A at the prices at which these were awarded to The BLAIR Consulting Group, less one dollar and less GST.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Mason·Shaw·Andrew Management Consultants its reasonable costs incurred in relation to filing and proceeding with the complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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Date of Determination:	December 17, 1999
Tribunal Member:	Richard Lafontaine
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Dominique Laporte
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	Mason·Shaw·Andrew Management Consultants
Government Institution:	Department of Public Works and Government Services

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STATEMENT OF REASONS

On September 18, 1999, Mason·Shaw·Andrew Management Consultants (MSA) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning a procurement by the Department of Public Works and Government Services (the Department) of a study on the business impact analysis of proposed new tobacco reporting and labelling requirements (Advance Contract Award Notice (ACAN) Solicitation No. H4097-9-0011/A) for the Department of Health (Health Canada), on a sole source basis, from The BLAIR Consulting Group (Blair).

MSA alleged that, in conducting this procurement, the Department, contrary to the provisions of the *North American Free Trade Agreement*,[2] failed to use open tendering procedures, thereby failing to provide all bidders equal access to all available information, including evaluation criteria, clearly set out in advance as part of the solicitation documents. MSA requested, as a remedy, that the Department conduct a fair and open competition for the requirement. In the alternative, MSA requested that it be awarded compensation for the lost opportunity to compete for, and profit from, the contract and such further and other relief as the Tribunal deems appropriate.

On September 22, 1999, the Tribunal issued an order postponing the award of any contract in relation to the procurement until the Tribunal determined the validity of the complaint.

On September 23, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] The Tribunal also requested that the Department make submissions concerning MSA's allegations that: (1) the services being procured should be covered under *NAFTA*, considering that the ACAN indicated that it was not subject to any of the trade agreements; and (2) the combined value of Solicitation Nos. H4097-9-011/A and H4097-8-0041 exceeds the *NAFTA* monetary threshold applicable to the procurement of services.

On September 30, 1999, the Department wrote to the Tribunal certifying that the solicitation at issue was urgent and that any delay in awarding a contract would be contrary to the public interest. Accordingly, on October 4, 1999, the Tribunal issued an order rescinding its postponement of award order of September 22, 1999.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA*].
3. S.O.R./93-602 [hereinafter *Regulations*].

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On October 5, 1999, the Department responded to the Tribunal's request of September 23, 1999, as follows.

Concerning the exclusion of the services from the coverage of *NAFTA*, the Department submitted that the services being procured are not R&D, but constitute "Medical and Health Studies" under Code B503 of the Common Classification System (CCS), and, therefore, are excluded from the coverage of *NAFTA* under the Schedule of Canada, Section B of Annex 1001.1b-2. The Department submitted that the requirement, which is the subject of this procurement, is a special study within the meaning of Appendix 1001.1b-2-B of *NAFTA* which is required by Health Canada as a direct result of the proposed implementation of new reporting and labelling requirements for tobacco products. The purpose is to conduct a study on the business impact analysis of the proposed requirements in the retail and distribution sectors. The expected outcome of the study is to provide data and information that Health Canada requires for its decision making with regard to its proposed regulations and will be utilized to draft sections of the Regulatory Impact Analysis Statement which will accompany the regulations when published in the *Canada Gazette*.

Concerning the estimated value of the solicitation at issue, the Department submitted that, at approximately $50,000, the value of the proposed contract is below the current threshold value of $72,600 for contracts for services (*NAFTA*, Article 1001(c)(i)).

In addressing MSA's allegation that Health Canada's requirement resulted in the award of more than one contract whose joint value exceeds the *NAFTA* threshold for the procurement of services, the Department submitted that at no time did it or Health Canada select a valuation method or divide the procurement requirement into separate contracts in order to avoid the obligations of *NAFTA*.

The Department argued that, consistent with a sound business management approach, it was considered necessary to plan and develop the methodology for the special study before any terms of reference were drafted for bid preparation purposes. This, the Department submitted, justified the existence of Contract No. H4097-8-0041/001/SS with Blair. In fact, the Department added, the deliverables under the above-mentioned contract, at paragraph b) of Phase 4 of the Statement of Work, clearly demonstrate that a competitive procurement strategy was contemplated for the study.

The Department further submitted that the provisions of Article 1002(5)(a) of *NAFTA* do not apply to this procurement, as the article only applies in the case of similar recurring contracts where there has been a change in quantity and value. In this context, the Department argued that the two solicitations at issue are not at all similar. In addition, the Department submitted that Article 1002(5)(b) does not apply in this instance because the second contract is not to develop another methodology, but to conduct a special study using such a methodology. It is not, therefore, a recurring contract as contemplated by Article 1002(5)(b).

For the above reasons, the Department submitted that the Tribunal does not have jurisdiction in this matter.

MSA submitted, in its response filed with the Tribunal on October 20, 1999, that: (1) the services at issue are not excluded from coverage under *NAFTA*; and (2) the procurement at issue meets the *NAFTA* monetary threshold of $72,600 applicable to the procurement of services.

On the issue of the proper classification of the services being procured, MSA submitted that the Department is mischaracterizing the services in an attempt to bring them within one of the excluded classes of service under *NAFTA*. To decide the question, MSA noted that the Tribunal must consider "the substance

of the services being procured". MSA submitted that it is obvious from the ACAN itself that the requirement at issue relates to assessing business impacts and that it is impossible to see how an "assessment of potential business impacts" could reasonably be said to constitute "Medical and Health Studies" under Code B503 of the CCS. MSA further argued that its conclusion is supported by the fact that the ACAN does not require the contractor to have any experience in carrying out medical or health studies, but rather to possess "in-depth knowledge of not only the regulatory issues [tobacco reporting and labelling] and the BIT [Business Impact Test]-equivalent process, but also a sound knowledge of the affected industry sectors and the business practices within these sectors". MSA added that the BIT or equivalent analysis is required for all major federal regulatory proposals, that it is not unique to Health Canada and that it cannot reasonably be called a medical or health study simply because the government organization involved in this case is Health Canada. Furthermore, MSA submitted that there is nothing whatsoever in the list of deliverables for the final report that is of a "medical" or "health" nature. Rather, MSA argued, the focus of the report is entirely on business and economic issues. Concluding on this point, MSA observed that the Department's shifting and contradictory submissions on the appropriate classification of the contract, initially as "Research and Development" and now as "Special Studies and Analysis - (not R&D)", "Medical and Health Studies", undermines both its position and the Department's credibility on this particular issue.

Addressing the monetary threshold question, MSA submitted that the first issue under Article 1002(5)[4] of *NAFTA* is to define the expression "individual requirement for a procurement". In this regard, MSA submitted that Health Canada's requirement is for a BIT-equivalent process in order to conform to the requirement of the Government of Canada Regulatory Policy. This, MSA submitted, cannot be changed, no matter how the work is planned, organized or executed. Furthermore, MSA argued that, because this individual procurement has resulted in the award of more than one contract, i.e. Contract No. H4097-8-0041/001/SS and the contract issued in relation to ACAN Solicitation No. H-4097-9-0011/A, the provisions of Article 1002(5) apply. In the circumstances, MSA submitted, the Department had to consider the value of the contract awarded and the estimated value of the contract to be awarded, to establish the estimated value of the procurement at issue for purposes of valuation and coverage under *NAFTA*.

On the question of whether the contracts are "similar", MSA stressed that two contracts are similar in nature if they are intimately related to each other and deal with the same, or similar, subject matter. Further, MSA pointed out that, contrary to the Department's assertion, under Article 1002(5)(b) of *NAFTA*, it is the contracts, and not the services being acquired, that must be recurring and that, therefore, two or more contracts can be recurring if they are issued in order to carry out integral parts of a common requirement, as is the case here.

On October 26, 1999, the parties were informed that the solicitation was in relation to a "designated contract" under *NAFTA*. The Tribunal based this decision on the substantive nature of the services being procured, which are described in the ACAN as follows: "Business Impact Assessment of the Proposed Tobacco Reporting and Labelling Regulations". In the Tribunal's opinion, the above description is self-explanatory, corresponds to Health Canada's requirement as set out in the Statement of Work for Solicitation No. H4097-9-0011/A and matches the services described by the parties in their submissions.

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4. "Where an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:
   (a) the actual value of similar recurring contracts concluded over the prior fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or
   (b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract."

On this basis, the Tribunal concluded that the subject services are for a business impact analysis in support of the regulatory process and, as such, are covered by *NAFTA* under Code B3 "Administrative Support Studies". They are not "Medical and Health Studies".

The Tribunal notes that Article 1002(4) of *NAFTA* provides that, "[f]urther to Article 1001(4), an entity may not select a valuation method, or divide procurement requirements into separate contracts, to avoid the obligations of this Chapter". With this in mind, the Tribunal is satisfied that, based on the evidence before it, there exists, in this case, an individual requirement for a procurement, namely, a business impact analysis of proposed regulations. As well, the Tribunal finds that the said individual requirement has resulted in the award of two separate contracts, i.e. the initial contract being the development of a methodology (Solicitation No. H4097-8-0041) and the second contract being the conduct of the business impact analysis proper (Solicitation No. H4097-9-0011/A). In the Tribunal's opinion, the Department, in estimating the value of the solicitation at issue, had to use the estimated value of the total requirement and not only that of the business impact analysis proper. By proceeding otherwise, the Department would avoid the obligations of Chapter Ten of *NAFTA*. The Tribunal established the estimated value of the individual requirement at $73,486.50, a value in excess of the $72,600.00 threshold applicable to a procurement for services under *NAFTA*.

For the above reasons, the Tribunal determined that the procurement was in relation to a designated contract and decided to continue its inquiry into this complaint.

The Department was requested to submit the Government Institution Report (GIR) in this matter no later than November 5, 1999.

VALIDITY OF THE COMPLAINT

Department's Position

On November 5, 1999, the Department sent a letter to the Tribunal, in lieu of the GIR, wherein it stated, in part: "Although the Department was *bona fide* of the view that the subject solicitation was not subject to the requirements of the trade agreements when it conducted the procurement process, in light of the Tribunal's decision [of October 25, 1999], the Department is now prepared to compensate [MSA] for its loss of opportunity to compete for the contract that was the subject of the [ACAN]".

MSA's Position

On November 17, 1999, MSA, in its comments on the Department's letter of November 5, 1999, acknowledged the Department's decision not to contest its complaint and to compensate it for the "loss of opportunity" and for the costs involved in filing and proceeding with the complaint.

TRIBUNAL'S DECISION

Section 30.14 of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in *NAFTA*.

The Tribunal interprets the Department's submission of November 5, 1999, and its offer to compensate MSA as an admission on the part of the Department that the procurement at issue was not conducted in accordance with the provisions of *NAFTA*. On this basis, the Tribunal finds that this procurement was not conducted in accordance with the provisions of *NAFTA*. The complaint, therefore, is valid.

On the question of remedy, the Tribunal notes that, by now, the requirement has been substantially performed and will, therefore, consider other alternatives. Under the *CITT Act*, the Tribunal may recommend that the government compensate MSA for the lost opportunity to compete for this requirement, to be the successful bidder and to profit from the contracts. The Tribunal is of the view that, in this particular instance, there existed at least two potential suppliers, the contract awardee and MSA, and that, in theory at least, both potential suppliers had an equal opportunity to be the successful bidder. Therefore, the Tribunal estimates MSA's lost opportunity at one in two, or half the profits that it would have made, had it been awarded the contracts at the prices submitted by Blair, less one dollar so as to be the lowest-cost compliant bidder.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of *NAFTA* and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the Department present to the Tribunal a proposal, developed jointly with MSA, to compensate MSA for the opportunity that it lost to compete for this requirement, to be awarded the contracts and to profit therefrom. The basis for the compensation will be half the profit that MSA would have made, had it been awarded the contracts for Solicitation Nos. H4097-8-0041 and H4097-9-0011/A at the prices at which these were awarded to Blair, less one dollar and less GST.

Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal awards MSA its reasonable costs incurred in relation to filing and proceeding with the complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member