CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, March 28, 2000

File No.: PR-99-035

IN THE MATTER OF a complaint filed by Dr. John C. Luik 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 for compensation, developed jointly with Dr. John C. Luik, that recognizes: (a) the opportunity that he lost by being unable to make a responsive bid in this case and the possibility that he may have been awarded this solicitation; (b) the prejudice caused to the integrity and efficiency of the competitive procurement system; and (c) the lack of good faith in conducting this procurement shown by the departments of Public Works and Government Services and Health. This proposal is to be presented to the Canadian International Trade Tribunal within 30 days of receipt of the statement of reasons.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Dr. John C. Luik his reasonable costs incurred in relation to filing and proceeding with the complaint, as well as any costs associated with his challenge to the Advance Contract Award Notice.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Date of Determination:	March 28, 2000
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member Richard Lafontaine, Member
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Gilles B. Legault
Complainant:	Dr. John C. Luik
Counsel for the Complainant:	Gordon Cameron Nancy K. Brooks
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke

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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*.

STATEMENT OF REASONS

On November 9, 1999, Dr. John C. Luik 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 on a sole source basis (Solicitation No. H4097-9-0014/A) by the Department of Public Works and Government Services (the Department) for the Office of Tobacco Control (OTC), a constituent of the Department of Health (Health Canada). The procurement in question was for a consumer research study, to be conducted by Dr. John Liefeld, regarding the proposed health warnings on tobacco products and their impact on the decision-making process to smoke or not to smoke.

Dr. Luik alleged that the solicitation at issue did not meet any of the criteria for procurement by limited tender provided in the *North American Free Trade Agreement*[2] and the *Agreement on Internal Trade*[3] and that officers of Health Canada conducted themselves so as to evade the obligations of these trade agreements. Dr. Luik further alleged that Health Canada and the Department used an Advance Contract Award Notice (ACAN) improperly so as to evade their obligations under the trade agreements and to mislead potential suppliers into believing that they were complying with those obligations and following applicable procurement policies, when, in fact, they knew that they were not. Specifically, Dr. Luik alleged that the procurement was improperly conducted, in that Health Canada: (1) used limited tendering procedures without proper justification; (2) set out improper time limits to receive tenders and to complete the work; (3) failed to provide equal information to all potential suppliers; (4) added unclear and unnecessary evaluation criteria; and (5) purposefully evaded the obligations imposed by NAFTA and the AIT and attempted to deceive potential suppliers.

Dr. Luik requested, as a remedy, to be compensated as follows: $100,000 for lost profit on the contract; $50,000 for the loss of reputation, profile and opportunity for future similar contracts; $50,000 for the Department's and Health Canada's discreditable conduct in this procurement; and $5,000 for his costs in responding to the solicitation and his complaint costs. Dr. Luik also requested that the Tribunal recommend that Health Canada rescind the requirement that any potential suppliers of services to Health Canada not have worked on behalf of the tobacco industry for three years and that Health Canada's and the Department's employees be instructed to refrain from efforts to deceive potential suppliers as to the particulars of procurement.

On November 17, 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*

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. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter AIT].

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Tribunal Procurement Inquiry Regulations.[4] On January 21, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[5] On February 3, 2000, Dr. Luik filed his comments on the GIR with the Tribunal indicating that the Department had failed to provide certain information. On February 9, 2000, the Tribunal requested the Department to produce additional information relevant to the matter. It did so on February 17, 2000. On February 24, 2000, Dr. Luik filed comments on the additional information with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

During the month of June 1999, the OTC initiated a study, to be conducted by independent researchers outside Health Canada, on the proposed health warnings on tobacco products and their impact on the decision-making process to smoke or not to smoke.

On June 18, 1999, Dr. Liefeld sent a note to Health Canada regarding his preliminary thoughts about research design.

An internal electronic communication at Health Canada, dated June 25, 1999, reads, in part, as follows:

> With authorization, we can get [Dr. Liefeld] and [name of company] on the road and get [the study] done no later than end of September (earlier, maybe, if we start now).
>
> On a personal note, this is probably going to be the most important of our research studies and I would recommend giving [Dr. Liefeld] as much support and slack as possible. As I said above, there is nobody better.

That same day, Dr. Liefeld sent an e-mail to Health Canada in relation to the study at issue which reads, in part:

> Please review the document, and if . . . all is in order, base the contract on it.

An internal electronic communication at Health Canada relating to the subject contract, dated July 7, 1999, reads, in part:

> ***. . . will need to provide you with the sole source justification.

An electronic communication at Health Canada, also dated July 7, 1999, dealing with the sole source justification reads, in part:

> Prof. Liefeld is the only one with the experience necessary for the successful and rapid completion of this project. Indeed, if this contract is subjected to the competitive process, no other contractor will be successful and the start of the contract will be delayed unnecessarily.

On July 16, 1999, the Department received a requisition from Health Canada for the solicitation at issue.

4. S.O.R./93-602 [hereinafter Regulations].
5. S.O.R./91-499.

An electronic communication between Health Canada and the Department, dated August 4, 1999, reads, in part, as follows:

> Subject: sole source justification
>
> This project, which involves, five studies . . . began on June 30 and has to end by Sept. 31.

On August 10, 1999, Dr. Liefeld sent a facsimile to the Department which reads, in part, as follows:

> Attached is detailed cost estimate, per your request of last week. I should point out that the project started June 17, and more than 50% of the work has been completed as of this date.

On August 13, 1999, an Advance Contract Award Notice (ACAN) for the solicitation at issue with a closing date of August 30, 1999, was posted on Canada's Electronic Tendering Service (MERX). The ACAN indicates that none of the trade agreements apply. It also indicates a noncompetitive strategy for reasons of exclusive rights. It also advertises the estimated value of the solicitation at $100,000.

A further electronic communication between Health Canada and the Department, dated August 16, 1999, reads:

> Sorry to have taken so long on this. I had a phone call from John Liefeld regarding your concerns about his per diem and attendance at data gathering sessions . . . we [Health Canada] are satisfied with Dr. Liefeld's proposal and recommend finalizing the contract as soon as possible.

Sires Inc. (Sires) challenged the ACAN in a communication dated August 27, 1999. In a letter dated August 29, 1999, Dr. Luik also challenged the ACAN.

On August 30, 1999, the Department acknowledged receipt of the two challenges to the ACAN.

In an e-mail between Health Canada and Dr. Liefeld dated August 31, 1999, Dr. Liefeld indicated, in part:

> Much of the final report has been drafted, and I project that we will be able to meet the Sept. 31 deadline.

In a further e-mail between Dr. Liefeld and Health Canada dated September 4, 1999, Dr. Liefeld stated, in part:

> I am getting more and more nervous about the lack of contract! I hope you can resolve this matter before you change positions.

A note to file dated September 7, 1999, reporting on a telephone conversation between Health Canada and the Department held the same day indicates that Health Canada had received the two challenges. The note reads, in part:

> He [Health Canada official] advised that the first thing we need to know from both suppliers is if they did any work for the tobacco industry in the past 3 years – this would put them in a potential conflict of interest situation and would mean that they wouldn't be eligible for this work.

On September 9, 1999, the Department sent a facsimile to Dr. Luik and Sires requesting further details concerning their experience in conducting similar work, including the client for which work was done. The facsimile also indicated that the OTC advised "that any supplier who has done work on behalf of the tobacco industry in the past 3 years is considered to be in a potential conflict of interest situation and, therefore, is not eligible for this work".

A letter from Sires dated that same day, addressed to the Department, reads, in part:

> After reading the request for information and the conditions imposed by the Office of Tobacco Control, I can see that there is a double standard in place: those who have worked for the Department of Health would not be in the same conflict of interest position as those who have advised private companies or organizations in the tobacco industry. From an economic and ethnological standpoint, this is an important fact that I finally discovered, thanks to you.
>
> I also found it interesting to see that the government gives contracts to its friends before announcing them publicly.
>
> You will understand that, under these conditions, and to call a spade a spade, it would seem to me immoral to work for your tyrannical administration — even if, on the other hand, it pays its advisors with the money that it forces me to pay in taxes. [Translation]

On September 17, 1999, Dr. Luik replied to the Department, taking issue with the proposed disqualification of a supplier on the basis of "a potential conflict of interest as opposed to a real conflict of interest" and indicated that he had worked for the tobacco industry in the last three years. On September 21, 1999, discussions took place between Health Canada and the Department regarding Dr. Liefeld's ongoing work and the award of this contract. On October 4, 1999, Dr. Luik communicated with the Department regarding the status of the requirement. The Department informed Dr. Luik that the requirement was presently in the hands of Health Canada and that it was waiting for Health Canada's instructions on how it would proceed. On October 12, 1999, Health Canada cancelled the procurement action that the Department had started and advised that it would proceed itself to pay Dr. Liefeld. This was confirmed in an e-mail dated October 22, 1999.

On October 27, 1999, Dr. Luik contacted the Department, by telephone, inquiring again about the status of the requirement. On that occasion, Dr. Luik was advised that Health Canada had cancelled the requirement and that any further questions should be directed to the OTC.

VALIDITY OF THE COMPLAINT

Department's Position

The Department indicated, first, that the complaint concerns a sole source procurement by itself, as well as a contract between Health Canada and Dr. Liefeld, and that, in preparing the GIR, the Department consulted extensively with Health Canada.

The Department submitted that Dr. Luik does not have standing as a "potential supplier" within the meaning of sections 30.1 and 30.11 of the CITT Act, as he worked for the tobacco industry during the last three years. Consequently, Dr. Luik would not qualify as a suitable researcher to conduct independent consumer research for the OTC in such a situation. The Department argued that avoidance of conflict of interest, appearance of conflict of interest or potential conflict of interest is important to the integrity of all government contracting for independent research. This explains why conflict of interest considerations apply to the contract at issue.

Furthermore, the Department submitted that conflict of interest considerations apply to all government contracting and that, in this case, the prohibition of conflict of interest set out in the contracting clauses regarding conflict of interest applied regardless of the fact that the clauses are not specifically referenced in the ACAN. As well, the Department argued that the integrity of government regulatory policy-making is preserved when those providing expert advice or conducting independent research for the government have no real or apparent relationship with the industry, which is the subject of the conflict of

interest regulations. Further, the Department argued that the judicial disapproval of the "appearance of conflict of appearance alone" in the legal profession was applicable in the circumstances and justified the application of conflict of interest precautions to the contract at issue.

The Department submitted that, generally, conflict of interest codes and policies do not distinguish between limitation applied to "actual" conflict of interest and "potential or apparent" conflict of interest. It submitted that if the Tribunal determined that the "vagueness" of the conflict of interest requirement in this instance makes it susceptible to discriminatory application, contrary to Article 1008(1) of NAFTA, or that it unreasonably limits competition, contrary to Article 1009(2)(b) of NAFTA and Articles 504(3)(b) and (g) of the AIT, such determination would bring into question the propriety of the applicability of the general conflict of interest guidelines in all government contracting, which would compromise the government's ability to scrutinize bidders and contractors on the basis of conflict of interest considerations.

Concerning Dr. Luik's allegation that his right to freedom of association, as guaranteed by paragraph 2(d) of the *Canadian Charter of Rights and Freedom*,[6] has been violated by the Department's statement that he would not qualify to do the work in question by virtue of the fact that he has worked for the tobacco industry within the last three years, the Department submitted that the Tribunal does not have jurisdiction to make a determination with respect to this constitutional question, the interpretation of the Charter and its application to the procurement process at issue.

With respect to Dr. Luik's accusations of deliberate misconduct on the part of government officials, the Department submitted that there is no basis in fact or reason to attribute misconduct or deliberate "mal intent" to any government official in the circumstances of this matter. According to the Department, officials were of the view that the solicitation at issue was not subject to the requirements of the trade agreements because, in their view, the service to be procured was exempt under the trade agreements. Further, the contract necessarily proceeded on an urgent basis because of the tight time lines in respect of the regulatory process. In any event, the Department submitted that, because of the urgency and importance of the requirement, it would not have been in the public interest to solicit bids.

Consequently, the Department argued that, although an error may have been made when it was determined that the procurement was not subject to the tendering rules of the trade agreements, which resulted in some problems and in miscommunication with Dr. Luik, there is no evidence whatsoever that officials acted with deliberate "mal intent".

In addition, the Department submitted that Dr. Luik's suggestion that the award of the sole source contract to Dr. Liefeld is equivalent to having "been adjudged before his peers to be unfit to do work in his own country" has no merit. In fact, the Department noted, Dr. Luik's interest in this procurement did not become a matter of public record until Dr. Luik filed the complaint.

As well, the Department submitted that damages for loss of opportunity to enhance one's reputation are available in very limited circumstances where reputation is central to the job performed. A scientist or researcher does not fall within this narrow class of persons.

Finally, the Department submitted that there is no merit to Dr. Luik's claim for compensation for loss of opportunity for future similar contracts, as this claim is unsubstantiated, not specific, remote and, therefore, not recoverable.

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6. (*Constitution Act, 1982*, U.K., Part I) [hereinafter Charter].

The Department requested the opportunity to make submissions with respect to the award of costs in this matter.

Dr. Luik's Position

Dr. Luik submitted that the undisputed facts in the complaint do not disclose some innocent confusion on the part of those responsible for administering the procurement. "They disclose a purposeful misleading of Dr. Luik and a cynical manipulation of the ACAN process resulting in a situation where Dr. Luik was attempting in good faith to compete for the contract and Health Canada was purporting to consider his potential candidacy for the work, when in fact Health Canada knew well that the contract had already been awarded". It is remarkable, Dr. Luik submitted, that the Department, whose mandate includes ensuring that the federal government procurement policies and obligations are followed, acknowledged nothing improper in that conduct.

With respect to the Department's argument that Dr. Luik lacked standing to file a complaint because he is not a potential supplier as required by section 30.11 of the CITT Act, Dr. Luik submitted that the argument is circular. Should it be accepted, this would mean that a government institution's decision to rule a bid non-compliant would mean, *ipso facto*, that such a supplier would never have standing before the Tribunal. This would undermine the procurement challenge process.

With respect to the Department's assertion that government officials did not know that this procurement was subject to the trade agreements, Dr. Luik submitted that ignorance of the law is no defence and that he finds the argument objectionable on the part of the Department. Furthermore, Dr. Luik submitted that there is no evidence before the Tribunal that Health Canada did not have sufficient warning about the requirements of the regulatory process and that, therefore, the Department could not be justified in using, in the GIR, urgency as a rationale for any wrongdoing.

With respect to the "conflict of interest" provisions, Dr. Luik submitted that Articles 506(4) and (6) of the AIT specifically prohibit the imposition of requirements that are not included in the bid solicitation documents. Furthermore, if a conflict of interest requirement is to form part of the evaluation criteria for a solicitation, it must be stated openly, including a method for evaluating whether bids are compliant. Dr. Luik added that there is no evidence in the GIR that the requirement existed as a mandatory condition at the time that Dr. Liefeld was awarded the contract, nor whether Dr. Liefeld was challenged as to whether he met the requirement.

Dr. Luik submitted that the statement in the GIR that the conflict of interest imposed during the ACAN challenge process "was in accordance with the Health Canada Policy on Conflict of Interest" is incorrect. In addition, Dr. Luik submitted that the three-year time limitation in the conflict of interest condition was arbitrary and not rationally connected to any reasonable objective.

Any conflict of interest requirement, Dr. Luik submitted, must be aimed at ensuring both impartiality and independence of the person retained to carry out the work. This is a reasonable objective. Any conflict of interest requirement that is aimed at screening out only those who have worked for the tobacco industry for the last three years and not aimed at screening out those who have worked for Health Canada in relation to tobacco issues in the last three years is discriminatory without ensuring impartiality and independence.

The conflict of interest requirement, Dr. Luik further submitted, was applied absolutely by Health Canada, with no attempt to determine whether he was actually partial or lacked independence, without any

assessment of the type or extent of work done for the "tobacco industry" or any analysis of whether there is any conflict. Dr. Luik submitted that the requirement is vague and incapable of rational application and, therefore, susceptible to discriminatory application.

Concerning his assertion that the conflict of interest requirement is in violation of the right to freedom of association in the Charter, Dr. Luik submitted that the Tribunal is a "court of competent jurisdiction", and has jurisdiction over the parties, the subject matter and the remedies sought. He added that he is not asking the Tribunal to have legislation struck down or declared invalid. He is seeking, instead, a determination that the conflict of interest requirement, in this instance, is not rationally connected to the objective of impartiality and independence being pursued, that it is not minimally impairing and that the deleterious effect of the infringement is greater that its salutary effects. Therefore, Dr. Luik submitted, the Tribunal should declare, in this instance, Health Canada's application of the conflict of interest provision to be unconstitutional and should direct Health Canada to cease and desist from using conflict of interest provisions to bar potential suppliers of professional and scientific services to Health Canada.

With respect to the Department's assertion in the GIR that there is no basis for Dr. Luik's contention that the procurement was conducted in bad faith so as to avoid the obligations of the trade agreements, Dr. Luik submitted that no other interpretation can be put on the events relating to Health Canada's award of the contract to Dr. Liefeld, while maintaining to the world (and perhaps to the Department) that the procurement was proceeding under an ACAN.

In his comments of February 24, 2000, Dr. Luik submitted that the additional information released by the Department on February 17, 2000, makes it clear that the Department "was utterly complicit with Health Canada throughout this process". Dr. Luik submitted that the circumstances of this case are even more disturbing than he estimated in his complaint, which reinforces his request for relief. Dr. Luik concluded by submitting that the Department's failure to recognize the impropriety of its conduct – indeed, its insistence that the complaint is frivolous – makes it critically important that the Tribunal protect the integrity of the public procurement process by condemning the conduct of the Department and Health Canada in appropriately strong terms.

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 NAFTA and the AIT.

The Tribunal first determines that there is no merit to the Department's submission that Dr. Luik does not have standing as a "potential supplier" within the meaning of sections 30.1 and 30.11 of the CITT Act because he has done some work for the tobacco industry during the last three years. Subsection 30.11(1) of the CITT Act provides that a potential supplier (defined in section 30.1 of the CITT Act as "a bidder or prospective bidder on a designated contract") may file a complaint with the Tribunal concerning any aspect of the procurement process at issue. In the Tribunal's opinion, the qualification of suppliers under the terms of a solicitation is clearly an aspect of the procurement process, which a potential supplier is entitled to challenge before the Tribunal. For the Department to prevent the exercise of that right for the very reasons being challenged, would allow it to substitute its judgement for that of the Tribunal and make a mockery of the bid challenge system. Furthermore, in the Tribunal's view, it

is clear from the record that Dr. Luik is an internationally recognized expert in the field of consumer research, with an extensive knowledge of the tobacco industry. The Department and Health Canada never disputed these qualifications in their response to the ACAN. As well, it is clear that Dr. Luik intended to bid on this solicitation, as is demonstrated by his challenge of the ACAN and this complaint. Therefore, he was a prospective bidder and a potential supplier.

With respect to the issue of whether this procurement is for a designated contract, the Tribunal notes that, on November 16, 1999, it accepted Dr. Luik's complaint for inquiry based, in part, on a determination that the subject solicitation was for the provision of services under Code B3, "Administrative Support Studies", of the Common Classification System, that is, classes B301, "Data Analyses (other than scientific)" and B304, "Regulatory Studies". These are two classes of services not excluded from NAFTA or the AIT when procured by or on behalf of Health Canada. As well, the Tribunal determined, on the basis of the $100,000 estimate advertised in the ACAN, that this solicitation met the monetary thresholds of both NAFTA and the AIT for the procurement of services. The parties have not challenged these decisions. In fact, the Department has admitted in the GIR that it erroneously concluded that the "designated contract" at issue was not covered by any of the trade agreements.

Turning to the merits of the case, the Tribunal will determine whether the justification invoked by the Department and Health Canada to use limited tendering procedures in this instance is valid under NAFTA and the AIT and whether the Department and Health Canada clearly set out in the ACAN, and the related solicitation documents, all the evaluation criteria and the methodology for evaluating these criteria.

With respect to the sole source justification highlighted in the ACAN, i.e. "Exclusive Rights", the Tribunal finds that there is no basis in fact to support this justification. Article 1016(2)(b) of NAFTA[7] and Article 506(12)(a) of the AIT,[8] which deal with limited tendering justification both refer to the protection of "exclusive rights" within the context of patents, copyrights, exclusive licences and proprietary information. In fact, neither the Department nor Health Canada made any representation to that effect in respect of this requirement. The Department never established this justification before the Tribunal. The Department and Health Canada used, instead, arguments to the effect that there was "nobody better" than Dr. Liefeld to do the work (the wording used in the ACAN is that Dr. Liefeld is "in the best position to ensure the successful and rapid completion of this project") or that it was urgent that the contract be let and the work performed. With respect to the first argument, the Tribunal observes that being the "better" person or "the person in the best position to perform a specific requirement" is not an admissible justification to use limited tendering procedures. In fact, in the Tribunal's opinion, the very term "best" implies that other qualified persons existed to perform the requirement and that a subjective judgement was made to determine the person who was the most qualified to do the work. This is tantamount to running a secret competition without proper notification. With respect to the reasons of urgency mentioned in Article 1016(2)(c) of NAFTA and Article 506(11)(a) of the AIT, the Tribunal finds that this argument was invoked *post facto* in the GIR and is without merit. The requirement for new regulations and their assessment through the government regulatory impact analysis process had been known since the new tobacco legislation was passed by Parliament about two years ago; furthermore, there is evidence on the record showing that Health Canada started talking to Dr. Liefeld about this requirement early in 1999.

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7. (b) where, for works of art, or for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists.
8. (a) to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain speciliazed products that must be maintained by the manufacturer or its representative.

With respect to the evaluation issue, the Tribunal notes that Article 506(4)(c) of the AIT provides that a notice for a call for tenders shall contain "the conditions for obtaining the tender documents". Article 1009(2)(a) of NAFTA also provides that conditions for participation by suppliers in tendering procedures shall be published sufficiently in advance so as to provide the suppliers adequate time to complete the qualification procedures. As well, Article 1008(1) of NAFTA requires that tendering procedures be applied in a nondiscriminatory manner. The Tribunal notes that, in this instance, the ACAN specifically stated that a "copy of the Request for Proposal or other bid documents is not available". In the Tribunal's view, it was critical in the circumstances that the ACAN contain a clear statement of any criteria that could prevent the qualification of a potential supplier, such as the "previous experience – conflict of interest" restrictions used by Health Canada to disqualify Sires and Dr. Luik. However, there is no mention whatsoever in the ACAN of such restrictions, let alone how the Department and Health Canada would apply them in qualifying potential suppliers. In the Tribunal's opinion, the ACAN completely failed to signal that previous work for the tobacco industry during the previous three years would create a potential conflict of interest situation sufficient to disqualify a potential supplier or did not give any indication as to how such a criterion would be applied. It also failed to publish such a criterion in advance so as to allow suppliers sufficient time to complete the qualification procedure. Further, there is no evidence that the criterion was applied to Dr. Liefeld at the time of his selection.

The Tribunal is of the view that, if an entity is going to include mandatory requirements in its call for proposals or, as the case may be, into an ACAN, it has an obligation to ensure that these requirements are clearly and transparently stated, that they are capable of being assessed and applied in a nondiscriminatory manner, that they are essential to the fulfilment of the contract and that they are not modified during the bid solicitation process without proper notification and without allowing potential suppliers adequate time to react to the changes. In the Tribunal's opinion, the requirement relating to prior work for the tobacco industry and the accompanying alleged appearance of conflict of interest, in the circumstances, meet none of these tests. The Department and Health Canada have argued that the conflict of interest provisions were implicit, as they are part of Health Canada's normal procedures. The Tribunal is not persuaded by this argument. Aside from the fact that they would not meet the above tests, the Department or Health Canada have presented no evidence to demonstrate that such procedures were for anybody but outside advisors to technical committees and, even then, the terms were different and allowed for some form of adjudication.

For the above reasons, the Tribunal finds that the procurement was not conducted in accordance with the trade agreements and that, therefore, the complaint is valid.

In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the CITT Act. In this context, the Tribunal makes the following findings of fact. Health Canada awarded the procurement at issue to Dr. Liefeld in June 1999. In July 1999, Health Canada asked the Department to initiate a procurement process for the same requirement by publishing an ACAN, all the while knowing that the action described in the ACAN was not prospective but past. At the time of publication of the ACAN, both the Department and Health Canada knew that the contract was well under way, as, in the very words of Dr. Liefeld, more than 50 percent had already been completed.

Two potential suppliers, Sires and Dr. Luik, opposed the ACAN, claiming that they could do the work. In the Tribunal's opinion, in terms of the qualification requirements described in the ACAN, both were credible.

Notwithstanding the fact that the project was approaching completion and that a contract could not realistically have been awarded to a new supplier, the Department and Health Canada pursued the ACAN process as if it were a valid exercise. Further, Health Canada raised new mandatory requirements that

caused Sires to withdraw its challenge and that further delayed the qualification of Dr. Luik, making it virtually impossible for him to participate. Finally, Health Canada advised that it was cancelling the requirement to further mask the fact that the procurement was complete.

In the Tribunal's opinion, these actions by the Department and Health Canada run counter to both the letter and the spirit of the trade agreements. That the Department and Health Canada continued to misinform the potential suppliers, when the former knew that it was virtually impossible for the latter to participate in this procurement, clearly demonstrates a lack of good faith. In the Tribunal's opinion, it is particularly regrettable that the Department was involved in these deceptions, given its responsibility to safeguard the efficiency and integrity of the procurement process.

In consideration of the above and in view of the fact that the contract had been substantially performed, the Tribunal recommends that the Department compensate Dr. Luik for the opportunity that he lost to profit from this contract. In addition, the Tribunal, in finalizing the quantum of the compensation for Dr. Luik, will review the Department's and Health Canada's submissions on the prejudice caused to the integrity and efficiency of the procurement system, particularly given the lack of good faith shown by Health Canada and the Department.

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 the AIT 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 for compensation, developed jointly with Dr. Luik, that recognizes: (a) the opportunity that he lost by being unable to make a responsive bid in this case and the possibility that he may have been awarded this solicitation; (b) the prejudice caused to the integrity and efficiency of the competitive procurement system; and (c) the lack of good faith in conducting this procurement shown by the Department and Health Canada. This proposal is to be presented to the Tribunal within 30 days of receipt of the statement of reasons.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards Dr. Luik his reasonable costs incurred in relation to filing and proceeding with the complaint, as well as any costs associated with his challenge to the ACAN.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Richard Lafontaine
Richard Lafontaine
Member