CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, August 4, 2000

File No.: PR-99-053

IN THE MATTER OF a complaint filed by Rolls-Royce Industries Canada Inc. 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 that the Department of National Defence conduct all procurements for repair and overall services required after March 31, 2001, for its Rolls-Royce Allison T-56-A7B, A-15, A15LFE and A14LFE aero engines in light of this determination and in accordance with the provisions of the *Agreement on Internal Trade*.

Pursuant to subsection 30.14(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Rolls-Royce Industries Canada Inc. its reasonable costs incurred in filing and pursuing this complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
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Date of Determination:	August 4, 2000
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member James A. Ogilvy, Member
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Gilles B. Legault
Complainant:	Rolls-Royce Industries Canada Inc.
Counsel for the Complainant:	Barbara McIsaac, Q.C. Kris Klein
Intervener:	Standard Aero Limited
Counsel for the Intervener:	David M. Attwater
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Christianne Laizner

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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 March 22, 2000, Rolls-Royce Industries Canada Inc. (Rolls-Royce Canada) 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 the procurement (Solicitation No. W8467-5-CL03/000/B) by the Department of Public Works and Government Services (the Department) on behalf of the Department of National Defence (DND) for the provision of repair and overhaul (R&O), modification, reduction to spares and related support services for Rolls-Royce Allison T-56-A7B, A-15, A15LFE and A14LFE aero engines (the subject services) for the period from April 1, 2000, to March 31, 2001.[2]

Rolls-Royce Canada alleged that the Department is imposing conditions for its participation in this solicitation which are prohibited under Articles 504(5) and (6) and 506(7) of the *Agreement on Internal Trade*.[3]

Rolls-Royce Canada requested, as a remedy, that a solicitation for the designated contract be issued which would allow it to bid for the contract on a competitive, fair and legal basis. In the alternative, Rolls-Royce Canada requested to be compensated by an amount equal to the profit that it would have made if it had had the opportunity to tender for and win the designated contract. Rolls-Royce Canada further requested, because the existing contract with Standard Aero Limited (Standard Aero) can be extended by amendment pending the resolution of this complaint, that the Tribunal order the postponement of the award of the designated contract. Rolls-Royce Canada finally requested its costs for filing this complaint.

On March 28, 2000, the Tribunal informed 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*.[4] That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On March 30, 2000, the Department wrote the Tribunal certifying that the contract extensions to which the solicitation relates were urgent and that a delay in extending the R&O and accountable advance spares (AAS) contracts would be contrary to the public interest. Accordingly, on March 31, 2000, the Tribunal rescinded its postponement of award order of

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. The complaint is in respect of the same procurement which was previously the subject of a complaint to the Tribunal (File No. PR-98-051) filed by National Airmotive Corporation, a U.S. corporation, in which the Tribunal determined that the services were excluded from the *North American Free Trade Agreement* and the *Agreement on Government Procurement*. The Tribunal determined that it did not have jurisdiction to conduct an inquiry in the matter and, therefore, did not deal with the case on its merits.
3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].

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March 28, 2000. On April 19, 2000, the Tribunal informed the parties that Standard Aero had been granted intervener status in the matter. On May 4, 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 May 16, 2000, Standard Aero informed the Tribunal, in writing, that it would not make submissions to the Tribunal in this matter. On May 17, 2000, Rolls-Royce Canada filed comments on the GIR with the Tribunal. On May 31, 2000, the Department filed submissions on Rolls-Royce Canada's comments on the GIR and, on June 14, 2000, Rolls-Royce filed comments in response.

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

In a letter dated September 27, 1995, in response to a request by National Airmotive Corporation[6] (NAC) that it be included on the bidders' list for all solicitations relating to the engines in question, the Department informed NAC that, as a result of the *North American Free Trade Agreement*,[7] it no longer maintained such lists and that the upcoming business opportunities relating to the engines in question would be advertised on the Open Bidding Service (OBS), since replaced by Canada's Electronic Tendering Service (MERX), and in *Government Business Opportunities* (GBO).

On October 23, 1995, DND raised a requisition for the subject services for the period from January 1, 1996, to March 31, 2001.

In January 1997, the Department published an Advance Contract Award Notice (ACAN) for Solicitation No. W8467-5-CL03/000/A for the provision of the subject services for the period from April 1, 1997, to March 31, 1999 (the 1997 ACAN). The 1997 ACAN included the following: "The work must be performed in Canada for reason of military operational readiness and security; and is to be carried out in accordance with Canadian Forces Technical Orders and the Original Equipment Manufacturer (OEM) specifications and drawings. Standard Aero Limited is the only OEM's T56 aero engine (T56) licensed Canadian maintenance facility". The 1997 ACAN was not challenged by any potential supplier and, on March 21, 1997, the Department awarded the contract for the subject services to Standard Aero for the period from April 1, 1997, to March 31, 1999.

On October 2, 1998, a new ACAN, Solicitation No. W8467-5-CL03/000/B was posted on the OBS (the 1998 ACAN). The 1998 ACAN reads, in part: "Standard Aero Limited is currently providing these services under the R&O and AAS contracts which expire on 31 March 1999. It is proposed to extend these services for two (2) additional years to 31 March 2001. Standard Aero Limited is the only OEM's T56 licensed Canadian maintenance facility".

On March 10, 1999, NAC filed a complaint with the Tribunal in respect of the 1998 ACAN. On June 3, 1999, the Tribunal dismissed NAC's complaint for lack of jurisdiction.[8] Also, on March 10, 1999,

5. S.O.R./91-499.
6. Recently, Rolls-Royce North America Inc., a U.S. corporation ultimately owned by Rolls Royce plc (Rolls-Royce England), purchased NAC. NAC is now known as Rolls-Royce Engine Services – Oakland Inc. (Rolls-Royce Oakland). Rolls-Royce England is the owner of Rolls-Royce Canada, as well as Rolls-Royce Allison (formerly Allison Engine Company), the designer and manufacturer of the T-56 engines in question.
7. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
8. *Supra* note 2.

NAC filed a notice of application for judicial review with the Federal Court of Canada - Trial Division seeking, in part, a declaration that NAFTA and the *Agreement on Government Procurement*[9] apply and requesting relief in the nature of prohibition to prevent the award of a contract without public tender. By agreement between the parties to the Federal Court proceedings, the contracts for the subject services were extended until September 30, 1999, and then, pursuant to a further agreement, until March 31, 2000.

On September 9, 1999, Rolls-Royce North America Inc. announced that it had signed an agreement to purchase NAC.

On February 3, 2000, counsel for the former NAC, now Rolls-Royce Oakland, wrote the Department of Justice to secure an agreement to permit Rolls-Royce Canada to bid for the subject services. On February 24, 2000, the Department of Justice replied that, notwithstanding the purchase of NAC by Rolls-Royce North America Inc., the Department had properly followed all applicable obligations in extending the current contract with Standard Aero.

At a meeting between counsel, held on February 29, 2000, Rolls-Royce Canada was advised that the Department required evidence or notification that Rolls-Royce Canada was qualified and capable of carrying out the work on the T56 engines as an authorized maintenance centre of the OEM. It was noted that, upon receipt of this information, the Department would investigate the capabilities of Rolls-Royce Canada and, if satisfied that it was a *bona fide* competitor (i.e. that Rolls-Royce Canada would perform the work at its facilities in Canada, rather than simply act as an agent for the purpose of bidding on behalf of Rolls-Royce Oakland), the process of competing the next contract would begin.

On March 9, 2000, counsel for the Department of Justice reiterated, in writing, to Rolls-Royce Oakland that the Department was prepared to hold a competitive procurement upon establishment that there was another OEM authorized supplier that could perform the work in Canada.

On March 22, 2000, Rolls-Royce Canada filed this complaint with the Tribunal. On March 30, 2000, the Department, in a letter to the Tribunal, acknowledged receipt of the complaint and confirmed its intention to extend the R&O and AAS contracts, by means of amendment, to March 31, 2001. On March 31, 2000, the contracts were amended to March 31, 2001.

POSITION OF PARTIES

Department's Position

The Department submitted that the requirement that the contractor be capable of performing the work in Canada reasonably should have become known to Rolls-Royce Canada on or about January 27, 1997, when the 1997 ACAN for this requirement was posted on the OBS. Consequently, the Department submitted that the time limit to complain with respect to this issue had long expired. Alternatively, the Department submitted that the very latest time for filing the complaint was within 10 working days from October 2, 1998, the date of the most recent notification that the contract with Standard Aero would be extended. The Department argued that recent corporate reorganization, creating an affiliation between the former NAC and a "newly involved" supplier with a place of business in Canada, should not mean that a further complaint based on a process emanating from the 1997 ACAN for contract award and 1998 ACAN for contract extension can be initiated at this late time.

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9. *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

The Department further submitted that Rolls-Royce Canada does not meet the AIT standing requirement of being a "supplier" because it is not capable of fulfilling the requirements of the procurement. The AIT, the Department argued, is a domestic trade agreement intended to ensure equal access to procurement for all Canadian suppliers. It is not intended to assist companies with a place of business in Canada that do not meet the definition of "supplier"[10] in the AIT and that are acting merely as agents of U.S. suppliers.

The Department submitted that, contrary to Rolls-Royce Canada's allegation, the requirement that the subject services be conducted in Canada by a licensed supplier is a long-standing essential requirement which is necessary for the maintenance of a strong Canadian defence industrial base for the provision of R&O services for the T56 engines. The Department submitted that, unlike the United States, Canada does not have repair depots that are owned by the Armed Forces and that, therefore, the domestic industry constitutes its base level support. The Department further noted that the national security exception under the AIT was not specifically invoked for the original contracting initiative in 1997, nor for the subsequent 1998 contract extension, because government officials never contemplated that a Canadian company would attempt to rely on the AIT to challenge a requirement for the work to remain in Canada in order to direct the contract to suppliers in the United States.

The Department further submitted that the true meaning of Article 504(5) of the AIT is to allow additional weighting in a bid evaluation, in the context of a proposal that specifies the amount of work under the contract which will be done by Canadian residents and puts a "10 percent limit" on such additional weighting. However, the Department submitted, such a scheme has no application to a mandatory requirement that the location of the project be in Canada for national security reasons (even though, as noted earlier, the Department has not invoked the national security exception).

Furthermore, the Department submitted that Article 504(6) of the AIT and any discussion about a "Canadian content" requirement has no logical application to the examination of an essential mandatory criterion that the work be done in Canada. After submitting that the Tribunal has no jurisdiction to apply or enforce the Department's Canadian content policy, the Department submitted that there is no basis, in fact, for Rolls-Royce Canada's suggestion that a requirement for "100 percent Canadian content" is imposed in the context of the R&O and AAS contracts, since the current ongoing requirement involves a significant portion of non-Canadian content, in that the majority of the engine parts and spares purchased under the contract with Standard Aero are actually purchased from Rolls-Royce Allison, the manufacturer, in the United States. In addition, noting that Article 504 of the AIT prohibits measures that discriminate between or that are designed to favour suppliers of a particular province or region, the Department submitted that a requirement that the contract be performed in Canada does not discriminate between or favour suppliers of a particular province or region. Accordingly, there is no prohibition in the AIT on such requirement.

In its comments of May 31, 2000, on Rolls-Royce Canada's response to the GIR, the Department submitted that the key issue in this instance is "whether the application of the AIT prohibits [the Department] from requiring that the work at issue be conducted in Canada". The Department submitted that, contrary to Rolls-Royce Canada's new allegation, the sole source justification in this case was based solely on the fact that Standard Aero is the only authorized supplier in Canada of the subject services and is the only authorized supplier able to do the work in Canada. National security considerations, the Department

10. Article 518 of the AIT defines "supplier" as follows: "means a person [a natural person or an enterprise] who, based on an assessment of that person's financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement".

argued, which support only the long-standing requirement that the work be done in Canada for purposes of "ensuring retention of the core repair and overhaul capabilities in Canada" are not at issue in this solicitation, and any evidence or submission by Rolls-Royce Canada in respect thereof should be disallowed or given no weight by the Tribunal.

With respect to Rolls-Royce Canada's assertion that it has "the commercial, technical and financial capability of being the contractor for the services" and that it is only asking for an opportunity to meet any legitimate requirements in a competitive solicitation, the Department submitted that Rolls-Royce Canada is purposely ambiguous and non-committal with respect to the location at which it would propose to render the subject services. In this respect, the Department submitted that Rolls-Royce Canada's representation of its long-standing capability to perform the subject services should be contrasted with the fact that, despite this alleged capability, it never challenged the 1997 ACAN nor responded to the 1998 ACAN. Rolls-Royce Canada's interest in the requirement, the Department argued, arose concomitant with corporate initiatives that created an affiliate relationship between Rolls-Royce Canada and Rolls-Royce Oakland.

Rolls-Royce Canada's Position

Rolls-Royce Canada indicated that it is seeking "a mere opportunity to bid for work on a Rolls-Royce proprietary engine".

Rolls-Royce Canada submitted that the contracts entered into by the Department and Standard Aero on April 1, 2000, are new contracts and cannot be characterized, as the Department suggested, as simple contract extensions. This assertion, Rolls-Royce Canada added, is supported by the very text of the 1998 ACAN, which indicates that the R&O and AAS contracts will expire on March 31, 1999, as well as by a notice of application for judicial review initiated in March 1999, which contained a motion for an order enjoining the Department not to enter into new contracts. Thus, simply put, after March 31, 2000, the Department was under no legal obligation to extend the old contracts or award the new contracts to Standard Aero, nor was Standard Aero under any obligation to continue work after that date.

Rolls-Royce Canada submitted that it became interested in this procurement in or about November 1999, once NAC was incorporated into the Rolls-Royce corporate structure. Rolls-Royce Canada submitted that it was not until February 29, 2000, that it became aware of the Department's continued intention to sole source the contracts to Standard Aero and that contractors willing to bid for the contracts had to establish their capability to perform all the work in Canada and had to commit to performing all the work in Canada. Indeed, such a requirement was not mentioned in the 1998 ACAN.

With respect to the national security issue raised by the Department in the GIR, Rolls-Royce Canada submitted that there is no evidence that national security considerations require that all the work be performed in Canada. Rolls-Royce Canada submitted, in response to the Department's assertion, that the U.S. requirement that 60 percent of the work in R&O contracts be performed on-site in the United States is the result of industrial and regional benefits programs, not national security. Rolls-Royce Canada also submitted that at no time before the production of the GIR did the Department assert that the work had to be necessarily performed in Canada for national security reasons and that this assertion is made without any evidence in support. In addition, Rolls-Royce Canada observed that the Department relied solely on Article 506(12) of the AIT to justify its decision to contract on a sole source basis with Standard Aero. However, this article does not contain any provisions which would justify sole sourcing based on national security considerations.

Rolls-Royce Canada also submitted that, in the absence of valid national security reasons, the Department, by virtue of the AIT, cannot prefer one contractor over another based on one contractor adding more than 10 percent Canadian value added. Therefore, adding a mandatory requirement obligating a contractor to meet a 100 percent Canadian value-added standard in a procurement violates Article 504(5) of the AIT. Further, Rolls-Royce Canada argued that the Department may not restrict the pool of potential suppliers because there are insufficient Canadian suppliers that can perform all the work in Canada.

Rolls-Royce Canada submitted that it is a part of the larger Rolls-Royce corporate structure which manufactures and owns the proprietary rights of the T56 engines and that it is capable of performing the subject services notwithstanding that it may not be explicitly "licensed" by the specific division of Rolls-Royce responsible for the T56 proprietary rights. It added that for the Department to argue that Rolls-Royce Canada is incapable of performing the work because of the lack of such an explicit licence is merely an attempt to hide behind the legal technicality of a corporate veil.

Concerning the Department's characterization of Rolls-Royce Canada as an agent of Rolls-Royce Oakland, Rolls-Royce Canada submitted that it is a Canadian company within the meaning of Article 518 of the AIT, that it is commercially, technically and financially capable of being the contractor for the subject services and that there is nothing improper about Rolls-Royce Canada using its worldwide assets, including its Canadian assets, to do the work, should it win the solicitation. In this context, Rolls-Royce Canada submitted that it is prepared to abide by all legitimate bid requirements, including any legitimate bid requirements concerning the value of any Canadian content of work required to be done.

In its June 14, 2000, response, Rolls-Royce Canada submitted that the Department now asserts that the government's national security concerns relate to the maintenance of a Canadian capability and not necessarily to the procurement at issue. It follows, Rolls-Royce Canada argued, that, if there is no national security justification or exemption requiring that all the work be necessarily performed in Canada, therefore, there exists no justification to sole source these contracts under the AIT.

Furthermore, Rolls-Royce Canada submitted that, even if one assumes, for discussion purposes, that a national security concern exists to justify the performance of the work in Canada, i.e. to maintain an indigenous capability, the Department has failed to demonstrate how a fair and legitimate competitive solicitation would necessarily result in the lessening or disappearance of that capability from Canada. Rolls-Royce Canada argued that there is no evidence that a competitive solicitation would diminish Standard Aero's ability to perform this type of R&O work. In fact, Rolls-Royce Canada submitted, the evidence shows that Standard Aero currently performs this type of R&O work for others, in addition to that done for DND, and to assert that Standard Aero will lose its capability if it is not awarded the subject contracts on a sole source basis is a mere speculation. Indeed, Rolls-Royce Canada argued, should it win this bid and perform at least 10 percent of the work in Canada, Canadian capability would be enhanced.

Rolls-Royce Canada added that there was nothing ambiguous about its previous submissions with respect to its technical, commercial and financial capabilities of being the contractor for the subject services. Rolls-Royce Canada currently performs all types of work on very complex gas turbine engines, including the manufacture of the world's largest aero-derived engine and R&O work, in Montréal, Quebec.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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 provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the relevant trade agreement, in this case, the AIT.

The Tribunal first notes that the designated contract at issue relates to that part of the requirement described in the 1998 ACAN concerning the provision of R&O services for DND aero engines for the period from April 1, 2000, to March 31, 2001.[11] The Department has contracted for the subject services by means of contract amendments dated March 31, 2000. However, it is clear to the Tribunal that these services represent a new procurement requirement that was never open to competition by means of open or limited tendering procedures. This is evidenced by the 1998 ACAN whose very purpose is to open to competition by means of limited tendering procedures with Standard Aero, DND's requirement for R&O services for its aero engines for the said period.

Although DND raised a requisition in 1995 for the provision of the subject services for the period from January 1, 1996, to March 31, 2001, this requisition, as such, did not elicit a response from the trade. In fact, it is the two notices of proposed procurement, the 1997 ACAN, covering the provision of the subject services for the period from April 1, 1997, to March 31, 1999, and the 1998 ACAN, extending the provision of the subject services to March 31, 2001, after the current R&O and AAS contracts expire on March 31, 1999, which gave effect to this requisition. Therefore, no contractual provisions, option clauses or agreement between the parties existed to cover the provision of the subject services for the period from April 1, 2000, to March 31, 2001, and the amendments to the R&O and AAS contracts, in fact, amount to the conduct of a new procurement on a sole source basis.

Regarding the issue of the time limit to file a complaint, the Department submitted that, because the 1998 ACAN, which served as notice of the Department's intent to sole source the requirement at issue to Standard Aero, was published on October 8, 1998, and because Rolls-Royce Canada's complaint was filed with the Tribunal only on March 22, 2000, the complaint fell outside the 10-working-day time frame prescribed in which to file a complaint. The Department argued that changes in corporate structure, giving rise to a new potential supplier with a place of business in Canada, should not mean that a complaint based on a process emanating from the 1997 ACAN could be initiated at this time.

In the Tribunal's opinion, this argument ignores completely two important considerations, namely, that, contrary to the 1997 ACAN, the 1998 ACAN makes no mention whatsoever of the requirement that the work must be performed in Canada and that, as a result of two successive agreements between the Government of Canada and NAC , the effects of the 1998 ACAN have, in effect, been suspended to March 31, 2000. In the Tribunal's view, the 1998 ACAN remained in force insofar as DND's service requirement for the period from April 1, 2000, to March 31, 2001, is concerned. Although the 1998 ACAN is silent on this point, Rolls-Royce Canada realized between late February and early March 1999 that the Department intended to insist that potential suppliers perform the work in Canada. Rolls-Royce Canada objected to this decision. With the passage of time, the March 31, 2000, deadline approaching and no response to its objection forthcoming, Rolls-Royce Canada concluded that there had been constructive denial of relief on the part of the Department and filed its complaint with the Tribunal on March 22, 2000. In the Tribunal's opinion, both the objection made by Rolls-Royce Canada on March 21, 2000, and the complaint that it filed with the Tribunal on March 22, 2000, fall within the time frames prescribed in subsection 6(2) of the Regulations.

11. The Tribunal notes that, by agreement between the Government of Canada and NAC (subsequently Rolls-Royce Oakland), the provision of the above-mentioned services for the period from April 1, 1999, to March 31, 2000, is not at issue.

Regarding the merits of the complaint, Article 501 of the AIT provides that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurements for all Canadian suppliers. The Department has submitted that Rolls-Royce Canada does not meet the AIT standing requirement of being a "supplier" because it is not capable of fulfilling the requirements of the procurement, specifically, to be OEM T56 licensed for the subject services and to perform the work in Canada. In the Tribunal's opinion, the Department's challenge of Rolls-Royce Canada's status as a "supplier" within the meaning of Article 518 of the AIT is unacceptable, since it rests on the very point at issue, i.e. whether, under the provisions of the AIT, the Department is allowed to require that potential suppliers be OEM T56 licensed and that the work under the contract be performed in Canada in order to be eligible for award.

Article 504(2) of the AIT provides that the federal government shall not discriminate between the goods or services of a particular province or region or between the suppliers of such goods or services. Furthermore, Article 504(3)(g) provides that the unjustifiable exclusion of a supplier from tendering is a measure inconsistent with the above non-discrimination principle. The Tribunal, therefore, must decide, given the specific circumstances of the solicitation at issue, whether the two conditions imposed by the Department for suppliers to qualify for this procurement amount to an unjustifiable exclusion within the meaning of Article 504(3)(g) of the AIT.

The Tribunal has no difficulty understanding the Department's insistence that the R&O services of DND T56 engines be conducted to established quality standards by suppliers whose qualifications, installations and work are recognized by a competent authority in the form of a licence. In fact, Rolls-Royce Canada accepts this condition and argued that, because the Rolls-Royce corporate family possesses such qualifications (Rolls-Royce Oakland is OEM T56 licensed), it meets this requirement.

The Tribunal is also of the view that, absent the formal invocation by DND of the national security exception in Article 1804 of the AIT, the requirement that the subject R&O services be performed in Canada is not justifiable in the circumstances. The Department argued that the requirement is justifiable for "reason of military operational readiness and security", as per the words of the 1997 ACAN. This requirement, the Department submitted, is necessary to preserve and maintain in Canada a core R&O capability for aero engines which is essential to Canada's national security.

With respect to national security considerations, nevertheless advanced by the Department in the GIR, the Tribunal notes that Article 1804 of the AIT, "National Security", provides that nothing in the AIT shall be construed to "prevent the Federal Government from taking any action that it considers necessary to protect national security interests or, pursuant to its international obligations, for the maintenance of international peace and security". However, the 1998 ACAN is completely silent on national security matters, and the Department, in the GIR,[12] has expressly stated that, for reasons set out in the GIR, the national security exception under the AIT was not specifically invoked for the original contracting initiative in 1997 or for the subsequent contract extension in 1998 for the purposes of restricting the requirement to Canadian sources.

In the Tribunal's opinion, because the Department has not invoked the national security exception in respect of the designated contract at issue, it, therefore, must conform to the terms of Chapter Five of the AIT in conducting this procurement. For the same reason, the Tribunal cannot accept any arguments advanced by the Department in support of the "in-Canada" performance condition which relies on national security considerations.

12. Paragraph 11.

The Tribunal is of the view that there are no provisions in the AIT other than those in Article 1804(b) applicable to this case that could justify the Department's requirement that the services be performed in Canada. In fact, and the Department does admit, the Canadian value-added provisions in Articles 504(5) and (6) of the AIT, by their very nature, contemplate the provision by potential suppliers of non-Canadian value-added contents by allowing the application of a maximum 10 percent preference to goods and services on the basis of their Canadian value-added contents.

The Tribunal concludes from the above that, absent the invocation of the national security provisions in Article 1804(b) of the AIT, the Department has unjustifiably excluded Rolls-Royce Canada from the tendering process; therefore, in the Tribunal's opinion, the Department has improperly awarded, by means of limited tendering procedures, to Standard Aero the part of Solicitation No. W8467-5-CL03/000/B at issue.

In determining a remedy, the Tribunal has considered subsections 30.15(2) and (3) in the CITT Act, in light of Rolls-Royce Canada's request and alternate requests, the past history of sole source contracting for this requirement and the fact that some time will be required to develop the solicitation and bid evaluation instruments necessary to openly compete these requirements in the future. Accordingly, the Tribunal will not disturb the contract amendments in place, but will recommend, instead, that all future DND procurements for R&O services required after March 31, 2001, for the T56 engines be conducted in light of this determination and in accordance with the provisions of the AIT.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that DND conduct all procurements for R&O services required after March 31, 2001, for its Rolls-Royce Allison T-56-A7B, A-15, A15LFE and A14LFE aero engines in light of this determination and in accordance with the provisions of the AIT.

Pursuant to subsection 30.14(4) of the CITT Act, the Tribunal awards Rolls-Royce Canada its reasonable costs incurred in filing and pursuing this complaint.

Pierre Gosselin
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