

Ottawa, Wednesday, October 20, 1999

File No.: PR-99-021

IN THE MATTER OF a complaint filed by BMCI Consulting Inc.
under subsection 30.11(1) of the *Canadian International Trade
Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47, as amended;

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 not valid.

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination:	October 20, 1999
Tribunal Member:	Zdenek Kvarda
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Dominique Laporte
Counsel for the Tribunal:	Gerry Stobo
Complainant:	BMCi Consulting Inc.
Government Institution:	Department of National Defence

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STATEMENT OF REASONS

On August 4, 1999, BMCI Consulting Inc. (BMCI) 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 of professional logistician services (Solicitation No. DND 99-0159) by the Department of National Defence (DND).

BMCI alleged that, contrary to the provisions contained in paragraph 2 of the Request for Proposals (RFP), DND awarded the contract to an individual who is self-incorporated. BMCI requested, as a remedy, that the contract with Kildonan Associates Inc. (Kildonan) be cancelled and awarded to BMCI. In the alternative, BMCI requested to be reimbursed for the costs of preparing its proposal, the costs of its submissions to the Tribunal and for the loss of projected profit, had it been awarded the contract.

On August 5, 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*². That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. On August 18, 1999, DND informed the Tribunal that, given that they had become aware of the possibility of a complaint, they were awarding the contract on a month-to-month basis. On August 30, 1999, DND filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*³. On September 7, 1999, BMCI filed its comments on the GIR 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.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].
 2. S.O.R./93-602 [hereinafter *Regulations*].
 3. S.O.R./91-499.

PROCUREMENT PROCESS

On April 22, 1999, DND posted a Notice of Proposed Procurement and an RFP on Canada's Electronic Tendering Service (MERX) for the subject requirement. The RFP at paragraph 2 reads as follows:

Treasury Board Policy precludes contract awards to individual or individuals who self incorporate, if the contract duration exceeds 20 weeks. For this contract, we may only contract with incorporated/registered firm that can show evidence of having employees and/or associates OR with any registered partnership.

On June 1, 1999, the solicitation closing date, two bids had been received, one from BMCI and the other from Kildonan. Both of the bids were determined by DND to be compliant.

On June 3, 1999, DND received a facsimile from BMCI asking DND to confirm that the provisions of paragraph 2 of the RFP would be enforced in that proposals submitted by self-incorporated individuals would not be given any consideration. On June 8, 1999, DND replied to BMCI confirming that the Treasury Board of Canada Secretariat *Contracting Policy* would be applied rigorously. DND also indicated that the *Contracting Policy* was established, in part, to reduce the impact of any employer/employee relationship. That same day, DND sent a facsimile to Kildonan indicating that its proposal was currently being evaluated and, in this context, requesting information in the form of evidence or documentation of employees and/or associates or any registered partnership. On June 9, 1999, DND received a response from Kildonan which provided documents showing contractual relationships with three individuals besides the one named in the complaint. DND found this evidence to satisfactorily prove the existence of employees/associates under contract with or employed by Kildonan.

VALIDITY OF THE COMPLAINT

DND's Position

DND submitted that the term "self-incorporate" has not been clearly defined in legal documents nor clarified in Article 16.3.12 of the *Contracting Policy*. Therefore, in this context, DND submitted that the intent of the *Contracting Policy* is to avoid an employer/employee relationship. With respect to BMCI's assertion that the services which are the object of this contract will be provided by the owner of Kildonan, DND submitted that this is an issue different from that of self-incorporation. DND argued that Kildonan has demonstrated that its incorporated company consists of more than one person and it would not be appropriate nor legal to prevent a contract with an incorporation simply because the owner would be conducting the work.

BMCI's Position

BMCI, in its comments to the GIR, submitted that Kildonan is an entity that consists of one individual and possibly a second, whom BMCI believes to be the spouse of the first individual. Thus, in BMCI's opinion, Kildonan is effectively a one-person entity and a contract with Kildonan contravenes the *Contracting Policy*. BMCI also submitted that, where a contract is for the full-time employment of the owner of the company, that contract contravenes the *Contracting Policy*. Finally, BMCI submitted that the documentation provided by Kildonan does not change the fact that Kildonan is effectively a one-person entity.

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 in the *Agreement on Internal Trade*⁴.

The substance of BMCI's complaint is that DND failed to apply the mandatory requirements in the tender documents in that DND did not eliminate Kildonan's bid which, in BMCI's opinion, is effectively a one-person entity. However, it is clear that Kildonan is an incorporated company and has, according to the information provided by DND, at least one director and one associate director. It is also evident that Kildonan has retained the services of several individuals to either perform, or assist in the performance of, contracts undertaken by Kildonan. The fact that one of those individuals may be related to the director of Kildonan changes nothing. The relevant *Contracting Policy* that DND had included in the tender documents requires that an incorporated firm, with whom a government department has entered into a contract, show evidence of having employees and/or associates. It is apparent that DND is satisfied that Kildonan complies with the RFP with respect to the *Contracting Policy* by virtue of certain contracts for services between Kildonan and three individuals. The Tribunal sees no fault with this view. As such, DND has not violated the provisions of the *AIT* in accepting Kildonan's bid as compliant. Therefore, the complaint is not valid.

DETERMINATION OF THE TRIBUNAL

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

Zdenek Kvarda

Zdenek Kvarda

Member

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