



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-025

Valley Associates Inc.

*Decision made
Tuesday, August 30, 2011*

*Decision and reasons issued
Thursday, September 15, 2011*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

VALLEY ASSOCIATES INC.

AGAINST

**THE CANADIAN COMMERCIAL CORPORATION AND THE DEPARTMENT OF
FOREIGN AFFAIRS AND INTERNATIONAL TRADE**

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a procurement by the Canadian Commercial Corporation (CCC), acting in conjunction with the Department of Foreign Affairs and International Trade (DFAIT), for the provision of X-ray inspection kits in support of Canada's commitment to provide assistance, as part of its Counter-Terrorism Capacity Building (CTCB) Program, to four countries in Southeast Asia (CCC Project No. 101483 and DFAIT Project No. 2010-381C). According to the information provided in the complaint, DFAIT, which is responsible for the administration of the CTCB Program, has entered into a Memorandum of Understanding with the CCC, which sets out their collaboration in delivering assistance—often in the form of in-kind contributions of goods, services and equipment—to foreign recipients.

3. Valley Associates Inc. (Valley) alleges that it has been treated in an unfair and prejudicial manner by the CCC throughout the process of attempting to negotiate the final terms and conditions of a directed contract for the supply of X-ray inspection kits. It alleges that the CCC's decision not to award the contract to Valley has caused considerable harm to its fiscal performance and business reputation.

4. According to the complaint, in December 2010, Valley received a request for a quote for X-ray inspection kits from Defence Research and Development Canada (DRDC), who was acting as the technical authority for the purposes of this sole-source procurement by the CCC and DFAIT. Between December 2010 and April 2011, Valley had ongoing discussions with DRDC and the CCC with respect to issues such as price, the contents of the X-ray inspection kits, technical specifications and the timelines for the completion of an agreement.

5. On April 21, 2011, the CCC sent Valley a draft contract accompanied by an e-mail requesting that it review the contract and provide its comments. It noted that DFAIT and the CCC had now provided their approval to proceed with the purchase, subject to certain conditions precedent, which were set out in the e-mail.

6. On May 4, 2011, Valley sent the CCC its comments on the draft contract along with a revised quote, which was to be valid until June 4, 2011. On the same day, the CCC provided its preliminary responses to Valley's comments and noted that Valley had not indicated whether it accepted the conditions precedent which were set out in the CCC's e-mail of April 21, 2011.

7. On May 11, 2011, Valley replied to the CCC and indicated that it would review the conditions precedent promptly. On May 16, 2011, Valley informed the CCC that two of the three conditions precedent would not be acceptable.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

8. On June 20 and 24 and July 4 and 11, 2011, Valley attempted to get in touch with the CCC. On July 14, 2011, a meeting was held between Valley and the CCC to discuss the current status.

9. On August 10, 2011, Valley received a letter dated August 9, 2011, from the CCC notifying Valley that it was unable to accept its subsequent submission of July 18, 2011, and that it was therefore returning, unopened, the package delivered to the CCC on that date. The letter noted that Valley had been advised at the meeting held on July 14, 2011, that the CCC was no longer pursuing a contract with Valley as it had not accepted the terms and conditions of the April 21, 2011, draft contract, nor had it accepted two of the three conditions precedent set out in the e-mail accompanying the draft contract. The letter also noted that the revised quote provided by Valley on May 4, 2011, included an increase in price and an extension in delivery time and that, since this was not acceptable to the CCC, it had begun to pursue other options upon the expiry of the revised quote on June 4, 2011.

10. On August 19, 2011, Valley advised the CCC that it intended to contest, through the Tribunal, its refusal to award it a contract. It stated that it was taking such action in response to the CCC's letter of August 9, 2011, which was received by Valley on August 10, 2011.

11. On August 23, 2011, Valley filed its complaint with the Tribunal.

12. As indicated above, subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "...complaint[s]...concerning any aspect of the procurement process that relates to a designated contract..."

13. Section 30.1 of the *CITT Act* defines a "designated contract" as "... a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations."

14. A designated contract is thus defined in part as a contract that has been awarded or is proposed to be awarded by a government institution.³ In the Tribunal's view, the evidence provided in the complaint does not indicate that such a contract exists in this case. Indeed, it is clear that the CCC's decision to no longer pursue a contract with Valley means that no contract has been awarded, or is any longer proposed to be awarded, to Valley for the provision of X-ray inspection kits. While Valley did suggest in its complaint that an out-of-country supplier would be awarded a contract, the Tribunal notes that the CCC's letter of August 9, 2011, only states that it had begun "to pursue other options". Therefore, in the absence of any concrete evidence that a contract has been awarded or is proposed to be awarded to another supplier,⁴ the Tribunal finds that Valley's complaint does not relate to a "designated contract" and, consequently, the Tribunal does not have jurisdiction to conduct an inquiry.

15. The Tribunal notes that, even if it had found that a contract had been or was proposed to be awarded by a government institution, it would still have concluded that Valley's complaint does not relate to a "designated contract" as the contract would not have been "... designated or of a class of contracts designated by the regulations."

3. Section 30.1 of the *CITT Act* defines "government institution" as "... any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations." Subsection 3(2) of the *Regulations*, in turn, designates the federal government entities and enterprises set out in the relevant annexes of the trade agreements. The Tribunal notes that, while the CCC is not listed as a covered government entity or enterprise in any of the trade agreements, DFAIT is listed as such a covered entity in all of the trade agreements.

4. Such evidence could take the form of an Advance Contract Award Notice or Contract Award Notice.

16. Subsection 3(1) of the *Regulations* provides that any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of the *North American Free Trade Agreement*,⁵ Article 502 of the *Agreement on Internal Trade*,⁶ Article I of the *Agreement on Government Procurement*,⁷ Article Kbis-01 of Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁸ Article 1401 of Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁹ or Article 1401 of Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,¹⁰ that has been or is proposed to be awarded by a government institution is a designated contract.

17. The Tribunal notes that all of the trade agreements similarly provide that procurements that are subject to their disciplines do not include any form of government assistance.¹¹ Therefore, it follows that any contract related to the provision of government assistance is not a contract designated by subsection 3(1) of the *Regulations*. In the Tribunal's view, the information contained in the complaint clearly indicates that the X-ray inspection kits, which the CCC and DFAIT were attempting to procure from Valley, were intended to be in-kind contributions of goods delivered to foreign recipients. In other words, the direct purpose of the solicitation was to provide assistance to other countries under the CTCB Program. Therefore, even if it had found that a contract had been or was proposed to be awarded, the Tribunal would still have found that Valley's complaint did not relate to a "designated contract" and would not have had jurisdiction to conduct an inquiry.

18. Finally, even if the Tribunal had found that Valley's complaint related to a "designated contract", it would not have determined that it disclosed, as required by paragraph 7(1)(c) of the *Regulations*, a reasonable indication that the procurement had not been conducted in accordance with the trade agreements.

19. Valley alleges that it has been treated in an unfair and prejudicial manner by the CCC. In this regard, it alleges that the CCC's frequent lack of response or slowness in responding led to frustration and delays in their negotiations to conclude an agreement and that, given the amount of time and energy that it put forth in working with the CCC, it should have been awarded the contract.

20. In the Tribunal's view, while the information contained in the complaint may demonstrate that Valley experienced frustrations and delays in the conduct of negotiations with the CCC and DFAIT, it does not reasonably indicate that there has been a breach of any of the provisions of the trade agreements. In fact, it seems reasonable to hold that negotiations conducted in the context of a sole-source procurement (i.e. a limited tendering procedure) would allow either party to abandon negotiations if and when it determined

5. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

7. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

8. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [CCFTA]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

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

10. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [CCOFTA].

11. See Article 1001(5)(a) of NAFTA, the definition of "procurement" at Article 518 of the AIT, General Note 2 of the AGP, Article Kbis-01(2)(a) of the CCFTA, Article 1401(2)(a) of the CPFTA and Article 1401(2)(a) of the CCOFTA.

that acceptable terms and conditions could no longer be negotiated. Moreover, the fact that a party may have invested much time and energy in working with the other party does not, in any way, guarantee that it will be awarded a contract.

21. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

22. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member