



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-042

Consortium GENIVAR—Centre for
Asia-Pacific Initiatives

Decision made
Thursday, November 10, 2011

Decision issued
Monday, November 14, 2011

Reasons issued
Wednesday, November 23, 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

CONSORTIUM GENIVAR—CENTRE FOR ASIA-PACIFIC INITIATIVES

AGAINST

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

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

The statement of reasons will be issued at a later date.

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 (Solicitation No. 2011-A-032788-1) by the Canadian International Development Agency (CIDA) for services relating to the National Legislative Development Project in Vietnam.

3. Consortium GENIVAR—Centre for Asia-Pacific Initiatives (GENIVAR-CAPI) alleged that CIDA must not accept, as a bidder, Ontario Justice International, one of the members of the winning group made up of the Canadian Bar Association, Ontario Justice International and Stikeman Elliott LLP, because this constitutes a flagrant violation of the rules for awarding contracts and is contrary to section 10.1.2 of the Treasury Board (TB) *Contracting Policy*. This section provides as follows: “Departments and agencies should not accept bids from one another or from the provinces, municipalities, territories or Crown Corporations unless the department, agency or Crown Corporation bidding is authorized by policy or statute.” According to GENIVAR-CAPI, Ontario Justice International is a consultation service of the Ontario Ministry of the Attorney General.

4. Further, GENIVAR-CAPI alleged that CIDA did not exercise due diligence when it did not proceed expeditiously with the award of the contract for this invitation to tender, which caused it to be prejudiced. GENIVAR-CAPI contended that CIDA imposed an excessive burden on it by extending the validity of its bid four times, which caused it to incur additional costs to retain the experts and personnel that it had proposed in its original offer. According to GENIVAR-CAPI, the winning group that had Ontario Justice International as an integral part of its proposal had an undue advantage by having Ontario civil servants already being paid with public funds as part of the proposed team, which was not the case for GENIVAR-CAPI.

5. Pursuant to subsection 6(1) of the *Regulations*, the potential supplier must file a complaint with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.” Subsection 6(2) provides that a potential supplier that has made an objection to the relevant government institution and is denied relief by that government institution may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

6. In other words, a complainant has 10 working days from when it first becomes aware of, or should have become aware of, its ground of complaint either to object to the government institution, in this case, CIDA, or to file a complaint with the Tribunal. In the event that a complainant has filed its objection with the government institution in a timely manner, and the government institution denies the objection, the complainant has 10 working days from when it received this denial to file its complaint with the Tribunal.

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

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

7. On the basis of the information in the complaint, the bid closing date was extended to September 14, 2010, and amendment No. 5 to the Request for Proposals (RFP), which contained questions and answers, was sent to GENIVAR-CAPI by e-mail on September 7, 2010, from CIDA's offices. GENIVAR-CAPI contended that CIDA sent it amendment No. 5 to the RFP after its offices closed on September 9, 2010. In that amendment, in question No. 1, a bidder asked if a provincial minister of justice or an attorney general met the eligibility requirements outlined in section 2.1 of the RFP. CIDA responded by saying that it was possible to enter into a contract with a provincial or federal government organization, provided the government organization could prove that it had the mandate and the statutory authority needed to enter into a contract. On October 7, 2011, CIDA advised GENIVAR-CAPI that its proposal had been rejected. During a telephone debriefing on October 17, 2011, CIDA advised GENIVAR-CAPI that it wanted to award the contract to a group made up of the Canadian Bar Association, Ontario Justice International and Stikeman Elliott LLP. On October 19, 2011, GENIVAR-CAPI made an objection to CIDA, contending that Ontario Justice International should not have been allowed to bid on the procurement.

8. The Tribunal is of the opinion that the basis of the complaint became known or reasonably should have become known to GENIVAR-CAPI on September 9 or 10, 2010, at the latest, once it had received or had knowledge of amendment No. 5. According to the complaint, GENIVAR-CAPI made an objection to CIDA on October 19, 2011. In order to be considered timely, an objection would therefore have had to have been made to CIDA or a complaint would have had to have been filed with the Tribunal within 10 working days of September 10, 2010, that is, on September 24, 2010, or at the latest within 10 working days of the deadline of September 14, 2010 (bid closing date), that is, on September 28, 2010. Given that the complaint was not filed with the Tribunal until November 4, 2011, the Tribunal finds that the complaint was not filed within the time limit set out in section 6 of the *Regulations*.

9. Even if the complaint had been filed within the time limits, the Tribunal would not have found, pursuant to paragraph 7(1)(c) of the *Regulations*, that the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁷ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁸ applies. In this case, only the *AIT* applies.

10. The Tribunal notes that, in its complaint, GENIVAR-CAPI contended that there was a violation of the rules for awarding contracts, specifically of section 10.1.2 of the *TB Contracting Policy*. The Tribunal notes that its authority relates exclusively to examining alleged violations of the trade agreements and that its mandate does not extend to the application or enforcement of government policies, such as the *TB* rules

3. *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).

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

6. *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). Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

7. *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).

8. *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/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

for awarding contracts. Accordingly, the Tribunal does not have the authority to conduct an inquiry into the alleged violation of the TB policies regarding the rules for awarding contracts which was raised in GENIVAR-CAPI's complaint, as these rules do not fall within the Tribunal's mandate.

11. In addition, with regard to GENIVAR-CAPI's allegation that the winning group made up of the Canadian Bar Association, Ontario Justice International and Stikeman Elliott LLP had a financial advantage because the persons proposed in its offer were Ontario civil servants, the Tribunal is of the opinion that this allegation is unfounded since there is no indication that such circumstances are contrary to the provisions of the applicable trade agreements.

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

DECISION

13. 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