



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-033

Almon Equipment Limited

*Decision made
Wednesday, October 19, 2011*

*Decision issued
Thursday, October 20, 2011*

*Reasons issued
Tuesday, November 1, 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

ALMON EQUIPMENT LIMITED

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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. W0125-11X012/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of aircraft de-icing, de-snowing and anti-icing services.

3. Almon Equipment Limited (Almon) alleged that, by including a specifically named individual on the evaluation committee, the evaluation process is tainted and raises concerns that the entire process for the solicitation is critically flawed, unfair and biased.

4. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed 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.”

5. Subsection 6(2) of the *Regulations* 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. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

7. On August 5, 2011, PWGSC issued the Request for Proposal (RFP) for the provision of aircraft de-icing, de-snowing and anti-icing services. According to the complaint, on September 7, 2011, bidding closed. In a letter dated September 16, 2011, PWGSC advised Almon that its proposal was deemed non-compliant.

8. On September 30, 2011, Almon submitted a complaint to the Tribunal. On October 3, 2011, the Tribunal determined that the complaint did not comply with subsection 30.11(2) of the *CITT Act* and requested that Almon provide a clear and detailed statement of the factual and evidentiary basis in support of its allegation along with the following information:

- a copy of the RFP for Solicitation No. W0125-11X012/B issued by PWGSC to Almon and any amendments thereto;
- a copy of the proposal submitted by Almon in response to the above-noted solicitation; and
- the form of relief requested.

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

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

9. On October 17, 2011, Almon provided some of the requested documentation to the Tribunal.

10. According to rule 96 of the *Canadian International Trade Tribunal Rules*,³ a complaint that does not comply with subsection 30.11(2) of the *CITT Act* is considered to have been filed only on the day on which the Tribunal receives the information correcting the deficiencies that make the complaint compliant with subsection 30.11(2) of the *CITT Act*, that is, October 17, 2011, in this case, since the Tribunal considers that the additional information provided by Almon on that day is sufficient to correct the deficiencies identified in the Tribunal's October 3, 2011, letter.

11. In the letter from PWGSC dated September 16, 2011, Almon was advised that its proposal was deemed non-compliant with seven different mandatory requirements. Included with the complaint is the evaluation of Almon's proposal against the mandatory criteria, signed by six evaluators, of which one is the specific individual of concern to Almon. It is not known if the evaluation grid was received with the letter on or shortly after September 16, 2011, or at some other time. The date of the evaluation grid is September 9, 2011, but the complaint does not indicate exactly when it was forwarded to Almon. However, on September 27, 2011, Almon attempted to supplement other complaints that it filed on August 19, 2011, and for which the Tribunal decided to conduct an inquiry⁴ with the same ground that forms the basis of the present complaint.⁵ Therefore, the Tribunal concludes that Almon was clearly aware of its ground of complaint by, at least, September 27, 2011.

12. October 17, 2011, is 20 working days after September 16, 2011, and 13 working days after September 27, 2011. As previously stated, the Tribunal is of the view that the basis of the complaint became known to Almon by, at least, September 27, 2011. Therefore, the Tribunal finds that the complaint was not filed in a timely manner. This constitutes a sufficient basis to justify the Tribunal's decision not to conduct an inquiry into the complaint.

13. Even if the complaint had been filed within the prescribed time limit, the Tribunal deems it appropriate to add that, at any rate, it is of the opinion that the complaint did not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.⁶ The Tribunal will now provide the rationale underlying this conclusion.

3. S.O.R./91-499 [*Rules*]. Subrule 96(1) of the *Rules* reads as follows:

96. (1) A complaint shall be considered to have been filed

(a) on the day it was received by the Tribunal; or

(b) in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection. [Emphasis added]

4. File No. PR-2011-022 and File No. PR-2011-023.

5. On September 28, 2011, the Tribunal informed Almon that the information contained in its September 27, 2011, request amounted to a new specific allegation that was not included in the list of grounds of complaint found in the complaints recently filed by Almon (i.e. File No. PR-2011-022 and File No. PR-2011-023), which the Tribunal accepted for inquiry. For this reason, the Tribunal determined that this allegation could not be considered in the context of those ongoing inquiries. The Tribunal also informed Almon that, if it wished that the Tribunal conduct an inquiry into the allegation contained in its September 27, 2011, letter, it should, pursuant to section 30.11 of the *CITT Act*, file another complaint with the Tribunal in this regard.

6. Paragraph 7(1)(c) of the *Regulations* provides that one of the conditions that must be met for the Tribunal to decide to conduct an inquiry into a complaint is that the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

14. In this complaint, Almon submitted that a tendering process needs not only to be fair, but be seen to be fair to all observers. It contended that, by conducting an evaluation on the basis of *modus operandi* that has previously been condemned as non-credible, PWGSC is intentionally acting in disregard for the Tribunal and in disrespect of the doctrines of fairness and impartiality, which, it submitted, are the cornerstones of any tendering process. According to Almon, it is the mere presence of an individual on the evaluation committee that results in this unacceptable state of affairs. Almon's allegation is very serious, since it calls into question the integrity of a specifically named individual. Allegations of this sort cannot be taken lightly and must be supported by adequate evidence. Mere insinuations are not sufficient.

15. The only evidence that Almon filed in support of its grave allegation is a quotation from a previous Tribunal decision concerning the evidence given by certain evaluators in the context of a previous inquiry conducted by the Tribunal. In the Tribunal's opinion, this quotation is misinterpreted and presented completely out of context in Almon's complaint. The Tribunal never found, in the context of its previous inquiry, that any individual evaluator was partial or biased against Almon.

16. On February 9, 2009, Almon filed a complaint with the Tribunal with respect to requirements regarding aircraft ground icing and glycol recovery programs at CFB Trenton.⁷

17. There were multiple grounds of complaint in that case. With respect to one of the grounds that was not accepted for inquiry the Tribunal stated as follows:

Ground 3—Alleged Bias by One of the Evaluators

18. Almon alleged that comments made by one of the evaluators during the debriefing held on September 22, 2008, indicated that he may have brought a predetermined opinion against Almon to the procurement process.

19. The Tribunal did not consider that the information in the complaint provided reasonable substantiation of this allegation. Accordingly, the Tribunal found that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the *AIT*, as contemplated by paragraph 7(1)(c) of the *Regulations*, and did not accept this ground of complaint for inquiry.

18. The Tribunal notes that the evaluator in question in that complaint is the same individual named in Almon's current complaint before the Tribunal. However, the Tribunal expressly refused to inquire into an allegation of bias against this individual.

19. The Tribunal also held an oral hearing in the previous inquiry which, evidently, related to issues other than alleged bias or partiality in the evaluation process, and the specific individual in question was called as a witness. With respect to Almon's allegation in that case as to whether PWGSC improperly evaluated certain point-rated technical criteria, the Tribunal stated as follows:

37. All three evaluators testified that the comments on the consensus scoring sheets were important factors taken into account in determining their scoring.

38. Given this evidence, and the evidence that the comments on the consensus scoring sheets were written during the evaluation process, the Tribunal accepts the comments on the consensus scoring sheets as reliable evidence of the key points taken into account in scoring these criteria. What the Tribunal must assess is what weight to give the evidence concerning the factors that the evaluators allegedly took into account over and above the comments found on the consensus scoring sheets.

7. *Re Complaint Filed by Almon Equipment Limited* (23 June 2009), PR-2008-048 (CITT).

39. In this regard, all three evaluators testified that the comments on the consensus scoring sheets were not a complete list of the important factors taken into account in determining their scoring. When asked why some of the important factors were not listed on the consensus scoring sheets, they all testified that there was not enough room in the column on the form to write all the important factors. Their testimony indicated that they did not consider the possibility of simply attaching an additional sheet to show their additional comments. PWGSC's contracting officer's testimony indicated that this approach was not due to any directions from PWGSC, as she testified that she did not give the evaluators any instruction on how to fill in the "Comments" column and that she was not asked about this by the evaluators. Despite the unanimity of the testimony on this issue, *the Tribunal does not view the described behaviour as credible behaviour on the part of three experienced professionals with access to advice from a PWGSC procurement specialist.*

...

42. Given the Tribunal's view concerning the credibility of the evaluators' testimony concerning the completeness of their written comments on the consensus scoring sheets and the fact that their recollection of the evaluation process was less than clear in some respects, the Tribunal does not consider that it can rely on the evaluators' testimony that there were significant reasons for their scoring that did not appear on the consensus scoring sheets.

[Footnotes omitted, emphasis added]

20. In that case, the Tribunal's finding of "credibility" was made in the context of not accepting the evaluators' testimony "... that there were significant reasons for their scoring that did not appear on the consensus scoring sheets." It did not apply to the general trustworthiness or potential bias of the evaluators as relating to Almon. In short, the Tribunal's statements cannot be reasonably interpreted to mean that the mere presence of certain evaluators on the evaluation committee for *other* procurement processes will necessarily render any such processes unfair or biased against Almon.

21. The test applied by the Tribunal in order to determine if the circumstances of a case give rise to bias or a reasonable apprehension of bias is the one set out by de Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*,⁸ as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,⁹ which reads as follows:

... what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude[?] Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly[?]¹⁰

22. The Tribunal is of the view that, in the present case, the complaint does not demonstrate, on the facts of the case, how an informed person would realistically and practically reach the conclusion that the mere presence of the specified individual, for whom the Tribunal found, in another case, that his evidence lacked credibility on a specific and limited circumstance, necessarily implies that the procurement process at issue is critically flawed, unfair and biased.

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

8. [1978] 1 S.C.R. 369 (S.C.C.).

9. [2003] 1 S.C.R. 884 (S.C.C.).

10. [1978] 1 S.C.R. 369 (S.C.C.) at 394. In this regard, see also *Re Complaint Filed by Acron Capability Engineering Inc.* (10 July 2007), PR-2006-046 (CITT).

DECISION

24. 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