



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-026

Air Tindi Ltd.

*Decision made
Tuesday, August 30, 2011*

*Decision and reasons issued
Thursday, September 8, 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

AIR TINDI LTD.

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.

Jason W. Downey
Jason W. Downey
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 (Solicitation No. M7594-120138/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for the removal and installation of wings on a de Havilland DHC-6-300 Twin Otter aircraft as well as additional maintenance services.

3. Air Tindi Ltd. (Air Tindi) alleged that its bid was improperly declared non-compliant by PWGSC because it proposed a sub-contractor that, according to PWGSC, did not meet certain mandatory requirements.

4. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of the following trade agreements applies: 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 In other words, the Tribunal must examine the complaint to determine if there is a reasonable indication that the procuring entity conducted the procurement in a manner that violated one of the applicable trade agreements. In this case, only the *AIT* applies.⁹

5. Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

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

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

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) [*NAFTA*].

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> [*AGP*].

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) [*CCFTA*]. 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) [*CPFTA*].

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) [*CCOFTA*].

9. The solicitation in question was tendered under Goods and Services Identification Number N1680 - Miscellaneous Aircraft Accessories and Components. In relation to procurement on behalf of the RCMP, Federal Supply Classification 16 (i.e. Class N1680) is not covered by *NAFTA*, the *CCFTA*, the *CPFTA* or the *CCOFTA*. The contract price is below the monetary threshold for the *AGP*.

6. On June 29, 2011, PWGSC issued a Request for Proposal (RFP) for the removal of wings, installation of new wings, completion of a five-year corrosion inspection and repainting of the cockpit, as well as additional miscellaneous work, on a de Havilland DHC-6-300 Twin Otter aircraft.

7. With respect to the mandatory criteria at issue, Part 4 of the RFP provides as follows:

1.2.1 Mandatory Requirements

... The words “shall” and “must”, in the RFP are to be interpreted as mandatory requirements.

... Any proposal, which fails to meet any of the Mandatory Requirements in Annex A, will be deemed non-responsive and will not be given further consideration. . . .

8. Annex “A” of the RFP, “Statement of Work”, provides as follows:

The work described within this document must be completed by a Transport Canada Approved Maintenance Organization (AMO), appropriately certified for the aircraft type and scope of work stated in this document.

All requirements described in Annex “A” are Mandatory requirements.

...

2. Work must be completed by a Transport Canada Approved Maintenance Organization (AMO), appropriately certified for the aircraft type and scope of work stated in this document.

9. Annex “C” of the RFP, “Certification Checklist”, required that suppliers’ bids include the Department of Transport (Transport Canada) AMO certification. According to the complaint, AMO certification includes, among other information, the aircraft type upon which a company is rated to work and the scope of work that it can undertake for that particular aircraft.

10. Air Tindi’s bid stated as follows: “Work will be performed by Air Tindi Ltd., Transport Canada AMO # 162-90 appropriately certified for the deHavilland DHC6 series aeroplanes and Discovery Air Technical Services Inc. AMO # 23-10 in accordance with [Transport Canada] CAR [*Canadian Aviation Regulations*] 573.11.”

11. In a letter dated August 12, 2011, PWGSC informed Air Tindi that the contract had been awarded to one of its competitors and that Air Tindi’s proposal had been found non-compliant because it had not met the following requirement: “Work must be completed by a Transport Canada Approved Maintenance Organization (AMO), appropriately certified for the aircraft type and scope of work stated in this document.”

12. Specifically, PWGSC explained that, while Air Tindi’s proposal had included Transport Canada AMO certifications for both Air Tindi and Discovery Air Technical Services Inc. (DATS), only Air Tindi was appropriately certified (under AMO 162-90) for the de Havilland DHC-6 series aircraft. PWGSC further explained that, as Air Tindi’s proposal had stated that a certain portion of the work would be performed by DATS, whose AMO certification (AMO 23-10) did not list the de Havilland DHC-6-300 series aircraft, Air Tindi’s bid did not meet the mandatory criterion that the work be completed by an organization that was appropriately certified for the aircraft type and scope of work stated in the RFP.

13. Air Tindi submitted that, according to section 573.11 of the *Canadian Aviation Regulations*¹⁰ (CAR 573.11), entitled “Maintenance Arrangements”, an AMO that is certified for a particular aircraft type is permitted to make “maintenance arrangements” with another maintenance provider to perform work on that aircraft, even if the other maintenance provider is an AMO that is not certified for that aircraft type. In

10. S.O.R./96-433.

its complaint, Air Tindi indicated that DATS was not bidding on the work and only proposed to provide facilities and labour to support Air Tindi in accordance with Transport Canada's regulations. The Tribunal notes that the information in the preceding sentence was not included in Air Tindi's proposal.

14. In the Tribunal's view, the Statement of Work clearly required that the work be completed by a Transport Canada AMO that is "... appropriately certified for the aircraft type and scope of work stated in this document" and that "[a]ny proposal, which fails to meet any of the Mandatory Requirements in Annex A, will be deemed non-responsive and will not be given further consideration."

15. The Tribunal is therefore of the opinion that PWGSC properly followed the terms of the RFP when it declared Air Tindi's proposal non-compliant, as Air Tindi, by all appearances, proposed to use a resource that was not an AMO for the particular aircraft type listed in the RFP.

16. Even if CAR 573.11 allows an AMO that is certified for a particular aircraft to supervise a non-certified resource in the execution of its work, this was not specified in its proposal and appears to be contrary to the specific technical requirements of the RFP.

17. Through the RFP, PWGSC stipulated specific technical requirements for the maintenance of a de Havilland DHC-6-300 aircraft. One of these requirements was that the entity that could perform work on the aircraft hold the proper certification to do so. Had PWGSC agreed that such work be performed by a non-certified contractor, through the supervision of another certified entity, whether through CAR 573.11 or otherwise, this would have been mentioned in the RFP; however, this is not the case.

18. In *Eurodata Support Services Inc.*,¹¹ the Tribunal held a similar position in rejecting a complaint filed against the Department of Human Resources Development (HRDC). The Tribunal then held as follows:

HRDC was required to state fully and clearly its requirements in the tender documents. As such, it was entitled to express any real and reasonable needs that it may have had. Furthermore, the Tribunal is of the view that HRDC was under no obligation to compromise its legitimate operational requirements to accommodate Eurodata's particular corporate circumstances.¹²

19. The Tribunal believes that such reasoning applies to the present case.

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

DECISION

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

Jason W. Downey

Jason W. Downey

Presiding Member

11. *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).

12. *Ibid.* at 7.