



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-028

723186 Alberta Ltd.

*Decision made
Monday, September 12, 2011*

*Decision and reasons issued
Friday, September 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

723186 ALBERTA LTD.

AGAINST

THE PUBLIC HEALTH AGENCY OF CANADA

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.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
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. 1000117933) by the Public Health Agency of Canada (PHAC) for the provision of translation services on an as-and-when-required basis.

3. 723186 Alberta Ltd. alleges that certain requirements of the subject Request for a Standing Offer (RFSO), specifically, that the successful supplier provide both English-to-French and French-to-English translation services, that the successful supplier possess a facility security clearance and, finally, that the proposed resources possess a “Secret” security clearance, unfairly shut out small translation businesses and individual suppliers from the competition.

4. On August 19, 2011, the PHAC issued the RFSO for the provision of the aforementioned translation services. The deadline for the receipt of bids was September 20, 2011.

5. Article 2.1, “**Mandatory Requirements**”, of section “I” of the RFSO advised bidders of the criteria that they were required to meet. Among these criteria were the following, which are relevant for the purposes of this complaint:

M2 The offeror must provide evidence that they possess a qualified human resource complement capable of providing translation services, as indicated in this RFSO. To demonstrate compliance, offerors must include within their proposal a detailed Curriculum Vitae (CV) for the required number of named resources in each of the following resource categories:

- English to French Translator (minimum of three (3) resources required)
 - French to English Translator (minimum of two (2) resources required)
- * *Named resources can only be proposed in one (1) resource category.*

...

M3 The offeror must demonstrate that their firm as well as each proposed translators hold a valid security clearance in accordance with the security requirements as indicated in article 3.6 of the statement of Work and the Security Requirements Check List (SRCL) attached hereto as Appendix B at the time of bid closing.

...

[Emphasis in original]

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

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

6. The SRCL required that the proposed resources hold a “Secret” security clearance and indicated that the contractor’s facility would be required to receive, store electronically, process and produce classified information.

7. Article 2.1, “Tasks, Activities, Deliverables and Milestones”, of the Statement of Work (SOW) attached to the RFSO advised bidders of the following:

... Typical documents that the Contractor may be expected to translate include, but are not limited to:

- Formal Texts, including (but not limited to) documents prepared for Cabinet and Treasury Board Submissions;
- Speeches;
- Presentations;
- Studies or other written Documents/Reports;
- Media Packages;
- Web Publications;
- Surveys;
- Notices;
- Publications;
- Articles;
- Records of Decision/Minutes; and
- Other materials and documents.

8. On August 22, 2011, 723186 Alberta Ltd. made an objection to the PHAC and argued that the bundling of the French-to-English translation services with English-to-French translation services and the security requirements of the RFSO imposed barriers to competition. In this regard, it submitted that a potential solution could be for the PHAC to break up the translation requirements so that bidders could bid on a single stream, e.g. only French-to-English translation services. As for those few documents that 723186 Alberta Ltd. considered would actually be classified, it proposed that these could be translated either in-house at the PHAC or by the Translation Bureau of the Department of Public Works and Government Services (PWGSC), thereby removing the security requirements for outsourced translation work. According to 723186 Alberta Ltd., these changes would allow it, and other French-to-English translators, to compete on a level playing field.

9. On August 23, 2011, the PHAC acknowledged receipt of 723186 Alberta Ltd.’s correspondence and advised that it was preparing a response to its concerns.

10. On August 30, 2011, the PHAC issued “Questions and Answers #1”, which provided bidders with the following information:

Question 1

Would the Public Health Agency of Canada consider revising the requirement to tender for English to French and French to English services separately?

Answer 1

The resulting Standing Offer Agreement (SOA) is intended to address the requirements for the Public Health Agency of Canada (PHAC) in its entirety. Due to operational requirements, urgent timelines, and the administration of the resulting SOA, PHAC is seeking a team of translators to address both English to French and French to English translation in a cost effective manner. As such it is in PHAC’s best interest to award a single SOA in order to obtain best value.

Individual bidders that are not in a position to fulfill the requirement for both English to French and French to English translation are encouraged to bid on the requirement as a Joint Venture.

Question 2

Would the Public Health Agency of Canada consider revising the security requirement for this solicitation to remove the requirement for Facility Security Clearance and Secret Clearance for personnel?

Answer 2

The security requirement for this solicitation has been established in consultation with the PHAC Departmental Security Officer and the Canadian International Industrial Security Directorate (CIISD) of PWGSC. The security requirement of this solicitation will not be modified.

...

Question 7

The Security Requirements require Bidders and translators to have Secret clearance. Could PHAC please provide an estimated percentage of the overall requirement that will have a Secret requirement attached to it?

Answer 7

Due to the large number of users and the wide variety of documents, PHAC is unable to identify the percentage of secret requirements.

...

Question 9

Our translators do not have Secret Clearance, Is there a way that we could bid on this and if accepted be sponsored for Secret clearance?

Answer 9

In order to have a solution implemented for PHAC users as soon as possible, bidders must have a valid security clearance in accordance with M3 at the time of bid closing.

[Emphasis in original]

11. On September 8, 2011, 723186 Alberta Ltd. filed its complaint with the Tribunal.
12. 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 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.

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].

13. The services being requested fall under class R109, “Translation and Interpreting Services (inc. sign language)”, of the Common Classification System and are specifically excluded from coverage under *NAFTA*, the *CCFTA*, the *CPFTA* and the *CCOFTA* and are not included in the coverage under the *AGP*. The services are not excluded under the *AIT*. Therefore, only the *AIT* could apply. While the PHAC is not listed, as such, as a covered government entity under the *AIT*, the solicitation documents issued by the PHAC list the *AIT* as the only applicable trade agreement. The PHAC was specifically established for the purpose of assisting the Minister of Health in exercising and performing his/her powers, duties and functions in relation to public health.⁹ These include the powers, duties and functions specifically set out in the *Department of Health Act*.¹⁰ As the PHAC was created after the *AIT* came into force and as the Department of Health is itself a listed entity under the *AIT*, the Tribunal will accept *arguendo* that the PHAC is a covered entity in the circumstances of this case.

14. Article 504(3)(b) of the *AIT* provides that certain types of measures are inconsistent with the non-discrimination provisions of the *AIT*, including, but not limited to, the following:

the biasing of technical specifications in favour of, or against, particular goods or services . . . or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter.

9. *Public Health Agency of Canada Act*, S.C. 2006, c. 5, s. 3: “The Public Health Agency of Canada is established for the purpose of assisting the Minister in exercising or performing the Minister’s powers, duties and functions in relation to public health.”

10. *Department of Health Act*, S.C. 1996, c. 8, s. 4:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction relating to the promotion and preservation of the health of the people of Canada not by law assigned to any other department, board or agency of the Government of Canada.

Particulars

(2) Without restricting the generality of subsection (1), the Minister’s powers, duties and functions relating to health include the following matters:

(a) the administration of such Acts of Parliament and of orders or regulations of the Government of Canada as are not by law assigned to any other department of the Government of Canada or any minister of that Government relating in any way to the health of the people of Canada;

(a.1) the promotion and preservation of the physical, mental and social well-being of the people of Canada;

(b) the protection of the people of Canada against risks to health and the spreading of diseases;

(c) investigation and research into public health, including the monitoring of diseases;

(d) the establishment and control of safety standards and safety information requirements for consumer products and of safety information requirements for products intended for use in the workplace;

(e) the protection of public health on railways, ships, aircraft and all other methods of transportation, and their ancillary services;

(f) the promotion and preservation of the health of the public servants and other employees of the Government of Canada;

(g) the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, in so far as they relate to public health;

(h) subject to the *Statistics Act*, the collection, analysis, interpretation, publication and distribution of information relating to public health; and

(i) cooperation with provincial authorities with a view to the coordination of efforts made or proposed for preserving and improving public health.

15. In its complaint, 723186 Alberta Ltd. submitted that the practice of bundling French-to-English and English-to-French translation services into a single solicitation “. . . impedes access to federal government work for qualified professional translators who work only from their second Official Language into their first while militating against optimal translation quality”¹¹ and, in particular, that this practice “. . . gives an unfair, discriminatory advantage to . . . agencies and other firms that maintain staff and/or routinely subcontract large volumes of work in one or both of these language directions . . .”,¹² as well as to “. . . individual independent Francophone translators or consortiums of such translators who . . . can manage the relatively small proportion of French-to-English work, either by doing it themselves anyway or by subcontracting it to qualified Anglophone translators.”¹³

16. 723186 Alberta Ltd. submitted that, in a typical Canadian federal department or agency, English-to-French translation accounts for about 90 percent of official languages translation volume. 723186 Alberta Ltd. submitted that this meant that it would have to manage and accept the asymmetrical administrative burden of devoting a large amount of its time to administering subcontracts for the English-to-French translation work in order to secure the remaining 10 percent of the work for itself. It claimed that this burden made it virtually impossible for French-to-English translators to compete for work from the PHAC.

17. 723186 Alberta Ltd. also submitted that the security requirements constituted a further barrier to competition. Specifically, 723186 Alberta Ltd. questioned the validity of the requirements, given what it considered the nature of the documents listed in the SOW. 723186 Alberta Ltd. argued that it, and other translators, had been providing such services for many years without a “Secret” security clearance. In addition, 723186 Alberta Ltd. claimed that obtaining a facility security clearance, with approval for document safeguarding at the required protected level, is a lengthy and onerous procedure that necessarily involves an information technology clearance designed for large government departments and large companies.

18. In its complaint, 723186 Alberta Ltd. requested that the requirements set out in the RFSO be revised as noted above, i.e. by allowing bidders to bid on a single stream of translation and removing the security requirements for outsourced translations.

19. It is well established in Tribunal jurisprudence that a government institution is entitled to define and satisfy its legitimate operational requirements. However, while a government institution has the right to establish the parameters of the solicitation, it must do so reasonably, as it does not have licence to establish conditions that are impossible to meet.¹⁴ Thus, the prerogative of the procuring entity to define its procurement needs is circumscribed by “reasonableness”.¹⁵

11. Complaint, section 5F at 2.

12. *Ibid.*

13. *Ibid.*

14. See, for example, *Re Complaint Filed by Forrest Green Resource Management Corp.* (12 August 2010), PR-2009-154 (CITT) at para. 44; *Re Complaint Filed by MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc.* (5 August 2005), PR-2004-061 (CITT) at para. 67.

15. *Re Complaint Filed by Global Upholstery Co. Inc.* (6 July 2009), PR-2008-052 (CITT) at para. 10.

20. The Tribunal has also held that a government institution, in satisfying its legitimate operational requirements, need not structure a procurement to accommodate any particular supplier.¹⁶ In its recent decision in *Daigen Communications*,¹⁷ the Tribunal noted that, as long as a procurement is not deliberately constructed to preclude certain suppliers or to direct the procurement to a favoured supplier, a government institution may choose to procure a combination of services by way of a single solicitation, even though this might have the effect of excluding some suppliers.

21. Moreover, as the Tribunal has stated in the past, the fact that certain bidders have competitive advantages regarding a particular tendering process is simply part of the ordinary ebb and flow of business; if a bidder is at a disadvantage, it does not necessarily follow that the procurement process is discriminatory.¹⁸

22. In the Tribunal's view, 723186 Alberta Ltd.'s complaint does not disclose any evidence to suggest that the PHAC structured the procurement at issue with the intent of excluding particular suppliers. More specifically, the Tribunal finds that the requirement that bidders be capable of translating documents from French to English and English to French does not appear to be unreasonably restrictive, and the Tribunal therefore defers to the PHAC in establishing the parameters of the subject RFSO. Indeed, there would seem to be some logic to the bundling of the services at issue in a single solicitation, insofar as they both relate to the translation of documents, albeit in different directions.

23. As for the reasons given by the PHAC for issuing a single solicitation for both English-to-French and French-to-English translation services, the Tribunal does not consider it unreasonable to assume that dealing with a single supplier for translation services in both language directions will allow for the realization of certain operational and administrative efficiencies. Moreover, that the practice of bundling both services together might have a negative impact on the quality of the services provided to the government, as alleged by 723186 Alberta Ltd., is of little relevance, as the PHAC, in structuring its solicitation, is entitled to balance quality considerations against its cost constraints, provided, of course, required minimum standards are met.

24. The Tribunal is also of the view that 723186 Alberta Ltd.'s challenge of the PHAC's assessment of its own security requirements do not provide a sufficient basis to impugn the procurement, especially given the reasonableness and sufficiency of the other reasons cited by the PHAC for structuring the solicitation in the manner in which it did, as discussed above. The Tribunal does not consider the security requirements to be discriminatory or designed to improperly exclude certain suppliers, given that, according to the PHAC's "Questions and Answers #1" issued on August 30, 2011, "[t]he security requirement for this solicitation has been established in consultation with the PHAC Departmental Security Officer and the Canadian International Industrial Security Directorate (CIISD) of PWGSC" [emphasis in original] and that the SOW includes inherently sensitive policy decision-related documents, such as "...documents prepared for Cabinet and Treasury Board Submissions".

25. The Tribunal could not take into consideration the claims made by 723186 Alberta Ltd. that it had provided such translation services in the past without the currently required security clearance, as the particular requirements of previous solicitations, being extraneous to the current RFSO, are not relevant to its assessment of the current complaint. The Tribunal carefully considered the requirements specified in the current solicitation, which were clear in relation to 723186 Alberta Ltd.'s grounds of complaint.

16. *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT) at 7; *Re Complaint Filed by Foundry Networks* (30 August 2001), PR-2001-008 (CITT) at 3.

17. *Re Complaint Filed by Daigen Communications* (23 August 2011), PR-2011-021 (CITT) at para 16.

18. *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT) at para. 43.

26. Consequently, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the *AIT*. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member