



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2011-056

Brains II Canada Inc.

*Decision made  
Thursday, March 15, 2012*

*Decision issued  
Friday, March 16, 2012*

*Reasons issued  
Wednesday, March 28, 2012*

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**

**BRAINS II CANADA INC.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC SAFETY**

**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.

Stephen A. Leach

Stephen A. Leach  
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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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 (Request for Proposal No. 42352-12-0001) by the Department of Public Safety and Emergency Preparedness (Public Safety Canada) for the provision of informatics technician services.

3. Brains II Canada Inc. (Brains II) alleged that Public Safety Canada unfairly awarded the contract to a supplier that had improperly included the résumés of two of Brains II's employees in its bid, in breach of their contractual obligations to Brains II.

### TIMELINESS

4. For the reasons below, the Tribunal finds that the complaint was filed outside the time limit.

5. 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." 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. Subsection 30.11(2) of the *CITT Act* lists the requirements for filing a complaint, including that the complaint must "(f) include all information and documents relevant to the complaint that are in the complainant's possession".

7. Subsection 30.12(2) of the *CITT Act* provides as follows:

Where the Tribunal determines that a complaint does not comply with subsection 30.11(2), it shall notify the complainant in writing and specify the deficiencies to be corrected, the corrective action required and the period within which the action must be taken.

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

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

8. In other words, a complainant has 10 working days from the day 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. If a complainant objects to the government institution within the designated time, the complainant will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

9. Furthermore, from whichever date the 10-day period to file a complaint with the Tribunal begins, it continues to run if the complaint, as filed, is deficient. Consequently, a deficient complaint that is not remedied within the 10-day period will be considered late.

10. On November 30, 2011, Public Safety Canada issued a Request for Proposal (RFP) for the provision of informatics technician services. On January 16, 2012, Brains II submitted a bid in response to the RFP.

11. According to the complaint, on February 13, 2012, Public Safety Canada notified Brains II that its bid was deemed non-compliant. On February 14, 2012, Brains II asked for an explanation.

12. On February 15, 2012, Public Safety Canada replied that two of Brains II's employees had not met the required 60 percent rating stipulated in the RFP. On the same day, Brains II asked for particulars and whether its own contract with Public Safety Canada would be extended while the new supplier obtained security clearances for its employees, adding that it would be unwilling to transfer its own employees to the new supplier. Public Safety Canada responded that it was not its practice to get involved in "internal" matters such as the transfer of employees between suppliers. According to the complaint, Brains II called Public Safety Canada on February 27, 2012, to further discuss the matter and then met with Public Safety Canada sometime between February 28 and March 1, 2012. However, the nature of these subsequent discussions was not specified in the complaint.

13. The Tribunal concludes that Brains II became aware of the basis of its complaint on February 15, 2012, the day on which Public Safety Canada advised it of the reason for which its proposal had been deemed non-compliant. The Tribunal also notes that there is no evidence in the complaint that Brains II objected to Public Safety Canada subsequent to February 15, 2012. Therefore, the Tribunal finds that Brains II had until March 1, 2012, to file its complaint, which it did.

14. However, the Tribunal finds that the complaint, as filed on March 1, 2012, was deficient because it did not include copies of the RFP and Brain II's proposal and that, by the time that Brains II remedied the deficiency, on March 8, 2012, the legislated time limit for filing a complaint had well passed; therefore, the Tribunal has no jurisdiction to accept it for inquiry.

#### **REASONABLE INDICATION OF BREACH**

15. Even if the complaint had been filed in a timely manner, the Tribunal would still have been unable to accept it for inquiry, since it failed to disclose a reasonable indication that the applicable trade agreements had been breached.

16. According to paragraph 7(1)(c) of the *Regulations*, to initiate an inquiry, the Tribunal must find that the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of the *North American Free Trade Agreement*,<sup>3</sup> the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> the *Canada-Chile Free Trade Agreement*,<sup>6</sup> the *Canada-Peru Free Trade Agreement*<sup>7</sup> or the *Canada-Colombia Free Trade Agreement*<sup>8</sup> applies.

17. Article 506(6) of the *AIT* provides as follows:

The 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.

18. Article 1015(4)(d) of *NAFTA* provides as follows:

[A]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . .

19. The remaining free trade agreements contain similar clauses. In applying the above provisions, the complainant bears the burden of proving that the evaluation of its bid was conducted incorrectly, i.e. not in accordance with the criteria stipulated in the tender documentation. In other words, the Tribunal will only interfere with an evaluation that is unreasonable, i.e. one where the evaluators have ignored vital information, wrongly interpreted the scope of the requirement, acted in a procedurally unfair way or based their evaluation on undisclosed criteria.<sup>9</sup>

20. In this instance, there was no evidence to suggest that the evaluation process was conducted in a procedurally unfair manner. Although Brains II alleged that the successful bidder had improperly “poached” five of its employees, Public Safety Canada concluded that the transfer of employees was an internal matter between Brains II and the other bidder and ought not to be considered in its evaluation. The Tribunal agrees. In other words, there is no evidence that the above provisions of the trade agreements have been breached.

21. As such, the Tribunal concludes that the information on the record fails to disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

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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](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](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).

9. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

**DECISION**

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

Stephen A. Leach

Stephen A. Leach

Presiding Member