



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-040

Avaya Canada Corp.

*Decision made
Wednesday, October 26, 2011*

*Decision issued
Thursday, October 27, 2011*

*Reasons issued
Wednesday, November 2, 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

AVAYA CANADA CORP.

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.

Diane Vincent
Diane Vincent
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. M9010-091080/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police for multimedia network convergence equipment and support services. The solicitation documents indicate that this procurement is set aside for aboriginal suppliers in accordance with the Government's Procurement Strategy for Aboriginal Business (PSAB) and set aside from the international trade agreements under the respective provisions that each contains regarding set-asides for small and minority businesses. The solicitation documents also state that, further to Article 1802 of the *Agreement on Internal Trade*,³ the *AIT* does not apply to the procurement.

3. Avaya Canada Corp. (Avaya) alleged that PWGSC improperly invoked the PSAB and is improperly shielding the solicitation from review behind what it claims is a wholly inappropriate aboriginal set-aside in an attempt to avoid its obligations under the trade agreements. Avaya also alleged that the technical specifications listed in the subject solicitation made it impossible for suppliers to offer products other than those of the brand name specified in the solicitation.

4. Regarding its first ground of complaint, Avaya argued that there was no connection between the procurement and any land claim agreements, treaties or other aboriginal business or policy considerations. It argued that PWGSC's discretion cannot be entirely unbridled and that PWGSC cannot arbitrarily decide, whenever it wishes, to set aside a solicitation in such a manner.

5. Regarding its second ground of complaint, Avaya submitted that, notwithstanding the language in the solicitation that allows for equivalent products to be proposed, suppliers were *de facto* required to offer products from Cisco Systems to have a chance of success. As an example, Avaya referenced a number of deliverables that, it claimed, required Cisco Systems licences or software which, according to Avaya, no manufacturer other than Cisco Systems can legally produce. Avaya requested, among other remedies, that the solicitation be amended or cancelled and re-tendered in a manner that would truly allow equipment of equivalent performance to be offered by suppliers.

6. Subsection 30.11(1) of the *CITT Act* provides that "... a potential supplier may file a complaint with 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."

7. Subsection 7(1) of the *Regulations* states that three conditions must be met before the Tribunal can inquire into a complaint. According to one of these conditions, a complaint must be in respect of a "designated contract", i.e. a contract subject to at least one of the trade agreements, as is made clear by subsection 3(1).

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

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

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

8. Section 30.1 of the *CITT Act* defines the term “designated contract” as follows:
“designated contract” means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations.

9. Subsection 3(1) of the *Regulations* provides the following:

For the purposes of the definition “designated contract” in section 30.1 of the [*CITT Act*], any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of the [*North American Free Trade Agreement*⁴], in Article 502 of the [*AIT*], in Article I of the Agreement on Government Procurement,^[5] in Article Kbis-01 of Chapter Kbis of the [*Canada-Chile Free Trade Agreement*⁶], in Article 1401 of Chapter Fourteen of the [*Canada-Peru Free Trade Agreement*⁷] or in Article 1401 of Chapter Fourteen of the [*Canada-Columbia Free Trade Agreement*⁸], that has been or is proposed to be awarded by a government institution, is a designated contract.

10. Article 1802 of the *AIT* reads as follows:

This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples.

11. Paragraph 1(d) of Annex 1001.2b to *NAFTA*, paragraph 1(d) of the General Notes for Canada to the *AGP*, paragraph 1(d) of Annex Kbis-01.1-6 to the *CCFTA*, paragraph 1(d) of Annex 1401.1-6 to the *CPFTA* and paragraph 1(d) of Annex 1401-6 to the *CCOFTA* all exclude “setasides for small and minority businesses” from their scopes of coverage.

TRIBUNAL’S ANALYSIS

12. The solicitation documents make it clear that “[t]his procurement is set aside under the federal government’s Procurement Strategy for Aboriginal Business, as detailed in Annex 9.4 - Requirements for the Set-aside Program for Aboriginal Business, of the Supply Manual.”⁹ Pursuant to Article 1802 of the *AIT*, the Tribunal finds that there is no provision of that trade agreement, including the provisions of Chapter Five on government procurement, that applies when such a set aside is invoked. Therefore, the Tribunal finds that the procurement at issue is not subject to the *AIT*.

4. *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*].

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. Solicitation M9010-091080/A, Section 1.2 at 5.

13. The solicitation documents also indicate that “[t]his procurement is set aside from the international trade agreements under the provision each has for set-asides for small and minority businesses.”¹⁰

14. As the Tribunal has ruled in the past,¹¹ a procurement made in the context of a set-aside program for aboriginal businesses constitutes a procurement for small and minority businesses:

14. The solicitation documents also make it clear that this procurement constitutes a set-aside for aboriginal business. As such, in the Tribunal’s opinion, it is a procurement in respect of set-asides for small and minority businesses. By virtue of the aforementioned provisions, the procurement at issue is not covered by *NAFTA*, the *AGP* or the *CCFTA*.

15. Consequently, by virtue of paragraph 1(d) of Annex 1001.2b to *NAFTA*, paragraph 1(d) of the General Notes for Canada to the *AGP*, paragraph 1(d) of Annex *Kbis-01.1-6* to the *CCFTA*, paragraph 1(d) of Annex 1401.1.-6 to the *CPFTA* and paragraph 1(d) of Annex 1401-6 to the *CCOFTA*, the Tribunal finds that the procurement is not covered by *NAFTA*, the *AGP*, the *CCFTA*, the *CPFTA* or the *CCOFTA*.

16. The Tribunal notes that Avaya has not suggested that qualified aboriginal suppliers are absent from the marketplace;¹² rather, it stated that there was a “. . . complete lack of connection between this solicitation and land claim agreements, treaties or other aboriginal business or policy considerations”¹³ The Tribunal does not consider that the trade agreements above require that any specific conditions need apply for the Government to invoke such set-asides.

17. Given that none of the relevant trade agreements applies to the procurement at issue, the Tribunal finds that the procurement process at issue does not relate to a “designated contract”, as is required by subsection 30.11(1) of the *CITT Act*. Accordingly, the Tribunal does not have jurisdiction to inquire into this complaint.

18. In view of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

DECISION

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

Diane Vincent
Diane Vincent
Presiding Member

10. Solicitation M9010-091080/A, Section 1.2 at 5.

11. *Re Complaint Filed by LeClair INFOCOM Inc.* (26 January 2010), PR-2009-076 (CITT).

12. The Tribunal notes that the federal government’s PSAB policy (PWGSC Supply Manual, Section 9.40, Procurement Strategy for Aboriginal Business) includes “voluntary” set-asides, which provide that departments may designate “. . . any procurement as being restricted exclusively to qualified Aboriginal suppliers . . . when qualified Aboriginal suppliers are known to exist in the marketplace.” The Tribunal does not have jurisdiction with respect to the application of this policy.

13. Complaint, para. 8.