



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-005

Accent on Clarity

*Decision made
Wednesday, June 13, 2012*

*Decision issued
Wednesday, June 13, 2012*

*Reasons issued
Friday, June 22, 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

ACCENT ON CLARITY

AGAINST

THE ROYAL CANADIAN MOUNTED POLICE

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

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. 201205262/A) by the Royal Canadian Mounted Police (RCMP) for the provision of off-site English language training services on an as-and-when-requested basis.
3. Accent on Clarity (Accent) alleged that the procurement improperly discriminated against small businesses that are unable to provide facilities and teachers to several regions across Canada. Accent argued that the procurement placed it in a less favourable position than other potential bidders by reason of its geographic location.
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 *North American Free Trade Agreement*,³ the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ the *Canada-Chile Free Trade Agreement*,⁶ the *Canada-Peru Free Trade Agreement*⁷ or the *Canada-Colombia Free Trade Agreement*⁸ applies. In this case, the complaint was brought under the *AIT* only.
5. On May 10, 2012, the RCMP issued a Request for a Standing Offer (RFSO). Section 4.1 of Annex “A” to the RFSO required that bidders be capable of providing the requested services in four regions of Canada: the Pacific Region, the Northwest Region, the Central Region and the Atlantic Region.
6. Accent wrote to the RCMP on May 19, 2012, to express its concern about the scope of work required under the RFSO. In particular, Accent questioned whether requiring potential suppliers to provide services in all four regions of Canada was discriminatory.

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).

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>.

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).

7. In response to Accent's concern, on May 31, 2012, the RCMP issued a series of questions and answers, which were attached to amendment No. 001, released on that same date. Question and answer Q7b and A7b provide as follows:

Q7b: Is there any reason why an offeror should have to be able to provide resources for all four (4) regions? Is an offeror not able to do this, not being discriminated against in this present RFSO?

A7b: As per Section 8.3 of the Statement of Work attached as Annex A (as amended), the scope of the requirement necessitates that a successful Offeror be capable (given 3 weeks' notice) of providing qualified facilities and teachers as and when required in several regions across Canada simultaneously.

8. Section 8.3 of Annex "A" (as amended) to the RFSO, titled "Statement of Work", provides as follows:

8.3 Contractor Training Facilities and Resources

Upon being given three weeks' notice, the Offeror shall provide:

1. second language training facilities (in conformance with section 4.2 above) strategically located – within 50 km – throughout the cities listed in Section 4.1 above; and
2. an appropriate number of qualified teacher resources (having met the minimum mandatory qualifications) necessary to carry out the work in each or any of the cities listed in Section 4.1 above as specified by any resulting call-up.

9. Accent filed its complaint with the Tribunal on June 1, 2012. On June 13, 2012, Accent filed further materials relating to its complaint, in response to a request by the Tribunal for additional information.

10. The complaint was filed in a timely manner in accordance with section 6 of the *Regulations*.⁹

11. With respect to Accent's allegation that the RFSO discriminated against potential suppliers on the basis of regional or geographic location, the Tribunal finds that the information provided in the complaint does not allow it to conclude that there is a reasonable indication that the solicitation was not conducted in accordance with the applicable trade agreement.

12. In its complaint, Accent alleged that the RCMP breached Article 504(3) of the *AIT*, which prohibits discriminatory practices as follows:

...

3(b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of the Chapter;

...

3(d) the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement;

...

9. Denial of relief was received by Accent on May 31, 2012. From that date, Accent had until June 14, 2012, to file its complaint. The complaint was considered properly filed in accordance with section 30.11 of the *CITT Act* on June 13, 2012, and was therefore timely.

13. In particular, Accent submitted that the RFSO discriminated against small businesses that are unable to provide facilities and teachers to all four regions of Canada.

14. However, in the Tribunal's view, the difficulties that Accent raises with respect to its lack of capacity to meet the requirements of the RFSO appear to arise from the fact that it does not have the specific ability to supply the services as required.

15. Indeed, the Tribunal notes that Accent has admitted in its complaint that it is unable to provide the facilities and teachers to all four regions identified in the RFSO. The lack of capability of a prospective bidder, outside of exceptional and very specific circumstances, cannot be impugned upon the procuring entity. Accordingly, the Tribunal is of the view that section 8.3 of the Statement of Work does not discriminate on the basis of regional or geographic location.

16. The Tribunal does not accept Accent's suggestion that the RCMP must restructure the solicitation to allow potential suppliers to submit bids for only the region of their choice.

17. By contrast, the Tribunal has repeatedly held that the Government is under no obligation to structure its procurement requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs. Rather, the Government may define its procurement conditions to ensure they meet its legitimate operational requirements.¹⁰

18. Moreover, the Tribunal has recognized that natural or legitimate competitive advantages may exist between potential bidders in a procurement process. While the trade agreements impose obligations on government entities to conduct solicitations in a fair and transparent manner, the Tribunal has also recognized that these obligations cannot be interpreted in a manner that would require the Government to adopt tendering procedures that seek to eliminate the effects of any natural or legitimate competitive advantages.¹¹

19. The Tribunal is not persuaded by Accent's argument that the RFSO ought to be restructured to model earlier solicitations in which potential suppliers were permitted to submit bids for only the region of their choice.

20. The Tribunal has previously held that it may not take into consideration allegations concerning a government entity's actions with respect to a previous procurement, as it is not the subject of the current complaint.¹² Furthermore, as noted above, the RCMP is entitled to structure the RFSO in a manner which fulfills its legitimate operational requirements, and those may change over time. Consequently, the Tribunal is not persuaded that the requirement in the RFSO for potential suppliers to provide the requested services in multiple regions across Canada is in any way discriminatory, as alleged by Accent.

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

10. *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Re Complaint Filed by Bajai Inc.* (7 July 2003), PR-2003-001 (CITT).

11. *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT).

12. *Re Complaint Filed by Winnipeg Audio-Visual Services Inc.* (27 May 2004) PR-2004-011 (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.

Jason W. Downey

Jason W. Downey
Presiding Member