



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2012-034

Adlerhorst International, Inc.

*Decision made  
Tuesday, December 18, 2012*

*Decision and reasons issued  
Thursday, December 20, 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**

**ADLERHORST INTERNATIONAL, INC.**

**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*<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 by the Department of Public Works and Government Services (PWGSC), on behalf of another government institution, for the provision of certain services. Further details regarding the procurement cannot be provided as the Request for Standing Offer (RFSO) issued by PWGSC states, in no uncertain terms, that the solicitation is confidential and that its details are not to be disclosed.

3. Adlerhorst International, Inc. (Adlerhorst) alleges that it was unfairly excluded from the solicitation by PWGSC.

4. As noted above, 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. Section 30.1 of the *CITT Act* defines the term “designated contract” as “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.”

5. Subsection 3(1) of the *Regulations* designates, for the purposes of the definition of “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*],<sup>[3]</sup> in Article 502 of the Agreement on Internal Trade,<sup>[4]</sup> in Article I of the Agreement on Government Procurement,<sup>[5]</sup> in Article Kbis-01 of Chapter Kbis of the [*Canada-Chile Free Trade Agreement*],<sup>[6]</sup> in Article 1401 of Chapter Fourteen of the [*Canada-Peru Free Trade Agreement*]<sup>[7]</sup> or

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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](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)> [*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*].

in Article 1401 of Chapter Fourteen of the [*Canada-Colombia Free Trade Agreement*],<sup>[8]</sup> that has been or is proposed to be awarded by a government institution . . . .”

6. However, Article 1018(1) of *NAFTA*, Article 1804 of the *AIT*, Article XXIII(1) of the *AGP*, Article *Kbis*-16(1) of the *CCFTA*, Article 1402(1) of the *CPFTA* and Article 1402(1) of the *CCOFTA* allow exceptions to the provisions of the respective trade agreements where national security is involved.

7. In this regard, Article 6 of Part 1, “**GENERAL INFORMATION**”, of the RFSO provides as follows:

**6. NATIONAL SECURITY EXCEPTION**

This procurement is subject to the National Security Exception and is excluded from the trade agreements in accordance with the following Articles: XXIII(1) of the World Trade Organization-Agreement on Government Procurement (WTO-AGP), 1018(1) of the North American Free Trade Agreement (*NAFTA*) and 1804 of the Agreement on Internal Trade (*AIT*). . . .

8. The Tribunal therefore finds, as it did in similar previous cases,<sup>9</sup> that the procurement at issue, being subject to a national security exception, is exempt from the provisions of the relevant trade agreements.<sup>10</sup> That being the case, the Tribunal finds that the complaint 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 conduct an inquiry into the complaint.

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

**DECISION**

10. 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

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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. *Re Complaint Filed by Corporate Special Events Catering Inc., d.b.a. BBQ Catering* (3 June 2010), PR-2010-015 (CITT); *Re Complaint Filed by Integrys Ltd.* (5 March 2010), PR-2009-103 (CITT); *Re Complaint Filed by International Safety Research Inc.* (14 June 2006), PR-2006-007 (CITT).

10. The Tribunal notes that, while the above-cited provision of the RFSO does not explicitly refer to the *CCFTA*, the *CPFTA* or the *CCOFTA*, it can reasonably be assumed that PWGSC intended to exclude the procurement from those agreements as well. In any event, as Adlerhorst is a US-based company and does not appear to have a place of business in Canada, the only agreements that could apply are *NAFTA* and the *AGP*, both of which are specifically mentioned in the RFSO.