



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-036

Rampart Aviation, LLC

*Decision made
Monday, January 7, 2013*

*Decision issued
Tuesday, January 8, 2013*

*Reasons issued
Monday, January 28, 2013*

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

RAMPART AVIATION, LLC

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.

Serge Fréchette
Serge Fréchette
Presiding Member

Eric Wildhaber
Eric Wildhaber
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. 8484-128148/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of one or more aircraft (through rental arrangements) and pilots to support the Canadian Forces parachute operations in Canada and the United States.

BACKGROUND

3. On August 21, 2012, a notice of a Request for Proposal (RFP) with a bid closing date of September 21, 2012, was published on MERX. According to the notice, the procurement was covered by the *Agreement on Internal Trade*.³

4. On October 21, 2012, PWGSC notified Rampart Aviation, LLC (Rampart) that the contract had been awarded to another bidder and gave reasons why Rampart was not selected as the successful bidder. The contract was awarded to Nouveau Air Sky Diving School and Summit Air Charters L.P., collectively the “successful bidder”.

5. On October 26, 2012, Rampart objected to the result of the solicitation on two grounds: first, there was an unfair application of the solicitation requirements, and, second, the solicitation required evaluation criteria to be met at the time of contract award and not at some later date. Rampart alleged that, as of the date of closing, the successful bidder failed to comply with a requirement of the RFP, i.e. that the aircraft be available and meet all the terms of the contract as of the date of the contract itself.⁴

6. Under the first ground, Rampart argued that the aircraft was meant to fly missions and that, before it could leave on such a mission, a temporary authority to operate (TAO) would be required.⁵ Rampart argued that, by implication, the successful bidder had to have a TAO as of the date of closing in order to meet the above requirement. The second ground consisted of a number of detailed examples of alleged failures to meet regulatory requirements. For example, Rampart states the following: “Aircraft must have a minimum useful load of 2,300 kg”⁶ (or 5,060 lbs.). However, according to the public literature on the successful bidder’s Type B aircraft, its maximum capacity was only 4,500 lbs. This appears to be contrary to the

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*].

4. See article 2.2 of Part 1 of the RFP.

5. See article 3.2 of Annex “A”, “Statement of Work”.

6. Rampart’s objection letter dated October 26, 2012, at 5.

following mandatory provision of the RFP: “**M1 The Bidder has provided sufficient information with their bid to prove the proposed type(s) of aircraft comply with the requirements set out in Annex 1.**”⁷

7. On December 13, 2012, PWGSC e-mailed Rampart and denied the relief requested in the latter’s objection of October 26, 2012. PWGSC acknowledged that the successful bidder’s Type B aircraft failed the minimum weight requirement quoted in the above paragraph and agreed to re-tender that portion of the procurement. PWGSC’s response regarding the remaining allegations was either that the successful bidder’s proposal complied with the RFP or that it was a matter of contract administration.

8. On December 26, 2012, Rampart filed a complaint with the Tribunal. Rampart alleged that the requirements of the RFP were “unfairly applied” by PWGSC and that Rampart’s bid was “unfairly evaluated” under the mandatory technical criteria of the RFP. In its complaint, Rampart asked for a “stay of performance” or termination of the contract awarded to the successful bidder. Rampart did *not* ask for costs.

9. In its complaint, Rampart listed its address as being in Franklin, North Carolina, USA. On December 31, 2012, the Tribunal requested Rampart to provide proof that its company was a “Canadian supplier” within the meaning of Article 518 of the *AIT*, i.e. that it had “a place of business in Canada”.

10. On December 31, 2012, Rampart replied to the Tribunal, questioning the need for it to be a “Canadian supplier” and asking under what authority the Tribunal’s request for proof was being made.

11. On January 4, 2013, the Tribunal referred Rampart to the Supreme Court of Canada’s decision in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*⁸ and renewed its request for confirmation and details of Rampart’s place of business in Canada or a statement that it did not have such a place of business. The Tribunal asked that the response be received by January 7, 2013.

12. On January 5, 2013, Rampart replied to the Tribunal, contending that *Northrop Grumman* did allow non-Canadian suppliers the benefit of the *AIT* if the procurement was made by the Department of Public Works and Government Services or by the Department of National Defence. Rampart never did provide proof of a place of business in Canada.

LAW

13. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.⁹

14. Section 30.11 of the *CITT Act* provides for the filing of a complaint by a “potential supplier” relative to a “designated contract”. Subsection 3(1) of the *Regulations* states that a “designated contract” is one that is covered by the prescribed trade agreements, including the *AIT*.

7. Article 1.1.1 of Part 4 of the RFP.

8. [2009] 3 S.C.R. 309 [*Northrop Grumman*].

9. The particular services requested fall under Category V – “Transportation, Travel and Relocation Services” and, as such, are excluded from coverage under the *North American Free Trade Agreement* per Annex 1001.1b-2, the *Agreement on Government Procurement* per Annex 4, the *Canada-Chile Free Trade Agreement* per Annex Kbis-01.1-4, the *Canada-Peru Free Trade Agreement* per Annex 1401.1-4B and the *Canada-Colombia Free Trade Agreement* as per Annex 1401-4B.

15. Article 502 of the *AIT* provides as follows: “[Chapter Five] applies to measures adopted or maintained by a Party relating to procurement *within Canada* . . .” [emphasis added].

ANALYSIS

16. In *Northrop Grumman*, the Supreme Court of Canada held that non-Canadian suppliers do *not* have standing before the Tribunal to bring complaints under the *AIT*. The Supreme Court of Canada was upholding a Federal Court of Appeal judgment¹⁰ that a U.S. company with no place of business in Canada was not a Canadian supplier and, thus, that the matter was outside the Tribunal’s jurisdiction under the *AIT*.

17. Specifically, the Federal Court of Appeal determined that “. . . the ‘within Canada’ requirement in Article 502 [would only] be met by [an] entity that [met] the requirements of the definition of ‘Canadian supplier’”,¹¹ which term is defined in Article 518 of the *AIT* as “. . . a supplier that has a place of business in Canada”.

18. In light of the above court decisions, the Tribunal determined in File No. PR-2007-008R¹² that, unless it had a place of business in Canada at the time of the bidding process, the company would not be a “Canadian supplier” within the meaning of the *AIT*, and, therefore, the Tribunal would not have jurisdiction to commence an inquiry into its complaint.

19. From the information included in Rampart’s complaint¹³ and its inability to refute the presumption that it has no place of business other than in the United States,¹⁴ the Tribunal finds that Rampart does *not* have a place of business in Canada. This puts this case on all fours with the Tribunal’s decision in *Northrop Grumman*.

20. The Tribunal finds that Rampart is not a Canadian supplier within the meaning of the *AIT* and that it therefore does not have standing before the Tribunal under that agreement.

21. Therefore, the Tribunal does not have jurisdiction to commence an inquiry into Rampart’s complaint.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

10. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.*, [2009] 1 F.C.R. 688.

11. *Ibid.* at para. 62.

12. *Re Complaint Filed by Northrop Grumman Overseas Services Corporation* (2 December 2009) (CITT) at para. 22.

13. Complaint, exhibit 8.

14. Rampart’s responses of January 3 and 5, 2013.