



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2012-053

9178-6574 Québec Inc. dba  
Moment Factory

*Decision made  
Tuesday, March 26, 2013*

*Decision issued  
Tuesday, March 26, 2013*

*Reasons issued  
Friday, April 5, 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**

**9178-6574 QUÉBEC INC. DBA MOMENT FACTORY**

**AGAINST**

**THE NATIONAL CAPITAL COMMISSION**

**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.

Daniel Petit  
Daniel Petit  
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*<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 (Solicitation No. NG210) by the National Capital Commission (NCC) for the services of an artistic team to carry out content updates to the sound and light show on Parliament Hill in Ottawa.

3. 9178-6574 Québec Inc. dba Moment Factory (Moment Factory) alleged, on three distinct grounds, that the NCC improperly evaluated its proposal and discriminated against it. As a remedy, Moment Factory requested that the contract awarded to the successful bidder be cancelled and that it be awarded the contract.

## BACKGROUND

4. On February 18, 2013, the NCC issued a request for proposal (RFP) for the above-mentioned services. The due date for receipt of bids was March 6, 2013. Moment Factory submitted a bid in response to the solicitation.

5. On March 12, 2013, the NCC informed Moment Factory that a contract had been awarded to Idées au cube Inc. (ID<sup>3</sup>). The NCC also informed Moment Factory that it had obtained a score of 72 out of 100 in the evaluation of its technical proposal.

6. The same day, Moment Factory requested the NCC to provide it with the detailed results of the evaluation of its technical proposal.

7. On March 13, 2013, the NCC provided Moment Factory with a detailed evaluation grid containing the score obtained by Moment Factory for each of the rated requirements indicated in the RFP, including the sub-requirements.

8. The same day, Moment Factory asked the NCC to indicate which member of the team it proposed was evaluated for the position of “*réalisateur*”. According to Moment Factory, the evaluation grid, which is written in English, incorrectly uses the term “producer” as equivalent to the term “*réalisateur*” used in the French version of the RFP.

9. On March 14, 2013, the NCC informed Moment Factory that it had evaluated Mr. Éric Fournier for the position of “*réalisateur*”.

10. On March 19, 2013, Moment Factory sent a letter to the NCC in which it expressed surprise at finding that it had received a score of only 3 out of 5 for *Mosaïka* (a show designed, directed and produced by Moment Factory and currently performed on Parliament Hill in Ottawa), which was one of the three projects included as references in its proposal to respond to one of the sub-requirements of the RFP

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

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

pertaining to experience in directing large-scale multimedia productions. Moment Factory indicated that it seemed that the score was unfounded, which led it to question the entire evaluation of its proposal and the way the scores were awarded. Finally, it indicated that it was considering its options regarding an appeal of the NCC's decision.

11. The same day, the NCC acknowledged receipt of Moment Factory's letter and indicated that a response would follow promptly.

12. On March 22, 2013, Moment Factory filed its complaint with the Tribunal.

### TRIBUNAL'S ANALYSIS

13. Subsection 7(1) of the *Regulations* sets out three conditions which must be met before the Tribunal may conduct an inquiry in respect of a complaint. The third condition is that the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*,<sup>6</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*<sup>7</sup> or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>8</sup> applies. In this case, only the *AIT* applies.<sup>9</sup>

14. Article 506(6) of the *AIT* provides as follows: "In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. 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."

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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).

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. The services being requested appear to be either specifically excluded from, or not included in, the coverage of the other trade agreements. Moreover, the monetary thresholds applicable under these trade agreements do not seem to have been reached.

15. A procuring entity will meet its obligations under Article 506(6) of the *AIT* when it makes a reasonable evaluation, in good faith, of the competing bid documents.<sup>10</sup> The Tribunal will not substitute its judgment for that of evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>11</sup>

### Ground 1

16. Moment Factory's first ground of complaint was that the evaluation grid, which is written in English, incorrectly uses the term "producer" as equivalent to the term "*réalisateur*" used in the French version of the RFP and that the NCC therefore evaluated the wrong person for the position of "*réalisateur*". It submitted that the NCC evaluated Mr. Fournier for the position when he is an executive producer and that Ms. Marie Belzil is the person that was submitted for the position of "*réalisatrice*" in its technical proposal.

17. In the Tribunal's view, the evidence on record seems to indicate that it was indeed Ms. Belzil that was identified and proposed for the position of "*réalisatrice*" in Moment Factory's technical proposal.<sup>12</sup> As such, in the Tribunal's view, the NCC erred in evaluating Mr. Fournier instead of Ms. Belzil for the position of "*réalisateur*", and this discloses a reasonable indication that the procurement was not carried out in accordance with the *AIT*.

18. Having said this, the Tribunal notes that Moment Factory obtained a score of 5 out of 6 in Mr. Fournier's evaluation for the position of "*réalisateur*". Therefore, if the NCC had correctly evaluated Ms. Belzil for this position, Moment Factory could have obtained, at best, only one additional point for its technical proposal. However, it appears that even if Moment Factory had obtained this additional point, it would not have been awarded the contract.<sup>13</sup>

19. Therefore, even if the Tribunal were to inquire into this first ground of complaint and if it were to find in favour of Moment Factory, it still would not be awarded the contract. In these circumstances, the Tribunal does not consider that it would be useful to inquire into this ground of complaint.

### Ground 2

20. Moment Factory's second ground of complaint is twofold. First, Moment Factory submitted that it does not understand why *Mosaika*, for which it obtained the score of 3 out of 5, is not the best reference regarding its experience and qualifications to update the content of the sound and light show, especially since *Mosaika* was praised repeatedly by the NCC.

21. Second, Moment Factory submitted that the meaning of one of the evaluation criteria appearing in the English version of the evaluation grid and pertaining to the bidders' experience and qualifications was not faithful to the meaning of the French version of article 9.1(b)(vi) of the terms of reference of the RFP.

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10. See *Northern Lights Aerobic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at para. 51.

11. See, for example, *MTS Allstream Inc.* (3 February 2009), PR-2008-033 (CITT) at para. 26.

12. See pages 31, 35 and 36 of Moment Factory's technical proposal.

13. Article 10 of the terms of reference of the RFP provides that "[t]he NCC will award a Contract to the Tenderer whose overall Proposal will obtain the lowest cost per point, which will be determined by dividing the total score awarded to the Proposal by the total cost proposed" [translation]. In view of the difference between the total cost proposed by ID<sup>3</sup> and Moment Factory, one additional point for Moment Factory would not translate into a lower cost per point than that of ID<sup>3</sup>.

22. The relevant provisions of the terms of reference of the French version of the RFP read as follows:

**9.0 PROPOSALS AND EVALUATION**

**9.1 Proposals**

...

The proposals shall include the following:

...

b. Experience and Qualifications

...

- vi. Describe three (3) projects of similar nature and scope that you have carried out in the past five (5) years. For each project, provide the following information: project title, date of performance, budget, location, description of the project, names of the team members and their roles. . . .

...

**9.2 Rated Requirements and Evaluation Criteria**

All the Proposals will be evaluated on the basis of the following rated requirements and evaluation criteria. . . .

...

c. Rated Requirement No. 3: Experience and Qualifications (55 points, minimum score of 38.5 points required, as well as a passing score for each sub-requirement)

...

- Experience in mounting large-scale multimedia productions, including level of involvement, scale and nature of events, as demonstrated in the 3 project examples provided (15 points, minimum 9).

...

[Translation]

23. The English version of the evaluation grid provided to Moment Factory by the NCC on March 13, 2013, contains the following evaluation criterion for Rated Requirement No. 3:

Experience in mounting large scale multimedia productions, including level of involvement, scale and nature of events, as demonstrated in the 3 project examples provided

24. In the Tribunal's opinion, it is perfectly clear that the meaning of the aforementioned evaluation criterion appearing in the English version of the evaluation grid is faithful to the meaning of the French version of article 9.2(c) of the terms of reference of the RFP. Article 9.1 pertains to the elements that the proposals must include, while article 9.2 pertains to the criteria used to evaluate the proposals. As such, there is no doubt that Moment Factory erred in thinking that the evaluation criterion appearing in the English version of the evaluation grid pertains to article 9.1(b)(vi) instead of article 9.2(c).

25. Regarding the score of 3 out of 5 obtained by Moment Factory for *Mosaika*, the Tribunal considers that this score or the praising of the show by the NCC are not sufficient in themselves to allow it to conclude that there is a reasonable indication that the NCC has not applied itself in evaluating Moment Factory's proposal or that it erred in its evaluation. As the Tribunal has stated previously, complainants bear the onus

of substantiating the allegations that they make, and unsubstantiated allegations are insufficient for the Tribunal to proceed with an inquiry.<sup>14</sup>

26. Therefore, with regard to this second ground of complaint, the Tribunal finds that the information provided by Moment Factory does not disclose a reasonable indication that the procurement was not carried out in accordance with the *AIT*.

### Ground 3

27. Moment Factory's third ground of complaint is that the NCC did not evaluate its proposal as the best overall proposal based on the evaluation criteria stated in the RFP and taking into consideration the fact that Moment Factory designed, directed and produced the original show which is the subject of the updates contemplated in the RFP. As such, having received a score of 72 out of 100, Moment Factory cast doubt on the NCC's intentions in excluding it from the process and awarding the contract to another bidder. In support of its arguments, Moment Factory also mentioned the fact that two surveys commissioned by the NCC give a very positive picture of the public's satisfaction regarding their viewing of *Mosaika*.

28. In the Tribunal's opinion, the evidence provided by Moment Factory in support of this third ground of complaint is insufficient to allow the Tribunal to conclude there is a reasonable indication that the NCC did not apply itself in evaluating Moment Factory's proposal or that it discriminated against it.

29. In this instance, the fact that Moment Factory designed, directed and produced *Mosaika* and that surveys indicate that the public is very satisfied with this show does not lead the Tribunal to conclude that the score of 72 out of 100 that it received for its technical proposal is undeserved. In this regard, the Tribunal notes that several of the rated requirements set out in article 9.2 of the terms of reference of the RFP are unrelated to *Mosaika* or to the public's perception of that show.

30. Therefore, the Tribunal also concludes that, regarding this third ground of complaint, the information provided by Moment Factory does not disclose a reasonable indication that the procurement was not carried out in accordance with the *AIT*.

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

### DECISION

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

Daniel Petit

Daniel Petit

Presiding Member

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14. See *Secure Computing LLC* (11 April 2012), PR-2012-001 (CITT) at para. 17; *Veseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9.