



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2012-007

Sunny Jaura d.b.a. Jaura
Enterprises

v.

Department of Public Works and
Government Services

*Order and reasons issued
Wednesday, September 5, 2012*

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IN THE MATTER OF a complaint filed by Sunny Jaura d.b.a. Jaura Enterprises pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

SUNNY JAURA D.B.A. JAURA ENTERPRISES

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

ORDER

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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Procurement Case Officer:	Josée B. Leblanc
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STATEMENT OF REASONS

COMPLAINT

1. On June 19, 2012, Sunny Jaura d.b.a. Jaura Enterprises (Jaura) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W847A-120109/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the provision of temporary housing accommodation services in Mesa, Arizona.

2. Jaura alleged that PWGSC and DND improperly determined that its proposal was non-compliant with certain mandatory technical requirements in the solicitation. As a remedy, Jaura requested that it be compensated by an amount equal to the value of the contract that, it claimed, should have been awarded to it. It also requested its bid preparation costs and its complaint costs.

3. On June 26, 2012, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On June 28, 2012, PWGSC acknowledged receipt of the complaint and informed the Tribunal that a contract had been awarded to Oakwood Temporary Housing (Oakwood) of Bellevue, Washington.

4. On July 23, 2012, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On July 26, 2012, Jaura filed its comments on the GIR.

PROCUREMENT PROCESS

5. On March 6, 2012, PWGSC issued a Request for Proposal (RFP) for the provision of temporary housing accommodation services in Mesa. These accommodation services were required for a period of 10 months, with one option period of 6 additional months, for Canadian Forces personnel working on temporary assignment at the Boeing plant in Mesa in connection with the Government of Canada's planned purchase of 15 medium-to-heavy lift helicopters.

6. On March 29, 2012, the solicitation closed. PWGSC received proposals from Jaura and Oakwood, which it then forwarded to the DND officials, acting as the technical authority, for technical evaluation. On May 11 and 12, 2012, DND visited the properties proposed by Jaura and Oakwood.

7. On May 31, 2012, PWGSC informed Jaura that its proposal had been found non-compliant with two mandatory technical requirements. It also informed Jaura that a contract in the amount of US\$78,432 had been awarded to Oakwood.

8. On the same day, Jaura requested a debriefing, which was held by telephone with PWGSC officials on June 1, 2012.

9. On June 7, 2012, PWGSC forwarded to Jaura DND's written justification for finding that Jaura's proposal was non-compliant with two mandatory technical requirements. On the same day, Jaura advised

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

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

3. S.O.R./91-499.

PWGSC that DND's justification was not acceptable and that it wished to file an appeal. On June 12, 2012, PWGSC referred Jaura to the Tribunal.

10. On June 19, 2012, Jaura filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

Jurisdictional Issue

11. In its GIR, PWGSC raised the Tribunal's jurisdiction as a preliminary issue. It submitted that each of the trade agreements identified in the *Regulations* (i.e. the *North American Free Trade Agreement*,⁴ the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ the *Canada-Chile Free Trade Agreement*,⁷ the *Canada-Peru Free Trade Agreement*⁸ and the *Canada-Colombia Free Trade Agreement*⁹) provides that the agreement in question applies only to those procurements whose values meet or exceed specified thresholds. It submitted that these trade agreements also provide that the value of a procurement for these purposes is to be determined on the basis of the estimated value of the procurement at the time of the issuance of the Notice of Proposed Procurement (NPP), taking into account all option periods.

12. PWGSC submitted that, at the outset of the procurement process, DND provided it with a requisition, dated March 2, 2012, which estimated the total value of the proposed procurement, taking into account both the original 10-month term and the 6-month option period, as well as applicable taxes, at \$56,500. It submitted that, as this amount does not meet the specified value thresholds for services under *NAFTA*, the *AIT*, the *AGP*, the *CCFTA*, the *CPFTA* and the *CCOFTA*, none of these trade agreements apply to this procurement and that the Tribunal therefore lacks jurisdiction to conduct an inquiry into the complaint.

13. In addition, PWGSC submitted that *NAFTA*, the *CPFTA* and the *CCOFTA* also do not apply to this procurement because the services procured by DND fall within a category of services that are specifically excluded from coverage under these trade agreements. It further submitted that the *AIT* does not apply to this procurement, as the procurement pertains to the provision of services in the United States.

14. In its comments on the GIR, Jaura submitted that the terms of the RFP made it clear that any resulting contract had to be interpreted and governed, and the relations between the parties determined, by the laws in force in Quebec. It submitted that the RFP made no mention of U.S. laws governing the contract.

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

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. *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.

8. *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*].

9. *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*].

15. 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.”

16. Section 30.1 of the *CITT Act* defines a “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”.

17. Subsection 3(1) of the *Regulations* provides that “. . . 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 NAFTA, in Article 502 of the [*AIT*], in Article I of the [*AGP*], in Article *Kbis*-01 of Chapter *Kbis* of the [*CCFTA*], in Article 1401 of Chapter Fourteen of the [*CPFTA*] or in Article 1401 of Chapter Fourteen of the [*CCOFTA*], that has been or is proposed to be awarded by a government institution, is a designated contract.”

18. Contracts concerning the procurement of services by federal government entities are described in the aforementioned provisions as having a value equal to or greater than \$78,500 (*NAFTA*, the *CCFTA*, the *CPFTA* and the *CCOFTA*), \$100,000 (the *AIT*) and \$205,100 (the *AGP*).

19. Section 5 of the *Regulations* provides that the value of a contract is deemed to be the value established by the government institution at the time the NPP was published or at the time the solicitation documentation was made available to potential suppliers.¹⁰ All the trade agreements similarly provide that the value of a contract is the value estimated by the government institution at the time of publication of an NPP or at the outset of the procurement process.¹¹ The trade agreements also provide that, in estimating the value of a contract, the government institution is to take into account all option clauses.¹²

20. When the Tribunal accepted Jaura’s complaint for inquiry on June 26, 2012, it did so on the basis of the value of the contract awarded to Oakwood and the total amount of Jaura’s bid, which were both greater than \$78,500.¹³ This was the only information available to the Tribunal at that time, as the NPP published on MERX¹⁴ by PWGSC failed to provide an estimated value for the contract.

21. However, PWGSC has now provided the Tribunal with a copy of the requisition for services that it received from DND, which estimated the total value of the proposed procurement, taking into account the

10. The Tribunal notes that relying on the estimated value of a contract at the time of publication of an NPP makes inherent sense, given that, as a practical matter, the final awarded contract value is not available to a government institution until the procurement process is completed and that a government institution, as well as potential bidders, must know at the outset of the process whether or not any of the trade agreements will apply.

11. See Article 1002(2) of *NAFTA*, Article 505(1) of the *AIT* and footnote 2 to Article II(1) of the *AGP*. Article *Kbis*-01(5) of the *CCFTA*, Article 1401(5) of the *CPFTA* and Article 1401(5) of the *CCOFTA* imply that the estimate is to be made at the outset of the procurement process.

12. See Article 1002(7) of *NAFTA*, Article II(6) of the *AGP*, Article *Kbis*-01(5) of the *CCFTA*, Article 1401(5) of the *CPFTA* and Article 1401(5) of the *CCOFTA*. The definition of the term “procurement value” at Article 518 of the *AIT* provides that option clauses are only to be taken into account when the compulsory part of the contract is for a period of less than one year.

13. The contract awarded to Oakwood was in the amount of US\$78,432. Once converted into Canadian dollars, it exceeded \$78,500.

14. Canada’s electronic tendering service.

6-month option period and the applicable taxes, at \$56,500.¹⁵ The Tribunal notes that the requisition is dated March 2, 2012, which is less than a week prior to the issuance of the RFP and the publication of the NPP.

22. While the Tribunal is in possession of evidence which clearly indicates that, on or around the time of publication of the NPP, the estimated value of the contract was below the monetary thresholds specified in the trade agreements, this fact alone does not preclude the Tribunal from conducting an inquiry into the complaint. The trade agreements prohibit government entities from selecting a valuation method that aims to avoid the obligations of the agreements.¹⁶ Therefore, if the Tribunal believes that the selection of a valuation method was used with the intention of avoiding the obligations of the trade agreements, it could, even when the monetary thresholds specified in the trade agreements have not been met, have jurisdiction to conduct an inquiry into a complaint.

23. In this case, the Tribunal has no reason to believe that DND selected a valuation method with the intention of avoiding the obligations of the trade agreements. Although the value of the contract awarded to Oakwood and the total amount of Jaura's bid were both greater than the value of the contract as estimated by DND, this could be attributable to the fact that PWGSC only received proposals from two bidders. In the end, the Tribunal is satisfied that the estimated value of \$56,500 for the contract was not unreasonable.

24. As the estimated value of the contract is below the monetary thresholds specified in *NAFTA*, the *AIT*, the *AGP*, the *CCFTA*, the *CPFTA* and the *CCOFTA*, the Tribunal finds that none of these agreements apply and that the complaint therefore does not relate to a "designated contract". Accordingly, the Tribunal is without jurisdiction to conduct an inquiry into the complaint. Under these circumstances, the complaint cannot be said to have a valid basis and must therefore be dismissed pursuant to paragraph 10(a) of the *Regulations*.

25. Having already determined that none of the trade agreements are applicable, the Tribunal need not address the other arguments made by PWGSC with respect to the applicability of *NAFTA*, the *AIT*, the *CPFTA* and the *CCOFTA*.

Costs

26. Section 30.16 of the *CITT Act* allows the Tribunal to award costs to complainants or government institutions. In determining whether costs should be awarded in this case, the Tribunal considers that, although the complaint has been dismissed for the reasons given above, as a practical matter, the complaint process could have been terminated at an earlier stage, had PWGSC filed a motion, prior to filing its GIR, to request that the complaint be dismissed on the basis that the Tribunal lacked jurisdiction to conduct an inquiry into the complaint. In fact, had PWGSC included the estimated value of the contract in the NPP, the Tribunal may not have accepted the complaint for inquiry.¹⁷ Therefore, in these circumstances, no costs will be awarded.

15. GIR, exhibit 1.

16. See Article 1002(4) of *NAFTA*, Article 505(3) of the *AIT*, Article II(3) of the *AGP*, Article 1401(5) of the *CPFTA* and Article 1401(5) of the *CCOFTA*. Article *Kbis*-01(4) of the *CCFTA* indirectly prohibits such actions.

17. The Tribunal notes that, while the NPP did state that none of the trade agreements were applicable, the Tribunal was not prepared to rely on this statement, given that the underlying reasons for the non-applicability were not readily apparent and that NPPs do, from time to time, contain errors.

ORDER OF THE TRIBUNAL

27. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member