Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2006-026R

Canadian North Inc.

v.

Department of Indian Affairs and Northern Development

Order and reasons issued
Tuesday, May 15, 2007

Canada

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IN THE MATTER OF a complaint filed by Canadian North Inc. on September 21, 2006, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO an order of the Canadian International Trade Tribunal made on November 9, 2006, dismissing the motion filed by the Department of Indian Affairs and Northern Development for an order dismissing the complaint for want of jurisdiction by the Canadian International Trade Tribunal;

AND FURTHER TO a decision of the Federal Court of Appeal, which quashed the order of the Canadian International Trade Tribunal made on November 9, 2006, and referred the matter back to the Canadian International Trade Tribunal with the direction that it grant the motion of the Department of Indian Affairs and Northern Development and dismiss the complaint of Canadian North Inc. for want of jurisdiction;

AND FURTHER TO requests for costs filed separately by the Department of Indian Affairs and Northern Development and Bradley Air Services Limited (carrying on business under the trade name of First Air);

AND FURTHER TO an order of the Canadian International Trade Tribunal made on April 5, 2007, granting the motion filed by the Department of Indian Affairs and Northern Development and dismissing the complaint.

BETWEEN

CANADIAN NORTH INC. **Complainant**

AND

THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT **Government Institution**

ORDER

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal hereby awards the Department of Indian Affairs and Northern Development costs in the amount of $10,000 for responding to the complaint and directs Canadian North Inc. to take appropriate action to ensure prompt payment (dissenting opinion of Member Fry).

Elaine Feldman
Elaine Feldman
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

BACKGROUND

1. On September 21, 2006, Canadian North Inc. (Canadian North) 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] The complaint concerned the procurement (Solicitation No. TCS 04/95) of air transport services in relation to the execution of the Food Mail Program in Canada's North.

2. Canadian North alleged that the Department of Indian Affairs and Northern Development (DIAND) and/or Canada Post Corporation (Canada Post) failed to disclose all the criteria that were employed in the evaluation of the proposals. It also alleged that the evaluation criteria were applied in a discriminatory manner that favoured the incumbent supplier that was ultimately awarded the contract—Bradley Air Services Limited (carrying on business under the trade name of First Air) (First Air).

3. The Tribunal conducted an inquiry, during which, on October 23, 2006, DIAND filed a motion requesting that the Tribunal dismiss the complaint for want of jurisdiction, as it argued that the subject procurement did not constitute a designated contract under the only applicable trade agreement, the *Agreement on Internal Trade*.[2] On November 9, 2006, after reviewing submissions from all the parties, the Tribunal dismissed DIAND's motion.

4. On February 5, 2007, the Tribunal issued its determination finding that the complaint was valid and awarding Canadian North costs in the amount of $10,000 for preparing and proceeding with the complaint.

5. DIAND, Canada Post and First Air appealed the Tribunal's decision of November 9, 2006, to the Federal Court of Appeal. On March 6, 2007, the Federal Court of Appeal issued a decision in which it quashed the Tribunal's dismissal of DIAND's motion of November 9, 2006, and referred the motion back to the Tribunal with the direction that the Tribunal grant the motion and dismiss the complaint. On April 5, 2007, the Tribunal issued an order granting DIAND's motion and dismissing the complaint.

6. On March 7, 2007, DIAND requested that it be awarded its costs in the same amount that had previously been awarded to Canadian North. On March 15, 2007, First Air also requested that it be awarded costs of no less than $10,000. On March 23, 2007, Canadian North filed its comments on both requests with the Tribunal. On the same day, DIAND responded to Canadian North's comments. On March 28, 2007, First Air responded to Canadian North's comments.

ANALYSIS

7. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint. When considering whether or not to award costs to a party, the Tribunal follows the "judicial model" in which, generally, the winning party is entitled to its costs, provided they have been requested during the proceedings.[3] The Tribunal may also award costs to or against

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
3. See *Canada (Attorney General) v. EDS Canada Ltd.* (2004), 237 D.L.R. (4th) 611 at para. 6: ". . . the Tribunal's power to award costs is exercisable on essentially the same principles as those governing the award of costs by the courts, including the principle that, in the absence of exceptional circumstances, the successful party is normally awarded its costs . . . ."

interveners. In the case currently before it, the Tribunal must consider requests for costs from two parties: DIAND, the government institution identified by the Tribunal as responsible for responding to the complaint; and First Air, the intervener.

Costs to DIAND

8. Canadian North argued that, while, in general, "costs should follow the cause", it is not necessarily true that, if costs are awarded to one party and the decision is thereafter reversed on judicial review, the mirror image of the costs should be awarded to the newly successful party.

9. Canadian North submitted that DIAND contributed unreasonably to the complexity of the proceedings by: (a) waiting until the day on which the Government Institution Report was due to file its jurisdiction motion, which was one of the principal causes of the intensity of work in the final weeks of the Tribunal's 135-day mandated decision period; (b) putting itself in a predicament of its own making by not obtaining the documentation of the evaluation of the bids at the time of the procurement; and (c) not requesting the documents regarding the evaluation of bids from Canada Post until over a month after the receipt of the complaint.

10. In response, DIAND submitted that the complexity of the proceedings stemmed from the nature of the allegations made by Canadian North and not DIAND's motion to dismiss the complaint. It submitted that it was Canadian North's decision to file a procurement complaint based on various legal theories which gave rise to the inquiry and its complexity and that Canadian North must now bear the consequences of that decision.

11. Concerning Canadian North's argument that DIAND put itself in a predicament by not having requested documents from Canada Post, DIAND submitted that this flies in the face of the Federal Court of Appeal's decision in which it was determined that the procurement was that of Canada Post and not DIAND. DIAND submitted that it was therefore under no moral or legal obligation to request Canada Post documentation at the time of the procurement. It also submitted that, when it did request the documents from Canada Post, Canada Post refused to produce them, which prompted the Tribunal to issue an order for their production, and hence the timing of the request for the production of documents by DIAND is without consequence.

12. DIAND also submitted that an award against Canadian North would not, as claimed by Canadian North, deter future complaints, given that a "large institutional player" like Canadian North would not be dissuaded from filing a complaint on a $138 million contract because it may be required to pay $10,000 in costs.

13. Regarding DIAND's request, the Tribunal is of the view that the circumstances of the present case do not justify a departure from its common practice of awarding costs to the winning party. There was no misconduct on DIAND's part, and ultimately DIAND was correct in its position that the Tribunal did not have jurisdiction to accept the complaint for inquiry. The Tribunal notes that costs are given as an indemnity to the party entitled to them and are not imposed as punishment on the party that pays them.[4] Therefore, the Tribunal awards DIAND its costs for responding to the complaint. Regarding the quantum of costs, the Tribunal, in drafting its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), did not contemplate the use of two measuring sticks—one for a complainant and a different one for the government.

4. *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, [2003] 4 F.C. 525 at para. 25.

14. In its determination of February 5, 2007, the Tribunal stated the following at paragraph 134:

> The Tribunal awards Canadian North its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (*Guideline*). In this instance the Tribunal believes that the circumstances surrounding the complexity of the complaint proceedings were particularly complex, involving, among other things, an intervener, another involved party, more than 15 motions and other procedural requests to the Tribunal, responses to these motions and requests, and additional submissions made by other parties throughout the proceeding. This unusually high degree of complexity requires that the Tribunal exceed the amounts contemplated by the *Guideline*. Therefore, the Tribunal awards Canadian North $10,000 for costs related to preparing and proceeding with the complaint.

15. The Tribunal notes that, in its submission, Canadian North agreed that this was a complex case and that "costs should follow the cause"; however, it argued, for the reasons listed above, that the costs awarded to DIAND should be relatively modest. The Tribunal does not consider that the Federal Court of Appeal's decision affects the reasons for which it awards costs, or the manner in which it determines the amount of the cost award. The Tribunal sees no reason to deviate from its previous decision regarding costs and thus maintains its finding that the complexity of the case warrants an award of $10,000. The Tribunal therefore awards DIAND costs in the amount of $10,000.

Costs to First Air

16. First Air argued that, while it is understandable that an intervener would only rarely be entitled to costs, First Air's role in this case was far more involved than the role generally played by interveners, particularly given the decision of the procuring authority—Canada Post—not to participate in the proceedings.

17. First Air submitted that in *Lynnview Ridge Residents' Action Committee v. Imperial Oil Limited*,[5] the court identified the following three factors that should be considered when determining whether it was appropriate to deviate from the general rule that interveners should bear their own costs:

> . . .
>
> - Has the intervener contributed to the court's deliberations by adding a viewpoint that otherwise would not have been considered? Alternatively, did the parties themselves present the same arguments or points of view?
> - Is there legislation relevant to the case to suggest whether the intervener has a special interest or an important role to play?
> - What is the nature of the intervener's special interest? The interest might be financial, proprietary, non-pecuniary or other.
>
> . . .

18. According to First Air, in the circumstances of the current inquiry, all three factors cited above support an award of costs to First Air.

19. In order to determine whether, in this circumstance, it will deviate from the general rule of not awarding costs to interveners, the Tribunal will examine the principles found in *Lynnview Ridge* and its own jurisprudence. The Tribunal notes that in *Sawridge Band v. Canada*,[6] a recent case before the Federal Court

5. 2005 ABCA 375 [*Lynnview Ridge*].
6. 2006 FC 656.

of Canada which dealt with the issue of intervener costs, the Federal Court of Canada stated that, ". . . while costs are not generally available to [interveners], they may receive costs where their interests are directly affected by the proceedings, and other factors support such an award . . . ."[7] The Federal Court of Canada made specific reference to the three factors found in *Lynnview Ridge* and remarked that they provided helpful guidance.

20. In applying the *Lynnview Ridge* factors to the circumstances of the current inquiry, the Tribunal will first address the second and third factors.

21. The second factor asks if there is legislation relevant to the case to suggest whether the intervener has a special interest or an important role to play. The third factor asks about the nature of the intervener's special interest. With respect to the second factor, First Air submitted that it has a legislatively acknowledged right in section 30.17 of the *CITT Act* to participate in a procurement complaint. With respect to the third factor, First Air submitted that it had a significant financial interest at stake and that not participating was not an option for it. It was protecting its economic interests and its employees' economic and employment interests, as it had a corporate obligation to do whatever was appropriate to safeguard those interests.

22. The Tribunal finds that section 30.17 of the *CITT Act*, which states that "[a]n interested party may, with leave of the Tribunal, intervene in any proceedings before the Tribunal in relation to a complaint", clearly contemplates the intervention of interested parties in proceedings before it. The Tribunal also finds that, as the contract awardee, First Air has a financial interest in the proceedings. However, given the nature and circumstances of the Tribunal's procurement inquiries and legislation, the Tribunal does not consider that these two factors are sufficient in themselves to lead the Tribunal to deviate from the general rule regarding intervener costs. In the Tribunal's experience, virtually every intervener is a participant (e.g. bidder or contract awardee) in any procurement process at issue and, therefore, has at a minimum a financial interest in the proceedings. Therefore, the Tribunal considers that, in deciding whether to award costs to interveners in procurement inquiries, it is the first of the *Lynnview Ridge* factors which is essential.

23. The first factor asks if the intervener contributed to the court's deliberations by adding a viewpoint that otherwise would not have been considered and, alternatively, if the parties themselves presented the same arguments or points of view.

24. First Air submitted that it did contribute to the process by adding new points that would not otherwise have been considered. As an example, First Air mentioned that it filed a motion alleging that the complaint was out of time. First Air also submitted that, throughout the proceedings, it made arguments, identified issues and provided information that were appropriate for the Tribunal to consider and that were not raised by other parties.

25. On the other hand, Canadian North submitted that First Air intervened voluntarily and did not raise any new issues. It also submitted that, consistent with the jurisprudence pertaining to intervener costs generally, and the decisions of the Tribunal on intervener costs in particular, there should be no award of costs to First Air. It submitted that, as a volunteer in the process, an intervener is neither liable for, nor entitled to, costs. Canadian North also noted that the Tribunal, in its determination, made no order that First Air pay costs to Canadian North, despite the fact that Canadian North had to respond to numerous submissions by First Air throughout the proceedings.

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7. *Ibid.*, para. 40.

26. In this case, the Tribunal finds that the arguments submitted by First Air during the inquiry proceedings were largely espoused by DIAND and did not, in and of themselves, represent an "added" viewpoint. The Tribunal notes that First Air did file a motion requesting that the Tribunal dismiss the complaint as, according to First Air, it was filed beyond the time limits specified in section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. However, the Tribunal also notes that it dismissed the motion, as it determined that Canadian North had respected those time limits.

27. In reviewing its own previous determinations regarding cost awards to interveners, the Tribunal notes that it has consistently decided against awarding costs to interveners. In three recent cases,[8] the Tribunal found that, while the intervener had a significant commercial interest in the proceedings and that its submissions were helpful, the intervener should not be awarded costs because it chose to intervene and brought no new significant substantive issues to the proceedings.

28. While the Tribunal agrees that First Air's interests are directly affected by the proceedings, the Tribunal does not consider that other factors, such as those discussed earlier, support such an award. In light of the foregoing, the Tribunal will not award costs to First Air.

DETERMINATION

29. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards DIAND its reasonable costs incurred in responding to the complaint, which costs are to be paid by Canadian North. To determine the amount of the award in this case, the Tribunal considered its *Guideline*, which contemplates the classification of the level of complexity of a case based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. The Tribunal believes that the circumstances surrounding the complexity of the complaint proceedings were particularly complex, involving, among other things, an intervener, another involved party, more than 15 motions and other procedural requests to the Tribunal, responses to these motions and requests, and additional submissions made by other parties throughout the proceedings. This unusually high degree of complexity requires that the Tribunal exceed the amounts contemplated by the *Guideline*. Therefore, the Tribunal awards DIAND $10,000 for costs incurred in responding to the complaint.

Elaine Feldman
Elaine Feldman
Presiding Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

8. *Re Complaint Filed by Bosik Vehicle Barriers Ltd.* (6 May 2004), PR-2003-082 (CITT); *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT); *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

DISSENTING OPINION OF MEMBER FRY

30. I disagree with my colleagues on the issue of whether costs should be awarded to the intervener, First Air. In my view, the exceptional circumstances in this case make it appropriate to award costs to First Air because First Air added a viewpoint that could not otherwise have been considered.

31. The nature of the relationship between Canada Post and the successful bidder was an important element in this inquiry. Under normal circumstances, the Tribunal would have had the benefit of submissions from at least one party to this relationship, the government entity. However, in this instance, because DIAND was not a direct participant in the relationship, and because Canada Post declined the opportunity to become an intervener, First Air was the only source of information in this regard. This is a highly unusual situation.

32. I do not agree with my colleagues that it is necessary to examine the content of First Air's submissions to determine whether, in fact, First Air made a significant substantive addition to the submissions by DIAND. In my view, the important thing in this instance is that First Air was the only participant in the inquiry that was a party to a key relationship. In other words, the important thing in my view is First Air's position and the inherent viewpoint that results from this position. It was for First Air to decide what evidence and arguments were appropriate to represent its viewpoint most effectively.

33. I agree with my colleagues that the total costs awarded should be in the amount of $10,000. Of this amount, I would award $8,000 to DIAND and $2,000 to First Air.

Ellen Fry

Ellen Fry
Member