

Ottawa, Friday, September 8, 2000

**File No.: PR-2000-023**

IN THE MATTER OF a complaint filed by K-Lor Contractors Services Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a motion by the Department of Public Works and Government Services for an order dismissing the complaint on the basis that the complaint falls outside the Tribunal's procurement review jurisdiction in the context of the application of the trade agreements to the procurement process.

## ORDER

The Canadian International Trade Tribunal hereby dismisses the motion by the Department of Public Works and Government Services.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

The Statement of Reasons will follow at a later date.

Date of Order:	September 8, 2000
Date of Reasons:	October 12, 2000
Tribunal Member:	Richard Lafontaine, Presiding Member
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Gerry Stobo
Complainant:	K-Lor Contractors Services Ltd.
Counsel for the Complainant:	Mark N. Sills Randal S. Van de Mosselaer Christopher Moore Alyson D'Oyley
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Christianne M. Laizner Susan D. Clarke

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## STATEMENT OF REASONS

### INTRODUCTION

On July 12, 2000, K-Lor Contractors Services Ltd. (K-Lor) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Tender No. E0224-00R014/A) by the Department of Public Works and Government Services (the Department) for the provision of services for the construction of a secure landfill site in Argentea, Newfoundland. On July 13, 2000, K-Lor sent additional information to the Tribunal.

K-Lor alleged that the Department improperly rejected its tender for failing to provide the required "Certification of Mandatory Site Visit" (site visit certificate). It claimed that it did include the site visit certificate in its bid documents. This claim is supported by two affidavits from company officials. K-Lor alleged that the Department, by rejecting its tender, breached Article 506(6) of the *Agreement on Internal Trade*.<sup>2</sup>

On July 17, 2000, 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*.<sup>3</sup> That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. The Department was directed to submit its response to the complaint in a Government Institution Report (GIR). On July 18, 2000, the Department certified to the Tribunal, in writing, that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest. Accordingly, on July 24, 2000, the Tribunal rescinded its postponement of award order of July 17, 2000.

On August 11, 2000, before the date set for receipt of the GIR, the Department filed a notice of motion with the Tribunal requesting that the complaint be dismissed because it dealt with an issue outside the Tribunal's jurisdiction. On August 21, 2000, K-Lor filed comments on the motion. On August 30, 2000, the Department filed comments in response. After considering the submissions, the Tribunal issued an order

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
  2. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
  3. S.O.R./93-602 [hereinafter Regulations].

on September 8, 2000, dismissing the motion, indicating that reasons for the decision would follow. These are the reasons.

## POSITION OF PARTIES

The Department submitted that K-Lor's complaint is, in essence, grounded in tort based on negligence or deliberate malfeasance on the part of government officials. The Department claimed that K-Lor has failed to identify, in its complaint, any specific alleged violation of the AIT. Furthermore, the Department claimed that, although K-Lor cited and relied on Article 506(6) of the AIT, the factual dispute identified in its complaint and the nature of the cause of action have no nexus to the disciplines of the AIT.

According to the Department, K-Lor did not allege that government officials failed to properly evaluate a document which was contained in its bid. Rather, the Department argued that the essence of K-Lor's complaint is that certain officials were either untruthful about the document not being submitted with the bid, were negligent in their management of the bid and were not forthcoming in disclosing that negligence, or deliberately sabotaged K-Lor's bid by removing the document from its bid package.

The Department submitted that K-Lor's allegations are very serious in nature and are an attack on the conduct and credibility of government procurement officials. The only way in which the Tribunal can decide this matter is by making a determination of negligence or deliberate malfeasance on the part of those officials. The Department continued that this is outside the Tribunal's jurisdiction, as the issue does not rest with the procurement process itself, but with the conduct of individuals.

The Department argued that the Tribunal's jurisdiction constitutes the domestic implementation of Canada's bid challenge procedure obligations under Article 1017 of the *North American Free Trade Agreement*,<sup>4</sup> Article XX of the *Agreement on Government Procurement*<sup>5</sup> and Article 514 of the AIT. Consequently, the Department argued, this legislative framework directs that the Tribunal may review any aspects of the procurement process in the context of applying the procurement disciplines of the trade agreements to the procurement process, but no more than that. Furthermore, the Department submitted that, pursuant to subsection 30.14(1) of the CITT Act, the Tribunal must limit its considerations to the allegations contained in the complaint as framed and to the nexus between those allegations and the provisions of the AIT. In considering the legislative framework within which the Tribunal operates, there is no authority for it to consider complaints which raise an issue such as the one cited by K-Lor.

In its comments of August 21, 2000, K-Lor responded by saying that the crux of its complaint is that the Department is in breach of its obligations under the AIT by declaring the bid non-responsive, despite the fact that the bid was, in fact, fully documented and included all mandatory material prescribed by the tender documents. K-Lor denied the Department's assertion that it framed a cause of action in tort based on negligence or deliberate malfeasance on the part of the Department's officials. K-Lor stated that the Department's position is a mischaracterization of the nature of its complaint. K-Lor submitted that it is not essential to the success of its complaint that the Tribunal conclude that there was negligence or malfeasance. Indeed, it is open to the Tribunal to hold that the site visit certificate was received by the Department without determining negligence or the like. However, K-Lor submitted, should an assessment of the conduct of government procurement officials be necessary in order to determine whether the procurement was conducted appropriately, it is within the Tribunal's jurisdiction to do so.

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4. 32 I.L.M. 289 (entered into force 1 January 1994).

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)>.

K-Lor claimed that the complaint falls squarely within the ambit of Articles 501, 504(2)(b), 504(3), 506 and 514 of the AIT. Article 501 aims at ensuring equal access for all Canadian suppliers. To the extent that the conduct by government officials may impede equal access, their behaviour would, therefore, be subject to scrutiny under the AIT.

Article 514 of the AIT is broad in its wording and allows suppliers to submit bid protests on any aspect of the procurement process. K-Lor noted that this wording parallels the wording in subsection 30.11(1) of the CITT Act, which states that the Tribunal may inquire into any aspect of the procurement process. Furthermore, Article 506(6) of the AIT, by necessary implication, also mandates the Parties to properly evaluate criteria, in addition to properly choosing and identifying them. K-Lor submitted that to hold that the Department was obligated under the AIT to choose and identify proper criteria, but free to improperly evaluate bids with impunity, would completely undermine the fair and open bid process envisaged by the AIT and would run counter to the spirit of the agreement.

With respect to Article 504(2)(b) of the AIT, K-Lor noted that this article prohibits the Federal Government from discriminating between suppliers of any province or region. Considering that K-Lor was the only one of the seven bidders on the landfill project that was not based in Newfoundland, the application of Article 504(2)(b), in this case, cannot be discarded without examination.

K-Lor submitted that Article 504(3) of the AIT does provide a list of measures that are inconsistent with the obligation of the signatories to the AIT, but such a list is non-exhaustive, and the Tribunal's lack of jurisdiction cannot be established simply because a complaint does not describe a situation specifically mentioned in the AIT.

Finally, K-Lor argued that the scope of the Tribunal's jurisdiction is not strictly limited to a formalistic consideration of the procurement rules contained in the trade agreements. K-Lor concluded that the Tribunal has broad powers to ensure that the Federal Government fulfils both its procedural and equitable responsibilities to the bidders.

## **TRIBUNAL'S DECISION**

Article 514(2) of the AIT provides that the Federal Government shall adopt and maintain bid protest procedures "[i]n order to promote fair, open and impartial procurement procedures". Article 518 of the AIT defines "procurement procedures" as follows: "the processes by which suppliers are invited to submit a tender, a proposal, qualification information, or a response to a request for information and includes the ways in which those tenders, proposals or information submissions are treated" [emphasis added]. 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". The parties agree that the solicitation at issue relates to a designated contract within the meaning of Article 502 of the AIT.

The only issue in this motion is whether the Tribunal has jurisdiction to consider a complaint in which it is claimed that a bid was unfairly rejected because of the way in which it was treated by the procuring authority. The Department argued that K-Lor's allegation is grounded in tort based on negligence or malfeasance and, therefore, has no nexus to the AIT. K-Lor alleged that the Department violated the obligations governing the tender by declaring its bid non-responsive, despite the fact that it was fully documented and included all mandatory material prescribed by the tender documents. It claimed that this violation is an aspect of the procurement process and falls clearly within the Tribunal's jurisdiction.

While determining whether or not the site visit certificate was submitted by K-Lor in its bid package is central to determining the merit of this complaint, this does not necessarily require that the Tribunal make a declaration that the Department's officials were negligent or malfeasant in their conduct.<sup>6</sup> At this preliminary stage, the Tribunal cannot comment on whether the site visit certificate was submitted and, if it was submitted, what happened to it during the tender evaluation process. This decision can only be made following consideration of all relevant information.

That said, the Tribunal is of the view that it can look at the way tenders are treated at the evaluation stage. Only by looking at these matters can the Tribunal decide whether the standards for a fair, open and transparent procurement procedure have been met. This may require, in some cases, that the Tribunal look at the conduct of procurement officials. Indeed, pursuant to paragraph 30.15(3)(d) of the CITT Act, the intent of the government officials in the way in which they conduct a procurement can be taken into account when assessing whether parties acted in good faith.

Taking all of this into account, the Tribunal is of the view that the consideration of the subject matter of this complaint is within its jurisdiction. The motion, therefore, was dismissed.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

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6. See *Canadian Computer Rentals* (3 August 2000), PR-2000-003 (CITT), in which the Tribunal concluded that the government entities improperly applied the evaluation methodology and criteria when they erroneously concluded that a mandatory certification was missing from the complainant's bid package.