



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2006-026

Canadian North Inc.

v.

Department of Indian Affairs and
Northern Development

and

Bradley Air Services Limited

*Order issued
Thursday, November 9, 2006*

*Reasons issued
Friday, December 22, 2006*

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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 a notice of motion filed by the Department of Indian Affairs and Northern Development on October 23, 2006, for an order dismissing the complaint for want of jurisdiction by the Canadian International Trade Tribunal.

BETWEEN

CANADIAN NORTH INC.

Complainant

AND

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

**Government
Institution**

AND

BRADLEY AIR SERVICES LIMITED

Intervener

ORDER

After having considered the submissions of the Department of Indian Affairs and Northern Development, Canada Post Corporation, Canadian North Inc. and Bradley Air Services Limited (carrying on business under the trade name of First Air), the Canadian International Trade Tribunal hereby dismisses the motion filed by the Department of Indian Affairs and Northern Development.

The Canadian International Trade Tribunal has determined that the government institution that must file a Government Institution Report in this matter is the Department of Indian Affairs and Northern Development.

The Canadian International Trade Tribunal extends the date for the filing of the Government Institution Report to Tuesday, December 5, 2006.

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

The statement of reasons will be issued at a later date.

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 (Request for Proposal [RFP] TCS 04/95) of air transport services in relation to the execution of the Food Mail Program (the 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) (Bradley Air Services).

3. As a remedy, Canadian North requested that the contract awarded to Bradley Air Services be cancelled and that the procurement be re-tendered. In the alternative, it requested that it be compensated for the profits that it lost as a result of the award of the contract to Bradley Air Services. Canadian North also requested its reasonable costs incurred in preparing its bid and its complaint.

4. On September 28, 2006, the Tribunal informed the parties that it had accepted the complaint, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On October 20, 2006, Bradley Air Services requested that it be granted intervener status, which was granted on October 23, 2006. Also on October 23, 2006, DIAND filed a motion with the Tribunal requesting that it dismiss the complaint for want of jurisdiction. Canada Post filed comments on the complaint on October 23, 2006, also stating that the subject procurement did not constitute a designated contract under the *Agreement on Internal Trade*,³ the only applicable trade agreement, and that, therefore, the complaint did not fall within the Tribunal's jurisdiction. Between October 27 and November 7, 2006, all parties submitted comments on DIAND's motion and Canada Post's comments, as well as on Canadian North's and Bradley Air Services' replies to DIAND and Canada Post.

5. The Program is described in a brochure posted on DIAND's Web site as follows:

...

Food Mail is a Government of Canada program that pays part of the cost of shipping nutritious perishable food and other essential items by air to isolated northern communities that are not accessible year-round by road, rail or marine service. This subsidy makes it possible for retailers in these communities to sell fresh food at lower prices.

Indian and Northern Affairs Canada (INAC) manages the program and provides funding to Canada Post to cover part of the cost of transporting eligible items. Health Canada provides advice and guidance on nutrition. Canada Post provides Food Mail service by contracting with air carriers.

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*].

In these northern communities, fresh affordable food from the south is an important complement to traditional Aboriginal foods. With lower-cost nutritious food shipped by Food Mail, a healthy diet becomes more affordable. This promotes healthy eating.

...

6. The Program has existed since the late 1960s, originally as the Northern Air Stage Program. The relationship between DIAND and Canada Post concerning the terms and funding for the Program is set out in an agreement dated October 7, 1996 (the Agreement), which has been amended numerous times between signature and the issuance of the RFP. Essentially, Canada Post contracts for air carrier services to carry out the Program in accordance with these agreed terms. Users pay for the delivery of the food mail directly to Canada Post at a pre-established rate. DIAND subsidizes the remainder of Canada Post's cost of the food mail transportation.

7. On May 20, 2006, because the current contract for air carrier services was soon to expire, Canada Post issued an RFP for a new contract. The contract is for both food mail and regular mail. According to the RFP, 66 percent of all unique departure-destination combinations are for the delivery of regular mail only, and 64 percent of all flights per week are for the delivery of regular mail only. However, 84 percent of the total estimated cargo by weight (7.7 million kg of 9.2 million kg) is dedicated to the delivery of food mail.

8. Canada Post awarded the contract to Bradley Air Services. It is the awarding of this contract that is the subject of the complaint to the Tribunal.

ANALYSIS

9. The issue now before the Tribunal is the motion brought by DIAND for an order dismissing the complaint for lack of jurisdiction by the Tribunal. According to DIAND, the complaint relates to a contract between Canada Post and Bradley Air Services and, since Canada Post is excluded from coverage by the *AIT*, the Tribunal does not have jurisdiction to inquire into this complaint.

10. The Tribunal's statutory authority to accept a complaint for inquiry is found in the *CITT Act* and the *Regulations*.

11. Subsection 30.11 (1) of the *CITT Act* reads as follows: "Subject to the regulations, 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." Before a complaint is accepted for inquiry, paragraph 7(1)(b) of the *Regulations* requires that the Tribunal determine if "... the complaint is in respect of a designated contract ..."

12. Thus, in order to accept a complaint for inquiry, the Tribunal has to be satisfied that it relates to a "designated contract" and that it concerns some aspect of the procurement process. There is no dispute with respect to the motion at issue that the complaint concerns an aspect of the procurement process. The question to be addressed is whether the complaint relates to a "designated contract".

13. "Designated contract" is defined at section 30.1 of the *CITT Act* 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 ..."

14. Thus, in order for a contract to be a “designated contract”, it must:
- have been awarded or be proposed to be awarded by a “government institution”; and
 - be designated or of a class of contracts designated by the regulations.
15. The Tribunal will first examine the second requirement. Subsection 3(1) of the *Regulations* provides as follows:
- For the purposes of the definition “designated contract” in section 30.1 of the Act, 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 Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.
16. The procurement in question relates to air transport services. The Tribunal needs to consider whether a contract for this type of service would be a “designated contract” under each trade agreement.
17. In the *North American Free Trade Agreement*,⁴ Article 1001 provides that “. . . [t]his [procurement] Chapter applies to measures adopted or maintained by a Party relating to procurement . . . of . . . services in accordance with Annex 1001.1b-2”
18. In Annex 1001.1b-2 of *NAFTA*, under Section B - Excluded Coverage, Schedule of Canada, Services Exclusions by Major Service Category, all classes of category V—Transportation, Travel and Relocation Services—except V503, “Travel Agent Services (not including Tour Guides)”, are specifically identified as being excluded from coverage.⁵ Therefore, in the Tribunal’s view, this is not a procurement described in Article 1001.
19. Article I of the *Agreement on Government Procurement*⁶ provides that “. . . [t]his Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I” There is a footnote to this paragraph that provides as follows: “. . . Annex 4 [to Appendix I] specifies services, whether listed positively or negatively, covered by this Agreement” Annex 4 to Appendix I contains a list of services offered for coverage by Canada. That list does not include air transport services.⁷ Therefore, in the Tribunal’s view, this is not a procurement described in Article I.
20. Article 502 of the *AIT* provides that “. . . [t]his [procurement] Chapter applies . . . in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B”
21. Annex 502.1B of the *AIT*—Services Covered by Chapter Five— provides as follows: “. . . All services are covered except the following” Air transport services are not part of this list of exclusions. Therefore, in the Tribunal’s view, this is a procurement described in Article 502.

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. Appendix 1001.1b-2-B, Common Classification System—Services, identifies Air Transport Services as category V2.

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

7. Under the United Nations Central Product Classification, air transport services falls under code 73.

22. Accordingly, the Tribunal concludes that the *AIT* applies to the type of service that is the subject of the procurement, but that *NAFTA* and the *AGP* do not.

23. The Tribunal will now consider the question of whether this complaint concerns “. . . a contract for the supply of . . . services that has been or is proposed to be awarded by a government institution . . .”

24. “Government institution” is defined at section 30.1 of the *CITT Act* as “. . . any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the [Regulations]”.

25. Given that the *AIT* is the only trade agreement that applies to the type of service in question, the Tribunal considered the portion of subsection 3(2) of the *Regulations* that applies to the *AIT*, which reads as follows:

For the purposes of the definition “government institution” in section 30.1 of the Act, the following are designated as government institutions:

(a) the federal government entities set out . . . under the heading “CANADA” in Annex 502.1A of the Agreement on Internal Trade . . . ;

. . .

(d) if a procurement that results in the award of a designated contract by a government entity or enterprise referred to in paragraph (a), (b) or (c) is conducted by the Department of Public Works and Government Services or its successor, that Department or its successor.

. . .

26. DIAND is listed in Annex 502.1A of the *AIT* in the section entitled “Government Departments, Commissions, Agencies, etc.”, but Canada Post is not. Therefore, DIAND is a “government institution” for purposes of the *AIT*, but Canada Post is not. This procurement was not conducted by the Department of Public Works and Government Services and, therefore, paragraph 3(2)(d) of the *Regulations* does not apply. Therefore, the complaint could only be in respect of a “designated contract” if the entity that awarded the contract in question was DIAND.

27. It is common ground between the parties that, technically speaking, the relationship between DIAND and Canada Post is not one of principal and agent. However, the question is whether the Tribunal should consider that DIAND exercised sufficient control over the procurement that, nonetheless, it is DIAND, and not Canada Post, that should be considered to be the entity awarding the contract.

28. The purpose of giving the Tribunal jurisdiction under the *CITT Act* is to provide a legislative mechanism to enforce the procurement rules contained in *NAFTA*, the *AIT* and the *AGP*. Accordingly, in exercising its jurisdiction, the Tribunal considers it appropriate to take into account the overall purpose of the procurement rules in these trade agreements, i.e. to promote trade liberalization by ensuring that tendering procedures are applied in a non-discriminatory and transparent manner.⁸ In order to address this purpose as comprehensively as possible, the Tribunal considers that the types of procurement situations covered by the trade agreements should be interpreted broadly.⁹

8. The purpose of the *AIT*, as described in Article 501, is “. . . to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.”

9. *Re Complaint Filed by McNally Construction Inc.* (6 December 2001), PR-2001-026 (CITT).

29. Accordingly, the Tribunal agrees with Canadian North that a government entity covered by the procurement rules contained in the *AIT* should not be able to avoid the application of those rules by using another government entity not covered by the rules as the instrument to conduct its procurement.

30. The Tribunal will therefore weigh the evidence that supports the contention that this is in essence a contract awarded by Canada Post against the evidence that this is in essence a contract awarded by DIAND. The Tribunal notes that awarding a contract is not necessarily the same as signing a contract.

Evidence to Indicate a Canada Post procurement

31. The RFP issued by Canada Post on May 20, 2005, does not refer to DIAND. The cover letter of the RFP stated that “. . . Canada Post Corporation . . . has a requirement for the conveyance of Mail and Foodmail by air between Northern Quebec through Nunavut, the NWT and area communities”

32. Once the RFP was issued, Canada Post conducted all phases of the solicitation. It was the sole point of contact for potential suppliers; all correspondence was between Canada Post and the suppliers; it received the bids; it evaluated the proposals; and it entered into the contractual relationship with the air carrier. According to the draft contract in the RFP, Canada Post would assume all obligations and responsibilities under the contract.

33. In addition, the RFP was not solely for services relating to the Program, it was also used to fulfill Canada Post’s mandate regarding the delivery of “regular” mail to all addresses across Canada. Canada Post has a statutory obligation to deliver mail to every address within Canada. Therefore, Canada Post would be contracting for a considerable amount of air transport services to remote northern communities even if the Program did not exist.

Evidence to Indicate a DIAND Procurement

34. The Agreement between Canada Post and DIAND sets out the parameters for the delivery of the food mail, in great detail, prescribing a significant amount of content that Canada Post would need to provide for in the contract between Canada Post and the air carrier, including which goods are eligible for shipment, which communities can receive food mail, from where food mail is to be shipped, the freight rates to be paid by food mail customers, and the frequency of freight service generally. The specifications for eligible foods list 14 categories of perishable foods and 18 categories of non-perishable foods. The specifications for non-eligible items list 2 categories of convenience perishable foods and 12 categories of foods of little nutritional value and provide a one-page outline of a number of categories of non-food items. The specifications showing the communities that can participate list 136 eligible air stage destinations, together with the required food entry point for each destination.

35. The specifications for food mail freight rates prescribe the rates to be charged per kilogram for perishable and non-perishable food, and provincial and territorial shipments, respectively. They also establish the costs that are eligible to be included in Canada Post’s direct cost of providing the service, including costs of preparing, printing and distributing public information about the Program, as authorized by DIAND.

36. Canada Post’s latitude in contracting with the air carrier is limited not only by these detailed initial specifications as agreed with DIAND, but also by the substantial degree of control exercised by DIAND over ongoing administration of the Program and future decisions. The Agreement provides that DIAND is the authority for interpreting what goods are or are not eligible for shipment under the Program. Canada

Post is required to refer these questions, whether from Canada Post staff or the public, to DIAND and is to receive copies of DIAND's interpretations only after they are given. DIAND is also authorized to declare certain categories of businesses, specific retailers or specific isolated communities to be ineligible. The Agreement makes it clear that Canada Post must obtain the concurrence of DIAND prior to making changes to such key matters as air staging points or entry points and that Canada Post undertakes to make changes, agreed to by both parties, within specified periods, following notification by DIAND, including suspending shipments to specific addressees that DIAND considers to be ineligible. The Agreement gives DIAND the right to a substantial amount of detailed information concerning Canada Post's relationship with the air carrier, including the right to audit Canada Post's costs and revenues, annual and quarterly information on the weight, type and cost of goods shipped to each of the 136 eligible communities, and the names and addresses of air carriers and customers.

37. In addition, DIAND employees had substantial influence on the content of the RFP used by Canada Post to select an air carrier. DIAND employees reviewed initial drafts of the RFP and found data inconsistencies, inappropriate program information and drafting errors that Canada Post subsequently corrected at DIAND's request. DIAND employees also provided answers to certain questions from bidders for Canada Post during the tendering phase. A DIAND document¹⁰ provides a list of four specific areas of the RFP requiring DIAND input, including: separating the ground/air work in Val-d'Or; the service standard regarding the delivery of perishables; ensuring that the contractor is held accountable for not meeting set service level agreements; and some refrigeration requirements. The Tribunal notes that these areas go beyond the detailed requirements set out in the Agreement between DIAND and Canada Post and indicate an increasing level of control by DIAND over the procurement. E-mail correspondence between Canada Post and DIAND exchanged during the drafting stage of the RFP also indicates that DIAND and Canada Post discussed many specific terms of the RFP.¹¹ In a briefing note prepared for the Minister of Indian Affairs and Northern Development, DIAND staff stated the following: "... Based on discussions between ... [DIAND] and Canada Post officials, Canada Post has revised its tendering package for service to communities currently served by [Bradley Air Services], to provide additional flexibility to bidders ..."¹²

38. The Program is a recognized DIAND program from both a funding and a management perspective within government. In the DIAND "2005-06 Estimates—Report on Plans and Priorities,"¹³ under the heading "Expected Results and Outputs", one of DIAND's deliverables is an "[e]ffective, appropriately focused Food Mail Program that increases the consumption of nutritious perishable food in isolated northern communities", and DIAND planned to carry out "[p]ublic consultation on the future of Churchill as the entry point for Food Mail service ... as part of the review of Food Mail entry points recommended by the Auditor General in December 2002." Under the heading "Indicators", the Report indicates: "Sustainable long-term decision on Food Mail Program funding based on evidence from the Food Mail pilot projects under way in three isolated communities." The Tribunal also notes that Canada Post's Program Customer Guide states the following: "... For information regarding the Food Mail Program, please contact: FOOD MAIL PROGRAM, INDIAN AND NORTHERN AFFAIRS CANADA ..."¹⁴

10. Canadian North's comments on the motion brought by DIAND, Tab C.

11. Canadian North's comments on the motion brought by DIAND, Tabs D-G.

12. Canadian North's comments on the motion brought by DIAND, Tab B.

13. Complaint, Tab 9.

14. Bradley Air Services' comments, dated October 27, 2006, Tab 2 at 2.

39. The Tribunal considers that the sustained level of control that DIAND has exercised over the parameters of the procurement carried out by Canada Post effectively has made the resulting contract a DIAND contract. In fact, DIAND's level of control in relation to the Program overall has been increasing, as evidenced by the series of amendments to the Agreement with Canada Post to the point where, under the Agreement as currently written (which governs the procurement that is the subject of this complaint), pilot projects are undertaken by DIAND with a view to fine tuning the Program's delivery mechanisms on the ground.¹⁵ Such fine tuning was expected to result in changes to the Program to make it more effective.

40. The Program is also a recognized program of DIAND outside the government. The close relationship between DIAND and Canada Post with respect to the Program was such that knowledgeable people in the area served by the procurement considered that DIAND controlled the procurement. A briefing note¹⁶ prepared by DIAND staff for the Minister of State for Indian Affairs and Northern Development indicates that it contains letters for his signature that address recommendations made regarding the procurement in question. Similarly, a letter¹⁷ from the heads of two northern groups concerning objections to the procurement process was addressed to the Minister of Indian Affairs and Northern Development.

41. The Tribunal notes that it took DIAND more than five months¹⁸ to reply to this correspondence to indicate essentially that, in DIAND's view, the procurement was the responsibility of Canada Post rather than DIAND. The fact that DIAND took such a long period to reply may indicate that this conclusion was not self-evident to DIAND officials. The Tribunal notes that, under the Agreement between DIAND and Canada Post, DIAND not only has responsibility for responding to questions from the public on food eligibility, as indicated above but also has broad responsibilities for communications with affected parties concerning the Program. It is required "[t]o communicate in a timely manner all aspects of policy, including any changes in policy, to all affected parties such as air stage freight customers, air stage communities and air carriers."¹⁹

CONCLUSION

42. On balance, the Tribunal considers that the weight of the evidence indicates that, in essence, this is a DIAND procurement rather than a Canada Post procurement. DIAND exercised substantial control over the detailed specifications imposed by Canada Post on the air carrier, including interpretation of and changes to these specifications after Canada Post signed the contract with the air carrier. During the procurement process, DIAND exerted considerable influence over the details of the RFP document used by Canada Post to conduct the procurement. The Agreement between DIAND and Canada Post specified that, after the contract between Canada Post and the air carrier was signed and work had been performed, DIAND had the right to obtain detailed information concerning the work done by the air carrier under the contract and substantial responsibility for communications to affected parties concerning the contract. DIAND's role was such that it gave rise to the perception that DIAND rather than Canada Post controlled the procurement process.

15. Complaint, Tab 9, at 42-43.

16. Canadian North's comments on the motion brought by DIAND, Tab B.

17. Canada Post's submission of October 23, 2006, Tab 3.

18. Canadian North wrote on March 6, 2006. A reply was dated August 22, 2006, although it was not received until September 7, 2006.

19. Canada Post's submission of October 23, 2006, Tab 2, para. 43.

43. In the Tribunal's view, in this procurement, the degree of control and influence exercised by DIAND over Canada Post's relationship with its air carrier goes far beyond what would be expected in a normal procurement situation where DIAND contracted with Canada Post, and Canada Post, in turn, subcontracted with an air carrier, or in a subsidy situation where DIAND merely contributed funds to assist Canada Post in carrying out a Canada Post program. In either of these situations, DIAND's role would normally be expected to be limited to setting broad parameters, leaving Canada Post the latitude to manage the details of its relationship with its subcontractor and of the execution of the Program. The fact that Canada Post chose to combine the food mail contract with a contract for transport of regular mail does not alter the Tribunal's conclusion concerning the relationship between DIAND and Canada Post on the food mail portion of the contract.

44. Accordingly, the Tribunal considers that DIAND is the government entity that awarded the contract and, therefore, that the complaint concerns a "designated contract" as contemplated by subsection 30.11(1) of the *CITT Act* and paragraph 7(1)(b) of the *Regulations*.

45. The Tribunal hereby dismisses the motion filed by DIAND.

Elaine Feldman
Elaine Feldman
Presiding Member

Ellen Fry
Ellen Fry
Member

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