

Ottawa, Wednesday, September 12, 2001

File No. PR-2001-019

IN THE MATTER OF a complaint filed by Marathon Management Company 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 under rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the basis that the Tribunal does not have jurisdiction to conduct an inquiry into the procurement at issue because the procurement does not relate to a “designated contract” within the meaning of subsection 30.11(1) of the *Canadian International Trade Tribunal Act* and as defined in subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

ORDER

The Canadian International Trade Tribunal has determined that the procurement does not relate to a designated contract, as required by subsection 30.11(1) of the *Canadian International Trade Tribunal Act*. The estimated value of the procurement that is the subject of the complaint is less than the minimum value established by Article 502(1)(a) of the *Agreement on Internal Trade*, by Annex 1001.2c, paragraph (a), of the *North American Free Trade Agreement* and by Appendix I, Canada, Annex 1 to the *Agreement on Government Procurement*. Therefore, the Tribunal grants the motion and dismisses the complaint.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Decision and Reasons: September 12, 2001

Tribunal Member: Peter F. Thalheimer, Presiding Member

Research Manager: Paule Couët

Counsel for the Tribunal: Philippe Cellard

Complainant: Marathon Management Company

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke
Ian McLeod

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STATEMENT OF REASONS

COMPLAINT

On July 13, 2001, Marathon Management Company (Marathon) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W8486-020270) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND). The solicitation is for the provision of 15,000 silhouette targets.

Marathon alleged that PWGSC issued this solicitation improperly, as it did not allow for a fair and equal tender due to the lack of access to all potential suppliers. Marathon requested, as a remedy, that the award of this contract be postponed until the Tribunal determined the validity of the complaint. In addition, Marathon requested that the solicitation be cancelled and reissued.

On July 19, 2001, 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 That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint.

MOTION

On August 1, 2001, PWGSC brought before the Tribunal a motion, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*,³ requesting that the Tribunal dismiss the complaint because

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499.

the procurement at issue does not relate to a “designated contract”, as required by subsection 30.11(1) of the CITT Act, and as defined in subsection 3(1) of the Regulations, as well as in Article 1001 of the *North American Free Trade Agreement*,⁴ Article I of the *Agreement on Government Procurement*⁵ and Article 502 of the *Agreement on Internal Trade*.⁶

PWGSC acknowledged that the goods in question are covered under the three trade agreements, i.e. the AIT, NAFTA and the AGP. However, PWGSC submitted that the value of the contract to be awarded did not meet the relevant thresholds.

PWGSC submitted that Article 502(1)(a) of the AIT provides that Chapter Five (on procurement) applies only in respect of a procurement of goods where the procurement value is \$25,000 or greater. “Procurement value” is defined in Article 518 of the AIT as follows:

procurement value means the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one year’s duration.

PWGSC also referred to Article 505(1) of the AIT, which requires that the value of a procurement be estimated at the time of the publication of the notice of a call for tenders.

PWGSC pointed out that, under Chapter 10 of NAFTA dealing with procurement and under the AGP, the monetary thresholds to be met for a contract to be covered are \$37,200 and \$261,200 respectively. These trade agreements also provide that the value of a contract be estimated at the time of the publication of a notice of proposed procurement.

PWGSC submitted that the Request for Proposal (RFP), which is the subject of this complaint, was for 15,000 target silhouettes, with an estimated procurement value of \$21,026, which value was properly estimated by DND at the time that it submitted a requisition to PWGSC on May 2, 2001. PWGSC also submitted that this value was estimated on the basis of the last known unit price under the most recent contract for these particular target silhouettes and adjusted for inflation. According to the Notice of Motion, the RFP was issued to two known suppliers on June 20, 2001. PWGSC submitted that the procurement process, which is the subject of this complaint, is with respect to a procurement of goods that does not meet the threshold procurement value for coverage under the applicable trade agreements.

In its comments of August 17, 2001, on PWGSC’s motion, Marathon submitted that, because it had been a supplier of the goods in question in previous years, it should have been considered a potential supplier. Marathon also alleged that it would have been easy to split the solicitation to allow the value to be below the required monetary thresholds.

In its response of August 23, 2001, to Marathon’s comments on the motion, PWGSC submitted that there had been no splitting of solicitations for the purpose of avoiding the obligations of the trade agreements.

4. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

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

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

TRIBUNAL'S DECISION

Subsection 30.11(1) of the CITT Act reads:

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.

The CITT Act defines “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”.

Subsection 3(1) of the Regulations reads:

For the purposes of the definition “designated contract” in section 30.1 of the [CITT 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.

Section 5 of the Regulations reads, in part:

Where the Tribunal requires that the value of a designated contract be determined, the Tribunal shall deem that value to be the value of the designated contract that was established by the government institution

...

- (b) where a notice of proposed procurement has not been published, at the time the solicitation documentation was made available to potential suppliers.

Article 502(1) of the AIT reads, in part:

This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:

- (a) \$25,000 or greater, in cases where the largest portion of the procurement is for goods.

Article 505(1) of the AIT reads:

1. An entity shall estimate the procurement value as at the time of publication of a notice of a call for tenders in accordance with Article 506.

Both NAFTA and the AGP have similar provisions although the monetary thresholds for the procurement of goods found in NAFTA Annex 1001.2c, paragraph (a), and in Appendix I, Canada, Annex 1 to the AGP, are higher in value than those of the AIT.

At the time of its decision on July 19, 2001, the Tribunal did not have before it the estimated value for the procurement, as established by the requisition sent to PWGSC by DND.

In light of the evidence presented by PWGSC concerning the value of the procurement (specifically, the requisition dated April 30, 2001), the Tribunal finds that, at the time of the DND requisition, the estimated value of the procurement was \$21,026, well below the thresholds for a contract to be a designated contract under the AIT, NAFTA and the AGP. The Tribunal notes also that, less than two months later, on June 20, 2001, at the time that the solicitation documentation was made available to two potential suppliers, the procurement value must have been almost identical. The Tribunal is satisfied

that the methodology used for the estimation of the value of the contract was reasonable and does not find any indication that DND's procurement requirements were divided in order to avoid the obligations of the relevant trade agreements. As such, the Tribunal is of the view that, given its value, this procurement does not relate to a designated contract. Therefore, the Tribunal does not have jurisdiction to conduct an inquiry into this complaint, and the complaint is dismissed.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member