



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2004-052

Everest VIT, Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Friday, April 8, 2005*

TABLE OF CONTENTS

ORDER OF THE TRIBUNAL.....i

STATEMENT OF REASONS1

 COMPLAINT1

 TRIBUNAL’S DECISION.....2

IN THE MATTER OF a complaint filed by Everest VIT, Inc. under 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 under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO an order under subsection 30.13(3) of the *Canadian International Trade Tribunal Act*.

BETWEEN

EVEREST VIT, INC.

Complainant

AND

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

**Government
Institution**

ORDER OF THE TRIBUNAL

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

Consequently, the order made on February 18, 2005, to postpone the award of any contract in relation to this procurement until the Canadian International Trade Tribunal determined the validity of the complaint is hereby rescinded.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

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

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Members:	James A. Ogilvy, Presiding Member Pierre Gosselin, Member Meriel V. M. Bradford, Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Eric Wildhaber
Complainant:	Everest VIT, Inc.
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On February 11, 2005, Everest VIT, Inc. (Everest) 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. W3474-05W500/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of video scopes.

2. Everest alleged that PWGSC narrowly stated the technical specifications, thereby favouring one manufacturer's video scope to the exclusion of all other manufacturers' equipment. It requested, as a remedy, that the Tribunal recommend that PWGSC revise the solicitation document to include technical specifications based on operational inspection requirements for the engines in question and written in a manner that is open to fair competition.

3. On February 18, 2005, 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 the same day, the Tribunal issued a postponement of award order under subsection 30.13(3) of the *CITT Act*.

4. On March 10, 2005, PWGSC filed a letter in lieu of a Government Institution Report (GIR) with the Tribunal. In this letter, it expressly denied the allegations in the complaint and advised the Tribunal that it had cancelled the solicitation at issue.

5. PWGSC submitted that DND had undertaken a thorough review of its projected requirements for the next several years and that these requirements were not necessarily reflected in the cancelled solicitation. It submitted that, with respect to any future solicitation, DND intended to remove the requirement for interchangeability, to otherwise employ less restrictive specifications and to include performance-based technical evaluation criteria. PWGSC therefore submitted that the complaint should be dismissed since, without a designated contract, the Tribunal lacked jurisdiction to conduct an inquiry into the complaint. PWGSC referred to the Federal Court of Appeal decision in *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*³ wherein it was stated: "While subsection 30.11(1) is broad enough to confer on the Tribunal jurisdiction to consider any aspect of a procurement process that relates to a designated contract, there must be a designated contract in order to trigger the broader inquiry. As there is now no designated contract at issue, the Tribunal is without jurisdiction to enter into any procurement process inquiry. In other words, there is no jurisdiction in the Tribunal under subsection 30.11(1) to conduct an at-large inquiry into the procurement processes of the government."

6. PWGSC also submitted that DND's intended actions were consistent with the nature of relief requested by Everest.

7. On March 22, 2005, Everest filed comments on PWGSC's letter of March 10, 2005, stating that it would accept the Tribunal's decision on the disposition of the case pursuant to PWGSC's letter. Everest indicated that it was not seeking any damages or costs as a result of this inquiry.

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

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

3. (26 May 2000), A-481-99 (C.A.).

TRIBUNAL'S DECISION

8. Section 30.1 of 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”.

9. Paragraph 10(a) of the *Regulations* provides that the Tribunal may, at any time, order the dismissal of a complaint where, after taking into consideration the *CITT Act*, the *Regulations* and the applicable trade agreements, the Tribunal determines that the complaint has no valid basis.

10. Given that the solicitation was cancelled, the Tribunal determines that there is no designated contract that has been or is proposed to be awarded by PWGSC and that, therefore, the complaint has no valid basis. Therefore, pursuant to paragraph 10(a) of the *Regulations*, the complaint is dismissed. Consequently, the Tribunal rescinds its order made on February 18, 2005, to postpone the award of any contract in relation to the above-referenced procurement until the Tribunal determined the validity of the complaint.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

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