

Ottawa, Friday, November 28, 1997

File No.: PR-97-025

IN THE MATTER OF an inquiry into a complaint filed by Harris Corporation under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

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 it was not filed within the prescribed time limits.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal concludes that the complaint was not filed within the prescribed time limits and, therefore, pursuant to paragraph 10(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, hereby orders the dismissal of the complaint.

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Order: November 28, 1997

Tribunal Member: Charles A. Gracey

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Shelley Rowe

Complainant: Harris Corporation

Intervener: Thomson-CSF Systems Canada Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Michael Ciavaglia

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STATEMENT OF REASONS

INTRODUCTION

On October 3, 1997, Harris Corporation (Harris) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement by the Department of Public Works and Government Services (the Department) of beyond line-of-sight high-frequency ground entry stations for the North American Air Defence Modernization, Interoperability and Connectivity project for the Department of National Defence (Solicitation No.: NH W8474-5-YU14/000/B).

In summary, Harris alleged that the finding by the Department that the successful bidder's offer was compliant, although the offer included the provision of government furnished equipment (GFE) and the Department did not make such GFE available to Harris, resulted in an unfair competitive process.

On October 8, 1997, the Canadian International Trade Tribunal (the Tribunal) determined, on the basis of the existing record, that the contract was a designated contract under the *Agreement on Internal Trade*² (the AIT), that Harris was a potential supplier in this solicitation and that the complaint disclosed a reasonable indication that the Department might have breached certain provisions of the AIT in conducting this procurement. Accordingly, the Tribunal decided to conduct an inquiry into the complaint.

On October 30, 1997, the Department filed with the Tribunal a notice of motion for an order dismissing the complaint on the basis that it was not filed within the prescribed time limits. On November 5, 1997, Harris filed with the Tribunal submissions on the Department's motion. Thomson-CSF Systems Canada Inc. (Thomson-CSF), an intervener in the matter, also filed submissions on November 6, 1997. On November 14, 1997, the Department filed with the Tribunal its submissions on Harris's comments. Harris filed further submissions with the Tribunal on November 21, 1997.

In its submissions, Harris states that it believes its actions to be within the time limits described in subsection 6(2) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³

1. R.S.C. 1985, c. 47 (4th Supp.).
2. As signed at Ottawa, Ontario, on July 18, 1994.
3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

(the Regulations). It submits that, subsequent to the debriefing given by the Department on August 28, 1997, it objected in writing on September 11, 1997 (nine working days after the debriefing) and requested clarification on the use of GFE. Harris further submits that the Department's response dated September 17, 1997, denied relief to Harris. On September 29, 1997, Harris submitted a complaint to the Tribunal.

In its submissions, the Department states that, on August 28, 1997, after the completion of the subject procurement process and after the award of the contract to Thomson-CSF, Harris had a debriefing with the Department. During that debriefing session, the Department submits that it became known to Harris that the successful proposal included the provision of GFE. The Department further submits that, as of August 28, 1997, it was clear to Harris that the procurement process was finalized, that the contract had been awarded and that the successful proposal involved the provision of GFE.

Concerning Harris's submission that its letter of September 11, 1997, to the Department constitutes an objection within the meaning of subsection 6(2) of the Regulations and that the Department's reply of September 17, 1997, constituted notice of denial of relief within the meaning of subsection 6(2) of the Regulations, the Department disagrees with this position. It submits that Harris's letter of September 11, 1997, was intended for the purposes of obtaining information from the Department with respect to the use of GFE in proposals for future reference in subsequent procurement procedures.⁴ The Department further submits that its reply of September 17, 1997, cannot be considered a denial of relief. Indeed, no relief was sought from the Department in Harris's September 11, 1997, letter and only information for clarification and future use was provided by the Department in its reply.

The Department concludes by submitting that Harris learned its ground of complaint during the debriefing on August 28, 1997, and, given that it submitted its complaint to the Tribunal on September 29, 1997, this date falls outside the 10-day time period established by subsection 6(1) of the Regulations. Further, this date is outside the 30-day time period which would be permitted in accordance with subsection 6(4) of the Regulations.

TRIBUNAL'S DECISION

Section 6 of the Regulations sets out the time limits for filing a complaint with the Tribunal. Section 6 provides as follows:

6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

4. "Harris believes that the answers to the questions will close the [North American Air Defence Modernization] procurement and be helpful in understanding [the Department's] policy in this area as regards bidding future Canadian competitive procurements."

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that

(a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) and (2); or

(b) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade and the Agreement on Government Procurement.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

The Tribunal is persuaded, based on the information in the complaint and the submissions received in response to the Department's motion, that Harris knew or reasonably should have known the basis of its complaint on or about August 28, 1997, when it was debriefed by the Department. Therefore, if Harris intended to file a complaint with the Tribunal, it was incumbent upon it either to file a complaint with the Tribunal within 10 working days after the debriefing, pursuant to subsection 6(1) of the Regulations, or to make an objection to the Department within 10 working days after the debriefing, pursuant to subsection 6(2) of the Regulations and await denial of relief before filing a complaint with the Tribunal.

After careful examination of all submissions, the Tribunal is persuaded that Harris's letter of September 11, 1997, to the Department is, in essence, a request for clarification and information for use in future procurements. Since the letter contains neither a specific objection to the alleged unfairness in the procedures nor a request for relief, within the meaning of subsection 6(2) of the Regulations, the Tribunal does not consider it to be an objection.

Given that, in the Tribunal's opinion, Harris did not make an objection to the Department on September 11, 1997, and considering that Harris filed its complaint with the Tribunal on October 3, 1997, some 25 working days after Harris knew or reasonably should have known of the basis of its complaint, the Tribunal determines that the complaint was not filed within the prescribed time limits and, therefore, orders the dismissal of the complaint.

Although the Tribunal has determined that Harris's complaint was not filed within the prescribed time limits and that the complaint must, therefore, be dismissed, the Tribunal would like to highlight the fact that it was persuaded, based on the information on the record concerning the provision of GFE for use by certain bidders, that the complaint disclosed a reasonable indication of a breach of certain contract evaluation and award provisions in the AIT. Had the complaint been filed within the prescribed time limits, the Tribunal would have inquired into the merits of the complaint.

Charles A. Gracey
Charles A. Gracey
Member