



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2013-013

Saskatchewan Institute of Applied
Science and Technology

v.

Department of Foreign Affairs,
Trade and Development

*Order and reasons issued
Thursday, October 10, 2013*

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IN THE MATTER OF a complaint filed by the Saskatchewan Institute of Applied Science and Technology pursuant to 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 Foreign Affairs, Trade and Development on September 27, 2013, seeking an order directing the Canadian International Trade Tribunal to dismiss the complaint for lack of jurisdiction.

BETWEEN

**SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND
TECHNOLOGY**

Complainant

AND

**DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND
DEVELOPMENT**

**Government
Institution**

ORDER

Having considered the motion by the Department of Foreign Affairs, Trade and Development filed on September 27, 2013, the comments by the Saskatchewan Institute of Applied Science and Technology filed on October 2, 2013, and the reply by the Department of Foreign Affairs, Trade and Development filed on October 4, 2013, the Canadian International Trade Tribunal hereby denies the motion and grants an extension of the time to file a Government Institution Report. Costs will be assessed upon determination on the merits of the complaint.

Ann Penner
Ann Penner
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

BACKGROUND

1. On September 6, 2013, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*,¹ the Canadian International Trade Tribunal (the Tribunal) decided to conduct an inquiry into a complaint filed by the Saskatchewan Institute of Applied Science and Technology (SIASST). The complaint alleged that the Department of Foreign Affairs, Trade and Development (DFATD), formerly the Canadian International Development Agency, improperly evaluated SIASST's bid in relation to a Request for Proposal, Solicitation No. 2013-A-033388-1 (the RFP).

2. On September 27, 2013, DFATD filed a motion for an order dismissing the complaint for lack of jurisdiction. DFATD argued that SIASST does not have standing to bring a complaint pursuant to section 30.11 of the *CITT Act*, because it is not a "potential supplier". Specifically, DFATD submitted that SIASST, as one member of a consortium of companies (the consortium) that submitted a bid in response to the RFP, could not be considered a "bidder" or "prospective bidder" within the meaning of the definition of "potential supplier" in section 30.1.

3. On October 2, 2013, SIASST filed its comments in response to DFATD's motion. On October 4, 2013, DFATD filed its reply to SIASST's response.

POSITIONS OF PARTIES

DFATD

4. DFATD argued that SIASST did not have standing to bring its complaint to the Tribunal, having filed it on its own behalf and not on behalf of the consortium.

5. DFATD's argument was based on its interpretation of the decision of the majority of the Tribunal in *Alliance agricole*,² a case in which the Tribunal found that there must be concordance between the identity of the supplier and that of the complainant, meaning that, where the bid was submitted by a consortium of companies, the consortium, not simply one of its members, would be considered a "bidder" and, therefore, a "potential supplier" with standing under section 30.11 of the *CITT Act*.

6. DFATD argued that SIASST could not meet the definition of "potential supplier" in section 30.1 of the *CITT Act* because (1) it was the sole complainant in this case, and (2) it did not have the requisite technical capacity to perform the contract in question on its own. DFATD also noted that the terms of the RFP established that, where a bid was submitted by a consortium, the consortium was considered to be the bidder. Accordingly, DFATD concluded that there was no concordance between the identities of the supplier and the complainant and requested that the complaint be dismissed for lack of jurisdiction.

7. In the alternative, DFATD submitted that, if the motion is dismissed, the Tribunal should extend the time for service and filing of its Government Institution Report (GIR) to 20 days from the determination of this motion.

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

2. *Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles-Développement international* (21 August 2006), PR-2006-003 (CITT) [*Alliance agricole*].

8. In reply to SIAST's comments on the motion, DFATD added that the evidence adduced by SIAST did not establish that, at the relevant time, every consortium member agreed to be a "complainant" in this case and that the after-the-fact evidence provided by SIAST also failed to confirm that each consortium member agreed to be bound by these proceedings as a complainant under section 30.11 of the *CITT Act*.

9. According to DFATD, the complaint could only have been properly brought by naming all the members of the consortium as complainants. Since this was not done, DFATD argued that the complaint was flawed and must be dismissed.

SIAST

10. SIAST argued that it is a "potential supplier" within the meaning of section 30.11 of the *CITT Act* and that the motion should be dismissed.

11. SIAST submitted that, at all material times, it acted on behalf of the bidding consortium, emphasizing that this was very clear in the complaint. Further, SIAST submitted evidence indicating that the other members of the consortium were led by SIAST, were aware of the nature of the complaint and were supportive of it going forward. SIAST argued that DFATD repeatedly acknowledged SIAST as the representative of the consortium. Therefore, according to SIAST, its complaint was in fact brought by the "bidder" or "potential supplier" as required by the *CITT Act*.

12. As such, SIAST argued that there was indeed concordance between the identity of the supplier and that of the complainant, thus meeting the requirement stipulated by the majority of the Tribunal in *Alliance agricole*. SIAST argued that there is no requirement that all members of a consortium sign or be named as parties to a complaint and that dismissing a complaint for failure to include all members of a consortium on the procurement complaint form would be inconsistent with the purposes of the regulatory regime within which the Tribunal operates.

13. Finally, SIAST argued that the Tribunal should order the delivery of the GIR forthwith, or alternatively, with the briefest of extensions.

14. SIAST requested costs for opposing this motion.

ANALYSIS

15. It is well established that the Tribunal has the statutory authority to accept for inquiry a complaint made under subsection 30.11(1) of the *CITT Act* if the complainant is a "potential supplier" within the meaning of section 30.1 and subsection 30.11(1).³

16. 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

[Emphasis added]

3. *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207 (CanLII) at para. 4; see, also, *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309.

17. The phrase “potential supplier” is defined in section 30.1 of the *CITT Act* to mean, subject to any regulation made under paragraph 40(*f.I*), “a bidder or prospective bidder on a designated contract.”⁴

18. As stated above, the Tribunal has previously determined that there must be concordance between the identity of the bidder and the complainant in order for the complainant to have standing before the Tribunal as a “potential supplier.”⁵

19. The Tribunal is satisfied that there is such concordance on the facts of this case.

20. The evidence on the record indicates that SIAST acted on behalf of the consortium in filing the complaint. Indeed, the complaint itself makes specific reference to the fact that SIAST *and* its consortium members took issue with DFATD’s evaluation of the consortium’s bid.⁶

21. In addition, the correspondence between DFATD and SIAST about the debriefing and objection process, which was filed as part of the complaint, indicates that, at all times, DFATD officials understood and accepted that SIAST represented the consortium and dealt directly with SIAST. The same evidence also indicates that the other consortium members were fully aware of this situation.

22. For example, DFATD addressed the regret letter dated July 15, 2013, to SIAST, with copies forwarded to the other members of the consortium. Similarly, the August 7, 2013, protest letter which followed the debriefing was sent from counsel for SIAST to DFATD, and copies were again forwarded to the representatives of the other consortium members. Further correspondence between SIAST and DFATD leading up to the filing of this complaint was also exchanged between SIAST and DFATD.⁷ At no point did DFATD raise an issue with respect to its interlocutor. In particular, DFATD never raised any questions about whether SIAST was acting on its own or as the representative of the consortium.

23. Accordingly, it was reasonable for the Tribunal to infer, in deciding whether to inquire into the complaint, that SIAST represented the consortium for the purposes of the complaint before the Tribunal. This being said, the Tribunal notes that it would have been advisable for SIAST to state explicitly that it was proceeding on behalf of the consortium, so as to pre-empt the possibility of preliminary issues such as the ones being raised in this motion.

24. Nevertheless, any possible doubt that SIAST represented the consortium in this complaint was dissipated by the evidence filed by SIAST in response to DFATD’s motion.

25. The relevant evidence includes letters from the other consortium members indicating their continued support for the complaint.⁸ It also includes further examples of correspondence with DFATD where SIAST acted on behalf of the consortium. The Tribunal specifically noted an e-mail dated August 13, 2013, from DFATD to SIAST acknowledging receipt of SIAST’s protest letter dated August 7, 2013, where the latter was referred to by DFATD as “*the consortium’s letter*.”⁹ DFATD clearly considered that SIAST was representing the consortium and that any correspondence from SIAST would be taken as

4. No regulations have been made under this paragraph.

5. *Alliance agricole* at para. 18.

6. See the Detailed Statement of Facts and Arguments accompanying SIAST’s Complaint Form at 1.

7. See DFATD’s letter to SIAST dated August 21, 2013; SIAST’s e-mail to DFATD dated August 22, 2013; SIAST’s letter to DFATD, dated August 26, 2013; SIAST’s letter to DFATD dated August 29, 2013.

8. See SIAST’s Response to Notice of Motion, Exhibits “O” and “R” referred to in the affidavit of Mr. David Harvey.

9. See SIAST’s Response to Notice of Motion, Exhibit “H” referred to in the affidavit of Mr. David Harvey.

correspondence *from the consortium*. Indeed, this understanding was clear as early as July 2013. On July 12, 2013, DFATD wrote to *SIAST* to request that it consider extending the validity date of its proposal.¹⁰ Before accepting, on July 15, 2013, on behalf of its fellow consortium members, to extend the validity of the consortium's proposal,¹¹ *SIAST* specifically asked DFATD whether *SIAST*'s representative could respond in his capacity as spokesperson for all the consortium members, and DFATD specifically accepted that he could do so.¹²

26. In the Tribunal's view, the foregoing sufficiently establishes that *SIAST* acted, and continues to act, as the representative of the bidding consortium.

27. Consequently, the requirement, adopted by the majority in *Alliance agricole*,¹³ that there be concordance between the supplier and the complainant, is met, and *SIAST* constitutes a "potential supplier" for the purposes of section 30.11 of the *CITT Act*.

28. The Tribunal does not accept DFATD's argument that "[t]he only basis upon which the complaint could have properly been brought would have been to name all members of the consortium as complainants."¹⁴ The Tribunal does not accept that section 30.11 of the *CITT Act* requires that all the members of a bidding consortium be named as parties, or that they all sign the complaint form.

29. Nothing in the *CITT Act* or the related regulations posits such a requirement of form.

30. Moreover, interpreting the phrase "potential supplier" in such a formalistic manner would amount to favouring form over substance and would be at odds with the purposes of the regulatory regime of procurement review by the Tribunal, which are, *inter alia*, to ensure *fairness* and *efficiency* in the procurement system.¹⁵ The undesirable and unhelpful consequences of such a rule are evident in the present case, where support for the complaint from the other consortium members is fully established and where DFATD *itself* repeatedly accepted *SIAST* as the representative of the bidding consortium.

31. In the Tribunal's view, the test established by the majority in *Alliance agricole* is met where there is concordance *in substance* between the supplier and the complainant, having regard to all the facts. The majority in *Alliance agricole* was concerned that, if there was asymmetry between the identity of the supplier and that of the complainant, a party that had never objected to the procurement process could find itself involved in the complaint process *against its will*.¹⁶ This concern does not arise when members of a consortium expressly indicate their support for a complaint brought by their representative, even if those members were not named as complainants. In addition, in determining that there was no concordance between the complainant and the supplier in that case, the majority in *Alliance agricole* noted that there was no evidence indicating that the other consortium member supported the complaint.¹⁷ Such an analysis would not have been necessary had the majority considered that the determinative factor is merely the name appearing on the complaint form.

10. See *SIAST*'s Response to Notice of Motion, Exhibit "B" referred to in the affidavit of Mr. David Harvey.

11. See *SIAST*'s Response to Notice of Motion, Exhibit "D" referred to in the affidavit of Mr. David Harvey.

12. See *SIAST*'s Response to Notice of Motion, Exhibit "C" referred to in the affidavit of Mr. David Harvey.

13. *Alliance agricole* at para. 18.

14. DFATD's reply submissions dated October 4, 2013, at 2.

15. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) at para. 23.

16. *Alliance agricole* at para. 18.

17. See, for example, *Alliance agricole* at para. 12.

32. Finally, while the Tribunal is satisfied that the test elaborated by the majority in *Alliance agricole* is met in this case, the Tribunal also finds support for denying the present motion in the following reasons given by Member Fréchette in his dissenting opinion in *Alliance agricole*:

29. It follows from the literal meaning of the expression “a bidder or prospective bidder” that any individual or company that has made a bid or that has the potential capacity to do so is a “potential supplier” within the meaning of the *CITT Act*.

30. In my view, nothing in the general context of the *CITT Act* or the *Regulations* militates in favour of an interpretation of the expression that differs from its literal meaning. As for the purpose and intent of the *CITT Act*, it is important to remember that their purpose is to ensure that a procurement review process is put in place, with a view to the transparency, equity and efficiency of the procurement process, so as to further economic development and the federal government’s access to optimal procurement conditions.

...

34. In my opinion, nothing in the *CITT Act* requires the participation of all members of the consortium in order for one of its members, in this case the Alliance, to have sufficient interest to file the complaint in question. The concept of “bidder or prospective bidder” inherently includes the concept of sufficient interest that is at the very root of the processes for triggering judicial and quasi-judicial proceedings in Canada. In employing this concept, the legislator simply wanted to ensure that a party that had participated in a solicitation, or had the potential capacity to do so, would have an appropriate remedy should the solicitation or the contract award not comply with the applicable rules. It is important to point out, for the purposes of this case, that nothing in the concept of “bidder or prospective bidder” or elsewhere in the *CITT Act* or *Regulations* makes this concept conditional on the internal rules of the solicitation.

33. Accordingly, the Tribunal denies DFATD’s motion requesting an order for the dismissal of the complaint.

CONCLUSION

34. The motion is denied. Costs will be assessed upon determination of the complaint on the merits. The deadline for the filing of a GIR is extended to 20 days following the issuance of this order. The Tribunal will advise the parties of any new deadlines by separate correspondence.

Ann Penner

Ann Penner
Presiding Member