



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-037

Thales Canada Inc.

*Decision made
Wednesday, November 7, 2018*

*Decision issued
Friday, November 16, 2018*

*Reasons issued
Thursday, December 6, 2018*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

BY

THALES CANADA INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Randolph W. Heggart

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Presiding Member

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

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

SUMMARY OF COMPLAINT

[2] This complaint by Thales Canada Inc. (Thales) concerns a request for proposal (RFP) (Solicitation No. W8486-184111/C) for the provision of land command, control, communications, computer, intelligence, surveillance and reconnaissance transition software support services issued by Public Services and Procurement Canada (PSPC) on November 30, 2017.

[3] The RFP contained Article 1.4, which stated “Canada has invoked a National Security Exception (NSE) for this requirement in order to ensure the required services are in place to support the military [sic] unique and vital software in times of crisis. . . . [T]herefore, this procurement is excluded from all of the obligations of the trade agreements.”

[4] On October 19, 2018, PSPC advised Thales that its bid was unsuccessful, and that the successful bidder was General Dynamics Missions Systems – Canada. On October 23, 2018, Thales requested a debriefing from PSPC. The debriefing had not yet taken place as of the date of the filing of the complaint, i.e. November 2, 2018.

ANALYSIS

[5] On November 7, 2018, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint.

[6] Pursuant to the *Regulations*, the Tribunal may conduct an inquiry if the complaint has been filed within the time limits prescribed by section 6 and meets the conditions specified in section 7;³ these provisions read 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

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

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

3. The Tribunal must also determine if the complainant is an actual or potential supplier, the complaint is in respect of a designated contract, the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

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.

...

7 (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:

(a) the complainant is a potential supplier;

(b) the complaint is in respect of a designated contract; and

(c) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of NAFTA, the Agreement on Government Procurement, Chapter Kbis of the CCFTA, Chapter Fourteen of the CPFTA, Chapter Fourteen of the CCOFTA, Chapter Sixteen of the CPAFTA, Chapter Seventeen of the CHFTA, Chapter Fourteen of the CKFTA, Chapter Nineteen of CETA, Chapter Five of the CFTA or Chapter Ten of CUFTA applies.

[7] In its complaint, Thales contends that PSPC failed to properly evaluate the technical portion of its bid in accordance with the *Canadian Free Trade Agreement*.⁴ The sole basis for this allegation is that Thales' self-evaluation indicated that the evaluation of its technical bid should have resulted in a higher score. Thales did not identify any specific issues with the evaluation; this is not surprising given that no debriefing had been held and Thales only had access to its *overall* technical score as well as that of the winning bidder. However, this is insufficient, even at the lower standard of a reasonable indication, to find a breach of the trade agreements.

[8] The Tribunal finds that the complaint does not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements by PSPC.

[9] In this case, the Tribunal determined that the complaint by Thales has no reasonable basis at this time. However, should the debriefing disclose a reasonable indication of a breach of the trade agreements, Thales could proceed with a complaint at that time.

[10] The tender documents indicate that an NSE has been invoked regarding this procurement. The RFP clearly deals with the provision of sensitive military goods/services. Although the Tribunal has not made a ruling in this regard, if the NSE were to be viewed as properly applying to all provisions of the trade agreements, the complaint may not be in respect of a designated contract and, therefore, not within the jurisdiction of the Tribunal.

4. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

DECISION

[11] Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Randolph W. Heggart

Randolph W. Heggart

Presiding Member