



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2018-043

Alion Science and Technology
Corporation and Alion Science and
Technology Canada Corporation

v.

Department of Public Works and
Government Services

*Order issued
Wednesday, January 30, 2019*

*Reasons issued
Thursday, February 28, 2019*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 PRELIMINARY MATTER 2

 Rescission of the Order to Postpone the Award of Contract 2

THE PROCUREMENT PROCESS 4

POSITIONS OF THE PARTIES 5

 The complainants 5

 PWGSC..... 6

 ISL..... 7

LEGISLATIVE FRAMEWORK..... 8

ANALYSIS..... 10

 Alion Canada does not have standing to bring this complaint 10

 Alion U.S. does not have standing to bring this complaint 13

ORDER..... 14

COSTS..... 15

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

AND FURTHER TO a decision of the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a motion filed by the Department of Public Works and Government Services on December 12, 2018, pursuant to Rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the grounds that the complainants do not have standing to bring the complaint before the Canadian International Trade Tribunal, and that the Canadian International Trade Tribunal does not have jurisdiction to conduct the inquiry;

AND FURTHER TO a motion filed by the intervener, Irving Shipbuilding Inc., on December 13, 2018, pursuant to Rule 24 of the *Canadian International Trade Tribunal Rules* for an order dismissing the complaint on the grounds that the complainants do not have standing to file a complaint before the Canadian International Trade Tribunal, that the Canadian International Trade Tribunal does not have jurisdiction to conduct the inquiry, and the complaint is premature.

BETWEEN

**ALION SCIENCE AND TECHNOLOGY CANADA
CORPORATION AND ALION SCIENCE AND TECHNOLOGY
CORPORATION**

Complainants

AND

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

**Government
Institution**

ORDER

The Canadian International Trade Tribunal has determined that Alion Science and Technology Canada Corporation and Alion Science and Technology Corporation do not have standing to file a complaint before the Canadian International Trade Tribunal. Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint, ceases its inquiry and terminates all proceedings related thereto.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member

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

STATEMENT OF REASONS

[1] The complaint concerns a procurement (Solicitation No. CSC-001) by the Department of Public Works and Government Services (PWGSC), through Irving Shipbuilding Inc. (ISI), on behalf of the Department of National Defence (DND). The Request for Proposals (RFP) is for the design of the Canadian Surface Combatant (CSC) vessel and combat management system (CMS) software support. On October 19, 2018, Lockheed Martin Canada Inc. (Lockheed Martin) was selected as the “Preferred Bidder”, which, in accordance with the evaluation process set out in the RFP, is a condition precedent to contract award.¹

[2] Alion Science and Technology Corporation² (Alion U.S.) and Alion Science and Technology Canada Corporation³ (Alion Canada) (“the complainants”) filed this complaint with the Canadian International Trade Tribunal on November 21, 2018, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.⁴ The complainants alleged that Lockheed Martin was incapable of bid compliance with certain mandatory technical requirements of the RFP and, therefore, its selection as the Preferred Bidder by ISI on behalf of PWGSC was in breach of the applicable evaluation criteria and of the provisions of the *Agreement on Internal Trade*.⁵

[3] On November 26, 2018, the Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *CITT Act*. On November 27, 2018, further to a request by the complainants and pursuant to subsection 30.13(3), the Tribunal issued an order for the postponement of the award of any contract in connection with the RFP. On December 6, 2018, PWGSC made a request for the rescission of the order, which was opposed by the complainants. On December 10, 2018, the Tribunal rescinded the order pursuant to subsection 30.13(4), for reasons to follow. Those reasons are provided below.

[4] Lockheed Martin and ISI were granted leave to intervene on November 29, 2018, and December 11, 2018, respectively.⁶

[5] On December 12 and 13, 2018, respectively, PWGSC and ISI filed notices of motion pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*⁷ for an order of the Tribunal dismissing the complaint and ceasing the inquiry. Both argued that the complainants do not have standing under the *AIT* to bring a complaint before the Tribunal, and that the Tribunal does not have

-
1. The contracts which are the intended result of this RFP are the CSC Definition Subcontract, the CMS Software Support Contract and the Agreement as to Canada’s Licenses and Ownership, as indicated in Part 1.2.5 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2391; Exhibit PR-2018-043-20, Vol. 1 at 7.
 2. Alion Science and Technology Corporation is organized as a Delaware corporation with its headquarters in McLean, Virginia, in the United States. Exhibit PR-2018-043-01, Vol. 1 at 62.
 3. Alion Science and Technology Canada Corporation is incorporated in Nova Scotia, Canada. It is a wholly-owned, privately held subsidiary of Alion U.S. Exhibit PR-2018-043-01, Vol. 1 at 62; Exhibit PR-2018-043-01B (protected), Vol. 2 at 2622.
 4. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 5. 18 July 1994, C. Gaz. 1995.I.1323, online: <<https://www.cfta-alec.ca/agreement-on-internal-trade/>>.
 6. On January 7, 2019, the Tribunal granted a request for intervener status from Navantia S.A., S.M.E. (Navantia) received on December 24, 2018. Navantia’s intervention was limited to commenting on the substantive aspects of the complaint and the Government Institution Report (GIR). Navantia’s intervention did not include making submissions on the motions to dismiss the complaint filed by PWGSC and ISI. Exhibit PR-2018-043-37, Vol. 1.
 7. S.O.R./91-499.

jurisdiction to inquire into the complaint because the government has invoked the National Security Exception (NSE) to the trade agreements in regard to all aspects of this procurement. In addition, ISI argued that the complaint is premature based on the time limits prescribed by the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁸

[6] On January 30, 2019, the Tribunal dismissed the complaint, having determined that the complainants do not have standing before the Tribunal to bring a complaint under the *AIT*.⁹ The reasons for this determination follow. As a result, and for reasons of judicial economy, the Tribunal need not address the other issues raised in the motions.¹⁰

PRELIMINARY MATTER

Rescission of the Order to Postpone the Award of Contract

[7] PWGSC asked the Tribunal to rescind its order postponing any award of contract. PWGSC indicated that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest. The complainants opposed this request, arguing that more than mere invocation of subsection 30.13(4) of the *CITT Act* is needed in order for the Tribunal to exercise its power to rescind an order for the postponement of contract award, which they described as analogous to injunctive relief. The complainants further submitted that PWGSC had not provided sufficient justification, similar to the requirement for an appropriate rationale where an NSE is invoked, as recognized in recent Tribunal decisions.¹¹

[8] The Tribunal is authorized to order the postponement of the awarding of a designated contract, and to rescind such order, pursuant to section 30.13 of the *CITT Act*. The relevant provisions provide as follows:

30.13 (3) Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint.

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

9. When a complaint is accepted for inquiry, the Tribunal's initial determination that the conditions for inquiry in subsection 7(1) of the *Regulations* have been met does not represent a final ruling on the question of whether a complainant is a "potential supplier". Its initial ruling on these conditions is made for gatekeeping purposes, as it is only based on the evidence and arguments of one party (the complainant) rather than the full record. These conditions are subject to further review during an inquiry, on the basis of a complete record of evidence and submissions from the parties. Where the Tribunal determines that a particular condition has not been satisfied it will cease its inquiry pursuant to section 10 of the *Regulations*.

10. In the Tribunal's view, the moving parties have not raised any new arguments not already considered and rejected by the Tribunal in its recent NSE cases, including *Harris Corporation v. Department of Public Works and Government Services* (23 August 2018), PR-2018-001 (CITT) [*Harris I*] at para. 80; *Hewlett-Packard (Canada) Co. v. Shared Services Canada* (20 March 2017), PR-2016-043 (CITT) [*Hewlett-Packard*] at para. 36; *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (10 August 2016), PR-2015-070 (CITT) at paras. 33-35. Moreover, to the extent that ISI attempted to differentiate the facts in the present case (i.e. what is being procured and for whom) from those in previous cases, such as *Hewlett-Packard*, the Tribunal is of the view that the same test applies, regardless of the circumstances, when reviewing a government entity's invocation of the NSE.

11. Citing, for example, *Hewlett-Packard* and *Harris I*.

(4) The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

[9] Pursuant to subsection 9(2) of the *Regulations*, the government institution must provide the certification described in subsection 30.13(4) of the *CITT Act* within seven working days after the day on which the order is made.

[10] The complainants' request for a postponement of contract award order consisted of a brief statement indicating that, to the best of their knowledge and publicly available information, no contracts resulting from the RFP had been awarded yet.¹² Where the Tribunal has decided to accept a complaint for inquiry, its long-standing practice, having regard to the above statutory provisions, is to issue a postponement order upon request by a complainant so long as there is no *prima facie* reason to deny the request outright (for example, where a designated contract has already been awarded). This process is in keeping with the summary nature of proceedings before the Tribunal at the acceptance stage of a complaint. The procedure for a complainant seeking a postponement order from the Tribunal is essentially a summary *ex parte* request without the need to prove the elements that would typically be required for obtaining an *ex parte* injunction. Unlike a typical injunction proceeding, there is no requirement for the requestor to demonstrate that there is an irreparable harm and that the balance of convenience is in favour of granting the request.¹³

[11] PWGSC's subsequent rescission request was in the form of a letter signed by the Assistant Deputy Minister of Defence and Marine Procurement dated December 6, 2018, certifying that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest.¹⁴ The procedure set out in the *CITT Act* and the *Regulations* requiring the Tribunal to rescind the order upon receipt of a certificate from the government institution—provided that the certificate is filed within the prescribed period—is also in keeping with the summary nature of the proceedings; the Tribunal has typically accepted the filing of such certification by the government institution at face value as meeting the test of subsection 30.13(4) for rescission of a postponement order. The Tribunal notes that there is no similar express authority regarding the invocation of an NSE by a government institution.

[12] In light of the above statutory framework, and having regard to the applicable trade agreement (the *AIT* only¹⁵), there is no requirement for the Tribunal to look beyond the certification provided by PWGSC in the present case. In any event, the matter of the rescission of the postponement order is moot in light of the Tribunal's determination that the complainants do not have standing to bring the present complaint before the Tribunal, as discussed further below.

12. Exhibit PR-2018-043-01, Vol. 1 at 11.

13. It is also important to note that pursuant to subsection 30.15(2) of the *CITT Act*, it would still be open to the Tribunal to recommend the termination of the contract or to award a compensation equivalent to lost profits if, at the conclusion of the inquiry, the Tribunal determines that the complaint is valid and considers that such remedy is appropriate.

14. Exhibit PR-2018-043-13, Vol. 1 at 1.

15. See paragraph 35.

THE PROCUREMENT PROCESS

[13] On October 27, 2016, ISI issued the RFP pursuant to its obligations to the Government of Canada as the Prime Contractor for the work in the definition phase of the CSC project, which involves the design and construction of CSC warships as part of Canada's National Shipbuilding Strategy.¹⁶ In addition to owing obligations to ISI, the entity entering into the resulting CSC Definition Subcontract will also owe obligations, on a contractual basis, directly to Canada.¹⁷ The motions before the Tribunal did not raise the question whether the RFP was conducted by ISI as an agent for Canada. Given the outcome, the Tribunal refrains from addressing that issue.

[14] The final bid closing date was July 20, 2018. Three bids were received from pre-qualified bidders, including Lockheed Martin, Alion U.S. and Navantia S.A., S.M.E.¹⁸

[15] A detailed review of the highly complex evaluation process set out in the RFP¹⁹ is unnecessary for the purpose of disposing of the issues raised in the present motions. The following features of the evaluation process, as summarized in the public motion filed by ISI,²⁰ are helpful to provide context to the Tribunal's analysis:

12. As a condition precedent to being awarded the CSC Definition Subcontract, the highest ranking compliant bidder, known as the Preferred Bidder, must meet all of the requirements of the RFP in respect of all contracts under the award. Once the Preferred Bidder is identified, a Condition Precedent Period, as defined in the RFP documents, begins.

13. During the Condition Precedent Period, the Preferred Bidder must demonstrate it has fulfilled all Conditions Precedent to contract award, and engage in limited negotiations, largely regarding IP rights, as explicitly contemplated in the RFP documents. These negotiations and the requirements under the Conditions Precedent Period are substantive. For this reason the RFP expressly contemplates that the Condition Precedent Period will be 45 days with the option for Canada and ISI to extend the period.

14. If all of the Conditions Precedent are met, a written notice of award will be delivered to the Preferred Bidder, at which time the bidder will be considered to have been selected for the CSC Definition Subcontract and related contracts (the "Selected Bidder").

16. Exhibit PR-2018-043-21B, Vol. 1 at 1. See also Part 1.2.4 of the RFP, Exhibit PR-2018-043-01B (protected), Vol. 2 at 2391.

17. Exhibit PR-2018-043-35, Vol. 1 at 7 and Exhibit PR-2018-043-20, Vol. 1 at 33, which both refer to Part 19.1 of the CSC Definition Subcontract. See also Exhibit PR-2018-043-01B (protected), Vol. 2 at 334.

18. Exhibit PR-2018-043-21B, Vol. 1 at 2.

19. The RFP and solicitation documents filed with the complaint were designated entirely as confidential information, out of an abundance of caution, given that bidders are subject to a Non-Disclosure and Confidentiality of Information Agreement with ISI. The RFP also contains various security requirements, including, for example, security classification requirements for contractors and contractor registration under the Controlled Goods Program of PWGSC. Exhibit PR-2018-043-01, Vol. 1 at 266; Exhibit PR-2018-043-020, Vol. 1 at 7. To the extent that any of the specific provisions of the RFP are discussed publicly in these reasons, it is because they have been made public by PWGSC and/or ISI.

20. Exhibit PR-2018-043-21B, Vol. 1 at 3.

[16] As indicated above, Lockheed Martin was identified as the Preferred Bidder on October 19, 2018, and entered the Conditions Precedent phase.²¹

[17] The specific terms of the RFP relevant to the issues at hand are addressed in the Tribunal's analysis. By way of introduction, it suffices to note that the RFP allowed pre-qualified bidders to include a request in their bid submissions, to be considered by ISI during the Conditions Precedent phase, to have the Preferred Bidder's Canadian affiliate as the signatory to the resulting CSC Definition Subcontract.²²

POSITIONS OF THE PARTIES

The complainants

[18] Initially, the complainants argued that "Alion [U.S.] and Alion Canada constitute a potential supplier for the purposes of the *AIT*."²³ In response to the motions, however, the complainants clarified their position with respect to standing, arguing that it is Alion Canada, specifically, that has standing to bring this complaint under the *AIT*.²⁴

[19] The complainants asserted that Alion Canada has standing "on the basis that the RFP in this case expressly permitted bids to be structured so that the Resulting Contract would be entered into directly with a Canadian affiliate of the pre-qualified bidder, not the pre-qualified bidder itself, and because the complainants' bid was structured in exactly this manner"²⁵ [underlining in original omitted].

[20] They argued that a critical factor in determining whether a bidder is a Canadian supplier is the identity of the entity that would enter into the resulting procurement contract (in this case, Alion Canada), and not necessarily the entity that files the bid document (in this case, Alion U.S.). The complainants submitted that the *AIT* applies by virtue of the fact that Alion U.S. exercised its right, under the RFP, to name a Canadian affiliate as the counterparty to the CSC Definition Subcontract. As the entity that would have been the contracting party, Alion Canada is a "Canadian supplier" under the *AIT* and, therefore, has standing to bring this complaint.

[21] The complainants further submitted that the bid "led" by Alion U.S. was made *on behalf of* Alion Canada, which was "irrevocably designated . . . as the legal entity that would enter directly into the main resulting contract [i.e. the CSC Definition Subcontract] with Irving and Canada."²⁶ The complainants argued that the RFP specifically contemplated that while the pre-qualified bidders (11 of 12 of which are foreign companies) would *lead* and submit the bid, they would not necessarily be the signatories of the resulting contract.²⁷ In this regard, they argued that, in the pre-qualification

21. Exhibit PR-2018-043-20, Vol. 1 at 7; Exhibit PR-2018-043-21B, Vol. 1 at 3.

22. Exhibit PR-2018-043-38, Vol. 1 at 2.

23. Exhibit PR-2018-043-01, Vol. 1 at 19.

24. Exhibit PR-2018-043-35, Vol. 1 at 23. The complainants' submissions in response to the motions did not explicitly address the issue of whether Alion Canada is a "bidder or prospective bidder" within the meaning of the "potential supplier" definition in section 30.1 of the *CITT Act*, but this is implicit in their position that Alion Canada, in and of itself, has standing as a "potential supplier" pursuant to subsection 30.11(1).

25. Exhibit PR-2018-043-35, Vol. 1 at 25.

26. *Ibid.* at 27.

27. Exhibit PR-2018-043-35, Vol. 1 at 9.

process, Canada represented that a successful bidder who is not a Canadian corporation would have the opportunity to have the bid awarded to its Canadian affiliate.²⁸ The complainants also relied on a December 2010 letter from DND officials regarding the invocation of the NSE, which refers to the need to use contractors based in Canada for the in-service support of the CSC (i.e., according to the complainants, what ultimately became the CMS Software Support Contract under the RFP).²⁹

[22] Citing the Tribunal's decisions in *Leonardo S.P.A. v. Department of Public Works and Government Services*³⁰ and *Soft DB Inc.*,³¹ the complainants argued that the Tribunal has "expressly confirmed that where the Canadian supplier was the entity that would be entering directly into the resulting contract with the procuring authority (as is the case here) . . . it could rely on the *AIT*"³² [emphasis in original]. As such, according to the complainants, had Alion U.S.' bid been successful, Alion Canada would have been the contractual counterparty to the CSC Definition Subcontract and, therefore, entitled to rely on the *AIT*. They further submitted that the requirement, under the RFP, for a parent company to execute a guarantee and collateral warranty does not change the fact that the Canadian signatory would be responsible for ensuring that the obligations under the CSC Definition Subcontract are met.

[23] The complainants argued that ISI's discretion under the RFP to accept a Canadian affiliate as the signatory "does not nullify the fact that a potential supplier is a potential supplier", and therefore does not alter the standing analysis, especially since numerous aspects of the evaluation were subject to Canada's and ISI's discretion.³³ The complainants argued that such discretion has to be exercised in a reasonable and non-arbitrary manner.³⁴ Given the RFP's preference for Canadian contracting parties, they argued that the Tribunal must not assume that the discretion, exercised by ISI in good faith, would have resulted in Alion Canada *not* being accepted as signatory to the CSC Definition Contract.

PWGSC

[24] PWGSC submitted that Alion Canada does not have standing to bring the complaint. First, it argued that Alion Canada is not a "potential supplier", which is defined as "bidder or prospective bidder" in section 30.1 of the *CITT Act*. PWGSC argued that for a complainant to be considered a bidder or prospective bidder it must (1) have the technical and financial capability of fulfilling the requirement that is the subject of the procurement; and (2) still have the capacity to submit a bid in response to the solicitation.³⁵ On this basis, PWGSC submitted that subcontractors do not meet the requirements of the *CITT Act* unless the RFP allows them to bid for a part of the work directly in their own name. Likewise, where a complainant has failed to bid on the prospective contract, it will not qualify under the *CITT Act* unless there is an allegation that the process itself unfairly prevented it from bidding. According to PWGSC, neither of these exceptions applies in this case.

28. Exhibit PR-2018-043-01, Vol. 1 at 105-106.

29. Exhibit PR-2018-043-20, Vol. 1 at 21.

30. (5 May 2017), PR-2016-064 (CITT) [*Leonardo*].

31. (4 October 2017), PR-2017-026 (CITT) [*Soft DB*].

32. Exhibit PR-2018-043-35, Vol. 1 at 4.

33. *Ibid.* at 29.

34. In this regard, the complainants relied on an Ontario Court of Appeal decision: *Shelanu Inc. v. Print Three Franchising Corp.*, 2003 CanLII 52151 (ON CA) at para. 96 [*Shelanu*].

35. *Soft DB* at para. 13.

[25] PWGSC argued that Alion Canada does not have the demonstrated independent capability to fulfil the requirements of the procurement. Otherwise, according to PWGSC, Alion Canada rather than Alion U.S. could have responded to the competitive process under which Alion U.S. qualified as one of 12 pre-qualified bidders eligible to bid on the contracts resulting from the RFP. In this regard, PWGSC relied on the terms of the RFP, which define the term “Bidder” as limited to the pre-qualified firms identified in the RFP and prohibited joint ventures or partnerships that might include non-qualified entities, such as Alion Canada.³⁶

[26] Alion Canada was proposed in the bid submitted by Alion U.S. as the Canadian Affiliate Signatory for the CSC Definition Subcontract (the “CSC Subcontract Affiliate Signatory Request”). The fact that the RFP permitted bidders to request that a Canadian affiliate sign that contract in their place does not, in PWGSC’s submission, alter the requirements of the *CITT Act* or the RFP with respect to the meaning of “potential supplier” or “bidder”.³⁷ The ability to substitute a Canadian affiliate as signatory to the resulting contract is subject to approval at the discretion of ISI, as expressly stated in the RFP.³⁸ Moreover, PWGSC asserted that Alion Canada would only be signing as an agent or proxy of Alion U.S., which remains contractually responsible for satisfying all conditions precedent and obligations, and must also provide a guarantee in respect of all obligations under the contract.

[27] PWGSC further submitted that the notion that the bid was made by Alion U.S. “on behalf of” Alion Canada lacks any supporting evidence. Rather, Alion U.S., in submitting its bid, availed itself of the option in the RFP to request that its Canadian affiliate be permitted to be the contract signatory, for contract administration purposes.³⁹

ISI

[28] ISI made similar arguments to those of PWGSC. It submitted that Alion U.S. is the bidder, not Alion Canada, and, while Alion Canada is a proposed counter-signatory to the resulting contract, its approval as such is subject to ISI’s sole and absolute discretion, pursuant to Part 1.4.2 of the RFP. ISI submitted that its discretion to accept a bidder’s Subcontract Affiliate Request is an exercise of private law and, therefore, it is not subject to public law requirements regarding arbitrariness.⁴⁰

36. RFP (Amendment R2-3 dated 13 August 2018), Parts 1.1.3, 1.3.1 and 1.3.2: Exhibit PR-2018-043-01B (protected), Vol. 2 at 2380, 2395-2396; Exhibit PR-2018-043-20, Vol. 1 at 13.

37. Part 1.4.1 of the RFP provides that the Bidder may request that ISI permit a Canadian affiliate company of the Bidder enter into the CSC Definition Subcontract. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396.

38. Exhibit PR-2018-043-20, Vol. 1 at 13.

39. PWGSC also relied on the Contract A/Contract B framework set out in *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111, 1981 CanLII 17 (SCC), arguing that Contract A was formed between Alion U.S. and ISI, and Alion Canada, even as a potential signatory of Contract B, was not a party to Contract A, nor does it have any rights thereunder.

40. In this respect, ISI references *Air Canada v. Toronto Port Authority*, 2010 FC 774 (CanLII), a decision in the context of judicial review holding that where the Crown acts in a commercial capacity, “it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.”

Further, in its view, the complainants have failed to recognize the *status quo*, which is that the bidder, i.e. Alion U.S., would be the contracting party.⁴¹

[29] ISI also noted that two other contracts are to be awarded under the RFP for which Alion Canada is *not* the proposed signatory. Of the two complainants, ISI submitted that Alion U.S. is the only entity that has rights under the procurement. The fact that Alion Canada may be involved in the contract administration phase does not, in ISI's view, entitle it to the status of a bidder/potential supplier during the procurement process.

[30] ISI further submitted that, pursuant to the RFP, it was to consider any Subcontract Affiliate Requests only *after* selection of the Preferred Bidder.⁴² At that point, "the Canadian affiliate may become part of the process, but not before (and again, only at ISI's sole discretion in a private capacity)."⁴³ As this complaint was filed prior to the selection of Alion U.S. as the Preferred Bidder, ISI argued that Alion Canada "is not a bidder, it is not a supplier, and it has no standing before the Tribunal."⁴⁴

LEGISLATIVE FRAMEWORK

[31] Standing is governed by subsection 30.11(1) of the *CITT Act*, which provides that "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."

[32] A "potential supplier" is defined in section 30.1 of the *CITT Act* as "a bidder or prospective bidder on a designated contract . . . (*fournisseur potentiel*)."⁴⁵ The statutory definition is thus specific and differs from what might commonly be understood as a "potential supplier" in everyday language.

[33] Section 30.1 of the *CITT Act* also defines a "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."

[34] Under the *CITT Act* and the *Regulations*, a "designated contract" is any contract or class of contract concerning a procurement of goods or services, or any combination of goods or services, described in the provisions of the trade agreements listed in the *Regulations*, including Article 502 of the *AIT*.

[35] The parties are in agreement that the *AIT* is the only trade agreement that applies to the procurement in issue.⁴⁵ The Tribunal was not presented with any argument or evidence indicating

41. Part 1.4.4 of the RFP provides that "[i]f ISI rejects the Preferred Bidder's Subcontract Affiliate Request or if the Preferred Bidder and the Canadian affiliate of the Preferred Bidder, as applicable, do not meet the Conditions Precedent set out in Part 1.4.3 [of the RFP], then the Preferred Bidder will enter into the CSC Definition Subcontract as signatory, subject to it satisfying all other applicable Conditions Precedent." Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396-2397; Exhibit PR-2018-043-38, Vol. 1 at 2-3.

42. Part 1.4.2 of the RFP. See note 38.

43. Exhibit PR-2018-043-38, Vol. 1 at 2.

44. *Ibid.* at 3.

45. Exhibit PR-2018-043-01, Vol. 1 at 11; Exhibit PR-2018-043-39, Vol. 1 at 6; Exhibit PR-2018-043-21B, Vol. 1 at 1. PWGSC and ISI submit that the application of the *AIT* is subject to the invocation of the NSE.

that the procurement is covered by any of the other trade agreements listed in the *Regulations*. Procurements in respect of shipbuilding and repair are expressly excluded from the trade agreements⁴⁶ other than the *AIT*. Although the *AIT* has been replaced by the *CFTA*, which entered into force July 1, 2017, the *CFTA* was not in effect when the RFP was issued on October 27, 2016. In accordance with Article 1211 of the *CFTA*, “Chapter Five (Procurement) of the [*AIT*] will continue to apply after the effective date to any procurement commenced before the effective date.” Therefore, there is no basis to consider the application of any trade agreements other than the *AIT* in these proceedings.

[36] Article 502 of the *AIT* provides that its procurement chapter “applies to measures adopted or maintained by a Party [to the *AIT*] relating to *procurement within Canada* . . .” [emphasis added].

[37] In *Northrop Grumman Overseas Services v. Canada (Attorney General)*,⁴⁷ the Supreme Court of Canada held that a “procurement within Canada” within the meaning of Article 502 of the *AIT* refers to procurements between a government entity of a party to the *AIT* and a “Canadian supplier”.⁴⁸ Article 518 defines “Canadian supplier” as “a supplier that has a place of business in Canada” and “place of business” as “an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours.”

[38] The case law has found that a procurement is within Canada where the trading activity that would occur under the resulting contract, i.e. the envisioned resulting transaction if the supplier wins the contract, constitutes internal trade. In particular, the Courts have held that this resulting transaction must be between the federal government and a supplier with a place of business in Canada.⁴⁹ The Tribunal reached a similar conclusion in *Leonardo*.⁵⁰

[39] The *AIT* definition of “Canadian supplier”, in turn, is part of the definition of a “potential supplier” under the *CITT Act*, where it refers to a bidder or prospective bidder *on a designated contract*. It is important to note, however, that the nationality of the “supplier” that is required to determine whether the procurement is “within Canada” and, thus, involves a designated contract for the purposes of the *AIT*, is not to be conflated with the more general concept of “potential supplier” under the *CITT Act*, which is relevant to determining whether a complainant has standing under any of the applicable trade agreements.⁵¹

46. See, for example, Canada’s Annex 7 to the *Agreement on Government Procurement [AGP]*; Annex 1001.2b – General Notes – Schedule of Canada to the *North American Free Trade Agreement [NAFTA]*.

47. [2009] 3 SCR 309, 2009 SCC 50 (CanLII) [*Northrop Grumman SCC*] confirming *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.*, [2009] 1 FCR 688, 2008 FCA 187 (CanLII) at para. 19.

48. *Northrop Grumman SCC* at paras. 27-29. This interpretation is undisputed in the present case.

49. *Ibid.*

50. *Leonardo* at para. 20 (“A situation where a corporation located in Italy enters into a procurement contract with the federal government cannot be described as internal trade. *Leonardo* did not allege that any of its subsidiaries were bidders or would have entered into a contract with the federal government. A transaction between *Leonardo* and the federal government is one of international trade.”)

51. In *Northrop Grumman SCC* at para. 34, the Supreme Court of Canada stated that “[w]hile these determinations may overlap to some extent, the notion of ‘potential supplier’ and the nationality of the supplier enter into consideration at different stages of the analysis for different purposes.”

ANALYSIS

[40] As stated above, standing before the Tribunal depends, first, on whether the complaint is made by a “potential supplier” within the meaning of the *CITT Act*. Thus, the first issue for the Tribunal to determine is whether Alion Canada is a “potential supplier” as defined in the *CITT Act*. This specifically requires determining whether Alion Canada is “a bidder or prospective bidder in respect of a designated contract”, in accordance with the definition found in the *CITT Act*, because Alion Canada might be a party to the resulting contract. As set out below, the Tribunal answers this question in the negative and finds that Alion Canada does not have standing to make this complaint.

Alion Canada does not have standing to bring this complaint

[41] The definition of “potential supplier” in section 30.1 of the *CITT Act* requires that the phrase “a bidder or prospective bidder” not be read in isolation, but rather in reference to a particular “designated contract”.⁵² 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 in respect of a designated contract is a “potential supplier” within the meaning of the *CITT Act*. This is consistent with the French version of section 30.1, which defines “fournisseur potentiel” (potential supplier) as “tout soumissionnaire – même potentiel – d’un contrat spécifique.” The Tribunal has previously referred to the ordinary meaning of the word “soumissionnaire” (bidder) as follows: “. . . Personne qui fait une soumission . . .” (person who makes a bid).⁵³

[42] The complainants argued that the “Tribunal has expressly recognized in previous decisions that the real issue for determining jurisdiction – and what underlies the concept of ‘bidder or prospective bidder’ in the *CITT Act* – is the identity of the entity that would be entering into the resulting procurement contract, not necessarily the entity that formally files the bid document (although in most cases these will be the same).”⁵⁴ However, in cases referenced by the complainants, the bidder and the ultimate supplier were one and the same entity. In the present case, two separate entities are involved.⁵⁵

[43] The provisions of the RFP and related solicitation documents are highly relevant for a contextual analysis of whether Alion Canada can be considered a bidder in respect of the designated contract at issue. In particular, there are specific requirements relating to eligibility to submit a bid (i.e. limited to pre-qualified bidders) and the manner in which bids are to be structured, as well as

52. *Flag Connection Inc. v. Department of Public Works and Government Services* (3 September 2009), PR-2009-026 (CITT) [*Flag Connection*] at para. 17.

53. See *The 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 v. The Canadian International Development Agency* (21 August 2006), PR-2006-003 (CITT) at para. 28.

54. Exhibit PR-2018-043-35, Vol. 1 at 25.

55. In *Leonardo*, the complainant was an Italian corporation that submitted a bid to enter into a procurement contract with the Canadian government and was found not to be a Canadian supplier even though it had subsidiaries in Canada. In the case of *Soft DB Inc.*, the complainant was only a subcontractor who did not and could not have bid on the solicitation.

rules governing CSC Subcontract Affiliate Requests by bidders and for proposing a bid team. It is abundantly clear from this evidence that Alion U.S. was the bidder.⁵⁶

[44] The RFP expressly requires that bids be led and submitted by a “Bidder”, and prohibits bids submitted by joint ventures, partnerships or other forms of multiple parties.⁵⁷ The term “Bidder” is expressly defined as being limited to the pre-qualified entities identified in the RFP.⁵⁸ Moreover, the RFP is explicit that only a pre-qualified Bidder has the right to submit a bid, such right not being assignable or transferable.⁵⁹ Alion U.S. is listed as a pre-qualified bidder, whereas Alion Canada is not.⁶⁰

[45] Bids were also to identify the Bidder’s “Bid Team”, including subcontractors and suppliers required to complete the work.⁶¹ This indicates that being a member of the Bid Team does not equate to being a Bidder. Therefore, the fact that technical deliverables would be performed by the Bid Team, including Alion Canada, does not make such other entities the Bidder. Indeed, the complainants do not assert standing simply because Alion Canada would perform some of the work under the resulting contract. The Tribunal agrees and finds accordingly.⁶²

[46] The RFP allowed Bidders to include in their bid a CSC Subcontract Affiliate Signatory Request.⁶³ However, ISI has “sole, absolute and unfettered discretion to approve or reject” such requests, a decision that is to be made during the Conditions Precedent period, with respect to the Preferred Bidder only.⁶⁴ If ISI accepts the Preferred Bidder’s Subcontract Affiliate Request, the Canadian affiliate will then be responsible for meeting certain Conditions Precedent.⁶⁵ Moreover, the Preferred Bidder would still be required to execute a guarantee and collateral warranty in favour of Canada and ISI in respect of *all* obligations under the CSC Definition Subcontract, including those of its Canadian affiliate.⁶⁶ The RFP further provided that if ISI rejects the Preferred Bidder’s

56. Including on the bid cover sheet submitted by Alion U.S.: Exhibit PR-2018-043-01B (protected), Vol. 2 at 2618.

57. Part 1.5.2 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2398; Exhibit PR-2018-043-20, Vol. 1 at 13.

58. Parts 1.1.3 (“Bidder”) and 1.3.2 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2380, 2396. The pre-qualification of potential Bidders occurred as a separate solicitation process (Request for Response for Evaluation Nos. W847S-150033/A and W847S-150033/B, the “RFRE process”) prior to the issuance of the RFP. See also Exhibit PR-2018-043-20, Vol. 1 at 13.

59. Parts 1.3.2 and 1.12.3 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396, 2407.

60. Part 1.3.1 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2395-2396; Exhibit PR-2018-043-21B, Vol. 1 at 2.

61. Parts 1.1.3 (“Bid Team”) and 1.5 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2380, 2398. See also Exhibit PR-2018-043-20, Vol. 1 at 13; Complainants’ Response to the Motions to Dismiss at para. 11: Exhibit PR-2018-043-35, Vol. 1 at 39.

62. The Tribunal reached a similar conclusion in *Soft DB Inc.* at para. 13, where the rights of the bidder did not extend to a subcontractor.

63. Part 1.4.1 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396. See also Complainants’ Public Response to the Motions to Dismiss at paras. 16, 66: Exhibit PR-2018-043-35, Vol. 1 at 8, 25.

64. Part 1.4.2 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396. See also Exhibit PR-2018-043-38, Vol. 1 at 2.

65. Part 1.4.3(c) of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396.

66. Parts 1.4.3(b), 1.4.5 and 6.11.1 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2396-2397, 2466. See also Exhibit PR-2018-043-39, Vol. 1 at 2-3. If the Bidder is not the ultimate parent entity of the Bidder’s organization, the parent entity must also guarantee the obligations under the CSC Definition Subcontract pursuant

Subcontract Affiliate Request, the Preferred Bidder would enter into the CSC Definition Subcontract, subject to any other applicable conditions.⁶⁷

[47] In other words, the default is that Alion U.S. would be counterparty to the resulting contract. Given ISI's discretion,⁶⁸ it remains a matter of speculation as to whether Alion Canada would become counterparty to the resulting contract. The evidence simply indicates that Alion U.S. was given the possibility to request that its Canadian affiliate become the signatory of the resulting contract should Alion U.S. be chosen as the Preferred Bidder and should ISI agree to the request.

[48] Moreover, the complainants' argument that the bid was made by Alion U.S. "on behalf of" Alion Canada is contrary to the letter and the spirit of the RFP and this procurement process. First, it would render meaningless the Bidder pre-qualification requirement in the RFP, as well as the stringent RFP restrictions as to the entities who were subsequently allowed to submit a bid.⁶⁹ Second, it is inconsistent with the structure and nature itself of the mechanism included in the RFP whereby the Bidder could make an Affiliate Signatory Request.

[49] The complainants did not expressly argue that Alion Canada should be considered a "prospective bidder" for the purposes of section 30.1 of the *CITT Act*. To the extent that they generally submitted that Alion Canada is a "potential supplier" because it is the proposed signatory for the CSC Definition Subcontract, the Tribunal does not consider this sufficient to fall within the scope of a "prospective bidder". In previous cases, the Tribunal has indicated that two requirements must be met in order to be considered a prospective bidder in relation to a particular designated contract. First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, it must have the capacity to submit a proposal in response to the solicitation.⁷⁰

[50] Leaving aside the question of technical and financial capability, it is clear that Alion Canada did not, and could not, have the legal capacity to submit a bid in response to the RFP because it was not pre-qualified as a Bidder. The pre-qualification period was completed during the RFRE process that preceded the issuance of the RFP. At the RFP stage, only pre-qualified bidders could participate in this procurement process as such. The complainants have not made any allegation that Alion Canada was somehow prevented from pre-qualifying to submit a bid in response to the RFP because of a breach of the *AIT* by PWGSC (or ISI, on behalf of PWGSC) and, in any event, the time to make such allegations is long past.

to Part 1.6.2 of the RFP: Exhibit PR-2018-043-01B (protected), Vol. 2 at 2525, 2627. See also Exhibit PR-2018-043-39, Vol. 1 at 5.

67. Part 1.4.3 and 1.4.4 of the RFP. Exhibit PR-2018-043-01B (protected), Vol. 2 at 2522. See also Exhibit PR-2018-043-38, Vol. 1 at 2-3.

68. The complainants argued that the exercise of discretion, even if stated to be "absolute", does not mean it can be exercised in any manner whatsoever. Referring to the Ontario Court of Appeal's decision in *Shelanu*, they argued that such absolute discretion has to be exercised in a reasonable manner. That case concerned the interpretation of a franchise contract. Even accepting that ISI's discretion was not unlimited, the broad wording of the discretionary clause suggests that it was significant. Ultimately, regardless of the scope of discretion or the manner in which it may be exercised, the RFP makes clear that, at most, there was a possibility that Alion Canada would be signatory to the resulting contract if *Alion U.S.* was identified as the Preferred Bidder.

69. The Tribunal notes that there is no evidence that Alion Canada sought to pre-qualify as a potential Bidder in the RFRE process and that it is undisputed that Alion Canada was not pre-qualified.

70. *Flag Connection* at para. 20.

[51] In sum, it is clear to the Tribunal, looking at the matter from any given angle, that Alion U.S. chose to structure its bid in such a way that it, and not Alion Canada, was the entity that was pre-qualified to bid, and did so. The attempt to present Alion Canada as the bidder or prospective bidder after the fact cannot succeed in light of the evidence.

[52] As a result, the Tribunal finds that Alion Canada is not a bidder or prospective bidder on a designated contract and, therefore, it does not have standing as a “potential supplier” under subsection 30.11(1) of the *CITT Act*.

Alion U.S. does not have standing to bring this complaint

[53] As noted above, the complainants’ position was that Alion Canada, in and of itself, is a potential supplier. They did not, in response to the motions, argue that Alion U.S. has standing to bring this complaint (alone or jointly with Alion Canada).

[54] For completeness, however, the Tribunal will set out below the reasons for which Alion U.S. cannot claim standing to bring the present complaint under the *AIT*.

[55] As indicated above, a “potential supplier” must be “a bidder or prospective bidder *on a designated contract*”, which, in relation to the *AIT*, is a transaction that constitutes *internal trade*. Specifically, the *AIT* contemplates a procurement between a government entity of a party to the *AIT* and a supplier within the jurisdiction of a party, namely, a Canadian supplier with a place of business in Canada.

[56] It is undisputed that Alion U.S. is a Delaware corporation, headquartered in McLean, Virginia, with no permanent places of business in Canada. Thus, it is within the jurisdiction of a non-party to the *AIT*.

[57] The Tribunal finds that the fact that Alion U.S. has, in Alion Canada, a subsidiary with a place of business in Canada⁷¹ that was a potential counterparty to the resulting contract does not mean that Alion U.S. has a place of business in Canada or that the resulting transaction would constitute internal trade, within the meaning of the *AIT*. The relevant terms under the *AIT*, i.e. of “Canadian supplier”, “supplier”⁷² and “place of business”, make no mention of subsidiaries of a supplier. As noted by the Tribunal in *Leonardo*,⁷³ throughout Chapter 5, the *AIT* confers rights to parties to the *AIT* and to “suppliers” of those parties. It makes no mention of subsidiaries (or subcontractors, for that matter) of a supplier. This holds true for Article 514 of the *AIT*, which deals with complaint procedures that must be made available by the federal government to “suppliers”.

[58] The complainants in the present case alleged that *Leonardo* is distinguishable, because the Canadian subsidiary, Alion Canada, would have been the entity that entered into the resulting contract if Alion U.S. had been selected as the Preferred Bidder and its Canadian Affiliate Signatory Request accepted (and assuming all Conditions Precedent were satisfied). In the Tribunal’s view, a situation where a foreign bidder is selected for contract award but may have its Canadian affiliate

71. Alion Canada is headquartered in Kanata, Ontario, and has offices in Vancouver, British Columbia, and St. John’s Newfoundland. See B. Samuelsen affidavit at para. 15; Exhibit PR-2018-043-01B, Vol. 2 at 63.

72. Article 518 defines “supplier” as “a person who, based on an assessment of that person’s financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement”

73. at para. 17.

sign the resulting contract, subject to the discretion of the procuring entity, is insufficient grounds for concluding that the resulting transaction will be one of internal trade.

[59] First, as discussed above, uncertainty existed in the circumstances as to whether a bidder's Canadian Affiliate Signatory Request would be granted. Such uncertainty has implications for the question whether the potential transaction may properly constitute "internal trade". Quite clearly, in the event that ISI were *not* to accept the proposed Canadian Affiliate Signatory, for whatever reason, then Alion U.S. would, by default, be counterparty to the resulting contract. A transaction between Alion U.S. and ISI would be one of international trade, as defined in the case law, regardless of the fact that some of the work was to be performed by Canadian entities that are a part of the Alion U.S. Bid Team.

[60] Second, to allow Alion U.S. access to the rights reserved for Canadian suppliers under the *AIT*, by virtue of its Canadian affiliate being the potential signatory to the resulting contract (subject to a discretionary decision by ISI), would, in the Tribunal's view, result in an overly broad application of *AIT* benefits by extending rights to a foreign supplier to which it has no entitlement under the trade agreements. This is not consistent with the purpose and context of the *AIT*, which the Supreme Court of Canada described as a domestic agreement concerned with internal trade aimed at the reduction and elimination of trade barriers within Canada and ensuring equal access to procurement for all Canadian suppliers.⁷⁴

[61] As an American corporation, Alion U.S. is within the jurisdiction of a party to *NAFTA* and the World Trade Organization's *AGP*, but Canada has excluded from those agreements goods and services covered by this procurement. Consequently, Alion U.S. cannot invoke the *AIT* where it did not structure its bid in a way that properly brings it within the scope of internal trade contemplated by that agreement. As stated by the complainants themselves, "the RFP expressly *invited and permitted* bids to be structured so that this resulting contract would be entered into directly with a Canadian affiliate of the pre-qualified bidder" [underlining in original omitted; emphasis added].⁷⁵ It was entirely optional for pre-qualified bidders to structure their bids in this manner. Whatever its reasons, Alion U.S. chose such a bid structure and the fact that doing so was permitted by the RFP in no way guarantees coverage under the *AIT*.

[62] Accordingly, Alion U.S. is not a bidder "on a designated contract", as it is not a "Canadian supplier" under the *AIT*. Therefore, it does not have standing as a "potential supplier" under subsection 30.11(1) of the *CITT Act*.

ORDER

[63] The Tribunal has determined that Alion Canada and Alion U.S. do not have standing to file a complaint before the Tribunal. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint, ceases its inquiry and terminates all proceedings related thereto.

74. *Northrop Grumman SCC* at paras. 28, 31, 41-44.

75. Exhibit PR-2018-043-35, Vol. 1 at 8.

COSTS

[64] PWGSC and ISI did not request their costs on their respective motions and the Tribunal will therefore not award any.

Jean Bédard

Jean Bédard, Q.C.
Presiding Member