



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2018-004

Digital Direct Multimedia

v.

Canadian International
Development Agency

*Order and reasons issued
Friday, June 22, 2018*

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IN THE MATTER OF a complaint filed by Digital Direct Multimedia 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 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 Canadian International Development Agency requesting that the Canadian International Trade Tribunal cease the inquiry on the grounds that the complaint does not concern a procurement the value of which is equal to or in excess of the \$101,100 threshold prescribed in the *Canadian Free Trade Agreement*.

BETWEEN

DIGITAL DIRECT MULTIMEDIA

Complainant

AND

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

**Government
Institution**

ORDER

The motion from the Canadian International Development Agency is allowed. Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act* and paragraph 10a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal terminating its inquiry on the ground that the complaint does not concern a designated contract, given that the value of the procurement that is the subject of the complaint is below the threshold of \$101,100 (services) prescribed in the *Canadian Free Trade Agreement*.

Serge Fréchette
Serge Fréchette
Presiding Member

STATEMENT OF REASONS

SUMMARY

1. On May 16, 2018, Digital Direct Multimedia (DDM) filed a complaint with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ regarding a request for proposals (RFP) (Solicitation No. 7384143) published by the Canadian International Development Agency (CIDA) for the provision of general photography services during the 2018 G7 Summit in the Charlevoix region.
2. On May 22, 2018, the Tribunal decided to conduct an inquiry into the complaint.
3. On June 5, 2018, CIDA filed the motion addressed in these reasons. CIDA asked the Tribunal to terminate the inquiry on the ground that the value of the services requested in the RFP did not reach the monetary threshold prescribed in the *Canadian Free Trade Agreement* (services: \$101,100).²
4. Having considered the submissions regarding CIDA's motion, the Tribunal notes that the monetary threshold prescribed in the *CFTA* was not reached and terminates the inquiry.

SUMMARY OF THE PROCEEDING

5. On January 25, 2018, CIDA published the first version of the RFP on www.buyandsell.gc.ca/, with a closing date of March 1, 2018. It included a \$75,000 limitation of expenditures clause. After receiving no bids, CIDA published a second version of the RFP on March 26, 2018, with a closing date (after modification) of April 16, 2018, and which included a \$95,000 limitation of expenditures clause. DDM submitted a bid. The Tribunal notes that the second version of the RFP was not published on www.buyandsell.gc.ca, while it had the same solicitation number as the first version and only the suppliers who had participated in the teleconference, held during the inconclusive process for the RFP in its first version, were invited to bid.
6. On May 7, 2018, DDM was informed that its bid was unsuccessful and that the winning bidder was Keepoint Inc.³
7. On May 10, 2018, DDM filed a complaint with the Office of the Procurement Ombudsman.⁴
8. On May 26, 2018, DDM filed a complaint with the Tribunal.
9. Exchanges between DDM and the Office of the Procurement Ombudsman, on record, suggest that DDM decided to address the Tribunal for various reasons: uncertainty with regard to the monetary value of the services requested in the RFP and whether the *CFTA* threshold had been reached; the fact that a contract might not have been awarded to the winning bidder as of the date the complaint was filed at the Office of the Procurement Ombudsman; the remedies provided under the *CITT Act* – in particular the fact that DDM

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

2. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/07/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (coming into force July 1, 2017) [*CFTA*].

3. Documents enclosed with the complaint (Exhibit PR-2018-004-01, Vol. 1 at 23 of 180).

4. Documents enclosed with the complaint (Exhibit PR-2018-004-01A, Vol. 2 at 4 of 728). Note that the procedural history presented by DDM erroneously states April 10, 2018, and the Ombudsman's form states May 14, 2018. Documents enclosed with the complaint (Exhibit PR-2018-004-01E, Vol. 2A at 6 of 15).

was requesting the contract be cancelled. Lastly, the Tribunal understands that the Office of the Procurement Ombudsman had declined to investigate, in part because DDM had also filed a complaint with the Tribunal.⁵

10. DDM alleges that the procurement process had many irregularities.

11. On May 22, 2018, the Tribunal decided to conduct an inquiry into the complaint considering it had determined on the basis of the information on file that the conditions for inquiry as set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁶ were met.

12. On June 5, 2018, CIDA filed the motion that is the subject of these reasons. A series of exchanges followed.

13. On June 12, 2018, CIDA asked for DDM's letters dated June 8, 10 and 11, 2018, to be withdrawn from the record because they had been submitted outside the Tribunal's usual procedure. The Tribunal acknowledges that DDM submitted a number of documents that were unsolicited by the Tribunal after filing its complaint, including the letters dated June 8, 10 and 11, 2018. However, the Tribunal also acknowledges that Mr. Roy is not a lawyer and is not a specialist in the procedure for filing complaints with the Tribunal. The documents referred to in CIDA's request of June 12, 2018, are not relevant to the issue raised in the present motion, which is to determine whether the monetary threshold prescribed in the *CFTA* was reached. These documents are, however, relevant to Mr. Roy in terms of the facts he is trying to elicit from his complaint. As a result, the documents listed in CIDA's request of June 12, 2018, shall remain on the record.

14. CIDA itself filed documents outside the usual procedure on June 20, 2018, namely, a Keeppoint's invoice dated June 11, 2018, and submissions regarding this invoice. DDM had the opportunity to make submissions on these documents, which were also placed on the record.

ANALYSIS

15. Subsection 7(1) of the *Regulations* states the conditions to be met for the Tribunal to conduct an inquiry into a complaint. One of these conditions is that the complaint be in respect of a "designated contract" (paragraph 7(1)b)).

16. Moreover, a "designated contract" is a procurement, the value of which is equal to or greater than the monetary thresholds prescribed in the trade agreements (subsection 3(1) of the *Regulations*). In this case, the relevant threshold is \$101,100 as prescribed under the *CFTA* for "services", since the value of the services requested in the RFP was close to this threshold and the threshold in other relevant trade agreements are greater than those in the *CFTA*.⁷

17. At the time the complaint was filed, the evidence on the record suggested that the monetary threshold prescribed in the *CFTA* might have been reached or surpassed. After review of the parties' submissions as part of CIDA's motion, the Tribunal notes that this is not the case. Only one contract with an initial value of \$83,350 appears to have been awarded following the call for bids.⁸ The maximum amount of

5. Documents enclosed with the complaint (Exhibit PR-2018-004-01A, Vol. 2 at 40-41, 50 and 66 of 728).

6. SOR/93-602 [*Regulations*].

7. The thresholds for the period of January 1, 2018, to December 31, 2019, are stated in the following Contracting Policy Notice: <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html>.

8. CIDA filed an invoice from the winning bidder showing the provision of services for \$94,167.50 (before taxes). CIDA indicated that the initial value of the contract was increased after it was signed.

\$95,000 for expenses remains the reference value to determine whether the procurement is subject to the *CFTA*. Since this is less than the \$101,100 threshold prescribed in the *CFTA* for “services”, the RFP does not concern a “designated contract” within the meaning of paragraph 7(1)b) of the *Regulations*. The Tribunal therefore does not have jurisdiction to inquire into the complaint and must terminate the inquiry.

18. The Tribunal understands that DDM may have believed that the *CFTA* monetary thresholds had been reached because of the addition of taxes to the maximum expense amount of \$95,000. The Tribunal considers that a tax is not a “value” and should therefore not be taken into account in the analysis of the total maximum value of a procurement. Indeed, paragraph 505(1)b) of the *CFTA* indicates that the total maximum value of a procurement comprises all forms of compensation including premiums, fees, commissions and interest, as well as the total value of options. The amount of the applicable tax or taxes is obtained by applying the percentage of the tax to the value of a procurement but does not constitute a “value” as such. Nor is the amount considered compensation for a co-contractor – rather, it is of the nature of a collection that is remitted to the Crown.⁹ This is the case even if the Crown is paying the tax to a service supplier, as in the present case.

COMMENTS

19. The Tribunal regrets that, in DDM’s view, CIDA appeared to have contributed, knowingly or not, to the confusion regarding whether or not the trade agreements were applicable – and the Tribunal’s jurisdiction, given that the contractual value was definitively below the monetary thresholds. The fact that CIDA initially invoked the national security exception was also a source of confusion.

20. Indeed, the Tribunal perfectly understands that photographers present at a meeting of G7 leaders are subject to security requirements. However, the Tribunal fails to understand how invoking the national security exception to remove rights set out in the *CFTA* (including recourse to the Tribunal) could be justified with respect to the first version of the RFP, when Canadian photographers could show that they had adequate security clearance.¹⁰ The Tribunal notes that the requirement for a “Secret” security clearance appears to have been dropped from the second version of the RFP.

21. Furthermore, given that the national security exception may only be considered in the context of the applicability of an agreement, why then invoke the exception if the monetary threshold established in the *CFTA* is greater than the maximum initial value of the anticipated needs for photographic services (\$75,000 versus \$101,100): at \$75,000, the *CFTA* regulations would necessarily not apply; nor would those of other trade agreements, given that their monetary thresholds are higher than that of the *CFTA*. The Tribunal does, however, note that the national security exception was abandoned in an amendment to the first version of the RFP.

22. Once the national security exception had been abandoned, why then choose to point out that several trade agreements were applicable? The situation remained unchanged: none of the monetary thresholds of the trade agreements would have been reached. The Tribunal noted that this incongruity was reiterated in the second version of the RFP even though that version once again indicated a maximum contract value below the threshold prescribed in the *CFTA* (\$95,000 compared to \$101,100).

23. In addition, if CIDA believed that several trade agreements applied, why then did it refrain from posting the second version of the RFP on www.buyandsell.gc.ca, a fundamental element of the trade agreements

9. *PTI Services* (28 November 2001), PR-2001-027 (CITT).

10. See first version of the RFP, Article 6.1 and Appendix C (“Secret” security clearance checked off).

being the publication of calls for bids? Also, why did CIDA restrict itself to inviting to bid only those suppliers who had taken part in a teleconference that was held as part of the abandoned process for the RFP in its first version? The Tribunal is all the more surprised, given the significant changes, notably, as to the maximum value of the contract and to the security clearance that had been made from one version to the other.

24. Lastly, the Tribunal found an unexplained irregularity with respect to the use of the same solicitation number for the RFP in the first and second versions.

25. Despite DDM's at times unorthodox methods, the Tribunal has no doubt as to the sincerity of DDM's representative, Mr. Roy, who is a photographer and who represented his company himself. As far as the Tribunal can ascertain from his submissions, it appears that Mr. Roy suspects, rightly or wrongly, that the maximum amount of the RFP may have been exceeded or that there may have been a splitting of contracts for the photographic services needs of the G7 Summit in such a way that the *CFTA* monetary threshold was exceeded. There is, however, no tangible evidence to this effect on the record, and the Tribunal has no reason to doubt the veracity of CIDA's statements regarding the costs incurred.

26. The Tribunal also believes that, as it understands it, DDM alleges that CIDA was thinking about availing itself of the option of invoking the national security exception in the event its photographic services needs were to exceed the monetary threshold prescribed under the *CFTA* – so as to escape the rules of that agreement. The Tribunal points out that although it did not have to examine this allegation, given the termination of the inquiry, there is no evidence on the record to support such an allegation.

27. As a rule, the Tribunal's decisions are final. An exception to this rule occurs where the decision is based on erroneous facts. If a future investigation by the Office of the Procurement Ombudsman were to be carried out and/or additional information obtained by Mr. Roy independently of the intervention of the Tribunal were to reveal, despite CIDA's assertions in its motion, that the expenses incurred for general photographic services reached the monetary threshold prescribed in the *CFTA*, the Tribunal could then re-examine the present order and resume the inquiry that it is currently terminating.

28. The Tribunal would like to make it clear that it cannot engage in seeking out such information, if it exists, given that it must conclude this proceeding on the basis of the evidence on the record. That evidence does not allow the Tribunal to be seized with this matter at this time, given that there is nothing that suggests that the *CFTA* monetary threshold was reached. However, in the event that evidence supporting DDM's allegations were to emerge, it would fall to Mr. Roy to adduce tangible and convincing evidence; mere unsupported allegations do not suffice.

29. Accordingly, absent any evidence establishing that the monetary threshold prescribed in the *CFTA* was exceeded (and therefore that CIDA erroneously claimed the contrary), the Tribunal considers the present matter closed.

30. If requested by DDM, the Tribunal will forward the (non-confidential) record in its entirety to the Office of the Procurement Ombudsman. A copy of the confidential record of the complaint may also be provided to DDM to facilitate any further steps that Mr. Roy may wish to proceed with.

DECISION

31. The motion from CIDA is allowed. Pursuant to subsection 30.13(5) of the *CITT Act* and paragraph 10a) of the *Regulations*, the Tribunal terminates its inquiry on the ground that the complaint does not concern a designated contract, given that the value of the procurement that is the subject of the complaint is below the threshold of \$101,100 (services) prescribed in the *CFTA*.

Serge Fréchette
Serge Fréchette
Presiding Member