



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-038

Avro Bourdeau Aerospace Corp.

*Decision made
Wednesday, October 9, 2019*

*Decision and reasons issued
Thursday, October 17, 2019*

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

AVRO BOURDEAU AEROSPACE CORP.

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.

Serge Fréchette
Serge Fréchette
Presiding Member

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 THE COMPLAINT

2. The complaint concerns a Suppliers List Invitation (SLI) and a Notice of Proposed Procurement (NPP) for the Future Fighter Capability Project (FFCP) (Solicitations W847A-180210/A and W847A-180210/B). Public Works and Government Services Canada (PWGSC) issued the solicitations on behalf of the Department of National Defense to acquire 88 advanced fighter aircraft.

3. The complainant, Avro Bourdeau Aerospace Corp. (Avro Bourdeau), describes its objective as “the sustainable rebirth of Canada’s innovation, advanced manufacturing and supersonic aerospace sectors”.³ Mr. Marc Bourdeau is the company’s Chairman and CEO. Avro Bourdeau has been advocating for a program for made-in-Canada fighter aircraft since at least 2010.

4. The present complaint raises various criticisms of the FFCP process. Avro Bourdeau submits that it has experienced “material retardation” over the past nine years in its “efforts to re-establish what was formerly Canada’s world leading aerospace capabilities through the FFCP”.⁴ Additionally, Avro Bourdeau argues that the selection criteria for the FFCP procurement enabled only foreign suppliers to qualify. By that, the Tribunal understands Avro Bourdeau to allege that the selection criteria are discriminatory against potential domestic suppliers.

5. The Tribunal has decided not to conduct an inquiry into Avro Bourdeau’s complaint because it was not filed within the time limits set by section 6 of the *Regulations*. In addition, the complaint discloses no reasonable indication that the procurement has violated the trade agreements, as required under subsection 7(1) of the *Regulations*.

BACKGROUND

6. PWGSC published the SLI on December 12, 2017 (“Solicitation A”). The SLI indicated that the deadline for responses was February 9, 2018, and it stated that “only Suppliers on the Suppliers List at the time of notification of solicitation will be invited to participate in subsequent formal supplier engagement and submit proposals during the competitive procurement process for the FFCP.”⁵

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2019-038-01, Vol. 1 at 41.

⁴ Exhibit PR-2019-038-01, Vol. 1 at 1.

⁵ Solicitation W847A-180210/A, online: https://buyandsell.gc.ca/cds/public/2017/12/12/bd8f87a30110dabda5030dafa738ef06/ABES.PROD.PW_NGF.B002.E26574.EBSU000.PDF

7. Avro Bourdeau registered on the FFCP “List of Interested Suppliers” and was granted a meeting with PWGSC in late January 2018.⁶ It appears from the complaint that Mr. Bourdeau indicated that he had issues with the selection criteria: in his view, only foreign suppliers were able to qualify for the Suppliers List. At the meeting, PWGSC officials told Mr. Bourdeau that industry consultations had already taken place over the past two years and there would be no changes to the FFCP selection criteria.⁷

8. On February 9, 2018, Avro Bourdeau submitted its “Letter of Interest” for the FFCP.⁸ This letter stated the following: “[O]ur disappointing conclusion is that we are ‘the square peg trying to fit into the (FFCP’s) round hole’ . . . The Letter of Interest solicitation effectively eliminates Canadians from organizing a Canadian OEM Fighter Jet manufacturer . . . We also find additional challenges to our eligibility to becoming a Supplier under FFCP criteria.”⁹

9. On February 22, 2018, Paula Folkes-Dallaire (the Senior Director of the FFCP) notified Avro Bourdeau that its submission was incomplete and that it did not meet the requirement to “currently have in production a fighter aircraft that can sustain supersonic level flight, is capable of air-to-air refuelling; and can carry and employ air-to-air and air-to-surface weapons in a contested environment”.¹⁰

10. On February 22, 2018, PWGSC published the Suppliers List (i.e., the results of Solicitation A). Avro Bourdeau was not on the list.

11. On July 16, 2019, Mr. Bourdeau sent a letter to Prime Minister Justin Trudeau, whose office forwarded the letter to Minister Carla Qualtrough (Public Services and Procurement and Accessibility) on July 23, 2019. In this letter, Mr. Bourdeau objected to various aspects of the FFCP process and requested that the government provide \$4 billion for Avro Bourdeau’s aerospace program.¹¹

12. On July 23, 2019, PWGSC published the NPP (“Solicitation B”), which is the second stage of the FFCP procurement process and includes only those suppliers that qualified for the Suppliers List via Solicitation A.

13. On September 17, 2019, Mr. Bourdeau emailed Minister Qualtrough, objecting to the fact that Avro Bourdeau was denied participation in the FFCP procurement process.¹² The letter states: “[I]f I do not receive a formal and serious response to this email before Monday, September 23, 2019 at 5PM I will assume you have formally rejected our Made in Canada FFCP program”¹³

14. Avro Bourdeau filed the present complaint on October 7, 2019.

ANALYSIS

15. On October 9, 2019, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The Tribunal finds that the complaint was not made within the time frames established in the *Regulations*. Furthermore, the Tribunal finds that the complaint fails to disclose a reasonable indication that the procurement has breached the trade agreements. As such, the Tribunal will not inquire into this matter.

⁶ Exhibit PR-2019-038-01, Vol. 1 at 66, 85.

⁷ Exhibit PR-2019-038-01, Vol. 1 at 85.

⁸ Exhibit PR-2019-038-01, Vol. 1 at 98.

⁹ Exhibit PR-2019-038-01, Vol. 1 at 98-99.

¹⁰ Exhibit PR-2019-038-01, Vol. 1 at 74.

¹¹ Exhibit PR-2019-038-01, Vol. 1 at 84.

¹² Exhibit PR-2019-038-01, Vol. 1 at 16-18.

¹³ Exhibit PR-2019-038-01, Vol. 1 at 18.

16. Subsections 6(1) and 6(2) of the *Regulations* require a complainant to make an objection to the relevant government institution or file a complaint with the Tribunal within 10 working days of the day on which the basis of a complaint became known (or reasonably should have become known). Subsection 6(2) of the *Regulations* requires a complainant who has objected to a government institution to file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge that the government institution has denied relief.

17. Avro Bourdeau submits that its complaint to the Tribunal is timely because it was filed within 10 working days of September 23, 2019, which was the deadline Mr. Bourdeau gave for Minister Qualtrough to reply to his letter.

18. In the Tribunal's view, September 23, 2019, is not the correct date from which to calculate the 10-working-day time frame. Pursuant to subsection 6(2) of the *Regulations*, the 10-working-day deadline after denial of relief from a government institution only applies if the objection to the government institution was made within 10 days of the day on which the basis of the complaint became known. However, the letter to Minister Qualtrough was sent much later than 10 working days after Avro Bourdeau became aware of the basis of its complaint.

19. As the timeline above indicates, PWGSC informed Avro Bourdeau that it was ineligible for the Suppliers List in January of 2018. PWGSC communicated that Avro Bourdeau's proposal was ineligible on February 22, 2018. Both of these events show that Avro Bourdeau knew or reasonably should have known the grounds that it raises in this complaint as of February 2018, at the latest. Avro Bourdeau did not file a complaint with the Tribunal at that time, even though PWGSC had rejected its objections, and even though the 10-working-day time frame of subsection 6 of the *Regulations* was engaged. Instead, it waited until more than a year and a half later to file its complaint. As such, Avro Bourdeau's complaint is now time-barred.

20. The Tribunal notes that Solicitation B was published on July 23, 2019. In order to participate in Solicitation B, it was necessary to qualify for the Suppliers List via Solicitation A. Because Avro Bourdeau was not included on the Suppliers List via Solicitation A, it is not a "potential supplier" for Solicitation B under paragraph 7(1)(a) of the *Regulations*. Again, it also follows that Avro Bourdeau cannot now complain about Solicitation B when grounds to complain about its exclusion from Solicitation A were known over a year and a half ago.

21. The Tribunal does not inquire at large into procurement processes, nor does it interfere with purchasing policy decisions. The Tribunal's jurisdiction cannot be engaged without evidence of a reasonable indication of a violation of the trade agreements. Here the Tribunal finds that the complaint fails to disclose any such violation.

22. Insofar as the Tribunal understands the alleged facts and grounds of complaint, Avro Bourdeau is contesting the FFCP's selection criteria as being discriminatory. It is well-established that a government institution can determine its "reasonable and legitimate operational requirements, as long as the procurement is not structured to favour any particular supplier."¹⁴ The Tribunal notes that the Suppliers List, on its face, names several qualified suppliers and that the procurement process does not otherwise demonstrate favouritism towards any particular supplier, despite what is alleged in the complaint. Moreover, there are otherwise no exceptional circumstances that could warrant the intervention of the Tribunal in this matter. The facts alleged by Avro Bourdeau simply do not reveal even a commencement of evidence of a violation of the trade agreements.

¹⁴ *J.K. Engineering Ltd.* (15 December 2015), PR-2015-045 (CITT) at para. 37.

23. Finally, the Tribunal notes that the FFCP solicitation has invoked a national security exception to exclude the procurement from the requirements of any otherwise applicable trade agreement. Given that the complaint fails to meet the requirements of sections 6 and 7 of the *Regulations*, the Tribunal does not need to determine whether the national security exception has been properly invoked.

DECISION

24. For the reasons above, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
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Presiding Member