



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2019-026

Hurricane Services Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Thursday, October 10, 2019*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 BACKGROUND 1

 ANALYSIS 2

 DECISION 4

IN THE MATTER OF a complaint filed by Hurricane Services Inc. 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 Department of Public Works and Government Services requesting that the Canadian International Trade Tribunal cease the inquiry on the grounds that the complaint is not in respect of a procurement by a government institution that is subject to the trade agreements.

BETWEEN

HURRICANE SERVICES INC.

Complainant

AND

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

**Government
Institution**

ORDER

The motion from the Department of Public Works and Government Services is allowed. Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act* and subsection 10(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal is terminating its inquiry on the ground that the complaint is not in respect of a procurement by a government institution that is subject to the trade agreements.

Rose Ann Ritcey

Rose Ann Ritcey
Presiding Member

STATEMENT OF REASONS

1. On August 13, 2019, Hurricane Services Inc. (Hurricane) filed a complaint with the Canadian International Trade Tribunal,¹ pursuant to subsection 30.11(1) of the *CITT Act*, regarding a request for proposal (RFP) (Solicitation No. W0142-19X036/B) published by the Department of Public Works and Government Services (PWGSC)² on behalf of the British Army Training Unit Suffield (BATUS), “for [the] Department of National Defence (‘DND’) and the Canadian Forces, for the repair, calibration, servicing, and testing of radiator related articles (‘**Radiator Repair Services**’) provided to BATUS.”³
2. On August 15, 2019, the Tribunal decided to conduct an inquiry into the complaint, and requested that the parties provide submissions regarding whether the Tribunal has jurisdiction to conduct an inquiry into the complaint, as well as on the proper venue for the complaint should the Tribunal determine that it does not have jurisdiction.
3. On September 12, 2019, PWGSC responded to the Tribunal’s request as part of a motion for an order ceasing inquiry. In its motion, PWGSC asked the Tribunal to terminate the inquiry on the ground that the complaint is not in respect of a procurement by a government institution that is subject to the trade agreements.
4. On August 16 and September 25, 2019, Hurricane filed its submissions on the Tribunal’s request.
5. Having considered the submissions of the parties, the Tribunal finds that PWGSC and DND acted as agents to BATUS. As BATUS is not a government institution subject to the trade agreements, the Tribunal terminates the inquiry.

BACKGROUND

6. On April 24, 2019, PWGSC issued the RFP, which closed on May 29, 2019.⁴ Two bids were received: one from Hurricane and one from Van Kappel International Inc. (Van Kappel).
7. On July 31, 2019, PWGSC advised Hurricane that its bid was non-responsive as it did not submit supporting documents, did not provide a quality plan as required in the RFP, and that a contract had been awarded to Van Kappel. On August 13, 2019, Hurricane filed a complaint with the Tribunal.
8. In its complaint, Hurricane submitted that a quality management plan (QMP) is not generally requested of small and medium companies, that it was not justified under the solicitation, and that it unreasonably removed competition. Hurricane added that it required more time than what was provided in the RFP to submit a QMP, but that it was now in a position to provide one. Hurricane also argued that, if

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1. Hurricane initially filed a deficient complaint on August 8, 2019. On August 11 and 13, 2019, Hurricane filed additional information further to a request made by the Tribunal on August 9, 2019, pursuant to subsection 30.12(2) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*]. Therefore, in accordance with rule 96(1)(b) of the *Canadian International Trade Tribunal Rules*, SOR/91-499, and subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed on August 13, 2019.
 2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.
 3. Exhibit PR-2019-026-15, Vol. 1 at 4.
 4. Two amendments were issued to the solicitation. Amendment 1 provided minutes for a site visit dated May 14, 2019, a Questions and Answers section, as well as a Statement on Quality Plan. Amendment 2 extended the closing date from May 27 to May 29, 2019, and provided a second Question and Answer section.

there was an omission in its bid, it should have had an opportunity to rectify it.⁵ Finally, Hurricane alleged that it is not clear if the winning bidder is using its European parent company's quality management qualification or if it was independently evaluated. As a remedy, Hurricane requested that the bids be re-evaluated with the penalty for not submitting a QMP removed.

ANALYSIS

9. Subsection 30.11(1) of the *CITT Act* 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”. Section 30.1 of the *CITT Act* further provides that a “designated contract” is one that is proposed to be awarded by a government institution, among other things. A “government institution” is in turn defined as “any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations”.

10. Section 3(2) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁶ refines the definition of “government institution” by listing the applicable provisions of the trade agreements designating the covered government institutions.

11. In this case, the tender notice and section 1.2 of the RFP stated as follows:

For the purposes of this procurement, Canada is acting as AGENT for the British Army Training Unit Suffield in accordance with the “Agreement Between the Government of Canada and The Government of The United Kingdom of Great Britain and Northern Ireland on British Armed Forces’ Training in Canada” and the “Memorandum of Understanding Between The Department of National Defence of Canada and The Ministry of Defence of the United Kingdom of Great Britain and Northern Ireland Concerning British Armed Forces Training at Canadian Forces Base Suffield

The resulting Task Authorization Contract will be for repair, calibration, servicing and testing of Radiator related Articles used by British Army Training Unit Suffield (BATUS) in the repair and maintenance of British military platforms and equipment holdings at Canadian Forces Base (CFB) Suffield. The Direct Repair Scheme (DRS) Canada – Radiator TA contract will promote the expedient repair of the equipment, whilst reducing the strain on the United Kingdom (UK) supply system, air bridge and BATUS staff at CFB Suffield.

12. The Federal Court of Appeal ruled on a similar question of jurisdiction involving Canada acting as agent for BATUS in *Canada (Attorney General) v. Davis Pontiac Buick GMC (Medicine Hat) Ltd.*⁷ In that case, the court held that, where an agency relationship exists, the procurement actions of the agent, including the awarding of the contract, are the actions of the principal and not those of the agent.⁸ The court found evidence of an agency relationship in that the vehicles procured were supplied and delivered to BATUS, the

5. The Tribunal notes that Annex F, subsection 1.1(4) of the RFP states as follows: “If the supporting documentation referenced above has not been provided at bid closing, the Contracting Authority *will notify the Bidder* that they must provide supporting documentation within two (2) business days following notification. Failure to comply with the request of the Contracting Authority within that time period, will deem the bid non-responsive and the bid will be given no further consideration” [emphasis added]. Since the Tribunal does not have jurisdiction it did not consider the effect of this statement on the validity of this ground of Hurricane’s complaint.

6. SOR/93-602 [Regulations].

7. 2008 FCA 378 (CanLII) [Davis].

8. *Ibid.* at para. 11.

detailed specifications of the vehicles in the RFP were supplied by BATUS, and the complainant did not contend that it was unaware that the RFP was for the supply of vehicles and related services to BATUS.⁹

13. Accordingly, the Federal Court of Appeal found that the procurement was undertaken, and the contract awarded, by BATUS, not its agent, and that since BATUS is not a government institution covered by the trade agreements, the Tribunal had no jurisdiction to hear the complaint.¹⁰

14. In the present case, the evidence shows that Canada also acted as an agent for BATUS. The tender notice and section 1.2 of the RFP clearly state the agency relationship between them, and Hurricane acknowledges that it knew of this relationship, although it argued that it was not aware of its significance.

15. Article 5 of the *Agreement between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland on British Armed Forces' Training in Canada (Agreement)* and section 7.4 of the *Memorandum of Understanding Between the Department of National Defence of Canada and the Ministry of Defence of the United Kingdom of Great Britain and Northern Ireland Concerning British Armed Forces Training at Canadian Forces Base Suffield* further set the Canadian Forces' role as agent to the British Armed Forces for the purpose of procuring goods, services and facilities in support of their training in Canada.¹¹

16. According to PWGSC, the RFP concerned a "routine procurement", where Canada would administer the contract and recover all costs from the British Armed Forces. In addition, the RFP at Annex A – Statement of Work provides that the services required pertain to radiator and charge air cooler articles used by BATUS in the repair and maintenance of British military platforms and equipment holdings at CFB Suffield. PWGSC noted that the platforms subject to repair and maintenance services listed in Annex A, Appendix 1 to the RFP are vehicles owned and operated by BATUS, and that Canada is therefore acquiring no goods or services. PWGSC also submitted that the specifications and forms to be used in the administration of the contract in Appendices 1 to 4 to Annex A of the RFP were provided by the United Kingdom's Ministry of Defence.

17. Based on the evidence above, the Tribunal finds that Canada acted as an agent for BATUS. As stated in *Davis*, the actions of Canada as an agent in this procurement are those of BATUS as the principal, which is therefore the procuring entity. As BATUS is not a "government institution" as defined in the *CITT Act*, the *Regulations*, or the trade agreements, the procurement does not relate to a "designated contract" and the Tribunal therefore does not have jurisdiction to inquire into the complaint.¹² The fact that Article 5(1) of the *Agreement* indicates that procurement is to be conducted by Canada as agent for the British Armed Forces "in accordance with the procedures, terms and conditions applicable to such procurement and construction for the Canadian Forces" does not make BATUS a government institution covered by the trade agreements, and therefore does not provide the Tribunal with jurisdiction over this matter.

18. The Tribunal agrees with PWGSC that identification of the proper venue for the complaint is not a factor in determining whether the Tribunal has jurisdiction to inquire into the complaint. The Tribunal acknowledges the unusual situation that procurements such as this represent, but the onus was on Hurricane

9. *Ibid.* at para. 8.

10. *Ibid.* at para. 12.

11. Exhibit PR-2019-026-15, Vol. 1 at 82; Exhibit PR-2019-026-15A, Vol. 2 (protected) at 3.

12. Furthermore, the Tribunal notes that the Tender Notice stated that none of the trade agreements apply; Exhibit PR-2019-062-15, Vol. 1 at 75.

to identify whether the Tribunal's recourse mechanisms apply.¹³ It is otherwise up to Hurricane to determine the proper venue with the advice of its legal counsel.

DECISION

19. The motion from PWGSC is allowed. Pursuant to subsection 30.13(5) of the *CITT Act* and subsection 10(1) of the *Regulations*, the Tribunal terminates its inquiry on the ground that the complaint is not in respect of a procurement by a government institution that is subject to the trade agreements.

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Presiding Member

13. The Tribunal notes that PWGSC's regret letter referred Hurricane to the Recourse Mechanisms page on the Buyandsell.gc.ca website, which lists the Tribunal as a possible venue for procurement complaints. However, this is not determinative of the proper venue, and complainants must still meet all complaint requirements in order to have standing before the Tribunal.