



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2018-006

Vidéotron Ltée

v.

Shared Services Canada

*Order issued
Friday, October 5, 2018*

*Reasons issued
Monday, October 22, 2018*

TABLE OF CONTENTS

ORDER	i
STATEMENT OF REASONS	1
INTRODUCTION	1
MOTION FILED BY SSC AND POSITIONS OF THE PARTIES	1
TRIBUNAL'S ANALYSIS	3
General Principles Regarding the Tribunal's Jurisdiction	3
Does the Tribunal Have Jurisdiction to Conduct an Inquiry Into the Complaint by Vidéotron?	4
National Security Exception (GCS Contract)	7
Costs	7
ORDER.....	8

IN THE MATTER OF a complaint filed by Vidéotron Ltée 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 inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a motion filed by Shared Services Canada on June 15, 2018, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, requesting an order that the Canadian international Trade Tribunal cease to conduct the inquiry.

BETWEEN

VIDÉOTRON LTÉE

Complainant

AND

SHARED SERVICES CANADA

**Government
Institution**

ORDER

The Canadian International Trade Tribunal hereby grants the motion filed by Shared Services Canada and, pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, 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

INTRODUCTION

1. On May 25, 2018, Vidéotron Ltée (Vidéotron), of Montreal, Quebec, 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

2. In its complaint, Vidéotron alleges that, without holding a tendering process, Shared Services Canada (SSC) awarded one or more contracts to Bell Canada or one of its affiliates (Bell) for certain telecommunications infrastructure related to the G7 Summit held in La Malbaie, Quebec, on June 8 and 9, 2018, i.e. contracts for:

- a. upgrading telephone switching stations and broadband communications networks, including the installation of fiber optic; and
- b. the construction and installation of at least thirteen cellular telephone towers along highways 138, 170 and 362, connecting the cities of Québec, La Malbaie and Bagotville.

3. Vidéotron alleges that the awarding of those contracts contravenes Chapter 5 (including Articles 500, 502, 504, 505, 506 and 515) of the *Canadian Free Trade Agreement*² and Chapter 10 (including Articles 1010 and 1013) of the *North American Free Trade Agreement*.³

4. The Tribunal accepted the complaint for inquiry on May 29, 2018, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴

5. On June 11, 2018, Bell requested intervenor status, which the Tribunal granted on June 19, 2018.

MOTION FILED BY SSC AND POSITIONS OF THE PARTIES

6. On June 15, 2018, SSC filed a motion with the Tribunal under section 24 of the *Canadian International Trade Tribunal Rules* asking it to decline jurisdiction over the complaint and to issue an order ceasing the inquiry.

7. Vidéotron and Bell had the opportunity to make submissions concerning that motion. Moreover, SSC responded to Vidéotron's and Bell's submissions, and Vidéotron submitted a response to Bell's submission.

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

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

3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

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

8. In its motion, SSC alleges that the complaint filed by Vidéotron is not related to a procurement process subject to the trade agreements, but instead raises issues related to contract administration, an area that does not fall within the Tribunal's mandate. SSC claims that the work set out in the contracts that are the subject of the complaint was carried out under contracts that were granted to Bell as part of past procurement processes and that there was no procurement process or designated contract for the work related to the G7 Summit.

9. SSC also alleges the following:

1. Vidéotron was not a potential supplier in those past procurement processes and therefore does not have standing to file a complaint.
2. One of the contracts was subject to the national security exception (NSE), which exempts that contract from the provisions of the trade agreements.
3. The complaint filed by Vidéotron is in part untimely.

10. For its part, Vidéotron asks the Tribunal to dismiss the motion filed by SSC. Vidéotron submits that the complaint is related to the awarding of two new contracts to Bell by SSC, not the administration of past contracts awarded to Bell. Vidéotron also argues that it was a potential supplier for the work required as part of the G7 and was unable to take part in a non-existent tendering process.

11. Vidéotron argues that the general NSE invoked by SSC does not apply to the new contracts for the cellular towers. Alternatively, Vidéotron alleges that invoking the NSE cannot remove the complaint from the Tribunal's jurisdiction. Finally, Vidéotron refutes the allegations by SSC that its complaint is in part untimely.

12. Bell supports the motion filed by SSC and supports SSC's argument that the complaint is related to issues of contract administration. Bell also supports SSC's argument that Vidéotron is not—and was not—a potential supplier. Bell claims as well that the complaint by Vidéotron is untimely.

13. As will be further explained below, the Tribunal concludes that, in the case at hand, there is no designated contract and that the Tribunal therefore does not have jurisdiction to conduct an inquiry into the complaint.

14. Indeed, it seems clear that the work that is the subject of the complaint was carried out under two prior government contracts:

- a. a government contract awarded by Public Works and Government Services Canada (PWGSC) to Bell on November 22, 2010 (contract No. EN869-0910651/001/EF)⁵, following the publication of Requests for Information (invitation Nos. EN869-070215/A and EN869-091651/A)⁶ and an Advance Contract Award Notice (No. EN869-091651/001/B)⁷

5. Exhibit PR-2018-006-15, Appendix 22. The LAS contract came into force on December 31, 2010. It had an initial term of five years and included options to extend it. Those options were exercised, extending the term of the contract to December 30, 2020. *Ibid.*, Appendices 25 and 26.

6. *Ibid.*, Appendices 18 and 19.

7. *Ibid.*, Appendix 21. The notice indicates that, as it concerned the supply of telecommunications services, the government contract was not subject to the *Agreement on Government Procurement*, *NAFTA*, the *Canada-Chile Free Trade Agreement* or the *Canada-Peru Free Trade Agreement*, and that only the *Agreement on Internal Trade* applied.

regarding the supply of local access telephone services (LAS), i.e. basic telephone services by means of traditional landline telephones (services commonly referred to as “Centrex”); and

- b. a government contract awarded by SSC to Bell on June 28, 2017 (contract No. 70035683⁸), regarding an Invitation to Qualify (ITQ) (invitation No. 10047830⁹) and a Request for Proposals (RFP) to qualified suppliers (invitation No. 10047830¹⁰) to obtain cellular services and products in Canada and service when roaming in the United States and abroad (government cellular services or GCS).

TRIBUNAL’S ANALYSIS

General Principles Regarding the Tribunal’s Jurisdiction

15. The motion filed by SSC raises the issue of the Tribunal’s jurisdiction to conduct an inquiry into the complaint filed by Vidéotron.

16. Subsection 30.11(1) of the *CITT Act* states that the Tribunal’s jurisdiction is limited to “a complaint . . . concerning *any aspect of the procurement process* that relates to a *designated contract*” [emphasis added]. The Tribunal’s jurisdiction is therefore limited to challenges related to the procurement process, which begins after an entity has decided on its procurement requirement and continues through the contract award. Matters subsequent to the award of a contract, i.e. matters of contract administration, are not within the Tribunal’s jurisdiction.¹¹

17. That said, the Tribunal has also concluded that, if substantial changes are made to mandatory requirements, rendering them completely contradictory to the original requirements, the complaint could fall within its jurisdiction, in that it is not simply a matter of contract administration. In such a case, there is, in effect, a new procurement process.¹²

18. In *Eclipsys*, the Tribunal stated the principles that guide its actions as follows:

The Tribunal has generally drawn a line between the procurement process and contract administration by considering whether the procuring entity took actions that effectively changed the terms of the mandatory requirements after the contract had been awarded, for example, by accepting goods that were either substantially different from, or contradictory to, the mandatory requirements

8. Exhibit PR-2018-006-15, Appendix 4.

9. Complaint, Appendix 13, and Exhibit PR-2018-006-15, Appendices 1A and 1B. SSC published three amendments to the ITQ. Complaint, Appendix 13, and Exhibit PR-2018-006-15, Appendices 2A and 2B.

10. *Ibid.*, Appendix 3.

11. See, for example, *Aerospace Facilities Group, Inc. v. Department of Public Works and Government Services* (12 October 2017), PR-2017-015 (CITT) at para. 31; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 32; *HDP Group Inc.* (28 December 2016), PR-2016-047 (CITT) at para. 10; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36.

12. See, for example, *Eclipsys Solutions Inc. v. Canada Border Services Agency* (21 March 2016), PR-2015-038 (CITT) [*Eclipsys I*] at paras. 37-39; *AdVenture Marketing Solutions Inc. v. Department of Public Works and Government Services* (31 March 2011), PR-2010-074 (CITT) at paras. 37-46; *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT) at paras. 25-26; *Bell Mobility v. Department of Public Works and Government Services* (14 July 2008), PR-2008-008 and PR-2008-009 (CITT) at paras. 25-44.

of the original solicitation. In those exceptional cases where such actions had taken place, the Tribunal found that it could inquire into whether the procuring entity effectively conducted a new procurement process for a different good or service and thereby claim jurisdiction over the complaint as a result.¹³

19. In short, if there are substantial changes to the initial terms of a contract, the federal institution must, as a general rule, conduct a procurement process in accordance with the trade agreements.

Does the Tribunal Have Jurisdiction to Conduct an Inquiry Into the Complaint by Vidéotron?

20. The essence of Vidéotron's complaint rests on its allegation that SSC allegedly sole sourced contracts to Bell and allegedly did so without a call for tenders, thereby breaching the trade agreements. In response to the motion by SSC, Vidéotron claims that its complaint was related to the awarding of two new contracts to Bell by SSC, not the administration of the LAS and GCS contracts described above.

21. Having considered the relevant facts and the evidence on the record, the Tribunal concludes that no new procurements were awarded in the case at hand. The work that is the subject of the complaint was carried out under two past government contracts, i.e. the LAS and GCS contracts awarded to Bell in 2010 and 2017, respectively.

22. In both cases, the calls for tenders stated that the Government of Canada's needs would fluctuate. Thus, the advance contract notice for the LAS stated that the Government of Canada's requirements could increase or decrease over the life of the contract as its needs evolved.¹⁴ Moreover, the contract awarded to Bell for the LAS states that, in addition to basic services, the Government of Canada may require additional services for special needs of an exceptional nature, emergencies or special events such as G7 or G8 summits.

23. The clause in question (clause 1.8(b) of the LAS contract) states that, in such cases, if the exceptional *ad hoc* needs of PWGSC (now SSC) exceed the capacity of the supplier's existing infrastructure, SSC and the supplier may, through a contract amendment, agree on the terms and conditions (including pricing), for putting in place the necessary infrastructure.¹⁵

24. The RFP for GCS included an almost identical clause, although it stated that the work could also be approved by means of a task authorization (clause 5.27.1 of the RFP).¹⁶ That clause was then included in the GCS contract (clause 1.27.1 of the GCS contract).¹⁷

25. It is through the exercise of their rights under these clauses of the LAS and GCS contracts that the parties agreed to the additional work that needed to be carried out by Bell to meet SSC's needs for the G7 Summit.

26. Regarding the LAS contract, the parties agreed by means of a contract amendment dated December 11, 2017, entitled "Construction of telecommunications infrastructure required to provide Services for the G7 Summit". The contract amendment indicated that it resulted from a need for approximately 2,000 new Centrex and ISDN (integrated services digital network) lines in La Malbaie,

13. *Eclipsys I* at para. 39.

14. Exhibit PR-2018-006-15, Appendix 21 at 2.

15. *Ibid.*, Exhibit 22, clause 1.8(b)(i).

16. *Ibid.*, Appendix 3, article 5.27.1.

17. Exhibit PR-2018-006-15, Appendix 4, article 1.27.1.

Bagotville and Québec for the G7 Summit. That amendment authorized the reimbursement of additional costs incurred by Bell up to \$9.508 million.¹⁸

27. Similarly, in anticipation of the G7 Summit, in November and December 2017, SSC issued 13 task authorizations for Bell to build and improve cellular towers in order to increase the capacity of the existing cellular network and offer greater coverage in the Charlevoix and Saguenay regions. Those task authorizations totalled close to \$15 million, plus taxes.¹⁹

28. In short, the possibility for SSC to require additional services to ensure the sustainability of services during the G7 Summit, and the fact that those *ad hoc* needs would lead to additional compensation, were already provided for as part of the initial tendering processes. In the case at hand, what was at issue was essentially the exercise of contract clauses that involved compensation to Bell by SSC for upgrades to the infrastructure needed to provide the required services—which had been acquired following a competitive process—in exceptional circumstances.

29. The Tribunal does not consider it unreasonable for SSC, in the process of awarding the GCS and LAS contracts, to have wanted to include a clause in each contract to allow it to provide for major *ad hoc* needs. This was done in the context of tendering processes intended to meet the Government of Canada's procurement needs through a limited number of contracts, awarded by province.

30. Similarly, the Tribunal does not find it unreasonable for the clauses to state that the specific terms for ensuring services required by SSC in the context of *ad hoc* needs remain subject to an agreement with the supplier. Essentially, those clauses state that SSC cannot require the selected supplier to build additional infrastructure at its own cost when such infrastructure is needed to supply services required by SSC for *ad hoc* needs that may arise during the life of the contract. In such cases, SSC instead agreed to compensate Bell for the construction or upgrading of infrastructure required to respond to such needs.

31. In that sense, the contracts make it possible for Bell to continue supplying the services in question in an exceptional context. The contract amendment to the LAS contract and the task authorizations under the GCS contract are therefore not contracts for the supply of new goods or services to SSC. Moreover, ultimately, the Government of Canada did not acquire anything through them: the switching stations, fiber-optic networks and cellular towers at issue here remain the property of Bell.

32. Vidéotron argues that Bell benefited “unilaterally and at no cost” [translation] from infrastructure that allowed it to compete against its competitors. However, the Tribunal notes that, even were the compensation paid to Bell for upgrading its infrastructure seen through the lens of a Government of Canada grant or contribution, it would not follow that there is a procurement process or a designated contract here into which the Tribunal can inquire.

33. In short, the amendment to the LAS contract and the task authorizations under the GCS contract regarding SSC needs for the G7 Summit cannot reasonably be considered to have led to new tendering

18. Exhibit PR-2018-006-15, Appendix 23.

19. *Ibid.*, Appendices 5-17. SSC alleges that these task authorizations were required given that the capacity of the existing network in the Charlevoix region was far too insufficient for the large number of RCMP employees, military members, public servants from various departments, foreign dignitaries and media who would be present for the G7 Summit. Moreover, according to SSC, the GCS provided were not only needed to ensure the usual communications between federal public servants working at the G7 Summit, but also for national security reasons, to ensure the reliability of the service for certain communications between RCMP employees and military members, particularly regarding the protection of the Prime Minister and foreign heads of state.

processes. In both cases, no new government procurement was awarded with requirements different from those of the original procurement.

34. For this reason, the Tribunal dismisses Vidéotron's argument that SSC had to launch a new tendering process to obtain the local telephone and cellular telephone services that it required for the G7 Summit. The Tribunal instead considers that SSC was not required to launch new tendering processes, as it did not acquire any goods or services that were not previously the subject of a competitive tendering process.

35. Moreover, in both cases, the facts on the record show that Vidéotron was not a potential supplier, as it had not tried to participate in the two calls for tenders and that, for the following reasons, it likely did not meet the requirements imposed on potential suppliers under the two calls for tenders.

36. On the one hand, regarding the LAS call for tenders, the second request for information indicated that the Government of Canada wished to ascertain the level of competition present in the market and that, whenever possible, i.e. where there was a competitive market, the suppliers would be selected through a competitive process.²⁰ According to SSC, PWGSC then determined that Bell continued to be the only supplier with the capacity to provide services for the Government of Canada lines needed in Ontario and Quebec (excluding the (federal) National Capital Region). The evidence on the record therefore shows that Bell was the only qualified supplier for the LAS contract.

37. Similarly, regarding the GCS call for tenders, each supplier interested in submitting a proposal in response to the ITQ had to show that it met certain mandatory requirements, including requirements regarding experience supplying cellular services to a client organization with 20,000 subscribers, cellular coverage and presence in certain locations in Canada, and cellular coverage in certain international locations. SSC alleges that Vidéotron did not meet those requirements, which Vidéotron does not directly dispute.²¹ In any event, Vidéotron did not submit a proposal and therefore could not qualify for that government procurement.

38. Finally, the Tribunal notes Vidéotron's argument that the terms and conditions, including the price, scope and nature of the work required by SSC in the context of events such as the G7 Summit, were not covered by the initial procurements and were not set out in the GCS and LAS contracts, as those terms and conditions had to be negotiated between the parties. Vidéotron argues that there is no contract if an essential condition that was not agreed to can only be determined by future agreement between the parties. Vidéotron also cites Article 503 of the *CFTA*, which states that a procuring entity cannot use options in a manner that circumvents its obligations.

39. Contrary to Vidéotron's claims, the situation in the case at hand is not one in which the essential conditions of the contract are not determined. Both clauses allow SSC to meet *ad hoc* needs. In the case at hand, no new contracts were awarded with requirements or characteristics that differed from those of the initial contract; it was rather a matter of extraordinary events that were expressly provided for in those contracts. Ultimately, as stated above, as there was no acquisition of new goods or services, there was no government procurement and, therefore, the Tribunal cannot conduct an inquiry, as there is no "designated contract" at issue. Moreover, the facts before the Tribunal do not show an attempt by SSC to circumvent its obligations under the *CFTA*.

20. SSC motion, Exhibit PR-2018-006-15, Appendix 19, Appendix A, article 2.0.

21. Vidéotron instead submits that it could not be a qualified supplier for a non-existent tendering process.

40. In light of this conclusion, it is not necessary for the Tribunal to consider the other arguments raised by SSC in its motion. However, the Tribunal notes the argument by Vidéotron that Bell, in its submission on the SSC motion, raises new grounds that were not raised in that motion.²² The Tribunal agrees with Vidéotron in this regard. Those grounds raised by Bell and to which Vidéotron objected were not considered by the Tribunal in its deliberations.

National Security Exception (GCS Contract)

41. SSC alleges that the procurement for the GCS contract and the contract itself are subject to a general NSE invoked by SSC in 2012.²³ The ITQ for the GCS procurement indicated that the Government of Canada invoked the NSE and that, consequently, no trade agreements applied to that procurement process.²⁴ SSC argues that the Tribunal therefore has no jurisdiction to inquire into the complaint by Vidéotron as it concerns the GCS contract.

42. For its part, Vidéotron argues that the general NSE does not apply to the new contracts for the construction of cellular towers and that, even if it did, that would not eliminate the Tribunal's jurisdiction concerning those contracts.

43. The Tribunal has considered the general NSE invoked by SSC in previous inquiries.²⁵

44. In the case at hand, given the Tribunal's conclusion that there were no designated contracts and that it does not have jurisdiction to inquire into Vidéotron's complaint, it is not necessary for the Tribunal to decide on SSC's invocation of the NSE.

45. However, for greater clarity, the Tribunal notes that, in previous inquiries, it has held that when national security considerations are invoked, the trade agreements do not automatically remove a solicitation from all the disciplines of the trade agreements, nor can the simple invocation of national security concerns automatically justify, without any scrutiny whatsoever, the wholesale removal of a solicitation from the disciplines of the trade agreements.²⁶

Costs

46. SSC did not request its costs on the motion and the Tribunal will therefore not award it any. Moreover, the Tribunal considers that, without the benefit of the information and documents—particularly the contracts in question—filed by SSC in these proceedings, Vidéotron could not assess whether the grounds that it raised in its complaint fell within the Tribunal's jurisdiction. Therefore, each party will bear its own costs.

22. Bell claimed, *inter alia*, that the complaint must be dismissed because the objection that was submitted to SSC was prepared by Québecor Média Inc., not by its subsidiary, Vidéotron, and that the remedies requested by Vidéotron did not fall within the jurisdiction of the Tribunal. Bell also presented various arguments to the effect that the complaint by Vidéotron was untimely.

23. Exhibit PR-2018-006-15, Appendix 24.

24. *Ibid.*, Appendices 1A and 1B at 1.2(c).

25. See *Hewlett-Packard (Canada) Co. v. Shared Services Canada* (20 March 2017), PR-2016-043 (CITT) [*Hewlett-Packard*]; *Eclipsys Solutions Inc. v. Shared Services Canada* (4 February 2016), PR-2015-039 (CITT) [*Eclipsys II*].

26. See, *inter alia*, *Hewlett-Packard* at paras. 21-75; *Eclipsys II* at paras. 16-21; *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (10 August 2016), PR-2015-070 (CITT) at paras. 20-29.

ORDER

47. The Tribunal grants the motion filed by SSC and, pursuant to paragraph 10(a) of the *Regulations*, dismisses the complaint, ceases its inquiry and terminates all proceedings related thereto.

Jean Bédard

Jean Bédard, Q.C.

Presiding Member