



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2020-030

University of Ottawa and Coding
for Veterans (Joint Venture)

v.

Department of Public Works and
Government Services

*Order and reasons issued
Wednesday, November 4, 2020*

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DECISION 7

IN THE MATTER OF a complaint filed by the University of Ottawa and Coding for Veterans (Joint Venture) 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 September 25, 2020, requesting that the Canadian International Trade Tribunal cease to conduct the inquiry.

BETWEEN

**THE UNIVERSITY OF OTTAWA AND CODING FOR VETERANS
(JOINT VENTURE)**

Complainant

AND

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

**Government
Institution**

ORDER

The motion filed by the Department of Public Works and Government Services is allowed. Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings related thereto. Each party shall bear its own costs in this matter.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

BACKGROUND

[1] This inquiry arises from a complaint filed by the joint venture of the University of Ottawa (the University) and Coding for Veterans (CFV) (together the “joint venture” or the “complainant”)¹ on August 20, 2020, pursuant to section 30.11 of the *Canadian International Trade Tribunal Act*.²

[2] The complaint concerns a Request for Proposal (Solicitation No. W4938-20069S/B) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for a cyber operator training program (the RFP).

[3] The complainant alleged that the winning bidder, KPMG LLP, did not meet the mandatory requirements of the solicitation; that PWGSC evaluated the complainant’s own bid in an unfair manner; and that the terms of the solicitation were biased.

[4] The Tribunal accepted the complaint for inquiry on August 27, 2020, in accordance with subsection 30.13(1) of the *Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³

[5] On September 10, 2020, the University informed the Tribunal that it wished to withdraw the complaint.⁴ On September 11 and 14, 2020, CFV advised that it did not agree to the withdrawal and requested that the Tribunal continue its inquiry.

[6] The Tribunal requested that the joint venture reach an agreement as to how it wished to proceed. By way of submissions on September 18, 2020, both the University and CFV maintained their positions. The Tribunal then requested and received further submissions on the matter from all parties.

[7] On September 25, 2020, PWGSC submitted the present motion seeking an order ceasing the inquiry pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*.⁵ CFV maintained its position and submitted a reply to PWGSC’s motion. The University only filed a submission in reply to CFV and PWGSC.

[8] After careful consideration of the parties’ submissions, the Tribunal has decided to grant PWGSC’s motion and cease the inquiry for the reasons below.

POSITIONS OF PARTIES

PWGSC

[9] PWGSC submitted the present motion seeking an order ceasing the inquiry on the basis that the complaint has been withdrawn by the potential supplier and that CFV has no standing to pursue the complaint on its own.

¹ The style of cause was initially noted as “University of Ottawa” but subsequently amended to “University of Ottawa and Coding for Veterans (Joint Venture)”.

² R.S.C., 1985, c. 47 (4th Supp.) [*Act*].

³ SOR/93-602 [*Regulations*].

⁴ Exhibit PR-2020-030-09.

⁵ SOR/91-499 [*Rules*].

[10] PWGSC argued that CFV has no clear authority to act for the joint venture. According to PWGSC, the University was the proper legal representative of the joint venture or there was no representative, meaning that decisions taken by the joint venture required the support of both members. PWGSC also argued that the complaint was not properly filed.

Coding for Veterans

[11] CFV submitted that the University did not have the legal authority to unilaterally speak on behalf of the joint venture, including unilaterally withdrawing a complaint that was properly submitted to the Tribunal on behalf of the joint venture.

[12] CFV submitted that the University was actively involved with the underlying bid and the decision to file a complaint to the Tribunal. CFV emphasized that representatives from both CFV and the University signed off on both the bid and the complaint, and argued that the University was aware at all stages of the proceedings before the Tribunal. CFV also asserted that the vice-president of the University responsible for procurement approved the filing of the present complaint.

[13] According to CFV, KPMG LLP is the auditor of the University as well as a large donor. CFV also alleged that when KPMG LLP was informed of the complaint, per the Tribunal's regular procedures, KPMG LLP contacted the office of the president of the University and demanded that the complaint be withdrawn.

University of Ottawa

[14] The University requested that the Tribunal cease the inquiry on the basis that it had no intention of pursuing the complaint and withdrew its purported participation. The University submitted that it was unwilling to proceed with the complaint and would not proceed or participate in any way. The University also objected to the allegations raised by CFV.

TRIBUNAL'S ANALYSIS

[15] Subsection 30.11(1) of the *Act* provides that complaints may be filed with the Tribunal by a "potential supplier", which is defined by section 30.1 of the *Act* as "a bidder or prospective bidder on a designated contract".⁶ Subsection 7(1) of the *Regulations* sets out the conditions of inquiry that must be met at the time the complaint is filed for the Tribunal to accept it for inquiry. Altogether, in order to accept a complaint for inquiry in accordance with subsection 7(1), the Tribunal must determine whether the complainant is a "potential supplier" within the meaning of subsection 30.11(1) and section 30.1 of the *Act*.⁷

[16] In the context of the present motion, the Tribunal must first consider whether the complaint was properly filed and accepted in accordance with subsection 30.11(1) of the *Act* and paragraph 7(1)(a) of the *Regulations*. If so, the Tribunal must then consider whether it should continue or cease its inquiry where one member of a joint venture has withdrawn its support of a properly filed complaint.

[17] The Tribunal previously considered a similar issue in *Alliance agricole*, where the underlying bidder comprised a consortium of groups and companies and the complaint was brought without the

⁶ There is no dispute that this complaint concerns a "designated contract" as defined by section 30.1 of the *Act* and section 3 of the *Regulations*.

⁷ Paragraph 7(1)(a) of the *Regulations*.

participation or support of one member of the consortium.⁸ The majority considered whether the complainant was a “bidder” or a “prospective supplier” as contemplated by the definition of “potential supplier”. The majority found that the complainant did not meet, at the time the complaint was filed, either component. As a result, the Tribunal ceased the inquiry on the basis that the complaint did not meet all the conditions of inquiry and therefore the Tribunal had no jurisdiction to conduct an inquiry into the complaint.⁹

[18] In making its finding, the majority held that provisions and the spirit of the *Act* require the bidder and the complainant to be one and the same.¹⁰ The majority noted that “[i]f the Tribunal accepted the possibility of asymmetry between these two entities, this could result in an absurd situation in which a company that belongs to a consortium and never objected to the procurement process finds itself, against its will, party to a complaint before the Tribunal”.¹¹ The majority also noted other consequences that could arise, such as confusion as to who would benefit from a potential remedy and whether a member that objected to the complaint could benefit from a remedy it opposed.¹²

[19] Following *Alliance agricole*, the Tribunal subsequently held that the test for concordance between bidder and complainant could be met if non-participating members of a consortium support a complaint brought by other members on behalf of the consortium.¹³

The complaint was properly filed

[20] In the present case, the Tribunal finds that the complaint was properly filed.

[21] The Tribunal is satisfied that the complainant and the bidder were one and the same at the time the complaint was filed, i.e. the time at which the Tribunal must consider the conditions set out in subsection 7(1) of the *Regulations*. The bid documents clearly identify the bidder as the joint venture between the University and CFV; Mr. Stephane Blais, Executive Director of the University’s Professional Development Institute, and Mr. Jeff Musson, Executive Director of CFV, both signed the bid.¹⁴ The complaint to the Tribunal was similarly filed on behalf of the joint venture and signed by both Mr. Blais and Mr. Musson.¹⁵

[22] The Tribunal notes that the University submitted that its legal services policy was not followed in respect of this complaint. The policy provides, in relevant part, that legal services from the University’s legal counsel office are required when the matter involves a legal proceeding against

⁸ *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. Canadian International Development Agency* (21 August 2006) PR-2006-003 (CITT) [*Alliance agricole*].

⁹ In *Alliance agricole*, Member Fréchette dissented from the majority opinion.

¹⁰ *Alliance agricole* at paras. 17-19.

¹¹ *Alliance agricole* at para. 18.

¹² *Alliance agricole* at para. 19.

¹³ *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (10 October 2013) PR-2013-013 (CITT) [*Saskatchewan Institute*] at para. 31.

¹⁴ Exhibit PR-2020-030-01C at 151 and 154.

¹⁵ Exhibit PR-2020-030-01 at 9 and 10.

the University at a court or tribunal.¹⁶ While the University's submission did not explain in what regard it relied on this argument, to the extent that the University intended to argue that the complaint was not properly filed for failing to obtain the required approvals in accordance with an internal administrative policy, the Tribunal notes that this would not have been persuasive.

[23] On the contrary, the evidence indicates that the University was sufficiently aware of the complaint. In addition to Mr. Blais' full participation in this complaint until the University's notice of withdrawal, Mr. Musson asserted in his witness statement that the joint venture began preparing to file the complaint only after Mr. Blais received approval from the University's vice-president of research, who, according to Mr. Musson, is responsible for procurement.¹⁷ Mr. Musson also asserted that the "central administrative office" of the University was kept apprised of these proceedings and that the University and CFV had discussed their ability to provide the procured services should the complaint be successful and the contract awarded to the joint venture.¹⁸ The University did not submit any evidence to counter Mr. Musson's statement.

The inquiry will not be continued

[24] The Tribunal now turns to the question of whether it should continue or cease its inquiry.

[25] PWGSC submitted that the complaint was properly withdrawn by the University, which according to PWGSC has legal authority to act on behalf of the joint venture. PWGSC also submitted that there is no evidence to suggest that CFV is the legal representative of the joint venture and therefore the inquiry cannot proceed on its authorization alone. PWGSC also argued that if the Tribunal proceeded with the present inquiry, it would result in the "absurd situation" described in *Alliance agricole* as the University would be party to a complaint in which it does not wish to participate.

[26] CFV submitted that the University is not the complainant in this inquiry, and therefore it has no authority to withdraw the complaint. CFV argued that one member of a joint venture cannot file a complaint without the full support of the joint venture, and it therefore flows that one member of a joint venture cannot unilaterally withdraw a complaint that was properly filed by the joint venture.

¹⁶ Exhibit PR-2020-030-18. Following the link at paragraph 2, the clause 9 of the University's "Policy 49 – Legal Services" provides in full as follows:

9. Legal Services provided by the Legal Counsel Office covers a variety of fields (including, but not limited, to employment and labour relations, student matters, human rights, contracts, procurement, construction, real property transactions and leases, corporate matters, business transactions, and intellectual property) and are required when the matter involves any one or more of the following or as may be determined by the Secretary-General of the University:

- a) a legal proceeding or the threat of a legal proceeding against the University in court or at a tribunal,
- b) a legal issue having strategic importance or University-wide implications,
- c) a matter or legal issue involving significant legal risk, financial exposure or adverse impact to the University,
- d) a contract (regardless of its type or of its value) between the University and a third party that presents potentially significant or uncertain legal liability for the University.

¹⁷ Exhibit PR-2020-030-17A at para. 13.

¹⁸ Exhibit PR-2020-030-17A at para. 15 and 17.

[27] The University, for its part, submitted that it has a right to withdraw from the inquiry and advised that it would not participate going forward.

[28] First, the Tribunal will address PWGSC's argument that the University had legal authority to act on behalf of the joint venture. PWGSC relied on the Standard Instructions incorporated by reference into the RFP, which provide that joint venture bidders must provide "the name of the representative of the joint venture, i.e. the member chosen by the other members to act on their behalf, if applicable" and the "name of the joint venture, if applicable".¹⁹ PWGSC argued that the bid listed the "University of Ottawa" as the joint venture bidder's legal name and Mr. Blais as the contact, which together suggest that the University was the legal representative of the joint venture with authority to act on its behalf.

[29] In the Tribunal's view, the chosen name or contact person of a joint venture is not determinative of which member, if any, holds the legal authority to act on behalf of the whole joint venture. On balance, the Tribunal finds that the evidence in this regard cannot support a finding that the University had legal authority to act on behalf of the joint venture.

[30] Notwithstanding the above, and though the Tribunal recognizes that CFV finds itself in a difficult position, the Tribunal cannot ignore the fact that the very concerns contemplated in *Alliance agricole* have arisen in the present inquiry. If the Tribunal were to continue with the inquiry, the University would be included in these proceedings against its will. Moreover, although CFV submitted that the joint venture is prepared and able to carry out the contract if such remedy were awarded, the University has been silent on this matter. More fundamentally, the Tribunal cannot ignore the fact that the joint venture partners have expressed diametrically opposite views as to the manner in which the joint venture ought to proceed before the Tribunal—CFV wants to pursue the inquiry whereas the University does not. As such, the Tribunal finds that the joint venture has not expressed the view that it is willing to proceed with the complaint.

[31] As a final point, the Tribunal notes that the majority in *Alliance agricole* considered whether the complainant had standing to continue on its own as a "prospective bidder" as contemplated by the definition of "potential supplier". In the present case, PWGSC submitted that there is no evidence CFV has the capacity to perform the contract on its own and therefore cannot be a prospective bidder. CFV argued that it is not necessary to consider whether CFV on its own qualifies as a "potential supplier" and did not provide further submissions or evidence on this point. The Tribunal therefore concludes that there is insufficient evidence to find that CFV qualifies as a "potential supplier" on its own, and declines to continue the inquiry on this basis as well.

[32] Altogether, the Tribunal finds that there is no qualified and willing complainant to continue with the inquiry and therefore ceases the inquiry. To the extent that CFV was denied its day in court, recourse would lie against its partner in the joint venture.

¹⁹ Clause 17 (2010-01-11) Joint Venture of the Standard Instructions – Goods or Services – Competitive Requirements [Standard Instructions] at paragraph 1c. and d. (online: <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/24#joint-venture>>).

DECISION

[33] The motion filed by PWGSC is allowed. Pursuant to subsection 30.13(5) of the *Act*, the Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings related thereto. Each party shall bear its own costs in this matter.

Peter Burn

Peter Burn
Presiding Member