



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2023-009

Forex-Afrique

*Decision made
Wednesday, May 10, 2023*

*Decision and reasons issued
Monday, May 15, 2023*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

BY

FOREX-AFRIQUE

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT

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, as Mali is not a party to any applicable trade agreement.

Serge Fréchette

Serge Fréchette

Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations), a potential supplier may file a complaint with the Canadian International Trade 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 must decide whether to conduct an inquiry into the complaint.

OVERVIEW

[2] The complaint concerns a request for proposal (RFP) for a field support services project (FSSP) in Mali issued by the Department of Foreign Affairs, Trade and Development (DFATD) (solicitation 2022-P-009681-1).

[3] The contract covered by this RFP corresponds to Phase II of the FSSP in Mali, with Phase I having been carried out by the complainant, Forex-Afrique. World University Service of Canada (WUSC) was awarded the contract under this procurement.

[4] Forex-Afrique raised two grounds of complaint. First, the contract should not have been awarded to WUSC because of a conflict of interest and, second, DFATD demonstrated a lack of ethics in the procurement process.

[5] For the reasons that follow, the Tribunal has concluded that Forex-Afrique, which is domiciled in Mali, is not a potential supplier, as Mali is not a party to any applicable trade agreement.

PROCEDURAL BACKGROUND

[6] The RFP in question was published on CanadaBuys³ on March 18, 2022, with a closing date of May 30, 2022. Two amendments and responses to 40 questions were issued as part of this procurement.

[7] During the procurement process, Forex-Afrique noted that two Canadian non-governmental organizations had posted calls for job applications for the positions of FSSP manager and financial coordinator/agent on Malian electronic bulletin boards.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ <https://canadabuys.canada.ca/en/tender-opportunities/tender-notice/pw-22-00990174>

[8] In this context, on or around May 3, 2022, Forex-Afrique asked DFATD to clarify the issue and to find out its interpretation of the clause regarding conflicts of interest for companies currently implementing DFATD-funded projects in Mali.⁴

[9] On May 5, 2022, DFATD issued its response to Forex-Afrique's question about its interpretation of the clause regarding conflicts of interest or the appearance of conflicts of interest. In its response, DFATD indicated that it considers that bidders, at the time of submitting their bids, have themselves determined that they are not in a situation of conflict of interest or appearance of conflict of interest.⁵

[10] In late October 2022, Forex-Afrique and its employees were informed that WUSC was advertising for support staff positions for the FSSP in Mali.

[11] On October 28, 2022, DFATD convened a meeting with the FSSP Phase I manager, an employee of Forex-Afrique, to discuss activities at the close of this phase scheduled for mid-November. The manager did not notify Forex-Afrique of the award of the contract to a different company.

[12] In its letter of October 31, 2022, DFATD informed Forex-Afrique that its proposal had not been selected and that the contract would be awarded to WUSC.⁶

[13] On November 11, 2022, Forex-Afrique submitted an objection to DFATD through the internal review mechanism provided for in the solicitation documents.⁷

[14] In its letter of April 21, 2023, the contracting authority responded to the objection and rejected Forex-Afrique's request for an internal review.

[15] On May 5, 2023, Forex-Afrique filed its complaint with the Tribunal.

ANALYSIS

[16] Pursuant to sections 6 and 7 of the Regulations, after receiving a complaint that complies with subsection 30.11(2) of the CITT Act, the Tribunal must determine whether the following four conditions are met before it can conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;
- (ii) the complainant is a potential supplier;
- (iii) the complaint is in respect of a designated contract; and

⁴ Section 18 of the Standard Instructions - Goods or Services - Competitive Requirements referred to in section 2.1 of the RFP states the following: "In order to protect the integrity of the procurement process, bidders are advised that Canada may reject a bid in the following circumstances: a. if the Bidder, any of its subcontractors, any of their respective employees or former employees was involved in any manner in the preparation of the bid solicitation or in any situation of conflict of interest or appearance of conflict of interest".

⁵ Exhibit PR-2023-009-01 at 45-46.

⁶ *Ibid.* at 40-42.

⁷ *Ibid.* at 30-36.

- (iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

[17] Therefore, in order for the Tribunal to conduct an inquiry into a complaint, the complainant must be a potential supplier, that is, “a bidder or prospective bidder on a designated contract”.⁸ A contract is considered to be a designated contract when the solicitation in question is covered by the relevant provisions of at least one of the trade agreements listed in the Regulations.⁹

[18] Where applicable, section 1.4 of the RFP provides that the Atlantic Procurement Agreement and the following trade agreements are applicable:

- World Trade Organization Agreement on Government Procurement,
- Canada-Panama Free Trade Agreement,
- Canada-Korea Free Trade Agreement,
- Canada-Honduras Free Trade Agreement,
- Canadian Free Trade Agreement,
- Canada-European Union Comprehensive Economic and Trade Agreement,
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership,
- Canada-Ukraine Free Trade Agreement,
- Canada-Chile Free Trade Agreement,
- Canada-Colombia Free Trade Agreement,
- Canada-Peru Free Trade Agreement.¹⁰

[19] However, the evidence on record indicates that Forex-Afrique is a limited liability company domiciled in Bamako, Mali.¹¹ There is nothing to indicate that it is domiciled in Canada.

[20] Recourse to the Tribunal under the international trade agreements listed in the Regulations is available only if both the government of the supplier and the Government of Canada are parties to those agreements.¹²

[21] Therefore, since Forex-Afrique is domiciled in Mali¹³ and that country is not a party to any of the trade agreements listed in section 1.4 of the RFP, the Tribunal concludes that Forex-Afrique does

⁸ Section 30.1 of the CITT Act.

⁹ *Ibid.*

¹⁰ Exhibit PR-2023-009-01 at 61.

¹¹ *Ibid.* at 2 and 37.

¹² As the Supreme Court of Canada has stated, “[i]f the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them”. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 at paras. 32, 44. See also: *Newland USA Corporation* (14 December 2020), PR-2020-062 (CITT) at para. 8; *Leonardo S.P.A.* (5 May 2017), PR-2016-064 (CITT) at para. 25.

¹³ Even if Forex-Afrique had a subsidiary in Canada, it would not be considered a Canadian supplier. See *Leonardo S.P.A.* (5 May 2017), PR-2016-064 (CITT) at para. 18.

not have standing under those agreements. In other words, the procurement process at issue in this case is not covered by any trade agreement to which Forex-Afrique might have recourse.

[22] Accordingly, the Tribunal does not have the jurisdiction to conduct an inquiry. In light of this conclusion, there is no need for the Tribunal to consider whether the complaint meets the other conditions for inquiry.

DECISION

[23] Pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette

Serge Fréchette
Presiding Member