



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2007-067

CMI Interlangues Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Wednesday, February 13, 2008*

*Reasons issued  
Monday, February 25, 2008*

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IN THE MATTER OF a complaint filed by CMI Interlangues Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**CMI INTERLANGUES INC.**

**Complainant**

**AND**

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

**Government Institution**

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services investigate the circumstances surrounding the publication of a Contract Award Notice containing erroneous information and take measures to prevent such an occurrence in the future.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards CMI Interlangues Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

The statement of reasons will be issued at a later date.

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## STATEMENT OF REASONS

### COMPLAINT

1. On November 15, 2007, CMI Interlangues Inc. (Interlangues) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. 08B65-070273) by the Department of Foreign Affairs and International Trade (DFAIT) for the provision of language training services.
2. Interlangues alleged that DFAIT improperly awarded a contract on a sole-source basis. Interlangues requested, as a remedy, that the Tribunal recommend that DFAIT terminate the contract with Graybridge International Consulting Inc. (Graybridge) and issue a competitive solicitation. In the alternative, Interlangues requested that the Tribunal recommend that DFAIT compensate it for its lost profit or its lost opportunity to profit. Interlangues also requested its reasonable costs incurred in preparing and proceeding with its complaint.
3. On November 20, 2007, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> However, it was later discovered that, in fact, the procurement was conducted by the Department of Public Works and Government Services (PWGSC) rather than by DFAIT.<sup>3</sup> Consequently, the Tribunal informed PWGSC of the complaint on November 30, 2007.
4. On December 3, 2007, PWGSC informed the Tribunal that a contract had been awarded to Graybridge. On December 21, 2007, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On January 8, 2008, Interlangues filed its comments on the GIR.
5. After reviewing the GIR, Interlangues modified its requested remedy and is no longer seeking the cancellation of the contract. However, Interlangues submitted that there has been harm to the integrity of the procurement process in this case, even if no individual prejudice to Interlangues can be found. It requested that the Tribunal recommend that PWGSC apply stricter controls and establish minimum standards before a notice is posted on MERX.<sup>5</sup> It submitted that, as a minimum, it should be mandatory that contact information, such as the name and telephone number of the contracting authority's representative, be listed on all MERX notices.
6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. See letter from DFAIT dated November 29, 2007.
4. S.O.R./91-499.
5. Canada's electronic tendering service.

## PROCUREMENT PROCESS

7. In its GIR, PWGSC submitted that the procurement is for the provision of certain intercultural training and related services for the Centre for Intercultural Learning (CIL), one of four learning centres at the Canadian Foreign Service Institute (CFSI), a part of DFAIT. It submitted that the CIL is responsible for intercultural training and education, while another learning centre, the Centre for Language Training, handles language training requirements.

8. PWGSC submitted that, beginning in 1998, a process was initiated for the outsourcing of the delivery of a significant portion of the CIL/CFSI's activities. As a result of the initiative, a Request for Proposal (RFP) was issued by PWGSC on December 22, 1998 for the delivery of intercultural training and related services with respect to the CIL/CFSI's mandate. According to PWGSC, two bids were received in response to the solicitation, with the resulting contract being awarded to Graybridge. The term of the contract was for three years, from October 1, 1999 to September 30, 2002, with two one-year option periods. Subsequently, the options were exercised, and services were provided under the contract until September 30, 2004.

9. PWGSC submitted that a new long-term solicitation was not ready at the time of the expiry of the contract in 2004 and that, to provide additional time for the development of the proposed new solicitation, the contract with Graybridge was amended to extend it to November 30, 2005. Since work on the new long-term solicitation was not to be completed by November 30, 2005, DFAIT, under its delegated procurement authority, issued a competitive solicitation on October 13, 2005 for the delivery of the required CIL/CFSI intercultural training and related services for a period of one year. Only one bidder, Graybridge, submitted a proposal in response to the solicitation. According to PWGSC, the contract was awarded to Graybridge on December 16, 2005 and covered the period from contract award to September 15, 2006, which was subsequently amended to February 27, 2007.

10. PWGSC submitted that, on October 4, 2006, in order to provide more time for the completion of the continuing work on the new long-term solicitation, DFAIT issued another competitive solicitation for the delivery of the CIL's required services, this time for a period extending to May 31, 2007. Only one bidder, Graybridge, submitted a proposal in response to the solicitation. According to PWGSC, the contract with Graybridge was signed on January 16, 2007, and its term was subsequently extended to November 2, 2007. In the meantime, work on the new long-term solicitation for the CFSI's services was completed, and the resulting RFP was issued on August 29, 2007.

11. According to PWGSC, the new RFP provided for a contract with a term of three years, with two one-year options. The closing date of the RFP was November 26, 2007. According to PWGSC, two proposals were received and are currently being evaluated.

12. PWGSC submitted that, before the issuance of the new RFP, it was apparent that the competition could not be completed in time for the contract to be in place prior to November 2, 2007, the date of the expiry of the contract with Graybridge. Instead, the new contract was not expected to be in place until the end of February 2008. For technical reasons relating to the financial limitations of DFAIT's contract authority, the Graybridge contract could not be extended for an additional period, i.e. until the end of February 2008. In the circumstances, it was determined that, since DFAIT could not extend the contract with Graybridge to cover the short-term gap, PWGSC would use its contract authority to award a short-term five-month bridging contract to Graybridge. As a result, PWGSC awarded the contract to Graybridge on November 2, 2007 to cover the period until March 31, 2008. PWGSC submitted that it is this bridging contract that is the subject of the complaint.

13. On November 5, 2007, a Contract Award Notice (CAN) was posted on MERX. PWGSC submitted that a number of inadvertent errors were made in the notice. In particular, DFAIT was incorrectly identified as the contracting buyer instead of PWGSC, and the contract services were incorrectly described as “language training services” instead of “intercultural effectiveness training services”.

14. On November 15, 2007, Interlangues filed its complaint with the Tribunal.

### TRIBUNAL’S ANALYSIS

15. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *Agreement on Internal Trade*<sup>6</sup> and the *North American Free Trade Agreement*.<sup>7</sup>

16. According to the complaint, Interlangues learned of the contract award on November 9, 2007, by accident, when the company’s director was searching MERX for other reasons. According to Interlangues, potential suppliers were not advised in advance of DFAIT’s intention to award such a contract or that there was a need for language training services. Interlangues submitted that, in the CAN, there was no useful information provided to potential suppliers to allow them to raise objections, demonstrate their own capabilities or seek further details of the contract award from DFAIT in a timely fashion.

17. In the CAN,<sup>8</sup> under “Contract Award Procedure (Procurement Strategy)”, it is stated as follows:  
Exceptional Circumstances Under Article 508 (1) of AIT

No other information or explanation is contained in the notice.

18. Article 508(1) of the *AIT* reads as follows:

A Party may, under exceptional circumstances, exclude a procurement from the application of this Chapter for regional and economic development purposes, provided that:

...

(c) notice of all such excluded procurements is provided by one or more of the methods specified in Article 506(2) and the notice provides details of the exceptional circumstances . . . .

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6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

7. *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 (entered into force 1 January 1994) [NAFTA].

8. Complaint, tab 1.

19. In its comments on the GIR, Interlangues submitted that the only information published by the Crown announcing the contract award to the supplier community is the MERX notice and that suppliers rely on the information contained therein as being true and accurate. Interlangues submitted that it is evident that the MERX notice in this case was deeply defective and that it is a question as to how so many fundamental and critical errors could have been made.

20. Interlangues submitted that PWGSC breached the *AIT* and *NAFTA*, as the notice was fundamentally flawed and provided substantially erroneous information. It contended that, in this case, the failure to provide information, even as basic as a contact name and telephone number, is a breach of the Government's obligations under the trade agreements. Interlangues submitted that it could not obtain clarification about the contract awarded to Graybridge.

21. Article 1015(7) of *NAFTA* reads as follows:

No later than 72 days after the award of a contract, an entity shall publish a notice in the appropriate publication referred to in Annex 1010.1 that shall contain the following information:

1. a description of the nature and quantity of goods or services included in the contract;
2. the name and address of the entity awarding the contract;
3. the date of the award;
4. the name and address of each winning supplier;
5. the value of the contract, or the highest-priced and lowest-priced tenders considered in the process of awarding the contract; and
6. the tendering procedure used.

There is no similar provision in the *AIT*.

22. In its response to the GIR, Interlangues stated as follows: "... it is clear that the complaint was prompted by wholly inaccurate information published by the Crown to the supplier community ..." and "... [g]iven the clarification provided about the contract, Interlangues is not seeking its cancellation ..." In addition, although Interlangues stated that it does intercultural training, it did not bid on the competitive RFP that relates to the services covered by the bridging contract that is the subject of the complaint, and it filed a complaint under the belief that the contract was for language training.

23. PWGSC admitted that the CAN contained erroneous information. The Tribunal finds that this is a violation of Article 1015(7) of *NAFTA*.

24. There is some doubt as to whether the selection of a limited tendering procedure was sufficiently justified in this case. However, since the Tribunal has already found that a violation of *NAFTA* occurred with respect to the CAN, it is not necessary to judge this aspect of the case.

25. In light of the foregoing, the Tribunal determines that the complaint is valid.

## Remedy

26. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

...

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

27. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factors applicable to this case are that an interim short-term contract has already been awarded and that a new competitively determined contract is expected to be awarded shortly. Another factor relevant to the circumstances is that PWGSC's conduct has not caused a significant prejudice to the integrity and efficiency of the competitive procurement system since the limited tendering procedure was only used as a stop-gap measure while a competitive process was being undertaken.

28. Regarding the relief sought, Interlangues requested that the Tribunal recommend that PWGSC apply stricter controls and establish minimum standards before a notice is posted on MERX. It submitted that, as a minimum, it should be mandatory that contact information, such as the name and telephone number of the contracting authority's representative, be listed on all MERX notices.

29. Accordingly, the Tribunal recommends that PWGSC investigate the circumstances surrounding the publication of a CAN containing erroneous information and take measures to prevent such an occurrence in the future.

## Costs

30. The Tribunal awards Interlangues its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The procurement was not complex, as the contract at issue was a non-competitive short-term contract. The complaint was of low complexity, as it only dealt with the matter of limited tendering. The complaint proceedings were also of low complexity, as there was no intervener, and no additional submissions from parties were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

## DETERMINATION OF THE TRIBUNAL

31. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

32. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC investigate the circumstances surrounding the publication of a CAN containing erroneous information and take measures to prevent such an occurrence in the future.

33. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Interlangues its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette  
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Serge Fréchette  
Presiding Member