



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-006

Siva & Associates Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, July 21, 2009*

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IN THE MATTER OF a complaint filed by Siva & Associates 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

SIVA & ASSOCIATES 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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Siva & Associates Inc. 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, as contemplated in the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. 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. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Member: Ellen Fry, Presiding Member

Director: Randolph W. Heggart

Senior Investigator: Cathy Turner

Counsel for the Tribunal: Georges Bujold

Complainant: Siva & Associates Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke
Ian McLeod
Karina Fauteux

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. On April 29, 2009, Siva & Associates Inc. (Siva) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W8482-091626/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of globe valves.
2. Siva alleged that PWGSC did not provide adequate information to allow it to bid an equivalent product. In this regard, Siva requested, as a remedy, that the Tribunal recommend that PWGSC provide it with detailed product information and drawings to enable it to submit a proposal for an equivalent product.
3. On April 30, 2009, 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*.²
4. On May 5, 2009, PWGSC informed the Tribunal that a contract had been awarded to CTH Instruments Ltd. (CTH). On May 25, 2009, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ Siva did not file any comments on the GIR.
5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. On March 11, 2009, PWGSC issued a Request for Proposal (RFP) for the provision of globe valves. The bid closing date was April 21, 2009.
7. The item description contained in the RFP reads as follows:
NSN – NNO: 4810-01-445-1197
100161267 VALVE, GLOBE
NSCM/CAGE – COF/CAGE: 35795
Part No. – N° de la partie:
6DDL-3X
8. The RFP also contained a provision for the proposal of equivalent products.
9. On March 12, 2009, Siva requested that PWGSC provide more information and detailed specifications on the globe valves so that it could propose an equivalent product.⁴ According to PWGSC, Siva was advised that no further information regarding the specified equipment was available.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.
4. GIR, exhibit 4.

10. On April 13, 2009, Siva requested more details from PWGSC regarding the globe valves.⁵ On April 14, 2009, PWGSC asked DND if there was any other information available.⁶ On April 15, 2009, DND advised PWGSC that it could not provide more information other than what was provided in the Canadian Government Cataloguing System (CGCS); it had no drawings nor did it own the proprietary rights to the design of the globe valves.⁷ Later that day, DND advised PWGSC that the part number in the CGCS was fully descriptive and that, if a potential supplier was looking for more information, it could approach the original equipment manufacturer (OEM).⁸ PWGSC advised Siva of the information that it had received from DND,⁹ and Siva requested more information in accordance with the clause on equivalent products in order to allow it to bid.¹⁰

11. On April 29, 2009, Siva filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

12. 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. 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* 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 *North American Free Trade Agreement*,¹¹ the *Agreement on Internal Trade*,¹² the *Agreement on Government Procurement*¹³ and the *Canada-Chile Free Trade Agreement*.¹⁴

13. Siva submitted that it attempted to obtain a price quote for the globe valves from the manufacturer; however, the manufacturer required additional information regarding the use of the globe valves before it was able to provide a quote. Siva submitted that it attempted to obtain the required information from PWGSC but that PWGSC did not provide the required information. Therefore, Siva submitted that it did not have enough information in order to submit a proposal.

14. PWGSC submitted that the original globe valves, used in the fire-suppression systems on Canadian naval vessels, were designed and built by Leslie Controls, Inc. (Leslie Controls) as OEM equipment. In 2001, changes to the requirements of the fire-suppression system led to increased demands on the original globe valves, and new globe valves were custom designed and built by Leslie Controls for installation in the systems. Those redesigned globe valves have now reached the end of their life cycle.

5. GIR, exhibit 5.

6. GIR, exhibit 6.

7. GIR, exhibit 7.

8. GIR, exhibit 8.

9. GIR, exhibit 9.

10. GIR, exhibit 10.

11. *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].

12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

13. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

14. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [CCFTA].

15. The RFP provided the NATO Stock Number (NSN)¹⁵ for the globe valves, the NATO Commercial and Governmental Entity (NCAGE) Code¹⁶ for the OEM of the valves, Leslie Controls, and Leslie Controls' part identifier for the globe valves. PWGSC submitted that Siva was provided with all the information that it had relating to the globe valves and that this information should have been sufficient to identify the equipment sought. According to PWGSC, the design of the OEM globe valves is intellectual property owned by Leslie Controls. The Crown does not have any of the OEM's drawings or other equipment specifications. PWGSC submitted that, with the provision of this information to potential suppliers, it received two compliant bids.

16. PWGSC submitted that the RFP specifically advised suppliers that no specifications or drawings relating to the OEM globe valves would be made available to suppliers, referring to the following clause of the RFP:

1.1 Mandatory Administrative Criteria

...

Specifications or drawings relating to the procurement of items will not be furnished by the Crown unless stated elsewhere herein.

...

17. In its complaint, Siva submitted that "This is a win win situation for LESLIE Controls or their Distributors/Agents (Who are also bidding this enquiry) since other suppliers/bidders do not have enough information to quote an equivalent."

18. PWGSC submitted that the Crown is aware that Leslie Controls has a particular commercial relationship with one of the two compliant bidders, CTH, with respect to sales of Leslie Controls' equipment to the Canadian Navy. It further submitted that, although the Crown is aware that Leslie Controls has described CTH as its exclusive sales representative to the Canadian Navy, the Crown is not aware of the full nature of this commercial arrangement. In any event, PWGSC submitted that, whatever the particulars of the commercial relationship between Leslie Controls and CTH, it did not preclude the submission of a compliant bid from another potential supplier.

19. Article 506(6) of the *AIT* provides that "[t]he tender documents shall clearly identify the requirements of the procurement"

20. Article 1013 of *NAFTA* provides as follows:

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders The documentation shall also include:

...

(g) a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;

...

15. NSNs identify all the standardized material items of supply as they have been recognized by the United States Department of Defense. The 13-digit numeric codes are used in all treaty countries pursuant to the NATO Standardized Agreements.

16. NCAGE Codes are unique identifiers assigned to suppliers, government agencies and other various organizations. The five-character codes are used internationally as part of the NATO Codification System and provide a standardized method of identifying a given facility at a specific location.

21. Article XII of the *AGP* provides as follows:

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

...

(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;

...

22. Article Kbis-06 of the *CCFTA* provides as follows:

1. An entity shall provide interested suppliers tender documentation that includes all the information necessary to permit suppliers to prepare and submit responsive tenders. The documentation shall include all criteria that the entity will consider in awarding the contract, including all cost factors, technical requirements and the weights or, where appropriate, the relative values, that the entity will assign to these criteria in evaluating tenders.

23. PWGSC included, in the RFP, the NSN, NCAGE Code and part number of the required globe valves. According to PWGSC, it provided Siva with all the information that it had, given the ownership by Leslie Controls of the design and intellectual property rights of the globe valves. Siva did not allege that PWGSC was withholding any information it had. In its GIR, PWGSC submitted that the information provided in the RFP was sufficient for it to receive two compliant bids, one from CTH, which has been described as Leslie Controls' "exclusive sales representative" to the Canadian Navy and one from Kaycom Inc.¹⁷ In view of these submissions, which Siva did not dispute, the Tribunal considers that the evidence does not indicate that PWGSC could have provided additional information to potential suppliers and that the information that PWGSC provided was sufficient to bid.

24. Accordingly, the evidence does not indicate that PWGSC breached any of the applicable trade agreements.

25. In light of the foregoing, the Tribunal determines that the complaint is not valid.

Costs

26. The Tribunal awards PWGSC its reasonable costs incurred in responding to 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 it was for the purchase of a single product. The complaint was not complex, as it only dealt with a single issue, whether or not PWGSC provided sufficient information to suppliers in its tender documentation. The complaint proceedings were not complex, as there were no motions, no interveners and no additional submissions by parties. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

17. GIR at 3, para. 8, at 7, para. 27, at 8, para. 8.

DETERMINATION OF THE TRIBUNAL

27. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

28. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Siva. 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, as contemplated in the *Guideline*. 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. The Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member