Leonardo S.p.A. v. Department of Public Works and Government Services, [2017] C.I.T.T. No. 65

Canadian International Trade Tribunal Decisions

Canadian International Trade Tribunal

Panel: Serge Fréchette, Presiding Member

Order issued: May 5, 2017.

Reasons issued: May 16, 2017.

File No. PR-2016-064

[2017] C.I.T.T. No. 65 | *[2017] T.C.C.E. no 65*

IN THE MATTER OF a complaint filed by Leonardo S.p.A. 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 to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the Canadian International Trade Tribunal Act. AND FURTHER TO notices of motion filed by the Department of Public Works and Government Services and Airbus Defence and Space S.A., pursuant to Rule 24 of the Canadian International Trade Tribunal Rules, for an order ceasing the inquiry and dismissing the complaint. Between Leonardo S.p.A., Complainant, and The Department of Public Works and Government Services, Government Institution

(28 paras.)

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* Procurement *

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ORDER

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint. Leonardo S.p.A. is not a "Canadian supplier" within the meaning of the *Agreement on Internal Trade* and, therefore, does not have standing to file a complaint before the Canadian International Trade Tribunal under the *Agreement on Internal Trade*.

Serge Fréchette

Presiding Member

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

STATEMENT OF REASONS

INTRODUCTION

1 The complaint concerns a procurement of fixed-wing search and rescue aircraft, together with long-term in-service support (solicitation No. W847A-150179/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND). Leonardo S.p.A. (Leonardo) submitted a bid in response to the procurement, as did Airbus Defence and Space S.A. (Airbus). In December 2016, the contract was awarded to Airbus.

2 Leonardo filed this complaint with the Canadian International Trade Tribunal (the Tribunal) on March 14, 2017, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] It alleged that PWGSC awarded the contract to Airbus in breach of the applicable evaluation criteria and of Article 506 of the *Agreement on Internal Trade*.[2] The Tribunal accepted the complaint for inquiry on March 15, 2017. Airbus was granted leave to intervene in the inquiry on March 27, 2017.

3 On April 5 and April 6, 2017, respectively, PWGSC and Airbus filed notices of motion pursuant to Rule 24 of the *Canadian International Trade Tribunal Rules*,[3] for an order of the Tribunal ceasing the inquiry and dismissing the complaint. Both argued that Leonardo does not have standing before the Tribunal to bring a complaint under the *AIT*; that the Tribunal does not have jurisdiction to inquire into the complaint because the government has invoked the National Security Exception to the trade agreements in regard to all aspects of this procurement; and that the complaint was filed outside of the time limits prescribed by the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[4]

4 On May 5, 2017, the Tribunal dismissed the complaint, having determined that Leonardo does not have standing before the Tribunal to pursue a complaint under the *AIT*. The reasons for this determination follow. Given the decision on standing, the Tribunal will not address the other issues raised in the motions.

LEONARDO DOES NOT HAVE STANDING UNDER THE *AIT*

Submissions

5 PWGSC submitted that, in accordance with the judgment of the Supreme Court of Canada in *Northrop Grumman Overseas Services v. Canada*,[5] only Canadian suppliers within the meaning of Article 518 of the *AIT*, i.e. suppliers that have a place of business in Canada, have standing to bring complaints pursuant to the *AIT*. PWGSC argued that Leonardo is not a Canadian supplier as it does not have a place of business in Canada. It submitted that having an ownership interest in separate legal entities located in Canada, which were not bidders in this procurement, does not qualify Leonardo as a Canadian supplier.

6 Airbus made arguments similar to those of PWGSC. It submitted that subcontracting with a Canadian supplier does not confer upon a company a place of business in Canada, even where the subcontractor is a wholly owned subsidiary of the bidder.

7 Leonardo submitted that it "carries on business" in Canada through subsidiaries that have permanent establishments in Canada, and thus meets the definition of a Canadian supplier under the *AIT*. Leonardo argued that carrying on business in Canada through wholly owned subsidiaries qualifies a supplier as Canadian and that the opposite view unnecessarily focuses on the legal entity of the bidder, favours form over substance in the interpretation of the *AIT* and is divorced from business reality.

8 Leonardo argued that *Northrop Grumman* did not involve a bidder having a subsidiary with a place of business in Canada, but rather a foreign company whose sister corporation had a place of business in Canada -- a substantively different situation according to Leonardo. It submitted that it has a sufficient geographical presence in Canada through its subsidiaries to be a Canadian supplier, in keeping with *Northrop Grumman* and the Tribunal's decision in *Winchester Division -- Olin Corporation v. PWGSC*.[6]

Analysis

9 Standing is governed by subsection 30.11(1) of the *CITT Act*, which provides that "a potential supplier may file a complaint with the 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." A "designated contract" is defined in section 30.1 of the *CITT Act* as "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations."

10 Under the *Act* and the *Regulations*, a "designated contract" is any contract or class of contract that that has been or is proposed to be awarded by a government institution concerning a procurement of goods or services, or any combination of goods or services, described in the provisions of the trade agreements listed in the *Regulations*, including Article 502 of the *AIT*. The procurement in issue is excluded from all the other listed agreements.[7]

11 Article 502 of the *AIT* provides that its procurement chapter "applies to measures adopted or maintained by a Party [to the *AIT*] relating to *procurement within Canada*. ..." [emphasis added].

12 In *Northrop Grumman*, the Supreme Court of Canada held that a "procurement within Canada" within the meaning of Article 502 of the *AIT* refers to procurements between a government entity of a party to the *AIT* and a "Canadian supplier" within the meaning of Article 518 of the *AIT*.[8] Article 518 defines "Canadian supplier" as "a supplier that has a place of business in Canada" and "place of business" as "an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours."

13 Leonardo's standing to pursue this complaint under the *AIT* therefore depends on whether Leonardo has a place of business in Canada within the meaning of Article 518 of the *AIT*. Specifically, the question is whether Leonardo, a corporation that is not itself located in Canada, but that has subsidiaries with establishments in Canada, can be considered to have a place of business in Canada within the meaning of Article 518.

14 The facts relevant to the issue of standing do not appear to be in dispute between the parties. Leonardo's bid included a web of "teaming arrangements" and several tiers of subcontractors, but Leonardo (formerly, Finmeccanica S.p.A.) alone was the bidder and proposed prime contractor. Leonardo is incorporated in Italy and its head office is in Rome. Three of the subsidiaries with offices in Canada to which Leonardo refers are wholly owned by Leonardo, either directly or through other subsidiaries, and appear to collectively employ a significant number of employees. Some of Leonardo's subsidiaries were also proposed as subcontractors on the bid.[9]

15 The Tribunal finds that Leonardo is not a "Canadian supplier" within the meaning of the *AIT*.

16 As noted above, the *AIT* defines "Canadian supplier" as a "supplier that has a place of business in Canada". The definition thus refers to a *supplier*, a term that is itself defined in Article 518 of the *AIT* as "a person who... is capable of fulfilling the requirements of a procurement ...", which, in this case, would be Leonardo. The expression "place of business", defined as "an establishment where a *supplier* conducts activities on a permanent basis . . ." [emphasis added] also refers to the supplier.

17 These definitions make no mention of subsidiaries of a supplier. Leonardo has not pointed to anything in the text of the *AIT* that would support an extended interpretation of "supplier" and "place of business" that includes the

subsidiaries of the supplier and their places of business. Indeed, throughout Chapter 5, the *AIT* confers rights to parties to the *AIT* and to "suppliers" of those parties. It makes no mention of subsidiaries (or subcontractors, for that matter) of a supplier. This holds true for Article 514 of the *AIT*, which deals with complaint procedures that must be made available by the federal government to "suppliers."

18 Furthermore, while the facts in this case differ in some respects from *Northrop Grumman*, as the latter did not concern a supplier with a wholly owned subsidiary in Canada, in the ultimate analysis, Leonardo's situation remains within the realm of that judgment. Specifically, Leonardo's claim that a supplier is Canadian by reason of the places of business in Canada of one or more of its subsidiaries is not in keeping with the interpretation of the *AIT* in that case.

19 Rothstein J., writing for the Supreme Court of Canada, explained that a procurement "within Canada" contemplated in Article 502 of the *AIT* is one where "an entity of the federal government . . . enters into a procurement contract with a supplier within the jurisdiction of the federal government or a provincial or territorial government . . . who are the parties to the AIT ..."[10] He further held that "only suppliers with an office in Canada qualify as Canadian suppliers" and that "[t]his makes sense in light of the AIT being concerned with internal trade." He went on to note, quoting Ryan J.A. of the Federal Court of Appeal, that "a procurement contract with a foreign supplier would entail *trading with a supplier not located in Canada* -- 'the *resulting transaction would more properly constitute "international" trade*, and not "internal" Canadian trade or trade inside Canada'"[11] [emphasis added].

20 A situation where a corporation located in Italy enters into a procurement contract with the federal government cannot be described as internal trade. Leonardo did not allege that any of its subsidiaries were bidders or would have entered into a contract with the federal government. A transaction between Leonardo and the federal government is one of international trade.

21 Leonardo argued that the *AIT* definition of "Canadian supplier" and "place of business" should not be interpreted to exclude foreign suppliers that choose to incorporate subsidiaries rather than open branch offices in Canada. It argued that this would artificially exclude from the *AIT* procurement chapter foreign suppliers that may, through their subsidiaries, have a significant attachment to Canada. It submitted that a "foreign corporation (as with Leonardo) might make very considerable contributions to Canadian taxes, employment, real estate etc. through its subsidiaries . . . and yet wish to 'arrange its affairs' so as to carry on business in Canada through the permanent establishments of its subsidiaries", for instance, to avoid having income from its worldwide operations taxed in Canada, as could be the result if the entity itself had a permanent establishment in Canada.[12] Leonardo suggested that formalism in the interpretation of "place of business" is misplaced and that "the objectives of the trade agreements . . . are fully met when a bidder carries on business in Canada through the permanent establishment of its subsidiary."[13]

22 However, Leonardo's argument does not square with the textual and contextual framework of the *AIT* described by the Supreme Court of Canada. The fact that foreign corporations may choose to participate in the Canadian market through subsidiaries does not bring such foreign corporations within the scope of the *AIT* procurement chapter, where nothing in the text of the *AIT* -- a domestic trade agreement -- indicates an intention of the parties to the *AIT* to bring them within its scope. In fact, the intention of the parties to the *AIT* is apparent from their choice to limit a "Canadian supplier" to those suppliers with a "place of business" in Canada (Article 518), which, as was recognized by the Federal Court of Appeal, is akin to a "permanent establishment", as that concept is used in income tax legislation and treaties.[14] As such, Leonardo's claim of purported "artificiality" cannot be accepted. Indeed, this issue has already been considered by the Courts.[15] In this context, Leonardo's reliance on *Winchester Division -- Olin*, a decision that was issued before *Northrop Grumman*, is also unhelpful to its case.

23 Leonardo did not explain how the objectives of the *AIT* could be "fully met" by accepting its view that foreign suppliers with subsidiaries in Canada should be entitled to the benefits of the procurement chapter of the *AIT*. Again, the *AIT* is a domestic trade agreement. The Supreme Court of Canada and the Federal Court of Appeal have both remarked that the purpose of the *AIT* is to "reduce and eliminate . . . barriers to the free movement of persons, goods, services and investments *within Canada* and to establish an open, efficient and stable *domestic*

market",[16] and specifically with respect to procurement, to "ensure equal access to procurement for *all Canadian suppliers* ..."[17] [emphasis added]. As such, ensuring access for foreign suppliers that do not properly bring themselves within the scope of the *AIT* is a matter unrelated to the stated goals of the *AIT*.[18]

24 As was the situation in *Northrop Grumman*, where a bidder was found not to be a Canadian supplier despite the fact that it had a sister company in Canada,[19] in this case, Leonardo is not a Canadian supplier even though it has subsidiaries in Canada. Consequently, the procurement cannot be said to be "within Canada" within the meaning of Article 502 of the *AIT*.

25 Ultimately, the evidence indicates that Leonardo is within the jurisdiction of the Italian government, which is not a party to the *AIT*. Italy, as a member of the European Union, is a party to the *AGP*; Canada has *excluded* from the *AGP* procurements by DND of goods such as the ones in issue in this matter. Leonardo cannot therefore invoke the *AIT* where it did not structure its bid in a way that properly brings it within the scope of internal trade contemplated by that agreement.

26 The Tribunal finds that Leonardo does not have standing to pursue this complaint under the *AIT*.

ORDER

27 Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint. Leonardo is not a "Canadian supplier" within the meaning of the *Agreement on Internal Trade* and, therefore, does not have standing to file a complaint before the Tribunal under the *AIT*.

COSTS

28 PWGSC did not request its costs on the motion and the Tribunal will therefore not award it any. While Airbus asked for its costs for intervening in this matter, in the circumstances, the Tribunal will not exercise its discretion[20] to award costs to Airbus. Its submissions on the motion largely repeated those of PWGSC. Serge Fréchette Serge Fréchette Presiding Member

Serge Fréchette
Presiding Member

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

2 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/agreement-on-internal-trade/> [*AIT*].

3 *S.O.R./91-499*.

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

5 *[2009] 3 SCR 309* [*Northrop Grumman*]; the Supreme Court of Canada affirmed the judgment of the Federal Court of Appeal in *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.*,[2009] 1 FCR 688 [*Northrop Grumman FCA*].

6 (2 April 2004), PR-2003-064 [*Winchester Division -- Olin*]. In that case, the Tribunal determined that an American bidder/complainant qualified as a "Canadian supplier" because its wholly owned Canadian subsidiary had a place of

business in Canada. Upheld by the Federal Court of Appeal, without discussion of the jurisdictional issue: *Winchester Division -- Olin v. Canada (Minister of Public Works and Government Services)*, *2005 FCA 95*.

7 The product subject to the procurement in issue is classified as "1510 Aircraft, Fixed Wing" pursuant to the Federal Supply Classification Code. When procured by DND, such goods are not included in the coverage of the trade agreements listed in the *Regulations*, except the *AIT*. For example, Canada's Annex 4 of Appendix 1 to the *Revised Agreement on Government Procurement* (online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*AGP*]) does not include that group as part of the coverage offered by Canada in respect of procurements by DND. In addition, Canada's Annex 5 to Appendix 1 of the *AGP* provides that the agreement does not cover procurement for "all services, with reference to those goods purchased by the Department of National Defence . . . which are not covered by this Agreement."

8 *Northrop Grumman* at paras. 27-29.

9 Schedule A to the complaint, para. 5; Leonardo's response to the motions, paras. 33-37.

10 *Northrop Grumman* at paras. 27, 32.

11 *Northrop Grumman* at para. 28.

12 Leonardo's response to the motions, paras. 26, 29.

13 Leonardo's response to the motions, para. 38.

14 *Northrop Grumman FCA* at para. 61: "The essential element of the definition of 'Canadian supplier' is, in my view, a geographical requirement in respect of the business activities of the entity in question, namely, a place of business in Canada. This essential element is very similar to the concept of a 'permanent establishment' as it is used in Canada's income tax legislation and treaties. That concept connotes a fixed place of business in the jurisdiction in question."

15 Leonardo suggested that "[i]t would be the height of pointless formalism to have a rule that allowed a foreign corporation to qualify as a Canadian supplier by renting an office with a receptionist (thus having a permanent address accessible during business hours), but that denied Canadian supplier status to a business such as Leonardo that, through its wholly-owned Canadian subsidiaries, employs hundreds of Canadians . . . at various locations in Canada": para. 26 of Leonardo's response to the motions. It suffices to note that "place of business" is defined in Article 518 as "an establishment where a supplier *conducts activities on a permanent basis*", and that the present case does not require the Tribunal to determine whether a rented office with a receptionist would qualify as "conducting activities on a permanent basis" for the purposes of the AIT. The Federal Court has previously answered the question in the negative: see *Augustawestland International Ltd. v. Canada (Public Works and Government Services)*, *2006 FC 767*, paras. 38-40.

16 Article 100.

17 Article 501.

18 Indeed, in *Northrop Grumman*, Rothstein J. also highlighted that trade agreements, including the *AIT*, are negotiated instruments premised on a mutual lowering of barriers to trade between the parties to the agreement. As such, he reasoned that "[i]f the government of a supplier did not negotiate access to the [Tribunal] for its suppliers, there is no access for them." And furthermore, allowing non-Canadian suppliers to gain rights under the *AIT* that were specifically excluded from the scope of agreements signed with the government of the country of the non-Canadian supplier would *undercut* that exclusion and could undermine Canada's negotiating position. See *Northrop Grumman* at paras. 41, 44.

19 *Northrop Grumman* at paras. 30, 47; *Northrop Grumman Overseas Services Corporation v. Department of Public Works and Government Services* (2 December 2009), PR-2007-008R (CITT).

20 *Adware Promotions Inc., Canadian Spirit Inc., Contractual Joint Venture* (15 June 2010), PR-2009-088 (CITT); *Saskatchewan Institute of Applied Science and Technology* (9 January 2014), PR-2013-013 (CITT) at para. 119.

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