



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-042

Super Channel International Corp.

*Decision made
Friday, February 21, 2014*

*Decision issued
Friday, February 21, 2014*

*Reasons issued
Friday, March 7, 2014*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

BY

SUPER CHANNEL INTERNATIONAL CORP.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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.

Ann Penner

Ann Penner
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

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

STATEMENT OF REASONS

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

SUMMARY OF COMPLAINT

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. 21120-142286/A) by the Department of Public Works and Government Services (PWGSC) on behalf of Correctional Service Canada for the supply of inmate toques.

3. Super Channel International Corp. (Super Channel) complained that PWGSC wrongly declared its proposal to be non-responsive because Super Channel had not provided the requisite certificate of compliance from the manufacturer of the yarn that would be used in the production of the toques.

4. As a remedy, Super Channel requested that PWGSC change its decision and award it the contract. Alternatively, Super Channel requested compensation for loss of the contract in the amount of \$28,080.

BACKGROUND INFORMATION

5. On November 1, 2013, PWGSC issued the RFP with a bid closing date of December 16, 2013. On November 4, 2013, the solicitation was posted on MERX.³

6. Super Channel submitted a proposal in response to the solicitation.

7. On January 20, 2014, PWGSC requested that Super Channel provide the name of its subcontractor, as well as the name of its yarn manufacturer. Super Channel responded the same day that its subcontractor was Zhenjiang Kimtex Industrial Inc. (Zhenjiang Kimtex) and its yarn manufacturer was Hangzhou Hengli Textile Co., Ltd.

8. On February 11, 2014, PWGSC informed Super Channel that it had not been awarded the contract because it had not provided a certificate of compliance for its yarn manufacturer.

9. That same day, Super Channel filed an objection with PWGSC. Super Channel explained that it had made an error on January 20 when it identified Hangzhou Hengli Textile Co., Ltd. as the yarn manufacturer. It noted that the yarn would be manufactured by Zhenjiang Kimtex, the subcontractor who would be producing the goods. Super Channel also insisted that it had provided a certificate of compliance for Zhenjiang Kimtex in its proposal.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Canada's electronic tendering service.

10. Super Channel further argued that PWGSC was not entitled to rely on its erroneous statement of January 20 as the statement was made after the bid closing date and could not modify what was included in its proposal. It requested that PWGSC award it the contract, as it believed that its financial proposal was lower than the contract award of \$136,100.16.

11. On February 12, 2014, PWGSC responded to Super Channel's objection.

12. On February 19, 2014, Super Channel filed its complaint with the Tribunal.

13. Upon receipt of the complaint, the Tribunal requested that Super Channel provide additional information to complete the file, including a copy of the certificate of compliance and any other relevant email correspondence. Super Channel replied that it could not provide the certificate of compliance because it had not kept a copy of what was provided in its proposal. It also confirmed that all relevant email correspondence had been attached to its complaint.

ANALYSIS

14. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before an inquiry can be conducted:

- whether the complaint has been filed within the time limits prescribed by section 6 of the *Regulations*;
- whether the complainant is an actual or potential supplier;
- whether the complaint is in respect of a designated contract; and
- whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,⁴ Chapter Five of the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁸ Chapter Fourteen

4. *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*].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. *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*]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

8. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

of the *Canada-Colombia Free Trade Agreement*⁹ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹⁰ applies.

15. Super Channel's complaint meets the first three conditions: it was filed within the prescribed time limits; the complainant is an actual bidder; and the complaint is in respect of a solicitation covered by all of the above-mentioned trade agreements except the *AGP* and the *CPFTA*.¹¹ The analysis will therefore focus on whether the information provided by the complainant discloses a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

16. Article 1015(4) of *NAFTA* provides that, "(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notice or tender documentation..." and "(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation." The *AIT*, *CCFTA*, *CCOFTA* and *CPAFTA* contain similar obligations.¹²

17. Part 4, paragraph 2, of the RFP provides that, in order to be considered responsive, proposals must "...meet all mandatory technical and financial evaluation criteria..." Paragraph 1.1.1, Mandatory Technical Criteria, stipulates that "[f]ailure to submit the required pre-award sample and certificate of compliance within the specified time frame will result in the bid being declared non-responsive..." In addition, Certificate of Compliance for the yarn stated at page 2 of the Purchase Description is required as defined herein."

18. Part 5 of the RFP provides that "[b]idders must provide the required certifications and documentation to be awarded a contract" and that these certifications are "...subject to verification by Canada at all times." In the case that a certification made by a bidder is found to be untrue, whether during the bid evaluation period or during the contract period, the bid will be declared non-responsive. In addition, the contracting authority retains the right to ask for additional information to verify the certifications, and any failure to comply with these requests will also render the bid non-responsive.

19. The key issue in this complaint is whether Super Channel provided sufficient evidence for the Tribunal to reasonably conclude that PWGSC erred in its determination that Super Channel had not complied with the essential requirements as set out in the RFP. More specifically, the key issue is whether Super Channel provided evidence to the Tribunal to confirm that it had indeed provided a veritable certificate of compliance in its proposal.

20. It is well established that complainants bear the onus of substantiating the contentions and allegations that they make when bringing a complaint before the Tribunal; unsubstantiated contentions and allegations are insufficient for the Tribunal to proceed with an inquiry.

9. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [*CCOFTA*].

10. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [*CPAFTA*].

11. The value of the procurement was below the applicable monetary thresholds for the *AGP* and the *CPFTA*.

12. See Article 506(6) of the *AIT*, Article 1015(4)(d) of *NAFTA*, Article Kbis-10 of the *CCFTA*, Article 1410:4 of the *CCOFTA* and Article 16.11:4 of the *CPAFTA*.

21. In this case, Super Channel failed to provide the Tribunal with a copy of the certificate of compliance for Zhenjiang Kimtex. It failed, therefore, to substantiate its contention that a certificate had been provided to PWGSC and its allegation that PWGSC wrongly declared its proposal to be unresponsive. The Tribunal cannot proceed with an inquiry on this basis, as a result.

22. It is also well established that, where a solicitation requires bidders to certify certain information in their proposal for accuracy and completeness, the procuring entity is entitled to rely on those certifications at the time of bid evaluation (i.e., after the bid closing date).¹³

23. The RFP at issue in this case clearly stipulates that PWGSC reserved the right to verify information, including the certifications, during the bid evaluation process. The Tribunal therefore finds that PWGSC was entitled to rely on Super Channel's statement of January 20 that its yarn manufacturer was Hangzhou Hengli Textile Co., Ltd. Since there is no evidence that Super Channel submitted a certificate of compliance for this company or, for that matter, Zhenjiang Kimtex, the Tribunal has no basis to determine that PWGSC improperly determined that Super Channel's bid was non-responsive.

24. Therefore, the Tribunal finds that the evidence provided by Super Channel does not disclose a reasonable indication that the applicable trade agreements were breached during the procurement process.

25. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Ann Penner
Ann Penner
Presiding Member

13. *Central Automotive Inspections Records & Standards Services (CAIRSS) Corp.* (31 October 2012), PR-2012-025 (CITT) at paras. 24-25. See also *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT) at paras. 22-23; *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at para. 11.