



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-006

TYR Tactical Canada, ULC

*Decision made
Friday, May 13, 2016*

*Decision issued
Monday, May 16, 2016*

*Reasons issued
Wednesday, May 18, 2016*

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

TYR TACTICAL CANADA, ULC

AGAINST

THE ROYAL CANADIAN MOUNTED POLICE

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.

Serge Fréchette

Serge Fréchette
Presiding Member

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. This complaint by TYR Tactical Canada, ULC (TYR) concerns a Request for Proposal (RFP) (Solicitation No. M0077-15-I641) by the Royal Canadian Mounted Police (RCMP) for the provision of soft body armour, specifically vests. The RFP was published on April 8, 2016. After being extended on two occasions, the closing date for the RFP was May 6, 2016.

3. TYR filed a complaint with the Tribunal on May 9, 2016.

4. TYR's complaint is comprised of essentially three grounds. The first ground is with respect to the type of stitching required by the RFP. TYR proposed that, notwithstanding the requirements in article 4.4.1.1 of RCMP Specification G.S. 1045-177 (the Specification), a zig zag stitch along the bottom of the panel would not be required because the material that it uses to construct vests does not have loose or fraying ends.

5. The second ground is with respect to the type of yarns to be used for the vests. TYR claims that the RCMP breached the trade agreements by requiring the vests to be constructed of material under the trade names Kevlar[®] or Twaron, to the exclusion of all other ballistic materials.

6. The third ground is that TYR alleges that the requirement to provide five years of historical test results showing the ballistic resistance of the aramid cloth used to construct the vests was selected in order to favour the incumbent supplier and to impede the participation of other manufacturers.

ANALYSIS

7. On May 13, 2016, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for that decision are as follows.

8. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;³
- the complainant is an actual or potential supplier;⁴
- the complaint is in respect of a designated contract;⁵ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁶

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

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

3. Subsection 6(1) of the *Regulations*.

4. Paragraph 7(1)(a) of the *Regulations*.

5. Paragraph 7(1)(b) of the *Regulations*.

6. Paragraph 7(1)(c) of the *Regulations*.

9. The second and third requirements appear to have been met in this case. The others are analyzed below.

Time Limit for Objecting and Filing a Complaint

10. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal, “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.”

11. Subsection 6(2) of the *Regulations* provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

12. TYR’s complaint, insofar as it concerns the type and amount of stitching required to be used on the vests, is not timely. On April 19, 2016, TYR asked the RCMP whether it was acceptable for the bottom of the vests not to be stitched with a 2.5 cm high and 2.5 cm wide (point-to-point) zig zag stitch across the entire width of the panel (as was required by article 4.4.1.1 of the Specification), if the material used did not contain any loose or fraying ends.

13. The RCMP’s response, on April 22, 2016, was to confirm that the stitching to be used was that which was stated in the Specification. In other words, the RCMP did not permit a variation from the Specification based on the properties of the material sought to be used by TYR. This issue was not raised again until the filing of this complaint on May 9, 2016. The correspondence of April 22, 2016, is therefore the date that relief was denied on this ground and the starting point for the 10-working-day period within which TYR was required to file a complaint with the Tribunal. Accordingly, a complaint on this ground is time-barred from proceeding because it was filed on May 9, 2016, whereas the 10-working-day time frame for the Tribunal to be seized of the matter expired on May 6, 2016.

14. Nevertheless, TYR’s two other grounds of complaint are timely; however, for the reasons discussed below, they do not disclose a reasonable indication of a violation of the *Agreement on Internal Trade*,⁷ which is the only trade agreement applicable to this solicitation. Consequently, the Tribunal will not conduct an inquiry into the complaint.

Reasonable Indication of Breach

Material to be used for Vests

15. TYR takes issue with the following requirement in article 4.2.1 of the Specification:

Cloth, Ballistic Aramid – Shall be constructed of Ballistic Aramid Yarn with a maximum size of 930 Decitex (840 Denier). Yarn produced under the trade names Kevlar or Twaron are acceptable. The cloth shall be natural in colour. The cloth shall be thoroughly scoured with not more than 0.7% residuals, shall not contain loading materials and shall be free from imperfections.

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [AIT].

16. With respect to the material required for the vests, TYR seems to be of the view that the RCMP's requirement was for Kevlar[®] or Twaron only. On April 19, 2016, TYR wrote to the RCMP, indicating that body armour manufacturers have access to other types of ballistic materials that could be used for the vests being procured, in particular, ultra-high-molecular-weight polyethylene (referred to as UHMWPE). It urged the RCMP to consider these other types of ballistic materials commonly used by law enforcement and the military, indicating that vests constructed of these materials tend to be thinner, lighter and higher-performing.

17. The RCMP's response to TYR's question, contained in amendment No. 002 to the RFP, appears to confirm TYR's impression that Kevlar[®] and Twaron are the only acceptable types of material, stating that "[t]he RCMP recognizes the availability of other materials but the operational requirement for this contract is the use of Kevlar or Twaron." This response appears to have caused some confusion and, as will be seen, in later correspondence, the RCMP clarified that it would indeed accept materials other than Kevlar[®] and Twaron.

18. On April 25, 2016, TYR again wrote to the RCMP, this time asking that it "... reverse its decision to not allow other ballistic materials outside of Kevlar and Twaron that meet the specification for protection against NIJ Standard 0101.03, Ballistic Resistance of Policy Body Armour."

19. On April 29, 2016, TYR received a response from the RCMP in which it maintained the requirement in the RFP, but wherein it also clarified that "[t]he RCMP has a requirement for an Aramid yarn with a proven history of ballistic protection. Kevlar and Twaron are two trade names that meet this requirement but other Aramid yarns can be used if they meet the performance requirements." In that letter, the contracting authority indicated that this would be the subject of a future amendment.

20. Amendment No. 004, which was published on April 29, 2016, included an updated version of the Specification. This updated Specification, dated April 27, 2016, revised the language in article 4.2.1 as follows:

Cloth, Ballistic Aramid – The ballistic cloth shall be constructed of woven Ballistic Aramid Yarn with a maximum size of 930 Decitex (840 Denier). Yarn produced under the trade names Kevlar or Twaron are known to meet the requirement. The cloth shall be natural in colour. The cloth shall be thoroughly scoured with not more than 0.7% residuals, shall not contain loading materials and shall be free from imperfections.

21. In the Tribunal's view, based on the April 29, 2016, letter to TYR and amendment No. 004, it is clear that the RCMP is open to accepting other types of aramid yarns, provided the performance requirements are met. In this way, it is difficult to conclude that the April 29, 2016, letter constitutes a denial of relief to TYR. While that letter may not have provided TYR with the ability to use any type of yarn that it wanted, it certainly clarified that Kevlar[®] and Twaron were not the only types of yarn that could be used to meet the requirement.

22. Article 506(6) of the *AIT* requires tender documents to clearly identify the requirements of the procurement and the criteria that will be used in the evaluation of bids. In the Tribunal's view, notwithstanding some confusion caused by the RCMP's initial response to TYR's query, the RFP is clear that Kevlar[®] and Twaron are not the only materials that could be used for the vests being procured. Indeed, other aramid yarns can be used as long as they meet the other requirements listed in the Specification. At this point, there is no indication that the RCMP has wrongly interpreted the scope of this requirement in the RFP.

23. Furthermore, the Tribunal has repeatedly stated that the federal government has the right to define its procurement requirements.⁸ In this respect, the government can require the vests that it seeks to procure to be tested in a certain way, to meet a certain standard or to be comprised of a certain type of material or yarn. The fact that other types of fabrics or yarns could be used or that, in the complainant's view, others may have been preferable in no way detracts from the government's ability to establish its procurement requirements in order to meet its operational objectives.

24. Accordingly, even if this ground of complaint was filed on a timely basis, it does not disclose a reasonable indication that a trade agreement has been breached.

Bias in Favour of the Incumbent

25. Amendment No. 004 to the RFP, published on April 29, 2016, introduced a new mandatory criterion requiring bidders to provide five years of historical test reports showing the ballistic resistance of the aramid cloth. In its complaint, TYR alleges that this requirement was added on the basis of the current manufacturer's ability to provide such information and to impede the use of other ballistic materials and other manufacturers.

26. Having complained within 10 days of this amendment, this ground of complaint was brought forward on a timely basis; however, as the Tribunal has previously stated, a ground of complaint must have some evidentiary basis to suggest that there was a breach of the relevant trade agreements.⁹ Beyond the assertion made in its complaint, TYR did not provide any documentation to substantiate its claim that this additional requirement was intended to favour the incumbent supplier. The more plausible interpretation is that this amendment, as suggested in the correspondence, was intended to clarify that ballistic aramid yarns, other than those using the trade names Kevlar[®] or Twaron, could be used for the vests, while at the same time providing a history of the effectiveness of the proposed materials.

27. In the Tribunal's view, this ground of complaint is based on speculation and, therefore, does not disclose a reasonable indication that a trade agreement has been breached.

DECISION

28. 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

8. *R.P.M. Tech. Inc. v. Department of Public works and Government Services* (25 March 2015), PR-2014-040 (CITT); *Inforex Inc.* (24 May 2007), PR-2007-019 (CITT); *FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT); *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

9. *Flag Connection Inc.* (30 July 2013), PR-2013-010 (CITT) at paras. 23-24; *The Powel Group – TPG Technology Consulting Ltd.* (28 November 2003), PR-2003-065 (CITT).