



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-007

MD Charlton Co. Ltd.

*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

MD CHARLTON CO. LTD.

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 MD Charlton Co. Ltd (MD Charlton) 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. MD Charlton filed a complaint with the Tribunal on May 10, 2016.

4. In the RFP, the RCMP required that ballistic panels be tested in accordance with the NIJ 0101.03 protocols, with certain exceptions, as specified in article 4.1.1 of RCMP Specification GS-1045-177.

5. In its complaint, MD Charlton takes issue with the RCMP's reliance on NIJ 0101.03, which it claims is outdated, having been superseded three times since its introduction in 1987. It argues instead that the RCMP should be relying on the current standard, NIJ 0101.06.

ANALYSIS

6. 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.

7. 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*.

8. MD Charlton's complaint appears to meet the second and third conditions. However, the timeliness requirement of the *Regulations* has not been met in this case because MD Charlton did not object to the RCMP or file a complaint to the Tribunal within 10 working days of knowing the basis of its complaint. Moreover, with respect to the fourth condition, MD Charlton's complaint does not disclose a reasonable indication that the RCMP failed to conduct the procurement in accordance with the applicable trade agreement. As such, even if the Tribunal were to accept that the prescribed time limits had been met, it will not conduct an inquiry into this complaint.

Time Limit for Objecting and Filing a Complaint

9. 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."

10. 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."

11. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

12. In its complaint, MD Charlton indicates that it became aware that the RCMP was relying on NIJ 0101.03 on April 8, 2016, the date on which the RFP was published.

13. On April 27, 2016, MD Charlton e-mailed the RCMP and requested that it consider re-soliciting the tender for the current standard, NIJ 0101.06. In amendment No. 004, the RCMP rejected MD Charlton's request, re-iterating the requirement in the RFP that ballistic panels be tested in accordance with the NIJ 0101.03 protocols, with certain exceptions. At that time, the RCMP also confirmed that it was not requiring the product to be NIJ certified.

14. As indicated above, MD Charlton did not raise its concern about the RCMP's reliance on NIJ 0101.03 until April 27, 2016, 13 working days after it became aware of the RCMP's reliance on this standard. As such, MD Charlton did not object or file its complaint within the time required by the *Regulations*.

15. In its complaint, MD Charlton indicates that "... another vendor requested that the current NIJ standard be used ...", but that this concern was dismissed in amendment No. 002. In the Tribunal's view, having reviewed amendment No. 002, including the questions and answers therein, this appears not to have been the case. Although one bidder asked for confirmation that "... the NIJ Standard, required on 5 (2.4) for this tender is 0101.03 Level 2", there was no mention of this standard potentially being outdated and no suggestion that an alternative standard be used.

16. For the reasons above, MD Charlton's complaint is time-barred.

No Reasonable Indication of a Breach

17. The Tribunal is of the view that, even if the complaint was not time-barred, it would not conduct an inquiry because the complaint discloses no reasonable indication of a breach of the *Agreement on Internal Trade*,⁷ which is the only trade agreement applicable to this solicitation.

18. 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 or to meet a certain standard. The fact that other standards 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.

19. It appears that the requirement for the vests to be tested in accordance with the NIJ 0101.03 standard was clearly communicated to bidders in the RFP itself, as well as in the questions and answers contained in amendment Nos. 002 and 004. For that reason, even if the objection and the complaint were timely, the complaint discloses no reasonable indication of a breach of a trade agreement.

20. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

DECISION

21. 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

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

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