



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-027

M.D. Charlton Co. Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, December 16, 2016*

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IN THE MATTER OF a complaint filed by M.D. Charlton Co. Ltd. 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*.

BETWEEN

M.D. CHARLTON CO. LTD.

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION

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. Each party will bear its own costs.

Jason W. Downey

Jason W. Downey
Presiding Member

Tribunal Member: Jason W. Downey, Presiding Member

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Registrar Support Officer: Rachel Cunningham

Complainant: M.D. Charlton Co. Ltd.

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STATEMENT OF REASONS

SUMMARY

1. On August 12, 2016, M.D. Charlton Co. Ltd. (MD Charlton) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a Request for a Standing Offer (RFSO) (Solicitation No. W8486-163098/A) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the provision of vest-style body armour carriers containing ballistic soft armour inserts (vests), to be worn by DND military police personnel.
2. M.D. Charlton alleged that, in permitting potential suppliers to provide vests meeting an obsolete safety standard from the National Institute of Justice (namely, standard NIJ 0101.04), PWGSC relied on a technical specification that discriminated against M.D. Charlton and other suppliers whose products meet the current standard (NIJ 0101.06), contrary to Article 504(3)(b) of the *Agreement on Internal Trade*.²
3. As a remedy, M.D. Charlton requested that a new solicitation for the designated contract be issued, with an amendment requiring the vests to meet standard NIJ 0101.06, rather than the presumably expired or outdated standard NIJ 0101.04.
4. For the reasons that follow, the Tribunal finds that M.D. Charlton's complaint is not valid.

BACKGROUND OF COMPLAINT

5. The RFSO was issued on June 27, 2016, with a closing date of July 28, 2016.
6. On July 4, 2016, M.D. Charlton wrote to PWGSC seeking clarification with respect to the reliance on standard NIJ 0101.04 and requesting that the RFSO be amended to require that standard NIJ 0101.06 be met instead. The next day, prior to receiving a formal response from PWGSC, M.D. Charlton filed a complaint with the Tribunal. The Tribunal did not initiate an inquiry on the basis of that complaint because it was premature.³
7. On July 5, 2016, PWGSC informed M.D. Charlton that the purpose of the RFSO was to replenish DND's existing stock of vests and that, on this basis, it was satisfied that vests conforming to standard NIJ 0101.04 *or higher* would meet its requirements. Following this correspondence, M.D. Charlton continued to insist that the RFSO should be modified to require standard NIJ 0101.06 only. The closing date of the RFSO was extended to August 29, 2016, to give PWGSC additional time to reflect upon M.D. Charlton's concerns.
8. On July 29, 2016, PWGSC notified M.D. Charlton that the requirement in the RFSO would remain unchanged.
9. On August 8, 2016, M.D. Charlton filed its complaint with the Tribunal.

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

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

3. *M.D. Charlton Co. Ltd.* (6 July 2016), PR-2016-019 (CITT).

RELEVANT PROVISIONS OF THE RFSO

10. M.D. Charlton's complaint centres on the acceptability of vests meeting standard NIJ 0101.04. In this respect, the RFSO provides as follows:

4.2 Soft Armour Panels

a. The soft body armour panels must meet or exceed the protection Level IIIA of NIJ 0101.04, Ballistic Resistance of Personal Body Armour, and all lesser threats.⁴

POSITIONS OF PARTIES

11. M.D. Charlton argues that the RFSO should have used standard NIJ 0101.06, as the standard referenced in the RFSO has been superseded twice—first by an interim standard in 2005 and, then, by the current standard which came into effect in 2008. M.D. Charlton alleges that the use of an inactive standard discriminates against it and others that supply only to the current standard by giving vendors that supply goods to the lesser standard an unfair financial advantage. On this point, M.D. Charlton argues in favour of the more stringent requirements and testing of standard NIJ 0101.06, which, it claims, are above and beyond what is required to meet standard NIJ 0101.04.

12. PWGSC argues that the complaint is without merit. It argues that the solicitation allows for bids with inserts meeting both standards NIJ 0101.04 and NIJ 0101.06. PWGSC also argues that it is the government's right to define its procurement requirements, including the right to test materials in a certain way or to request that a particular standard be met, and that it should not be required to modify its requirements to ensure that all suppliers make a profit or to compensate for business advantages. Along those lines, PWGSC suggests that setting requirements so that a less expensive product than that offered by M.D. Charlton is acceptable does not constitute discrimination.

TRIBUNAL ANALYSIS

13. From the outset, it is important to note that, contrary to M.D. Charlton's assertions, the RFSO does not limit bidders to *only* those that meet standard NIJ 0101.04. Rather, section 5.0 of Annex C to the RFSO, Technical Evaluation Plan, which lists the technical evaluation criteria, provides as follows: "a. The soft body armour panels must *meet or exceed* the protection Level IIIA of NIJ 0101.04, Ballistic Resistance of Personal Body Armour, and all lesser threats" [emphasis added].

14. Based on this language and based on PWGSC's response to M.D. Charlton dated July 5, 2016, it is clear that vests meeting standard NIJ 0101.06 would meet this criterion, as the level of protection effectively exceeds that of standard NIJ 0101.04. Thus, there was nothing preventing M.D. Charlton or other suppliers meeting the higher standard from tendering a bid on the RFSO. Accordingly, the express language of the RFSO imposes no barrier to competition.

15. As to whether the requirements may have a discriminatory effect on M.D. Charlton and other suppliers whose products are specifically designed to meet the more modern standard NIJ 0101.06, M.D. Charlton has provided little elaboration on this claim; however, its claims appear to be grounded in the notion that it is more expensive to manufacture and test vests meeting the current standard. Presumably, then, companies that supply vests meeting standard NIJ 0101.04 would have a financial advantage vis-à-vis companies supplying vests that meet the higher standard NIJ 0101.06.

4. Annex C to the RFSO, Technical Evaluation Plan, section 5.0.

16. Previous Tribunal jurisprudence and Federal Court of Appeal jurisprudence suggest that the fact that one supplier may be better situated to meet the terms of a procurement is not, in and of itself, discriminatory.⁵

17. The Tribunal has also recognized that the non-discrimination provisions of the trade agreements will not *automatically* be breached where a supplier has a business advantage that gives it a competitive edge with respect to a given procurement.⁶ Indeed, there are situations in which certain companies will have a natural or legitimate competitive advantage over others. The Tribunal has not required the government to modify procurements so as to eliminate the effects of any such natural advantages.⁷

18. Otherwise, M.D. Charlton has not provided sufficient positive evidence to establish that suppliers of vests meeting standard NIJ 0101.04 effectively have a price advantage over suppliers of vests meeting standard NIJ 0101.06. Other than allegations and the supply of documentation relating to the standards themselves, it was not demonstrated that the differences between these standards actually resulted in a real financial distinction between suppliers that would operate as a barrier to competition.

19. Even if such a price advantage did exist, the Tribunal is of the view that, on the facts of this case, it could aptly be characterized as a legitimate competitive advantage, much akin to any procurement in which the government requires goods to meet certain minimum specifications. The Tribunal cannot rule out the possibility that there could be circumstances where a solicitation, despite on its face being open to many suppliers, in fact, results in discrimination against a particular supplier or a particular group of suppliers. However, based on the facts presented to the Tribunal here, this is not such a case.

20. If it is clear from the RFSO that the standing offer will be awarded on the basis of the lowest price, conceptually, it could be difficult to offer a premium product. However, in the absence of cogent positive evidence to this effect, the Tribunal can only, in the present case, speculate on such a difficulty. Even in the face of a clearly demonstrated difficulty by M.D. Charlton, it would not herein render the procurement unfair, biased or discriminatory. The facts of this case do not lend themselves to a finding that there is an actual barrier to competition created by the terms of the RFSO.

21. Furthermore, it is well established 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 M.D. Charlton'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.

5. *Almon Equipment Limited v. Canada*, 2012 FCA 318 (CanLII).

6. *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at para. 39. In *CAE Inc. v. Department of Public Works and Governmental Services* (7 September 2004), PR-2004-008 (CITT) at para. 43, the Tribunal found that there is not "...necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. . . . [C]ompetitive advantages could be created as a result of incumbency, [intellectual property], [*International Traffic in Arms Regulations*] or any number of other business factors. . . . [I]f a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used . . . are discriminatory."

7. *Accent on Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 18.

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).

DETERMINATION OF THE TRIBUNAL

22. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. Each party will bear its own costs.

Jason W. Downey _____

Jason W. Downey
Presiding Member