



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-070

M.D. Charlton Co. Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, August 10, 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the solicitation be cancelled and a new solicitation be issued. The new solicitation should not include technical requirements that favour a particular supplier.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards M.D. Charlton Co. Ltd. its reasonable costs incurred in proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the awards.

Serge Fréchette
Serge Fréchette
Presiding Member

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STATEMENT OF REASONS

BACKGROUND

1. On March 30, 2016, M.D. Charlton Co. Ltd. (M.D. Charlton) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint relates to a procurement (Solicitation No. M7594-5-4254/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for the provision of night vision binoculars.

2. M.D. Charlton alleged that the national security exception was improperly invoked to remove the procurement process from the disciplines of the trade agreements. M.D. Charlton also alleged that the solicitation requirements favoured a specific supplier.

PROCUREMENT PROCESS

3. On February 4, 2016, PWGSC issued the Request for Standing Offer (RFSO) for this solicitation with a bid closing date of March 15, 2016. The RFSO was not made publicly available and, instead, was sent to a pre-determined list of three potential bidders, one of which was Newcon Optik. The RFSO and the covering e-mail sent to the three potential bidders also prohibited the disclosure of the RFSO to third parties without PWGSC's permission.

4. The RFSO specified that a national security exception (NSE) had been invoked and, therefore, that the procurement was excluded from all the disciplines of the trade agreements.

5. On March 1, 2016, Newcon Optik forwarded a copy of the RFSO to M.D. Charlton, its authorized Canadian government distributor.

6. On March 9, 2016, M.D. Charlton filed an objection with PWGSC. M.D. Charlton questioned the need to limit the tendering to three bidders and the need to invoke the NSE, and submitted that the procurement was otherwise not conducted in an open, fair and transparent manner, in contradiction with PWGSC's own policies. M.D. Charlton also asked several questions about the technical specifications and noted that they seemed designed to favour a particular supplier.

7. On March 11, 2016, PWGSC wrote to the three invited potential suppliers to request that they sign a non-disclosure agreement (NDA).

8. On March 14, 2016, PWGSC replied to M.D. Charlton's objection. PWGSC refused to answer M.D. Charlton's questions because "... they [did] not constitute clarification questions of the tender document but are rather expressions of discontent over the stringent specifications requested by the client department."² PWGSC further indicated that there would be no changes made to the technical specifications.

9. Also on March 14, 2016, Newcon Optik informed PWGSC that it would not sign the NDA and indicated that it and M.D. Charlton would not be submitting a bid. Newcon Optik also reiterated some of M.D. Charlton's objections, in particular that the technical specifications were designed to favour one particular supplier.

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

2. Exhibit PR-2015-070-01D at 37, Vol. 1.

10. On March 30, 2016, M.D. Charlton filed this complaint.
11. On April 6, 2016, the Tribunal accepted the complaint for inquiry.
12. On April 28, 2016, PWGSC filed a motion requesting that the Tribunal dismiss the complaint on the grounds that it does not have jurisdiction to conduct an inquiry and seeking an order directing M.D. Charlton to destroy its copy of the RFSO.
13. On June 3, 2016, the Tribunal dismissed PWGSC's motion in its entirety. The reasons for that decision are set out below.
14. On June 17, 2016, PWGSC filed its Government Institution Report (GIR).
15. On July 6, 2016, M.D. Charlton filed its comments on the GIR.
16. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

MOTION TO DISMISS

17. PWGSC submitted that, as the procurement at issue was subject to an NSE, the complaint does not concern a "designated contract" as required by section 30.1 of the *CITT Act* and subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ and that, as a result, the Tribunal does not have jurisdiction to conduct an inquiry.
18. PWGSC also submitted that M.D. Charlton should be required to destroy the copy of the RFSO in its possession because Newcon Optik sent it to M.D. Charlton in contravention of the non-disclosure obligation contained in the RFSO and requested the Tribunal to order M.D. Charlton to either return the RFSO to PWGSC or submit proof of its destruction.
19. In reply, M.D. Charlton again questioned the necessity to invoke the NSE since the technical specifications for the type of night vision binoculars requested are already in the public domain. M.D. Charlton submitted that this constituted an abuse of the NSE for the purpose of justifying the award of the contract to the RCMP's pre-determined preferred supplier.
20. As it did in an order in File No. PR-2015-039,⁴ the Tribunal found that, despite the invocation of the NSE, it retained jurisdiction in accordance with subsection 30.11(1) of the *CITT Act*. For that reason, PWGSC's motion was denied.
21. The Tribunal recently clarified the analytical framework that applies where an NSE has been invoked.⁵
22. Subsection 30.11(1) of the *CITT Act* provides that, subject to the *Regulations*, 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.

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

4. *Eclipsys Solutions Inc. v. Shared Services Canada* (4 February 2016) (CITT) [*Eclipsys*].

5. *Eclipsys* at paras. 12-22.

23. Section 30.1 of the *CITT Act* defines “designated contract” 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”

24. As contemplated by the *CITT Act*, the *Regulations* set more precise parameters for the exercise of the Tribunal’s jurisdiction. Subsection 3(1) of the *Regulations* provides as follows:

For the purposes of the definition **designated contract** in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of [the *North American Free Trade Agreement*],^[6] in Article 502 of the Agreement on Internal Trade,^[7] in Article II of the Agreement on Government Procurement,^[8] in Article *Kbis*-01 of Chapter *Kbis* of the [*Canada-Chile Free Trade Agreement*],^[9] in Article 1401 of Chapter Fourteen of the [*Canada-Peru Free Trade Agreement*],^[10] in Article 1401 of Chapter Fourteen of the [*Canada-Colombia Free Trade Agreement*],^[11] in Article 16.02 of Chapter Sixteen of the [*Canada-Panama Free Trade Agreement*],^[12] in Article 17.2 of Chapter Seventeen of the [*Canada-Honduras Free Trade Agreement*]^[13] or in Article 14.3 of Chapter Fourteen of the [*Canada-Korea Free Trade Agreement*],^[14] that has been or is proposed to be awarded by a government institution, is a designated contract.

25. None of the provisions of the trade agreements cited in subsection 3(1) of the *Regulations* make explicit reference to an exclusion from the coverage of these agreements based on national security. For example, Article 1001 of *NAFTA*, titled “Scope and Coverage”, provides in part that Chapter Ten, “Government Procurement”, applies to measures adopted or maintained by a party relating to the procurement by the government entities set out in Annexes 1001.1a-1, 1001.1a-2 or 1001.1a-3 of goods, services or construction services in accordance with Annexes 1001.1b-1, 1001.1b-2 or 1001.1b-3, where the

6. *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, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].
7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].
8. *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*].
9. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en>> (entered into force 5 July 1997) [*CCFTA*]. Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.
10. *Free Trade Agreement between Canada and the Republic of Peru*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng>> (entered into force 1 August 2009) [*CPFTA*].
11. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng>> (entered into force 15 August 2011) [*CCOFTA*].
12. *Free Trade Agreement between Canada and the Republic of Panama*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [*CPAFTA*].
13. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014) [*CHFTA*].
14. *Free Trade Agreement between Canada and the Republic of Korea*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).

value of the contract to be awarded is estimated to be equal to or greater than certain monetary thresholds. The remaining paragraphs of Article 1001 set out additional conditions that must be met in order for a procurement to be within the scope of the chapter; again, there is no reference relating to national security therein.¹⁵ The provisions relating to scope of the other trade agreements are similarly structured.

26. However, the trade agreements contain separate exclusion provisions relating to national security in respect of the disciplines of the agreements.¹⁶ For example, Article 1018 of *NAFTA*, a general provision that provides for certain specific exceptions, provides as follows:

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

27. There is no reference in this provision, explicit or implicit, to the exclusion of procurements from the scope of the government procurement chapter where national security concerns are involved. Therefore, it is not correct to pretend that the invocation of the NSE automatically removes a solicitation from the

15. Article 1001 of *NAFTA* provides as follows:

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement:
 - (a) by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2, or a state or provincial government entity set out in Annex 1001.1a-3 in accordance with Article 1024;
 - (b) of goods in accordance with Annex 1001.1b-1, services in accordance with Annex 1001.1b-2, or construction services in accordance with Annex 1001.1b-3; and
 - (c) where the value of the contract to be awarded is estimated to be equal to or greater than a threshold, calculated and adjusted according to the U.S. inflation rate as set out in Annex 1001.1c, of
 - (i) for federal government entities, US\$50,000 for contracts for goods, services or any combination thereof, and US\$6.5 million for contracts for construction services,
 - (ii) for government enterprises, US\$250,000 for contracts for goods, services or any combination thereof, and US\$8.0 million for contracts for construction services, and
 - (iii) for state and provincial government entities, the applicable threshold, as set out in Annex 1001.1a-3 in accordance with Article 1024.
2. Paragraph 1 is subject to:
 - (a) the transitional provisions set out in Annex 1001.2a;
 - (b) the General Notes set out in Annex 1001.2b; and
 - (c) Annex 1001.2c, for the Parties specified therein.
3. Subject to paragraph 4, where a contract to be awarded by an entity is not covered by this Chapter, this Chapter shall not be construed to cover any good or service component of that contract.
4. No Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter.
5. Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:
 - (a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; and
 - (b) the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.
16. Article XXIII of the *AGP*, Article *Kbis*-16 of the *CCFTA*, Article 1402(1) of the *CPFTA*, Article 1402(1) of the *CCOFTA*, Article 16.03(1) of the *CPAFTA* and Article 17.3(1) of the *CHFTA*. Further, Article 1804 of the *AIT*, a domestic trade agreement, also provides for exceptions to its provisions where there are national security concerns.

scope of the definition of “designated contract” for the purposes of subsection 3(1) of the *Regulations* and subsection 30.11(1) of the *CITT Act*.

28. When national security considerations are invoked, the trade agreements do not automatically remove a solicitation from all the disciplines of the trade agreements, nor can the simple invocation of national security concerns automatically justify, without any scrutiny whatsoever, the wholesale removal of a solicitation from the disciplines of the trade agreements. To be sure, the trade agreements allow government institutions to (i) refuse to disclose information (for example, not disclose mandatory requirements, the identity of contract awardees, etc.) or (ii) take any action that they consider *necessary* to protect national security.

29. As it did in *Eclipsys*, the Tribunal looked at the exact terms of the invocation to determine its intended scope and the extent to which the removal of certain disciplines of the trade agreements, including the Tribunal’s jurisdiction to inquire into procurement complaints, was considered necessary to protect the stated national security objective.¹⁷

30. In this case, the NSE was invoked at the request of the Deputy Commissioner of Contract and Aboriginal Policing, RCMP. In its request, dated August 26, 2015, the RCMP identified the national security interest involved in this procurement as follows:

The *specifications* of the [night vision binoculars] procurement contain details that, if released into the public domain, could compromise the integrity of the tool’s capability and jeopardize criminal and national security investigations. It is considered necessary for the protection of essential security interests that *the procurement of this solution not be disclosed* as it remains indispensable for criminal investigations, counter-terrorism and other national security purposes. Any disclosure would identify RCMP capabilities and provide avenues for adversaries to attempt to defeat this capability. These measures are considered necessary to protect public order and safety and considered necessary to protect human life and health as well as our obligations to international partnerships. The nature of any operation using this particular equipment will be covert.¹⁸

[Emphasis added]

31. To paraphrase, the national security interest identified for the purposes of this procurement is to safeguard the ability of the RCMP to conduct investigations in order to protect public order and safety, as well as human life and health. The RCMP also identified the action necessary to protect this interest, i.e. the non-disclosure of the technical specifications of the night vision binoculars.

32. In response to this request, the Assistant Deputy Minister (ADM), Acquisitions Branch, PWGSC, in a letter on September 15, 2015, agreed to invoke the NSE “[b]ased on the reasons set out in your letter of August 26, 2015, . . . to exempt the procurement of Night Vision Binoculars from the provisions of all of Canada’s trade agreements, current and future . . . *for all purposes*” [emphasis added].¹⁹

33. The Tribunal has stated that the trade agreements leave the identification of the national security interest to the sole discretion of the responsible government institution.²⁰ However, the Tribunal has also found that the language of the trade agreements suggests that the government institution should curtail the application of the disciplines of the trade agreements only to the extent necessary for the protection of the

17. *Eclipsys* at para. 21.

18. Exhibit PR-2015-070-11, Attachment 2 at 2, Vol. 1.

19. *Ibid.* at 3.

20. *Eclipsys* at para. 23.

national security interest identified with respect to the particular procurement.²¹ This means that government institutions should conduct an objective assessment and exclude only specific provisions of the trade agreements that cannot be maintained without compromising national security.

34. In this case, the RCMP conducted an assessment and clearly identified that the only action necessary to protect the national security interest was the non-disclosure of the technical specifications of the night vision binoculars to be procured.

35. However, when it invoked the NSE, PWGSC went beyond that need, as assessed by the RCMP, and instead applied a blanket exemption to the solicitation, subtracting it altogether from any and all of the disciplines of the trade agreements (i.e. for “all purposes”). In so doing, the Tribunal finds that PWGSC breached the trade agreements by failing to properly tailor the scope of the exception. Rather, the trade agreements require PWGSC to exclude only those provisions of the agreements necessary to protect the national security interest at play. In light of the RCMP’s limited objective of non-disclosure of the technical specifications, PWGSC provided no rationale to justify the extent of the means that it took to achieve that objective. The need for the wholesale jettisoning of potential suppliers’ access to all the disciplines of the trade agreements, including to the Tribunal’s review mechanism, was not justified by PWGSC. No nexus was given between the extent of the means taken in order to achieve the limited stated objective (no concern whatsoever was given to the fact that this resulted in the wholesale circumvention of the trade agreements) and the resultant nullification or impairment of the undertakings that they contain, including by barring access to the Tribunal’s procurement review mechanism.

36. Here, it is essential to underscore that, through the *CITT Act*, Parliament provided for access to a specialized procurement review mechanism that specifically allows Tribunal proceedings to be conducted, where necessary, in a manner that protects from disclosure of confidential information, including information that is of national security concern.²²

37. The procurement review mechanism provided by the *CITT Act* should have been open to those potential suppliers that met the RCMP’s security requirements to bid on the solicitation.²³ That list includes M.D. Charlton. Accordingly, the Tribunal inquired into the validity of M.D. Charlton’s complaint.

38. To be clear, the Tribunal is not questioning the validity of the national security interest identified by the RCMP. As indicated above, that is a decision with which the Tribunal does not interfere.²⁴ Consequently, the Tribunal will not address M.D. Charlton’s claim that the NSE is unwarranted because the technical specifications for that particular type of night vision binoculars are publicly available.

39. Finally, the Tribunal will not order M.D. Charlton to destroy its copy of the RFSO on the basis that the RFSO contained a non-disclosure obligation. PWGSC focused its argument on this point on the fact that Newcon Optik breached the non-disclosure obligation in the RFSO and covering e-mail by forwarding it to M.D. Charlton. However, Newcon Optik’s conduct cannot form the basis for the Tribunal to order

21. *Eclipsys* at para. 20.

22. For example, for information protected by the *U.S. International Traffic in Arms Regulations*, 22 C.F.R. Parts 120-130 and the *Defence Production Act* (R.S.C., 1985, c. D-1), in addition to signing the Tribunal’s declaration and undertaking on confidentiality, in such cases, counsel could be required to register with the Controlled Goods Program in order to obtain access to technical data pertaining to controlled goods. See Exhibit PR-2015-051-15, Vol. 1J.

23. The RFSO indicated that there was no security requirement applicable to this solicitation; however, PWGSC indicated that this was a mistake. Exhibit PR-2015-070-11 at 3, Vol. 1.

24. *Eclipsys* at para. 23.

M.D. Charlton to destroy a document. This is a matter to be resolved directly between Newcon Optik and PWGSC. The Tribunal does note however that neither M.D. Charlton nor Newcon Optik appears to have consented to be bound by the non-disclosure obligation by either signing the NDA (which was sent after M.D. Charlton raised issues with the solicitation) or submitting a bid.

MERITS OF THE COMPLAINT

Tribunal Analysis

Preliminary Findings

40. PWGSC's GIR consisted, almost entirely, in repeating the arguments that it had previously made at the time of its motion on jurisdiction.

41. PWGSC's only additional submission was that the inquiry should be terminated on the grounds that M.D. Charlton would not have been, in its view, a "potential supplier" as required by paragraph 7(1)(a) of the *Regulations*. PWGSC submitted that the information on the record regarding Newcon Optik's and M.D. Charlton's various objections to the technical specifications of the RFSO were "strongly suggestive" of the fact that Newcon Optik is not capable of producing the required type of night vision binoculars.²⁵

42. In response to these arguments, M.D. Charlton argued that PWGSC (i) had conceded that the procurement had been conducted contrary to Canada's obligations under the trade agreements and (ii) had improperly relied on the invocation of the NSE as a complete response to the complaint. M.D. Charlton submitted that, in order to give effect to the words "considers necessary" in the trade agreements, the Tribunal should examine whether the NSE has been invoked for the predominant purpose of defeating the procurement obligations arising from the trade agreements.

43. In this case, M.D. Charlton argued that the NSE was invoked solely to avoid the fair competition obligations of the trade agreements and Tribunal's scrutiny, thereby allowing the RCMP to effectively sole-source the night vision binoculars from its pre-selected preferred supplier without fear of challenge. Although three suppliers were invited to bid, M.D. Charlton submitted that this was done simply to give the solicitation the "vener of legitimacy"²⁶ and that the technical specifications were designed in such a way that only one of the companies would be able to meet them.

44. M.D. Charlton submitted that, if the predominant purpose of the invocation of the NSE is not found to be improper, then the Tribunal should continue with its traditional examination of whether the NSE has been properly invoked by a duly authorized person. M.D. Charlton also submitted that the Tribunal should examine whether the approving authority fettered his or her discretion by approving an NSE request that was unsupported by evidence sufficient to withstand a somewhat probing examination. M.D. Charlton argued that, if such evidence is lacking, then "rubber stamping" is tantamount to fettering of discretion or improper delegation because the *de facto* decision-maker in fact becomes the requesting government institution instead of the duly authorized individual.

45. M.D. Charlton submitted that that is precisely what occurred in the specific instance of this case: the ADM fettered her discretion by "rubber stamping" the RCMP's request to invoke the NSE. M.D. Charlton argued that the RCMP in fact submitted no evidence in support of its request to the ADM, but simply made

25. Exhibit PR-2015-070-19 at 12, Vol. 1.

26. Exhibit PR-2015-070-23 at paras. 11, 28, Vol. 1.

assertions and conclusions in the request that were properly for the ADM to make in deciding whether to invoke the NSE.

46. Further, M.D. Charlton submitted that, while the RCMP's request may have set out reasons for the non-disclosure of the solicitation documents, it presented no justification for the limited tendering of the solicitation nor for removing the procurement from review by the Tribunal.

47. In response to PWGSC's submission that M.D. Charlton is not a "potential supplier", MD. Charlton submitted that Newcon Optik is clearly capable of supplying the type of night vision binoculars required and provided documentary and affidavit evidence to support this argument. M.D. Charlton submitted that the fact that it and Newcon Optik ultimately declined to bid was due to their grave concerns with the procurement process and should not be considered as evidence that Newcon Optik does not manufacture the required night vision binoculars.

48. The Tribunal dismisses PWGSC's submissions on jurisdiction for the same reasons as given above regarding PWGSC's motion to dismiss the complaint.

49. Furthermore, the Tribunal gives no credence to PWGSC's submission that M.D. Charlton is not a "potential supplier". Newcon Optik was specifically invited to participate in the solicitation. M.D. Charlton has demonstrated that Newcon Optik is capable of producing the required type of night vision binoculars.²⁷

50. The Tribunal notes M.D. Charlton's arguments on the alleged fettering of discretion that occurred in this instance but makes no pronouncement on that issue for reasons of economy.

Validity of the Complaint

51. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

52. Although the RFSO does not specify a Federal Supply Classification (FSC) code, the requested goods appear to fall within FSC code 5855,²⁸ which, when procured for the RCMP, are excluded from the scope of coverage of all the trade agreements, except for the *AIT*. As a result, the Tribunal will proceed with its analysis under the *AIT* only.

53. The basis of M.D. Charlton's complaint is that the solicitation requirements favoured a specific supplier. PWGSC made no submissions on the merits of this complaint.

27. Exhibit PR-2015-070-23A (protected), Confidential Attachment 1 at para. 20, Exhibit F, Vol. 2A.

28. Based on the FSC codes identified for procurements of similar goods, e.g. Solicitation No. W8482-168198/A, Night Vision Viewers (<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-QF-108-25510>); Contract No. M7594-133542/001/QD, Night Vision Equipment, Emitted and Reflected Radiation (<https://buyandsell.gc.ca/procurement-data/award-notice/PW-QD-021-23586-001>).

54. Article 504 of the *AIT* provides as follows:

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:

...

(b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter

55. The Tribunal has previously held that including a requirement for the products of a particular supplier in the technical specifications of the solicitation documents is a violation of Article 504(3)(b) of the *AIT*, where this has been done to avoid the open competition requirements of Chapter Five.²⁹

56. In at least one instance, the technical specifications in the RFSO make it mandatory to provide the products of either of two of the three invited specific suppliers, which are identified by name.³⁰ Further, the Tribunal accepts M.D. Charlton's uncontested evidence that some of the other mandatory requirements could only be met by one supplier.³¹ In addition, there are no provisions in the RFSO that would allow for potential suppliers to propose equivalent products.

57. PWGSC has offered no justification that would allow the Tribunal to conclude that the technical requirements were set out this way for reasons other than avoiding the open competition requirements of Chapter Five. In fact, some of the documentary evidence submitted with the GIR supports M.D. Charlton's claim that the RCMP clearly had a preferred supplier,³² which is also the company favoured by the technical specifications.

58. For these reasons, the Tribunal finds that PWGSC violated Article 504(3)(b) of the *AIT*. As a result, M.D. Charlton's complaint is valid.

Remedy

59. As a remedy, M.D. Charlton requested that the solicitation be cancelled and re-solicited in an open, fair and transparent manner.

60. PWGSC did not make any submissions on the issue of remedy.

Costs

61. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

29. *AT&T Canada Corp.* (27 November 2000), PR-2000-024 (CIIT) at 5-6; *Foundry Networks* (23 May 2001), PR-2000-060 (CIIT) at 5-8; *Trust Business Systems v. Department of Public Works and Government Services* (13 May 2005), PR-2004-058 and PR-2004-059 (CIIT) at paras. 53-55.

30. Exhibit PR-2015-070-19A (protected), Confidential Attachment 4 at 28, Vol. 2A.

31. Exhibit PR-2015-070-23A (protected), Confidential Attachment 1 at paras. 15, 18, Vol. 2A.

32. Exhibit PR-2015-070-19A (protected), Confidential Attachment 3 at 7-8, 11, Vol. 2A.

62. In this instance, the complexity of the procurement itself was relatively high, as the solicitation documents contained detailed technical specifications for the required product.

63. The complexity of the complaint was also high, as it raised novel issues regarding the Tribunal's ability to inquire into complaints where an NSE has been invoked.

64. With regard to the complexity of the proceedings, these were complicated somewhat as a result of the motion to dismiss the complaint filed by PWGSC. This required additional rounds of submissions by the parties and the use of a 135-day time frame. Moreover, PWGSC was unsuccessful in this motion. The complexity of the proceedings, therefore, was also slightly higher.

65. Therefore, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and the preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION

66. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

67. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that the solicitation be cancelled and a new solicitation be issued. The new solicitation should not include technical requirements that favour a particular supplier.

68. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards M.D. Charlton its reasonable costs incurred in proceeding with the complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for the complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the awards.

Serge Fréchette
Serge Fréchette
Presiding Member