



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2003-064

Winchester Division—Olin  
Corporation

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Friday, April 2, 2004*

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IN THE MATTER OF a complaint filed by Winchester Division—Olin Corporation under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**WINCHESTER DIVISION—OLIN CORPORATION**

**Complainant**

**AND**

**DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**DETERMINATION OF THE TRIBUNAL**

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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Winchester Division—Olin Corporation.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

Tribunal Member: Pierre Gosselin, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Reagan Walker

Complainant: Winchester Division—Olin Corporation

Counsel for the Complainant: Riyaz Dattu

Interveners: Michel Gravel Agency Inc.  
Remington Arms Company Inc.

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## STATEMENT OF REASONS

### COMPLAINT

1. On November 19, 2003, Winchester Division—Olin Corporation (Olin) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. M0077-03E00/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP), the Correctional Service of Canada (CSC) and the Department of Fisheries and Oceans (DFO).
2. Olin claimed that its bid was improperly rejected and that PWGSC failed to award the contract in accordance with the requirements of the applicable trade agreements.
3. Specifically, Olin submitted that it fully complied with the mandatory requirements of the bid solicitation and advised PWGSC that it would deliver the first samples 60 days after notification of the award of the contract, contingent upon import/export licences. According to Olin, the successful bidder is also the Canadian distributor of a U.S. ammunition manufacturing company and would have faced the same import/export licence requirements. Olin submitted that delivery times were not a mandatory requirement, but rather that delivery was merely preferred as soon as possible, and that, accordingly, delivery times cannot constitute a valid criterion upon which to select or reject a bid. Olin submitted that Article 506(6) of the *Agreement on Internal Trade*,<sup>2</sup> Articles 1013(1)(g) and 1015(4)(d) of the *North American Free Trade Agreement*<sup>3</sup> and Article XII of the *Agreement on Government Procurement*<sup>4</sup> had been violated.
4. Olin submitted that the appropriate remedy is for PWGSC to terminate the designated contract and re-evaluate its proposal. Olin submitted that, in the alternative, if termination is not possible, it should be awarded the profit that it would have earned, had it been awarded the designated contract, and that it should be awarded its legal and other costs for the preparation and filing of this complaint.
5. On November 26, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup> On December 22, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> On December 29, 2003, the Tribunal granted Michel Gravel Agency Inc. (MGA) and Remington Arms Company Inc. (Remington) intervener status. After being granted an extension by the Tribunal, Olin filed its comments on the GIR on January 9, 2004. The interveners filed their comments on the GIR on January 8, 2004.
6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

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

2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

3. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

4. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

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

6. S.O.R./91-499.

## PROCUREMENT PROCESS

7. On July 29, 2003, PWGSC published a Notice of Proposed Procurement on MERX<sup>7</sup> and issued a Request for Proposal (RFP) with respect to this solicitation. PWGSC provided the RFP to an established list of qualified suppliers, including Olin.

8. The RFP called for proposals for the supply of 18 different types of ammunition and specified the categories and amounts of ammunition being acquired for each of the RCMP, CSC and the DFO. The RFP indicated that the RCMP would act as the technical authority for the solicitation with respect to all the ammunition identified in the RFP, including that acquired for CSC and the DFO.

9. According to PWGSC, items 1, 4 to 12 and 16 to 18 were for the RCMP only; items 13 to 15 were for CSC only; item 2 was divided between the RCMP and the DFO; and item 3 was divided between the RCMP, CSC and the DFO.

10. Paragraph D1 of section 4 of the RFP states the following:

1. Delivery is preferred as soon as possible. Bidders are required to specify their proposed delivery date in the Delivery Offered column of Appendix "D".

2. For Options 1 and 2:

Delivery of Options 1 and 2 are preferred to be completed within thirty (30) days from the date of the order. Bidders are required to specify their proposed delivery date in the Delivery Offered column of Appendix "D".

11. The RFP initially specified that the solicitation was to close on August 29, 2003. The bid closing date was subsequently extended to September 26, 2003. On September 18, 2003, amendment No. 1 to the RFP was issued, which amended certain provisions of the RFP relating to requirements for North American origin of the ammunition and for delivery. Five proposals were received by the bid closing date, of which three were set aside on the basis that they failed to comply with mandatory requirements of the RFP.

12. Olin's proposal contained the following information with respect to the delivery date:

IST SAMPLES 60 DAYS AFTER NOTIFICATION—CONTINGENT UPON IMPORT/EXPORT LICENSES.

13. On September 30, 2003, PWGSC requested that Olin clarify the phrase "contingent upon import/export licenses". On October 1, 2003, Olin replied that its "ability to supply against a contract [would] be contingent upon export license approvals".

14. On October 22, 2003, PWGSC informed Olin that its proposal had been found unacceptable because it was contingent upon the company receiving import/export licences.

15. On November 3, 2003, Olin objected to PWGSC's determination that its proposal was "unacceptable because it was contingent on [Olin] receiving import/export licenses". On November 4, 2003, PWGSC denied Olin's objection. On November 19, 2003, this complaint was filed with the Tribunal.

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7. Canada's Electronic Tendering Service.

## POSITIONS OF THE PARTIES

### Olin's Position

16. Olin submitted that PWGSC drew erroneous conclusions of fact and law when it stated that Olin had filed a "contingent offer" or "contingent proposal" and, therefore, did not comply with the requirement that "potential suppliers commit themselves to the supply of the goods in question."<sup>8</sup> According to Olin, PWGSC appears to take objection to the fact that Olin, by expressly stating that "delivery" or "supply" is contingent on approval of and obtaining "import/export" licences, has gone beyond qualifying its ability to deliver on time, based on third-party governmental approvals, and has in effect provided a "contingent offer" or "contingent proposal".

17. Olin further submitted that, whether explicit or not, the issue of inability to supply (as opposed to the issue of timing of delivery) is a matter with which to deal under the common law of contract through the doctrines of "frustration" and "force majeure". Olin added that, if PWGSC's concern is that Olin may not in the future be able to supply goods due to a change in the practices of the U.S. and Canadian governments, then, whether expressed or not, the winning bidder, MGA, would also be in the same position. Therefore, Olin submitted, PWGSC's conclusion that Olin's offer was "contingent" and that MGA's offer was not is incorrect in law.

18. Olin further submitted that PWGSC also made an error in effectively making "delivery" a "mandatory requirement". According to PWGSC, this is contrary to the position expressed in the RFP, that delivery was not a "mandatory requirement" and, instead, that "[d]elivery is preferred as soon as possible." Olin submitted that the statements made in the e-mail of October 1, 2003, were merely an attempt to explain why its ability to deliver could be affected by circumstances beyond its control. According to Olin, the statements set out in this e-mail could be regarded as relating only to the timing of delivery and possible delays in delivery and were not indicative that Olin was unwilling to enter into a firm contract with the Canadian federal government entities procuring its products.

19. Olin further submitted that the definition that appears to have been given to the word "supply" by PWGSC in the October 1, 2003, e-mail is unreasonable in the context of this procurement and should not have been the basis for rejecting Olin's proposal.

20. Olin submitted that the procurement of ammunition by PWGSC for the RCMP, CSC and the DFO is covered by Annex 1001.1b-1 to *NAFTA* and Appendix I, Canada, Annex 1 to the *AGP*. Olin submitted that each of the RCMP, CSC and the DFO is a federal government entity set out in Annex 1001.1a-1 to *NAFTA* and that, therefore, their procurement of goods is, in accordance with Annex 1001.1b-1 of *NAFTA*, covered by the applicable provisions of Chapter Ten of *NAFTA*, unless some exception can be shown. According to Olin, no exception has been found, nor has it been claimed by PWGSC as applying to the procurement of ammunition by PWGSC on behalf of CSC and the DFO. Thus, Olin submitted that, at least with respect to the procurement by PWGSC on behalf of CSC and the DFO, the relevant provisions of *NAFTA* should apply.

21. With respect to the claim that *NAFTA* does not apply to the procurement of ammunition by PWGSC on behalf of the RCMP, Olin submitted that this procurement is covered by Annex 1001.1b-1 and is not excluded from coverage by any of the exceptions. Olin submitted that the exceptions set out in paragraphs 2 through 5 and Section B of that annex do not exclude the ammunition at issue from the

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8. GIR, para. 7.

procurement obligations of Chapter Ten. Furthermore, Olin submitted that none of the exceptions set out in section B apply to the ammunition at issue. Olin further submitted that PWGSC's interpretation of Annex 1001.1b-1 is completely at odds with the wording of paragraphs 1 and 2 of that annex and that it is clear that paragraph 1 "applies to all goods, except to the extent set out in paragraphs 2 through 5 and Section B." Olin submitted that the aforementioned paragraph 2 does not exclude ammunition, but rather simply states that the goods listed in Section B, if purchased by the Department of National Defence and the RCMP, "are included in the coverage of this Chapter, subject to Article 1018(1)." Thus, Olin submitted that, by its very wording, paragraph 2 does *not* exclude ammunition from the coverage otherwise provided by the all-inclusive phrase of paragraph 1.

22. Olin further submitted that, for the same reasons as those set out above, the ammunition to be supplied by Olin is covered by the provisions of the *AGP*. According to Olin, with only minor exceptions, the coverage of the *AGP* extends to all goods being supplied to each of the RCMP, CSC and the DFO. Olin submitted that, in addition to the list of federal government entities covered by the *AGP*, the latter part of Annex 1 to the *AGP* provides that certain products purchased by the Department of National Defence, the Coast Guard and the RCMP are included in the coverage of the *AGP*, subject to application of Article XXIII of the *AGP* (which provides for exceptions based on various grounds, including "essential security interests"). According to Olin, this portion of Annex 1 to the *AGP* (in a manner similar to paragraph 2 of Annex 1001.1b-1 to *NAFTA*) does not exclude goods from the coverage of the *AGP*, but rather provides for the exclusion of certain goods covered. Lastly, Olin submitted that the General Notes applicable to Annex 1 to the *AGP* provide for certain exceptions to the coverage provided by the *AGP*; however, other than the potential exception for "national security", there are no exceptions for the procurement of the ammunition at issue for any of the three federal government purchasing entities, and none have been claimed in this procurement.

23. Olin submitted that it is a "Canadian supplier", as defined in the *AIT*, by virtue of the fact that it has a subsidiary with a place of business in Canada through which it sells products. Olin further submitted that it was its understanding that PWGSC prefers to have Olin supply the ammunition directly rather than have its Canadian subsidiary involved in the transactions. Accordingly, Olin maintains that it is a Canadian supplier, as defined in Article 518. Olin also submitted that, in any event, Article 514 (Bid Protest Procedures—Federal Government) does not limit the availability of the benefit of the procedures of the *AIT* bid challenge to "Canadian suppliers", but rather extends standing to all "suppliers."

### **PWGSC's Position**

24. PWGSC submitted that Appendix "D" of Olin's proposal included the phrase "contingent upon import/export licenses". According to PWGSC, although this qualification was included in a column entitled "Delivery Offered", it was not clear that the effect of this contingency was limited to delivery dates and, thus, clarification was sought from Olin. The reply from Olin, dated October 1, 2003, stated that its "ability to supply against a contract [would] be contingent upon export license approvals issued by the U.S. State Department (Centerfire products) and U.S. Commerce Department (Shotshell products)."

25. PWGSC submitted that, although, as a question of fact, the ability of any supplier proposing to supply ammunition sourced in the United States would be affected by its ability to obtain the required import/export licences from the appropriate authority, this is not relevant to this matter. PWGSC submitted that the issue is that Olin, unlike other potential suppliers, attempted to make its basic obligation to supply the ammunition contingent on its ability to obtain the required licences. This, according to PWGSC, would have the effect of relieving Olin of its liability to supply the goods in the event that permits were not issued to it. PWGSC submitted that the statement made by Olin, in the above-mentioned e-mail, had the effect of



qualifying its obligations under the solicitation and under any potential contract, thus making its proposal a contingent proposal, contrary to the provisions of the solicitation. On that basis, PWGSC submitted that it acted correctly in setting Olin's proposal aside on the basis that it was a contingent proposal and, thus, that the complaint is without merit and ought to be dismissed.

26. PWGSC further noted that Olin did not include, in its complaint, PWGSC's e-mail of September 30, 2003, to Olin, nor did it refer to Olin's reply in the complaint. PWGSC submitted that Olin's response of October 1, 2003, is the single most important document relevant to this matter and that, if at the outset, Olin had disclosed this correspondence in its complaint, this would have greatly assisted the Tribunal in determining whether there was a reasonable basis to initiate an inquiry into this matter.

27. PWGSC submitted that the procurement of ammunition for the RCMP does not fall within the scope of *NAFTA* pursuant to the terms of Annex 1001.1b-1 and, consequently, that the Tribunal does not have jurisdiction under *NAFTA* with respect to those procurements. PWGSC submitted that, for similar reasons, the procurement of ammunition for the RCMP is also not included in the coverage of the *AGP*, pursuant to the terms of Annex 1 to the *AGP*.

28. PWGSC submitted that, to have standing under the *AIT*, a complainant must be a "Canadian supplier", as defined in Article 518 of the *AIT*, which defines "Canadian supplier" as a "supplier that has a place of business in Canada". PWGSC also submitted that the *AIT* defines "place of business" as "an establishment where a supplier conducts activities on a permanent basis that is clearly defined by name and accessible during normal business hours". PWGSC submitted that it was unable to find any indication in the complaint that Olin had a "place of business in Canada", as defined in the *AIT*.

29. PWGSC requested that, for the above reasons, the complaint be dismissed and the Crown be awarded its costs.

### **Remington's Position**

30. According to Remington, Olin's allegations misstate the requirements of the RFP and the terms and conditions of Olin's proposal. Remington submitted that the obligation to supply the goods is a mandatory requirement and that any contingent proposal would fail to meet those requirements. It further submitted that Olin's proviso "contingent upon import/export licenses" cannot be read in such a manner as to apply only to the timing of delivery dates, but relates instead to the fundamental ability to supply the goods under the procurement. According to Remington, Olin qualified its response, seeking to shift the liability for failure to supply the goods from itself to the Crown and, in so doing, failed to comply with a fundamental requirement of the RFP, i.e. that potential suppliers commit themselves to the supply of the goods offered.

31. Remington agreed with the facts set out in the GIR and submitted that it is a manufacturer of ammunition products headquartered in Madison, North Carolina, and that MGA is its Canadian distributor.

32. Remington agreed with PWGSC's jurisdictional arguments set out in the GIR, namely, (1) that the ammunition items that are the subject of the procurement by the RCMP are not listed in Section B of Annex 1001.1b-1 to *NAFTA* or Annex 1 to the *AGP* and are thus excluded; and (2) that the procurement is not covered by the *AIT*, as Olin is not a "Canadian supplier".

33. For the above reasons, and the fact that Olin failed to file evidence that is required by the Tribunal to make a determination, Remington requested that the Tribunal dismiss the complaint.

**TRIBUNAL'S DECISION**

34. 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.

35. Before deciding the merits of the complaint, the Tribunal must first establish that Olin had standing, under the trade agreements, to file the complaint. The *AIT* is a domestic agreement between Canada's federal government and its provincial and territorial governments. In the case of international agreements, a third country, not party to an agreement, cannot take the benefit or be obliged to accept the burden of the agreement without its consent.<sup>9</sup>

36. Since the United States is not a party to the *AIT*, a U.S. supplier cannot be extended any rights under the *AIT*. To have standing under the *AIT*, a complainant must be a "Canadian supplier", as defined in Article 518 of the *AIT*, which defines "Canadian supplier" as a "supplier that has a place of business in Canada" and "place of business" as "an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours". The Tribunal notes that Olin has a wholly owned subsidiary, Olin Canada Inc., located in Peterborough, Ontario, which is the importer of record for a large proportion of the products that Olin sells in Canada. It is a common business practice for corporations to arrange their affairs so as to carry on various aspects of their business through wholly owned subsidiaries. One can infer from the fact that Olin Canada Inc. has a permanent address and a local telephone number in Canada that it conducts activities on a permanent basis and is accessible during normal working hours. In fact, Olin suggests that the only reason that the bid was nominally submitted by the parent corporation was to comply with an unwritten preference of PWGSC. Thus, the Tribunal is of the opinion that Olin meets the requirements of a "Canadian supplier" under the *AIT* and that, therefore, the disciplines of the agreement apply to this procurement, including the items to be purchased on behalf of the RCMP.

37. With respect to the issue of whether the procurement, on behalf of the RCMP, is also covered by *NAFTA* and the *AGP*, the Tribunal is of the opinion that, since this procurement *is* covered by the *AIT* and Olin has standing to file a complaint under that agreement, the Tribunal need not decide the issue. Thus, the Tribunal finds that it has jurisdiction to inquire into and determine the validity of the complaint.

38. With respect to the merits of the complaint, the Tribunal notes that section A6 of the RFP (Basis of Selection), as amended on September 18, 2003, states:

To be considered responsive, a bid must meet all of the following *mandatory* requirements of this solicitation:

...

7. Compliance with all other clauses, Terms and Conditions stipulated in the RFP.

[Emphasis added]

39. Paragraph 1 of section D1 (Delivery) of the RFP, as amended, reads, in part, as follows:

Delivery is preferred as soon as possible. Bidders are required to specify this proposed delivery date in the Delivery Offered Column of Appendix "D".

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9. *Vienna Convention on the Law of Treaties* (1969), 8 International Legal Materials, Art. 34.

40. The Tribunal is of the view, in light of the above portions of the RFP, that it was mandatory for the bidders to stipulate a firm delivery date in their proposals, specifically in the “Delivery Offered” column of Appendix “D”. Olin failed to do this. Rather, in each instance where it gave a delivery period, it added the phrase “contingent upon import/export licenses”. This meant that its proposed delivery periods could vary depending on the application of import and export controls. Therefore, Olin’s proposal failed to meet a mandatory requirement.

41. To further complicate matters, Olin also “clarified” its position, by writing, in its October 1, 2003, e-mail to PWGSC, that its “ability to supply against a contract [would] be contingent upon export license approvals. . . . In addition, Import Permits . . . [would] be required . . . Any delay . . . [would] affect [Olin’s] ability to perform in accordance with the contract.” This led PWGSC to conclude that Olin’s entire proposal was conditional.

42. Olin submitted that it had, in qualifying its bid as described above, merely stated the obvious. According to Olin, the common law doctrines of frustration and force majeure would have, by operation of law, attached the same reservation to its bid as was expressly stated. It is not necessary for the Tribunal to address this point of contract law, since, *whatever its effect*, the phrase “contingent upon import/export licenses” still constituted a modification of the delivery date requirement and would have required an amendment to the RFP in order to be acceptable. The proper process to obtain such an amendment would have been for Olin to rely on the procedure in section A5 of the RFP (Communications – Solicitation Period) and raise the issue of the potential problems caused by the necessity to obtain export permits with PWGSC before bid closing. Olin failed to do so.

43. Accordingly, the Tribunal finds that, based on the fact that Olin’s proposal did not contain a firm delivery date, which was identified in the RFP as a mandatory requirement, PWGSC was correct in rejecting Olin’s proposal.

44. In light of the foregoing, the Tribunal finds that the complaint is not valid.

45. The Tribunal awards PWGSC its reasonable costs incurred in preparing its response to this complaint.

#### **DETERMINATION OF THE TRIBUNAL**

46. In light of the foregoing, and pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

47. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Olin.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member