



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2005-015

Ville Marie Holding

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Monday, November 21, 2005*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL .....i

STATEMENT OF REASONS ..... 1

    COMPLAINT ..... 1

    PROCUREMENT PROCESS..... 1

    POSITIONS OF THE PARTIES .....2

        PWGSC’s position.....2

        Ville Marie’s position .....3

    TRIBUNAL’S ANALYSIS.....3

    DETERMINATION OF THE TRIBUNAL.....5

IN THE MATTER OF a complaint filed by Ville Marie Holding 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**

**VILLE MARIE HOLDING**

**Complainant**

**AND**

**THE 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 valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services take the steps proposed in the Government Institution Report, namely, that the Department of Public Works and Government Services re-evaluate the bids, beginning with the lowest-priced bid, so that the samples can undergo appropriate testing to determine whether these samples meet all the requirements of Solicitation No. 21W30-030061/B. If this re-evaluation results in a new successful bidder, the existing standing offer should be cancelled and awarded to that bidder.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Ville Marie Holding its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford

Meriel V. M. Bradford

Presiding Member

Hélène Nadeau

Hélène Nadeau

Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On August 23, 2005, Ville Marie Holding (Ville Marie) 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> The complaint concerned the procurement (Solicitation No. 21W30-030061/B) by the Department of Public Works and Government Services (PWGSC), on behalf of the Correctional Service of Canada (CSC), for the supply of mattress cushioning material.

2. Ville Marie alleged that PWGSC improperly issued a standing offer to a company whose product did not meet the technical specifications of the solicitation. It specifically alleged that the product supplied or to be supplied by the successful bidder—Adams Foam Rubber Co. of Chicago, Illinois (Adams)—did not meet the specifications because it had not been manufactured with the appropriate material and did not comply with the compression set limit in the specifications.

3. As a remedy, Ville Marie requested compensation equivalent to the general manufacturing and administration costs relating to the contract awarded and to subsequent contracts. It also requested reimbursement of the costs associated with the complaint and with preparing the bid. Finally, as an interim remedy, it requested postponement of the option to extend the standing offer awarded by PWGSC.

4. On August 26, 2005, the Tribunal informed the parties that the complaint had been accepted, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> It decided not to make an order to postpone the award of the contract because the complaint inquiry procedure would be completed well before the time that PWGSC normally decides to exercise the extension option. In addition, the Tribunal is of the view that Ville Marie has not established that the option is being exercised now. PWGSC filed the Government Institution Report (GIR) on September 23, 2005. On October 5, 2005, Ville Marie submitted its comments on the GIR. Since Ville Marie's comments contained new evidence regarding one element of the complaint, the Tribunal gave PWGSC the opportunity to comment on this new evidence on October 19, 2005. PWGSC did so on the scheduled date, and Ville Marie forwarded its final comments to the Tribunal in response to PWGSC on October 24, 2005.

5. 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, pursuant to paragraph 25(c) of the *Canadian International Trade Tribunal Rules*,<sup>3</sup> disposed of the complaint on the basis of the information on the record.

### PROCUREMENT PROCESS

6. The Request for a Standing Offer (RFSO) was published on MERX<sup>4</sup> on April 12, 2005, with a bid closing date of May 24, 2005, which was subsequently extended to May 27, 2005.

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

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

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

4. Canada's electronic tendering service.

7. The RFSO stated that the CSC required the supply of mattress cushioning material for its CORCAN<sup>5</sup> Industries at its Drumheller, Alberta, institution for a period starting from the contract award date to May 31, 2006. It included two renewal options for extending the standing offer period, specifically, June 1, 2006, to May 31, 2007, and then June 1, 2007, to May 31, 2008.

8. According to PWGSC, five companies submitted proposals, four of which, including Ville Marie, were found compliant. According to PWGSC, the standing offer was issued to Adams on July 18, 2005, for a total value of US\$180,000. On August 5, 2005, Ville Marie wrote to PWGSC to inquire into the status of the bid evaluation. On August 11, 2005, PWGSC informed Ville Marie in a letter that the standing offer had been awarded to Adams and that Ville Marie had ranked third.

9. Ville Marie filed its complaint with the Tribunal on August 23, 2005.

## POSITIONS OF THE PARTIES

### PWGSC's position

10. PWGSC submitted that, according to the specifications in Solicitation No. 21W30-030061/B, it was impossible to propose a product other than a polymerized chloroprene compound foam with a maximum compression set of 12 percent.

11. Regarding the composition of the foam, PWGSC stated that the expression "polymerized chloroprene compound foam" referred to a compound foam treated with a chemical compound that includes chloroprene to make the product fire-resistant. It added that nothing led it to believe that Adams' product did not meet this requirement. PWGSC also submitted that Ville Marie did not indicate anything at all to lead it to believe that Adams' product did not meet this generic definition. It stated that Ville Marie's claims in no way led to the conclusion that the material supplied by Adams was not the material required under the RFSO. PWGSC submitted that Ville Marie's claims were based on the assumption that the material safety data sheet of June 1, 1990,<sup>6</sup> related to the product currently offered by Adams. However, PWGSC was unsure whether this was the case. It also reported that these exhibits were inconclusive, if not contradictory. It referred to two letters from the same source where mention is made of whether hydrogen chloride (HCL) is present among the decomposition products of the foam. It stated that one exhibit submitted by Ville Marie did not indicate HCL as a by-product of decomposition, whereas the other exhibit revealed the presence of this chemical compound in the product. PWGSC mentioned that the previous product submitted by Adams as part of a different standing offer had undergone tests that had determined that it was fire resistant, in December 2004, which was approximately six months prior to the award of the current standing offer.

12. Regarding the requirement for a 12 percent maximum compression set, PWGSC stated that Adams had provided it with documents including test results, suggesting that Adams' product meets this requirement. Moreover, it noted that the samples submitted by Adams had not undergone the tests indicated in the solicitation.

13. PWGSC stated that the official in charge of administering the tests believed that it was unnecessary to test Adams' samples because the supplied product was the same as the one already in the CSC warehouse, which had come from Adams, the previous standing offer supplier. PWGSC therefore suggested that, if the Tribunal were to determine that the complaint is valid, it recommend a re-evaluation of the bids

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5. CORCAN is a CSC rehabilitation program that provides employment and training opportunities to offenders in federal correctional institutions.

6. Comments on the GIR, confidential exhibit 8.

so that these samples can undergo the appropriate tests. PWGSC believes that this action would be fairer, given that, among other things, Ville Marie is the third lowest-priced bidder and that it is unknown at this point whether its product is compliant, since it was not tested according to the requirements of the solicitation.

### Ville Marie's position

14. Ville Marie stated that, to its knowledge, the mattress cushioning material provided or to be provided to the CSC by Adams is not a polymerized chloroprene compound foam. It submitted supporting documents to the Tribunal,<sup>7</sup> including a report on the characteristics of the material safety data sheet, regarding the foam that it believes was provided by Adams, as well as correspondence from another company stating that it does not believe that the product proposed by Adams is made of the appropriate foam. Ville Marie stated that, even though the tests conducted on an Adams sample had revealed some loss of HCL, that result is inconclusive as to whether the foam in question contains polychloroprene.

15. Regarding the compression set limit, Ville Marie submitted that the maximum limit of Adams' product is higher than that stipulated in the mandatory requirement. It included a copy of the product specification sheets<sup>8</sup> that it had obtained from the only company in North America, according to Ville Marie, that manufactures the product that Adams proposed. Ville Marie submitted that these sheets show that, according to the testing conditions specified in the RFSO, the maximum compression set of this product is 20 percent, which is higher than the 12 percent limit indicated in the specifications.

### TRIBUNAL'S ANALYSIS

16. In accordance with subsection 30.14(1) of the *CITT Act*, in conducting an inquiry, the Tribunal shall limit its considerations to the subject matter of the complaint. In addition, at the conclusion of the inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract are being observed. Also, section 11 of the *Regulations* provides that the Tribunal shall determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*<sup>9</sup> and the *North American Free Trade Agreement*.<sup>10</sup>

17. Article 506(6) of the *AIT* reads as follows: "In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

18. Also, Article 1015(4)(d) of *NAFTA* provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . . ."

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7. Comments on the GIR, confidential exhibits 7, 8, 9, 10.

8. Complaint, Tab 6.

9. July 18, 1994, C. Gaz. 1995.I.1323, on line: Internal Trade Secretariat <[http://www.intrasec.mb.ca/index\\_en/ait.htm](http://www.intrasec.mb.ca/index_en/ait.htm)> [*AIT*].

10. *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*, December 17, 1992, C.T.S. 1994, No. 2 (in force January 1, 1994) [*NAFTA*].

19. Thus, the issue is whether PWGSC evaluated the bids in accordance with the evaluation criteria set out in the RFSO.

20. Ville Marie alleged that the mattress cushioning material proposed by Adams did not meet the mandatory requirements in the RFSO, specifically that the mattresses were not manufactured with a polymerized chloroprene compound foam and that the compression set exceeded the maximum allowed limit stipulated in the requirements. Moreover, PWGSC acknowledged that Adams' samples had not undergone the tests stated in the solicitation or any other independent testing.

21. The Tribunal is of the view that, based on the evidence before it, there is a doubt as to whether the mattress cushioning material proposed by Adams meets all the mandatory requirements of the specifications. It notes that PWGSC provided test results indicating that the compression set of the proposed foam meets the requirements of the specifications. However, the question of whether the Adams product is manufactured with a polymerized chloroprene compound foam was not answered to the Tribunal's satisfaction; therefore, the Tribunal determines that the complaint is valid in part.

22. The Tribunal notes that PWGSC suggested in the GIR that, if the Tribunal were to determine that the complaint is valid, the appropriate remedy would be to recommend that PWGSC repeat the evaluation process from the lowest-priced proposal stage, in other words, that PWGSC conduct the appropriate tests on the product from the lowest-priced bidder. If the lowest-priced bidder's product did not meet all the mandatory requirements, PWGSC would continue the procedure and conduct tests on the samples from the second lowest-priced bidder. The procedure would be repeated until PWGSC found a product meeting all the mandatory requirements in the RFSO.

23. The Tribunal agrees with PWGSC and believes that this remedy would be the fairest for all parties involved in this procurement. Thus, it recommends the following:

- that PWGSC confirm with all parties whether their proposed prices are still valid. If a company does not maintain its price, that company's bid would be excluded from the re-evaluation process;
- that PWGSC conduct tests on samples to be provided by the bidders to ensure that the proposed products meet all the mandatory requirements in the RFSO, specifically, that the product is a polymerized chloroprene compound foam meeting all the requirements listed in Annex A of Solicitation No. 21W30-030061/B;
- that PWGSC award the standing offer to the lowest-priced bidder whose products meet all the mandatory requirements. If the standing offer were to be issued to a company other than Adams, the standing offer with Adams should be cancelled.

24. The Tribunal notes that, in its complaint, Ville Marie requested compensation equivalent to its general manufacturing and administration costs relating to the contract awarded and subsequent contracts. Ville Marie also requested reimbursement of the costs associated with the complaint and with preparing the bid. The Tribunal believes that it is appropriate to apply the remedy of repeating the evaluation process from the point where a breach could have occurred. As such, the Tribunal does not award Ville Marie its bid preparation costs or its general manufacturing and administration costs relating to the contract.

25. The Tribunal awards Ville Marie its reasonable costs incurred in preparing and proceeding with the complaint. It took into account its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*). The Tribunal's preliminary view is that this complaint case has a level of complexity that corresponds to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The



*Guideline* contemplates classification of the level of complexity of complaint cases based on the following three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. The complexity of the procurement itself was low, in that the procurement included one simply defined item. The complexity of the complaint was low, in that the basic facts were simple. Finally, the complexity of the proceedings was low, as the respondent did in fact acknowledge the validity of the complaint, there were no motions or interveners, the 90-day time frame had been observed, and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

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

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

27. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC take the steps proposed in the GIR, namely, that PWGSC re-evaluate the bids, beginning with the lowest-priced bid, so that the samples can undergo appropriate testing to determine whether these samples meet all the requirements of Solicitation No. 21W30-030061/B. If this re-evaluation results in a new successful bidder, the existing standing offer should be cancelled and awarded to that bidder.

28. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Ville Marie its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford

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Presiding Member