



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-041

Marathon Management Company

v.

Department of Public Works and
Government Services

*Determination issued
Thursday, April 26, 2007*

*Reasons issued
Tuesday, May 29, 2007*

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IN THE MATTER OF a complaint filed by Marathon Management Company 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

MARATHON MANAGEMENT COMPANY

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 not valid.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

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Director: Marie-France Dagenais

Senior Investigator: Cathy Turner

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Complainant: Marathon Management Company

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STATEMENT OF REASONS

COMPLAINT

1. On January 26, 2007, Marathon Management Company (Marathon) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W8486-072900/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of extreme cold weather boots.
2. Marathon alleged that PWGSC incorrectly awarded the contract to another bidder and incorrectly applied the Canadian content provision. Marathon requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with the successful bidder and award the contract to Marathon.
3. On February 5, 2007, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
4. On February 7, 2007, PWGSC informed the Tribunal that a contract had been awarded to AirBoss Engineered Products Inc. (AirBoss). On March 2, 2007, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On March 13, 2007, Marathon filed its comments on the GIR.
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 disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. On October 26, 2006, PWGSC issued a Notice of Proposed Procurement (NPP) and, on November 2, 2006, issued a Request for Proposal (RFP). The bid closing date was December 14, 2006. PWGSC submitted that, in response to the RFP, five proposals were received.
7. The NPP reads as follows:
...
If 3+ bids offer Canadian goods/services other bids will not be considered.
...
8. The RFP reads as follows:
...

CANADIAN CONTENT CERTIFICATION – CONDITIONALLY LIMITED – SINGLE ITEM OR AGGREGATE BASIS

1. This procurement is subject to a preference for Canadian Goods and/or Services as defined in clause K4000D.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

2. Bids that include this representation and warranty will be given preference over other bids, if there are three or more suppliers who have submitted bids with valid certification.
3. The Bidder represents and warrants that, of the goods and/or services being offered, no less than 80 percent of the bid price consists of Canadian Goods and/or Services, as defined in the clause K4000D, Canadian Content Definition.
4. The Bidder acknowledges that the Minister relies upon such representation and warranty to evaluate bids and to enter into any contract resulting from this bid. Such representation and warranty of Canadian content may be verified in such manner as the Minister may reasonably require.
5. Should a verification by the Minister disclose a breach of such covenant, the Minister shall have the right to treat any contract resulting from this bid as being in default.
6. Failure to execute this representation and warranty on the signature block immediately following this paragraph and to include it with the bid will result in the Goods and/or Services offered being treated as non-Canadian.

...

9. Clause K4000D, "Canadian Content Definition",⁴ reads as follows:

...

Canadian good: A good wholly manufactured or originating in Canada is considered a Canadian good. A product containing imported components may also be considered Canadian for the purpose of this policy when it has undergone sufficient change in Canada, in a manner that satisfies the definition specified under the North American Free Trade Agreement Rules of Origin (see Supply Manual, Annex 5.5:

<http://www.pwgsc.gc.ca/acquisitions/text/sm/chapter05-e.html#annex5.5>).

...

10. According to PWGSC, AirBoss, Levitt-Safety Limited and Allen-Vanguard Corporation submitted proposals that included signed Canadian content certification statements. Marathon and Chaussures Régence inc. (Régence) did not include signed Canadian content certification statements with their proposals. Pursuant to the Canadian content provision of the RFP, PWGSC determined that, since three bids were submitted with Canadian content certifications, these bids were to be given preference. As a result, PWGSC set aside the bids from Marathon and Régence. On January 25, 2007, the contract was awarded to AirBoss.

11. On January 25, 2007, Marathon contacted PWGSC to discuss the evaluation results. On January 26, 2007, Marathon filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

12. 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

4. GIR, Exhibit 4.

conducted in accordance with the applicable trade agreements. In this instance, only the *Agreement on Internal Trade*⁵ applies.

Terminology

13. Marathon submitted that it was the lowest-priced bidder and not AirBoss. It argued that AirBoss is not the manufacturer of the boots in Canada but is only a footwear wholesaler.

14. Marathon submitted that the solicitation was conditionally limited to Canadian content, which requires three or more suppliers that can manufacture the boots in Canada. It contended that, if there are three bidders using the same supplier, there is only one Canadian supplier and that, therefore, this situation does not meet the Canadian content requirements in the solicitation.

15. PWGSC submitted that, according to Marathon, in giving preference to the three bids with Canadian content certifications, PWGSC did not adhere to the requirements of the RFP because the term “suppliers” in the certification clause should be interpreted as being restricted to “manufacturers” and that not all three bidders in question were manufacturers.

16. PWGSC submitted that the term “suppliers” is a term of common usage in procurement matters and is well understood to be broadly inclusive of all parties able to supply the required goods or services, including manufacturers, distributors, dealers, wholesalers and retailers. Accordingly, PWGSC submitted that the onus lies with Marathon to demonstrate that the RFP contained clear and sufficient directions to impose on this term, as it is used in the RFP, a special restrictive meaning limiting it to manufacturers.

17. The term “supplier” is defined in Article 518 of the *AIT* as follows:

[S]upplier means a person who, based on an assessment of that person’s financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement.

18. The *CITT Act* states that “potential supplier” means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

19. In the Tribunal’s view, Marathon has understood the term “supplier” as meaning “manufacturer”. The view that a supplier must be a manufacturer is not supported by the usage of the term in the *AIT*, which, in this case, is the sole trade agreement that applies, nor is it consistent with either common usage or Tribunal jurisprudence. A supplier or potential supplier is an entity that is capable of fulfilling the terms of an RFP. In the Tribunal’s view, this could include distributors, wholesalers, retailers and other potential vendors, in addition to manufacturers. The complaint therefore fails on this ground.

Canadian Content Provision

20. Marathon submitted that the Canadian content provision should not apply at all to the solicitation because 60 percent of the cost of making the boots is the rubber material. It submitted that there is no raw material of rubber found in Canada and that all rubber materials are imported. It further submitted that Canadian content means that 80 percent of the cost of the product should be Canadian and that, on the basis of the importation of rubber, these boots cannot qualify as Canadian products.

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

21. PWGSC submitted that the requirement for bids from a minimum of three “suppliers” of “Canadian goods” is a proper and reasonable requirement, since it reflects a balance, for procurement purposes, between the requirement to restrict the required goods to “Canadian goods” and the need for competition by requiring bids from multiple bidders in order to encourage price competition.

22. PWGSC submitted that the terms of the RFP provided that it was entitled to rely on the validity of the certification of bidders. It further submitted that the RFP required that bidders submit certification of the Canadian content of their goods, that it did not require that bidders provide substantiation of the validity of their certification and that it did not require an evaluation process that would independently determine whether the offered goods did in fact qualify as “Canadian goods”. According to PWGSC, such a verification process would only be initiated where the available information called a certification into question.

23. With respect to Marathon’s allegation that Canadian content means that 80 percent of the cost of the product should be Canadian and that, on the basis that all rubber inputs are imported, these boots cannot qualify as Canadian products, PWGSC contended that Marathon’s interpretation is not correct. PWGSC submitted that paragraph 3 of the Canadian content certification states that “[t]he bidder represents and warrants that, of the goods and/or services being offered, no less than 80 percent of the bid price consists of Canadian Goods and/or Services, as defined in the clause K4000D, Canadian Content Definition” and that it does not state that 80 percent of the value of each of the goods (i.e. each of the boots) is Canadian value.⁶

24. Article 506(6) of the *AIT* provides the following:

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.

25. The Canadian content provision, which was used as one of the bases for evaluation, was accessible to all bidders, as the pertinent portions were either reproduced in the RFP or incorporated into the RFP by reference.

26. PWGSC received five bids in all. In its GIR, PWGSC provided adequate evidence that three of these included the requisite certification of Canadian content for the goods being offered. In the Tribunal’s view, PWGSC, working within the terms of the RFP, was justified in applying the Canadian content provision and in setting aside those proposals that did not have the certification of Canadian content. The Tribunal is also of the view that PWGSC was not obligated to verify the validity of the certification provided by each bidder and could accept each one at face value. Accordingly, the Tribunal is satisfied that there is no evidence to indicate that, once the Canadian content provision was brought into play, the evaluation was conducted in any manner that was in violation of the terms of the RFP.

27. The Tribunal will not make a determination on the question of whether the Canadian content provision was a reasonable requirement to include within the terms of the RFP. The Canadian content provision would have been known to all bidders before the closing date for the RFP, that is, before December 14, 2006, at the very latest, and any complaint on this ground is long out of time.

6. GIR, para. 40.

Canadian Goods

28. As specified in the RFP, PWGSC used the formula under the rules of origin of the *North American Free Trade Agreement* to determine whether the goods offered qualified as Canadian goods. Marathon's argument that the goods in question cannot possibly meet the standard is not supported by the evidence on the file. The Tribunal is satisfied that there is no basis within the complaint for concluding that the formula applied by PWGSC was inappropriate or that it was applied inappropriately.

29. PWGSC's view that Marathon misinterpreted the 80 percent requirement for Canadian content appears to be somewhat inaccurate, as the goods being offered are multiple units of identical goods; therefore, the 80 percent requirement applying to the value of the total bid price would apply equally to each unit making up the total. In the end, however, this had no bearing on the outcome of the complaint.

30. Accordingly, the Tribunal finds that PWGSC did not breach Article 506(6) of the *AIT*.

31. In light of the foregoing, the Tribunal determines that Marathon's complaint is not valid.

32. In this case, since PWGSC did not request its costs associated with responding to the complaint, the Tribunal will not award costs to PWGSC.

DETERMINATION OF THE TRIBUNAL

33. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

James A. Ogilvy
James A. Ogilvy
Presiding Member