



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-019

Marathon Management Company

*Decision made
Tuesday, June 30, 2009*

*Decision and reasons issued
Friday, July 03, 2009*

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

BY

MARATHON MANAGEMENT COMPANY

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. M0077-08B052/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police for the provision of cloth.

3. Marathon Management Company (Marathon) alleged that PWGSC improperly declared its proposal non-compliant and that it should have been awarded the contract.

4. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies. In this case, only the *AIT* applies.

5. The RFP contained the following terms:

1.1 TECHNICAL EVALUATION

1.1.1 MANDATORY TECHNICAL CRITERIA

PRE-AWARD SAMPLE AND SUPPORTING DOCUMENTATION

As part of the technical evaluation, to confirm a bidder's capability of meeting the technical requirements, a pre-award sample of three (3) meter length, full width, fully representative of the specification and/or pre-contract award evaluation criteria and test results will be required, after the bid closing date and upon a written request from PWGSC, from low bidder(s) who never supplied this item to the Royal Canadian Mounted Police (RCMP).

...

The Bidder must ensure that the required pre-award sample is manufactured in accordance with the technical requirement and is/are fully representative of the bid submitted. Rejection of the pre-award sample will be the basis for declaring the bid non-responsive.

...

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. *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 (entered into force 1 January 1994).
 4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
 5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.
 6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997).

The sample will be evaluated for quality of workmanship and conformance to specified materials and measurements. Minor observations will not be a reason to reject the sample unless, in the opinion of the technical evaluator, they are considered to render the item unserviceable. However, only one deviation will result in the bid being declared non-responsive.

6. On October 1, 2008, PWGSC requested Marathon to provide its pre-award sample. It made the following statement to Marathon: “[c]are must be taken with the preparation of the pre-contract award sample, as only one opportunity to submit a compliant sample will be offered to you.”

7. On December 5, 2009, Marathon sent its sample to PWGSC. It stated the following: “The samples are a little bit overweight . . . Please note that the width of production can be adjusted . . . it is impossible for anyone to meet the specification requirement using proper test methods on this specified material. . . we focused on the colorfastness issue and forgot to make the ‘water resistance’ treatment/coating on the samples. . . We should have the test result by next Tuesday. . . .”

8. On December 9, 2009, Marathon made the following statement to PWGSC : “we would like to point out that the color of our pre-contract award sample can be dyed and matched to RCMP’s requirement. As we mentioned on our letter that we made the sample from the available stock inventory. For sure we can dye the color exactly the same to RCMP color swatch for the pre-production samples.”

9. On June 22, 2009, PWGSC advised Marathon that its pre-award sample was found to be unacceptable and cited the following four deviations:

- The test result for the mass is 521 g/m².⁷ The mass should have been from 232 to 248 g/m².⁸
- The width of the fabric is 146 cm. It should have been at least 148 cm.⁹
- The test result of the determination of resistance to surface wetting is 50 percent initially, 50 percent after 3 washes and 50 percent after 20 washes. The pre-contract award sample evaluation criteria contained in amendment No. 001 stated that the requirement for the pre-award samples was no less than 100 percent initial, 90 percent after 3 washes and 70 percent after 20 washes.
- The sample provided was soiled and/or was not dyed properly, making it difficult to evaluate it for flaws, and was not compatible with the RCMP viewing sample.

10. The Tribunal is of the view that the solicitation document was clear, in that the requirements for the pre-award samples clearly stated the conditions that had to be met by the bidder.

11. In *Trans-Sol Aviation Service Inc.*,¹⁰ the Tribunal stated the following:

11. The Tribunal is of the view that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation and that it accurately reflects the bidder’s intention ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal and to make sure that it is compliant with all essential elements. . . .

7. According to Marathon, this number is a typographical error and should have read 251.

8. Amendment No. 001, “Pre-Contract Award Sample Evaluation Criteria”, para. 4.4.

9. *Ibid.*, para. 4.5.

10. *Re Complaint Filed by Trans-Sol Aviation Service Inc.* (13 May 2008), PR-2008-010 (CITT).

12. In previous decisions, the Tribunal has stated that it will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.

13. The Tribunal finds that there is no evidence to indicate that PWGSC did not properly apply the evaluation criteria as stated in the solicitation document. In fact, the complaint contains an inherent admission that the proposal did not satisfy the applicable requirements. Consequently, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreement.

14. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

15. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member