



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-011

Marathon Watch Company Ltd.

*Decision made
Wednesday, May 19, 2010*

*Decision and reasons issued
Thursday, June 3, 2010*

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

BY

MARATHON WATCH COMPANY LTD.

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.

André F. Scott
André F. Scott
Presiding Member

Dominique Laporte
Dominique Laporte
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 procurement (Solicitation No. W8486-097012/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of binoculars.
3. Marathon Watch Company Ltd. (Marathon) alleged that PWGSC improperly declared its proposal non-compliant. In addition, Marathon alleged the following: (1) there was complicated, misleading and ambiguous procurement information that limited the number of potential bidders; (2) the successful bidder's price was too high; and (3) there was a lack of equality and fairness.
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 Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ or Chapter 14 of the *Canada-Peru Free Trade Agreement*⁷ applies. In this case, only the *AIT* applies.⁸
5. Article 506(6) of the *AIT* provides that “[t]he 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.”

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) [*NAFTA*].

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> [*AGP*].

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) [*CCFTA*]. Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

8. The Goods and Services Identification Number (GSIN) is N1240. This number corresponds to the Federal Supply Classification (FSC) code 12. Goods corresponding to this code, purchased for the Department of National Defence, are excluded from coverage under *NAFTA* per Annex 1001.1b-1, Section B, under the *AGP* per Annex 1, under the *CCFTA* per Annex Kbis-01.1-3 and under the *CPFTA* per Annex 1401.1-3.

6. Section I of Part 3 of the Request for Proposal (RFP) reads as follows:

In their technical bid, bidders must fully demonstrate compliance with the mandatory requirements by completing Annex C, Table 1, Binocular Performance Specifications – Mandatory Requirements

7. The evaluation procedures in the RFP indicate: “After the proposal closing date, no amendment to the proposal will be accepted. However, during the evaluation, [PWGSC] may, at its discretion, request clarification in writing.”

8. On May 6, 2010, PWGSC advised Marathon that its proposal had been deemed non-compliant with the following mandatory requirements:

4.2 As a minimum, 90 % of the coating shall be magnesium fluoride.

5.1 The binoculars shall be fitted with a reticle graduated in mils as shown in the figure below or marked with increments of 10 meters vice the depicted increments of 1 meter.

5.7 The vertical scale shall cover, as a minimum, a total range of 100 meters at 1000 meters distance with 30 meters at 1000 meters distance below the horizontal line and shall be etched with graduations depicting 5 meter increments at 1000 meters distance.

6.4 Broadband rejection of infra-red radiation is required and shall be achieved through the use of an absorbing glass (such as KG-5, ISK 171 or equivalent) as the substrate for the filter.

10.1 The binoculars accessories (carrying strap, eye cups, eye lens covers, and objective lens covers) shall be easily replaced by the user in the field lacking clean rooms.

9. With respect to mandatory requirement 4.2, PWGSC indicated that the specification data were not provided. While Marathon indicated in its bid that it met this requirement, it also stated that its product is “. . . (fully broadband multi-coated) on each lens”. In its complaint to the Tribunal, Marathon stated: “We specified the term ‘fully broad band multi-coating’ which is used in the optical industry recognized by anyone purchasing binoculars. PWGSC did not understand this terminology, and we feel PWGSC should have attempted to contact us for clarification.”

10. With respect to mandatory requirement 5.1, PWGSC indicated that the technical drawing and photo provided contradict the compliance statement. Marathon indicated in its bid that it met this requirement. In its complaint to the Tribunal, Marathon stated: “there are some discrepancies between our drawings and photo but DND did not ask for clarification.”

11. With respect to mandatory requirement 5.7, PWGSC indicated that the “[t]echnical drawing shows that the [vertical] scale covers a total range of 100m at 1000m distance with a 20 m at 1000 meters distance below the horizontal line.” Marathon indicated in its bid that it met this requirement. In its complaint to the Tribunal, Marathon stated: “there are some discrepancies between our drawings and photo but DND did not ask for clarification.”

12. Regarding mandatory requirement 6.4, PWGSC indicated that Marathon’s Option B proposal lacked a broadband infrared (IR) filter. Marathon indicated in its bid that it met this requirement and referred to its specification data and test reports. Marathon’s complaint to the Tribunal includes an e-mail to PWGSC, dated May 6, 2010, in which it states: “as we mentioned on our letter which was sent with the bid that we proposed two options (A & B) for laser protection. Option A – we can produce the binocular with broadband IR filter. Option B – we can coat broadband IR filter directly on the objective lens therefore broadband IR filter is not required in this option. Even DND rejected our Option B, but our option A still meets this requirement.”

13. Regarding mandatory requirement 10.1, PWGSC indicated that, since Marathon's proposal states that the eyecups are glued, they are not easily replaced by the user in the field. Marathon's complaint to the Tribunal includes an e-mail to PWGSC, dated May 6, 2010, in which it states: "it is because the eye cups could fall off easily and ruin the lens. All binoculars are manufactured this way. If changed in the field, the lens will be destroyed." Its complaint also indicates that, according to its experience, ". . . it is very hard for a [soldier] to change the eye cups in the field because [of] the lack of clean room. If the eye cups are glued they [do] not need to be replaced because they [do] not fall off."

14. In previous decisions, the Tribunal has made it clear that suppliers bear the onus to respond to and meet the criteria established in a solicitation.⁹ The Tribunal has also made it clear that the onus is on the bidder to seek clarification before submitting an offer.¹⁰ It has also 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.¹¹

15. In this case, the Tribunal notes that Marathon recognized that there were discrepancies in its proposal, specifically regarding mandatory requirements 5.1 and 5.7. Regarding mandatory requirement 10.1, it is clear that the accessories were to be ". . . easily replaced by the user in the field . . ." The Tribunal finds that PWGSC was correct in determining that Marathon's proposal did not meet this requirement.

16. With respect to Marathon's contention that PWGSC should have sought clarification, the Tribunal notes that seeking clarification was at PWGSC's discretion and that it was not obligated to do so. In any event, it should be noted that the clarification process would not have allowed Marathon to modify its proposal if adequate information had not been included in the first place.

17. Upon review, the Tribunal finds that the complaint contains no evidence that the evaluators did not properly apply themselves in evaluating Marathon's proposal and determining that it did not meet the mandatory requirements.

18. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal ". . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier."

19. Subsection 6(2) states that "[a] potential supplier who has made an objection . . . to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

20. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government

9. See, for example, *Re Complaint Filed by Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Re Complaint Filed by Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

10. See, for example, *Re Complaint Filed by Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

11. See, for example, *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

21. Regarding Marathon's allegation that there was complicated, misleading and ambiguous procurement information that limited the number of potential bidders, in order to meet the requirements of section 6 of the *Regulations*, if Marathon still had concerns about the RFP after bid closing, it had 10 working days after the bid closing date of February 5, 2010, to make an objection to PWGSC or to file its complaint with the Tribunal. Marathon did not make an objection to PWGSC on this ground, and it filed its complaint with the Tribunal on May 13, 2010. Accordingly, this ground of complaint was filed outside the time limit established in the *Regulations*.

22. Regarding Marathon's allegation that the successful bidder's price was too high, the Tribunal finds no evidence in the complaint that this is a violation of the applicable trade agreements.

23. Therefore, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

DECISION

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

André F. Scott

André F. Scott
Presiding Member