



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2013-007

Carmichael Engineering Ltd.

*Decision made  
Friday, July 5, 2013*

*Decision issued  
Monday, July 8, 2013*

*Reasons issued  
Wednesday, July 17, 2013*

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**

**CARMICHAEL ENGINEERING 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.

Ann Penner  
Ann Penner  
Presiding Member

Gillian Burnett  
Gillian Burnett  
Acting Secretary

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

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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.

### SUMMARY OF THE COMPLAINT

2. On July 3, 2013, Mr. Mark Galea of Sumit Products Inc. (Sumit) and Coldmatic Refrigeration (Coldmatic) filed a complaint on behalf of its customer Carmichael Engineering Ltd. (Carmichael). The complaint related to a procurement (Solicitation No. 21401-131879/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Correctional Service of Canada, for the supply and delivery of new walk-in coolers and freezers at three institutions located in Ontario.

3. The complaint alleged that PWGSC improperly evaluated Carmichael's proposal and did not give appropriate consideration to the fact that the proposal supposedly constituted the lowest bid.

4. As a remedy, Carmichael requested that PWGSC review the specifications in the Request for Proposal (RFP), cancel the contract and award it to Carmichael.

### BACKGROUND TO THE COMPLAINT

5. According to the complaint, an RFP was published on MERX on February 25, 2013.<sup>3</sup> The deadline for the receipt of bids was March 18, 2013.

6. On March 14, 2013, Carmichael submitted a proposal in response to the solicitation.

7. On June 13, 2013, PWGSC sent a letter to Carmichael providing the evaluation results. PWGSC advised Carmichael that its proposal did not meet mandatory requirement 4.12 of the RFP and informed Carmichael that the contract had been awarded to EnviroSoft Programmable Environmental Technology (EnviroSoft).

8. On June 14, 2013, Mr. Galea wrote to PWGSC on behalf of Carmichael. He stated that Carmichael's proposal did indeed comply with mandatory requirement 4.12 and requested an explanation as to why the evaluation team did not ask for clarification regarding that requirement. PWGSC replied to Mr. Galea by e-mail that same day, noting that it was limited in its ability to discuss the bid results of another entity, given the *Access to Information Act*<sup>4</sup> and the *Privacy Act*.<sup>5</sup> It also provided the relevant excerpt of the RFP regarding mandatory requirement 4.12.

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

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

3. Canada's electronic tendering service.

4. R.S.C. 1985, c. A-1.

5. R.S.C. 1985, c. P-21.

9. Between June 14 and 28, 2013, Mr. Galea and PWGSC exchanged additional e-mails. Mr. Galea continued to emphasize that Carmichael's bid was compliant, while PWGSC continued to decline to discuss the bid results with him. Mr. Galea and Mr. John Iozzo of Carmichael also exchanged e-mails and contacted PWGSC and MERX customer support about the ability of non-members to access procurement documents from MERX and credentials of EnviroSoft.

10. On July 3, 2013, Mr. Galea filed a complaint on behalf of Carmichael with the Tribunal.

11. On July 5, 2013, Mr. Galea submitted an amendment to the complaint form to clearly indicate that the complainant, Carmichael, was represented by Mr. Galea as counsel.<sup>6</sup>

## ANALYSIS

12. Subsection 6(2) of the *Regulations* states that “[a] potential supplier who has made an objection regarding a procurement relating to a designated contract 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” [emphasis added].

13. By “. . . actual . . . knowledge of the denial of relief . . .”, the *Regulations* contemplate explicit rejection of a complainant's requested relief, such as a written reply rejecting the complainant's substantive position. In past instances, the Tribunal has interpreted “. . . constructive knowledge of the denial of relief . . .” as other non-explicit situations, including where, after the passage of a reasonable period of time, the complainant's position has yet to be addressed by the government institution.

14. For the purposes of subsection 6(2) of the *Regulations*, the evidence indicates that Mr. Galea's letter to PWGSC of June 14, 2013, constitutes an objection. As this objection was made the day after Carmichael received the results of PWGSC's evaluation, the objection is timely.

15. Nevertheless, PWGSC does not appear to have actually responded to the substance of Mr. Galea's objection thus far. Instead, all that PWGSC has done to date is reiterate its view that it cannot discuss Carmichael's bid with Mr. Galea and to underscore the relevant mandatory requirements of the RFP. In this way, PWGSC has not yet denied relief within the meaning of subsection 6(2) of the *Regulations* and, as a result, the Tribunal currently lacks jurisdiction to accept the complaint for inquiry because it is premature.

16. PWGSC seems to have misunderstood that Mr. Galea was acting on behalf of the bidder (i.e. Carmichael), rather than Sumit and Coldmatic *per se*. This is understandable even though Mr. Galea copied Carmichael on his correspondence with PWGSC. While PWGSC recognized the “working relationship” between Mr. Galea and Carmichael,<sup>7</sup> it would not discuss the bid results with him, likely because Carmichael had not explicitly confirmed that Mr. Galea was authorized to intervene on its behalf. Indeed, correspondence between Carmichael and PWGSC was limited to the evaluation results of its bid and questions about MERX.<sup>8</sup>

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6. Further to the amendment to the complaint form submitted by Mr. Galea, the name of the complainant was changed from Sumit Products Inc. to Carmichael Engineering Ltd.

7. E-mail from PWGSC to Mr. Galea dated June 14, 2013, as an attachment to the complaint.

8. Letter from Mr. Galea to PWGSC dated June 14, 2013, and e-mails dated June 18, 2013, as attachments to the complaint.

17. Therefore, the Tribunal would encourage the parties to find a way to engage in dialogue so that Carmichael's complaint could be heard and dealt with in an appropriate and timely manner. Should such dialogue result in a denial of relief, and should Carmichael continue to believe that recourse to the Tribunal is necessary, it would be free to file a new complaint, as long as the Tribunal receives the complaint within 10 working days of the denial of relief.

18. Alternatively, Carmichael could file a new complaint if PWGSC does not address its objection within a reasonable period of time.

## **DECISION**

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

Ann Penner  
Ann Penner  
Presiding Member