



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2018-031

V Zero Corporation

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, December 19, 2018*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

V ZERO CORPORATION

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services issue the Standing Offer to V Zero Corporation and that it compensate V Zero Corporation for any lost profit up until the moment the Standing Offer is issued to it.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards V Zero Corporation its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint is Level 1 and its preliminary indication of the amount of the cost award is \$1,150.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

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STATEMENT OF REASONS

[1] On September 24 and 25, 2018, V Zero Corporation (V Zero) filed this complaint with the Canadian International Trade Tribunal (the Tribunal), pursuant to a procurement process issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for a Request for Standing Offer (RFSO) for the provision of general duty rifle plates for RCMP members.

[2] On August 21, 2018, PWGSC notified V Zero that it was the successful bidder for the procurement of general duty rifle plates for RCMP members. However, the Standing Offer issued to V Zero was subsequently rescinded on September 11, 2018, on the basis that the RCMP learned that the rifle plates offered by V Zero had been suspended from the National Institute of Justice (NIJ) Compliant Products List on May 31, 2018, and its bid was therefore deemed non-compliant with a mandatory criterion of the solicitation.

[3] V Zero alleges that its offer was compliant with the requirements of the RFSO and that it was properly issued the standing offer (SO) in the first place. It denies any allegations to the effect that its rifle plate was non-compliant to the standards of the NIJ at any relevant time.

BACKGROUND

[4] On April 14, 2017, V Zero received from the NIJ a Notice of Compliance for its rifle plate to NIJ Standard 0101.06. This authorized V Zero to apply the NIJ mark to its product model.

[5] On April 30, 2018, PWGSC published a RFSO for the provision to the RCMP of general duty rifle plates for a 12-month period, with the possibility of 12-month extension periods.

[6] On May 31, 2018, V Zero received an Advisory Notice from the NIJ. It read that the rifle plate:

has been suspended from the NIJ Compliant Products List. Following the completion of an ongoing evaluation, the compliance status of this model will be reassessed.

Law enforcement and corrections officers currently wearing this model of armor are encouraged to continue wearing it during this suspension period.

[7] On June 11, 2018, V Zero submitted its financial offer and technical bid to PWGSC for this RFSO. It did not mention in its response to the RFSO that the product it was offering had been suspended from the NIJ Compliant Products List.

[8] The RFSO process closed on June 13, 2018.

[9] On June 19, 2018, PWGSC requested that bidders submit pre-award samples and supporting documentation, in accordance with section 4.1.1.1 of the RFSO.

[10] On August 21, 2018, PWGSC informed V Zero by email that it was the successful bidder.

[11] On August 31, 2018, PWGSC emailed V Zero to enquire about the suspension from the NIJ Compliant Products List, which had just come to its attention.

[12] On September 4, 2018, V Zero responded to PWGSC advising that the suspension “is to be lifted and the V Zero PRO 1041 is to be relisted on the NIJ Compliant Products List”

[13] The next day, V Zero sent PWGSC an email with a supporting letter from the NIJ that indicates that the:

NIJ CTP will: 1. Remove the suspended status of the subject armor model and place it on the NIJ Compliant Product List as an active model. 2. Remove the NIJ Advisory Notice published in the active file on JUSTNET and mark it as being in the closed file on JUSTNET. 3. Notify the Office of Justice Program’s Bulletproof Vest Partnership of the status change of the armor model.

[14] The NIJ letter further refers to the fact that “a FIT inspection must be completed for the subject armor model during the initial production run once the suspension has been removed.”

[15] On September 11, 2018, V Zero received correspondence from PWGSC advising that it considers “V Zero Corporation non-compliant” and would withdraw the SO.

[16] Specifically, in its email dated September 11, 2018, PWGSC noted:

It is the position of the Uniform and Equipment Program to consider V-Zero Corporation non-compliant and withdraw the standing offer award notice and [issue] the SO award to the next compliant offeror. In light of the information received by the Technical authority informing us that V-Zero was, at the time of PAS submission date and pending SO award, suspended from the NIJ Compliance Products List, the Technical Authority considers this a violation of the requirement and therefore considers V-Zero non-compliant. According to NIJ, during the suspension, the product is deemed non-compliant until reinstated but ultimately it’s a grey area and the consumer is left to decide on whether or not to purchase the product.

[17] PWGSC’s email went on to note the following:

Even though V-Zero is now reinstated on the NIJ compliance product list as of September 5, 2018, V-Zero is not yet fully compliant with the re-testing protocol. The FIT inspection is the final and most important determining factor in maintaining an active status on the Compliance Products List. If V-Zero does not pass the testing protocols during the FIT inspection, they would be removed from the Compliance Products List. This would leave the RCMP without a compliant product and without a SO and a new solicitation would be required. As there is no set time line for the FIT inspection and there is a possibility that the product may not be compliant, the Technical Authority further considers V-Zero non-compliant [*sic* throughout].

[18] PWGSC also informed V Zero that it would issue the SO to the next compliant bidder.

[19] On that same day, V Zero telephoned PWGSC to object to the withdrawal of the SO.

[20] Notably, the complainant opposed the withdrawal of the SO on the following grounds:

- The only agency that can determine compliance of the V Zero product to the NIJ standard is the NIJ and the only evidence required by the RFSO was the NIJ Notice of Compliance, which was provided with the bid and with the pre-award samples.
- The Technical Authority had reviewed V Zero's NIJ documentation and found it acceptable. This evaluation must stand.
- V Zero had no obligation to notify the RCMP or PWGSC of the suspension.
- A suspension is a temporary status during an NIJ investigation.
- On August 31, 2018, PWGSC gave V Zero until September 7, 2018, to prove that the suspension was lifted. V Zero was returned to fully active status on September 5, 2018, thus meeting the deadline. It further submits that the upcoming FIT inspection does not affect that status.

[21] PWGSC disagreed with the complainant and maintained its decision to rescind the SO and issue it to the next compliant bidder.

[22] PWGSC issued the SO to M.D. Charlton, and published this information online on September 21, 2018.

POSITIONS OF THE PARTIES

V Zero's Position

[23] V Zero's position that PWGSC acted unreasonably can be summarized as follows:

- V Zero was compliant at all times with the requirements of the RFSO, because the only proof acceptable for and required by the RFSO was an NIJ Notice of Compliance (s. 4.1.1.1 of the RFSO), which V Zero provided. A NIJ "suspension" is a temporary status that does not amount to non-compliance. The NIJ never withdrew its Notice of Compliance issued to V Zero in 2017.
- V Zero was compliant because it provided the required additional supporting documentation asked by PWGSC within the time lines required by PWGSC and the RFSO – in this case, before the production phase of the contract.

PWGSC's Position

[24] PWGSC submits that it was proper and reasonable for it and the RCMP, as Technical Authority, to consider that the rifle plate proposed by V Zero was non-compliant with the mandatory requirements of the RFSO, in that the rifle plate proposed by V Zero was not fully compliant with the NIJ standard. Furthermore, PWGSC alleges that V Zero misled it in submitting its bid as being compliant with the mandatory requirement when it knew or ought to have known that it was not.

[25] PWGSC further submits that, while V Zero obtained confirmation from the NIJ on September 5, 2018, that the "suspended" status was being lifted, the NIJ still noted that a new NIJ FIT inspection would be required. According to PWGSC, giving a contract to V Zero would have required the RCMP to take a risk that the rifle plate would fail the test, thus rendering it fully non-compliant and leaving the RCMP without a "supplier of the urgently required rifle plates".

V Zero's Reply

[26] V Zero denies that it submitted a bid in bad faith or that it misled PWGSC. V Zero submits that the information pertaining to the status of its rifle plates was publicly available on the NIJ website. In fact, V Zero further submits that the certificate of compliance directs users to verify the status of the product through the website.

[27] V Zero challenges what it calls “new evaluating criteria”, which refers to PWGSC stating in its GIR that there was urgency to the rifle plate procurement and/or a risk. V Zero alleges that only it was subjected to this urgency or risk criteria and that no other submissions were evaluated as such. V Zero denies claims that there existed a risk as alleged by PWGSC.

[28] V Zero also submits that NIJ FIT inspections are ongoing and that all companies must undergo these inspections periodically, thus meaning that every company poses a risk of potential non-compliance during a FIT inspection.

ANALYSIS

[29] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act*¹ requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint. At the conclusion of the inquiry, the Tribunal must determine whether a 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* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. In this case, the *Canadian Free Trade Agreement* applies.

[30] The *Canadian Free Trade Agreement* provides that “[t]ender documentation shall include all pertinent details concerning the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighing and evaluation”² It also specifies that a procuring entity shall “base its evaluation on the conditions that the procuring entity has specified in advance in its tender notice or tender documentation”³ and “[t]o be considered for an award, a tender . . . shall, at the time of opening, comply with the essential requirements set out in the . . . tender documentation”⁴

[31] The Tribunal is typically deferential to evaluators in their evaluation decisions, and will normally only intervene if the evaluation is unreasonable, such as where 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.⁵

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

2. *Canadian Free Trade Agreement*, article 509(7) [CFTA].

3. CFTA, article 507(3)(b).

4. CFTA, article 515(4).

5. See e.g. *Gallason Industrial Cleaning Services Inc. v. Department of Public Works and Government Services* (15 August 2018), PR-2018-002 (CITT) at para. 31.

“Suspended” Status

[32] The Tribunal finds that, in determining that the suspended status of V Zero’s proposed product on the NIJ Compliant Products List made its bid non-compliant to the terms of the RFSO, PWGSC introduced a new and unannounced criterion into its evaluation. As such, PWGSC has based its evaluation on undisclosed criteria which rendered the evaluation unreasonable.

[33] The RFSO, at para. 4.1.1.1, required that the NIJ “Notice of Compliance” be submitted. It provided as follows:

- a. The U.S. Department of Justice Notice of Compliance with NIJ Standard – 0101.06 for the model provided is required.

[34] The issue for the Tribunal is whether PWGSC unreasonably concluded that a “suspension from the NIJ Compliant Products List” amounted, for the purposes of the RFSO, to V Zero being non-compliant with RFSO criterion 4.1.1.1(A)(a).

[35] V Zero provided the required Notice of Compliance in the form of a letter from the NIJ indicating that the NIJ has determined that the product model complies with the applicable requirements. This letter clearly indicated that, at least at the time of the issuance of the letter, the proposed rifle plate met the NIJ Standard – 0101.06.

[36] The RFSO did not require bidders to provide a Notice of Compliance *and* proof of an “active” status on the NIJ’s Compliant Products List at the time of submitting the bid. Had that been the requirement, PWGSC would have been justified in determining that a suspension did not meet the active status requirement. Without it, the only requirement that should have been evaluated by PWGSC is whether a valid Notice of Compliance certificate was submitted, which it was. Deeming V Zero’s bid non-compliant on the basis of the status on the NIJ Compliant Products List amounts to introducing a new and undisclosed criterion, and is therefore contrary to the applicable trade agreements.

[37] Indeed, contrary to PWGSC’s argument that the Notice of Compliance required in criterion 4.1.1.1 was critical to ensuring that “any rifle plate model proposed by a supplier was in full current compliance with NIJ Standard 0101.06 Level IV” [emphasis added],⁶ this is *not* actually what the criterion says. It was incumbent on PWGSC to evaluate proposals in accordance with the evaluation criteria that it chose for this solicitation.⁷

[38] PWGSC submits that V Zero had been advised by the NIJ that its rifle plates were not fully compliant with the NIJ’s standards, though this statement is not supported by the evidence. V Zero was not advised that its rifle plates were considered to be not fully compliant with the NIJ

6. GIR at para. 55.

7. PWGSC’s assertion that the purpose of the criterion was to ensure full current compliance is also not supported by the fact that the RCMP/PWGSC never verified the status of the product on the Compliant Products List at the stage of the initial evaluation, and this, despite the fact that the NIJ Notice of Compliance itself includes a passage indicating that “end users are invited to visit the website to verify the product’s current status” The Tribunal considers that the evidence as to how the evaluation was initially conducted by the evaluators is in fact entirely consistent with how the requirement was drafted and should always have been interpreted.

requirements; it was advised that the model had been suspended from the NIJ Compliant Products List, not that the product itself was non-compliant to a particular performance requirement.

[39] The evidence indicates that the NIJ itself makes this distinction⁸ in the following definitions:

Compliant Products List: A publicly accessible record of body armor models that have been issued an NIJ Notice of Compliance, which indicates that the models have successfully met all requirements of the appropriate standard and the CTP.

NIJ Non-compliance Notice: A notice posted with the Compliant Product List to inform law enforcement and correctional officers that production samples of a model currently on the Compliant Product List have been identified as having characteristics which have the potential of not being compliant with NIJ 0101.06. The entire model or a portion of a specific production run should be replaced as soon as possible.

Non-compliant: Status of a body armor model when testing or evaluation demonstrates that a body armor model does not satisfy one or more of the CTP requirements. Non-compliant models are not listed on the NIJ Compliant Products List.

Suspended: The temporary compliance status of an NIJ listed body armor model when one or more of the required conditions for compliance or listing is not met (either intentionally or unintentionally) due to an action on the part of the body armor applicant. Suspended models will remain on the Compliant Products List but be clearly distinguished from fully compliant models for the duration of the suspension period

[40] The Tribunal finds no evidence on which it could conclude that V Zero misled, or attempted to mislead, PWGSC as to its NIJ Notice of Compliance. First, having regard to the evidence on record as well as the RFSO criteria themselves, the Tribunal observes as follows.

[41] The RFSO required that the bidder's proposed product meet the specification outlined in "RCMP Specification for General Duty Rifle Plate, G.S. 1045-330C", including the specification that the rifle plates must meet the U.S. Department of Justice NIJ Standard 0101.06 Level IV ballistic protection level:

4.1 Ballistic Protection Level – The General Duty Rifle Plate must meet the NIJ Standard 0101.06 Level IV when tested as stand-alone hard armour against the following ballistic threat:

i. 7.62x63 mm 166 gr M2 AP, with a steal core, at velocities up to and including 887 m/s (2910 f/s)

[42] It is not contested that V Zero's pre-award samples met the inspection requirements,⁹ as evidenced by the fact that V Zero was initially assigned the SO.

8. GIR, Exhibit 4: *Body Armor Follow-Up Inspection and Testing*, CTP 4-01 (8 April 2011).

9. GIR, Exhibit 1: RFSO, section 4.1.1.1(A).

[43] Furthermore, having obtained the certification through the NIJ, the products offered by V Zero met the ballistic requirement at some point in time. Additionally, V Zero stated in its proposal to PWGSC that the product it proposed met this requirement.¹⁰

[44] In effect, PWGSC drew the conclusion that V Zero's product was non-compliant with the technical specifications and RFSO requirements on the basis of nothing at all contained in V Zero's bid, thereby ignoring the actual contents of that bid. Furthermore, in doing so, PWGSC applied evaluation criteria that were not set out in the RFSO.

[45] In essence, the Tribunal finds that PWGSC unfairly conflated the requirements and obligations of V Zero towards the NIJ, and those towards the terms of the RFSO. V Zero's status on the NIJ website and its compliance to the standards established by the NIJ concerns only the relationship between V Zero and the NIJ. As outlined above, the RFSO contained no provisions requiring that a certain status be met on the NIJ Status of Compliance List, nor that V Zero comply with all the terms of its agreement with the NIJ.

[46] Finally, it similarly appears that PWGSC conflated the RFSO evaluation criteria with the winning bidder's obligations pursuant to the resulting standing offer and contract clauses. The RFSO and resulting SO and contract clauses in fact included several provisions allowing PWGSC/RCMP to verify and ensure that the product delivered by the winning bidder and SO holder complied, and continued to comply, with the specifications identified by the RCMP. For instance, the RFSO required that, at the latest at the production phase, NIJ Compliance Test Reports be submitted. If V Zero had been unable to provide products that complied with the RCMP above-mentioned specification during the production phase, it was open to PWGSC to invoke its rights under the SO (e.g. to reassign the Standing Offer to the next lowest-priced compliant bidder, or to reissue the RFSO).

[47] It was clear in the terms of the RFSO that the successful offeror would remain obligated to submit "samples and supporting documentation as required by the resulting contract clauses" or to strictly adhere "to the technical requirement of this Request for Standing Offer and any resultant Standing Offer or any contract resulting from the Standing Offer",¹¹ therefore leaving the considerable flexibility to the RCMP, under the provisions of the resulting SO and any resulting contract, to ensure that the product provided met and continued to meet all performance requirements.

[48] With respect to the considerations of urgency introduced by PWGSC before the Tribunal, there was no indication in the RFSO that there was urgency, neither was there any mention of a time line for production. Though the Tribunal recognizes the critical importance of this piece of equipment for the RCMP, the invocation of such considerations at a later stage in the process cannot help PWGSC avoid the obligation to evaluate bids in accordance with the criteria set out in the RFSO. In any event, no evidence before the Tribunal indicates that V Zero is incapable of meeting its obligations under the SO or any resulting contracts. Finally, while the Tribunal is reluctant to suggest to PWGSC how to conduct its procurements, it might be reasonable to consider having more than one holder of a standing offer and thus alternative sources of supply, when issuing an RFSO for critically important safety items for first responders.

10. V Zero's Technical Bid at 8.

11. GIR, Exhibit 1: RFSO, section 4.1.1.1(B)(v).

REMEDY

[49] V Zero requested that the Standing Offer be awarded to it. Alternatively, V Zero is seeking compensation for lost profits, the lost opportunity and the lost experience, as well as the costs of this proceeding.

[50] PWGSC did not make submissions on the appropriate remedy recommendation.

[51] Pursuant to subsection 30.15(2) of the *CITT Act*, the Tribunal has wide discretion to craft flexible remedies:

Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

[52] Pursuant to subsection 30.15(3) of the *CITT Act*, in determining an appropriate remedy, the Tribunal must consider each of the following:

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

[53] Having considered these factors, the Tribunal finds that the most appropriate remedy in the circumstances is that PWGSC reinstate the original issuance of the Standing Offer to V Zero.

[54] The Tribunal recognizes that M.D. Charlton may have begun production to fulfill the requirements pursuant to the SO that was issued to it. The Tribunal also recognizes that supply of this product may be critical to the safety of first responders and therefore should not be interrupted at an inopportune time. As such, the Tribunal recommends that any call-ups already issued to M.D. Charlton be fulfilled by it, and that, once V Zero has demonstrated it is ready to begin production of its offered product, pursuant to the terms of section 6.10 of the Resulting Contract Clauses section of the RFSO, any further call-ups be issued to V Zero.

[55] Given the circumstances, the Tribunal also recommends that PWGSC compensate V Zero for any lost profit it suffered resulting from plates already ordered from M.D. Charlton until such time as the SO is transferred to V Zero and V Zero begins fulfilling call-ups.

COMPLAINT COSTS

[56] Pursuant to section 30.16 of the *CITT Act*, “the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.”

[57] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[58] The Tribunal finds that this complaint was relatively simple in that it raised simple issues of interpretation and contained simple allegations. The complaint proceedings were not complicated. As such, and in accordance with Appendix A of the *Guideline*, the Tribunal’s preliminary indication of the level of complexity for this complaint is Level 1, and the preliminary indication of the amount of the cost award is \$1,150.

DETERMINATION

[59] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that this complaint is valid.

[60] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC issue the Standing Offer to V Zero and that PWGSC compensate V Zero for any lost profit up until the moment the Standing Offer is issued to it.

[61] Should the parties be unable to agree on the amount of compensation for lost profit, V Zero shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have seven working days after the receipt of V Zero’s submission to file a response. V Zero will then have five working days after the receipt of PWGSC’s reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal.

[62] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards V Zero its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal’s preliminary indication of the level of complexity for this complaint is Level 1 and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member