



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File PR-2022-045

M.D. Charlton Co. Ltd.

v.

Department of Public Works and
Government Services

*Order issued
Thursday, December 1, 2022*

*Reasons issued
Friday, December 16, 2022*

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IN THE MATTER OF a complaint filed by M.D. Charlton Co. Ltd. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

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*;

AND FURTHER TO a motion filed by the Department of Public Works and Government Services on October 28, 2022, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, requesting that the Canadian International Trade Tribunal cease to conduct the inquiry on the grounds that the complaint was not filed within the time limits prescribed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

BETWEEN

M.D. CHARLTON CO. LTD.

Complainant

AND

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

**Government
Institution**

ORDER

The motion filed by the Department of Public Works and Government Services is allowed. Pursuant to paragraph 10(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal ceases its inquiry into the complaint on the ground that the complaint was not filed within the time limits prescribed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. Each party will bear its own costs in this matter.

Peter Burn

Peter Burn
Presiding Member

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

STATEMENT OF REASONS

BACKGROUND

[1] This inquiry arises from a complaint filed by M.D. Charlton Co. Ltd. (M.D. Charlton) on September 29 and October 3, 2022,¹ pursuant to section 30.11 of the *Canadian International Trade Tribunal Act* (CITT Act).²

[2] The complaint concerns a solicitation (WS3264674520) issued on a sole-source basis by the Department of Public Works and Government Services (PWGSC), on behalf of the Royal Canadian Mounted Police, for the supply of “Instant Armor-Tac III with Blanket System (5 Panels) with hardcase attachment package”.³ A contract was awarded to Rampart International Corp. (Rampart) on December 22, 2021.⁴

[3] In its complaint, M.D. Charlton alleged that, by proceeding with a directed, non-competed solicitation, PWGSC improperly awarded the contract in violation of the Canadian Free Trade Agreement (CFTA). In essence, M.D. Charlton claimed that the sole sourcing was not justified, as there were other equivalent products available from other suppliers with compatible requirements and specifications.

[4] M.D. Charlton further claimed that PWGSC never published an advance contract award notice (ACAN), nor did it publish a notice of contract award within the time frame prescribed by the CFTA. Specifically, M.D. Charlton asserted that it first saw the notice of contract award when the Government of Canada transitioned to its new official electronic tendering service, CanadaBuys.canada.ca (CanadaBuys),⁵ i.e. on or around September 20, 2022.⁶ M.D. Charlton further alleged that a notice of contract award was never published on the Government of Canada’s previous electronic tendering service, Buyandsell.gc.ca (Buyandsell).⁷ In support of its allegation, M.D. Charlton mainly relied on correspondence dated September 22, 2022, from PWGSC’s contracting authority, indicating that no notice of contract award was posted on Buyandsell as a result of the lingering effects of a “widespread system error” during the transition to CanadaBuys.⁸

[5] On October 12, 2022, the Canadian International Trade Tribunal informed the parties that the complaint had been accepted for inquiry in accordance with subsection 30.13(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations),⁹ as it was satisfied, at the time the complaint was filed, that all conditions necessary for the Tribunal to initiate and proceed with an inquiry were met.¹⁰

¹ Exhibit PR-2022-045-01; Exhibit PR-2022-045-01.A.

² R.S.C., 1985, c. 47 (4th Supp.).

³ Exhibit PR-2022-045-01 at 14.

⁴ *Ibid.*

⁵ See CanadaBuys.canada.ca, online: <<https://canadabuys.canada.ca/en>>.

⁶ See Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/>>, indicating that “CanadaBuys is the new official source for Government of Canada tender and award notices.”

⁷ Exhibit PR-2022-045-01 at 6.

⁸ *Ibid.* at 19.

⁹ SOR/93-602.

¹⁰ Exhibit PR-2022-045-04; Exhibit PR-2022-045-05.

[6] Following the Tribunal's decision to conduct an inquiry into M.D. Charlton's complaint, PWGSC filed a motion¹¹ requesting that the Tribunal cease its inquiry on the basis that the complaint was not filed within the time limits set out in section 6 of the Regulations. PWGSC claimed, essentially, that contrary to M.D. Charlton's allegation, a notice of contract award was, in fact, published and made publicly available on Buyandsell as of December 29, 2021. As a result, PWGSC argued that the basis of M.D. Charlton's complaint should have reasonably become known to it as of that date.

[7] Rampart was granted leave to intervene in this matter and made submissions in support of PWGSC's motion.¹² M.D. Charlton, for its part, opposed PWGSC's motion.¹³ PWGSC also filed a reply to M.D. Charlton's submissions.¹⁴

[8] For the reasons that follow, and having carefully considered the parties' submissions as well as the evidence on record, the Tribunal has decided to grant PWGSC's motion and cease its inquiry into the present complaint.

POSITION OF THE PARTIES

PWGSC

[9] PWGSC submitted the present motion on the basis that the complaint was not filed within the time limits prescribed by section 6 of the Regulations. To support and substantiate its claims, PWGSC relied on the sworn affidavits from three persons employed with PWGSC.¹⁵

[10] Specifically, PWGSC claimed that a notice of contract in respect of this solicitation was first published on December 29, 2021, on Buyandsell, which remained publicly available up until September 19, 2022. PWGSC further claimed that, during a transitional "beta period" between August 8, 2022, and September 18, 2022, notices that were present on Buyandsell were also publicly available on CanadaBuys, as the two websites were working in parallel while transitioning to CanadaBuys. The notice of contract award in question from Buyandsell was replicated and migrated in the form of an amendment to CanadaBuys on July 27, 2022.

[11] Moreover, PWGSC claimed that the transition from Buyandsell to CanadaBuys was completed on September 19, 2022, at which point CanadaBuys became the Government of Canada's official electronic tendering service. As of that date, notices that were previously published on

¹¹ Exhibit PR-2022-045-13.

¹² Exhibit PR-2022-045-15.

¹³ Exhibit PR-2022-045-17.

¹⁴ Exhibit PR-2022-045-18.

¹⁵ PWGSC's evidence consisted of the sworn-in affidavits of Catherine Wong, supply officer and contracting authority who was responsible for the contract at the time (Exhibit PR-2022-045-13 at 9–10); Mohit Sharma, acting director within the Buyandsell Team, Procurement Assistance Canada Sector (Exhibit PR-2022-045-13 at 19–21) and Giuseppe D'Angelo, principal service designer at the time and manager of the service design, overseeing the design and development of CanadaBuys, as well as the full migration from Buyandsell to CanadaBuys (Exhibit PR-2022-045-13 at 24–26). A supplementary affidavit of Giuseppe D'Angelo was filed by PWGSC in reply to M.D. Charlton's submissions (Exhibit PR-2022-045-18 at 5–6). These sworn-in affidavits were accompanied by documentary evidence, which comprised notably internal email correspondence within PWGSC as well as a screenshot of Buyandsell data logs information.

Buyandsell were no longer publicly available on that website. The notice of contract award remains publicly available on CanadaBuys as of today.

[12] Relying on the affidavit material filed in support of its motion, PWGSC argued that M.D. Charlton reasonably should have known the basis of its complaint on the day on which the notice of contract award was first posted on Buyandsell, i.e. December 29, 2021. PWGSC further argued, among other things, that a nine-month delay to search for an award notice and file a complaint with the Tribunal is simply not vigilant and would, as a result, impede the procurement process that is meant to be expeditious and focused on achieving finality of procurement contracts.

Rampart

[13] Rampart submitted that M.D. Charlton's failure to review the government's official tendering website for more than eight months cannot be considered reasonable diligence in the context of the Tribunal's procurement review mechanism.

[14] Rampart argued, notably, that absent evidence to the contrary, bidders should be deemed to have obtained a copy of the notice of contract award on the date of their publication on the Government of Canada's official electronic tendering service.¹⁶ Rampart further argued that, while potential suppliers are expected to keep a constant vigil and react as soon as they become aware or reasonably should have become aware of a potential flaw in the process, there is no evidence or information in the complaint demonstrating that M.D. Charlton took any steps to keep itself apprised of notices of contract awards on the government's official tendering website.

[15] Finally, Rampart stressed that M.D. Charlton's allegation that no notice of contract award was ever published on Buyandsell is "incorrect and grossly misleading".¹⁷

M.D. Charlton

[16] M.D. Charlton opposed PWGSC's motion and submitted that it was without merit.

[17] Among the arguments that were raised in opposition to PWGSC's motion, M.D. Charlton argued that the date on which CanadaBuys was launched is the date when it should have reasonably become aware of the notice of contract award. M.D. Charlton maintains its position that there was no notice of contract award published prior to that date, given PWGSC's very own admission at the outset of the complaint process. M.D. Charlton stressed that it has a legitimate expectation that the information provided by PWGSC is reliable.

[18] M.D. Charlton further argued that, without being able to "currently" see the published notice of contract award on Buyandsell, it would be impossible to suggest this as factual. M.D. Charlton

¹⁶ Rampart relied on the Tribunal's jurisprudence, which provides for the general principle that, when grounds of complaint concern the terms of a solicitation or of amendments, bidders are generally deemed to have obtained copies of solicitations or amendments on the date of their publication to argue that the same principle should apply to contract award notices published on the Government of Canada's official tendering website. Rampart notably relied on *CTS Defence Inc. v. Department of Public Works and Government Services* (11 August 2021), PR-2020-102 (CITT) at paras. 37–38.

¹⁷ Exhibit PR-2022-045-15 at 1.

stressed, notably, that an online search using the Google search engine reveals that the notice of contract award related to this solicitation was never published on Buyandsell.¹⁸

[19] Finally, M.D. Charlton's submissions included comments on the submissions and evidence filed by PWGSC and Rampart.

ANALYSIS

[20] Pursuant to section 6 of the Regulations, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no 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 supplier.¹⁹ In other words, the prescribed time limit will start running on the date a potential supplier or complainant either became aware or reasonably should have become aware of its ground of complaint.

[21] It is well established that, in procurement matters, time is of the essence and potential suppliers must be vigilant and react as soon as they become aware or reasonably should have become aware of a flaw in the process. In that regard, the Federal Court of Appeal, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,²⁰ underlined the functional importance of the limitation periods inherent in the procurement regime as follows:

[18] In procurement matters, time is of the essence. The time limits for the filing of a complaint are governed by section 6 of the Regulations. Subsection 6(1) requires potential suppliers to file complaints "not later than ten working days after the day on which the basis of the complaint became known or reasonably should have become known" to them (my emphasis). Subsection 6(2) provides for the delivery of formal objections to the contracting authority within ten working days of the potential suppliers knowing or having objective knowledge of the basis for an objection. If an objection is made, then the ten-day time limit in subsection 6(1) to complain is extended to a further ten working days from the time that a written answer is given to the objection.

...

[20] Complaints, on the other hand, may be filed "concerning any aspect of the procurement process that relates to a designated contract" (ss. 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47). Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. The whole procurement process, as is illustrated by the Question and Answer method which ensures that potential suppliers equally know at all times what conditions have to be met, is meant to be as open as it is meant to be expeditious. It is focussed on achieving finality of contracts in the best possible time.

[Underlining in original]

¹⁸ M.D. Charlton filed, in support of its submissions, various excerpts of searches conducted on the Google search engine; Exhibit PR-2022-045-17 at 330.

¹⁹ Subsections 6(1) and (2) of the Regulations.

²⁰ 2002 FCA 284.

[22] In the matter at hand, the allegation that the sole sourcing or the limited tendering was not justified constitutes the basis of M.D. Charlton's complaint. In the Tribunal's view, the day triggering the application of the 10-working day statutory period for the filing of a timely objection or complaint in this case would be the day on which M.D. Charlton knew or reasonably should have known that a contract had been awarded to Rampart. Given the absence of an ACAN, it is only at this juncture that M.D. Charlton could have known or reasonably should have known that PWGSC improperly or unjustly used, as alleged, limited tendering procedures.

[23] International trade agreements impose a requirement on procuring entities to publish contract award information by way of notice on a designated medium.²¹ In that respect, and for reasons of transparency, article 516(2) of the CFTA, an applicable trade agreement relied upon by M.D. Charlton, requires procuring entities to publish on their tendering websites or designated systems a notice containing prescribed information, no later than 72 days after the award of each contract. The prescribed information notably includes a description of the goods or services being procured, the name and address of the procuring entity and the successful supplier, the date of award and, if limited tendering was used, the conditions and circumstances that justified its use. The CFTA further prescribes that the information shall remain readily accessible for a reasonable period of time. In Canada, these notices are published on the Government of Canada's official electronic tendering service.²²

[24] The Tribunal agrees with Rampart and is of the view that bidders or potential bidders would, absent evidence to the contrary and subject to the particular facts of each case, generally be considered to have obtained a copy of the notice of contract award, and thus be made aware of a contract award, on the date of publication of the notice on the Government of Canada's official electronic tendering service, or a reasonable time thereafter. It bears noting, in that regard, that M.D. Charlton stated in its complaint that the publishing of a notice of the contract award "would permit other suppliers to challenge the justification for a limited tender ...".²³

[25] The main issue raised by this motion turns on determining the date on which the notice of contract award was, in fact, published on the Government of Canada's official electronic tendering service. Parties have presented contradictory views in that regard.

[26] When the Tribunal initially accepted M.D. Charlton's complaint for inquiry, it did so based on the evidence placed on the record. The information available at the time suggested that the

²¹ See e.g. article XVI(2) of the World Trade Organization Agreement on Government Procurement, article 10.16(2) of the Canada-Ukraine Free Trade Agreement, article 19.15(2) of the Canada-European Union Comprehensive Economic and Trade Agreement, article 15.16(3) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, article 17.13(2) of the Canada-Honduras Free Trade Agreement, article Kb11-11(2) of the Canada-Chile Free Trade Agreement, article 1410(8) of the Canada-Peru Free Trade Agreement, article 1410(8) of the Canada-Colombia Free Trade Agreement, and article 16.11(8) of the Canada-Panama Free Trade Agreement. These trade agreements are accessible via the Tribunal's website, online: <https://www.citt-tcce.gc.ca/en/procurement-inquiries/legislation-and-trade-agreements>.

²² It was previously Buyandsell and is now CanadaBuys.

²³ Exhibit PR-2022-045-01 at 8.

complaint was timely. The information *prima facie* supported M.D. Charlton's assertion that a notice of contract award may have only been published on CanadaBuys on or around September 20, 2022.²⁴

[27] PWGSC has since, as part of its motion, presented additional evidence with respect to the timeliness of the complaint via sworn-in affidavits. Based on this additional evidence, the Tribunal finds that PWGSC has demonstrated, on balance, that a notice of contract award was in fact published on December 29, 2021, on Buyandsell, contrary to M.D. Charlton's earlier assertion. The Tribunal concludes, as a result, that M.D. Charlton's complaint was filed outside the time limits prescribed by the Regulations, given that M.D. Charlton reasonably should have become aware of the basis of its complaint as early as December 29, 2021.²⁵

[28] In the Tribunal's view, the affidavits filed in support of the present motion provided ample and sufficient evidence to support PWGSC's claim that a notice of contract award was published on December 29, 2021, on Buyandsell, which remained publicly available until CanadaBuys became the official electronic tendering service.²⁶ The affidavits provided detailed and reliable explanations as to how the migration process from Buyandsell to CanadaBuys took place during the relevant period²⁷ and were accompanied by corroborating documentary evidence, which included data log information from Buyandsell²⁸ as well as contemporaneous internal correspondence confirming that a notice had indeed been published on Buyandsell on December 29, 2021.²⁹ On balance, the Tribunal placed greater weight on the uncontroverted evidence presented via affidavit than other evidence on the record, such as the information generated from a Google search that was filed by M.D. Charlton.³⁰ The Tribunal is thus satisfied that a notice of contract award was indeed published on the Government of Canada's previous electronic tendering service, Buyandsell, as of December 29, 2021.

[29] As a result, the Tribunal finds that M.D. Charlton reasonably should have become aware of the basis of its complaint as early as of that date. To put it differently, M.D. Charlton should have reasonably known that a contract had been awarded to Rampart as of the date of publication of the notice of contract award on Buyandsell. M.D. Charlton did not adduce any evidence that would warrant departing from this reasoning, nor was there any evidence demonstrating that M.D. Charlton kept a constant vigil during the relevant period. Indeed, there is no clear evidence of any steps or

²⁴ M.D. Charlton filed, in support of its complaint, correspondence dated September 22, 2022, from PWGSC's contracting authority to M.D. Charlton indicating that a "widespread system error" had resulted in the failure of the notice of contract award being published on Buyandsell. See Exhibit PR-2022-045-01 at 19.

²⁵ The Tribunal has, in the past, dismissed complaints in circumstances where, after it had initiated an inquiry, it obtained additional evidence indicating that the complaint was untimely. Section 10 of the Regulations also provides that "[t]he Tribunal may, at any time, order the dismissal of a complaint where ... (c) the complaint is not filed within the time limits set out in these Regulations" See e.g. *Harris Corporation v. Department of Public Works and Government Services* (23 August 2018), PR-2018-001 (CITT) at paras. 84–86; *Oracle Canada ULC v. Department of Public Works and Government Services* (24 July 2014), PR-2014-010 (CITT) at paras. 15–18.

²⁶ See e.g. Exhibit PR-2022-045-13 at 9, 20.

²⁷ See e.g. Exhibit PR-2022-045-13 at 19–20, 24–25; Exhibit PR-2022-045-18 at 5.

²⁸ See Exhibit PR-2022-045-13 at 23.

²⁹ *Ibid.* at 13–18.

³⁰ As stated by the Tribunal in *Rona Inc. v. President of the Canada Border Services Agency* (18 October 2019), AP-2018-053 (CITT) at para. 111, "... the result of a Google search alone does not comprise information that is obtained from an identifiable and verifiable source or publication. Purported information delivered by Google alone may be crowd-sourced, variable or otherwise be inherently unreliable" (footnote omitted).

actions that were taken by M.D. Charlton to keep itself apprised of notices of contract award on the Government of Canada's electronic tendering service between the date of publication of the notice of contract award on Buyandsell and the date CanadaBuys became the official electronic tendering service.

[30] The Tribunal therefore concludes that M.D. Charlton's complaint was filed outside the time limits prescribed by the Regulations. In order to meet the prescribed time limits, M.D. Charlton would have been required to either file an objection to the government institution or a complaint with the Tribunal within 10 working days of December 29, 2021.

[31] Finally, the Tribunal would like to make some final remarks. While the Tribunal has no reason to doubt the explanation provided by PWGSC's contracting authority in its sworn-in affidavit as to why it had made an erroneous statement to M.D. Charlton on September 22, 2022,³¹ the Tribunal reminds PWGSC that procuring entities should ensure that information provided to potential suppliers is accurate. One would expect that procuring entities would take care to ensure that information is accurate before it is used and disclosed to potential suppliers or bidders. The Tribunal cannot but note that, had PWGSC provided an accurate response at the outset, the triggering of the present complaint could have been avoided.

[32] Neither party requested to be awarded costs in the matter.³² Given these circumstances, the Tribunal finds it appropriate that each party will bear its own costs in this matter.³³

DECISION

[33] The motion filed by PWGSC is allowed.

[34] Pursuant to paragraph 10(1)(c) of the Regulations, the Tribunal ceases its inquiry into the complaint on the ground that the complaint was not filed within the time limits prescribed by section 6 of the Regulations.

[35] Each party will bear its own costs in this matter.

Peter Burn
Peter Burn
Presiding Member

³¹ See Exhibit PR-2022-045-13 at 10.

³² Exhibit PR-2022-045-01 at 6; Exhibit PR-2022-045-13.

³³ See e.g. *Exeter v. Attorney General of Canada*, 2013 FCA 134 (CanLII).