



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-074

M.D. Charlton Co. Ltd.

Decision made
Wednesday, March 15, 2023

Decision issued
Thursday, March 16, 2023

Reasons issued
Thursday, March 30, 2023

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

BY

M.D. CHARLTON CO. LTD.

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

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*¹ (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (Regulations), a potential supplier may file a complaint with the Canadian International Trade 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] The complaint by M.D. Charlton Co. Ltd. (M.D. Charlton) relates to a request for proposal (RFP) (solicitation W8485-226574/A) issued on November 9, 2021, by the Department of National Defence (DND). The RFP invited proposals for the provision of helmet liners.³

[3] M.D. Charlton alleges that, while the contract for the solicitation in question was awarded over 72 days ago, DND never issued a contract award notice,⁴ contrary to what is required under certain trade agreements.

[4] On March 15, 2023, the Tribunal decided not to conduct an inquiry into the complaint for the reasons set out below.

BACKGROUND

[5] The RFP was issued on November 9, 2021.⁵

[6] On February 21, 2023, M.D. Charlton emailed DND to inquire about the status of the RFP.⁶ Specifically, M.D. Charlton inquired whether a contract had been awarded and, accordingly, whether an award notice had been issued.

[7] On February 21, 2023, DND confirmed that the contract had indeed been awarded in 2022. DND made no comment pertaining to the notification of such award.⁷

[8] On March 12, 2023, M.D. Charlton filed a complaint with the Tribunal.

¹ R.S.C., 1985, c. 47 (4th Supp.).

² SOR/93-602.

³ Exhibit PR-2022-074-01.A at 1.

⁴ Exhibit PR-2022-074-01 at 1–2.

⁵ *Ibid.* at 19; Exhibit PR-2022-074-01.A at 1.

⁶ Exhibit PR-2022-074-01 at 19.

⁷ *Ibid.*

ANALYSIS

[9] Pursuant to sections 6 and 7 of the Regulations, upon receipt of a complaint which complies with subsection 30.11(2) of the CITT Act, the Tribunal must decide whether the following four conditions have been met before it may conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;⁸
- (ii) the complainant is a potential supplier;⁹
- (iii) the complaint is in respect of a designated contract;¹⁰ and
- (iv) the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.¹¹

[10] The second requirement concerns the standing of a complainant to bring a complaint to the Tribunal. In this regard, subsection 30.11(1) of the CITT Act provides that “a potential supplier may file a complaint with 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.” In turn, section 30.1 of the CITT Act defines “potential supplier” as “a bidder or prospective bidder on a designated contract.”

[11] In this case, before accepting the complaint for inquiry, the Tribunal must determine whether M.D. Charlton is either a bidder or a prospective bidder on the designated contract (i.e., solicitation W8485-226574/A).

[12] In its reply to the Tribunal’s letter requesting additional information, M.D. Charlton confirmed that it had not submitted a bid in relation to the designated contract at issue.¹² The Tribunal therefore finds that M.D. Charlton is not a bidder on the designated contract.

[13] Secondly, the Tribunal will consider whether M.D. Charlton is a prospective bidder on the designated contract. In this regard, the Tribunal has held that two requirements must be met in order for a complainant to be considered a prospective bidder in relation to a particular designated contract.¹³ First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, the complainant must be capable of submitting a proposal for the procurement at issue. An exception to this last requirement could be made where the complainant is effectively deprived of that capacity as a result of an alleged breach of the trade agreements by the government institution in the procurement process.

⁸ Subsection 6(1) of the Regulations.

⁹ Paragraph 7(1)(a) of the Regulations.

¹⁰ Paragraph 7(1)(b) of the Regulations.

¹¹ Paragraph 7(1)(c) of the Regulations.

¹² Exhibit PR-2022-074-01.B at 1.

¹³ *Flag Connection Inc. v. Department of Public Works and Government Services* (3 September 2009), PR-2009-026 (CITT) at para. 20.

[14] Based on the evidence before the Tribunal, it is clear that the second condition is not met: M.D. Charlton does not have the capacity to submit a proposal for the procurement at issue, given that the bidding period has expired. As such, M.D. Charlton cannot be considered a prospective bidder in relation to the designated contract at issue.

[15] In this regard, M.D. Charlton is not alleging that it has been precluded from bidding due to a breach of the trade agreements.¹⁴ In the present case, M.D. Charlton's only ground of complaint relates to DND's alleged failure to publish a contract award notice as required by certain trade agreements.

[16] For the foregoing reasons, the Tribunal finds that M.D. Charlton is neither a bidder nor a prospective bidder with respect to the designated contract that is the subject of this complaint and, therefore, not a potential supplier in relation to the designated contract at issue. Consequently, M.D. Charlton does not have standing to file this complaint.

[17] As the Tribunal and the Federal Court of Appeal have held in the past, where the Tribunal determines that a complainant does not meet the statutory definition of "potential supplier", the Tribunal is required, as a matter of law, to dismiss the complaint for lack of jurisdiction.¹⁵

DECISION

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

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

¹⁴ M.D. Charlton submitted, on the same date, another complaint concerning solicitation W8485-226512/A on the alleged same grounds related to DND's failure to publish a contract award notice under the prescribed timeline. See *M.D. Charlton Co. Ltd.* (16 March 2023), PR-2022-075 (CITT).

¹⁵ *Wärtsilä Canada Incorporated v. Department of Public Works and Government Services* (3 August 2021), PR-2021-007 (CITT) at para. 59; *Canada (Attorney General) v. Siemens Enterprise Communications Inc.*, 2011 FCA 251 at para. 5; *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207 at para. 16.