



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2013-041

Alcohol Countermeasure  
Systems Corp.

v.

Royal Canadian Mounted Police

*Determination and reasons issued  
Thursday, April 24, 2014*

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IN THE MATTER OF a complaint filed by Alcohol Countermeasure Systems Corp. 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**

**ALCOHOL COUNTERMEASURE SYSTEMS CORP.**

**Complainant**

**AND**

**THE ROYAL CANADIAN MOUNTED POLICE**

**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 Tribunal recommends that the Royal Canadian Mounted Police cancel the Request for a Standing Offer - National Individual Standing Offer, Solicitation No. 201403094, and the standing offer issued thereunder to DAVTECH Analytical Services Inc., and issue a new solicitation on the basis of non-discriminatory requirements. In this regard, the Canadian International Trade Tribunal suggests that the new solicitation could include all relevant information, including historical data on the usage of ethyl alcohol standards by relevant Royal Canadian Mounted Police detachments for the period of the standing offer previously in effect, as well as any available information with respect to the transition to dry gas standards.

Ann Penner

Ann Penner

Presiding Member

Gillian Burnett

Gillian Burnett

Secretary

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## STATEMENT OF REASONS

### BACKGROUND

1. On February 18, 2014, Alcohol Countermeasure Systems Corp. (ACS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> concerning a Request for a Standing Offer - National Individual Standing Offer, Solicitation No. 201403094 (RFSO) by the Royal Canadian Mounted Police (RCMP) for the supply of ethyl alcohol standards to detachments across Canada.

2. ACS complained that the pricing mechanism of the RFSO unfairly benefitted the incumbent supplier (and ultimate successful bidder). Specifically, ACS alleged that the RFSO gave the incumbent an unfair advantage because it required bidders to include all freight charges in their financial offers but failed to specify the distribution of shipments to the various RCMP detachments across Canada. Given that the incumbent had historical knowledge of the RCMP's needs, it was therefore uniquely positioned to predict future requirements and, thus, the freight charges to be factored into the total bid price. ACS explained that, due to the weight of ethyl alcohol standards, shipping charges could contribute up to 20 percent of the total price and that multiple shipments to remote locations could have a very important impact on total costs.

3. As a remedy, ACS requested that the RFSO be cancelled and a new RFSO issued based solely on the cost of ethyl alcohol standards, excluding any shipping costs. If shipping costs were to be included, ACS requested that all potential suppliers be given historical information for shipping quantities for the last three years to enable them to fairly participate in the procurement. ACS did not request its complaint costs. However, it asked that the award of any contract in relation to the RFSO be postponed until the final determination by the Tribunal pursuant to subsection 30.13(3) of the *CITT Act*.

4. On February 21, 2014, the Tribunal informed the parties that the complaint had been accepted for inquiry, having satisfied the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> On the same day, the Tribunal ordered the postponement of the award of any contract (i.e. call-ups) in relation to this solicitation until the Tribunal determined the validity of the complaint.

5. On March 18, 2014, the RCMP filed a government institution report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> ACS filed its comments on the GIR on March 26, 2014.

6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

### PROCUREMENT PROCESS AND COMPLAINT

7. The RCMP issued the RFSO on October 10, 2013. The solicitation closed on November 20, 2013.

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

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

3. S.O.R./91-499.

8. The RFSO estimated the total quantity of ethyl alcohol standards that the RCMP intended to purchase under the standing offer, as follows:

2.3 One standing offer will be issued as a result of this solicitation. The estimated quantity per year is as follows:

Initial Period: 10,000 packages\*

Option year 1: 7,000 packages

Option year 2: 3500 packages

Option year 3: 3500 packages

\*each package contains 6 bottles.<sup>4</sup>

9. The RFSO required bidders to quote firm unit prices and total yearly prices on the basis of these quantities. The firm unit prices were to include all applicable charges, including freight charges to various RCMP destinations across Canada,<sup>5</sup> as follows:

2.1 Offerors must submit their financial offer in accordance with Annex B, Basis of Payment.

2.1.1 The Offeror must quote firm unit prices, DDP Destination, freight charges to destination and all applicable customs duties and excise taxes must be included. The total amount of Goods and Services Tax or Harmonized Sales Tax must be shown separately, if applicable.

...

#### **ANNEX "B"** **BASIS OF PAYMENT**

The Offeror shall be paid the firm unit prices, Delivery Duty Paid (DDP) (as per Annex D - RCMP Shipping Addresses/Users), freight charges to destination and all applicable Customs duties and Excise taxes included, the total amount of applicable taxes must be shown separately, as detailed below for the items and period identified.

10. The evaluation criteria indicated that the responsive offer with the lowest evaluated price would be recommended for issuance of a standing offer.<sup>6</sup> Further, Annex "B" made clear that the evaluated price for each bid would be derived by adding the total prices per year for each of the years of the RFSO (i.e. initial period, plus three option years).

11. The RFSO therefore required bidders to include freight charges to destination in their firm unit and total prices, but did not specify how the total yearly quantities would be spread across RCMP detachments.

12. By e-mail dated November 18, 2013, ACS contacted the RCMP contracting officer with the following request:

Would the RCMP be able to provide *an approx. shipment size to each of the locations specified in Annex D*. This is required since shipping to remote locations such as Whitehorse can cost a lot more than major urban cities. An approximate yearly usage would be sufficient.<sup>7</sup>

[Emphasis added]

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4. RFSO, Part 1, Exhibit PR-2013-041-01, Vol. 1.

5. RFSO, Annex "D", Exhibit PR-2013-041-01, Vol. 1.

6. RFSO, Part 4, section 2.1, Exhibit PR-2013-041-01, Vol. 1.

7. Exhibit PR-2013-041-10, tab 4, Vol. 1.

13. Although this request was received after the period for questions and answers envisaged in the RFSO had passed, the RCMP contracting officer replied to ACS on the same day, in the following terms:

... because this is a Standing Offer Agreement [the RCMP is] unaware of approximately how many packages each destination may request throughout the year. One way you can estimate the shipping charges is that the bigger divisions will always order more than the smaller divisions up north.<sup>8</sup>

14. ACS submitted its bid on November 19, 2013. Its financial offer was based on quantities per destination pro-rated to their populations.<sup>9</sup>

15. On January 29, 2014, the RCMP advised ACS that its bid had not been chosen, as it did not achieve the lowest evaluated price. It also informed ACS that the standing offer had been awarded to DAVTECH Analytical Services Inc. (DAVTECH).<sup>10</sup> As noted above, DAVTECH was also the incumbent supplier.

16. On February 6, 2014, ACS objected by phone to the RCMP that the RFSO process was unfair because the RCMP did not release quantities for the various shipping addresses. The RCMP conducted an internal review of the procurement process in response. It informed ACS, on February 7, 2014,<sup>11</sup> that no unfair practices were found and that the results of the procurement would stand.

17. On February 18, 2014, ACS filed its complaint with the Tribunal. As stated above, the basis of its complaint was that, by not releasing approximate quantities for each relevant destination, the RFSO unfairly favoured the incumbent supplier that allegedly had historical knowledge of the quantities shipped to each RCMP detachment, including remote detachments, thus allowing it to attribute freight charges more accurately to its cost structure.

## POSITIONS OF PARTIES

18. The RCMP set out two arguments in the GIR to respond to ACS' complaint.

19. First, the RCMP argued that the complaint was filed beyond the time limits in subsections 6(1) and (2) of the *Regulations*. In its view, ACS filed its complaint nearly three months after it first became aware of the basis of its complaint. According to the RCMP, ACS requested information on historical yearly usage on November 18, 2013, and the contracting officer made it clear, on the same day, that that information would not be provided.<sup>12</sup> Accordingly, the RCMP argued that "ACS could have and should have raised a formal objection at that time."<sup>13</sup>

20. In reply, ACS submitted that it had been diligent at all times and that, as such, its complaint was submitted on time.

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8. *Ibid.*

9. *Ibid.*, tab 5. See, also, the chart submitted to the Tribunal by ACS explaining the method underlying its financial offer, Exhibit PR-2013-041-14, Attachment 1, Vol. 1.

10. Exhibit PR-2013-041-10, tab 6, Vol. 1.

11. While the complaint form indicates that the denial of relief from the RCMP came on February 7, 2014, the further explanations provided by ACS in an e-mail to the Tribunal dated February 18, 2014, indicate that discussions with the RCMP occurred between February 7 and 10, 2014. In any case, this point is not disputed by the RCMP (see Exhibit PR-2013-041-10 at para. 10, Vol. 1), nor is the exact date of the RCMP's denial of relief in February determinative in the circumstances to the timeliness of the complaint.

12. The Tribunal notes that this statement in the GIR is inaccurate; ACS requested the "... approx. shipment size to each of the locations specified ..."; it did *not* refer to historical yearly usage in its November 18, 2013, e-mail.

13. Exhibit PR-2013-041-10 at para. 15, Vol. 1.

21. Second, the RCMP argued that historical knowledge of the quantities delivered to various RCMP detachments did not provide the incumbent supplier with an unfair advantage because such information was not relevant in the preparation of a successful bid.

22. In that context, the GIR noted that the RCMP is currently phasing out the use of ethyl alcohol standards and transitioning to dry gas standards. However, because “RCMP detachments across Canada are at various stages of the transition process and will continue to progress at unpredictable rates”<sup>14</sup> and because “[v]ariables surrounding the decision to transition to dry gas alcohol standards are specific to each detachment, and must be considered independently by each detachment commander”,<sup>15</sup> it was impossible for the RCMP to predict the approximate yearly usage for each detachment. Further, the RCMP explained that historical usage information was not helpful and could even have been misleading to potential suppliers when predicting future usage, given the large number of unknown variables.”<sup>16</sup>

23. Accordingly, the RCMP argued that all potential suppliers, including the incumbent, were in the same position. All were required to make an “educated guess” about the frequency and the quantity to be delivered to RCMP detachments across the country, including those in remote locations.

24. The RCMP added that the Government is not obligated to take measures to reverse any legitimate and natural advantage that an incumbent supplier might have during a solicitation.<sup>17</sup> Likewise, it argued that the obligation to provide a level playing field does not absolve potential suppliers of relying on their own skills to acquire any additional information that they feel may be useful when developing a competitive bid. Finally, the RCMP added that, given the sheer weight and volume of ethyl alcohol standards, a supplier’s ability to take logistics and transportation into account when designing its pricing model was an important part of the service for which the RFSO was tendered.

25. In reply, ACS underscored its view that the RCMP not only structured the RFSO to include shipping costs, which clearly required past usage information from which to make predictions, but also withheld information regarding the transition to dry gas standards, as it was not mentioned in the RFSO at all. As such, the incumbent was doubly advantaged; it had not only information regarding historical usage (including information on which detachments ordered more overall, and in what shipment sizes) but also information regarding which detachments had transitioned or were transitioning to the dry gas standards. ACS explained that, to the extent that detachments that had transitioned or were already transitioning to dry gas standards were also the most remote ones (with the highest shipping costs), the impact on total pricing could be “monumental”.

## ANALYSIS

26. The Tribunal’s role in a case of this sort is to determine the validity of a complaint. It will do so in the context of the RCMP’s two principal arguments: (1) whether the complaint was time-barred; and (2) whether the RFSO provided an unfair advantage to the incumbent supplier.

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14. *Ibid.* at para. 7.

15. *Ibid.* at para. 21. This is supported by the affidavit of Mr. Benny Wong, Exhibit PR-2013-041-10, tab 3, Vol. 1, which provides, at para. 4, that decisions about the rate of conversion are detachment-specific.

16. Exhibit PR-2013-041-10 at para. 22, Vol. 1.

17. The RCMP relied on *Corel Corporation* (26 October 1998), PR-98-012 and PR-98-014 (CITT).



### Was the Complaint Timely?

27. The time limits for the filing of a procurement complaint are rigid and strictly enforced.<sup>18</sup> Subsection 6(1) of the *Regulations* requires potential suppliers to file complaints "...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 them. Subsection 6(2) provides that potential suppliers may also choose to first make a formal objection to the relevant government institution within 10 working days of knowing or having objective knowledge of the basis for an objection. In the latter case, the potential supplier has 10 working days after the day on which it has actual or constructive knowledge of the denial of relief by the government institution to file its complaint with the Tribunal.

28. The RCMP argued that ACS knew of its ground of complaint on November 18, 2013, when the RCMP contracting officer refused to provide an estimated breakdown per shipping address of the yearly quantities of ethyl alcohol standards required under the RFSO. Accordingly, the RCMP argued that ACS should have made a formal objection within 10 days of this time.

29. The Tribunal disagrees.

30. Nothing in the e-mail exchange of November 18, 2013, indicates that ACS had at that time turned its mind to the issue of incumbent advantage. Contrary to what is alleged in the GIR,<sup>19</sup> on November 18, 2013, ACS did *not* request an estimate of past yearly usage for each RCMP detachment. Instead, ACS only asked that the RCMP provide estimated quantities for the years of the RFSO. As such, while ACS was aware on November 18, 2013, that certain information that it considered relevant to its bid was missing from the RFSO documents, it does not follow that the issue of potential incumbent advantage had become apparent, or reasonably should have become apparent, to it at that time.

31. Indeed, in the Tribunal's view, the RCMP's very answer of November 18, 2013, supports the view that ACS did not know, and could not reasonably have known, of its ground of complaint at that time. As mentioned, in the November 18, 2013, e-mail, the contracting officer suggested that ACS "... estimate the shipping charges [by considering] that the bigger divisions will always order more than the smaller divisions up north."<sup>20</sup> In effect, the RCMP suggested a methodology to ACS by which to determine the quantities per destination for the purposes of preparing its financial offer. ACS followed this suggestion. In this respect, the Tribunal considers that, far from indicating to ACS that information regarding historical shipments per destination would not be provided, as argued in the GIR,<sup>21</sup> the RCMP provided the variables for ACS to derive estimates for the years of the RFSO. In effect, the RCMP's answer was akin to providing the very information requested by ACS at that time (i.e. approximate shipment size for the RFSO years).

32. The Tribunal considers that, in effect, the RCMP reasonably addressed any concerns that ACS may have had with respect to the pricing mechanism of the RFSO in November 2013. Indeed, ACS explained in its comments on the GIR that it submitted its bid using the methodology suggested by the RCMP in the

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18. It is well established that, in procurement matters, time is of the essence and that potential suppliers must "... keep a constant vigil and ... react as soon as they become aware or reasonably should have become aware of a flaw in the process", *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20.

19. Exhibit PR-2013-041-10 at para. 14, Vol. 1.

20. *Ibid.*, tab 4.

21. *Ibid.* at para. 14.

November 18, 2013, e-mail, “. . . on the reasonable assumption that the RCMP would take this into account when awarding the contract.”<sup>22</sup>

33. It is noteworthy that nothing in the November 18, 2013, exchange, or in any other evidence on the record, indicates that ACS even knew that the incumbent was in the contest at any point before January 29, 2014, when it found out that the incumbent supplier had won the standing offer.

34. Accordingly, in the Tribunal’s view, it is when ACS found out that a standing offer was issued to the incumbent that it realized that the RFSO may have created inequality between potential suppliers, by failing to provide all bidders with equal information that was required in order to be able to bid competitively in this process, in a context where one potential supplier – the incumbent – likely had access to such information. The Tribunal therefore finds that ACS only became aware of its ground of complaint on January 29, 2014. Given that ACS respected all the other deadlines under subsection 6(2) of the *Regulations*,<sup>23</sup> the Tribunal determines that the complaint was timely.

### **Did the RFSO Favour the Incumbent Supplier?**

35. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the 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.

36. The single question in this regard is whether the RFSO provided an unfair advantage to the incumbent supplier.

37. All the trade agreements<sup>24</sup> identified in paragraph 7(1)(c) of the *Regulations* apply to this solicitation and similarly forbid discrimination between potential suppliers. For example, the *AGP* provides

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22. Exhibit PR-2013-041-14 at para. 8, Vol. 1.

23. After becoming aware of its ground of complaint on January 29, 2014, ACS objected to the RCMP on this basis within 10 working days (i.e. on February 6, 2014). ACS further filed the complaint on February 18, 2014, that is, within 10 working days of being denied relief by the RCMP on February 7, 2014. As such, ACS respected all deadlines in subsection 6(2) of the *Regulations*.

24. *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*]; 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*]; 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*]; *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; *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*]; *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [*CCOFTA*]; *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [*CPAFTA*].

that tendering procedures of covered entities must be applied in a non-discriminatory manner, including an obligation that contracting authorities not provide any supplier with information with respect to a procurement in a manner that could preclude competition.<sup>25</sup> Article VII of the AGP provides as follows:

**Article VII: Tendering Procedures**

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.
2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

38. Furthermore, the trade agreements include specific procurement rules to ensure that tendering procedures are practically conducted in a non-discriminatory manner.<sup>26</sup> In particular, the central premise of any fair and transparent procurement system is that each and every supplier must be given all the information necessary to submit a responsive tender.<sup>27</sup>

39. The Tribunal has recognized that the non-discrimination provisions of the trade agreements will not automatically be breached where a supplier, including an incumbent, has a certain business advantage that gives it a competitive edge with respect to a procurement.<sup>28</sup> However, the Tribunal has equally recognized that a breach of the trade agreements will occur when procuring entities use solicitation documents to create or compound an unfair advantage to an incumbent. For example, the Tribunal has found such a breach in previous cases where, as a result of the terms of solicitation documents, an incumbent had access to information directly relevant to the procurement process that was not available to other bidders.<sup>29</sup>

40. It is in this context that the Tribunal must examine whether the pricing mechanism established by the RFSO provided the incumbent with an unfair competitive advantage (i.e. an advantage that went above and beyond any natural competitive advantage that it may already have possessed). If the Tribunal

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25. The wording of the anti-discrimination provision in Article 1008(1) of *NAFTA* closely resembles that of the *AGP* provision. Article 1403(3) of the *CPFTA*, Article 1403(3) of the *CCOFTA* and Article 16.04(3) of the *CPAFTA* require that procuring entities conduct procurements in a “transparent and impartial manner”, namely, in a manner consistent with the particular rules provided in those agreements. Although drafted in different terms, the *AIT* also forbids discrimination between suppliers (Articles 501 and 504). For example, see the Tribunal’s reasoning in this regard in *AT&T Canada Corp.* (27 November 2000), PR-2000-024 (CITT) at 5-6. Article Kbis 2 of the *CCFTA* is similar to the *AIT* in this respect.

26. For example, the rules in Articles VI through XVI of the *AGP*.

27. See, in particular, Article XII(2) of the *AGP*; Article 1013(1) of *NAFTA*; Article 506(6) of the *AIT*; Article Kbis-06(1) of the *CCFTA*; Article 1407(6) of the *CPFTA*; Article 1407(6) of the *CCOFTA*; Article 16.08(6) of the *CPAFTA*.

28. In *CAE Inc. v. Department of Public Works and Governmental Services* (7 September 2004), PR-2004-008 (CITT) at para 43, the Tribunal found that there is not “. . . necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. . . . [C]ompetitive advantages could be created as a result of incumbency, [intellectual property], [*International Traffic in Arms Regulations*] or any number of other business factors. . . . [I]f a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used . . . are discriminatory.”

29. See, for example, *Tactical Technologies Inc.* (30 April 1998), PR-97-037 (CITT); *Telus Integrated Communications Inc.* (2 November 2000), PR-2000-017 and PR-2000-035 (CITT) (reversed on unrelated jurisdictional grounds in *BCE Nexxia Inc. v. Canada (Commissioner of Corrections)*, 2002 FCA 9 [CanLII]); *Trust Business Systems v. Department of Public works and Government Services* (13 May 2005), PR-2004-058 and PR-2004-059 (CITT) (reversed on a different basis in *Canada (Attorney General) v. Trust Business Systems*, 2007 FCA 89 [CanLII]).

determines that an unfair competitive advantage was provided by the RFSO, it must therefore conclude that the non-discrimination provisions of the relevant trade agreements were breached.<sup>30</sup>

41. The RFSO did not provide a breakdown of the approximate quantities of ethyl alcohol standards that would be required by each detachment.<sup>31</sup> Nevertheless, the RFSO also made it clear that the single basis for awarding the standing offer was total price, including all freight costs. Therefore, it is evident that the lack of information regarding the distribution of shipments would have had to have been supplemented in some way by bidders in order to prepare bids. Indeed, the shipping distances to RCMP detachments across the country, and the RCMP's own admission that "... the sheer weight and volume of Ethyl Alcohol Standards ..." are important pricing considerations,<sup>32</sup> made information about the distribution of shipments an important variable for this RFSO.

42. The RCMP argued that all bidders were on a level playing field in determining the shipment distribution variable. In particular, all bidders, including the incumbent, were in the same position of having to make an "educated guess" about future shipping quantities and frequency per RCMP detachment, and about the associated freight costs. The RCMP did not deny that the incumbent had acquired information regarding historical usage of ethyl alcohol standards that was not provided to other bidders. Similarly, it did not deny that the incumbent was aware of the transition to the dry gas standards, which appears to have been mentioned for the first time in the GIR. However, the RCMP did state that historical usage information for ethyl alcohol standards and information regarding the transition would be "useless", and even potentially misleading, when bidders were making predictions for future usage of ethyl alcohol standards.

43. The Tribunal does not accept the RCMP's view.

44. As ACS rightly pointed out, historical usage information remained a relevant factor for predicting future usage, especially for those detachments that had not yet started or were not very advanced in the transition to dry gas standards.<sup>33</sup> In addition to the extent that remote detachments were already advanced in the transition, the Tribunal accepts ACS' argument that knowledge of this information could have impacted greatly on forecasted future freight costs and bidders' cost structures.<sup>34</sup>

45. Accordingly, the Tribunal finds that the pricing mechanism of the RFSO inherently advantaged the incumbent, as it would have been the only potential supplier privy to such information relevant to the RCMP's requirements. In that sense, the degree to which the incumbent was advantaged is, in the Tribunal's view, over and above any natural business advantage acquired by the incumbent as a result of its previous experience, because it stems from the very terms of the RFSO themselves.

46. The Tribunal recognizes that the RCMP may not have been in a position to establish its future needs with certainty in the context of the transition to dry gas standards. Nevertheless, the RCMP was fully obligated under the trade agreements to formulate the RFSO in a way that would not discriminate between bidders. At the very least, the RCMP was obligated to provide as much information as was possible when setting the terms of the RFSO, including the fact that the transition was underway, so as to help all bidders

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30. The same approach was taken by the Tribunal to examine allegations of discrimination against a certain type of suppliers in *Acklands-Grainger Inc. v. Department of Public Works and Government Services* (19 September 2011), PR-2011-007 at paras. 58-59. The Tribunal's decision was upheld on judicial review by the Federal Court of Appeal in *Acklands-Grainger Inc. v. Canada (Attorney General)*, 2012 FCA 298 (CanLII).

31. RFSO, Part I, section 2.3, Exhibit PR-2013-041-01, Vol. 1.

32. Exhibit PR-2013-041-10 at para. 27, Vol. 1.

33. The GIR states that "RCMP detachments across Canada are at various stages of the transition process...", Exhibit PR-2013-041-10 at para. 7, Vol. 1. The GIR includes no timelines regarding the transition to dry gas standards.

34. Exhibit PR-2013-041-14 at para. 2, Vol. 1.

prepare responsive and competitive bids and so as to alleviate any information disparity vis-à-vis the incumbent.<sup>35</sup>

47. There is no doubt that potential suppliers have to assume an element of risk when preparing bids in a competitive bidding process. Nevertheless, procuring entities cannot leave bidders without relevant information over which they have control.<sup>36</sup> In cases such as this where new developments unfold alongside the procurement process itself, it is important that procuring entities structure or conduct their procurements in a way that provides bidders with pertinent information that is equally available to all. In this way, procuring entities ensure that incumbent suppliers are not placed in an unduly privileged class separate from all other potential suppliers.

48. Historical usage information, as well as any other available information about the transition, regardless of how limited it might have been at the time the RFSO was issued, would have helped all bidders make projections about the future usage of ethyl alcohol standards of RCMP detachments, notwithstanding the RCMP's views to the contrary. This information would have been directly relevant to each and every bidder when trying to develop competitive and realistic bids. To paraphrase the words of the RCMP, this type of information would have enabled bidders to ensure that their "educated guesses" were that much more educated. Ultimately, it would have ensured that bidders compete for the standing offer on a fair basis.

49. For the foregoing reasons, the Tribunal finds that, by setting up the pricing mechanism in the RFSO as it did, and by not disclosing relevant information that could have assisted bidders in estimating freight costs, the RCMP conducted this procurement in a manner that discriminated between potential suppliers, thereby breaching the applicable trade agreements. Accordingly, the Tribunal finds that the complaint is valid.

## REMEDY

50. In accordance with the criteria set out in subsection 30.15(3) of the *CITT Act*, the Tribunal finds that the breach identified above is serious and prejudicial to the integrity and efficiency of the competitive procurement system. The deficiency was not only potentially prejudicial to ACS but also potentially prejudicial to any other potential supplier that had participated in this RFSO process.<sup>37</sup> In light of the Tribunal's postponement of award order issued on February 21, 2014, the Tribunal expects that no contract (i.e. call-up) pursuant to the standing offer will have been awarded or performed to date.

51. In these circumstances, the Tribunal considers it appropriate to recommend, pursuant to subsection 30.15(2) of the *CITT Act*, that the RFSO and the standing offer issued to DAVTECH be cancelled.

52. Further, the Tribunal recommends that the RCMP issue a new solicitation constructed on the basis of non-discriminatory criteria. For example, the RFSO could include all relevant information, including historical data on the usage of ethyl alcohol standards by RCMP detachments for the period of the standing offer previously in effect, as well as any available information with respect to the transition to the dry gas standards.

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35. In this regard, the Tribunal has previously found, in other circumstances, that "... as much as possible, all bidders are entitled to receive *any* information that could reduce the natural advantage of an incumbent... it is critical that [new developments relevant to the requirements of the solicitation] be reasonably documented and made equally available to all potential suppliers" [emphasis added], *Tactical Technologies* (30 April 1998), PR-97-037 (CITT) at 9-10.

36. *Corel Corporation* (26 October 1998), PR-98-012 and PR-98-014 (CITT).

37. The GIR did not indicate the number of bids received as part of the process.

53. ACS did not request any costs with respect to this complaint process. The Tribunal will not therefore award costs, in accordance with its usual practice.

54. Finally, as a general comment, the Tribunal would encourage the RCMP to be mindful of the importance of properly informing bidders of their recourse to the Tribunal, in appropriate circumstances. In this case, neither the regret letter dated January 29, 2014, nor the RFSO made any mention of such recourse or of the applicable timelines. Further, it appears that the RCMP did not inform ACS of the possibility of filing a complaint with the Tribunal when it denied its objection by telephone between February 7 and 10, 2014.<sup>38</sup> Instead, it appears that ACS was directed to the Tribunal by a person who had no connection to the present procurement process, that is, an employee of the Department of Public Works and Government Services, with whom ACS had previous experience.

55. Although the present complaint was filed within the prescribed time limits under section 6 of the *Regulations*, it clearly took ACS additional time to determine its appeal options, without having been fully informed by the RCMP. This could have resulted in a scenario in which the Tribunal refused to accept ACS' complaint on the basis of timeliness alone, given the tight timelines for filing a complaint with the Tribunal. In this regard, the RCMP should consider the inclusion of the following paragraph in the main body of its solicitations and when informing bidders of the possibility of requesting a debriefing, as well as in all letters advising bidders when they are not successful:

As a general rule, a complaint regarding this procurement process must be filed with the Canadian International Trade Tribunal (the Tribunal) **within 10 working days** from the date on which a bidder becomes aware, or reasonably should have become aware, of a ground of complaint. Alternatively, within that time frame, a bidder may first choose to raise its ground of complaint by way of an objection to [the RCMP]; if [the RCMP] denies the relief being sought, a bidder may then file a complaint with the Tribunal within 10 working days of that denial. In certain exceptional circumstances, a 30-day time frame may be applicable for filing a complaint with the Tribunal. More information can be obtained on the Tribunal's Web site ([www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca)) or by contacting the Secretary of the Tribunal at 613-993-3595. Reference: section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (S.O.R./93-602).

#### DETERMINATIONS OF THE TRIBUNAL

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

57. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that the RCMP cancel the RFSO and the standing offer issued thereunder to DAVTECH and issue a new solicitation on the basis of non-discriminatory requirements. In this regard, the Tribunal suggests that the new solicitation could include all relevant information, including historical data on the usage of ethyl alcohol standards by relevant RCMP detachments for the period of the standing offer previously in effect, as well as any available information with respect to the transition to dry gas standards.

Ann Penner  
Ann Penner  
Presiding Member

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38. Exhibit PR-2013-041-02, Vol. 1.