



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-031

Legacy Products Corporation

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, April 2, 2014*

*Corrigendum issued
Monday, May 26, 2014*

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IN THE MATTER OF a complaint filed by Legacy Products 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

LEGACY PRODUCTS 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 in part. Each party will bear its own costs in this matter.

Ann Penner
Ann Penner
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

IN THE MATTER OF a complaint filed by Legacy Products 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

LEGACY PRODUCTS CORPORATION

Complainant

AND

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

**Government
Institution**

CORRIGENDUM

The reference to Article XVII:1(b) of the *AGP* in paragraph 40 of the statement of reasons should have read as follows:

(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement.

By order of the Tribunal,

Gillian Burnett
Gillian Burnett
Secretary

Tribunal Member: Ann Penner, Presiding Member

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Complainant: Legacy Products Corporation

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STATEMENT OF REASONS

COMPLAINT

1. On January 8, 2014, Legacy Products Corporation (Legacy) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a Request for Quotation (RFQ) (Solicitation No. W0100-145012/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of 23 high-speed precision engine lathes to the Canadian Forces Naval Engineering School in Halifax, Nova Scotia.

2. Legacy's complaint was based on two grounds: (1) the manner in which PWGSC (and DND) drafted the mandatory requirements of the RFQ violated Articles VI:2(a) and VI:4 of the World Trade Organization (WTO) *Agreement on Government Procurement*;² and (2) PWGSC improperly evaluated Legacy's bid by finding that it did not comply with the mandatory requirements regarding spindle speeds and the tool and die faceplate, thereby violating Articles VI:1 and XVII:1 of the *AGP*.

3. As a remedy, Legacy initially requested that an immediate "stop-work-order" be issued to allow for a review of the process and a re-evaluation of the bids. Alternatively, Legacy requested that the contract be cancelled and a revised RFQ be issued with clear and proper guidelines regarding what is to be considered compliant.³ Legacy later revised its remedy request to ask that it also be awarded the contract and/or compensation.⁴

BACKGROUND

4. On September 6, 2013, PWGSC issued an RFQ for 23 high-speed precision engine lathes with a bid closing date of November 1, 2013. The RFQ stated that compliant bids had to meet mandatory requirements 1(a) to 1(z).⁵ Most relevant to this case are mandatory requirements 1(e) and 1(r): 1(e) required the engine lathes to have a "minimum of 18 spindle speeds varying (40 – 2000 rpm)"; and 1(r) required them to have a "15[-in.] tool and die faceplate".⁶

5. On October 9, 2013, PWGSC issued amendment No. 2 in response to a series of questions from prospective bidders about some of the mandatory requirements. Amendment No. 2 included PWGSC's response to a question about mandatory requirement 1(e) as follows:

3. Can it be electronic vari-speed which would give a complete speed range between 10 to 2000rpm?

No.

6. Amendment No. 2 also included PWGSC's clarification about the exact nature of several other mandatory requirements as follows:

1. The tender is currently stated as mandatory specifications. This is ok but some of the listed requirements are very difficult to meet if not impossible. The mention of minimum 18 spindle speeds

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

2. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

3. Exhibit PR-2013-031-01B, Procurement Complaint Form, sections 4(E) and 5(C), Vol. 1.

4. Exhibit PR-2013-031-08, Vol. 1.

5. Exhibit PR-2013-031-01B, Attachment 2, Part 4 and Annex A, Vol. 1.

6. Exhibit PR-2013-031-01B, Attachment 2, Vol. 1.

is very unique. Also the threads per inch of 4-112 is also very hard to match. For instance 15 spindle speeds is more common and would allow more companies to quote.

18 spindle speeds is absolutely required and easily met and 4-112 TPI is minimum mandatory, however a broader range is acceptable.

As well noted in Mandatory requirements for W0100-145012/A should read.

1. Twenty-three (23) High Speed Precision with minimum 17"/40" (432mm/1016mm) [(18/40) or more is acceptable] Engine Lathes complete with items (a) through (z)

***Bidders are to note the changes from mandatory to minimum mandatory for the items described above.**

7. Legacy submitted its bid on October 31, 2013.
8. On November 25, 2013, PWGSC requested that Legacy provide further information to substantiate whether and how its bid met all the mandatory requirements. On November 27, 2013, Legacy supplied PWGSC with additional materials and information regarding its bid.
9. On December 14, 2013, PWGSC informed Legacy that its bid did not meet all the mandatory requirements of the RFQ and that the contract had been awarded to the lowest bidder whose bid was found to be compliant in all respects.⁷ PWGSC explained that Legacy's bid was not compliant because the lathe that it offered obtained the required 18 spindle speeds by way of electronic vari-speed controls, which, in PWGSC's view, would pose inherent safety risks to the students using them if the speed selector was in the wrong position.⁸
10. On December 15, 2013, Legacy objected to PWGSC's decision. Legacy argued that PWGSC had made an *ex post facto* change to the "Statement of Work" after the bidding period closed, by implying in its e-mail of December 14, 2013, that speed changes must be made solely by gear change selector levers.
11. On December 20, 2013, PWGSC responded by confirming its decision that Legacy's bid was non-compliant with mandatory requirement 1(e). Furthermore, PWGSC added that Legacy's bid was non-compliant with mandatory requirement 1(r), which required that the lathes have a 15-in. tool and die faceplate. PWGSC viewed item 1(r) as an exact requirement. As Legacy offered a 16-in faceplate, PWGSC found that Legacy's proposal also failed to meet this mandatory requirement.
12. On January 8, 2014, Legacy filed its complaint with the Tribunal.
13. On January 10, 2014, the Tribunal informed the parties that the second ground of complaint (i.e. that PWGSC improperly evaluated Legacy's bid) had been accepted for inquiry because it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in section 6 and subsection 7(1) of the *Canadian International Trade Tribunal Inquiry Regulations*.⁹ As will be explained, the Tribunal did not inquire into Legacy's first ground of complaint because it was not filed in a timely manner.
14. On February 10, 2014, PWGSC filed its Government Institution Report (GIR) in response to Legacy's complaint. On February 21, 2014, Legacy filed its comments on PWGSC's GIR.

7. Exhibit PR-2013-031-01B, Attachment 7, Vol. 1.

8. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(a), Vol. 1; Exhibit PR-2013-031-01 (protected), Attachment 7, Vol. 2.

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

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

FIRST GROUND OF LEGACY'S COMPLAINT

16. As stated, the Tribunal did not inquire into Legacy's first ground of complaint about the manner in which PWGSC (and DND) drafted the mandatory requirements of the RFQ. Legacy argued that the manner in which they drafted the wording of the RFQ violated Articles VI:2(a) and VI:4 of the *AGP* in two ways: (1) the mandatory requirements of the RFQ were prescribed in terms of design and descriptive characteristics rather than of performance; and (2) the mandatory requirements of the RFQ were prescribed in terms of the design of a single manufacturer's product. As these two arguments are closely related, the Tribunal will address them together.

17. Upon receipt of a complaint that complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must first decide whether it has been filed within the prescribed time limits of subsections 6(1) and (2) of the *Regulations*. Those subsections state that a complainant has 10 days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or to file a complaint with the Tribunal. If a complainant objects to the government institution within the prescribed time period, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

18. Applying subsections 6(1) and (2) of the *Regulations* to Legacy's first ground of complaint, Legacy could have become aware of its concerns when the RFQ was first issued (i.e. September 6, 2013), as this ground of complaint depends only on the manner in which the RFQ was drafted rather than on any action taken by PWGSC (as is the case for Legacy's second ground of complaint). There is no evidence indicating that Legacy was aware of the RFQ when it was first issued or when it first became aware of the RFQ. However, the evidence does indicate that Legacy was aware of the RFQ and its mandatory requirements at least by September 25, 2013, when it first asked PWGSC to clarify mandatory requirements not relevant to its complaint before the Tribunal.¹⁰

19. Therefore, the Tribunal finds that Legacy should have become aware of the first ground of its complaint on September 25, 2013. Accordingly, Legacy should have either made an objection to PWGSC or filed a complaint with the Tribunal within 10 working days of September 25, 2013. However, there is no evidence on the record demonstrating that Legacy did either within the prescribed time periods.

20. As Legacy did not take steps to seek relief within the prescribed time periods regarding its concerns over the manner in which the mandatory requirements of the RFQ were drafted, the Tribunal had no choice but to find that Legacy's first ground of complaint was filed late and that it did not have jurisdiction to consider this ground of complaint on its merits. As the Tribunal has previously stated, "[t]he procurement review process does not provide for an accumulation of grievances to be put forward only in the event of an unsuccessful bid."¹¹

10. Exhibit PR-2013-031-09A (protected), Exhibit 6, Vol. 2.

11. *Corel Corporation* (21 November 1996), PR-96-011 (CITT) at 12.

SECOND GROUND OF LEGACY'S COMPLAINT

21. As stated above, the second ground of Legacy's complaint focused on the manner in which PWGSC evaluated Legacy's proposal against mandatory requirements 1(e) and 1(r).

POSITIONS OF PARTIES

Legacy

22. With regard to mandatory requirement 1(e), Legacy argued that its proposed lathes were not evaluated correctly because they did not fall within the prohibition against electronic vari-speeds.

23. Moreover, Legacy argued that, while PWGSC and DND's Technical Authority may have assumed that a prohibition against electronic vari-speed systems would require bidders to propose only those that were fully mechanical, this was not clearly specified in the tendering documentation.¹² In other words, Legacy charged that PWGSC's rejection of its proposed speed change system implied that PWGSC assessed the bids using a more restrictive requirement than that indicated in the RFQ. As a result, Legacy maintained that PWGSC violated Articles VI:1 and Article XVII:1 of the *AGP* by not evaluating its bid using requirements that were fully explicit and transparent to all the parties.

24. Legacy submitted that PWGSC wrongly implied, in its effort to defend its decision about non-compliance, that Legacy's choice of speed change selectors was more dangerous than that required by the RFQ. In Legacy's view, its proposed speed change selectors were as safe as those required by PWGSC.¹³ Moreover, its proposed machines complied with all safety norms, including Canadian Standards Association safety norms, and could not be deemed to be any less safe than other machines also complying with those norms.¹⁴

25. With regard to mandatory requirement 1(r), Legacy argued that specifications are generally interpreted as minimum requirements in the usual course of government purchasing, unless otherwise stated. In this way, bids that meet or exceed the stated minimum requirements should be deemed compliant.

26. Therefore, Legacy submitted that it should have been able to exceed the requirements of a 15-in. faceplate just as it had been able to exceed the requirement that the threading range be 4-112 TPI. In its view, a 16-in. faceplate was better than a 15-in. faceplate, as it offered more utility and no hindrance.

27. Legacy argued that PWGSC, in deeming its 16-in. faceplate to be non-compliant, violated Articles VI:1 and XVII:1 of the *AGP* by evaluating bids using unwritten specifications and in an inconsistent and capricious manner. In addition, it argued that PWGSC violated Article VI:1 by arbitrarily choosing which specifications must be met exactly and which may be exceeded (i.e. which ones were exact and which ones were minimum).

12. Exhibit PR-2013-031-17, Vol. 1A at 2.

13. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(c), Vol. 1; Exhibit PR-2013-031-17, Vol. 1A at 3.

14. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(c), Vol. 1.

PWGSC

28. As a preliminary matter, PWGSC maintained that its evaluators treated Legacy fairly throughout the procurement process, especially given that Legacy was allowed to submit additional technical documents to demonstrate how its bid was compliant with the mandatory requirements of the RFQ.

29. Furthermore, PWGSC submitted that its evaluation team acted reasonably in determining that Legacy's bid failed to meet all the mandatory technical requirements of the RFQ and was non-compliant as a result.

30. With regard to mandatory requirement 1(e), PWGSC submitted that DND's Technical Authority reviewed the issue carefully before deciding that Legacy's proposal was non-compliant with the prohibition on electronic vari-speed. It further submitted that PWGSC officials worked with DND's Technical Authority to ensure that the analysis and determination were thorough and complete. It maintained that PWGSC officials acted reasonably in accepting the conclusions of DND's Technical Authority as determinative of the matter.¹⁵

31. With respect to mandatory requirement 1(r), PWGSC maintained that the 15-in. faceplate was set out in the RFQ as an exact specification.¹⁶ A review by PWGSC and DND's Technical Authority of whether any of the exact specifications could be revised to "minimum" standards did not result in any change to the 15-in. faceplate specification. In PWGSC's view, this conclusion was clearly articulated in amendment No. 2.¹⁷ Since Legacy's bid offered lathes with a 16-in. faceplate, PWGSC maintained that the evaluators had no option but to find Legacy's bid non-compliant.¹⁸

TRIBUNAL'S ANALYSIS

32. Pursuant to subsection 30.14(1) of the *CITT Act*, the Tribunal must limit its considerations to the subject matter of the complaint when conducting an inquiry. Furthermore, pursuant to section 11 of the *Regulations*, the Tribunal must determine whether the procurement was conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,¹⁹ Chapter Five of the *Agreement on Internal Trade*,²⁰ the *AGP*, Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*,²¹ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,²² Chapter Fourteen of the *Canada-Colombia Free*

15. Exhibit PR-2013-031-09, Vol. 1A at 17.

16. *Ibid.*

17. *Ibid.* at 18.

18. *Ibid.*

19. *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*].

20. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

21. *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.

22. *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*].

*Trade Agreement*²³ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*²⁴ applies. In this case, all seven trade agreements apply.

33. The question before the Tribunal, then, is whether PWGSC breached any of the relevant trade agreements when it determined that Legacy's proposal was not compliant with mandatory requirements 1(e) and 1(r).

34. In the Tribunal's view, the following provisions of the applicable trade agreements are most relevant to the question at hand.

35. Article 506(6) of the *AIT* provides that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

36. Article XIII(4)(c) of the *AGP* and Article 1015(4)(d) of *NAFTA* provide that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."

37. Article Kbis-10(2) of the *CCFTA* provides that an entity ". . . shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation."

38. Article 1410(5) of the *CPFTA* provides that a procuring entity ". . . shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted: (a) the most advantageous tender; or (b) where price is the sole criterion, the lowest price."²⁵

39. As stated above, Legacy argued that PWGSC breached Articles VI:1 and XVII:1 of the *AGP* in the evaluation of its proposal. Article VI:1 of the *AGP* provides as follows:

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

40. Article XVII:1 of the *AGP* sets out obligations relating to transparency and provides as follows:

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

23. *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*].

24. *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*].

25. Article 1410(5) of the *CCOFTA* and Article 16.11(5) of the *CPAFTA* contain nearly identical language and, therefore, have not been reproduced here.

- (a) specify their contracts in accordance with Article VI (technical specifications);
- (b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 18 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;
- (c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

Standard of Review

41. It is well established that the Tribunal accords a large measure of deference to evaluators in their evaluation of proposals. The Tribunal will interfere only with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when 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.²⁶ In addition, the Tribunal has previously stated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.²⁷

42. It is also well established that there is an onus on bidders to demonstrate how their bids meet the mandatory criteria published in the solicitation documents.²⁸ Accordingly, it is incumbent upon bidders to exercise due diligence in the preparation of their bids to make sure that they are compliant with all mandatory requirements.²⁹ In this respect, the Tribunal has consistently refused to impose an obligation on government institutions to seek clarification from bidders.³⁰ While bidders can and should ask questions to clarify mandatory and technical requirements before bids are submitted, government institutions are not required to do likewise when bids are received.³¹

43. The Tribunal must assess whether PWGSC's evaluation of Legacy's bid was in accordance with the relevant provisions of the applicable trade agreements in the context of these principles.

26. *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 52; *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) [*SIAS*] at para. 58; *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at paras. 26-28; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel Human Resources*] at para. 33; *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT).

27. *SIAS* at para. 58; *Northern Lights* at para. 52.

28. *Info-Electronics H P Systems Inc. v. Department of Public Works and Government Services* (2 August 2006), PR-2006-012 (CITT) [*Info-Electronics H P Systems*]; *SIAS* at para. 59; *Excel Human Resources* at para. 34.

29. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) [*Integrated Procurement Technologies*] at para. 13.

30. *Accipiter Radar Technologies Inc. v. Department of Fisheries and Oceans* (17 February 2011), PR-2010-078 (CITT) [*Accipiter Radar Technologies*] at para. 52; *Integrated Procurement Technologies* at para. 13.

31. *SIAS* at para. 59.

Mandatory Requirement 1(e)—Spindle Speed Controls

44. As stated above, mandatory requirement 1(e) required the engine lathes to have a “minimum of 18 spindle speeds varying (40 - 2000 rpm)”. This requirement was clarified in amendment No. 2, where PWGSC stated that the lathes could not be “. . . electronic vari-speed which would give a complete speed range between 10 to 2000rpm”.

45. Legacy offered engine lathes that could obtain at least 18 spindle speeds using a total of three speed selection levers, two to set 12 speeds and one additional lever to set the remaining speeds.³²

46. PWGSC considered that Legacy’s proposed speed control system fell within the prohibition against “electronic vari-speed” and therefore deemed Legacy’s bid non-compliant. PWGSC explained that it did not wish to have the spindle speeds achieved electronically due to the inherent safety risks to the students posed by having the speed selector in the wrong position.³³

47. Legacy strongly disagreed with PWGSC’s conclusion that it proposed an electronic vari-speed system.³⁴ It argued that its speed selection controls were neither more nor less dangerous to the students that would be using them than any other speed selection lever that the student must set.³⁵ It also argued that PWGSC’s conclusion implied that speed changes must be made solely by gear change selector levers but that this requirement was not part of the RFQ or any amendments and therefore represented a change to the RFQ after the bid period.³⁶

48. On the basis of the evidence before it, the Tribunal concludes that PWGSC did not act reasonably when evaluating Legacy’s bid and, in so doing, breached Article 506(6) of the *AIT*, Article XIII(4)(c) of the *AGP*, Article 1015(4)(d) of *NAFTA*, Article Kbis-10(2) of the *CCFTA*, Article 1410(5) of the *CPFTA* and the *CCOFTA* and Article 16.11(5) of the *CPAFTA*.

49. The evidence reveals that neither PWGSC officials nor DND’s Technical Authority were certain of the meaning of the term “electronic vari-speed”.³⁷ The precise nature of mandatory requirement 1(e) does not appear to have been clearly defined prior to the RFQ being posted, and the meaning of the term “electronic vari-speed” remained undefined when this type of speed control system was prohibited in amendment No. 2.³⁸

50. It was only during the course of evaluating Legacy’s bid that an official at DND’s Technical Authority offered PWGSC his interpretation of this mandatory requirement and the term “electronic vari-speed”.³⁹ Even after providing his interpretation, he conceded that, given his mechanical rather than

32. Exhibit PR-2013-031-17, Vol. 1A at 3; further details regarding the speed selection mechanism of Legacy’s proposed engine lathes have been designated as confidential.

33. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(a), Vol. 1; Exhibit PR-2013-031-01 (protected), Attachment 7, Vol. 2.

34. Exhibit PR-2013-031-01B, Vol. 1, Attachment 8.

35. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(c), Vol. 1.

36. Exhibit PR-2013-031-01B, Attachment 8, Vol. 1.

37. Exhibit PR-2013-031-21, Exhibit 14, Vol. 1B; Exhibit PR-2013-031-17, Vol. 1A at 3.

38. Exhibit PR-2013-031-21, Exhibit 14, Vol. 1B.

39. *Ibid.*; Exhibit PR-2013-031-09A (protected), Exhibit 14, Vol. 2.

electrical background, it would be difficult to definitively say whether Legacy's bid could indeed be considered electronic vari-speed or not.⁴⁰

51. Moreover, the evidence indicates that broad assumptions were made by DND's Technical Authority regarding what it thought bidders would understand from the question and answer in amendment No. 2 regarding electronic vari-speed. It assumed, for example, that bidders would understand that the speed change system had to be fully mechanical with "dedicated manual gearing".⁴¹ It also assumed that bidders would understand that Amendment No. 2 ruled out "electronic" or "vari-" speed systems.⁴²

52. However, neither these interpretations nor these assumptions were made public or formed part of the tendering documentation. As Legacy correctly noted, "... bidders are not party to DND's assumptions or the internal discussions between DND and PWGSC. Bidders are only aware of the public specifications and must comply with those."⁴³

53. The Tribunal recognizes that there may be more than one reasonable interpretation of the scope of what is described by an "electronic vari-speed which would give a complete speed range". One of these interpretations is that infinitely variable speed drives were prohibited. This is the conclusion reached by Legacy, as stated in its complaint as follows:

An "electronic vari-speed" control is an electronic control which varies the motor speed electronically by changing the frequency of the electrical supply which drives the motor. . . . Since the frequency can be varied in steps of 1 Hz, the control varies the motor in infinitely small steps of 1 Hz. This is the speed control system which is excluded by PWGSC's Amendment 002 point 3⁴⁴

54. Nevertheless, PWGSC and DND's Technical Authority interpreted this mandatory requirement as including only fully mechanical speed change systems to the exclusion of electronic speed change systems. In doing so, the Tribunal finds that PWGSC and DND's Technical Authority wrongly interpreted the scope of amendment No. 2, as they gave it an overly narrow and therefore unreasonable interpretation. The question stated in amendment No. 2 did not ask whether the lathes could be "electronic" or "vari-" speed but rather asked whether they could be "... electronic vari-speed which would give a complete speed range" This question is much narrower than the way in which it was interpreted by DND's Technical Authority. Therefore, it cannot be reasonably interpreted as excluding all electronic speed change systems, as determined by DND's Technical Authority and, ultimately, PWGSC when they evaluated Legacy's bid.

55. Legacy argued that PWGSC breached Articles VI:1 and XVII:1 of the *AGP* when evaluating its bid. Specifically, Legacy argued that PWGSC created unnecessary obstacles to international trade in violation of Article VI:1 by evaluating bids using unwritten specifications.⁴⁵ Legacy also argued that the use of "non-explicit standards and implied requirements" in the technical specifications denied transparency and thus violated Article XVII:1.⁴⁶

56. As the Tribunal has already found that PWGSC interpreted mandatory requirement 1(e) in an unreasonable manner in violation of Article 506(6) of the *AIT*, Article XIII(4)(c) of the *AGP*,

40. Exhibit PR-2013-031-21, Exhibit 14, Vol. 1B.

41. Exhibit PR-2013-031-17, Vol. 1A at 2; Exhibit PR-2013-031-21, Exhibit 14, Vol. 1B; Exhibit PR-2013-031-09A (protected), Exhibit 14, Vol. 2, for all the assumptions made by DND's Technical Authority.

42. Exhibit PR-2013-031-21, Exhibit 14, Vol. 1B.

43. Exhibit PR-2013-031-17, Vol. 1A at 2.

44. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(a), Vol. 1.

45. *Ibid.*

46. *Ibid.*

Article 1015(4)(d) of *NAFTA* and the similar provisions of the other agreements, the Tribunal does not consider it necessary to also determine whether PWGSC's interpretation of this mandatory requirement also violated Articles VI:1 and XVII:1 of the *AGP*.

Mandatory Requirement 1(r)—Tool and Die Faceplate

57. Mandatory requirement 1(r) states that the engine lathes must include a "15[-in.] tool and die faceplate". As noted above, DND's Technical Authority reviewed all the mandatory requirements to determine whether any could be revised to be a "minimum" mandatory requirement.⁴⁷ It determined that mandatory requirements 1(p), (q) and (r) were "exacting" specifications but that the requirements for 4-112 TPI and 17 in./40 in. could be revised to be minimum mandatory requirements.⁴⁸ This determination was communicated to bidders in amendment No. 2.

58. Legacy offered a 16-in. tool and die faceplate ". . . because a larger faceplate is more useful than a smaller faceplate even though a 15" faceplate costs us less money," and because the faceplate could ". . . be quite easily and simply changed for the 15" size, if preferred."⁴⁹ Legacy also explained that PWGSC must have known that it would have been happy to provide a 15-in. faceplate and that PWGSC could have contacted it to ask whether it would provide a 15-in. rather than a 16-in. faceplate if a 15-in. faceplate was "in any way important".⁵⁰ Furthermore, Legacy stated that it interpreted the 15-in. faceplate requirement as a minimum requirement and that, as long as the minimum requirement was met or exceeded, the offer should have been found to be compliant.⁵¹

59. In the Tribunal's view, PWGSC made it clear that certain mandatory requirements were not exacting standards by the use of the word "minimum". For example, mandatory requirement 1(e) requires a "*minimum* of 18 spindle speeds" [emphasis added] and mandatory requirement 1(f) requires a "*minimum* spindle bore of 2.250" [emphasis added]. When asked whether other requirements could also be made minimum requirements, PWGSC indicated which items were now minimum mandatory requirements by adding the word "minimum" to these requirements: "4-112 TPI is *minimum* mandatory" and ". . . High Speed Precision with *minimum* 17"/40" (432rnm/ 1016rnm) . . . Engine Lathes . . ."⁵²

60. Mandatory requirement 1(r), as written in the RFQ, did not contain the word "minimum" and this word was not added in amendment No. 2. Therefore, the Tribunal rejects Legacy's argument that this mandatory requirement could be interpreted as a "minimum" mandatory requirement.⁵³ Given the question directly addressing the precise nature of the requirements and PWGSC's response in amendment No. 2, the Tribunal finds that mandatory requirement 1(r) was an exact requirement and not a minimum mandatory requirement as Legacy suggested.

61. Had Legacy's bid indicated that it was willing to substitute the proposed faceplate with a 15-in. faceplate if such a faceplate was preferred, then PWGSC evaluators may have been able to conclude that Legacy's proposal was compliant with the RFQ. However, given that Legacy's bid did not, and for the reasons stated above, the Tribunal finds that PWGSC acted reasonably when it concluded that Legacy's

47. Exhibit PR-2013-031-09, Exhibit 3, Vol. 1A.

48. *Ibid.*

49. Exhibit PR-2013-031-01B, Procurement Complaint Form, sections 5(A) and 5(F)(b), Vol. 1.

50. *Ibid.*, section 5(A).

51. *Ibid.*, section 5(F)(b).

52. Exhibit PR-2013-031-01B, Attachment 2, Vol. 1.

53. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(b), Vol. 1.

proposed 16-in. faceplate was not compliant with mandatory requirement 1(r). Therefore, PWGSC was correct in declaring Legacy's proposal non-compliant with the RFQ.

62. As stated above, Legacy argued that PWGSC could have asked whether it would provide a 15-in. rather than a 16-in. faceplate. The Tribunal rejects this argument. The Tribunal has consistently held that government institutions do not have an obligation to seek clarification from bidders.⁵⁴ Rather, the onus is on bidders to be compliant with all the mandatory requirements published in the solicitation documents and to demonstrate compliance.⁵⁵ Therefore, PWGSC had no obligation to contact Legacy to determine whether it could have provided the 15-in. faceplate required by the RFQ.

63. Legacy argued that PWGSC breached Articles VI:1 and XVII:1 of the *AGP* when evaluating its bid. Specifically, Legacy argued that PWGSC created unnecessary obstacles to international trade in violation of Article VI:1 by evaluating bids against unwritten specifications.⁵⁶ Legacy also argued that PWGSC's use of "non-explicit standards and implied requirements" lead to an inconsistent and capricious evaluation in violation of Article XVII:1.⁵⁷

64. Article VI:1 of the *AGP* prohibits technical specifications from being prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

65. In this case, the Tribunal has already found that PWGSC acted reasonably when it concluded that mandatory requirement 1(r) was an exact requirement and that Legacy's bid was not compliant with the RFQ. As PWGSC's evaluation of mandatory requirement 1(r) was reasonable, the Tribunal cannot conclude that Article VI:1 of the *AGP* was breached through the creation of unnecessary obstacles to international trade.

66. Article XVII:1 of the *AGP* requires Canada to encourage its procuring entities to take certain steps to improve the transparency of the procurement process. In the Tribunal's view, the word "encourage" indicates that this provision is merely hortatory and does not impose a substantive obligation regarding transparency on either Canada or its procuring entities. As such, this provision does not provide a basis on which the Tribunal can evaluate Canada's or PWGSC's actions.

REMEDY AND COSTS

67. In summary, the Tribunal finds that the second ground of Legacy's complaint is valid in part.

68. Therefore, the Tribunal must consider the appropriate remedy pursuant to subsections 30.15(2) and (3) of the *CITT Act*. In recommending an appropriate remedy under subsection 30.15(3) of the *CITT Act*, the Tribunal must consider all the circumstances relevant to the procurement in question including the following: (1) the seriousness of the deficiencies found by the Tribunal; (2) the degree to which Legacy and other interested parties were prejudiced; (3) the degree to which the integrity and efficiency of the competitive procurement system were prejudiced; (4) whether the parties acted in good faith; and (5) the extent to which the contract was performed.

54. *Accipiter Radar Technologies* at para. 52; *Integrated Procurement Technologies* at para. 13.

55. *Info-Electronics H P Systems* at para. 23; *SIASST* at para. 59; *Integrated Procurement Technologies* at para. 13; *Excel Human Resources* at para. 34.

56. Exhibit PR-2013-031-01B, Procurement Complaint Form, section 5(F)(b), Vol. 1.

57. *Ibid.*

69. Legacy requested that the Tribunal grant it 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 contract awarded to Sharp Industries Ltd. be terminated; (d) that the contract be awarded to Legacy; and (e) that compensation be paid according to sections 3 and 4 of the *Procurement Compensation Guidelines*.⁵⁸

70. PWGSC did not directly address the remedy issue.

71. As stated above, the Tribunal found that PWGSC did not evaluate Legacy's proposal consistently with mandatory requirement 1(e), as amended in amendment No. 2. Evaluating proposals in accordance with published criteria constitutes a central premise of the regulatory regime established by the applicable trade agreements. Contravening this fundamental principle has the potential of seriously affecting the integrity and efficiency of the entire procurement system.

72. However, the Tribunal also found that PWGSC correctly determined that Legacy's bid was not compliant with mandatory requirement 1(r) and therefore properly excluded it from consideration for contract award.

73. Therefore, the Tribunal finds that, although the breach in regard to mandatory requirement 1(e) was serious, it did not result in significant prejudice to Legacy. Regardless of whether PWGSC correctly evaluated Legacy's proposal under mandatory requirement 1(e), the outcome for Legacy would have been the same—its proposal would have been rejected. As such, the Tribunal is not convinced that the interests of fairness and efficiency require recommending a remedy.

74. Likewise, the Tribunal will not award costs to either party.

DETERMINATION OF THE TRIBUNAL

75. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part. Each party will bear its own costs in this matter.

Ann Penner
Ann Penner
Presiding Member

58. Exhibit PR-2013-031-08, Vol. 1.