



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2014-007

CAE Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, August 26, 2014*

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IN THE MATTER OF a complaint filed by CAE Inc. 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

CAE INC.

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

Tribunal Member: Ann Penner, Presiding Member

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STATEMENT OF REASONS

COMPLAINT

1. On April 15, 2014, CAE Inc. (CAE) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*. The complaint concerned a Request for Proposals (RFP) (Solicitation No. W8482-134640/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for an in-service support (ISS) contract for the Victoria Class Trainers (VCT).

2. CAE complained that PWGSC incorrectly found that CAE's bid did not comply with mandatory requirement item T3(i)¹ (MR T3i) and thus violated Article 506(6) of the *Agreement on Internal Trade*.² As a remedy, CAE requested that the Tribunal declare its proposal compliant with the mandatory requirements of the solicitation; that a new independent evaluation team evaluate its proposal; and that it be awarded the contract if the new evaluation determined that it was, in fact, the highest rated compliant bid. In the alternative, it requested monetary compensation for lost opportunity or lost profit. Finally, it requested costs and such other relief that the Tribunal deemed appropriate.³

3. On April 22, 2014, the Tribunal accepted CAE's complaint for inquiry, as it met the requirements of subsection 30.11(2) of the *Canadian International Trade Tribunal Act*⁴ and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁵ However, as the complaint indicated that the contract had already been awarded to a third party, the Tribunal did not order a postponement of the contract award.

4. MDA Systems Ltd., the winning bidder, requested intervener status on April 30, 2014, which was granted by the Tribunal. Babcock Canada Inc., another unsuccessful bidder, requested intervener status on May 1, 2014, which was denied by the Tribunal.⁶

5. PWGSC filed a Government Institution Report (GIR) on May 26, 2014. On June 12, 2014, CAE filed its reply to the GIR.

6. On June 18, 2014, PWGSC alleged that CAE had raised new arguments and evidence in its reply. It therefore requested the Tribunal's leave to provide a response.⁷ The Tribunal granted this request. PWGSC filed additional comments on June 27, 2014, and CAE filed a further reply on July 8, 2014.

7. 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.

1. See Exhibit PR-2014-007-01 at tab 1, Appendix A to Annex C, Mandatory Requirements – Technical (Personnel Qualifications), Vol. 1.

2. *Ibid.* at paras. 7, 11.

3. *Ibid.* at para. 109.

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

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

6. Exhibit PR-2014-007-19, Vol. 1B. The Tribunal rejected Babcock's request primarily because Babcock had not provided any indication of how its intervention would be of assistance to the Tribunal. Moreover, given that Babcock was unlikely to have direct knowledge of the substance of CAE's complaint, the Tribunal considered that Babcock was unlikely to be of assistance in the resolution of the issues raised in the proceeding.

7. Exhibit PR-2014-007-36, Vol. 1D.

PROCUREMENT PROCESS

8. On November 19, 2013, PWGSC issued an RFP for in-service support for the VCTs with a bid closing date of January 24, 2014.⁸ The bid closing date was subsequently extended to February 3, 2014.

Relevant Provisions of the RFP at Issue

9. The RFP contained numerous mandatory technical requirements. Most relevant to this case is MR T3i, which relates to the qualifications of the Contractor Project Manager (PM). MR T3i provides as follows:

The Bidder must demonstrate that the proposed Contractor PM has a minimum of one (1) year experience in the past five (5) years in each of the following “experience” areas:

- i. Management of in-service support contracts or development projects for complex naval systems or complex naval simulators;
- ii. Project management or services delivery management; and
- iii. Using Microsoft Word and Microsoft Excel.

10. The RFP also included provisions about the manner in which mandatory requirements (including MR T3i) would be evaluated and bids would be deemed compliant. Provisions most relevant to the complaint state the following:

3. Evaluation of Mandatory Requirements

... Mandatory requirements are assessed as either compliant or non-compliant prior to the evaluation of point-rated requirements, and any non-compliant proposals will be eliminated and no further consideration will be given to the non-compliant proposal. ...

...

6.1 Point-Rated Evaluation of Technical Requirements

... The Bidder’s proposal shall include a completed Curriculum Vita[e] for each proposed personnel (preferably following a standard format for all proposed personnel). The Curriculum Vitae (CV) shall demonstrate the degree to which the proposed personnel meet or exceed the respective requirements.⁹

11. In addition, section 1.6 of the *Standard Instructions – Goods or Services – Competitive Requirements* was incorporated by reference into the RFP and provides as follows:

01 (2012-11-09 Revised) Code of Conduct and Certifications - Bid

...

6. By submitting a bid, the Bidder certifies that it is aware, and that its affiliates are aware, that Canada may request additional information, certifications, consent forms and other evidentiary elements proving identity or eligibility. Canada may also verify the information provided by the Bidder, including the information relating to the acts or convictions specified herein, through independent research, use of any government resources or by contacting third parties.

8. Exhibit PR-2014-007-01 at tab 1, Vol. 1.

9. *Ibid.* at tab 1, Annex C, Sections 3, 6.1.

Relevant provisions of CAE's Bid

12. CAE submitted its bid on February 3, 2014, in which it proposed Mr. Spearman (the candidate) as Contractor PM.

13. CAE's bid identified three aspects of the candidate's résumé as relevant to the requirements of MR T3i: (1) Submarine Basic Training Officer – Canadian Forces Naval Operations School (CFNOS), held from August 2006 to August 2009; (2) Submarine Weapon Certification Officer – CFNOS, held from July 2011 to July 2012; and (3) Executive Officer – *HMCS Windsor*, held from August 2012 to January 2014.¹⁰

14. According to CAE, the following passages in the candidate's résumé demonstrated that his experience as a Submarine Basic Training Officer and Submarine Weapon Certification Officer complied with MR T3i.¹¹ In particular, the résumé noted that he had:

Utilized and applied extensive career training and experience with respect to submarine tactics and operations, as well as possessing and applying solid skill sets for both Victoria Class combat and mechanical operating systems in order to provide exceptional and practicable BVSCCT and SCT training plans and scenarios for both Submarine Command and Watch Team Training, as well as for a variety of courses including BSQ [basic submarine qualification], SOQC [submarine officer qualification], CRWK(D) [control room watch keeper (dived) qualification], COW [chief of the watch qualification], and SMWD [submarine weapons director qualification].

Actively assisted in the management of in-service support contracts and in development projects for the VSCTT [Victoria Class Submarine Command Team Trainer] in collaboration with the incumbent contract team, as observed through duties as lead instructor for various courses, such as BSQ, SOQC, CRWK(D), COW, and SMWD, and SMORO [submarine operations room officer qualification]. In addition, through duties as assessor for Watch Team Training and for various positions for Command Team Training, employed and offered experience, knowledge, and information gained as a Watch Leader (Dived) to assist in-service support contractors in improving simulation and functionality, by describing how operations equipment is used at sea in order to improve equipment and trainer efficiency.

Maintained a robust and professional working relationship with the in-service support contractors, presented excellent ideas for development projects, and followed the final project through to completion through practical testing and verification. Contributed numerous hours in the development of tactical and operational training and assessment scenarios for submarine Watch and Command teams, which have been archived in the VSCTT database.

[Emphasis omitted]

15. Furthermore, CAE noted that the candidate's résumé identified the following additional experience, in regards to his position as a Submarine Weapon Certification Officer, as relevant to MR T3i:¹²

In a Project Management capacity, he was responsible to the CFNOS Submarine Division Coordinator, for performing the recurring functions of training budget and resource forecasting and validation, schedule synchronization (de-conflicting CFNOS training serials with Fleet and OPSKED requirements), program monitoring and change control.

10. *Ibid.* at paras. 34, 51.

11. *Ibid.* at para. 35.

12. *Ibid.* at para. 36.

16. Finally, CAE highlighted the candidate's experience as Executive Officer of the *HMCS Windsor* as relevant to MR T3i:¹³

Executive Officer – HMCS Windsor – July 2012 – Present

Second in command of HMCS Windsor, a Victoria Class submarine, with a complement of fifty-nine personnel.

Responsible for the overall leadership, training, and financial management of Windsor's Naval Combat Systems Engineering, Marine Systems Engineering, Combat, and Executive Departments.

Additionally responsible for the training and career management of Windsor's officers, including the Naval Combat Systems and Marine Systems Engineers, and the Combat, Navigating, and Sonar/Logistics Officers.

...

Effectively managed system delivery projects for complex naval systems. Actively managed and de-conflicted competing Marine and Combat Systems Engineering systems' delivery requirements for requisite trials and testing near the end of Windsor's Extended Docking Work Period (EDWP) in order to maintain schedule and keep delivery of Windsor on its critical path.

...

[Emphasis omitted]

Evaluation of CAE's Bid

17. The candidate's résumé was evaluated along with the rest of CAE's bid by a technical evaluation team consisting of five members (the Panel), each of whom "brought extensive relevant experience and knowledge to the [P]anel"¹⁴ and had "extensive knowledge regarding the management of ISS contracts"¹⁵ according to the GIR.

18. During the evaluation process, the Panel expressed concerns that CAE's bid might not be compliant with MR T3i. Therefore, on February 24, 2014, PWGSC asked CAE to clarify how the candidate's résumé demonstrated compliance with the RFP.¹⁶ On February 25, 2014, CAE replied with the following information:¹⁷

Clarification Required	Proposal Reference
Management of In-service support contracts	
Mr. Spearman actively managed requirements of the Victoria Class ISS contract related to development, delivery, implementation, and the operations start-up of the VCT's operations and weapons training and certification processes	Paragraph 4.2.1.1.1 August 2006 – July 2009 (7 months)
As such, he was responsible for the management of ISS contracts and expert service delivery of a myriad of material, logistic, and HR services required for her operational reactivation	Paragraph 4.2.1.1.1 August 2012 – January 2014 (18 months)

13. *Ibid.* at para. 43.

14. Exhibit PR-2014-007-22 at 6, Vol. 1B.

15. *Ibid.* at 9.

16. *Ibid.* at 10. PWGSC also noted that the panel also had concerns with regard to Mandatory Technical Requirement T4 but that these were later resolved in favour of CAE.

17. Exhibit PR-2014-007-01 at tab 4, Vol. 1A.

Development projects for Complex naval systems or Complex Naval Simulators	
Effectively managed system delivery projects for complex naval systems. Actively managed and de-conflicted competing Marine and Combat Systems Engineering systems' delivery requirements for requisite trials and testing near the end of <i>Windsor's</i> Extended Docking Work Period (EDWP) in order to maintain schedule and keep delivery of <i>Windsor</i> on its critical path.	BP3008-1, Annex A, Appendix A, Attachment A (page 2) August 2012 – January 2014 (18 months)
Actively assisted in the management of in-service support contracts and in development projects for the VSCTT in collaboration with the incumbent contract team, as observed through duties as lead instructor for various courses, such as BSQ, SOQC, CRWK(D), COW, and SMWD, and SMORO.	BP3008-1, Annex A, Appendix A, Attachment A (page 3) July 2011 – July 2012 (12 months)
Mr. Spearman actively managed requirements of the Victoria Class ISS contract related to development, delivery, implementation, and the operations start-up of the VCT's operations and weapons training and certification processes	BP3008-1, Annex A, Appendix A, Attachment A (page 5) August 2006 – July 2009 (7 months)

19. After reviewing CAE's clarifications, the Panel concluded that CAE's bid did not meet the requirements of MR T3i as the candidate's experience did not constitute the management of an in-service support contract or development project for a complex naval system.

20. The Panel explained its preliminary findings regarding CAE's bid in a letter to PWGSC on February 27, 2014. The parts of the Panel's letter relevant to this complaint are as follows:

... The bidder's response to Criteria T3 in Part 4 of the Technical and Management Bid claims that the proposed Project Manager has experience in management of in-service support contracts, but the bid evaluation team was not able to find information in Part 4 of the Technical and Management Bid, in the proposed Project Manager's résumé or elsewhere in the proposal that demonstrates that the proposed Project Manager has experience in management of in-service support contracts or development projects.

...

The bid evaluation team's findings are:

1. The response to item T3 in section 4.2.1.1.1 states that the proposed project manager "actively managed requirements of the Victoria Class ISS contract related to development, delivery, implementation, and the operations start-up of the VCT's operations and weapons training and certification processes" during the period of Dec 2008 to July 2009 (7 months) while a Warfare Training Officer in CFNOS.

...

6. The experience noted in items 2 to 5 above [describing his experience over the period August 2006 to August 2009] does not substantiate the claim noted in item 1 above. The duties as described in the résumé are those of an instructor and subject matter expert, and do not constitute management of ISSCs or development projects.

7. During the period stated in the résumé (August 2006 - August 2009), the VSCTT was being commissioned and the ISSC was just starting. As the DND TA [Technical Authority] for the acquisition and support contracts for the VSCTT, the evaluation team leader can attest to the fact that the individual did not at any time manage the VSCTT development project or ISS contract.

...

13. As the DND TA for the VSCTT and VCT ISS contracts during the period stated in the résumé (July 2011 - July 2012), the evaluation team leader can attest to the fact that the individual did not at any time manage the development project or ISS contract. As the Officer In Charge for the CFNOS submarine training school during the period stated in the résumé (July 2011 - July 2012), another member of the evaluation team can attest to the fact that the individual did not at any time manage the VSCTT or VCT development project or ISS contract.

14. The response to item T3 in section 4.2.1.1.1 states that the proposed project manager was “responsible for the management of ISS contracts and expert service delivery of a myriad of material, logistic and HR services” associated with Windsor’s EDWP as the Executive Officer position for HMCS Windsor during August 2012 to January 2014 (18 months). The résumé (page 1-2, period of July 2012 - Present) describes Executive Officer duties that are related to management of the submarine as a platform, makes no mention of ISSC or development project management in this period, and does not support the claim made in section 4.1.1.1.15

15. As a CFNOS Officer In Charge for the CFNOS submarine training school, and as a training requirements manager in the Directorate of Naval Training and Education, two members of the evaluation team can attest to the fact that an Executive Officer of a submarine would not manage development projects or ISS contracts. The evaluation team has been unanimous in the determination that the claims contained in section 4.2.1.1.1 of the proposal regarding item T3 (i) are not based on fact and are not substantiated in the proposal, and the proposal . . . would seem to be non-compliant against criteria T3 (i) based solely on the information provided.¹⁸

21. On the basis of its preliminary findings, the Panel conducted a “verification” process of the candidate’s qualifications vis-à-vis MR T3i. According to the GIR, the verification process was based on the “actual knowledge” of members of the Panel and their experience in areas relevant to the solicitation at hand.¹⁹ The verification process led the Panel to conclude that the candidate’s experience fell short of what was required by the RFP.

22. Accordingly, on March 18, 2014, PWGSC notified CAE that its bid failed to comply with MR T3i and that the contract had been awarded to MDA Systems Ltd.²⁰

23. On March 25, 2014, CAE objected to the finding that its bid failed to meet MR T3i. On April 1, 2014, PWGSC replied to CAE’s objection letter and scheduled a debriefing session. PWGSC also provided the following reasons why the Panel had determined that CAE’s bid did not satisfy the requirements of the RFP:

The evaluation team determined that the proposal claims that the proposed individual has experience in management of in-service support contracts, but the claim is not supported by the proposed individual’s résumé. The responsibilities and experience described in the résumé do not relate to management of in-service support contracts or development projects for the complex naval systems or complex naval simulators.

Regarding Jul 2012 – present (HMCS Windsor). Section 4.2.1.1.1 (Page 4-12) of the proposal states that the proposed project manager was “responsible for the management of ISS contracts and expert service delivery of a myriad of material, logistic and HR services” associated with Windsor’s EDWP as the Executive Officer position for HMCS Windsor

18. Exhibit PR-2014-007-22 at tab 13, Vol. 1B.

19. *Ibid.* at 40, 43-46.

20. Exhibit PR-2014-007-01 at tab 5, Vol. 1A.

during the period. The résumé describes duties that are related to management of the submarine as a platform, but makes no mention of management of in-service support contracts or development projects for the complex naval systems or complex naval simulators during this period and does not support the claim in section 4.2.1.1.1

Regarding August 2011 – July 2012 (CFNOS Submarine Training Division). Page 4-11 of the proposal describes several duties, but none of these relate to management of in-service support contracts or development projects for the complex naval systems or complex naval simulators. The résumé indicates that the individual “assisted in the management of in-service support contracts and in development projects for the VSCTT” but the duties described do not relate to management of in-service support contracts or development projects for the complex naval systems or complex naval simulators.

Regarding October 2010 – July 2011 (HMCS Corner Brook). None of the experience mentioned in the résumé relates to criteria T3(i).

Regarding August 2009 – October 2010 (HMCS Victoria). None of the experience mentioned in the résumé relates to criteria T3(i).

Regarding August 2006 – August 2009 (CFNOS Submarine Training Division). The résumé indicates that the individual “assisted in the management of in-service support contracts and in development projects for the VSCTT” but the duties described do not relate to management of in-service support contracts or development projects for the complex naval systems or complex naval simulators. In section 4.2.1.1.1 (page 4-11) the proposal claims that for a seven (7) month period (Dec 2008 – July 2009) the individual “actively managed the requirements of the Victoria class ISS contract related to development, delivery, implementation, and the operations start up of the VCT’s operations and weapons training and certification processes”. This description, and the other duties described on page 4-11 do not demonstrate management of in-service support contracts or development projects for the complex naval systems or complex naval simulators.

Furthermore, in accordance with Standard Instructions – Goods or Services – Competitive Requirements of the Contract, Article 16.1, Canada has verified the following:

Regarding the two periods while the proposed individual was posted at CFNOS – Based on actual knowledge of the Technical Authority on both the Victoria Class Submarine Command Team Trainer (VSCTT) Development and in-service support contracts, from their inception, the proposed individual was not involved in the management of either the VSCTT development contract or the ISSC. Based on actual knowledge of Technical Authority for the Victoria Class Trainers ISSC since April 2008, the proposed individual was not involved in the management of the VCT ISSC. The individual did not participate in management of the SCTT ISSC, VCT ISSC or SCTT development project. The actual knowledge of the Officer-in-Charge of CFNOS Submarine Division since July 2009 reinforces this knowledge of the individual’s experience; and

Regarding the period while the proposed individual was posted on HMCS Windsor – Based on actual knowledge of individuals in the DND training organization, an Executive Officer on a submarine would not manage in-service support contracts or development projects for the complex naval systems or complex naval simulators. Their duties relate to operations and maintenance of the submarine itself.²¹

24. Upon taking PWGSC’s letter as a denial of relief, CAE filed its complaint with the Tribunal on April 15, 2014.

21. *Ibid.* at tab 7.

TRIBUNAL'S ANALYSIS

25. 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*,²² Chapter Five of the *Agreement on Internal Trade*,²³ the World Trade Organization (WTO) *Agreement on Government Procurement*,²⁴ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,²⁵ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,²⁶ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*²⁷ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*²⁸ applies. In this case, all seven trade agreements apply.

26. The question before the Tribunal, then, is whether CAE's complaint is valid in terms of how PWGSC did, or did not, breach any of the relevant trade agreements when it determined CAE's bid to be non-compliant with MR T3i.

27. In this regard, the Tribunal will consider the validity of CAE's allegations in the context of Article 506(6) of the *AIT*, Article 1015(4) of *NAFTA* and the equivalent provisions of the other applicable trade agreements.

28. 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."

29. Article 1015(4) of *NAFTA* provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."²⁹

Standard of Review

30. When considering the validity of a complaint in the context of the applicable trade agreements, the Tribunal employs the standard of reasonableness. To that end, the Tribunal has accorded a large measure of deference to evaluators in their evaluation of proposals. It has stated that a government entity's

22. *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*].

23. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

24. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

25. *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). Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

26. *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).

27. *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).

28. *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).

29. As the other applicable trade agreements contain similar provisions, they have not been replicated here.

determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.³⁰

31. Conversely, the Tribunal has been clear that it will find an evaluation to be unreasonable and will substitute its judgment for that of the evaluators 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.³¹

32. Furthermore, the Tribunal has also consistently held that bidders bear the onus of demonstrating how their bids meet the mandatory criteria published in the solicitation documents.³² Accordingly, the Tribunal has stated that 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.³³ In this respect, the Tribunal has refused to impose an obligation on government institutions to seek clarification from bidders.³⁴ 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.³⁵

33. Keeping these principles in mind, the Tribunal will assess whether PWGSC's evaluation of CAE's bid was reasonable and in accordance with the relevant provisions of the applicable trade agreements.

Tribunal's Review of the Validity of CAE's Complaint

34. As mentioned above, CAE complained that PWGSC improperly evaluated its bid. More specifically, CAE argued that PWGSC erred in three ways:

- 1) by adopting an unduly narrow definition of the term "management";
- 2) by finding the candidate's experience to be non-compliant with MR T3i, and in particular by interpreting the contents of CAE's proposal in a disjunctive way such that it required the contents of the candidate's résumé to exactly mirror other parts of the proposal that supplemented the descriptions in the résumé; and
- 3) by failing to act in a fair and due diligent manner when it undertook a bid verification process based solely on the evaluators' own experiences or assumptions.³⁶

30. *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) [*SIAST*] at para. 58.

31. *Northern Lights* at para. 52; *SIAST* 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).

32. *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*]; *SIAST* at para. 59; *Excel Human Resources* at para. 34.

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

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

35. *SIAST* at para. 59.

36. Exhibit PR-2014-007-31 at paras. 27-28, Vol. 1D.

36. The Tribunal will consider the validity of each of these alleged errors in turn.

Error 1—Definition of the Term “Management”

Positions of the Parties

35. According to CAE, as the term “management” was not defined in the RFP, the Panel should have used the ordinary meaning of the term during the evaluation of its bid.³⁷ Stated another way, CAE argued that the unqualified use of the term “management” in MR T3i meant that it should have been given a broad meaning. It argued that the term “management” in MR T3i referred to “. . . all forms of experience in the management of ISS contracts of development projects for complex naval systems or complex naval simulators” as opposed to more narrow or specific types of management, such as project management or services delivery management.³⁸ In addition, it argued that the context surrounding the use of this term in MR T3i “. . . supports an interpretation that any person involved in the management of ISS or project development work for complex naval systems/simulators is eligible.”³⁹

36. Moreover, CAE submitted that the term “in-service support”, as defined in Defence Administrative Order and Directive 3022-1, informed the scope of the term “management”. For CAE, this definition indicated that “. . . ISS contract work includes management functions related to maintenance and upgrades of CF platforms.” As such, the term “management” therefore could include the day-to-day operations at the site where in-service support work would be performed.⁴⁰

37. In contrast, PWGSC argued that the Crown’s requirement for a PM with “experience in holding the authority and responsibility for the control and direction over an ISS contract or development project” required a “plain and reasonable meaning” of the term “management”.⁴¹ In PWGSC’s view, the term “management” thus meant that the proposed resource had to have the “authority to direct the contractor to carry out particular tasks or deploy specific resources”.⁴²

Tribunal’s Analysis

38. As mentioned above, the Tribunal’s role in this case is to determine the validity of CAE’s complaint in the context of the applicable trade agreements. Applying that role to CAE’s argument regarding the meaning of the term “management”, the Tribunal must determine whether PWGSC acted reasonably when it interpreted the term “management” in MR T3i.

39. MR T3i required bidders to “demonstrate that the proposed Contractor PM has a minimum of one (1) year experience in the past five (5) years” in “[m]anagement of in-service support contracts or development projects for complex naval systems or complex naval simulators.”

40. CAE was correct to note that the term “management” was not defined in the solicitation and, as such, the term should be interpreted according to its ordinary meaning.

37. *Ibid.* at para. 42.

38. *Ibid.* at para. 46.

39. *Ibid.*

40. *Ibid.* at para. 49.

41. Exhibit PR-2014-007-41 at 6, Vol. 1D.

42. Exhibit PR-2014-007-22 at 47, Vol. 1B.

41. The *Canadian Oxford Dictionary* defines “management” as “**1** the process or an instance of managing or being managed. **2 a** the professional administration of business concerns, public undertakings, etc. **b** the people involved in this.”⁴³ It further defines “manage” as:

1 organize; regulate; be in charge of (a business, household, team, a person’s career, etc.). **2** succeed in achieving; contrive. **3 a** succeed in one’s aim, esp. against heavy odds. **b** meet one’s needs with limited resources etc. **4** gain influence with or maintain control over (a person etc.). **5 a** cope with; make use of. **b** be free to attend on (a certain day) or at (a certain time). **6** handle or wield (a tool, weapon, etc.).⁴⁴

42. The *Merriam-Webster’s Collegiate Dictionary* defines “management” as “**1**: the act or art of managing: the conducting or supervising of something (as a business) **2**: judicious use of means to accomplish an end **3**: the collective body of those who manage or direct an enterprise”.⁴⁵ It defines “manage” as:

1: to handle or direct with a degree of skill: as **a**: to make and keep compliant **b**: to treat with care: HUSBAND **c**: to exercise executive, administrative, and supervisory direction of **2**: to work upon or try to alter for a purpose **3**: to succeed in accomplishing: CONTRIVE **4**: to direct the professional career of **1 a**: to direct or carry on business or affairs; *also*: to direct a baseball team **b**: to admit of being carried on **2**: to achieve one’s purpose⁴⁶

43. Taken together, these definitions indicate that the term “management” has a broad range of ordinary meanings from “to gain influence” or “succeed in achieving”, on the one hand, to “exercise executive, administrative and supervisory direction of” or “to direct”, on the other.

44. After considering the range of these definitions and the requirements of the RFP for the PM, the Tribunal finds that PWGSC’s interpretation of “management” (i.e. “the authority to direct the contractor to carry out particular tasks or deploy specific resources”) was reasonable. PWGSC’s interpretation of “management” falls within the range of dictionary definitions set out above. Its interpretation is similar to “to exercise executive, administrative and supervisory direction of” or “to direct or carry on business or affairs”.

45. Contrary to the argument put forward by CAE, the Tribunal considers that the wording of MR T3i does indeed limit the type of management to that of in-service support contracts or development projects for complex naval systems or complex naval simulators. In other words, MR T3i does not require management experience *writ large*, but rather calls for specific experience in “ISS contract management” or “development project management” for complex naval systems or simulators. Anything short of this type of management experience could therefore be deemed non-compliant. Understood this way, PWGSC’s interpretation of the term “management” was reasonable.

46. Moreover, PWGSC’s interpretation accounts for the roles and responsibilities that the PM would play in the implementation of the in-service support contract. Section 4.2.1 of Annex A of the RFP describes the duties of the PM as managing all aspects of the in-service support contract including costs, personnel, inventory, reporting, and subcontracts to ensure that the tasks required by the contract would be completed.⁴⁷ As such, there is no doubt that the role of the PM would be to “direct or carry on business affairs” or “exercise executive, administrative and supervisory direction”.

43. Second ed., s.v. “management”.

44. *Ibid.*, s.v. “manage”.

45. Eleventh ed., s.v. “management”.

46. *Ibid.*, s.v. “manage”.

47. Exhibit PR-2014-007-01 at tab 1, Vol. 1.

47. Accordingly, the Tribunal accepts PWGSC's view that the term "management" can reasonably refer to the person with the authority to control and direct an in-service support contract or development project.

48. That said, the Tribunal considers that the term "management" could have been defined in a more straightforward manner to ensure that bidders would not have based their bids on alternate interpretations of the term. PWGSC could have specified that the PM needed to have experience as a manager with direct authority to control an in-service support contractor. In addition, as evidenced by the different ways in which the parties interpreted MR T3i as a whole,⁴⁸ the Tribunal considers that PWGSC could have more clearly articulated the exact combination of requirements necessary to satisfy the terms of MR T3i.

49. Nevertheless, as noted above, the Tribunal is mindful that *bidders* bear the onus of seeking clarification regarding the interpretation of particular requirements when preparing bids to ensure that they demonstrate compliance.⁴⁹ If CAE had been uncertain as to the meaning of "management" and the types of experience required to meet this requirement, it should have consulted with PWGSC *before* submitting its bid. CAE should neither have presumed to know the meaning of the term nor simply assumed that the candidate's qualifications were sufficient in light of its own interpretation.

Error 2—Whether the Candidate's Experience Complied With MR T3i

50. Having found that PWGSC's interpretation of the term "management" was reasonable, the Tribunal will now consider CAE's second argument that PWGSC erred by finding the candidate's experience to be non-compliant with MR T3i. Once again, the Tribunal will consider CAE's claim in terms of the reasonableness of PWGSC's evaluation.

Positions of the Parties

51. CAE argued that PWGSC acted unreasonably when it found that the candidate's experience, and particularly his experience as Executive Officer of *HMCS Windsor*, did not meet the requirements of MR T3i.⁵⁰ To support this position, it argued that PWGSC failed to account for the candidate's vast experience by incorrectly considering a submarine to be a platform rather than a complex naval system and that PWGSC acted unreasonably by requiring the contents of the candidate's résumé to mirror other parts of the bid that supplemented the descriptions in the résumé.⁵¹

52. PWGSC disagreed, arguing that the Panel reasonably assessed the candidate's experience, as outlined in CAE's bid and his résumé, against the requirements of MR T3i. With regard to CAE's argument that PWGSC considered a submarine to be a platform rather than a complex naval system, PWGSC stated that the Panel had "... no issue in recognizing that a submarine qualifies as a 'complex naval system'"⁵² [emphasis omitted]. The only issue for the Panel was whether the candidate's management experience related to "in-service support contracts or development projects"⁵³ [emphasis omitted].

48. See Exhibit PR-2014-007-01 at paras. 25-29, Vol. 1; Exhibit PR-2014-007-22 at 30, Vol. 1B.

49. *Info-Electronics H P Systems*; *SIAS* at para. 59; *Excel Human Resources* at para. 34.

50. Exhibit PR-2014-007-31 at para. 26, Vol. 1D.

51. *Ibid.* at para. 27.

52. Exhibit PR-2014-007-22 at 45, Vol. 1B.

53. *Ibid.* at 46.

53. In response to CAE's argument that PWGSC required the contents of the résumé to mirror the contents of the bid, PWGSC submitted that the RFP required bidders to submit résumés for proposed resources that demonstrated the degree to which those proposed resources met or exceeded the respective requirements.⁵⁴ As such, PWGSC submitted that the RFP required the Panel to assess statements made in all bid documents on the basis of the required résumés.⁵⁵

54. As indicated above, MR T3i required a proposed PM to have a "minimum of one (1) year experience in the past five (5) years" in "[m]anagement of in-service support contracts or development projects for complex naval systems or complex naval simulators". In addition, section 6.1 of Annex C of the RFP specified that bidders "... must provide complete details as to where, when (month and year) and how (through which activities/responsibilities) the stated qualifications/experience were obtained ... " in order to demonstrate compliance.

55. According to PWGSC, the Panel reviewed the information provided by CAE for each of the candidate's three positions when considering whether he had the necessary experience to satisfy the requirements of MR T3i.

56. With regard to the candidate's first position, CFNOS Submarine Warfare Training Officer (August 2006 – January 2009), the Panel found that the experience noted in section 4.2.1.1.1 of CAE's proposal and in the candidate's résumé did not substantiate the claim that the candidate "actively managed requirements of the Victoria Class ISS contract related to development, delivery, implementation, and the operations start-up of the VCT's operations and weapons training and certification processes". Rather, the Panel considered that the duties described in the candidate's résumé were "those of an instructor and subject matter expert" and did not constitute management of in-service support contracts or development projects.⁵⁶

57. With regard to the candidate's second position, CFNOS Submarine Weapon Certification Officer (August 2011 – July 2012), the Panel found that descriptions, such as "actively assisted in the management of in-service support contracts and in development projects for the VSCTT", "assist[ed] ISS contractors" and "maintained a robust and professional working relationship with the in-service support contractors" did not describe duties relating to the management of in-service support contracts or development projects.⁵⁷

58. Finally, with regard to the candidate's third position as Executive Officer of *HMCS Windsor* (August 2012 – January 2014), the Panel found that the candidate's résumé described "duties that are related to management of the submarine as a platform, ma[de] no mention of [in-service support contract] or development project management in this period, and d[id] not support the claim made in [CAE's bid]".⁵⁸

59. PWGSC argued that the Panel, when reaching its conclusion with regard to compliance with MR T3i, was fully aware that "responsibility for the day-to-day operation and management of [in-service support] contracts for the Crown lies with the officials of DGMEPM [Director General of Maritime Equipment Program Management]" and that "RCN [Royal Canadian Navy] officers, whose commands are the recipients of the work done under the [in-service support] contracts, coordinate and work closely with both DGMEPM officials and the contractor to ensure that their operational needs are being met".⁵⁹

54. Exhibit PR-2014-007-41 at 7, Vol. 1D.

55. *Ibid.*

56. Exhibit PR-2014-007-22 at 38, Vol. 1B.

57. *Ibid.* at 42.

58. *Ibid.* at 44.

59. *Ibid.* at 46-47.

60. On the basis of these explanations, PWGSC justified the Panel's decision that the candidate's experience did not constitute management of in-service support contracts or development projects. Furthermore, PWGSC argued that even if the candidate's experience had constituted management of in-service support contracts or development projects, it would not have met the minimum requirement of one year's experience.⁶⁰

61. Finally, PWGSC stated that it accepted that the candidate's experience related to a complex naval system⁶¹ and therefore suggested that the Tribunal did not need to address this element of MR T3i in its deliberations.

Tribunal's Analysis

62. In its analysis of this alleged error, the Tribunal will first consider whether PWGSC acted reasonably when it concluded that the candidate's experience, as described in CAE's bid and supporting documents, did not constitute management of in-service support contracts or development projects. Only if the Tribunal concludes that PWGSC acted unreasonably will it address the issue of the requirement for a minimum of one year of experience.

63. Upon reviewing the candidate's résumé, the Tribunal finds that his experience falls short of the meaning of the term "management", which PWGSC reasonably interpreted as referring to the person in charge or the person with the authority to control and direct an in-service support contract or development project.

64. The candidate's résumé twice stated that he had "[a]ctively *assisted* in the management of in-service support contracts and in development projects . . . *in collaboration with* the incumbent contract team, as observed through duties as *lead instructor* . . . [and] by *describing* how operations equipment is used at sea . . ." [emphasis added]. Similarly, his résumé stated that he "*presented* excellent *ideas* for development projects" [emphasis added].⁶²

65. Taken together, these phrases cast doubt on the degree to which the candidate had the requisite management experience in terms of being in charge of the solicited roles and responsibilities for a PM. "Actively assist[ing] in the management" and "present[ing] excellent ideas" do not indicate that the candidate had the authority to control or direct the in-service support contracts or development projects, as reasonably required by PWGSC. As such, the Tribunal finds that the candidate's résumé, while commendable,⁶³ does not demonstrate that he had experience in the management of in-service support contracts or development projects for complex naval systems or simulators.

66. Likewise, the candidate's affidavit also indicates that he participated in daily planning meetings during the *HMCS Windsor's* EDWP and was involved in:

. . . the day to day decision making regarding issues such as the sequencing of the work and made recommendations that the contractor accepted regarding the work schedule that made sense based on the nature of the work and the overall schedule of the EDWP and TRP [Tiered Readiness Program].⁶⁴

60. *Ibid.* at 47.

61. *Ibid.* at 45.

62. *Ibid.* at tab 25; Exhibit PR-2014-01 at tab 9, Vol. 1.

63. See Exhibit PR-2014-007-01A (protected) at tab 8, attachment 2, Vol. 2.

64. Exhibit PR-2014-007-31, tab 1 at para. 10, Vol. 1D.

67. While “being involved in decision making” and “making recommendations” may fall within the scope of certain phrases used to define “management”, such as “influence” and “organize” as noted above, they are unlikely to fall within the scope of the majority of these terms, such as “control”, “direct”, “supervise”, “regulate”, “exercise direction of” or “be in charge of”, all of which are implicit in PWGSC’s reasonable interpretation of the term in the context of the RFP.

68. The Tribunal therefore finds that the Panel’s evaluation was reasonable. When comparing the words used in the candidate’s résumé with the requirements of MR T3i, the Panel did not ignore vital information in CAE’s bid. Accordingly, it reasonably concluded that the candidate’s experience was insufficient to satisfy the terms of MR T3i. Likewise, as the RFP required the entire bid to *demonstrate* compliance, the Panel reasonably concluded, from the contents of the candidate’s résumé, that his experience was more akin to that of an instructor or subject matter expert or related to the management of the submarine itself, as opposed to the management of in-service support contracts and project development. Finally, by providing CAE with a detailed explanation of its findings, the Panel acted in a procedurally fair way. As such, the Tribunal will defer to the Panel as its explanation is more than tenable, and even compelling in certain regards.

69. In regard to CAE’s claim that the RFP did not include a requirement for “redundant” compliance between the bid and the résumé or compliance based on the résumé alone,⁶⁵ the Tribunal would once again highlight that bidders bear the onus of ensuring that their bids sufficiently demonstrate compliance. While this onus can, at times, appear to be excessive or “redundant” in terms of the ways in which bids need to be written and supporting documents need to be supplied, bidders must always prepare their bids in such a way as to demonstrate and justify compliance.

70. If this were not the case, evaluators could be placed in a compromised situation in which they might not be able to assess bids fairly, objectively or on the basis of submitted documentation. Evaluators would, instead, be required to “read between the lines” in an attempt to piece together various components of a bid vis-à-vis the mandatory requirements of a solicitation, thus potentially breaching the terms of the applicable trade agreements at hand. Similarly, bidders could find themselves in a compromised position in which they could not be confident that their bids would be evaluated against the stated requirements of an RFP, thus putting at risk the fairness and transparency of the procurement system as a whole.

71. In this case, the Panel offered CAE a chance to substantiate how its bid, and the candidate’s résumé in particular, demonstrated compliance with MR T3i. As stated above, CAE did not do this to the Panel’s satisfaction. Likewise, CAE did not provide any rationale to convince the Tribunal that the Panel’s determination of non-compliance was anything but reasonable and fair based on the evidence in the complaint. Had CAE’s bid included the confidential attachment 2 to Murray Hooper’s affidavit, the Panel may have reached a different conclusion about the candidate’s qualifications. However, the Tribunal notes that this document was not included in CAE’s bid. Furthermore, the document was dated after CAE learned that its bid was not compliant with the RFP. In other words, the document was drafted after the contract had already been awarded to MDA Systems Ltd. Any consideration of the document by PWGSC would, therefore, have been tantamount to bid repair.

72. Therefore, the Tribunal finds that the Panel reasonably operationalized its interpretation of the term “management” during its evaluation of the candidate’s qualifications against the stated requirements of MR T3i. As such, the Tribunal does not find any evidence to support the allegation that the Panel breached the applicable trade agreements when applying the meaning of the term “management” to the bid at hand.

65. *Ibid.* at paras. 55-56.

Error 3—Bid Verification

73. Having found that the first two of CAE's allegations are not valid, the Tribunal will turn its attention to the third: that PWGSC failed to act in a fair and diligent manner when it undertook a bid verification process based solely on the evaluators' own experiences or assumptions.

Positions of the Parties

74. According to CAE, PWGSC improperly "read down" the experience in its candidate's résumé by relying on the personal knowledge of the members of the Panel. In its view, members of the Panel incorrectly drew conclusions about the candidate's qualifications on the basis of unsubstantiated and subjective opinions.⁶⁶

75. In response, PWGSC stressed that the RFP permits the verification of bids. Furthermore, PWGSC argued that members of the Panel used their personal or "actual" knowledge merely to confirm conclusions that they had already made. In its view, the extensive experience and knowledge of the Panel "strongly positioned" it to "effectively" assess the compliance of bids in response to the MR T3i.⁶⁷

76. PWGSC highlighted the Panel's notes to demonstrate how individual evaluators verified CAE's claims about the candidate's résumé. For example, with regard to his duties as a CFNOS Submarine Warfare Training Officer (August 2006 – July 2009), the Panel stated: "As the DND TA [Technical Authority] for the acquisition and support contracts for the VSCTT, the evaluation team leader can attest to the fact that the individual did not at any time manage the VSCTT development project or ISS contract."⁶⁸

77. With regard to the candidate's duties as CFNOS Submarine Weapon Certification Officer, the Panel stated that two members of the evaluation team, one who acted as the DND Technical Authority for the VSCTT and VCT in-service support contracts and the other who acted as the Officer in Charge of the CFNOS submarine training school during the period stated in the résumé (July 2011 – July 2012), could attest to the fact that the candidate did not at any time manage the VSCTT or VCT development project or in-service support contract.⁶⁹

78. Finally, with respect to the candidate's duties as an Executive Officer on *HMSC Windsor*, the Panel stated: "As a CFNOS Officer In Charge for the CFNOS submarine training school, and as a training requirements manager in the Directorate of Naval Training and Education, two members of the evaluation team can attest to the fact that an Executive Officer of a submarine would not manage development projects or ISS contracts."⁷⁰

Tribunal's Analysis

79. As noted above, by incorporating section 1.6 of the *Standard Instructions – Goods and Services – Competitive Requirements*, the RFP provides that "Canada may . . . verify the information provided by the Bidder . . . through independent research, use of any government resources or by contacting third parties." On the basis of this provision, the Tribunal considers that the Panel was clearly entitled to verify the information contained in CAE's bid.

66. Exhibit PR-2014-007-01 at paras. 58-59, Vol. 1.

67. Exhibit PR-2014-007-22 at 9, Vol. 1B.

68. *Ibid.* at tab 18.

69. *Ibid.*

70. *Ibid.*

80. However, PWGSC's reliance on the fact that the Panel was entitled to verify information is not enough for the Tribunal to conclude that it acted in a manner that was reasonable, procedurally fair or in accordance with the applicable trade agreements. Even CAE did not contest PWGSC's right to conduct the verification. Instead, it took issue with the manner in which the verification was performed, and it is in response to this allegation that the Tribunal will consider the validity of the Panel's actions in the context of the applicable trade agreements.

81. The wording of section 1.6 of the *Standard Instructions – Goods and Services – Competitive Requirements* conveys the standard by which verifications should be performed. If evaluators so choose to verify a bid, section 1.6 requires them to seek objective evidence, such as direct personal knowledge of the particulars of a situation or an independent verification from a third party. In other words, evaluators are required to *apply themselves* in the verification. On the flip side, evaluators must not and cannot “apply themselves” by simply relying upon personal knowledge or assumptions about what might or could have happened in a particular situation.

82. In this case, evidence before the Tribunal indicates that the Panel did both. While properly or reasonably “applying itself” when verifying two of the three positions that the candidate held, the Panel did not apply itself to the third.

83. In regard to the candidate's first position as CFNOS Submarine Warfare Training Officer between August 2006 and July 2009, PWGSC explained that panel members Mr. Riddell and Lt Cdr Bryan applied their personal knowledge to CAE's claims. Given that Mr. Riddell was the Technical Authority for the VCT in-service support contract, PWGSC argued that he had actual knowledge of all that the contract entailed. Similarly, as Lt Cdr Bryan has been the Officer in Charge of the program since 2009,⁷¹ he had direct and actual knowledge of the role of instructors in relation to the VCT trainers and the VCT in-service support contract, and was therefore in a position to support Mr. Riddell's direct knowledge with his own general knowledge of the role of instructors at CFNOS.

84. In response, CAE argued that the candidate and Mr. Riddell did not know each other and that Mr. Riddell would not have had the opportunity to know the specific details of the candidate's actual role as Submarine Warfare Training Officer.⁷²

85. The Tribunal notes that while Lt Cdr Bryan supervised all instructors in the CFNOS submarine training program after 2009, the evidence does not indicate that he had been the Officer in Charge during the whole period in which the candidate was an instructor in this unit (i.e. from 2006 to 2009). The Tribunal therefore cannot say that Lt Cdr Bryan had direct, personal knowledge of the candidate's duties during this period. However, the evidence does indicate that Mr. Riddell was the TA for the VCT in-service support contract since its inception,⁷³ and CAE has not contradicted PWGSC's claim that Mr. Riddell would have had direct knowledge of all individuals involved in the management of that contract.

86. In regards to the candidate's second position as CFNOS Submarine Weapon Certification Officer (August 2011 – July 2012), PWGSC claimed that Mr. Riddell and Lt Cdr Bryan used their actual and direct knowledge to confirm their conclusions about his compliance with MR T3i. In particular, PWGSC noted that, as an instructor in the submarine training program at CFNOS, the candidate reported to Lt Cdr Bryan.⁷⁴

71. *Ibid.* at 41.

72. Exhibit PR-2014-007-01 at para. 62, Vol. 1.

73. Exhibit PR-2014-007-22 at tab 9, Vol. 1B.

74. *Ibid.* at 44.

87. Evidence in the complaint indicates that in this regard, the verification exercise was reasonable. As the candidate's supervisor during this period, Lt Cdr Bryan would have been in an excellent position to know the extent of the candidate's duties. His actual and personal experience thereby allowed him to make an objective assessment of the ways in which the candidate did, and did not, demonstrate the requirements of MR T3i.

88. In regard to the candidate's third position as Executive Officer, *HMCS Windsor* (August 2012 – January 2014), PWGSC highlighted that the Panel based its verification upon the knowledge of Lt Cdr Bryan and Mr. Sekaly, both of whom were in DND training organizations. Lt Cdr Bryan, for example, served as Executive Officer and Officer in Charge of *HMCS Chicoutimi* from May 2003 to April 2005 and subsequently as Executive Officer of *HMCS Corner Brook* until December 2005.⁷⁵ According to their personal and actual knowledge, executive officers like the candidate would not manage in-service support contracts or development projects in a manner consistent with PWGSC's interpretation of the term.⁷⁶

89. CAE responded with evidence that the candidate, as Executive Officer of the *HMCS Windsor*, managed requirements and activities relating to the EDWP and TRP not normally managed by an Executive Officer.⁷⁷ CAE argued that neither Lt Cdr Bryan nor Mr. Sekaly had any involvement in the actual EDWP or TRP projects on the *HMCS Windsor*. While they may have known what executive officers *might have done*, CAE maintained that neither Panel member had specific knowledge of what the candidate *actually did* in this role.⁷⁸

90. The Tribunal agrees. As noted above, when explaining its decision that CAE's bid was non-compliant, the Panel stated that “. . . two members of the evaluation team can attest to the fact that an Executive Officer of a submarine *would not* manage development projects or ISS contracts” [emphasis added].⁷⁹

91. The use of the words “would not” suggests that the Panel's verification of the candidate's role as Executive Officer was not based on objective, direct personal knowledge. Instead, the verification was based on assumptions about what the candidate might (or might not) have done while in this role. That is confirmed by the fact that the candidate's affidavit was clear that he was involved with activities *not normally undertaken* by an Executive Officer,⁸⁰ and as such undertook activities that the Panel members would have had no direct knowledge about unless they had truly applied themselves in the verification.

92. By relying on assumptions as opposed to an extensive and objective verification, the Panel thereby did not apply the standard set out in section 1.6 to the third position that the candidate held. By accepting the Panel's verifications, the Tribunal must find that PWGSC acted unreasonably and contrary to Article 506(6) of the *AIT*, Article 1015(4) of *NAFTA* and the similar provisions of the other trade agreements as a result.

Summary of the Tribunal's Analysis

93. In summary, the Tribunal finds that CAE's complaint is valid in part. While the Panel reasonably interpreted and applied the meaning of the term “management” when evaluating CAE's bid against MR T3i, the Panel did not consistently apply itself when verifying all three areas of the candidate's

75. Exhibit PR-2014-007-41 at 8, Vol. 1D.

76. Exhibit PR-2014-007-22 at 46, Vol. 1B.

77. See Exhibit PR-2014-007-31, tab 1 at para. 12, Vol. 1D.

78. Exhibit PR-2014-007-31 at para. 69, Vol. 1D.

79. Exhibit PR-2014-007-22 at tab 18, Vol. 1B.

80. Exhibit PR-2014-007-31, tab 1 at para. 12, Vol. 1D.

experience as presented in his résumé. As PWGSC ultimately accepted the Panel's evaluation and verification of CAE's bid, it acted reasonably in regards to CAE's first two allegations, but unreasonably, and therefore in contravention of the applicable trade agreements, in regard to the third.

REMEDY

94. As the complaint is valid in part, the Tribunal must consider the appropriate remedy pursuant to subsections 30.15(2) and (3) of the *CITT Act*. In recommending an appropriate remedy, the Tribunal must consider all of the circumstances relevant to the complaint at hand including the following: (1) the seriousness of the deficiencies found by the Tribunal; (2) the degree to which CAE 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.

95. As indicated above, CAE requested that the Tribunal declare its proposal compliant with the mandatory requirements of the solicitation; order that a new independent evaluation team evaluate its proposal; and award CAE the contract if the new evaluation determined that it was, in fact, the highest-rated compliant bid. CAE also requested monetary compensation for lost opportunity and lost profit.

96. PWGSC did not directly address the remedy issue.

97. As stated above, the complaint is valid in part given that PWGSC did not act reasonably when it accepted the Panel's verification of CAE's bid even though part of the verification was based on assumptions and opinions rather than facts and independent evaluation. In this regard, the complaint reveals a deficiency in the procurement process at hand.

98. However, the Tribunal cannot conclude that the deficiency was "serious" or that any party (including CAE) was prejudiced to a great degree. Instead, PWGSC acted reasonably when it accepted the Panel's interpretation of the meaning of the term "management" and the Panel's evaluation of CAE's candidate's experience vis-à-vis the requirements of MR T3i. Accordingly, PWGSC reasonably rejected CAE's bid as non-compliant, given that Section 3 of Annex C of the RFP clearly states that "... any non-compliant proposals will be eliminated and no further consideration will be given"

99. Therefore, although the failure to perform the verification in a procedurally fair way constitutes a breach of Article 506(6) of the *AIT* and Article 1015(4) of *NAFTA* as it contravenes their requirements to evaluate bids in accordance with the published criteria, the Tribunal finds that this breach did not result in significant prejudice to CAE. Regardless of whether or how the Panel verified CAE's bid, the outcome for CAE would have been the same—its bid would have been eliminated. As such, the Tribunal is not convinced that the interests of fairness and efficiency require recommending a remedy.

COSTS

100. Each party requested that the Tribunal award it costs if its claim was successful.

101. In this case, as the Tribunal has found the complaint to be valid in part, each party was successful on one or more issues, but unsuccessful in others. One of CAE's three arguments was successful in that the Tribunal found that the Panel did not properly verify elements of its bid. Two of PWGSC's counter-arguments were successful in that the Tribunal upheld the Panel's interpretation of the term "management" and the Panel's evaluation of CAE's bid in that regard.

102. Accordingly, the Tribunal will not award costs to either party.

DETERMINATION

103. 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