Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-014

CAMEC Joint Venture

v.

Department of Public Works and Government Services

Determination and reasons issued
Friday, October 7, 2016

Canada

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IN THE MATTER OF a complaint filed by CAMEC Joint Venture 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

CAMEC JOINT VENTURE	**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. However, the Canadian International Trade Tribunal finds that the test failure with respect to two mandatory requirements means that the bid submitted by CAMEC Joint Venture is non-responsive.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal's preliminary indication is that no costs are warranted. If any party disagrees with the preliminary indication, it may make submissions to the Canadian International Trade Tribunal, as contemplated by article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Peter Burn

Peter Burn
Presiding Member

Tribunal Member:	Peter Burn, Presiding Member
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STATEMENT OF REASONS

SUMMARY

1. On June 6, 2016, CAMEC Joint Venture (CAMEC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,[1] concerning a Request for Proposal (RFP) (Solicitation No. W8476-155245/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND). The RFP was for a headquarters shelter system (HQSS) and in-service support for the HQSS.

2. CAMEC alleged that the performance verification tests were not carried out in accordance with the requirements of the RFP. CAMEC asserted that, because of the evaluation errors, it did not achieve the required minimum score necessary for its bid to be considered responsive and to proceed to a further stage of the evaluation.

3. As a remedy CAMEC requested that the performance verification tests be re-conducted in accordance with the terms of the RFP. In the alternative, CAMEC asked that it be compensated for lost opportunity and/or its bid preparation costs or that the solicitation be cancelled and a new solicitation issued.

PROCUREMENT PROCESS

4. The evaluation was conducted in accordance with a two-phased process. In Phase 1, bids were evaluated on the basis of bidders' responses. If bidders passed Phase 1, they proceeded to Phase 2, which consisted of a physical test of the HQSS provided by the bidders.

5. The physical test of the HQSS was carried out using performance verification tests, during which the HQSS was evaluated under 63 mandatory requirements and 37 point-rated requirements.

6. Only those bids which passed both Phase 1 and Phase 2 were considered responsive.

7. It is the conduct and results of the performance verification tests which are at issue in this complaint.

8. On April 23, 2015, PWGSC issued the RFP for an HQSS and related in-service support on behalf of DND. The solicitation was initially scheduled to close on July 15, 2015, but, after several amendments were issued, the closing date was changed to September 4, 2015.

9. CAMEC submitted its bid on September 4, 2015.

10. CAMEC passed Phase 1 of the evaluation and was therefore invited to participate in Phase 2, being the performance verification test of the HQSS.

11. From January 11 to 18, 2016, officials conducted several tests and evaluations in accordance with Phase 2 of the evaluation.

12. On January 13, 2016, officials conducted the flexible footprints verifications, which tested semi-rigid flooring (criterion 4.8.1) and fabric interchangeability (criterion 2.3.15). CAMEC objected to both the involvement of DND officials during the testing and the interpretation of the RFP put forward by DND at

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

the time of the testing. These objections were noted in the test data sheet for the flexible footprint verifications.

13. On January 14 and 15, 2016, officials conducted the snow loading test (criterion 1.40.2.7.2).

14. On January 18, 2016, CAMEC was informed that it did not pass the snow loading test, at which time it objected to the reasons provided by the National Research Council of Canada (NRC) for the alleged test failure.

15. On January 14, 2016, officials conducted the heater starting test (criterion 3.17.8). During testing, CAMEC raised an objection regarding the type of fuel used for the test.

16. After the heater starting test was concluded, CAMEC was informed that it had failed the test and was sent a material safety data sheet on the fuel used during the testing.

17. On January 15, 2016, officials conducted the U-factor heat transmission test (criterion 2.6.1) and informed CAMEC that its HQSS had failed the test. On May 20, 2016, CAMEC was informed that air velocity had not been measured during the U-factor heat transmission test.

18. On February 24, 2016, CAMEC made a further objection to PWGSC in which it detailed each ground of objection.

19. On May 20, 2016, PWGSC responded to the objections raised by CAMEC in January 2016 and in its letter of February 24, 2016. PWGSC denied relief and informed CAMEC that no re-testing would be conducted.

PROCEDURAL HISTORY

20. CAMEC filed its complaint with the Tribunal on June 6, 2016, and it was accepted for inquiry on June 8, 2016.

21. PWGSC filed its Government Institution Report (GIR) on July 18, 2016.

22. On July 25, 2016, CAMEC filed a motion requesting that PWGSC produce certain documents relating to the testing and evaluation of CAMEC's proposed HQSS and that it be granted an extension of time to file its comments on the GIR.

23. On July 26, 2016, PWGSC wrote to provide its consent to produce the documents requested in CAMEC's motion of July 25, 2016.

24. On August 3, 2016, PWGSC filed the documents requested by CAMEC relating to the testing and evaluation of CAMEC's proposed HQSS.

25. On August 15, 2016, CAMEC filed its comments on the GIR.

26. On August 17, 2016, PWGSC requested leave to file a sur-reply to CAMEC's comments on the GIR. After seeking additional submissions from the parties, the Tribunal granted PWGSC's request.

27. On August 30, 2016, PWGSC filed its sur-reply to CAMEC's comments on the GIR.

28. On September 7, 2016, CAMEC filed its response to PWGSC's sur-reply.

29. Given that there was sufficient information on the record to fully deliberate and decide upon the complaint, the Tribunal concluded that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

REQUIREMENTS AT ISSUE

30. CAMEC argued that the performance verification tests were to be carried out by officials from the NRC, but that DND officials were involved in the testing contrary to the terms of the RFP.

31. In addition, CAMEC argued that the following criteria were improperly evaluated during the performance verification tests:

Verification Profile	Criterion	Test Type	Evaluation
6.6 Heating	3.17.8	Heater start test	Mandatory
6.7 U-factor test	2.6.1	U-factor heat transmission	Mandatory
6.4 Environmental protection—snow load verification	1.40.2.7.2	Snow loading test	Mandatory
6.3 Flexible footprints verifications	2.3.15	Fabric interchangeability	Rated
6.3 Flexible footprints verifications	4.8.1	Semi-rigid flooring	Rated

32. After the bid evaluation, CAMEC was informed that it either failed to meet the mandatory requirements or did not achieve maximum points for the rated requirements listed above.

APPLICATION OF TRADE AGREEMENTS

33. While the RFP explicitly acknowledges that the *Agreement on Internal Trade*[2] applies to this agreement, CAMEC argued that both the *North American Free Trade Agreement*[3] and the World Trade Organization *Agreement on Government Procurement*[4] are also applicable. CAMEC contended that the goods and services are being purchased by PWGSC and, therefore, are subject to both *NAFTA* and the *AGP*.

34. As noted by PWGSC, the goods and services being procured are classified under Federal Classification Code N8340 (Tents and Tarpaulins).[5] Both *NAFTA* (in Section B of Annex 1001.1b-1) and

2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/agreement-on-internal-trade/> [*AIT*].
3. *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, online: Global Affairs Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng> (entered into force 1 January 1994) [*NAFTA*].
4. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*AGP*].
5. Exhibit PR-2016-014-11 at para. 26, Vol. 11.

the *AGP* (in Annex 4 to Canada's Appendix 1) provide exhaustive lists of goods purchased by DND which are subject to coverage under those respective agreements. The goods, and their related services, are not included in either list and are therefore exempt from coverage under *NAFTA* and the *AGP* when purchased by DND.

35. While the procurement was conducted by PWGSC on behalf of DND, the Tribunal has repeatedly held that, when considering the application of the relevant trade agreements, the government institution acting as the contracting authority may simply be acting as an agent for another government institution. In such cases, for the purposes of the application of the trade agreements, the relevant government institution is determined on the basis of factors such as the department that requires the actual goods or services, that drafted the specifications, that conducted the evaluation and that will pay for the work and other statements in the solicitation document indicating that the contracting authority is acting on behalf of another government institution.[6]

36. In reviewing the RFP, the Tribunal finds that there are multiple provisions which make it clear that PWGSC is acting as an agent for DND. For example, Appendix BB to Annex B of the "Bidder Instructions and Requirements" provides as follows:

> **1.2 Purpose/Objective**
>
> *DND has retained the services of a Third Party test facility* to develop and undertake a program to verify the Headquarters Shelter System (HQSS) requirements (mandatory and rated) listed in Appendix A.
>
> **1.3 Background**
>
> *DND is in the process of acquiring a Headquarters Shelter System (HQSS)* to partially replace an in-service tactical shelter system with a more capable tactical command post shelter system, in support of Canadian Forces deployment in all operational environments.
>
> **1.4 Limitations**
>
> No provision has been made for the repetition of verifications. Only a few observers will be allowed at the testing site. *These observers will be limited to DND members*, PWGSC members, and Bidder representatives on a restricted basis. Final decisions of who will be allowed on site *will be at the ultimate discretion of the DND Project Manager and PWGSC*.[7]
>
> [Emphasis added]

37. On balance, these provisions suggest that this RFP is for the provision of an HQSS and related services for, and on behalf of, DND. Thus it is DND, not PWGSC, which is the relevant government institution when deciding the applicability of the trade agreements. As such, the exclusions in both *NAFTA* and the *AGP* apply, and the solicitation is not subject to either of those trade agreements.

38. Nevertheless, as the *AIT* does apply to this solicitation, the Tribunal will proceed to determine whether the grounds of complaint raised by CAMEC are valid.

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6. See, for instance, *Zenix Engineering Ltd. v. Defence Construction Canada* (10 April 2007), PR-2006-035 (CITT); *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 FCR 514, 1999 CanLII 9343(FCA); *National Airmotive Corporation* (3 June 1999), PR-98-051 (CITT).
7. Exhibit PR-2016-014-01 at 136, Vol. 1.

ANALYSIS

39. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, as set out above, is the *AIT*.

40. Article 506(6) of the *AIT* provides as follows:

> In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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.

41. In cases where the application of Article 506(6) of the *AIT* is at issue, the Tribunal does not generally substitute its judgment for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[8] In addition, the Tribunal is of the view that the responsibility for ensuring that a proposal is compliant with all essential criteria of a solicitation ultimately resides with the bidder.[9]

Requirements to Pass Phase 2 of Evaluation

42. Amendment 7 to the RFP stated that, in order to be considered responsive, a bid had to receive a minimum score of 76 points during Phase 2 of the evaluation.[10] CAMEC was awarded less than 76 out of the 126 points available and, therefore, did not achieve the necessary minimum threshold to be considered responsive.

43. Of the requirements, two are rated requirements: 4.8.1 for the semi-rigid flooring (2 points), and 2.3.15 for fabric interchangeability (3 points). If, as argued by CAMEC, the HQSS solution that it proposed was improperly evaluated, any additional points awarded would result in CAMEC's bid meeting the 76 points necessary to be deemed responsive.

44. However, as noted by PWGSC, the requirements also contain several mandatory requirements which CAMEC's proposal had to meet in order to be considered responsive. In support of this, PWGSC pointed to question and response 430 in amendment No. 9 to the RFP, which provided as follows:

> **Question 430**
>
> Headquarters Shelter Systems (HQSS), Amendment No. 007 & Annex B to Volume 1, Bid Evaluation Plan
>
> . . .

8. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) [*MTS Allstream*] at para. 26.
9. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT).
10. Exhibit PR-2016-014-01 at 1100, Vol. 1.

> Please confirm: Will a bid which provides a compliance statement to a "Mandatory Requirement" by providing . . . a response that contains a deviation from the requirement and the physical and functional performance capability of the proposed system be considered responsive?
> OR
> Will a bid which provides a compliance statement with a deviation from the requirement . . . be considered non-responsive.
>
> Response:
>
> Any bid with a deviation to a Mandatory Requirement will be considered to be a non-responsive bid. A bidder must meet all mandatory requirements to provide a responsive bid.[11]

45. The Tribunal has previously found that there is no such thing as a flexible or optional mandatory requirement.[12] Rather, the Tribunal has held as follows:

> . . . compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system. Therefore, procuring entities must evaluate bidders' conformance with mandatory requirements thoroughly and strictly.[13]

46. Therefore, the Tribunal finds that, in order for CAMEC's bid to be responsive, it not only had to achieve a minimum of 76 out of the 126 points available for Phase 2 of the evaluation but also had to pass each of the mandatory requirements evaluated during Phase 2.

47. As such, the analysis will begin with the mandatory criteria before proceeding to the rated criteria.

Heater Start Test—Mandatory Requirement 3.17.8

48. In order to meet the mandatory requirements, the RFP provided as follows:

3.17.8	The Heater shall start and operate in NATO Climatic Category C3 in accordance with NATO STANAG 4370 – Allied Environmental Conditions Testing Publications (AETCP) 230 Ed 1, Leaflet 2311/1, without any starting aids. Three (3) attempts will be allowed within 15 minutes.[14]

49. The test protocol for conducting the test was as follows:

1. Bidder personnel will position the heater inside climate chamber.
2. The third party test personnel will lower the climatic chamber temperature and set to -51°C and the heater is allowed to cold soak overnight.
3. Bidder personnel shall Turn ON the heater following cold soak.
4. The Bidder is allowed up to 15 minutes to start the heater.[15]

Positions of Parties

50. CAMEC argued that, by using Jet A-1 fuel, PWGSC failed to properly carry out the heater start test. CAMEC maintained that it had understood that JP-8 fuel would be used for the test and that Jet A-1 fuel was inadequate for the existing testing conditions. In particular, CAMEC asserted that Jet A-1 fuel was

11. *Ibid.* at 1162.
12. *Raymond Arsenault Consultants Inc. v. Public Service Commission* (18 April 2006), PR-2005-042 (CITT) at para. 24.
13. *IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) at 7.
14. Exhibit PR-2016-014-01 at 159, Vol. 1.
15. *Ibid.* at 160.

not suitable for the cold temperatures used in the heater start test, as it formed ice crystals and was in a "jelly"-like state at the time of testing. Thus, CAMEC submitted that, by using improper fuel, PWGSC failed to follow the prescribed evaluation criteria and did not conduct a fair evaluation.

51. PWGSC contended that CAMEC was, or ought to have been, aware that Jet A-1 fuel could be used for the heater start test, as that was fully consistent with the terms of the "final" RFP. While PWGSC acknowledged that, during the Letter of Intent (LOI) phase, it indicated that JP-8 fuel would be used, it noted that the LOI phase did not supersede the terms of the RFP. In support of this, PWGSC referred to the answer to question 341 in amendment No. 6 to the RFP, which provided as follows:

> The LOI and RFP are two distinct processes. We refer you to Volume 1 – Bidder Instructions and Requirements, paragraph 1.2.11 of the RFP which provides as follows:
>
> "This Request for Proposal contains all the requirements and objectives relating to this bid solicitation. Other information or documentation provided to or obtained by the Bidder from any other source will have no force or effect.[16]

52. In addition, PWGSC argued that NATO STANAG 4362, which was incorporated by reference into the RFP, allowed for the use of both JP-8 and Jet A-1 fuel. Thus, PWGSC maintained that it fully complied with the terms of the RFP when it chose to use Jet A-1 fuel rather than JP-8 fuel for the heater start test.

Tribunal Analysis

53. At issue before the Tribunal is the question of whether PWGSC conducted the testing in accordance with the terms of mandatory requirement 3.17.8. In particular, the Tribunal must determine whether the correct fuel was used in carrying out the heater start test.

54. While CAMEC correctly pointed out that, in response to question 15 in amendment No. 16 to the RFP, PWGSC stated that JP-8 fuel would be used for the heater start test,[17] both the RFP and the answer to question 341 in amendment No. 6 indicated that the LOI and the RFP were two distinct processes. Although the LOI phase may have been used to give bidders an idea of how testing would be conducted, both the bidder instructions in the RFP and the answer to question 341 in amendment No. 7 specifically stated that information or documentation obtained outside of the RFP would have no force or effect. Moreover, amendment No. 6 clearly states that the LOI phase did not form part of the RFP process. As such, the Tribunal finds that there was no obligation on PWGSC to conduct testing in accordance with information given during the LOI phase.

55. Furthermore, the Tribunal finds that using Jet A-1 fuel for the heater start test was fully compliant with the terms of the RFP. In addition, the Tribunal notes that both JP-8 and Jet A-1 fuel were in accordance with NATO STANAG 4362, which was incorporated by reference into the terms of the RFP.[18] While CAMEC stated that NATO STANAG 4362 "... is an agreement document not a fuel specification document ...",[19] it nonetheless conceded that both JP-8 and Jet A-1 fuel are in accordance with that document. As such, the Tribunal finds that the evaluators had the option of selecting either JP-8 or Jet A-1 fuel. Given that both were contemplated by the terms of the RFP, the evaluators did not breach the terms of the RFP by selecting Jet A-1 fuel for the conduct of the heater start test.

16. Exhibit PR-2016-014-01 at 39, 1059, Vol. 1; Exhibit PR-2016-014-11 at para. 37, Vol. 1D.
17. Exhibit PR-2016-014-01 at 1429, Vol. 1.
18. Exhibit PR-2016-014-27 at para. 20, Vol. 1E; Exhibit PR-2016-014-11 at 18, Vol. 1D.
19. Exhibit PR-2016-014-27 at para. 20, Vol. 1E.

56. Since the use of Jet A-1 fuel was contemplated by the terms of the RFP, if CAMEC had concerns about its use in the heater start test, it was incumbent on CAMEC to bring these to PWGSC's attention when it became aware of its possible use. The Tribunal has repeatedly held that a bidder cannot wait until the results of an evaluation to raise grounds of complaint that should have been apparent on the face of the solicitation documents.[20] Furthermore, the Tribunal has made it clear that, where uncertainty exists, it is incumbent upon the bidder to seek clarification.[21] The use of Jet A-1 fuel contradicted CAMEC's own understanding, as set out in its submissions, of how testing would be conducted. However, CAMEC neither sought to confirm its understanding regarding the fuel type to be used nor sought clarification of the type of fuel that would be used at the time of submission of its bid.

57. CAMEC did not object to the use of Jet A-1 fuel in the conduct of the heater start test until its letter of February 24, 2016.[22] This was more than seven months after the issuance of the RFP, which is when CAMEC became aware, or ought to have become aware, of its objection to the use of Jet A-1 fuel. This was well beyond the 10-day time limit set out in the *Regulations.* Therefore, the Tribunal finds that this ground of complaint is not timely.

58. Even if CAMEC could not have become aware that the evaluators intended to use Jet A-1 fuel for the heater start test until the actual time of testing, which the Tribunal does not find to be accurate, CAMEC's complaint on this ground still would not be timely. CAMEC acknowledged that it became aware that Jet A-1 fuel was used on the same day on which the heater start test took place (January 14, 2016), after the DND official sent a material safety data sheet on Jet A-1 fuel to CAMEC.[23] Nevertheless, CAMEC did not object to the use of Jet A-1 fuel until its letter of February 24, 2016, more than one month after testing was completed on January 14, 2016. Thus, even if the Tribunal had found that CAMEC did not discover the ground of its complaint until the time of testing, the complaint was not filed in a timely manner.

59. With respect to CAMEC's contention that the fuel was "jelly"-like at the time of the heater start test, the Tribunal notes that CAMEC's argument on this ground relates solely to the type of fuel used and does not relate to any of the other testing conditions. For instance, CAMEC stated as follows:

> After CAMEC was informed of the fuel type, Jet A1 fuel, used in the test, it conducted its own research on the suitability of this fuel considering the temperature requirements. According to manufacturers of Jet A1 fuel, the free point of Jet A1 is -47 C. *This was not a suitable fuel for the prescribed test conditions.*[24]
>
> [Emphasis added, footnote omitted]

60. However, as noted above, CAMEC was aware that Jet A-1 fuel was a possible fuel for use in the heater start test when the RFP requirements were published. If it had concerns about the suitability of Jet A-1 fuel for the heater start test, it should have communicated those concerns in a timely manner. By waiting until February 24, 2016, to communicate its concerns, CAMEC did not object until more than seven months after the RFP was published and more than one month after it became aware that Jet A-1 fuel was used in the heater start test.

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20. *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10. See, also, comments by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd*., 2002 FCA 284 (Can LII) at paras. 18-21.
21. *The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 (CITT) at para. 16.
22. Exhibit PR-2016-014-01B (protected) at 1745, Vol. 2E.
23. Exhibit PR-2016-014-01 at para. 74, Vol. 1; Exhibit PR-2016-014-01B (protected) at para. 12, Vol. 2E.
24. Exhibit PR-2016-014-01 at para. 75, Vol. 1.

61. Moreover, the Tribunal notes CAMEC's following acknowledgement:

> If CAMEC had been aware that Jet A-1 fuel was the designated fuel, it would have provided a pre-heating capacity for the heater fuel.[25]

62. While the Tribunal will not comment on the suitability of Jet A-1 fuel for the conditions set out in the RFP for the heater start test, CAMEC's comments demonstrate that the heater start test could have been successfully performed using Jet A-1 fuel. Specifically, CAMEC's comment reveals that, had it understood that Jet A-1 fuel was an acceptable choice under the terms of the RFP, it may have taken additional steps to ensure that it meet the mandatory requirements of the RFP.

63. In light of the foregoing, the Tribunal finds that CAMEC's ground of complaint regarding the heater start test is not timely.

U-factor Test—Mandatory Requirement 2.6.1

64. As part of the U-factor test, the RFP provided as follows:

> The Operations Shelter, Planning Shelter and Office Shelter shall have a heat transmission rate (U Factor) no greater than 5.37 Watts/C per m^2 when tested in accordance with the Third Party Verification Test Plan.[26]

65. The verification procedure for the U-factor test provided as follows:

> 1. The Third Party test personnel will install circulation fans in the middle of shelter to gently circulate air inside the shelter. Air velocity shall not exceed 100 feet per minute at any point within 6" of the inside shelter wall surface.
>
> . . .
>
> 7. Air velocity in the climate room shall not exceed 500 feet per minute at any point within 6 inches of the shelter.[27]

Positions of Parties

66. CAMEC alleged that the U-factor test[28] was not conducted in accordance with the evaluation criteria in the RFP. Specifically, CAMEC submitted that, since air velocity was not measured during testing, the performance of its HQSS could not be accurately evaluated.

67. PWGSC admitted that air velocity was not measured during CAMEC's U-factor testing. However, PWGSC submitted that two prior bidders requested an air speed check. According to the NRC Project Manager, none of the air speed measurements taken during these checks exceeded the test parameters, and the fan settings, temperature set points and HQSS placements were kept identical during CAMEC's

25. Exhibit PR-2016-014-27 at para. 21, Vol. 1E.
26. Exhibit PR-2016-014-01 at 163, Vol. 1.
27. *Ibid.* at 1298.
28. The purpose of the U-factor test is to evaluate if the shelter system meets the maximum allowable heat transmission rate (U-factor), which is a measure of the effectiveness of the shelter insulation. The U-factor test was to be conducted pursuant to section 6.7 of the Third Party Verification Test Plan (Exhibit PR-2016-014-01 at 33-34, Vol. 1). In short, the test is performed by controlling the exterior temperature of the shelter using a climate chamber, introducing a known quantity of heat inside the shelter and observing what interior temperature is achieved with that amount of heat.

testing.[29] PWGSC thus claimed that the U-factor test was carried out in accordance with the verification test plan, and that CAMEC failed the U-factor test, as its heater exceeded the maximum allowable heat transfer.

Tribunal Analysis

68. As the Tribunal has previously found that, where the RFP and related amendments set out the evaluation method to be followed, it is the obligation of the evaluators, not the bidders, to ensure that those methods are followed.[30]

69. In the present case, amendment No. 12 to the RFP clearly stated that air velocity "shall not exceed" a maximum velocity during the U-factor test.[31] Notwithstanding this direction, PWGSC admitted that it did not measure air velocity during the U-factor test of CAMEC's proposed HQSS.[32] As such, there is no way to determine whether the air velocity remained below the maximum thresholds set out in the verification procedures, or what impact this had on the testing of CAMEC's proposed HQSS.

70. While PWGSC argued that CAMEC could have taken the opportunity to request that the evaluators check the air velocity before or during the U-factor test, it is the evaluators who are ultimately responsible for confirming that the testing provisions of the RFP were properly followed. By failing to do so, the evaluators did not ensure that CAMEC's proposed HQSS was evaluated in accordance with the terms of the RFP.

71. As a result of the foregoing, the Tribunal finds that the evaluators breached the provisions of the *AIT* and that this ground of complaint is valid.

Snow Load Test—Mandatory Requirement 1.40.2.7.2

72. As part of the evaluation process, the HQSS was tested in order to determine whether it could provide adequate snow load capacity. The RFP requirement for the snow load test provided as follows:

> The Planning Shelter shall operate and withstand, without collapse or damage, a minimum snow load capacity of 478.80 Pa + 10% tolerance, sustained for a period of twelve (12) hours and removed, while meeting all performance requirements and without the use of any additional support structures installed specifically to satisfy this requirement.[33]

73. In order to test this requirement, the RFP set out the procedure to be followed by the third party test personnel as follows:

1. Measure and record the horizontal projection area of the shelter roof.
2. Start the data acquisition system at 0.1 Hz to record the deflection.
3. Using boom lifts, apply the 478.80 Pa (10 lbs/ft^2) load, longitudinally, and centered, to the roof surface so that the area covered equals the horizontal projection of the roof.
4. After the load is applied, record the deflection measurement.
5. Allow the shelter to rest under the load condition for 12 hours.

29. Exhibit PR-2016-014-11A (protected), Attachment 13, tab 8 at paras. 12-13, Vol. 2K.
30. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (20 May 2016), PR-2015-051 and PR-2015-067 (CITT) at para. 186.
31. Exhibit PR-2016-014-01 at 1298, Vol. 1.
32. Exhibit PR-2016-014-11 at para. 56, Vol. 1D.
33. Exhibit PR-2016-014-01 at 155, Vol. 1.

> 6. After 12 hours, record the final deflection and gradually remove the simulated load from the shelter.
>
> 7. Inspect the shelter for damage and record evidence of structural damage, seam separation, or fabric damage.[34]

74. After the snow load test was complete, CAMEC was advised that it did not pass the test as its proposed HQSS had undergone damage as a result of the testing.

Positions of Parties

75. CAMEC stated that the observations of alleged damage recorded by the evaluators did not constitute actual damage within the meaning of the RFP, but rather were aesthetic only and did not impede the functionality of the HQSS. CAMEC pointed to the fact that its HQSS had been successfully used (erected and dismantled) over 15 times and that it had since been utilized in the field and in additional trials.

76. Furthermore, CAMEC asserted that the evaluators were incorrect in finding that the proposed HQSS failed the snow load test. CAMEC argued that the conditions observed by the evaluators either were all pre-existing conditions or resulted from improper set-up and dismantling of the HQSS during testing. As evaluators were required to inspect the HQSS for damage *caused by* the snow loading test, CAMEC submitted that any alleged damage observed was actually attributable to the set-up and dismantling of the HQSS and was therefore not caused by the snow load test.

77. In response, PWGSC contended that the evaluators acted reasonably in finding that the HQSS did not pass the snow load test. PWGSC argued that, in light of the ordinary meaning of the term "damage", in the context of the solicitation, and considering the scope and objectives of the RFP, it was reasonable for the evaluators to have concluded that the HQSS had sustained damage.

78. PWGSC noted that the anti-splay kit and concrete blocks used to secure the HQSS ropes during the snow load test were the same for every bidder. PWGSC contended that CAMEC was aware of the set-up of the anti-splay kit and concrete blocks at the time of the testing, but decided not to request any adjustments or make objections at that time. Moreover, PWGSC argued that the anti-splay kit was highly adjustable, but that CAMEC did not request any adjustments to, or make objections about, its set-up.

79. PWGSC also argued that CAMEC's assertions regarding the differences in weight and movement of the blocks used during the test were not timely. Given that CAMEC was present during the test, and that its representatives applied the snow load and the tension on the HQSS stay lines, PWGSC asserted that it was open to CAMEC to either adjust the blocks or object to their use at that time. PWGSC contended that its failure to raise the objection at that time forecloses CAMEC from raising it at this late stage.

80. Thus, PWGSC stated that any resulting damage was caused by the design of the HQSS, not the testing equipment.

Tribunal Analysis

– Meaning of "damage"

81. In order to determine whether the observations made by the evaluators during the snow load test constituted "damage", the Tribunal must first determine what is meant by "damage" within the context of

34. *Ibid.* at 156.

the RFP. CAMEC suggested that "damage" means more than "merely cosmetic" and should affect the ability of the HQSS to withstand and operate with a snow load of 478.80 Pa.[35] In support of this, CAMEC pointed to the fact that its HQSS had been successfully used (erected and dismantled) over 15 times and that it had since be utilized in the field and in additional trials.

82. Whether or not CAMEC's proposed HQSS had previously been utilized in the field and in additional trials is not relevant to the reasonable interpretation of the criteria in this particular RFP. The Tribunal has repeatedly held that bidders should treat all solicitations as independent and that the terms of a previous solicitation are not determinative of those of a new one.[36] A procuring entity has the right to determine its own requirements and to establish its specifications, and there is no obligation for a procuring entity to incorporate the terms of a previous solicitation into a new RFP.[37]

83. It is well established that the terms of tender documents should be interpreted according to their ordinary meaning and within the context in which they are used.[38] Moreover, the Tribunal has previously noted that the use of a term in an RFP should be logically connected to the tasks/deliverables set out therein.[39] In this regard, the RFP provided as follows:

> The HQSS shall have a service life (starting at the date of first usage of the HQSS) and sustainability of at least 15 years when used in any combination of climatic and environmental conditions in accordance with paragraph 1.40.
>
> . . .
>
> The HQSS will be expected to be moved and set up 36 times per year, and stricken and moved 36 times per year.[40]

84. Consequently, the definition of damage used by PWGSC will be reasonable if it is consistent with the ordinary meaning of that term when viewed in the context of the sustainability and usage information described above.

85. CAMEC argued that its proposed HQSS ". . . did not even come close to collapse nor did it demonstrate damage that deemed it incapable of operating while withstanding such load for a lengthy period of time."[41]

86. While it is true that the proposed HQSS did not collapse, the RFP did not require any damage observed to be so severe as to render the HQSS incapable of operating. Rather, the RFP simply stated that

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35. Exhibit PR-2016-014-01, Attachment 1 at para. 124, Vol. 1.
36. *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at para. 30; *6979611 Canada Inc.* (18 August 2009), PR-2009-039 (CITT) at para. 20 [*GDC*]; *The Spallumcheen Band* (26 April 2001), PR-2000-042 (CITT).
37. *GDC* at para. 20; *Martel Building Ltd. v. Canada* [2000] 2 SCR 860 at 908, 2000 SCC 60 (CanLII).
38. *StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (15 April 2016), PR-2015-043 (CITT) at para. 39; *Microsoft Canada Co, Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation v. Department of Public Works and Government Services* (12 March 2010), PR-2009-056 (CITT) at para. 50; *Bergevin v. Canada (International Development Agency)*, 2009 FCA 18 (CanLII) at paras. 17-22; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII) at paras. 64-65; *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53 (CanLII) at paras. 47-48, 56-58.
39. *Joint Venture of BMT Fleet Technology Limited and Notra Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 28.
40. Exhibit PR-2016-014-01 at 320, Vol. 1.
41. *Ibid.*, Attachment 1 at para. 125.

the HQSS must withstand the snow load without damage. Thus, the Tribunal finds that the interpretation proposed by CAMEC requires reading in additional language, which is not present in the actual terms of the RFP.

87. The Tribunal accepts CAMEC's contention that "damage" must mean something more than a mere cosmetic issue. However, in the present case, the evaluators identified several changes in the physical condition of CAMEC's proposed HQSS after the snow load test was concluded, including cracking and tears to aspects of the structure.[42] Given the durability and service life expectations for the HQSS set out in the RFP, the Tribunal finds that these issues amounted to more than simple cosmetic imperfections.

88. As noted above, the Tribunal does not generally substitute its judgment for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[43] In the present case, the Tribunal finds that the evaluators acted reasonably in determining that CAMEC's proposed HQSS had suffered damage.

89. As a result, the Tribunal finds that this ground of complaint is not valid.

– Cause of the Observed Damage

90. CAMEC also contended that any damage observed was not caused by the snow load test, but rather either existed prior to the test or was caused by the set-up of the test facility.

91. As noted above, the Tribunal has repeatedly stated that it will not substitute its judgment for that of the evaluators unless it is satisfied that the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[44]

92. CAMEC has acknowledged that, prior to the snow load test, it was given an opportunity to inspect its proposed HQSS, replace any damaged parts and point out any pre-existing damage.[45] However, it was not until after the snow load test was completed (and after CAMEC was informed of the reasons that its proposed HQSS did not pass the test) that CAMEC stated as follows:

> . . . all observations *could* have been pre-existing considering the pre-inspection was conducted from a boom lift and was inconsequential compared to the post test inspection.[46]
>
> [Emphasis added]

However, the Tribunal finds that this line of argument is entirely speculative. Although CAMEC offered possible explanations as to why it believed the damage was either pre-existing or resulted from the dismantling of the HQSS,[47] the Tribunal does not find that these arguments demonstrate that the evaluators erred in finding that the HQSS was damaged as a result of the snow load test. In short, presenting a hypothetical alternative explanation is not sufficient for the Tribunal to conclude that the evaluators acted unreasonably.

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42. *Ibid.*, Attachment 1 at para. 66; Exhibit PR-2016-014-01A (protected) at para. 65, Vol. 2.
43. *MTS Allstream* at para. 26.
44. *Ibid.*
45. Exhibit PR-2016-014-01 Attachment 1 at para. 62, Vol. 1.
46. *Ibid.* at para. 67.
47. Exhibit PR-2016-014-27A (protected) at paras. 33-48, Vol. 2M.

93. In addition, the Tribunal notes that the condition of the HQSS prior to being provided to evaluators for testing was a matter within CAMEC's control. Just as the bidder bears the onus of properly preparing a written bid in response to an RFP,[48] it was incumbent upon CAMEC to either supply an undamaged HQSS or ensure that any pre-existing damage was recorded prior to the start of testing.

94. The Tribunal is also not persuaded by CAMEC's contention that the pre-inspection that it was permitted to conduct was "inconsequential" and somehow insufficient to identify any pre-existing damage.[49] The evidence demonstrates that, as a result of the inspection, CAMEC did identify a crack in one of the HQSS components and replaced that component prior to the snow load test.[50] Yet, this same component was found to once again be cracked after the snow load test was completed.[51] This demonstrates not only that CAMEC was able to identify a crack during the pre-inspection but also that the subsequent crack in the newly installed component was not a pre-existing condition.

95. In light of the foregoing, the Tribunal finds that this ground of complaint is not valid.

Conclusion on Mandatory Criteria

96. As a result of the foregoing analysis, the Tribunal finds that, although CAMEC's complaint with respect to the U-factor test is valid, its complaint regarding the heater start test and snow load test is not valid. Given that both the heater start test and snow load test are mandatory requirements under the terms of the RFP and that a bidder must meet all mandatory requirements in order for its bid to be considered compliant, CAMEC's failure with respect to those two requirements is fatal to its complaint. Whether or not CAMEC ought to have been awarded any additional points under the rated requirements cannot alter the fact that CAMEC's proposal was ultimately non-complaint. As such, the Tribunal will not proceed to analyze those aspects of CAMEC's complaint.[52]

REMEDY

97. Having found the complaint to be valid in part, the Tribunal will now examine the most appropriate remedy. In this regard, the Tribunal is instructed to consider subsection 30.15(3) of the *CITT Act*, which provides as follows:

> The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
>
> (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
> (b) the degree to which the complainant and all other interested parties were prejudiced;
> (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
> (d) whether the parties acted in good faith; and
> (e) the extent to which the contract was performed.

48. *Samson & Associates v. Department of Public Works and Government Services* (16 July 2015), PR-2015-002 (CITT) at para. 49; *Neopost Canada Limited v. Canada Revenue Agency* (29 December 1015), PR-2015-033 (CITT) at para. 26; *Deloitte Inc. v. Department of Public Works and Government Services* (10 June 2015), PR-2014-055 (CITT) at para. 77.
49. Exhibit PR-2016-014-01, Attachment 1 at para. 67, Vol, 1.
50. Exhibit PR-2016-014-01B (protected) at 1693, Vol. 2E.
51. *Ibid.*
52. As a result, the Tribunal will also not examine CAMEC's argument that DND officials improperly influenced the conduct of certain performance verification tests, since its allegations in that respect only impacted the rated requirements.

98. Given that both the heater start test and the snow load test were mandatory criteria and that CAMEC did not meet these mandatory criteria, the Tribunal notes that, even if PWGSC had properly evaluated the U-factor test, CAMEC's bid would not have been deemed compliant, and it therefore could not have been the successful bid. As such, the Tribunal finds that the error committed with respect to the U-factor test did not affect the outcome of the procurement process.

99. The Tribunal recognizes that not evaluating a proposal in accordance with the requirements of the RFP is a serious deficiency in the procurement process. However, while the Tribunal believes such a serious deficiency does prejudice the integrity of the competitive procurement system, ultimately the end result would have been the same regardless of the violation. As such, there was no prejudice to CAMEC. In addition, there is no indication that PWGSC was acting in bad faith. Consequently, the Tribunal will not recommend a remedy in this case.

COSTS

100. Although the complaint is valid in part, the Tribunal finds that no costs are warranted. While the Tribunal recognizes that PWGSC breached the trade agreements by failing to conduct the U-factor test in accordance with the terms of the RFP, CAMEC's complaint with respect to two other mandatory criteria were not valid. Thus, while CAMEC was successful in demonstrating that a breach did occur, ultimately PWGSC's conclusion that CAMEC's bid was not responsive remains unchanged.

101. As such, considering the circumstances of this case, the Tribunal finds that each party should bear its own costs and, therefore, will not make a costs award.

DETERMINATION OF THE TRIBUNAL

102. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part. However, the Tribunal finds that the test failure with respect to two mandatory requirements means the bid submitted by CAMEC is non-responsive.

103. Pursuant to section 30.16 of the *CITT Act*, the Tribunal's preliminary indication is that no costs are warranted. If any party disagrees with the preliminary indication, it may make submissions to the Tribunal, as contemplated by article 4.2 of the *Procurement Costs Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Peter Burn

Peter Burn
Presiding Member