



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-043

StenoTran Services Inc. and
Atchison & Denman Court
Reporting Services Ltd.

v.

Courts Administration Service

*Determination and reasons issued
Friday, April 15, 2016*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 SUMMARY OF COMPLAINT 1

 PROCEDURAL HISTORY: THE RFP AND STENOTRAN’S COMPLAINT 1

 GROUNDS OF COMPLAINT NOT ACCEPTED FOR INQUIRY 2

 Ground 1: No Reasonable Indication that CAS Unfairly Deemed StenoTran’s Bid Non-compliant..... 3

 Ground 3: Alleged Non-compliance with the Tribunal’s Recommendation in *StenoTran 2013*..... 4

 GROUND 2: ACCEPTED FOR INQUIRY..... 5

 Positions of Parties 5

 Analysis..... 5

REMEDY 10

COSTS..... 11

DETERMINATION 11

IN THE MATTER OF a complaint filed by StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. 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

**STENOTRAN SERVICES INC. AND ATCHISON & DENMAN
COURT REPORTING SERVICES LTD.**

Complainant

AND

THE COURTS ADMINISTRATION SERVICE

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Courts Administration Service take measures to ensure that it will conduct future procurements in strict adherence to the procedures set out in the tender documents, including any standard clauses.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. their reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Courts Administration Service. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Rose Ritcey
Rose Ritcey
Presiding Member

Tribunal Member: Rose Ritcey, Presiding Member

Counsel for the Tribunal: Anja Grabundzija
Jessica Spina (student-at-law)

Senior Registrar Officer: Sara Pelletier

Complainants: StenoTran Services Inc. and Atchison & Denman Court
Reporting Services Ltd.

Government Institution: Courts Administration Service

Counsel for the Government Institution: Lynn Marchildon

Please address all communications to:

The Registrar
Canadian International Trade Tribunal Secretariat
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

SUMMARY OF COMPLAINT

1. The complaint relates to a Request for Proposal (RFP) (Solicitation No. 5X001-15-0242) (RFP) by the Courts Administration Service (CAS). The purpose of the RFP was to award three separate contracts for the provision of court reporting and transcription services in Federal Court and Tax Court of Canada proceedings in Ontario, except Ottawa; Federal Court and Tax Court of Canada proceedings in Ottawa; and Federal Court designated proceedings in Ontario.
2. The three grounds of complaint put forward by StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. (StenoTran) can be summarized as follows:
 1. CAS unfairly and improperly declared StenoTran's bid non-compliant with certain mandatory criteria of the RFP;
 2. CAS allowed the bids submitted in response to the RFP to expire and, by awarding contracts after such time, CAS improperly issued three sole-source contracts; and
 3. CAS did not "...undertake a new procurement process within a reasonable time frame...", as recommended by the Canadian International Trade Tribunal (the Tribunal) in File No. PR-2013-046,¹ as it took an unreasonably long time to conduct a new procurement and provide a debriefing to StenoTran.

PROCEDURAL HISTORY: THE RFP AND STENOTRAN'S COMPLAINT

3. The RFP was published on June 19, 2015. StenoTran submitted its bid on or before July 13, 2015, the date on which the solicitation closed.
4. On September 10, 2015, StenoTran wrote to CAS to inquire when the outcome of the solicitation would be known. CAS replied that it intended to inform bidders of the results by the end of September 2015.
5. On October 9, 2015, having received no further news, StenoTran again contacted CAS to "confirm" that it would extend its offer beyond October 19, 2015. In response to this correspondence, CAS stated that it would inform bidders of the result of the solicitation as soon as possible.
6. On the same day, CAS contacted ASAP Reporting Services Inc. (ASAP Reporting) and International Reporting Inc. (International Reporting), the other two bidders, asking them to "confirm the extension" of their offers beyond October 19, 2015. Both ASAP Reporting and International Reporting confirmed that their offers were extended.
7. On November 13, 2015, CAS informed StenoTran that its bid did not comply with all the mandatory technical criteria of the RFP and that contracts would be awarded to ASAP Reporting and International Reporting.
8. On November 18, 2015, StenoTran objected to CAS, arguing that its bid complied with all mandatory criteria and that, in any event, the bids were no longer valid when CAS awarded the contracts to the successful bidders.

1. *StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (24 July 2014) (CITT) [*StenoTran 2013*].

9. A debriefing took place on December 7, 2015, and on December 9, 2015, StenoTran filed its complaint with the Tribunal.²

10. On December 15, 2015, the Tribunal informed the parties that the complaint had been accepted for inquiry in part, namely, in respect of the allegation that the bids submitted in response to the solicitation were no longer valid and that CAS, consequently, had improperly issued three sole-source court reporting and transcription services contracts. The Tribunal also indicated that it would provide the reasons for its decision not to inquire into some of StenoTran's grounds of complaint as part of its reasons for the determination.

11. The parties filed submissions in accordance with rules 103 and 104 of the *Rules*. As certain new arguments were raised in StenoTran's comments pursuant to rule 104, the Tribunal allowed CAS to file a supplemental report, which was followed by comments in reply from StenoTran.

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

GROUND OF COMPLAINT NOT ACCEPTED FOR INQUIRY

13. Pursuant to sections 6 and 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,³ the Tribunal may conduct an inquiry if the following four conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;
- the complainant is an actual or potential supplier;
- the complaint is in respect of a designated contract; and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements, in this case, the *Agreement on Internal Trade*.⁴

14. Grounds 1 and 3 of StenoTran's complaint did not meet the fourth condition. As such, the Tribunal did not inquire into these matters.

2. While the Tribunal initially received a complaint from StenoTran on December 1, 2015, the Tribunal determined that the complaint did not meet the requirements of subsection 30.11(2) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*]. StenoTran filed additional documents on December 3 and 9, 2015, at which time the Tribunal considered that the complaint met the requirements of subsection 30.11(2). Pursuant to rule 96 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499 [*Rules*], the complaint was considered filed on December 9, 2015.

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

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

Ground 1: No Reasonable Indication that CAS Unfairly Deemed StenoTran’s Bid Non-compliant

15. CAS determined that StenoTran’s bid failed to comply with the mandatory criteria of the RFP. Specifically, CAS found that StenoTran’s bid “. . . did not provide a CD with a label including all the information required as per MT3 [and that] [t]he electronic version of the transcript was saved on the technical proposal CD.”⁵

16. According to StenoTran, mandatory technical criterion 3 (MT3) did not require bidders to submit a CD with a label, as a label is normally printed on paper and then placed onto the CD, and the RFP indicated that a print label was “not applicable”. It also argued that the RFP did not require bidders to provide two CDs.

17. The relevant provisions of the RFP provide as follows:

**EVALUATION PROCEDURES
ATTACHMENT 1 TO PART 4**

1. **Mandatory Technical Criteria**

- (a) The bid must meet the mandatory technical criteria specified below. . . .
- (b) Bids which fail to meet the mandatory technical criteria will be declared non-responsive. Each mandatory technical criterion should be addressed separately.

. . .

MT3 The Bidder must provide, in either official language, a paper and electronic copy on CD of a court or regulatory tribunal transcript THAT INCLUDES EACH AND EVERY of the following specifications:

Specifications	Paper	Electronic
. . .		
For the electronic version, the transcript is to be provided in Microsoft Word 2003 format on a CD.	Not applicable	
The label on the CD shall include: <ul style="list-style-type: none"> - the name of the case; - the court file number; - the name of the presiding Judge; and - the date and location of the hearing. 	Not applicable	

18. The Tribunal finds no reasonable indication that the evaluators wrongly interpreted and applied MT3 or the bid preparation instructions.

19. The RFP clearly required a print label to be included on the CD containing the electronic version of the transcript. MT3 consisted of various specifications concerning either the paper copy or the electronic copy of the required transcript, or both, as applicable. The requirement for a “label on the CD” was clearly applicable to the electronic copy of the transcript, since it referred to the CD. The words “not applicable”

5. Exhibit PR-2015-043-13, tab 13, Vol. 1B.

appearing next to this specification in the column titled “Paper” clarified beyond any doubt that the specification for a “label on the CD” was inapplicable *to the paper copy of the transcript*. The words “not applicable” in that column did not dispense with the need for a label in the case of the electronic copy of the transcript—indeed, the box under the column titled “Electronic” remained blank.

20. The words “not applicable” could not reasonably be read to mean that, because a label is normally printed on paper, it was not required. If, as argued by StenoTran, the words “not applicable” related to the label itself, there would have been no need to include such a specification in the mandatory criteria at all. StenoTran’s interpretation voids the requirement for a “label on the CD” of any meaning.

21. Given the Tribunal’s conclusion that there is no reasonable indication that CAS should not have rejected StenoTran’s bid on the basis of MT3, StenoTran’s bid was properly excluded from further evaluation and could not be considered for contract award. The RFP made clear that bidders had to provide transcripts with each and every one of the specified elements.

22. In any event, the Tribunal will briefly address StenoTran’s claim that its bid was improperly rejected for having failed to provide two separate CDs. The Tribunal again finds no reasonable indication that CAS acted contrary to the requirements of the RFP. Section 2.0 of Part 2, “Bidder Instructions”, and section 1.0 of Part 3, “Bid Preparation Instructions”, read in the entire context of the RFP, indicated that bidders were required to provide both a hard copy and a soft copy of their bids, in addition to a separate CD reserved for the electronic transcript in Microsoft Word 2003 format. Furthermore, to the extent that there was any ambiguity in the way in which these instructions were drafted, such ambiguity should have been apparent to StenoTran upon reading the RFP; as such, it was incumbent on StenoTran to seek the necessary clarifications before submitting its bid.⁶

23. Accordingly, the Tribunal finds no reasonable indication that CAS rejected StenoTran’s bid contrary to the criteria of the RFP.

Ground 3: Alleged Non-compliance with the Tribunal’s Recommendation in *StenoTran 2013*

24. StenoTran’s third ground of complaint was that “. . . CAS has not respected the statement made by the [Tribunal] . . .”⁷ in its recommendation in *StenoTran 2013*. The procurement in that case concerned similar services. Having conducted an inquiry, the Tribunal found StenoTran’s complaint valid in part and recommended, *inter alia*, that CAS undertake a new procurement for the services in issue “. . . within a reasonable time frame . . .” StenoTran now argues that the new procurement process took an unreasonably long time. It adds that CAS’s delay in providing StenoTran with a debriefing is also an example of a delay in violation of the Tribunal’s recommendation.

25. StenoTran’s third ground of complaint does not provide a reasonable indication of a breach of any of the provisions of the *AIT* and, thus, does not meet the condition set out in paragraph 7(1)(c) of the *Regulations*. This ground of complaint instead concerns alleged failures by CAS to act in accordance with the Tribunal’s recommendation in *StenoTran 2013*. However, as confirmed by the Federal Court of Appeal,

6. As stated in the 2003 (2014-09-25) Standard Instructions – Goods or Services- Competitive Requirements (Standard Instructions), incorporated by reference into the RFP, bidders have a responsibility to obtain clarification of the requirements in the bid solicitation, if necessary, prior to submitting a bid. See subsection 05(2) (2014-09-25) “Submission of Bids” at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/19>.

7. Exhibit PR-2015-043-01 at 4, Vol. 1.

the Tribunal's jurisdiction under section 30.11 of the *CITT Act* and the trade agreements does not extend to the enforcement of its own recommendations in respect of a past procurement.⁸

GROUND 2: ACCEPTED FOR INQUIRY

Positions of Parties

26. StenoTran submitted that CAS awarded the contracts outside of the bid validity period of 60 days from the close of the solicitation and that, by reason of the bids having expired at the time of contract award, CAS improperly issued three sole-source contracts. In making its claim, StenoTran relied on subsection 05(4) of the Standard Instructions, which were incorporated by reference into the RFP. StenoTran also argued that its position is consistent with the Supply Manual of the Department of Public Works and Government Services (PWGSC).

27. CAS submitted that the bids did not expire because subsection 05(4) of the Standard Instructions only provided that bids were to remain valid for a *minimum* of 60 days. Furthermore, all bidders had confirmed that their bids were open for acceptance at the time of contract award. CAS also argued that the provisions of PWGSC's Supply Manual cited by StenoTran did not form part of the RFP and that the Tribunal could not inquire into whether CAS acted consistently with those provisions.

Analysis

28. 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 the *AIT*, which, as stated above, is the only trade agreement applicable to the RFP.

29. StenoTran's argument that the bids had expired at the time of contract award, and were thus awarded on an uncompetitive basis, hinges on the interpretation of subsection 05(4) of the Standard Instructions, which were incorporated by reference into the RFP, and on the allegation that CAS awarded contracts in breach of that subsection. Thus, the question before the Tribunal is essentially determining whether CAS breached a provision of the RFP in awarding the contracts.

30. For the reasons that follow, the Tribunal finds that CAS failed to award contracts in accordance with the procedures set out in subsection 05(4) of the Standard Instructions.

31. As a preliminary matter, the Tribunal will briefly address the timeliness of StenoTran's complaint on this ground. CAS argued that "[a]ny complaint that the bid validity had expired 60 days after bid closing should have been raised shortly after the alleged 60-day period."⁹

32. While it is true that the regulatory regime under the *CITT Act* includes strict deadlines,¹⁰ CAS's argument misconstrues the basis of StenoTran's complaint. StenoTran is not protesting the expiry of the 60-day period *per se*, but is protesting the award of contracts outside of that period. Thus, it is when it learned of the award of contracts, on November 13, 2015, that StenoTran became aware of its ground of complaint. In coming to this conclusion, the Tribunal accepted StenoTran's statement in its

8. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) at paras. 37-38.

9. Exhibit PR-2015-043-21 at para. 11, Vol. 1C.

10. Section 6 of the *Regulations*; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18-21; *Genesis Security Inc.* (2 February 2016), PR-2015-055 (CITT) at para. 13.

November 18, 2015, objection letter to CAS that "... we had expected information regarding a rebid situation."¹¹ Furthermore, as StenoTran objected to CAS and filed its complaint within the applicable deadlines, the complaint on this ground is timely.

CAS Failed to Award Contracts in Accordance with the Procedures Prescribed in the RFP

33. Pursuant to the *AIT*, CAS was obligated to stipulate the requirements of the solicitation clearly and to award contracts consistently with the procedures in the RFP.¹² It is well established that a procuring entity will meet these obligations when it conducts a reasonable evaluation consistent with the terms of the RFP. However, the Tribunal may find an evaluation to be *unreasonable* where the evaluators have not applied themselves in evaluating the proposal, have wrongly interpreted the scope of a requirement, have ignored vital information provided in a bid, have based their evaluation on undisclosed criteria or have not conducted the evaluation in a procedurally fair way.¹³

34. As mentioned earlier, by virtue of section 1.0 of Part 2 of the RFP, the Standard Instructions were incorporated by reference into and formed part of the RFP. As also indicated in the RFP, the Standard Instructions were set out in the Standard Acquisition Clauses and Conditions Manual issued by PWGSC, and were available online.

35. The Standard Instructions included the following relevant section:

05 (2014-09-25) Submission of Bids

...

4. Bids will remain open for acceptance for a period of not less than 60 days from the closing date of the bid solicitation, unless specified otherwise in the bid solicitation. Canada reserves the right to seek an extension of the bid validity period from all responsive bidders in writing, within a minimum of 3 days before the end of the bid validity period. If the extension is accepted by all responsive bidders, Canada will continue with the evaluation of the bids. If the extension is not accepted by all responsive bidders, Canada will, at its sole discretion, either continue with the evaluation of the bids of those who have accepted the extension or cancel the solicitation.¹⁴

The RFP did not specify a period different from 60 days nor did it modify this provision in any other way.

11. Exhibit PR-2015-043-13, tab 14, Vol. 1B.

12. Article 506(6) of the *AIT* provides that "... 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." This also implies the corollary obligation for a government institution to award contracts in accordance with the criteria stipulated in the tender documents. *AmeriData Canada Ltd.* (9 February 1996), PR-95-011 (CITT).

13. *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at paras. 26-28; *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at paras. 63-64; *CGI Information Systems and Management Consultants Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 99.

14. The French version of subsection 05(4) of the Standard Instructions provides as follows: "*Les soumissions seront valables pendant au moins 60 jours à compter de la date de clôture de la demande de soumissions, à moins d'avis contraire dans la demande de soumissions. Le Canada se réserve le droit de demander par écrit une prolongation de cette période à tous les soumissionnaires qui déposent des soumissions recevables, dans un délai d'au moins 3 jours avant la fin de la période de validité des soumissions. Si tous les soumissionnaires qui ont déposé des soumissions recevables acceptent de prolonger cette période, le Canada continuera d'évaluer les soumissions. Si cette prolongation n'est pas acceptée par tous les soumissionnaires qui ont déposé des soumissions recevables, le Canada, à sa seule et entière discrétion, continuera d'évaluer les soumissions des soumissionnaires qui auront accepté la prolongation ou annulera la demande de soumissions.*"

36. The facts are not in dispute. CAS awarded the contracts more than 60 days from the closing date of the bid solicitation. It is also not disputed that CAS *did not* seek any extension within a minimum of 3 days before the end of those 60 days.

37. CAS submits that it did not breach subsection 05(4) of the Standard Instructions, arguing that the section only stipulated that bids must remain open for acceptance “. . . *not less* than 60 days . . .” [emphasis added], i.e. for a minimum time of 60 days. It further argues that, “[i]n a solicitation such as this one, where no bid validity period was expressly set out and where no bidder identified a specific validity period in its bid, it is reasonable for a bidder to expect that the contract will be awarded within a reasonable period.”¹⁵

38. In other words, according to CAS, bids remained open for a “reasonable period” and, as such, there was no need for CAS to seek any extension of validity. CAS adds however that “. . . if the contracting authority determines that the date of the contract award may be beyond what could be considered a ‘reasonable period’, it would be prudent for the contracting authority to raise the issue of bid validity with bidders.”¹⁶

39. In accordance with the general principles of interpretation of contracts, the terms of tender documents are interpreted according to their ordinary meaning within the context in which they are used. This means that the terms of a solicitation must not be read in isolation, but rather should be understood in harmony with the rest of the RFP, its purpose and objectives, and the broader commercial context.¹⁷

40. CAS’s interpretation of subsection 05(4) of the Standard Instructions runs counter to this basic principle; it hinges on a narrow and isolated reading of the words “. . . not less than 60 days . . .” in the first sentence of that subsection.

41. While CAS does not discuss the rest of that subsection, on its face, subsection 05(4) of the Standard Instructions does more than simply provide that bids must remain open for acceptance for “. . . not less than 60 days . . .”; it goes on to reserve a right for Canada to “. . . seek an extension of the bid validity period from all responsive bidders . . .” and prescribes the manner for doing so. It also sets out alternatives available within Canada’s discretion—either continue the evaluation or cancel the solicitation—depending on whether all compliant bidders accept this “extension”. This subsection must, in the Tribunal’s view, be given meaning as a coherent whole.

42. As explained further below, the Tribunal finds that a reasonable construction of subsection 05(4) of the Standard Instructions giving effect to the entirety of its text, in its ordinary meaning, is as follows. In order to comply with the criteria of the solicitation, bids had to be valid for 60 days, not less. Importantly, contrary to what was presumed by CAS, nothing in this subsection required that bids remain valid longer than 60 days or reasonably indicated to CAS that they, in fact, thus remained valid.¹⁸ In fact, the subsection

15. Exhibit PR-2015-043-13 at para. 43, Vol. 1B.

16. *Ibid.*

17. *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; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA); *Ready John Inc. v. Canada (Public Works and Government Services)*, 2004 FCA 222 (CanLII) at para. 35; *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) [*Tercon Contractors*] 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.

18. Indeed, paragraph 1.0(b) of Part 2 of the RFP provided that “[b]idders who submit a bid agree to be bound by the instructions, clauses and conditions of the bid solicitation . . .” Thus, having regard to subsection 05(4) of the Standard Instructions, bidders only accepted to be bound by the requirement that their bids remain open for acceptance for a period of 60 days from the closing date of the bid solicitation.

specifically reserved the right for Canada to seek an extension of the bid validity period, which bidders could choose to accept or refuse.

43. Furthermore, the subsection provided a detailed procedure for asking all compliant bidders for such an extension. The Tribunal finds that, if CAS wished to avail itself of its right to extend the period of validity of bids beyond the stipulated 60 days, it had to follow the prescribed procedure. It did not do so, and therein lies its breach of the RFP and Article 506 of the *AIT*.

44. This interpretation of subsection 05(4) of the Standard Instructions is consistent with its wording and structure. In setting out a period of validity of bids of not less than 60 days¹⁹ and then detailing an extension procedure, subsection 05(4) clearly contemplates that this 60-day period of validity in fact applies to all bids, unless it is extended through the specified procedure. This is perhaps most obvious in the French version of subsection 05(4), which provides that “[l]es soumissions seront valables pendant au moins 60 jours . . .” and then that “[l]e Canada se réserve le droit de demander . . . une prolongation de cette période . . .” [underlining and bold added for emphasis]. The word “cette” [that], which is used in the French version where the expression “bid validity period” appears in the English version, is a clear reference to the period of 60 days stipulated in the first sentence of the clause.²⁰

45. On the contrary, CAS’s interpretation makes much of subsection 05(4) of the Standard Instructions largely irrelevant. If bids, by default, remain valid for a “reasonable period” beyond the stipulated 60 days, there is little need to set out the detailed procedure for extension. Indeed, it is difficult to see how a procuring entity could in reality ask bidders for extensions “. . . within a minimum of 3 days before the end of . . .” such a flexible concept as a “reasonable period”. Similarly, a procedure pursuant to which Canada may request an extension within 3 days before the expiry of the period from *all* responsive bidders is inapplicable, as written, in a situation where each bid sets its particular period of validity, as CAS suggested could have been the case. The Tribunal finds it unlikely that the intended scope of subsection 05(4) of the Standard Instructions was one that makes much of the text of this standard provision irrelevant or inapplicable as such.

46. CAS’s interpretation of subsection 05(4) of the Standard Instructions also seems inconsistent with the broader commercial context of public procurement, which further makes it doubtful that the subsection

19. Of course, subsection 05(4) of the Standard Instructions allows that a period other than 60 days may be specified “in the bid solicitation”.

20. This interpretation is also consistent with the interpretation retained by PWGSC in its Supply Manual. Section 5.90 of the Supply Manual, clearly referencing the Standard Instructions, provides that “[b]ids will remain open for acceptance for a period of 60 days (30 days for construction), from the closing date of the bid solicitation, unless otherwise indicated in the bid solicitation (see Standard Acquisition Clauses and Conditions Manual, (SACC) Standard Instructions 2003, 2006, and 2008). Contracting officers must carefully assess the potential for extended bid evaluation periods and indicate in the bid solicitation the modified period for bid acceptance. Contracting officers must also carefully monitor events during the bid evaluation period and contract approval process in order to award the contract before the bid acceptance period has expired. . . . As stated in the standard instructions, Canada may seek an extension of the bid validity period from all responsive bidders in writing within a minimum of three (3) days before the end of the bid validity period. If all responsive bidders accept the extension, Canada will continue with the evaluation of the bids. If all responsive bidders do not accept the extension, Canada will, at its sole discretion, either continue with the evaluation of the bids of those who have accepted the extension or cancel the solicitation.” CAS argued that the Supply Manual did not form part of the RFP and was not binding on CAS. The Tribunal agrees that the Supply Manual is not a binding document. However, it is a policy document issued by the Government of Canada, through PWGSC, the government department which also issues the Standard Acquisition Clauses and Conditions Manual, including the Standard Instructions that CAS chose to incorporate into the RFP. Unless shown to be inconsistent with the provisions of the RFP, relevant passages from the Supply Manual can provide further evidence of the intended meaning of the Standard Instructions incorporated into the RFP.

was intended to operate in the manner suggested by CAS. Effective public tendering depends on procurement procedures that are fair, transparent and efficient.²¹ However, under CAS's reading, beyond the minimum requirement of 60 days, subsection 05(4) provides bidders with little notice of the period during which they should in fact expect their offers to remain on the table to be considered for contract award. Yet, the duration of the offer may be a material consideration for bidders in devising their bids.²² For example, bidders may need to ensure the availability of certain resources required by the solicitation, or the duration of the offer may impact other material characteristics that bidders choose to offer (e.g. the bid price). Furthermore, a flexible concept such as a "reasonable period" remains open to interpretation and, as such, creates potential for disagreements and litigation. Finally, to the extent that CAS's approach would invite bidders to stipulate their own periods of validity, it leads to procurement processes that are more difficult to administer in practice, particularly in procurements with a large number of bids.

47. CAS's interpretation of subsection 05(4) of the Standard Instructions is thus unlikely to lead to the fairest, most transparent and efficient procurement processes. By contrast, the interpretation of subsection 05(4) most consistent with its text—one pursuant to which the procuring entity clearly announces the period during which all bids remain valid and pursuant to which the procuring entity may ask all bidders to extend that period through a transparent procedure, with reasonable notice—also appears to be the one more likely to contribute to the transparency and efficiency of public procurements.

48. In conclusion, the Tribunal finds that, if it wished to award contracts past the bid validity period of 60 days, CAS was under an obligation to seek an extension in the manner prescribed by subsection 05(4) of the Standard Instructions. CAS did not do so. By awarding contracts outside of the bid validity period of 60 days without having asked for an extension as prescribed by subsection 05(4), CAS breached subsection 05(4) and, thus, Article 506(6) of the *AIT*. In this regard, the fact that CAS confirmed at a time after the bid validity period of 60 days stipulated by subsection 05(4) that all bidders' bids remained valid does not cure its breach of the procedures chosen for the RFP.²³ The Tribunal does consider this fact significant for the purpose of recommending an appropriate remedy, as discussed further below.

-
21. This is evident from provisions of the *AIT* prescribing specific procedures, as well as Article 501 of the *AIT*, which provides that "... the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency." Indeed, the Federal Court of Appeal has indicated that fairness, competition, efficiency and integrity are the purposes of the procurement regulatory regime under the trade agreements and the *CITT Act*. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) at para. 23. The importance of similar considerations was also underlined by the Supreme Court of Canada, in *Tercon Contractors* at paras. 67-68, interpreting a clause of a public tender document. The Supreme Court of Canada opined as follows: "Effective tendering ultimately depends on the integrity and business efficacy of the tendering process . . . in the context of public procurement . . . in addition to the interests of the parties, there is the need for transparency for the public at large."
 22. While the *North American Free Trade Agreement*, 17 December 1992, 1994 Can. T.S. No. 2, online: Department of Foreign Affairs, Trade and Development <<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), does not apply to the RFP, it is interesting to note that Article 1013(1)(d) provides that "[w]here an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders The documentation shall also include: . . . the length of time during which tenders should be open for acceptance."
 23. CAS argued that it "... did exactly as the Procurement Board suggested . . ." in *Nicolet Instrument Canada Inc. v. Canada (Supply and Services)*, 1993 CanLII 5293 (CA CITT) [*Nicolet*], when "... before awarding the contracts, [CAS] contacted all bidders to verify the validity of their bids." *Nicolet* is distinguishable on this point and thus not helpful to CAS; in *Nicolet*, the bid validity provision did not expressly prescribe a procedure for extending the validity of bids prior to the expiry of the stipulated bid validity period of "not less than 60 days".

REMEDY

49. Having found StenoTran's complaint to be valid, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) and (3) of the *CITT Act*. StenoTran requested several remedies, including that its bid be accepted as compliant, that CAS terminate the resulting contracts, that the bids be re-evaluated, that a new solicitation for the designated contracts be issued or that StenoTran receive compensation for lost profits and for the cost of preparing its bid. CAS did not address the issue of remedy.

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

51. While adherence to the terms of an RFP is a key aspect of any procurement, the seriousness of the breach in this particular case is mitigated on the facts. Under the terms of the RFP, CAS had the right to ask bidders for an extension of the period of validity of their bids, following a specific procedure set out in subsection 05(4) of the Standard Instructions. CAS did not ask bidders for an extension in accordance with that procedure. However, it did so some time later, on October 9, 2015, and all bidders, including StenoTran, accepted to extend their offers. Thus, the *only* breach in this case is that the extension was requested *after* the initial 60 days, contrary to the procedures prescribed in subsection 05(4).

52. Other than the lack of transparency and the uncertainty that ensued as a result of CAS not following the prescribed extension procedure, there is no indication that CAS ultimately treated any bidder unfairly and no evidence that the process was unfair or uncompetitive in a broader sense. In the Tribunal's view, on the particular facts of this case, this procurement has in substance been conducted on a competitive basis. CAS's breach was a technical breach with a limited impact on the integrity of the procurement process.

53. With respect to StenoTran in particular, there is no evidence that CAS's breach caused it any prejudice. StenoTran's bid was found non-compliant for other reasons. Furthermore, as discussed at the outset, the Tribunal found no reasonable indication that CAS deemed StenoTran's bid non-compliant in breach of the RFP and the *AIT*. As such, StenoTran in fact had no possibility of winning the contract, regardless of the breach by CAS found by the Tribunal.

54. While StenoTran argues that, had the solicitation been cancelled, it would have had a debriefing which would have allowed it to correct the deficiencies and submit a compliant bid in response to a re-issued solicitation, this argument cannot stand. Debriefing obligations arise *after* evaluations are completed and a contract is awarded, not if a solicitation is cancelled before such time. In any event, the fact that StenoTran may have gotten another "kick at the can" had the solicitation been cancelled due to the expiry of bids is not sufficient evidence of prejudice to StenoTran resulting from the breach identified in this inquiry.

55. There is no evidence of bad faith on either side. There is evidence that the resulting contracts are at least partially performed at this time.²⁴

24. Exhibit PR-2015-043-09, Vol. 1A.

56. As the identified breach was ultimately inconsequential to the outcome of this particular procurement process, the Tribunal does not consider that the interests of fairness and efficiency, or the general public's interest in the integrity and efficiency of the competitive system, require recommending a remedy that would upset the awarded contracts or compensate StenoTran for lost profits or the costs incurred in preparing its bid. The Tribunal recommends however that CAS take measures to ensure that it will conduct future procurements in strict adherence to the procedures set out in the tender documents, including any standard clauses.

COSTS

57. The Tribunal has decided to award StenoTran its reasonable costs incurred in the Tribunal's process, which costs are to be paid by CAS.

58. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. In this regard, the solicitation in issue concerned well-defined services. The ground of complaint accepted for inquiry was of medium complexity; it involved the interpretation of a somewhat complex standard clause of the solicitation and allowed for the identification of an issue potentially affecting future procurements conducted by CAS. The proceeding itself was of medium complexity, involving one motion, some submissions beyond the normal scope of proceedings and an extended 135-day time frame. Therefore, the Tribunal's preliminary indication of the level of complexity for the complaint case is Level 2, and the preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION

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

60. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that CAS take measures to ensure that it will conduct future procurements in strict adherence to the procedures set out in the tender documents, including any standard clauses.

61. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards StenoTran its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by CAS. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Rose Ritcey
Rose Ritcey
Presiding Member