



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-021

Springcrest Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Monday, November 21, 2016*

*Reasons issued
Tuesday, November 29, 2016*

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IN THE MATTER OF a complaint filed by Springcrest Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

SPRINGCREST INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

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

Pursuant to section 30.15 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the existing solicitation and issue a new solicitation. The new solicitation should either allow equivalent product suppliers sufficient time to provide certification of shock testing prior to bid closing or eliminate the requirement for equivalent product suppliers to submit this certification prior to bid closing.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Springcrest Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the 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.

Ann Penner

Ann Penner

Presiding Member

The statement of reasons will be issued at a later date.

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Complainant: Springcrest Inc.

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STATEMENT OF REASONS

1. On July 8, 2016, Springcrest Inc. (Springcrest) 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 procurement (Solicitation No. W8482-178454/A) by the Department of Public Works and Government Services² (PWGSC) on behalf of the Department of National Defence (DND) for the provision of multiple frigate pumps.
2. The Tribunal accepted the complaint for inquiry on July 12, 2016, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³
3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *CITT Act*.
4. For the reasons set out below, the Tribunal finds that the complaint is valid. As a remedy, the Tribunal recommends that PWGSC cancel the existing solicitation and issue a new one. The new solicitation should either allow suppliers of equivalent products sufficient time to provide certification of shock testing prior to bid closing or eliminate the requirement for those suppliers to submit this certification prior to bid closing.

SUMMARY OF COMPLAINT

5. Springcrest put forward the following two grounds of complaint: (1) the terms of the Request for Proposal (RFP) were biased in favour of the original equipment manufacturer (OEM); and (2) alternatively, it was impossible for suppliers of equivalent products to meet the solicitation requirements because of the timing of events in the solicitation process.
6. As a remedy, Springcrest requested that the solicitation be amended by removing the requirement to provide a certificate of shock testing prior to bid closing or, in the alternative, that a new solicitation be issued that does not contain the shock testing certification requirement. Springcrest also requested its reasonable costs incurred in preparing this complaint.
7. Springcrest also requested that the Tribunal issue an order postponing the award of any contract in connection with this procurement until the Tribunal has determined the validity of the complaint. Accordingly, on July 13, 2016, the Tribunal issued an order postponing the award of the contract.⁴

PROCUREMENT PROCESS

8. On March 5, 2015, PWGSC issued Solicitation No. W8482-156689/A (the 2015 RFP) on behalf of DND for frigate pumps. The bid submission deadline was May 15, 2015.
9. On May 12, 2015, Springcrest submitted its bid in response to the 2015 RFP.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.
3. S.O.R./93-602 [*Regulations*].
4. Exhibit PR-2016-021-04, Vol. 1.

10. On August 12, 2015, PWGSC informed Springcrest that its bid was responsive to the mandatory requirements of the 2015 RFP but that the solicitation was being cancelled and would be re-solicited with modifications to the requirements.
11. On May 17, 2016, PWGSC issued a new RFP (Solicitation No. W8482-178454/A) for multiple pumps on behalf of DND. This new RFP, which is the subject matter of this complaint, is identical to the 2015 RFP, with the exception of the new requirement for shock testing of the pumps prior to bid submission for suppliers of equivalent products.
12. The bid submission deadline for the RFP in this complaint was originally June 27, 2016. It was subsequently amended multiple times, with the final bid submission deadline being set for September 30, 2016.
13. On May 26, 2016, Springcrest submitted an objection to PWGSC. Springcrest requested that the requirement to submit a certificate of shock testing prior to bid closing be removed from the RFP, as it was impossible for any manufacturer to meet that requirement.
14. On June 23, 2016, PWGSC amended the RFP by extending the closing date to July 18, 2016. The requirement for a certificate of shock testing prior to bid closing was not removed.
15. On July 4, 2016, Springcrest inquired whether the OEM was also required to provide a copy of a certificate of shock testing for the motors on the pumps.
16. On July 8, 2016, PWGSC issued amendment No. 004 to the RFP, which stated that, “[i]f the OEM is offering a motor different from the motor on the original pump unit then shock certificates will be required. If the motors are the same as original then no certification is required as these motors were certified before.”⁵
17. On July 8, 2016, Springcrest filed its complaint with the Tribunal.
18. On July 12, 2016, the Tribunal accepted the complaint for inquiry.
19. On August 3, 2016, PWGSC requested an extension to the deadline to file its Government Institution Report (GIR). On August 4, 2016, the Tribunal granted PWGSC a two-week extension to file the GIR, i.e. until August 22, 2016. As a result of this extension, pursuant to paragraph 12(c) of the *Regulations*, the Tribunal extended the deadline for the issuance of its determination in respect of the complaint to 135 days after the filing of the complaint.
20. On September 2, 2016, Springcrest filed its reply to the GIR.
21. On September 9, 2016, the Tribunal found that Springcrest’s reply to the GIR contained additional evidence not submitted with the complaint and gave PWGSC an opportunity to reply. The Tribunal also requested that both parties provide further information regarding the shock testing process.
22. On September 26, 2016, PWGSC submitted its reply to the Tribunal’s letter of September 9, 2016.
23. On October 3, 2016, Springcrest submitted its response to PWGSC’s reply to the Tribunal’s letter of September 9, 2016.

5. Exhibit PR-2016-021-10, Exhibit 9, Vol. 1.

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

RELEVANT PROVISIONS OF THE RFP

25. The relevant provisions of the RFP at issue in this complaint provide as follows:

Section 1: Technical Bid

In their technical bid, bidders should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.

3.1.1 Equivalent Products

1. Products that are equivalent in form, fit, function and quality to the item(s) specified in the bid solicitation will be considered where the Bidder:

(a) designates the brand name and model and/or part number and NSCM/NCAGE of the substitute product;

...

4. Canadian Military Technical Data (Shock test) - Equivalent Products

Submission of certificate of shock testing and drawings:

Any equivalent product(s) proposed must have successfully met the testing requirements of Specification D-03-003-007/SG-000 Grade 1 Type A, prior to the bid closing. If bidder is offering substitute products that are equivalent in form, fit, function and quality to the Original Equipment Manufacturer (OEM) parts specified herein, the bidder must provide proof by submitting a copy of the successful certificate of shock testing including the serial numbers of the proposed products and an acceptable drawing with certification of the proposed products. Upon request, the Canadian Military Technical Data (Shock test) must be submitted within three **(3) business days** of the request. Bids unable to meet this requirement will be given no further consideration.

26. The pumps that are the subject of this complaint are identified by the following NATO stock numbers (NSN):

- NSN 4320-21-904-1983 (incorporating a 75-hp motor);
- NSN 4320-21-904-1985 (incorporating a 10-hp motor); and
- NSN 4320-21-904-1989 (incorporating a 50-hp motor).

POSITIONS OF PARTIES

27. Springcrest submitted that the terms of the RFP regarding the certification of shock testing arbitrarily favoured the OEM. Springcrest submitted that there was insufficient time for any manufacturer to obtain a shock testing certificate prior to bid closing. As a result, only OEM suppliers with previously recognized shock testing certificates would be able to bid on the solicitation.

28. Springcrest submitted that industry standard practice is to perform a shock test on the first unit produced. Because shock testing requires that the pump assemblies be fully manufactured, Springcrest submitted that it takes approximately one year for a manufacturer to be in a position to provide a shock

testing certificate. However, when Springcrest filed its complaint, there were only 62 days between bid issuance and bid closing, which prevented it from being able to comply with this requirement.

29. As a result, Springcrest submitted that, if OEM suppliers were not required to provide a shock testing certificate, then the terms of the RFP were discriminatory because they effectively precluded non-OEM suppliers from being able to submit bids. Springcrest also submitted that requiring the shock testing certificate prior to bid closing was contrary to industry standard and past DND practice, which has been to require shock testing certificates after contract award and not prior to bid closing.

30. Further, according to Springcrest, there are no pumps available that could meet the OEM designation. Springcrest submitted that the manufacturer of the motors used in the original pump assemblies was no longer in business and that no company currently owns the rights to manufacture those motors. As a result, any bidder proposing pumps matching the OEM NSN designation would have to include new motors that did not have previously recognized shock testing certificates.

31. Accordingly, as noted above, Springcrest requested clarification from PWGSC as to whether the OEM supplier would be required to submit shock testing certificates for the motors that it proposed to use in the pump assemblies.

32. PWGSC replied that, if the OEM offered a motor different from the motor on the original pump unit, then shock certificates would be required. Conversely, if the motors were the same as original, then shock testing certificates would not be required.

33. In the GIR, PWGSC stated that DND understood that the rights to manufacture the OEM motors are held by Hansome Energy Systems, Inc. (Hansome).⁶

34. PWGSC argued that the requirement to submit proof of shock testing at bid closing reflected the government's legitimate operational requirements and was not discriminatory. PWGSC argued that past Tribunal cases have established that a government institution is entitled, on a reasonable basis, to define its legitimate operational requirements and that there is no obligation to compromise those requirements to accommodate the circumstances of a particular supplier.⁷ PWGSC also argued that the onus is on Springcrest to demonstrate that any contested specifications or requirements do not reflect the government institution's legitimate operational requirements.⁸

35. PWGSC submitted that the pumps were urgently required to maintain the operational readiness of the *Halifax* class frigates of the Royal Canadian Navy (RCN). It noted that the RCN currently does not possess sufficient spare pumps in working order to fulfill demand. As such, PWGSC submitted that the requirement for shock testing prior to bid closing was included in the RFP to ensure that the pumps were procured without undue delay.

36. According to PWGSC, allowing suppliers of equivalent products to submit shock testing certificates after bid closing would delay the delivery of the pumps by many months. As a result, PWGSC submitted that the requirement for shock testing certificates prior to bid closing was reasonable and based on the RCN's legitimate operational requirements.

6. PWGSC initially incorrectly identified this company as "Hansome Energy Inc."

7. *723186 Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at paras. 19-21 [*723186 Alberta*].

8. *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at para. 30 [*R.P.M.*].

37. PWGSC also submitted that, contrary to Springcrest's submission, in most cases, the government requires that bidders submit shock testing certificates at bid closing. Only in cases where there was less urgency and more flexibility had bidders been permitted to submit shock testing certificates after contract award.

38. In reply, Springcrest submitted that the evidence does not support PWGSC's contention that providing shock testing certificates at the time of bid submission was a legitimate operational requirement. Springcrest contested PWGSC's assertion that the need for the pumps was urgent, citing the fact that a contract had been awarded under the 2015 RFP but cancelled shortly thereafter. Springcrest submitted that, if the contract awarded under the 2015 RFP had not been cancelled, the RCN would have had the required pumps in hand before the current RFP was even issued.

39. Springcrest explained that the three- to four-week shock testing certification process was part of the broader 54-week manufacturing cycle, which includes up to nine months to obtain the motors to be used in the pump assemblies. Therefore, it suggested that the fact that the pump assemblies had to be fully assembled prior to shock testing meant that it could take approximately one year for a manufacturer to be in a position to provide the requisite shock testing certificate.

40. Springcrest further reiterated its claim that it is industry standard practice to conduct shock testing during the manufacturing cycle and that it has never been required to provide a shock testing certificate prior to bid closing in any previous solicitation process.

41. Springcrest also submitted that Hansome does not have the rights to manufacture the motors used in the OEM pumps. Springcrest submitted an affidavit stating that, according to a Hansome representative, the company had never manufactured motors for two of the pump types (NSN 4320-21-904-1985 and NSN 4320-21-904-1989).⁹

42. With respect to the third pump type (NSN 4320-21-904-1983), Springcrest conceded that Hansome did supply 75-hp motors for these pumps but maintained that these were not manufactured in accordance with the OEM designs. While these motors were approved by DND by "shock extension" in 1996, Springcrest submitted that there is no evidence that these motors were actually shock tested. As a result, Springcrest argued that the original shock testing certificates did not apply and that a new shock testing certificate should be required for any Hansome motors, in accordance with amendment No. 004 to the RFP.

43. In response, PWGSC provided evidence that shock testing for a 100-hp Hansome motor was conducted in 1990 and submitted to DND as part of a 1996 request that DND accept the pump assemblies containing the Hansome motors as successor OEM pump assemblies for the purposes of the NSN numbers cited above.¹⁰

44. Further, PWGSC pointed to a letter written by DND in 1996 that extended the shock testing certificates to successor products and motors of different powers, as long as the design or materials had not drastically changed. As DND had recognized the pump assemblies incorporating the 75-hp, 10-hp and 50-hp Hansome motors as OEM equipment since 1996, PWGSC submitted that new shock testing certificates were not required now.

9. Exhibit PR-2016-021-12, Exhibit B at para. 11, Vol. 1.

10. Exhibit PR-2016-021-14A (protected), Vol. 2; Exhibit PR-2016-021-14, Attachment 2, Vol. 1A.

45. With respect to the amount of time required to complete shock testing, PWGSC submitted that Springcrest's assessment of three to four weeks did not take into account potential delays caused by the limited number of time slots available in a shock testing facility or the potential that the product could fail the test and thereby require retesting.

46. In reply, Springcrest submitted that Hansome motors should not be recognized as OEM motors and that bidders proposing pump assemblies including these motors should be required to submit shock testing certificates in accordance with amendment No. 004 to the RFP. Springcrest argued that there is no evidence on the record of this complaint that the shock testing certificate submitted referred to the Hansome 100-hp motor discussed above, as the identification number on the shock testing certificate was different from that noted in DND's 1996 letter. Further, Springcrest submitted that PWGSC had provided no evidence of the extension of the shock testing certificate to the 10-hp and 50-hp motors, as the 1996 letter only referred to the 75-hp model.

47. Regarding the amount of time required to complete shock testing, Springcrest reiterated its claim that shock testing does not add appreciably to the delivery schedule but noted that it had allocated three to four weeks within a 54-week delivery schedule for shock testing. Springcrest further submitted that PWGSC's statements regarding the difficulty in obtaining time slots in testing facilities are inaccurate.

48. Finally, Springcrest submitted that PWGSC had not successfully disputed its claim that the RFP is discriminatory.

ANALYSIS

49. At issue in this complaint are Springcrest's allegations that the requirement in the RFP for shock testing certificates at the time of bid closing was either discriminatory and/or impossible for certain suppliers to meet.

50. 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. Furthermore, 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* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. In this case, all the trade agreements listed in section 11 of the *Regulations*, including the *Agreement on Internal Trade*,¹¹ the *North American Free Trade Agreement*¹² and the *World Trade Organization Agreement on Government Procurement*,¹³ are applicable.

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [AIT].

12. *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].

13. *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].

51. The provisions of the applicable trade agreements that are relevant to this complaint include the following:

- Article 1007 of *NAFTA* and Article X of the *AGP*, which provide that technical specifications should not be drafted in certain prescribed ways that favour a particular supplier or suppliers;
- Article 504(3)(b) of the *AIT*, which prohibits the biasing of technical specifications in favour of, or against, particular goods or services, or the suppliers of such goods or services, for the purpose of avoiding the obligations of Chapter Five; and
- Article 504(3)(c) of the *AIT*, which prohibits the timing of events in the solicitation process so as to prevent suppliers from submitting bids.

52. In order to determine the validity of Springcrest's complaint in the context of these provisions, the Tribunal will consider (1) whether PWGSC deliberately structured the RFP in a discriminatory manner to favour a particular supplier or exclude others and, (2) whether the requirement to provide shock testing certificates prior to bid closing was impossible to meet for suppliers of equivalent products because of the requisite timing of events in the solicitation process.

Did PWGSC Deliberately Structure the RFP in a Discriminatory Manner to Favour a Particular Supplier or Exclude Others?

53. When dealing with similar complaints about allegedly biased technical specifications, the Tribunal has found that a government institution is entitled to define its legitimate operational requirements and to reflect them in the technical requirements of the solicitation, as long as these are reasonable, i.e. not impossible to meet.¹⁴ The Tribunal has also found that a complainant bears the onus to present positive evidence that the government institution *deliberately* structured the procurement to favour a particular supplier or to exclude particular suppliers when applying Article 504(3)(b) of the *AIT* to complaints of this kind.¹⁵

54. The Tribunal accepts that DND had legitimate operational requirements when it sought to secure delivery of the pumps without undue delay. Contrary to Springcrest's allegations, the Tribunal does not accept that the cancellation of the 2015 RFP proves otherwise. Indeed, the cancellation of the 2015 RFP does not establish that the RCN's current need was not urgent.

55. Furthermore, Springcrest did not present the Tribunal with evidence that PWGSC *deliberately* structured the terms of the RFP to exclude suppliers of equivalent products and/or favour the OEM supplier. Instead, the evidence suggests that the need to procure the pumps as quickly as possible caused PWGSC to *inadvertently* structure the technical specifications in a way that effectively made it impossible for some suppliers to meet, as will be discussed more fully below. As such, the Tribunal finds that PWGSC did not violate Article 504(3)(b) of the *AIT*, Article 1007 of *NAFTA* or Article X of the *AGP*.

56. Accordingly, the Tribunal finds this ground of Springcrest's complaint not valid.

14. *723186 Alberta; Inforex Inc.* (24 May 2007), PR-2007-019 (CITT); *FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT); *Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

15. *R.P.M.* at para. 30.

Was the Requirement to Provide Shock Testing Certificates prior to Bid Closing Impossible to Meet for Suppliers of Equivalent Products Because of the Requisite Timing of Events in the Solicitation Process?

57. The Tribunal will now consider the validity of Springcrest's second ground of complaint that the timing of the events in the solicitation process made it impossible for suppliers of equivalent products to comply with the requirements of the solicitation, as it was not possible for any supplier to manufacture the pumps and have them shock tested prior to bid closing.

58. Submissions from both parties confirm that the process to obtain a shock testing certificate could take approximately one year. PWGSC submitted that the process could take "many months",¹⁶ especially if manufacturers could not secure access to a testing facility or if their products failed the initial shock test. Springcrest presented evidence that it would usually allocate three to four weeks within a 54-week manufacturing cycle to complete shock testing certification before delivery.¹⁷

59. Given that section 3.1.1(4) of the RFP required shock testing certification to be completed at the time of bid closing and that there were only 62 days (or 8-9 weeks) between bid issuance and bid closing when Springcrest filed its complaint, the timing of events in the RFP discriminated against suppliers of equivalent products in that they could only obtain shock testing certificates *after* a new pump was manufactured—a process that could take up to 54 weeks based on Springcrest's evidence. In contrast, the OEM supplier would not have had to undertake the year-long manufacturing process prior to submitting a bid, as it presumably held a valid shock testing certificate, according to evidence submitted by PWGSC.

60. Even if PWGSC did not deliberately intend for the requirement for suppliers of equivalent products to submit shock testing certificates prior to bid closing to have a discriminatory effect, in the interests of ensuring fair competition, it should still have provided sufficient time for the suppliers of equivalent products to manufacture the pumps and then obtain those certificates in order for them to be able to compete on a level playing field against OEM suppliers. PWGSC did not do so. As such, the Tribunal finds that PWGSC violated Article 504(3)(c) of the *AIT*, which prohibits the timing of events in the solicitation process so as to prevent suppliers from submitting bids. Unlike Article 504(3)(b), there is no need to find that the government institution acted deliberately to exclude suppliers in order to find a violation of Article 504(3)(c). In that way, the Tribunal finds this ground of Springcrest's complaint valid.

61. With respect to PWGSC's argument regarding DND's legitimate operational requirements, the Tribunal notes that there are other provisions of the trade agreements that could be invoked to exempt the procurement from the procedural obligations of the agreements to serve a legitimate objective, such as public safety and security.¹⁸ However, PWGSC did not argue that its discriminatory conduct was justified on the basis of any of these exceptions.

16. Exhibit PR-2016-021-10 at 12, Vol. 1.

17. Exhibit PR-2016-021-12 at para. 27, Vol. 1; Exhibit PR-2016-021-15 at para. 10, Vol. 1A.

18. Article 504 of the *AIT* is subject to Article 404, which sets out conditions that an otherwise discriminatory measure must meet in order to be permissible: the measure must serve a legitimate objective, must not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective, must not be more trade restrictive than necessary to achieve that legitimate objective and must not create a disguised restriction on trade. "Legitimate objective" is defined in Article 200 and includes, *inter alia*, public safety and security, public order, and protection of human, animal or plant life or health. There is no basis on the record of this complaint for the Tribunal to assess whether these criteria are met.

62. As an aside, the Tribunal notes that the parties devoted a great deal of argument to the issue of the shock testing of the Hansome motors. While it was initially relevant to Springcrest's claim to clarify whether any OEM suppliers currently exist and whether the procurement was impossible to meet as a result, it devolved into a dispute over whether Hansome motors had been properly shock tested for previous procurements dating back to the 1990s, and whether they should be recognized as OEM products in the current process.

63. This dispute is outside the scope of the complaint, and it is not appropriate for the Tribunal to comment on whether pumps with Hansome motors were accepted as OEM products in past procurements. However, even if this dispute were within the scope of the complaint, it would be premature for the Tribunal to comment on this issue, as no contract has even been awarded.

REMEDY

64. As a remedy, Springcrest requested that the solicitation be amended by removing the requirement to provide the shock testing certificate prior to bid closing, or, in the alternative, that a new solicitation be issued that does not contain the requirement a shock testing certificate.

65. PWGSC did not make any submissions on the issue of remedy; however, throughout the process, it stressed the urgency of procuring the pumps as expeditiously as possible.

66. Subsection 30.15(2) of the *CITT Act* provides that, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including that a new solicitation be issued, that the bids be re-evaluated, that the designated contract be terminated, that the designated contract be awarded to the complainant or that the complainant be compensated by an amount specified by the Tribunal.

67. In recommending the appropriate remedy, the Tribunal must consider the factors set out in subsection 30.15(3) of the *CITT Act*. These include the following:

- the seriousness of any deficiency in the procurement process found by the Tribunal;
- the degree to which the complainant and all other interested parties were prejudiced;
- the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- whether the parties acted in good faith; and
- the extent to which the contract was performed.

68. In making its recommendation, the Tribunal has taken these circumstances into account, the most relevant ones being that the contract has yet to be awarded—making contract performance moot—and that Springcrest and other suppliers of equivalent products have been seriously prejudiced by their inability to bid on the RFP because of the timing of events in the solicitation process.

69. As the bid submission period under the current RFP has now ended, Springcrest's request that the Tribunal recommend that the current solicitation be amended to remove the requirement for shock testing certificates prior to bid closing is not feasible.

70. Therefore, given that the Tribunal understands that there is an urgency for the RCN to acquire the pumps, the Tribunal recommends that PWGSC cancel the existing solicitation and issue a new one. The new solicitation should either allow suppliers of equivalent products sufficient time to provide shock testing certificates of prior to bid closing or eliminate the requirement for suppliers of equivalent products to submit this certification prior to bid closing.

71. This will allow PWGSC to award the contract as expeditiously and fairly as possible and then address any issues with delays in delivery during the contract performance phase of the process.

COSTS

72. Springcrest requested its reasonable costs incurred in preparing its complaint.

73. In determining the amount of the cost award for this complaint, 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.

74. In this instance, the complexity of the procurement itself was medium, as it concerned custom-designed goods with multiple mechanical parts. As well, the Tribunal had to develop an understanding of the shock testing process, including the standards governing that process. The complaint itself, however, was not complex, as the only issue was whether or not the technical specifications were biased in favour of a particular supplier.

75. With regard to the complexity of the proceedings, these were complicated somewhat as a result of the request for an extension to file the GIR submitted by PWGSC and the necessity for the Tribunal to request that the parties clarify certain factual issues. This required additional rounds of submissions by the parties and the use of a 135-day time frame. The complexity of the proceedings was slightly higher as a result.

76. Therefore, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and the preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION

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

78. Pursuant to section 30.15 of the *CITT Act*, the Tribunal recommends that PWGSC cancel the existing solicitation and issue a new one. The new solicitation should either allow suppliers of equivalent products sufficient time to provide certification of shock testing prior to bid closing or eliminate the requirement for those suppliers to submit this certification prior to bid closing.

79. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Springercrest its reasonable costs incurred in responding to the complaint, which costs are to be paid by PWGSC. 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.

Ann Penner

Ann Penner

Presiding Member