



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-018

Lincoln Landscaping Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, November 16, 2016*

*Reasons issued
Thursday, November 24, 2016*

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IN THE MATTER OF a complaint filed by Lincoln Landscaping 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

LINCOLN LANDSCAPING 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 subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services award the resulting contract for the solicitation at issue to Lincoln Landscaping Inc.

In addition, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Lincoln Landscaping Inc. for its lost profits for the grass cutting and landscaping maintenance in the solicitation at issue which were carried out by a third-party contractor. The Canadian International Trade Tribunal recommends that the parties negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome of the negotiations. Should the parties be unable to agree on the amount of compensation, the Canadian International Trade Tribunal will set a timeline for the filing of further submissions on that matter.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Lincoln Landscaping Inc. its reasonable costs incurred in bringing 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 Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and its preliminary indication of the amount of the cost award is \$4,700. 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 by 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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STATEMENT OF REASONS

1. On July 4, 2016, Lincoln Landscaping Inc. (Lincoln) 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 an Invitation to Tender (ITT) (Solicitation No. W0105-16E028/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND). The ITT was for the provision of snow and ice control, and grass cutting and landscape maintenance services.

2. The Tribunal decided to conduct an inquiry into the complaint on July 5, 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*.²

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 compensate Lincoln for the lost profits that it would have received for the grass cutting portion of the contract performed by the third party. For the remaining work under the resulting contract, the Tribunal recommends that PWGSC award the contract to Lincoln. In addition, the Tribunal awards Lincoln its reasonable costs in bringing the complaint, which costs are to be paid by PWGSC.

SUMMARY OF COMPLAINT

5. Lincoln argued that it should have been awarded the resulting contract because, in its view, it was fully compliant with the requirements of the ITT. In addition, Lincoln alleged that PWGSC breached the applicable trade agreements on the following three grounds: (1) it improperly involved a third-party competitor³ in the bid evaluation process; (2) it disclosed Lincoln's bid price to that third-party competitor; and (3) it violated the competitive bidding process by soliciting the third-party competitor via a standing offer from another procurement⁴ to conduct the work in question even though the third-party competitor had not submitted a bid in response to the ITT.

6. As a remedy, Lincoln requested that it be awarded the resulting contract or, in the alternative, that PWGSC compensate it for lost profits or lost opportunity.

PROCEDURAL HISTORY

7. On March 14, 2016, PWGSC issued the ITT, with a closing date of April 25, 2016. The ITT stated that work under the contract would begin on May 1, 2016.

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

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

3. The third-party competitor, Mr. Lorne Beers, submitted an affidavit which was filed by Lincoln in the course of this inquiry. At the outset, the Tribunal wishes to emphasize that there is no indication that Mr. Beers acted improperly in any way, as will be explained more fully below.

4. Standing Offer and Call-up Authority (Standing Offer No. W0105-15E008/001/PWB) for the provision of maintenance services at the Moncton and Sussex Armouries (the SO).

8. On April 24, 2016, Lincoln submitted its bid in response to the ITT. Lincoln was the only bidder to submit a response to the ITT.
9. On May 10, 2016, PWGSC contacted Lincoln and requested that it resubmit prices for its bid by May 11, 2016.
10. On May 11, 2016, Lincoln submitted reduced prices, as requested by PWGSC.
11. On May 17, 2016, Lincoln contacted PWGSC to inquire about the status of the solicitation. PWGSC replied that Lincoln's bid would not be accepted and that the ITT would be re-issued at a later date.
12. On May 19, 2016, Lincoln made an objection to PWGSC.
13. On June 24, 2016, PWGSC responded to Lincoln's objection, stating that the solicitation would be cancelled and that PWGSC would issue a new ITT with minor changes.
14. On July 11, 2016, PWGSC acknowledged receipt of the complaint and informed the Tribunal that no contract had been issued in response to the ITT.
15. On July 26, 2016, PWGSC informed the Tribunal that the solicitation was cancelled on July 25, 2016. In addition, PWGSC requested that the deadline for filing its Government Institution Report (GIR) be extended by 10 days until August 12, 2016. PWGSC also informed the Tribunal that it intended to file a motion requesting that the Tribunal cease to conduct the inquiry.
16. On August 12, 2016, PWGSC filed its motion on the grounds that the solicitation had been cancelled and that, therefore, the complaint did not relate to a designated contract. Alternatively, PWGSC argued that the complaint had been rendered trivial and without any valid basis.
17. On August 22, 2016, Lincoln filed its response to PWGSC's motion. While the Tribunal provided PWGSC with an opportunity to provide a reply to Lincoln's response to the motion, PWGSC did not file any further submissions with respect to the motion.
18. On September 16, 2016, the Tribunal denied PWGSC's motion⁵ and directed PWGSC to file its GIR by September 26, 2016. The Tribunal also canvassed the parties about the possibility of holding an oral hearing at the end of October 2016, should the Tribunal deem it necessary.⁶ It also informed parties that the deadline of the Tribunal's determination for this complaint had been extended to 135 days and was now November 16, 2016.
19. On September 19, 2016, PWGSC requested a further extension of time to file its GIR.
20. On October 3, 2016, PWGSC filed its GIR.
21. On October 6, 2016, Lincoln requested an extension of time to file its response to the GIR.

5. *Lincoln Landscaping Inc. v. Department of Public Works and Government Services* (16 September 2016), PR-2016-018 (CITT).

6. Both parties provided their availability; however, on October 11, 2016, the Tribunal informed the parties that it had decided not to conduct an oral hearing for this inquiry. Neither party objected or otherwise commented on the Tribunal's decision.

22. On October 11, 2016, the Tribunal requested that PWGSC provide additional information regarding a conversation referenced in the GIR; that information was to be provided by October 14, 2016.
23. On October 13, 2016, PWGSC requested that it be granted an extension of time to file its response to the Tribunal's request for information.
24. On October 24, 2016, PWGSC filed its response to the Tribunal's request of October 11, 2016. Included in its response was an affidavit sworn by Mr. Wayne J. O'Keefe, Contract Manager for DND in Gagetown, New Brunswick, and the technical authority of the solicitation.
25. On October 28, 2016, Lincoln filed its comments on the GIR and on the response filed by PWGSC on October 24, 2016. As part of its response, Lincoln included affidavits by Mr. Zachary Sweet (owner and sole director of Lincoln) and Mr. Beers (owner of the third-party competitor and holder of the SO).
26. On November 7, 2016,⁷ PWGSC requested that it be permitted to make additional submissions on alleged new arguments contained in Lincoln's comments on the GIR and to ask that the Tribunal hold an oral hearing so that counsel could cross-examine Mr. Sweet and Mr. Beers. The Tribunal notes that this request was made six business days after the affidavits were submitted and five days before the Tribunal's statutorily required deadline for the issuance of its determination.⁸
27. Notwithstanding the lateness of PWGSC's request, the Tribunal notified parties on November 8, 2016, that an oral hearing had been scheduled for November 10, 2016. In order to facilitate the attendance of the affiants on such short notice, the Tribunal informed the parties that the oral hearing would be conducted via video link. The Tribunal also denied PWGSC's request to make additional submissions, since the arguments to which PWGSC referred were either included in Lincoln's original complaint or directly responded to arguments PWGSC had itself raised in its GIR.
28. On November 9, 2016, PWGSC withdrew its request for an oral hearing with consent from Lincoln. The Tribunal duly cancelled the hearing and informed PWGSC that it would accept the contents of its November 7, 2016, submission in regard to the affidavits of Mr. Sweet and Mr. Beers only. It also offered Lincoln the opportunity to respond to PWGSC's submissions on the affidavits.⁹
29. On November 14, 2016, Lincoln filed its response to PWGSC's submissions regarding the contents of the affidavits.
30. Given that both parties agreed that an oral hearing was not necessary and that the parties were afforded multiple opportunities to make written submissions, the Tribunal disposed of the matter on the basis of the written record.

7. This correspondence was received at 5:04 p.m. on November 7, 2016, and the Tribunal therefore could not respond until the following day.

8. Paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602. November 11, 2016, was a statutory holiday and, therefore, not included in the Tribunal's calculations.

9. Although PWGSC's entire letter of November 7, 2016, appears at Exhibit PR-2016-018-32, only the section pertaining to the affidavits was considered by the Tribunal. As set out in the Tribunal's letter of November 8, 2016 (Exhibit PR-2016-018-33), the remainder of the letter dealt with matters which had already been raised in the original complaint or which were raised in Lincoln's reply to the GIR directly in response to arguments that PWGSC made in the GIR. Therefore, no further submissions were warranted on those matters, and the Tribunal declined to consider the additional submissions.

ANALYSIS

31. As noted above, Lincoln complained that it should have received the contract, as it was fully compliant with the ITT. It also alleged that PWGSC breached the applicable trade agreements on the following three grounds: (1) it improperly involved a third-party competitor in the bid evaluation process; (2) it disclosed Lincoln's bid price to that third-party competitor; and (3) it violated the competitive bidding process by soliciting the third-party competitor via a standing offer from another procurement to conduct the work in question even though the third-party competitor had not submitted a bid in response to the ITT.

32. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint. At the conclusion of the inquiry, the Tribunal must determine whether a 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, in this case, are the *Agreement on Internal Trade*¹⁰ and the *North American Free Trade Agreement*.¹¹

33. The Tribunal will therefore determine whether PWGSC complied with its obligations under the applicable trade agreements by considering whether it improperly (1) awarded a contract to the third-party competitor without carrying out a competitive procurement process, (2) disclosed pricing information to that third-party competitor and (3) refused to award the resulting contract to Lincoln.

Did PWGSC Improperly Award a Contract to the Third-party Competitor without Carrying out a Competitive Process?

34. Lincoln alleged that, while the procurement process was still ongoing, DND approached a third-party competitor (i.e. Mr. Beers) and entered into a sole-sourced contract with it for grass cutting and landscape services.

35. PWGSC acknowledged Lincoln's allegations, noting that "[a] decision was made that it was not in the financial interest of the Crown to enter into a contract with the Complainant."¹² It also acknowledged that Lincoln submitted the only bid in response to the ITT and that there was no indication that Lincoln did not meet the requirements of the ITT. However, even though Mr. Beers did not submit a bid in response to the ITT, PWGSC noted that his company held the SO and, as such, argued that the work was properly tendered and that the contract was not sole-sourced. PWGSC filed the SO and provided evidence that 21 call-ups were made under the SO in order "... to meet the urgent summer grass cutting requirement ..."¹³

36. In accordance with Articles 1008 and 1015 of *NAFTA* and Article 506(1) of the *AIT*, the Tribunal has found that, except under limited circumstances, a government institution must hold an open procurement process whenever it seeks to acquire or continue services that are not provided for under an

10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

11. *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*].

12. Exhibit PR-2016-018-18 at 2, Vol. 1A.

13. *Ibid.* at 7.

ongoing contract.¹⁴ Applying those provisions to this case, PWGSC was therefore required to use an open and competitive procurement process in order to acquire the grass cutting and landscape maintenance services for the Moncton Armoury, Salisbury Range, Sussex Armoury and Sussex Range.

37. After reviewing the terms of the SO, however, the Tribunal finds absolutely no mention of grass cutting or landscape maintenance services. The “Description of Work” in the SO provides as follows:

The work under this Standing Offer comprises the furnishing of all labour, material, tools and equipment required to complete all the *maintenance tasks pertaining to the Civil, Structural, Mechanical and Electrical Technologies and Trades* at Moncton Armoury and Sussex Armoury as requested on Form CF 942, Requisition Against A Standing Offer, as directed by the Engineer and specified herein.¹⁵

[Emphasis added]

38. Moreover, the SO required the contractor to have the following qualifications:

The Contractor will be an established general contracting company with a minimum of 5 years *experience in new construction and building renovations*.¹⁶

[Emphasis added]

39. A plain reading of these provisions, combined with the fact that the SO called for personnel such as carpenters, plumbers and electricians,¹⁷ suggests that the SO was intended for construction and related services, not for grass cutting or landscape services as sought by the ITT.

40. Indeed, the description of work for the ITT provides as follows:

The work covered under this Service Contract comprises the furnishing of all labour, supervision, materials, tools and equipment required to provide Snow and Ice Control (SNIC) and Grass Cutting/Landscape Maintenance at the Moncton Armoury, Salisbury Range, Sussex Armoury and Sussex Range when requested and as specified herein.¹⁸

41. The description of work for the ITT then goes on to state the specific requirements for the grass cutting, including the expected intervals between cuttings, the appropriate height of the mowing and trimming, and the locations for cutting as set out on attached maps.¹⁹

42. The stark contrast between the language of the SO and the ITT calls into question how PWGSC could have complied with the trade agreements in its efforts to procure grass cutting and lawn maintenance services. The Tribunal simply cannot accept that the SO for construction-related services was appropriately used to procure grass cutting and landscaping services under an open and fair procurement process, especially in light of the fact that the 21 call-ups *under* the SO did not even reflect the statement of work contained *in* the SO. Rather, the call-ups under the SO featured excerpts from the ITT, including the appropriate height of the mowing and trimming, and the locations for cutting as set out on attached maps.²⁰

14. *Tendering Publications Limited* (8 July 2002), PR-2002-002 (CITT); *FM One Alliance Corp.* (27 June 2001), PR-2000-063 (CITT).

15. Exhibit PR-2016-018-18 at 115, Vol. 1A.

16. *Ibid.* at 115.

17. *Ibid.* at 105.

18. Exhibit PR-2016-018-01 at 45, Vol. 1.

19. *Ibid.* at 48-49, 59-66.

20. Exhibit PR-2016-018-18A (protected), Attachment 16, Vol. 2; Exhibit PR-2016-018-01 at 48, Vol. 1.

In other words, the description of the work to be completed under the 21 call-ups was expressly set out in the ITT but did not form part of the requirements of the SO.

43. The Tribunal affirms that Article 1016 of *NAFTA* provides for certain circumstances and conditions where limited tendering procedures can be used by a government institution. Nevertheless, there is no evidence that such circumstances existed in the present case, and PWGSC did not even argue that Article 1016 was applicable. As such, the Tribunal finds that, by having the grass cutting work contemplated in the ITT done through a call-up under the SO, DND attempted to extend the scope of the SO without conducting a competitive bidding process. In other words, PWGSC used the SO to bypass an otherwise open and competitive procurement process under the ITT.

44. Therefore, the Tribunal finds that, by circumventing the competitive procurement process and improperly sole-sourcing the work to a party that had not submitted a bid in response to the ITT, DND breached its obligations under the trade agreements. As such, this ground of Lincoln's complaint is valid.

45. In reaching this finding, the Tribunal emphasizes that there is no indication that the third-party that conducted the grass cutting work acted improperly in any way. The evidence indicates that Mr. Beers was approached by DND to perform the work and was not even aware that Lincoln had submitted a bid in response to the ITT when he was initially approached by PWGSC to do the work.²¹

Did PWGSC Disclose Pricing Information to the Third-party Competitor?

46. Lincoln alleged that PWGSC conducted an improper evaluation process by involving a third-party competitor in the evaluation process. In particular, Lincoln stated that PWGSC shared its bid pricing information with a third-party competitor (i.e. Mr. Beers). Lincoln argued that PWGSC therefore effectively engaged in bid shopping because, by revealing Lincoln's bid price to a competitor, it in fact attempted to secure a lower price from that competitor.

47. For its part, PWGSC contended that there is no basis for Lincoln's allegation that a third-party was involved in the evaluation process. PWGSC maintained that the third party was simply told that call-ups were being issued under the SO because the bidder's pricing was too high. In support of its position, PWGSC submitted an affidavit sworn by Mr. O'Keefe, in which he stated that he had "... no recollection of ever providing the Third Party Contractor with the Complainant's pricing"²²

48. However, Lincoln provided an affidavit sworn by Mr. Beers, the third-party contractor, to support its allegations that PWGSC disclosed its confidential pricing information. In the affidavit, Mr. Beers stated that he received a telephone call from Mr. O'Keefe in April 2016 during which he "... told me that the price was high and that he did not want Lincoln Landscaping to get the work. Mr. O'Keefe told me the amount that Lincoln Landscaping had bid in total on the contract or in total on a part of the contract. I cannot remember what number he told me but that it was a large number."²³

49. In response, PWGSC argued that Mr. Beers' affidavit contradicted that of Mr. O'Keefe and that Mr. Beers' recollection seemed selective. As noted above, while PWGSC initially requested an oral hearing in order to cross-examine Mr. Beers on his affidavit—an oral hearing which the Tribunal promptly

21. Exhibit PR-2016-018-27, Affidavit of Lorne Beers at para. 2, Affidavit of Zachary Adam Sweet at paras. 8-9, Vol. 1A.

22. Exhibit PR-2016-018-26 at para. 5, Vol. 1A.

23. Exhibit PR-2016-018-27, Affidavit of Lorne Beers at para. 2, Vol. 1A.

scheduled—it then withdrew its request and instead argued that the Tribunal should give little weight to the Mr. Beers’ affidavit.

50. The Tribunal has found that the disclosure of a party’s confidential pricing information is a breach of both Article 1008(a) of *NAFTA* and Article 501 of the *AIT*.²⁴ Those provisions state that a government institution shall not give information to a potential supplier about a specific procurement, as such actions could preclude competition. The Tribunal has interpreted those provisions as meaning that, while the release of confidential pricing information may not prevent a party from bidding on a future, re-tendered solicitation, disclosure of such information could mean that a bidder “...is likely to be seriously handicapped in setting its price when bidding on the second RFP and, as a result, fundamentally prejudiced in relation to at least one significant competitor when tendering on that solicitation.”²⁵

51. Applying those provisions and findings to this case, the disclosure of confidential pricing information could have significantly jeopardized Lincoln’s ability to properly and fairly bid on the re-issued ITT. Consequently, PWGSC’s actions could have unjustifiably excluded Lincoln from the procurement process.

52. The Tribunal recognizes that Mr. Beers was unable to recall the exact amount of Lincoln’s bid; based on his sworn affidavit, all he knew was that the amount told to him by Mr. O’Keefe was a “large number”. While this suggests that the harm caused by the disclosure of Lincoln’s pricing information may have been limited, the fact remains that the disclosure of Lincoln’s bid price is a serious breach of the trade agreements, which undermines the integrity of the procurement process. As such, the Tribunal finds that this ground of complaint is valid.

53. As an aside, the Tribunal does not accept PWGSC’s suggestion that Mr. Beers’ affidavit contradicts that of Mr. O’Keefe. In determining the relative weight to be given to Mr. Beers’ affidavit, the Tribunal notes that Mr. O’Keefe did not unequivocally state that he did *not* disclose Lincoln’s prices to Mr. Beers. Rather, he simply stated that he had “no recollection” of providing that information. While the Tribunal does not find that Mr. O’Keefe was being untruthful in his affidavit, it does find that his affidavit lacks certainty; that he does not recollect discussing Lincoln’s prices with Mr. Beers is not an absolute denial of doing so.

54. In his affidavit, Mr. O’Keefe states that there was “no reason” for him to provide Lincoln’s price to Mr. Beers.²⁶ However, in Mr. O’Keefe’s own words, he contacted Mr. Beers to inform him that “... the Crown may require grass-cutting services at the Moncton and Sussex Armouries on an as-and-when required basis, *as the pricing received in the response to the ITT was too high*” [Emphasis added].²⁷

55. Thus, it is clear that Mr. O’Keefe reached out to Mr. Beers because of his opinion that Lincoln’s prices were “too high” and of his desire to find an alternative contractor for the work. While the Tribunal cannot conclude that Mr. O’Keefe must have disclosed Lincoln’s actual bid price during the telephone call with Mr. Beers, it does call the accuracy of Mr. O’Keefe’s recollection into question.

24. *Lengkeek Vessel Engineering Incorporated v. Department of Public Works and Government Services* (2 November 2006), PR-2006-022 (CIIT) [*Lengkeek*] at para. 38; *Conair Aviation, A Division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CIIT).

25. *Lengkeek* at para. 38.

26. Exhibit PR-2016-018-26 at para. 5, Vol. 1A.

27. *Ibid.* at para. 4.

56. As noted by Lincoln, Mr. Beers is an independent witness who is not connected with Lincoln and who has no interest in the outcome in the complaint. While he does not recall the exact figure disclosed by Mr. O'Keefe, there is no reason to question his unambiguous statement that he was told the amount of Lincoln's bid by Mr. O'Keefe. Given the certainty expressed by Mr. Beers, combined with the ambiguity of Mr. O'Keefe's affidavit, the Tribunal finds that Mr. Beers' affidavit is persuasive on this point.

57. Although, in its initial complaint, Lincoln made general allegations that a third-party had somehow been improperly involved in the evaluation process, its reply to the GIR was limited to the argument that its pricing information was improperly disclosed to a third-party competitor. The Tribunal does not believe this to be a separate ground of complaint. Rather, the Tribunal reads Lincoln's argument to be that the third-party was "involved" in the evaluation by virtue of being told Lincoln's bid price while the evaluation was ongoing. Therefore, the Tribunal finds that the foregoing analysis addresses the entirety of this ground of complaint.

Was PWGSC Wrong to Refuse to Award the Resulting Contract to Lincoln

58. Lincoln alleged that PWGSC breached the trade agreements by refusing to award it the resulting contract. Lincoln noted that Article 1015(4)(c) of *NAFTA* provides as follows:

4. An entity shall award contracts in accordance with the following:

...

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lower-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.

59. Given that Lincoln submitted the only bid in response to the ITT and that its bid was fully responsive to the terms of the ITT, Lincoln argued that PWGSC was obligated to award it the resulting contract.

60. PWGSC did not argue that Lincoln's bid failed to meet the terms of the ITT. However, PWGSC referred to the "Standard Instructions - Goods or Services - Competitive Requirements", incorporated by reference in the ITT, which provide as follows:

11 (2007-11-30) Rights of Canada

Canada reserves the right to:

a. reject any or all bids received in response to the bid solicitation;

...

b. *cancel the bid solicitation at any time.*²⁸

[Emphasis added]

28. <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/21#rights-of-canada>

61. In addition, PWGSC noted that in the tender notice for the ITT, the estimated value of the resulting contract was listed at \$250,000 to \$500,000.²⁹ PWGSC argued that the tender notice informed bidders of its “financial expectations”.³⁰

62. Therefore, reflective of the terms of Article 1015(4)(c) of *NAFTA*, PWGSC argued that it was not obligated to award the contract if, in its opinion, it was not in the public interest to do so. PWGSC maintained that Lincoln’s proposed price was “excessive”³¹ and that “[p]aying a reasonable price for goods and services is necessarily in the Crown’s financial interest and, therefore, in the greater public interest.”³² As such, PWGSC submitted that it acted in the public interest by deciding not to award the resulting contract to Lincoln.

63. The Federal Court has found that, in the context of Article 1015(4)(c) of *NAFTA*, the term “public interest” permits a relevant government authority to “. . . make a discretionary, administrative decision in which he or she may weigh and evaluate a broad range of considerations, beyond those in dispute between the parties, with a view to determining what is in the best interests of the Canadian public.”³³

64. The Federal Court has also said that, when interpreting the application of Article 1015(4)(c) of *NAFTA*, the question is not merely whether a government institution erred in assessing the public interest but rather whether it erred in determining that it was not in the public interest to award the contract to the compliant bidder.

65. Applying the Federal Court’s findings to the case at hand, since there is no evidence on the record that Lincoln’s bid was not compliant with the ITT, the Tribunal must determine whether PWGSC’s contention that Lincoln’s bid did not represent “good value” for the Crown constituted a valid public interest rationale for cancelling the ITT. In so doing, the Tribunal will consider the terms of the ITT itself, as well as the manner in which the negotiations between PWGSC and Lincoln may have impacted DND’s decision to procure the grass cutting and landscape maintenance services via the SO.

66. The Tribunal finds that there was no maximum price listed under “Basis of Selection”, nor was “good value” listed as one of the evaluation criteria. The only requirement under “Basis of Selection” was the following

A bid must comply with all requirement of the bid solicitation to be declared responsive. *The responsive bid with the lowest evaluated price will [be] recommended for award of a contract.*

[Emphasis added]

67. The Tribunal has previously held that, absent terms such as “maximum price” or “good value” in a solicitation document, the relevant government institution must properly establish the grounds for cancelling the solicitation on the basis of the “public interest” under Article 1015(4)(c) of *NAFTA*.³⁴

68. While PWGSC pointed to the cost estimate included in the tender notice as evidence that Lincoln ought to have known that its bid would be evaluated against a maximum price, PWGSC included neither a

29. Exhibit PR-2016-018-18, Attachment 2, Vol. 1A.

30. *Ibid.* at 11.

31. *Ibid.*

32. *Ibid.* at 10.

33. *Wang Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [1999] 1 FCR 3, 1998 CanLII 9093 (FC).

34. *Carsen Group Inc.* (22 March 1995), 94N66W-021-0019 (CITT).

cost estimate nor a provision regarding good value in the ITT. Moreover, it refused to provide a cost estimate when Lincoln specifically asked for one in the course of negotiations with PWGSC. In his affidavit, Mr. Sweet stated that Ms. Darlene Reay of PWGSC contacted him on May 10, 2016, and asked Lincoln to submit revised prices. Mr. Sweet's evidence is confirmed by Ms. Reay's own notes detailing her conversation with Mr. Sweet.³⁵ He stated as follows:

Ms. Reay advised me that the company's prices were higher than DND's estimate for the work. I had asked Ms. Reay what that estimate was and *she advised me that she could not tell me that information.*³⁶

[Emphasis added]

69. PWGSC did not offer any explanation as to why, in the midst of negotiations with a responsive bidder whose price it viewed as being too high, it refused to provide the cost estimate which it "expected" bidders would meet.³⁷ If the cost estimate was, as PWGSC alleged, an essential part of the evaluation process of which Lincoln ought to have been aware,³⁸ the Tribunal finds that PWGSC's refusal to provide the information in response to Lincoln's request was unreasonable. Furthermore, the Tribunal finds that such actions simply do not support PWGSC's contention that the cost estimate was clearly intended to be an integral part of the evaluation process.

70. In reaching this conclusion, the Tribunal is not suggesting that the government institution is required to reveal all financial limitations or budgets to bidders during negotiations. As noted by the Federal Court of Appeal, such a requirement would be "... counter to the very nature of a competitive bidding and negotiated procurement process."³⁹ However, if there is a cost estimate of which bidders are expected to be aware and to meet, and/or a standard against which bids will be evaluated, the principles of openness and transparency require that such information not be denied to bidders.

71. The Tribunal accepts that achieving a reasonable price for goods and services is one of the objectives of the federal procurement process. However, the evidence shows that the prices paid to the third party under the SO were actually *higher* than those proposed by Lincoln in its original and revised bids.⁴⁰ Thus, by refusing to award the contract to Lincoln on the grounds that its proposed prices were too high, PWGSC ultimately selected a more expensive option. Its actions, therefore, directly contradict its argument that it refused to award the contract to Lincoln in order to achieve good value on behalf of the "greater public interest".⁴¹

72. For the foregoing reasons, the Tribunal is not satisfied that PWGSC has established that the refusal to award the contract to Lincoln was done in the public interest. Therefore, the Tribunal finds that PWGSC breached Article 1015(4)(c) of *NAFTA* by refusing to award the contract to the supplier that was fully compliant with the ITT, without establishing a public interest rationale for doing so. As such, the Tribunal finds that this ground of Lincoln's complaint is valid.

35. Exhibit PR-2016-018-18A (protected), Attachment 11 at 47, Vol. 2.

36. Exhibit PR-2016-018-07, Affidavit of Zachary Adam Sweet at para. 14, Vol. 1A.

37. Exhibit PR-2016-018-18 at 5, Vol. 1A.

38. *Ibid.* at 11-12.

39. *Defence Construction (1951) Limited v. Zenix Engineering Ltd.*, 2008 FCA 109 (CanLII) at para. 36.

40. Exhibit PR-2016-018-18A (protected), Attachment 16, Vol. 18A; Exhibit PR-2016-018-01A (protected) at 12, Vol. 2.

41. Exhibit PR-2016-018-18 at 12, Vol. 1A.

REMEDY

73. Having found all three grounds of Lincoln's complaint to be valid, the Tribunal will turn to remedy.

74. In the course of the procurement process, officials from DND and PWGSC behaved in a manner that the Tribunal finds troubling for three key reasons. All three of these reasons are relevant to the Tribunal's consideration of the appropriate remedy that should be recommended to compensate Lincoln.

75. First, as noted above, PWGSC requested and was granted several extensions of time to file various submissions or to respond to Tribunal requests. These extensions gave PWGSC 25 extra days to file various submissions over the course of these proceedings.⁴² More importantly, these extensions had significant effects on the schedule of the proceedings—a schedule that is deliberately undertaken according to strict timelines to ensure that issues in a procurement process are addressed as expeditiously as possible. Some of PWGSC's requests should have come sooner. Notably, the Tribunal would have expected PWGSC to take immediate notice of the affidavits that were filed by Lincoln, instead of waiting 6 days to request an oral hearing.

76. Therefore, the Tribunal would encourage PWGSC to act with greater concern for the short time frames that govern procurement review proceedings under the *CITT Act* in order for the proceedings to be conducted as quickly as possible for the benefit of all concerned.

77. Second, the Tribunal notes that DND officials contacted Mr. Beers to ask him about the grass cutting work *before* they asked PWGSC to enter into negotiations with Lincoln, and *before* they saw Lincoln's full financial proposal.⁴³ In fact, the evidence shows that Mr. O'Keefe contacted Mr. Beers about performing the work several days before he asked PWGSC to provide him with Lincoln's pricing information.⁴⁴ Mr. Beers' also stated that Mr. O'Keefe told him that he "... did not want Lincoln Landscaping to get the work."⁴⁵

78. After being contacted by Mr. O'Keefe, Mr. Beers, not realizing that Lincoln had bid on the contract, contacted Mr. Sweet to ask if Lincoln would be willing to subcontract the grass cutting work and repeated Mr. O'Keefe's comments to him.⁴⁶ As a result, before negotiations even began between the parties, Lincoln was aware that its confidential pricing information had been disclosed to a third party competitor, that the contract manager had approached that same third party competitor and asked about performing the grass cutting work on which Lincoln had bid and that there was some indication that the contract manager may not have wanted Lincoln to even get the contract.

79. Notwithstanding these issues, Lincoln entered into the contract negotiations in good faith, as evidenced by the fact that it reduced its bid price by \$239,850.00.⁴⁷ It should be noted that Lincoln reduced its price after Ms. Reay refused to provide the cost estimate that, according to PWGSC, bidders were

42. While Lincoln was initially granted an extension of time to file its response to the GIR, this deadline was later delayed due to PWGSC's request for an extension of time to file a response to the questions posed by the Tribunal in its letter of October 11, 2016.

43. Exhibit PR-2016-018-26 at paras. 3-4, Vol. 1A. Although Mr. O'Keefe was made aware of Lincoln's total bid price, the evidence shows that he did not have any costing breakdown before him prior to contacting Mr. Beers.

44. Exhibit PR-2016-018-18A (protected) at 19, Vol. 2.

45. Exhibit PR-2016-018-27, Affidavit of Lorne Beers at para. 2, Vol. 1A.

46. *Ibid.* at paras. 2-3.

47. Exhibit PR-2016-018-27, Affidavit of Zachary Adam Sweet at para. 15, Vol. 1A.

expected to meet. Despite Lincoln's efforts to reduce its price, PWGSC rejected Lincoln's bid and proceeded to improperly sole-source the grass cutting work at a cost *higher* than what Lincoln proposed.

80. Third, the Tribunal notes that the Notice of Proposed Procurement for the solicitations replacing the original ITT were not issued until October 24, 2016, even though Lincoln was informed that this would be done some five months earlier on May 17, 2016.⁴⁸ This significant delay meant that all the grass cutting work called for under the original ITT had already been completed by Mr. Beers by the time that the new solicitations were issued, thus precluding Lincoln from being able to submit a new bid on that portion of the work.

81. Taken together, these three issues deeply trouble the Tribunal. The conduct of DND and PWGSC demonstrate a complete lack of regard for the speed of the inquiry process, and for the openness, transparency and fairness of the procurement process. These actions, whether or not taken in good faith, had serious consequences for Lincoln and call into question the very integrity of the procurement process.

82. Accordingly, the Tribunal recommends that PWGSC compensate Lincoln for the lost profits that it would have received for the grass cutting portion of the contract performed by the third party. As this work has already been completed, the Tribunal finds that compensation for lost profit is the most appropriate way to compensate Lincoln for the breach caused by PWGSC improperly sole-sourcing the work to a third party.

83. With respect to the remainder of the contract, the Tribunal finds that Lincoln was fully compliant with the terms of the ITT and that PWGSC has not established that it had a valid public interest rationale for refusing to award the contract to Lincoln. Therefore, the Tribunal recommends that PWGSC award the contract to Lincoln, with the remaining work called for under the resulting contract (with the exception of the grass cutting mowing work already completed) being carried out by Lincoln.

COSTS

84. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Lincoln its reasonable costs in bringing the complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline* (the *Guideline*), the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3. While the procurement was relatively straightforward, the complaint related to several grounds of complaint which were multifaceted. In addition, the proceedings were drawn out and involved a motion to dismiss, additional questions posed by the Tribunal in order to collect the necessary evidence and an additional round of submissions by the parties.

85. As such, the Tribunal's preliminary indication of the cost award is \$4,700. 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 by article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

48. Exhibit PR-2016-018-27, Attachment C to the Affidavit of Zachary Adam Sweet, Vol. 1A. The evidence indicates that the ITT was re-issued as two distinct solicitations; one for the Moncton Armoury and a second for the Sussex Armoury.

DETERMINATION OF THE TRIBUNAL

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

Ann Penner

Ann Penner
Presiding Member