Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2017-006

Rockwell Collins Canada Inc.

v.

Department of Public Works and Government Services

Determination issued
Monday, September 11, 2017

Reasons issued
Friday, October 13, 2017

Canada

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IN THE MATTER OF a complaint filed by Rockwell Collins Canada 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

ROCKWELL COLLINS CANADA 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 compensate Rockwell Collins Canada Inc. for half of its lost profits for the Phase 1 work and, to the extent that the Department of Public Works and Government Services has already exercised, or intends to exercise, its options for them, the Phase 2 and Phase 3 work.

Should the parties be unable to agree on the amount of compensation, Rockwell Collins Canada Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have seven working days after receipt of Rockwell Collins Canada Inc.'s submission to file a response. Rockwell Collins Canada Inc. will then have five working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments. The parties are required to serve each other and file with the Canadian International Trade Tribunal simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Rockwell Collins Canada Inc. its reasonable costs incurred in preparing and proceeding with this complaint. 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 3, and its preliminary indication of the amount of the cost award is $4,700, which reflects the technical nature of the Request for Standing Offer and the need to hold an oral hearing. If any party disagrees with the preliminary level of complexity or 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 cost award.

Jason W. Downey
Jason W. Downey
Presiding Member

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

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Complainant:	Rockwell Collins Canada Inc.
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Government Institution:	Department of Public Works and Government Services
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STATEMENT OF REASONS

1. On April 28, 2017, Rockwell Collins Canada Inc. (Rockwell Collins) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] The complaint concerns a Request for Standing Offer (RFSO) (Solicitation No. W8474-156921/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of air traffic control radio systems for military bases across Canada.

2. On May 5, 2017, the Tribunal decided to conduct an inquiry into the complaint 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 held an oral hearing into the matter on August 31 and September 1, 2017.

SUMMARY OF THE COMPLAINT

4. Rockwell Collins' complaint concerns the evaluation of its bid, which was found to be compliant with the mandatory requirements of the solicitation but more expensive than the winning bid by Rohde & Schwarz Canada Inc. (Rohde & Schwarz). Rohde & Schwarz intervened in these proceedings.

5. Rockwell Collins alleges that PWGSC did not evaluate bids in accordance with the mandatory requirements set out in the RFSO, in contravention of Article 506(6) of the *Agreement on Internal Trade*.[3] This solicitation is covered by the *AIT* only.[4]

6. Rockwell Collins argues that Rohde & Schwarz's bid was non-compliant with the mandatory requirements of the solicitation because the RFSO specified, in places that radios with *both* Very High Frequency (VHF) *and* Ultra High Frequency (UHF) band capabilities were required. In those instances, Rockwell Collins proposed radios with *both* VHF *and* UHF band capabilities. Conversely, in those same instances, Rohde & Schwarz proposed radios with *only* VHF or *only* UHF band capabilities. Rockwell Collins alleges that that difference in band capabilities accounts for why its radios were more expensive than those bid by Rohde & Schwarz.

7. PWGSC concedes that the resultant difference in the bid price was the determining factor in contract award.

8. Had the evaluation process been properly conducted, Rockwell Collins alleges that it would have been deemed the lowest-cost compliant proposal, and should have been awarded the resulting contract and any exercised options it contains.

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <https://www.cfta-alec.ca/agreement-on-internal-trade/> [*AIT*].
4. See *Park Air Systems Ltd.* (5 April 2017), PR-2016-070 (CITT) at paras. 6-8, where the Tribunal considered a different complaint on this same solicitation process and determined that the solicitation process was covered only by the *AIT* and none of the other trade agreements.

9. For its part, PWGSC essentially argues that any capabilities for *both* VHF and UHF presented *together* were only ever expressed as a mere "preference". PWGSC also argues that, if any requirement was ambiguous, Rockwell Collins should have sought clarification during the bidding process.

PROCUREMENT AND COMPLAINT PROCESSES

10. The RFSO was originally issued on August 2, 2016, with a closing date of August 31, 2016. The bid closing date was subsequently extended twice, with the final closing date being October 28, 2016. Rockwell Collins submitted its proposal by the deadline. A total of four bids were received.

11. Between November 16 and December 1, 2016, the technical portions of the bids were reviewed by the evaluation team at DND. This initial review was done in accordance with the provisions of the RFSO, Part 4, Article 4.1.1, "Two Step Offer Evaluation Process".

12. The first step of the "two-step" process allowed DND to identify potential non-compliance in a bid and communicate them to the bidder, such that the bidder would be allowed to submit additional or different information to establish compliance if necessary.

13. Further to DND's initial assessment, PWGSC asked the evaluation team to review the substantiation documents that had been provided by bidders for all mandatory requirements set out in Annex G. As a result, on December 9, 2016, DND provided revised initial bid review evaluation results to PWGSC; validation to substantiate mandatory requirements was required for all four bidders.

14. On December 12, 2016, PWGSC advised the bidders which mandatory requirements of their technical offer were non-compliant and requested that they submit remedial information. Responses from bidders were received by PWGSC and forwarded to DND on December 23, 2016.

15. The second stage of bid evaluation was conducted by DND between January 3 and January 10, 2017. It resulted in Rockwell Collins and Rohde & Schwarz being found compliant. The other two bids were evaluated as non-compliant and received no further consideration.

16. On January 17, 2017, PWGSC sent both Rockwell Collins and Rohde & Schwarz a summary of their respective bids to confirm the quantities, pricing and extended totals that were provided in the bids. The pricing was confirmed by both bidders.

17. On January 24, 2017, PWGSC informed Rockwell Collins that it was not the lowest-priced technically compliant bidder and that subsequent testing would be administered to another supplier. On April 4, 2017, PWGSC informed Rockwell Collins that the standing offer was awarded to Rohde & Schwarz.

18. On April 18, 2017, Rockwell Collins received an in-person debriefing from PWGSC and DND. At that meeting, Rockwell Collins learned that, in various instances, the RFSO had been interpreted by the evaluators as not requiring *both* VHF *and* UHF band capabilities presented together in the same device.[5] PWGSC and DND did not provide details on the winning bid, citing bid confidentiality.

19. On April 28, 2017, Rockwell Collins filed its complaint with the Tribunal.

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5. Throughout the course of the hearing, parties referred to this presentation generically as having a VHF and UHF capability present in the same "box", which includes the presence of technology for both band capabilities in one device or through the assembling of two (or more) devices technologically linked together.

20. On May 12, 2017, PWGSC acknowledged receipt of the complaint and informed the Tribunal that a standing offer had been awarded to Rohde & Schwarz.

21. On May 31, 2017, PWGSC requested that the deadline for filing the Government Institution Report (GIR) be extended until June 7, 2017. On June 2, 2017, the Tribunal granted this request.

22. On June 5, 2017, the Tribunal granted a request from Rohde & Schwarz to intervene in the proceedings.

23. On June 7, 2017, PWGSC filed a GIR.

24. On June 16, 2017, Rohde & Schwarz filed its submission.

25. On June 20, 2017, Rockwell Collins requested, and the Tribunal granted, that the deadline for the filing of its comments on the GIR be extended to July 7, 2017, one reason being that it had retained new counsel to assist with the complaint.

26. By a letter dated July 5, 2017 (but only received by the Tribunal on July 7, 2017), Rockwell Collins requested a further extension of time to file its comments on the GIR. On July 10, 2017, the Tribunal granted this request.

27. On July 7, 2017, Rockwell Collins requested that the Tribunal issue a postponement of award order in this matter.

28. On July 12, 2017, Rockwell Collins filed it comments on the GIR. As part of the comments, PWGSC included a report by proposed technical expert Dr. Knud Steven Knudsen, President and Primary Consultant at TechConficio Inc., and an affidavit sworn by Mr. Geoffrey Blair, Business Development Director at Rockwell Collins.

29. On July 12, 2017, the Tribunal issued the postponement of award order.

30. On July 20, 2017, PWGSC requested that the Tribunal's postponement of award order be rescinded. PWGSC certified that the procurement was urgent and that a delay in awarding a contract would be contrary to the public interest.

31. On July 19, 2017, Rohde & Schwarz requested leave to file a response to the comments made on the GIR until July 24, 2017. On July 20, 2017, the Tribunal granted this request.

32. On July 21, 2017, in accordance with subsection 30.13(4) of the *CITT Act*, the Tribunal issued a rescission of the postponement of award order.

33. On July 21, 2017, PWGSC requested that the comments on the GIR and the report by proposed expert, Dr. Knudsen, be struck on the basis that they raised new arguments and contained new evidence.

34. On July 24, 2017, Rohde & Schwarz filed its submission on Rockwell Collins' comments on the GIR.

35. On July 27, 2017, the Tribunal held a teleconference to discuss the issues raised with respect to Dr. Knudsen's report. During that teleconference, the opportunity for PWGSC to secure its own technical expert witness was discussed, and considering the technical nature of the procurement and goods at issue,

the Tribunal decided to schedule an oral hearing on the merits of the case in order to better understand the specifics of air traffic control and the equipment included in this RFSO (i.e. bands, bandwidth, channels, VHF, UHF, civil aviation requirements and military aviation requirements).

36. On August 2, 2017, PWGSC requested an extension of three weeks to secure a witness. The Tribunal allowed PWGSC two additional weeks to secure a witness given the limited time remaining in the Tribunal's legislated 135-day inquiry deadline.

37. The date for the oral hearing was rescheduled on three occasions in order to provide an opportunity for PWGSC to secure such a witness and to accommodate the schedule of counsel for Rockwell Collins. On August 5, 2017, the Tribunal informed the parties that the oral hearing would take place on August 31, 2017.

38. On August 11, 2017, Rohde & Schwarz came forward and proposed Mr. Angelo Pallotta as an expert witness. That same day, Rockwell Collins objected to that proposal, and on August 14, 2017, filed submissions on that matter. PWGSC and Rohde & Schwarz responded to those objections on August 14 and 15, 2017, respectively. On August 16, 2017, the Tribunal advised parties that it would hear arguments on the respective qualifications of Dr. Knudsen and Mr. Pallotta at the hearing. On August 21, 2017, a report authored by Mr. Pallotta was filed with the Tribunal.

39. At the hearing, Rockwell Collins sought to have Dr. Knudsen qualified as an expert witness in the design and manufacture of radio communications. The Tribunal granted the request, as it was satisfied with Dr. Knudsen's experience. For its part, Rohde & Schwarz sought to have Mr. Pallotta qualified as an expert witness in radio communications. The Tribunal was also satisfied with Mr. Pallotta's experience and therefore accepted his qualification as an expert in that field.

40. PWGSC did not call a witness.[6]

TRIBUNAL ANALYSIS

Summary

41. This case underscores the importance of using plain language in the course of a procurement process. Plain language is attractive for many reasons. Chiefly, it is more understandable than legalese and therefore more agreeable to read and more accessible. Perhaps most importantly, it avoids mistakes and misunderstandings. In legal matters, plain language is a fundamental aid to the rule of law: it fosters access to justice and faith in our institutions. In business, and with regard to tendering in particular, it helps to create a level playing field among bidders and to avoid costly litigation on what can sometimes amount to nothing more than semantics.

6. As indicated above, Dr. Knudsen's expert report was filed by Rockwell Collins as an attachment to its comments on the GIR. PWGSC objected to this filing on the grounds that new and therefore impermissible arguments were being introduced. The Tribunal held a teleconference on July 25, 2017, to discuss this matter. It was at that time that the Tribunal decided on the need for an oral hearing, in large part so that it could gain a better understanding of the goods being procured. The Tribunal offered PWGSC the opportunity to secure its own witnesses and encouraged PWGSC to contact DND officials familiar with the technology as an option. One week later, counsel for PWGSC requested, and was granted, an extension of time to find a witness but ultimately notified the Tribunal that it was unable to do so, given time and contracting constraints. PWGSC decided to rely on Mr. Pallotta's testimony. The Tribunal confirmed PWGSC's intention in subsequent correspondence.

42. A government institution does no one any favours when it (i) fails to speak clearly, or (ii) fails to properly define its evaluation criteria. PWGSC did both in this solicitation.

43. On the first issue, to be sure, procuring entities often have complex requirements, but that is all the more reason that they be expressed as clearly as possible.[7] In the present case, inconsistent language and the unfortunate use of the oblique type symbol ("/") used in the solicitation documents when referring to different band capability requirements misled the bidders.

44. Even though the Tribunal finds that the solicitation ought to have been read in the manner that Rockwell Collins proposes, the Tribunal is nevertheless sympathetic to the way Rohde & Schwarz read it as well. Fundamentally, the RFSO left both bidders to bid in a contest that could not lead to a single, clear, identifiable winner.

45. On the second issue, the Tribunal has long held that evaluation criteria must be clearly defined in the solicitation documents.[8] Here, the RFSO contains an explicit *preference* for one solution over another; Rockwell Collins bid equipment that aligns with that preference. However, the RFSO had no evaluation criteria attached to this stated preference. As a result, the procurement process was seriously compromised by allowing the evaluators to ultimately circumvent, or even ignore, this preference. PWGSC ended up choosing a winning bidder based on an evaluation that can only be deemed incomplete as it ignored this preference.

46. Through the course of the hearing, it became obvious to the Tribunal that PWGSC actually went shopping for bids with not only an ill-defined grocery list (the issue in (i)), but also without any properly defined criteria for deciding what to buy for dinner (the issue in (ii)).

47. Further compounding the problem, PWGSC certified urgency to set aside the Tribunal's postponement of award order and awarded a contract to Rohde & Schwarz, even though work had not yet already commenced on the RFSO.

48. A postponement of award issued by the Tribunal is not done capriciously and aims to preserve the integrity of a procurement process and potentially save taxpayers money by preventing a government institution from paying twice for goods and services following a positive finding from the Tribunal.[9] Although the Tribunal remains mindful of the possible operational consequences of entirely reversing an award, the ideal remedy for the present RFSO would have been cancellation and retendering.

49. For the reasons set out below, the Tribunal finds that the complaint is valid.

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7. The Tribunal remarks that the equipment at issue in this solicitation was not particularly complicated. To be sure, what it consisted of required technical explanations for presentation to the Tribunal, but the requirements consisted of essentially off-the-shelf equipment that are well-known to the specialized supplier community here.
8. *PTI Services* (28 November 2001), PR-2001-027 (CITT) at 3.
9. The Tribunal has various remedies available to it (including non-monetary) when recommending compensation for a violation of the trade agreements. Some remedies, however, become progressively inaccessible as a contract progresses. In the present case, as will be explained below, very few viable options were available to the Tribunal other than the one that it recommended.

Remarks on the Recourse to Expert Witnesses

50. The Tribunal wishes to address the recourse to expert witnesses in the present case.[10] As was explained at the outset of the hearing, these experts were not called upon in order to assist in the interpretation of the terms of solicitation documents. That is a job for the Tribunal itself. Although both of them delved into their own personal understanding of the RFSO (with many years of experience to guide them), this was not the work expected of them, nor was it relied upon by the Tribunal to reach the present conclusions.[11] Their knowledge and expertise was informative in helping the Tribunal understand the technical nature of military and civilian radio communications including specifics relating to bands, bandwidth, VHF, UHF, Air Traffic Control (ATC) and other concepts. With a better understanding of this specialized universe, the Tribunal was better informed as to what was to be understood from the contents of the RFSO.[12]

First Issue: The RFSO Misled Both Bidders

51. PWGSC claims that the RFSO was set up to allow maximum flexibility so that bidders could provide "innovative low-cost solutions". As far as the Tribunal is concerned, that statement means very little, if anything at all. It certainly is no excuse for a lack of clarity in the solicitation documents. Otherwise, it actually introduces an open-endedness to requirements which does nothing but add confusion to the process.

52. In this instance, the RFSO contained so many latent ambiguities that the Tribunal understands how neither bidder questioned its own individual reading of the requirements. In short, those ambiguities misled both bidders to the point that neither questioned their respective understandings of what the RFSO was asking for.

53. The relevant provisions of the RFSO are reproduced in the Appendix to the present reasons.

The RFSO Requires Multi-Channels with *both* VHF *and* UHF Capabilities

54. The Tribunal believes that the RFSO language is so unclear that PWGSC cannot even properly recognize what its own document says.[13] It may very well be that, as it claims, PWGSC *intended* that the RFSO provide for transceivers that were either VHF *or* UHF, but that is not what its documents state. Had that been PWGSC's intention, it should have said so clearly in black and white. It did not. Rather, the RFSO supports the position taken by Rockwell Collins.

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10. The Tribunal requires experts and those that are recognized as such to conform to certain duties of impartiality recognized the Supreme Court of Canada in *White Burgess Langille Inman v. Abott and Haliburton Co.*, [2015] 2 SCR 182, 2015 SCC 23 (CanLII) [*White Burgess*].
11. Explicit direction and caution from the Presiding Member at the hearing was given on this issue; see *Transcript of Public Hearing*, Vol. 1, 31 August 2017, at 11-12.
12. To be sure, the Tribunal is interested in hearing experts explain technical issues in lay terms, and the Tribunal will not hesitate to call for oral hearings when a discussion of technical terms is best done in the presence of experts. However, the Tribunal cautions counsel that appear before it that they should not lead experts down a road that is for counsel alone to travel. In short, arguments by counsel are not better founded when supported by an *argument* that comes from an expert.
13. As will be discussed, PWGSC invited the Tribunal to read the word "and" as actually being an "or", recognizing that these terms mean different things, but that the Tribunal should adopt a contextual reading and replace one by the other in the course of its consideration of the bid documents.

55. Annex I sets out three lists of the "actual [Canadian Forces Units or bases] to receive . . . new [air traffic control] ATC system[s]." The lists contain various "current equipment" that is to be "replaced". Of that equipment, there are 10 instances where "VHF Multi" and "UHF Multi" radios are referenced; these are described in the list for Canadian Forces Base B (list B) and the list for Canadian Forces Base C (list C) (together, "lists B and C"); the list for Canadian Forces Base A is not in issue.

56. The complaint pertains specifically to those 10 instances.[14] Again, Rockwell Collins bid on these items understanding that they required *both* VHF *and* UHF band capabilities. For its part, Rohde & Schwarz bid on them thinking that dual band capabilities were not required.

57. The preambles of both lists B and C state that ". . . the Multi-Channels listed [below the preambles in each list] are to be replaced by *VHF/UHF Multi-Channels*" [emphasis added]. That requirement applies to the 10 instances identified above.

58. Annex A defines a "Multi-Channel" (or a "TXCVR") as a "Multi-channel transceiver capable of transmitting and receiving in the frequency ranges of: a) VHF: 118 to 137 MHz, *and* b) UHF: 225 to

14. The Tribunal arrives at the number 10 in the manner that follows. There are a total of 76 current radios that were to be replaced, including 14 Multi-Channels (see lists B and C of Annex I—confirmed by Mr. Pallotta's testimony. See also *Transcript of Public Hearing*, Vol. 1, 31 August 2017, at 255). The Tribunal finds that of those 14 Multi-Channels, only 10 are in issue in the complaint. As explained further along in this footnote, two clearly fall into an exception; and two others are treated in the same manner as also falling into that exception. Indeed, the Tribunal finds that those remaining four Multi-Channels fall into an exception allowing for "separate UHF [only]" Multi-Channels "for specialised [sic] waveforms." That exception is provided for at the note contained in Item 1 (General) of Section 5 (Multi-Channel) of Annex B, which provides as follows: "Any bid that includes a *separate* UHF TXCVR to meet *specialised waveforms* capabilities will be accepted if it meets transceiver specifications. We are stating that at the discretion of the bidder, they can submit *one* TXCVR for ATC functions (VHF, UHF) and *one* TXCVR (UHF) *for specialized waveforms*" [emphasis added]. In this instance, the Tribunal notes that the comma between the words "VHF" and "UHF" may not be any clearer than the oblique used elsewhere; however, the fact that this note distinguishes between ATC functions and "specialized waveforms" allows the Tribunal to determine that both VHF and UHF band capacity was not necessarily required in such instances: in fact, the bidder has "discretion" to "submit" a "separate UHF" Multi-Channel for "specialized waveforms" "and" another ("one") Multi-Channel for "ATC functions", be they VHF or UHF; the comma in the expression "(VHF, UHF)" meaning "or" and indicating an alternative. This interpretation is consistent with the language of the preambles of lists B and C that also indicate that "[a] *separate* UHF Multi-Channel for specialized waveforms must be included." Here again PWGSC's RFSO language is unclear and unfortunate: because a Multi-Channel is defined in Annex A as being a multi-channel transceiver capable of *both* VHF *and* UHF band capabilities, the inclusion of the words "separate UHF" before the word "Multi-Channel" in fact narrows the defined term down to only one transceiver with only UHF capabilities; again, this is a terrible drafting technique that could only create confusion. The "Notes" column of list C of Annex I identifies two pieces of current equipment as "Specialized Waveform[s]". Those two instances clearly fall into the exception discussed in this footnote. The "Designation" columns of lists B and C of Annex I also each identify one (for a total of two) piece of current equipment as "Vinson" and, under the "Notes" column, state "External Crypto device". The witnesses both treated this type of equipment as a specialized device that required encryption; see *Transcript of Public Hearing*, Vol. 1, 31 August 2017, at 89, 228. The Tribunal treated these two instances as also falling into the same category as two instances of exceptions discussed above in this footnote; whether or not the Tribunal has properly determined that the "Vinson" and "External Crypto device" equipment properly falls into the exception that is discussed in this footnote is ultimately inconsequential because PWGSC's failure to properly evaluate the requirements of the 10 Multi-Channels in issue in this complaint were sufficient in and of themselves to compromise the procurement process, and result in the Tribunal finding this complaint to be valid.

400 MHz" [emphasis added].[15] Here, the word "and" is clearly cumulative, connective, and not alternative.[16]

59. In the Tribunal's view, the plain meaning of the solicitation is to be understood as follows: all[17] multi-channel transceivers that are bid should be capable of *both* VHF *and* UHF band capabilities. Indeed, because "Multi-Channel[s]" are *already* defined in Annex A as capable of *both* VHF "and" UHF band capabilities, the use of the terms "VHF/UHF" in the expression "VHF/UHF Multi-Channels" in the preambles of lists B and C of Annex I is inherently repetitive and at the same time connected to the earlier interpretation; but, nevertheless, by stating the requirement for *combined* VHF *and* UHF capabilities not just once, but twice—first in the definition of "Multi-Channel[s]" and again by adding "VHF/UHF" in the preambles of lists B and C of Annex I before the words "Multi-Channels"—, the RFSO necessarily stresses the requirement that Multi-Channels have *both* VHF *and* UHF capabilities.[18]

60. As such, the RFSO is not, to say the least, a good example of plain language drafting. Even complex or technical requirements are no excuse for a lack of clarity, and indeed the Tribunal knows of no authority that says that they cannot be simply and intelligibly expressed.[19]

61. Nevertheless, the Tribunal is sympathetic to the circumstances faced by Rohde & Schwarz in this matter. It bid in good faith according to what it understood the requirements to be. As also explained by Mr. Pallotta at the hearing, from a bidder's perspective, there were possibly alternative ways to minimally respond to this solicitation (even if it was not in keeping with other parts of its requirements) which needed not account for the dual VHF and UHF approach. This interpretation is suspect as it would replace current legacy equipment with newer equipment that was just as limited, but would provide a minimal threshold of acceptability in the bid documentation.[20] This proposition is difficult to defend.

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15. Essentially, PWGSC asked the Tribunal to read the word "and" in Annex A as an "or". The Tribunal does not accept that proposition.
16. *Merriam-Webster's Collegiate Dictionary*, 11th ed., *s.v.* "and" – "*and*. 1. used as a function word to indicate connection or addition *esp.* of items in the same class or type."
17. All but the four exempted radios discussed in the previous footnote.
18. Counsel for Rockwell Collins properly identified that Annex A supersedes the others: see *Transcript of Public Hearing*, Vol. 2, 1 September 2017, at 324-325.
19. In fact, there is authority for the opposite: Nicholas Boileau, the "Législateur du Parnasse" ("Legislator of Parnasse") stated the following in *L'Art poétique*, *Chant 1* (1674): "Ce que l'on conçoit bien s'énonce clairement, Et les mots pour le dire arrivent aisément" ("What is clearly understood is clearly stated, and the words to describe such come naturally" [translation]. See also *Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) at 17, where the Tribunal held that while government institutions were entitled to flexibility in identifying their procurement needs, such flexibility, ". . . does not mean that entities can dispense with establishing rules governing the formulation of proposals, their receipt and evaluation, their ranking and the identification of a winner for award, or that they can keep such rules secret. On the contrary, in the Tribunal's opinion, the less well defined the expected outcome, the more the procurement framework, including the evaluation and award rules, must be transparent and well articulated in the RFP. The reason for this position is that the role of subjectivity in the evaluation of proposals increases significantly when the expected solution is broadly defined."
20. The bid documentation was clear on questions of « flexibility » and « future capability »; this makes the proposed interpretation of minimally replacing a single band, single channel piece of equipment by the same a little absurd, especially considering other provisions of the RFSO.

The Oblique

62. The oblique may be the most confusing symbol of the keyboard (and of both official languages). Any explanation of the oblique is convoluted (as the attempt that follows perfectly illustrates). While it is without specific meaning when used on its own, it can mean "or", "and" or "and/or" when used between two words. The expression "and/or" actually means "and *or* or"; in that circumstance, the oblique serves to eliminate an unwelcome repetition. In short, it can have various meanings that are not always immediately ascertainable.

63. The oblique in the term "VHF/UHF" in the expression "VHF/UHF Multi-Channels" in the preambles of lists B and C of Annex I is therefore inherently confusing as it has no immediate and apparent meaning. Rockwell Collins believed that it confirmed the other language in the RFSO requiring *both* VHF *and* UHF capabilities. Rohde & Schwarz read that oblique as meaning "or". At first blush, both are potentially correct if the Tribunal was to disregard the word "and" which appeared in the interpretation provided in Annex A.

64. The Tribunal has had to consider the use of the oblique in the past and has, quite unsurprisingly, concluded that its meaning has to be derived from a contextual reading.[21] This essentially means that the oblique has no set meaning and is inherently confusing. The Tribunal warned over a decade ago that "the use of the oblique in drafting the terms and conditions of solicitation documents lends itself to interpretation difficulties and should be avoided. In circumstances where it cannot be avoided, then the meaning of the oblique should be set out clearly."[22] The lesson should have been understood as this: unless absolutely necessary for a clear purpose, avoid the oblique or, better yet, do not use it at all.

65. In this instance, the oblique had no redeeming qualities. In fact, it created confusion and latent ambiguity. And both parties fell into the oblique's trap. Rohde & Schwarz let itself believe that it had understood the terms of the RFSO in one way. Rockwell Collins came to a different view. The oblique played a defining role in each of those differing choices, one of which ultimately turned out to be ill-fated.

The RFSO is Latently Ambiguous

66. There will be times when two reasonable and knowledgeable bidders cannot be wronged for reading a solicitation as they did when the solicitation is altogether confusing. This is one of those instances where there was no immediately clear red flag that could tip bidders off to require them to seek a clarification.

67. Indeed, the RFSO language examined above is so latently ambiguous that a bidder would likely have required specialized legal training to be alerted to its ambiguities. That is no way to write solicitations. In a very unique sense, the bidders' technical expertise may, in the present case, have served them an ironic disservice: their individual knowledge and experience in the field of radio-communications (as revealed through the testimony of the experts) was such that it allowed them to find meaning in such equivocal language.

68. In the real-life commercial world where the rush to prepare a bid is a time-sensitive imperative, the Tribunal understands how the overarching incongruities of the RFSO identified above could have gone unnoticed. The confusion was such that two very competent and credible experts presented by the parties

21. *Quality Services International Inc.* (28 June 1999), PR-99-006 (CITT) [*Quality Services*] at 5; *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 9.
22. *Quality Services* at 7.

had the same opposing insight: for each of them, the terms of the RFSO were justifiably read as requiring the products that were bid by each party.

69. Ultimately, the Tribunal finds that Rockwell Collins' interpretation was properly in-line with the terms of the RFSO. Nevertheless, the Tribunal cannot wrong Rohde & Schwarz for having read the RFSO as it did. As such, Rohde & Schwarz is more of an innocent bystander to PWGSC's failure to draft a plain language, comprehensible RFSO. These inherent ambiguities came as a surprise to both bidders, and only started coming to light later—as of the debriefing for Rockwell Collins—through the filing of the complaint and ultimately culminating at the hearing. This is latent ambiguity of a level rarely encountered by the Tribunal.

70. As such, the Tribunal is of the view that neither party could be wronged for not seeking further clarification sooner in the procurement process.

71. Fundamentally, in the present case, PWGSC went shopping for goods without knowing exactly what it wanted. It failed to provide firm criteria and essentially invited the bidding community to suggest or propose what it could buy. Otherwise, where criteria were defined, it was ill-defined, leaving gaps and where it attempted to fill those gaps, it did so by providing information which further compounded the confusion.[23] Essentially, it set up the entire bidding community to fail. PWGSC also set itself up for failure when it did not give any weight to the RFSO's explicitly stated "preferred" solution.

Second Issue: The RFSO's Preference was Ignored

72. Article 506(6) of the *AIT* requires, in part, that the "tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighing and evaluating the criteria."

73. Annex A explicitly states a *preference* for one solution over another as follows: ". . . *the preferred* solution is a VHF/UHF capable multi-channel transceiver . . ." [emphasis added]; it goes on to say that PWGSC will not refuse a solution that does not meet this "preference". Rockwell Collins unwittingly and logically bid according to that preference in regard to the 10 instances of items at issue in this complaint.

74. To Rockwell Collins' great surprise, following the evaluation, it discovered that no weight was ultimately given to that preference and that PWGSC had instead preferred Rohde & Schwarz even though Rohde and Schwarz had not addressed the RFSO's preferred solution in its bid; this rightfully gave Rockwell Collins reason to question the result of the evaluation, and ultimately led to the discovery of how the bids had been evaluated.

75. The Tribunal reads the RFSO's stated "preference" in harmony with the definition provided for the "TXCVR" in Annex A, which unites the requirements for VHF *and* UHF devices by the use of the term "and" in the specification provided.

23. Annex I, for example, which appeared late in the procurement process, provided additional specifications relating to the equipment currently used at the three Canadian Forces Bases which, with regard to what existed in earlier bid documentation, could lead to different interpretations as to a) what Annex I actually called for and b) how earlier documentation should now be interpreted. Exhibit PR-2017-006-14A (protected) at 8, Vol. 2A. The deadline for bid submission was extended to reflect the additional requirements set out in Annex I. The Tribunal believes that the filing of Annex I was important in contributing to this latent ambiguity.

76. The *Merriam-Webster's Collegiate Dictionary* defines "preference" as "the state of being preferred . . . one that is preferred . . . the act, fact, or principle of giving advantages to some over others . . . ."[24] Similarly, it *defines* "prefer" as "to like better or best."[25]

77. PWGSC argued that a "preference" in the present case should be read in the same way as when a buyer fancies a more expensive car but that, at the end of the day, will settle for something cheaper when faced with the choice.

78. This, in fact, is a *non-choice* between something that a buyer wished they could afford, and what they settle for on financial considerations—to which only they are privy.[26] Such a view may be acceptable in the context of a negotiation,[27] or on an approach to negotiation, or when a consumer is just shopping around; in those instances no unilateral or bilateral obligations arise. But that position is incorrect under the law of tendering where bilateral obligations exist.[28]

79. The obligation that PWGSC committed to by issuing the RFSO was to evaluate Rockwell Collins' bid (and every other bid for that matter) according to the commitments that were set out within. Specifically, here, it made a clear statement of *preference* to the type of equipment that Rockwell Collins bid for the 10 instances described above. It did not adhere to its own statement. Instead, it tried to argue in these proceedings that a preferred solution should be on the same level as a non-preferred solution (albeit one that would not be eliminated). Such logic is absurd: a preferred solution necessarily must have an advantage given to it over others.

80. By evaluating the bids as if the stated preference did not exist, PWGSC effectively trapped Rockwell Collins—it lured it into bidding something that would meet the preferred requirement (and that preference was, of course, more expensive than the non-preferred solution), only to disqualify Rockwell Collins for having given PWGSC the exact preferred solution it had asked for. That is the epitome of unfairness.

81. It turned out that there were no criteria associated with evaluating the preference—so effectively the preference would be ignored. PWGSC had no right to ignore that preference because it was part of the playing field which it set out for this solicitation. Not evaluating according to stated criteria and, worse, pretending that the criterion does not exist, is simply wrong. A fundamental tenet of the law of tendering is this: a supplier who bids by the rules cannot be failed for abiding by them.

82. PWGSC did not apply itself to evaluating that preference to its face value because it set out no criteria as to how that preference would weigh in the overall evaluation.[29] PWGSC's failure to afford any

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24. Available online: https://www.merriam-webster.com/dictionary/preference.
25. Available online: https://www.merriam-webster.com/dictionary/preferred.
26. *Transcript of Public Hearing*, Vol. 2, 1 September 2017, at 377-379.
27. Such as when one party has engaged in an "invitation to treat"; or, in civil law, when parties are engaged in "*pourparlers*" ("talks") or are making "*pollicitations*".
28. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII) at paras. 87-95.
29. The requirement stated that ". . . *the preferred* solution is a VHF/UHF capable multi-channel transceiver. Offers will *not be eliminated* from consideration if the UHF and VHF transceiver units are separate, if all other capabilities are as defined" [emphasis added]. A government institution cannot state a preference and purport to put it on the same footing as another (by definition) non-preferred product that is simply not eliminated for not being the preferred solution. The Tribunal has long stressed the importance of knowing and being able to count on government institutions to apply the "rules of the game". If solicitation documents state a preference, a bidder who proposes a preferred solution should be able to count on that preference weighing to their advantage when their bids are evaluated. By not setting out evaluation criteria in respect of the RFSO's preference, let alone evaluating the preferred solution as such, PWGSC violated the *AIT*.

weight to the RFSO's stated preference is a violation of Article 506(6) of the *AIT* and is sufficient, in and of itself, for the Tribunal to find the complaint valid.

Additional Remarks

83. The Tribunal believes it important to add that Rockwell Collins properly identified two additional matters that appear to have contributed to the derailing of this procurement process. For reasons of judicial economy, the Tribunal need not analyze them at length, but offers the following remarks to underscore how the procurement process contained flaws that went beyond the two issues discussed above.

84. First, in a series of questions and answers that arose during the procurement process, PWGSC indicated that the RFSO was intended to provide maximum flexibility to DND for its future ATC radio communications needs.[30] The Tribunal understands how this could have logically encouraged a bidder to put forward the "preferred" solution of a multi-channel that operates in both VHF *and* UHF bands: of course such a preferred solution would also be delivering "maximum flexibility" by providing operability, present and future, in both bands. In turn, that encouragement compounded how imperative it should have been for PWGSC to set out criteria for weighing its stated preferred option compared to non-preferred options, as discussed above. With this encouragement in hand, it is no wonder that Rockwell Collins bid as it did.

85. Second, Rockwell Collins highlighted how PWGSC appears to have treated Annex G as mere "guidance" instead of being mandatory. Again, the Tribunal finds that this event shows how PWGSC appears to have simply had too few guideposts when it evaluated the bids. The Tribunal finds PWGSC's position to be untenable because, in black and white, the RFSO says that Annex G is mandatory: indeed, Article 4.1.1 of the RFSO entitled "Two Step Offer Evaluation Process" provides that "[t]he . . . *mandatory* requirements will be those included in . . . Annex G"[31] [emphasis added].

REMEDY

86. Having found Rockwell Collins' complaint to be valid, the Tribunal must determine the appropriate remedy, in accordance with subsections 30.15(2) and (3) of the *CITT Act*.

87. PWGSC made no submissions on remedy, as its view was that the trade agreements were not breached. PWGSC did, however, ask that it be awarded its costs in this proceeding.

88. To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including the following:

1) the seriousness of the deficiencies found;

2) the degree to which the complainant and all 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.

30. Exhibit PR-2017-006-14 at 163, Vol. 1C.

31. *Ibid.* at 49. For the most part, Annex G was a reproduction of the requirements and preferences set out in Annexes A and B.

89. The deficiencies in the procurement process were significant because of the two failures examined above: had the requirement been clearly stated and the preference clearly weighted, both parties could have submitted different bids at different prices. They were denied the opportunity to put their best foot forward.

90. All parties were seriously prejudiced because of the deficiencies as well. Rohde & Schwarz received business that it would not have been entitled to receive had tendering rules been followed (or had the postponement of contract award order not been rescinded). Rockwell Collins lost the opportunity to be properly evaluated for submitting the RFSO's preferred solution.

91. To compound the situation, DND chose to commence purchasing equipment from Rohde & Schwarz despite the initiation of this inquiry. This is potentially problematic because Rohde & Schwarz's equipment may not be fully compatible with other suppliers' solutions, including Rockwell Collins'. The feasibility of a new solicitation to cover needs that have still not been met is thereby considerably diminished. This can perpetuate the need to continue to source equipment from a supplier who did not rightfully win a solicitation—as such, improper sole-sourcing would continue—albeit not without compensation, but certainly at greater expense to the taxpayer.

92. The integrity and efficiency of the competitive procurement system is at a low in this matter because bidders were not able to understand the terms or requirements of the solicitation. The bidders participated in a solicitation so flawed that it could only lead to failure. Because the award to Rohde & Schwarz was made in the absence of a proper evaluation, the procurement is tantamount to sole sourcing under the guise of a competitive process. That is a serious failing.

93. Again, the problem is further driven by the claim to urgency by PWGSC and hastiness to realize the contract, notwithstanding the fact that grounds of complaint had been raised. The Tribunal has no evidence to fault PWGSC on its claim to urgency in the present case—and it does not do so either; the Tribunal is merely left to look for a potential remedy, with the reality of a partially realized contract by a bidder who also invested in this process in good faith.

94. The contract that PWGSC awarded is, to a large extent, being performed. Retendering or awarding Rockwell Collins the contract could impose operational difficulties on DND related to either interoperability concerns between different products or duplication of expenses. Re-evaluation is not an option because of the fundamental flaw in the absence of criteria on the stated preference.

95. As such, the Tribunal has set out a remedy below that allows PWGSC maximum flexibility in meeting its current needs, while still providing Rockwell Collins with compensation.

96. The compensation is set at 50 percent of Rockwell Collins' reasonable profits had it been awarded the contract for the RFSO. The Tribunal reasons that Rockwell Collins would likely have been on a footing at least as equal as Rohde & Schwarz to win the RFSO had the procurement process been properly conducted. The Tribunal refrains from fixing the amount of compensation at 100 percent because the final outcome of any retendering (what would have been the optimal remedy but for the ongoing performance of the contract) cannot be ascertained with any certainty.

97. PWGSC had identified both Rockwell Collins and Rohde & Schwarz as being compliant with the mandatory requirements of the RFSO. An award for lost opportunity at 50 percent based on the existence of

another compliant bidder is in keeping with similar past circumstances examined by the Tribunal.[32] With two compliant bidders at the final stage of the solicitation process, each had a 50 percent chance of success. Finally, in fixing its compensation percentage at 50 percent, the Tribunal is mindful of not affording Rockwell Collins a windfall either.

COSTS

98. In determining the amount of 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.

99. In this instance, the complexity of the procurement itself was low to medium: the procurement was for somewhat complicated equipment to the layperson, but was essentially for off-the-shelf equipment for the bidding community. The complaint itself was of a medium level of complexity because it dealt with a very unclear RFSO.

100. The proceedings were complicated by the filing of expert reports and the need for a hearing. The matter also required a 135-day timeframe as a result. The complexity of the proceedings was therefore high and in these circumstances it is this factor that weighs the heaviest in the determination of the level of costs to be awarded.

101. As such, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and the preliminary indication of the amount of the cost award is $4,700.

102. The Tribunal awards no costs to Rohde & Schwarz even though its intervention in these proceedings was helpful and essentially the fault of PWGSC's failings: a cost award to Rohde & Schwarz is incompatible with being on the receiving end of a sole-sourced contract.

DETERMINATION

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

104. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal determines that PWGSC compensate Rockwell Collins for half of its lost profits for the Phase 1 work and, to the extent that PWGSC has already exercised, or intends to exercise, its options for them, the Phase 2 and Phase 3 work.

105. Should the parties be unable to agree on the amount of compensation, Rockwell Collins shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have seven working days after receipt of Rockwell Collins' submission to file a response. Rockwell Collins will then have five working days after the receipt of the PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal.

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32. *Tritech Group Ltd v. Department of Public Works and Government Services* (31 March 2014), PR-2013-035 (CITT); *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT); *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

106. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Rockwell Collins its reasonable costs incurred in preparing and proceeding with this complaint. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,700, which reflects the technical nature of the RFSO and the need to hold an oral hearing. If any party disagrees with the preliminary level of complexity or 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 cost award.

Jason W. Downey

Jason W. Downey
Presiding Member

APPENDIX

Relevant Portions of the RFSO

Article 4.1.1[33]

4.1.1 Two Step Offer Evaluation Process

4.1.1.1 Step 1: Initial Review of Mandatory Requirements

Canada will conduct an initial review of the Offeror's proposal to determine if all mandatory requirements have been addressed and met as required. After the initial review the Contracting Authority will provide each Offeror with a "Preliminary Evaluation Report" listing the non-compliant mandatory requirements evaluated to date. This will include only a list of RFP references for each failed requirement.

Offerors that do not meet all mandatory requirements will be invited to submit additional or different information to prove to evaluators, in accordance with the RFP, that the proposal is compliant with those mandatory requirements. This information must be submitted to the Bid Receiving Unit on or before the date and closing time specified in the invitation.

The new information submitted by the Offeror must be based on the system it proposed at solicitation closing. An Offeror responding to a request for information will not be allowed to do a hardware or software substitution to correct a non-compliance issue.

The paper evaluation mandatory requirements will be those included in the following areas:

Annex E
Annex G

Annex A

Table 1 in Section 2.1 of Annex A[34] sets out the general description of equipment required and describes a transmitter, a receiver and a Multi-Channel TXCVR (transceiver) as the following:

1.	Transmitter (TX)	Single channel radio or radios capable of transmitting in the frequency ranges of: a) VHF: 118 to 137 MHz, and b) UHF: 225 to 400 MHz
2.	Receiver (RX)	Single channel radio or radios capable of receiving in the frequency ranges of: a) VHF: 118 to 137 MHz, and b) UHF: 225 to 400 MHz
3.	Multi-Channel (TXCVR)	Multi-channel transceiver capable of transmitting and receiving in the frequency ranges of: a) VHF: 118 to 137 MHz, and b) UHF: 225 to 400 MHz

33. Exhibit PR-2017-006-14 at 49, Vol. 1C.
34. *Ibid.* at 66-67.

> c) Note: For the UHF/VHF transceivers, the preferred solution is a VHF/UHF capable multi-channel transceiver. Offers will not be eliminated from consideration if the UHF and VHF transceiver units are separate, if all other capabilities are as defined.

Annex B

Annex B, Section 5 of the RFSO is entitled "Multi-Channel" and provides in part as follows:[35]

> The TXCVR must have the following characteristics:
>
> > a) all performance specs must apply to both freq bands unless specifically identified as either VHF or UHF only requirements.
> >
> > . . .
> >
> > Note: Any bid that includes a separate UHF TXCVR to meet specialised waveforms capabilities will be accepted if it meets transceiver specifications. We are stating that at the discretion of the bidder, they can submit one TXCVR for ATC functions (VHF, UHF) and one TXCVR (UHF) for specialized waveforms.

Annex I

A preamble description precedes each of the grids outlining the frequency requirements at Canadian Forces Bases B and C and provides as follows:[36]

> This is one of the actual units to receive a new ATC system. Radios are located at 3 different Sites (Single Channel TX's at a TX Site, Single Channel RX's at the Tower, and Multi-Channels at both Radar Terminal and Tower). The object is to replace the current equipment listed below. Retaining the split site is negotiable. The Multi-Channels listed are to be replaced by VHF/UHF Multi-channels. A separate UHF Multi-channel for specialized waveforms must be included.

35. *Ibid.* at 100.
36. *Ibid.* at 286-287.