



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2017-060

Dynamic Engineering Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, May 16, 2018*

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IN THE MATTER OF a complaint filed by Dynamic Engineering 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

DYNAMIC ENGINEERING 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, in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, and having regard to the termination of the designated contract by the Department of Public Works and Government Services on April 10, 2018, the Canadian International Trade Tribunal recommends, as a remedy, that a new solicitation for the designated contract be issued.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Dynamic Engineering Inc. its reasonable costs incurred in proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in Article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Serge Fréchette
Serge Fréchette
Presiding Member

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STATEMENT OF REASONS

1. On February 26, 2018, Dynamic Engineering Inc. (Dynamic) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the Canadian International Trade Tribunal Act¹ concerning a Request for Proposals (RFP) (Solicitation No. W8482-168399/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of repair and overhaul services for turbochargers.

2. The Tribunal accepted the complaint, in part, for inquiry on February 28, 2018, pursuant to subsection 30.13(1) of the *CITT Act* and in accordance with 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 ground of complaint that was accepted for inquiry as required by sections 30.13 to 30.15 of the *CITT Act*.

SUMMARY OF THE COMPLAINT

4. The complaint filed by Dynamic included several allegations, which can be summarized as the following three grounds of complaint:

- i. PWGSC improperly awarded a contract to a competing bidder, Wärtsilä Canada Incorporated (Wärtsilä), having erroneously concluded that Wärtsilä's bid met mandatory technical criteria 1 and 2 in Annex I of the RFP. At the time of bid closing, Wärtsilä was incapable of meeting those requirements, as it was not a Napier turbocharger authorized agent with experience overhauling Napier turbochargers in the last five years.
- ii. PWGSC erred in disqualifying Dynamic's bid on the basis that it did not have a Napier-qualified field service representative (FSR) as required by mandatory technical criterion 3. For the purposes of that requirement, PWGSC should have accepted as equivalent the experience of Dynamic's senior turbocharger specialists in overhauling DND turbochargers, especially given that they had cross-trained with a former employee (Mr. R. Swann) who had done the Napier FSR training. Mr. Swann had resigned from Dynamic during the procurement process, in order to go work for Wärtsilä and help them set up a turbocharger workshop. Wärtsilä appears to have deliberately timed its raid of Mr. Swann a few days prior to the bid closing date in order to render Dynamic incapable of submitting a compliant bid, which Dynamic considers to be a tactic akin to "bid rigging".
- iii. Wärtsilä may have unduly influenced PWGSC and/or DND to include a requirement for a Napier-qualified FSR in the technical evaluation criteria of the RFP. This criterion was unnecessary from a technical standpoint but it gave Wärtsilä's bid an advantage in the solicitation process vis-à-vis Dynamic, especially given the timing of Mr. Swann's resignation in order to go work for Wärtsilä.

5. As a remedy, Dynamic requested compensation for lost profits. It also sought reimbursement of its bid preparation costs and complaint costs.

PROCEDURAL BACKGROUND

6. On December 8, 2017, PWGSC issued the RFP with a closing date of January 24, 2018. Dynamic and Wärtsilä submitted bids in response to the solicitation.

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

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

7. On January 29, 2018, the contracting authority contacted Dynamic seeking clarification of whether it had any Napier-certified personnel other than Mr. Swann, who was identified in its bid response to technical criterion 3, given that elsewhere its bid indicated that Mr. Swann had resigned as of January 12, 2018. Dynamic replied the same day, as follows:³

It is as stated in our no. 3.

Our ex[-]employee, [Mr. Swann], with the Napier factory training, left the company on January 12th. However, he may return to the company. It is uncertain at this time, and confidential, as a would-be competitor has hired him away, and he is uncertain if he will stay with them or return to us.

On the other hand, however, our very senior individuals . . . have done the DND turbos for over 25 years, since the inception. They worked with [Mr. Swann] and trained him as well. They have a lot of experience with all makes of turbochargers.

For the DND turbos, nobody has more experience than our two people.

This is something akin to the “letter” or the “spirit” of the law. *If you stick to the “letter” of the law, we are non-compliant at this time.* If you stick to the “spirit” of the law, we are compliant because we have the experienced personnel required for your units. The proof is in the fact that our people who are doing the work now, have done it for over 25 years, with minimal problems or warranties.

Today, we do not have a certified, trained Napier person on staff. Several weeks from now, we may have, if [Mr. Swann] returns, or if we send one of our people to Napier or hire someone with Napier training.

[Emphasis added.]

8. On February 9, 2018, PWGSC informed Dynamic that a contract had been awarded to Wärtsilä and that the evaluating team had determined that Dynamic’s bid did not comply with all the mandatory technical requirements of the solicitation, including mandatory technical criterion 3. As a result, Dynamic’s bid was found to be non-responsive and it was disqualified.

9. On February 14, 2018, Dynamic made an objection to PWGSC regarding the contract award to Wärtsilä on the basis that its bid was incapable of satisfying mandatory technical criteria 1 and 2. Dynamic also objected to the evaluation team’s finding that its own bid was non-responsive.

10. On February 16, 2018, PWGSC replied to Dynamic affirming the results of the solicitation process, including the resulting contract value, and stated that “[t]he successful bidder’s proposal has met all the mandatory technical criteria listed in Annex “I””

11. In a further exchange of e-mails on the same date, PWGSC denied Dynamic’s request for disclosure of the information on which the evaluators relied in concluding that Wärtsilä met technical criteria 1 and 2, stating that it was unable to divulge confidential information in relation to the winning bidder’s business model. Dynamic expressed further concern that “[t]he extra long time taken by Canada, together with the timing of the successful bidder’s raiding of Dynamic’s employee and the preparation to start a turbocharger workshop, has the appearance of favouritism given by Canada to [Wärtsilä].”⁴

12. On February 26, 2018, Dynamic filed its complaint with the Tribunal.

3. Attachment to the Public Complaint, e-mail dated 29 January 2018 from Ms. E. Creighton of Dynamic to Mr. S. Nemati of PWGSC.

4. Attachment to the Public Complaint, e-mail dated 16 February 2018 from Ms. V. Chan of Dynamic to Mr. S. Nemati of PWGSC.

13. On March 2, 2018, the Tribunal informed the parties that it had accepted the complaint, in part, for inquiry, as only the ground relating to the evaluation of Wärtsilä's bid – summarized above as ground (i) – met the conditions set out in subsection 7(1) of the *Regulations*.

14. On March 21 and April 6, 2018, the Tribunal granted two brief extensions of time for PWGSC to file its Government Institution Report (GIR). Dynamic objected to the second extension request on the basis that PWGSC had already received one extension and no such extensions are available for complainants when filing a complaint with the Tribunal. In its letter to the parties granting the second extension request, the Tribunal addressed Dynamic's objection as follows:⁵

With respect to [Dynamic's] objection, the Tribunal notes that unlike the tight legislative timeline for filing a complaint, once the Tribunal has commenced an inquiry it has the discretion to grant extensions to parties for the filing of their respective submissions. In exercising that discretion, the Tribunal necessarily takes into account procedural fairness to all parties. The present request from PWGSC is for an extension of 3 working days to file the GIR, which does not impact the overall 90-day timeline for this inquiry and the complainant will receive a corresponding extension to file comments on the GIR.

15. Later in the inquiry, Dynamic questioned⁶ the timing of the Tribunal's letter granting PWGSC's second request for extension, which was issued to the parties on the same day as the deadline for filing the GIR. Dynamic submitted that it appeared PWGSC knew the extension approval would be forthcoming, before the decision letter was sent. The Tribunal did not provide any such advance notice to PWGSC of its decision that was communicated to the parties, simultaneously, by way of the above-cited letter dated April 6, 2018. To the extent that Dynamic appeared to view extensions of time granted to PWGSC in these proceedings as "unfair", the Tribunal reiterates that the extensions in question were found to be reasonable and did not impact the overall time frame of these proceedings. Unlike the time limits for filing a complaint prescribed by the *Regulations*,⁷ which the Tribunal has no discretion to modify,⁸ once the Tribunal has commenced its inquiry it does have discretion to grant extensions of filing deadlines to parties, if warranted. In the present case, Dynamic was offered a comparable extension to file its comments on the GIR.

16. On April 13, 2018, PWGSC filed its GIR. It indicated that after receiving the complaint, PWGSC reviewed Wärtsilä's bid and determined that "through inadvertent error" it had been improperly evaluated as compliant with the mandatory technical criteria of the RFP. As a result, PWGSC had terminated the resulting contract on April 10, 2018. PWGSC further indicated that the procurement would be retendered as soon as practicable and that it had unsuccessfully attempted to settle the matter with Dynamic.

17. On April 18, 2018, the Tribunal requested Dynamic's position on whether the scope of the inquiry could be narrowed given PWGSC's admission that the contract was improperly awarded to Wärtsilä.

5. Tribunal's letter to counsel for Wärtsilä dated April 6, 2018.

6. Dynamic's comments on the GIR at para. 34(a).

7. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Subsection 6(2) of the *Regulations* provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal "within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

8. *Monroe Solutions Group Inc.* (12 May 2014), PR-2014-009 (CITT) at para. 20.

18. On April 20, 2018, Dynamic filed its response to the Tribunal's request together with its comments on the GIR. As discussed further below, Dynamic maintained its position that PWGSC erred in its conduct of the solicitation process.

19. The Tribunal also received a request from Wärtsilä, on April 16, 2018, seeking intervener status in this inquiry. The Tribunal denied the request on April 24, 2018, with reasons to follow. Those reasons are set out below.

20. The Tribunal did not consider an oral hearing necessary and made its decision based on the written record.

PRELIMINARY ISSUE: THE INTERVENER REQUEST

21. Once the Tribunal has decided to conduct an inquiry into a complaint, section 30.17 of the *CITT Act* permits the Tribunal to give any "interested" party an opportunity to intervene in the proceedings. In order to qualify as an "interested party, a party may, under section 30.1, either be a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint.

22. As indicated above, Wärtsilä, the contract awardee, requested intervener status in these proceedings three days after the GIR was filed. According to Wärtsilä's request, it had consented to PWGSC's decision to terminate the designated contract. However, since Dynamic had not withdrawn its complaint following PWGSC's admission, Wärtsilä sought to represent its interests before the Tribunal in these proceedings on the basis that it was directly implicated in several of the allegations made by Dynamic.

23. The Tribunal denied the intervener request because there was sufficient information on the record to determine the validity of the single ground of complaint that was the subject of the inquiry. Namely, ground (i) relates to the alleged non-compliance of Wärtsilä's bid with the mandatory technical criteria of the RFP. As PWGSC has admitted that Wärtsilä's bid was non-compliant and, as a result, terminated the resulting contract, on consent, the Tribunal does not consider that Wärtsilä has any material and direct interest in the substantive issues that remain to be determined by the Tribunal. In particular, as discussed further below, those issues include remedy and costs.

24. Although the complaint included other allegations relating to Wärtsilä, summarized above as grounds (ii) and (iii), those allegations were not subject to the present inquiry, for the reasons provided below. Accordingly, there was no basis for Wärtsilä to be granted intervener status in relation to those other grounds of complaint.

ANALYSIS

The Grounds of Complaint That Were Not Accepted for Inquiry

25. In accordance with the *Regulations*, the Tribunal may conduct an inquiry into a complaint where certain prescribed conditions are met. One of the conditions requires that the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements,⁹ which in this case is the *Canadian Free Trade Agreement*.¹⁰

9. Paragraph 7(1)(c) of the *Regulations*.

10. Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

26. With respect to the above grounds (ii) and (iii) of the complaint, the Tribunal found no reasonable indication of a breach of the relevant provisions of the *CFTA*.

27. Ground (ii) relates to the evaluation of Dynamic's bid. The *CFTA* requires procuring entities to evaluate bids in accordance with the essential criteria specified in the tender documentation.¹¹ To be considered for an award a tender must, at the time of opening, comply with those essential criteria. When verifying whether these procedures were followed, the Tribunal shows deference to evaluators. It interferes only if an evaluation appears *unreasonable*, e.g., if it appears that the evaluators have not applied themselves in evaluating a bidder's proposal, that they have wrongly interpreted the scope of a requirement, that they have ignored vital information provided in a bid, that they have based their evaluation on undisclosed criteria or that they have otherwise conducted the evaluation in a procedurally unfair way.¹²

28. In this case, the RFP provisions indicated that a "bid must comply with the requirements of the bid solicitation and meet all mandatory technical criteria to be declared responsive." The responsive bid with the lowest evaluated price would be recommended for award of contract. Annex I of the RFP set out the mandatory technical evaluation criteria, of which the following are relevant to the complaint:

1.1 Mandatory Technical Criteria

All mandatory technical criteria must be met in order to be technically compliant. The Offeror must submit the supporting documentation required in accordance with this requirement.

...

1. The bidder shall be a Napier Turbocharger Authorized Agent (Service Centre).
2. The bidder shall have overhauled Napier turbochargers in the last 5 year period.
3. The bidder shall have at least one Napier[-]qualified Field Service Representative (FSR) who received product training on the operation and maintenance of NAPIER 5 Series Turbochargers, which is available to respond to DND requirements.

...

29. Dynamic has admitted that its bid was technically non-compliant with the above criterion 3.¹³ In particular, its letter to the contracting authority dated January 29, 2018, confirmed that it did not have a Napier-qualified FSR on staff as of the bid closing date of January 24, 2018. Dynamic argued that PWGSC

11. The *CFTA* requires that a procuring entity provide suppliers all information necessary to permit them to submit responsive tenders, including the evaluation criteria (Article 509(7)) and indicates that, to be considered for award, a tender must, at the time of opening, comply with the essential requirements set out in the tender documentation (Article 515(4)).

12. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25, the government institution's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling." See also *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Northern Lights Aerobic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

13. The Tribunal notes that Dynamic subsequently denied, in its comments on the GIR at paragraph 20, having made any admission that its bid failed to meet the mandatory technical criteria of the RFP. Nevertheless, the documentary evidence that was filed with the complaint clearly shows that Dynamic acknowledged to PWGSC that its bid was technically non-compliant with mandatory technical criterion 3. See above paragraph 7 and the Attachment to the Public Complaint, e-mail dated 29 January 2018 from Ms. E. Creighton of Dynamic to Mr. S. Nemati of PWGSC ("If you stick to the 'letter' of the law, we are non-compliant at this time.").

should have nevertheless found its bid compliant with criterion 3 in light of the circumstances in which Mr. Swann had resigned shortly prior to bid closing, on January 12, 2018, and given the equivalent experience of its other senior personnel.

30. The published RFP criteria, however, did not allow for the provision of equivalent qualifications or experience in relation to criterion 3. As such, and given Dynamic's admission that it was non-compliant with that criterion at the time of bid closing, Tribunal found no reasonable indication that PWGSC conducted an improper evaluation of its bid. In particular, there was no reasonable indication that PWGSC wrongly interpreted the mandatory criteria of the RFP, failed to diligently consider relevant information included in Dynamic's bid, based its evaluation on undisclosed criteria or that it otherwise conducted the evaluation in a procedurally unfair way.

31. Furthermore, with respect to both grounds (ii) and (iii), the information filed with the complaint did not disclose any indication that PWGSC was improperly influenced by or colluded together with Wärtsilä or acted in a manner that unfairly favoured Wärtsilä's bid. Given the potential seriousness of this type of allegation of bias for the integrity of the competitive procurement system, unsupported allegations are insufficient to reasonably establish a breach of the applicable trade agreements.

32. To the extent that Dynamic alleged that its personnel was raided by Wärtsilä during the bidding process, this allegation relates entirely to behaviour of private actors and has nothing to do with PWGSC or its conduct of the procurement process. It is therefore beyond the scope of the Tribunal's jurisdiction, which is to determine whether PWGSC has conducted the procurement process in accordance with Canada's obligations under the applicable trade agreements.

33. In light of the above, the Tribunal found no reasonable indication that PWGSC acted contrary to the provisions of the *CFTA* in relation to grounds (ii) and (iii). The Tribunal did, however, find a reasonable indication of a breach of the relevant *CFTA* provisions in relation to ground (i) concerning the evaluation of Wärtsilä's bid. In particular, Dynamic filed with the complaint a copy of a published list of authorized agents for Napier that did not include Wärtsilä's Canadian operations, which reasonably indicated that its bid could not have met criterion 1. Dynamic also provided information that indicated Wärtsilä was, at the time of bid closing, still in the process of setting up a turbocharger workshop and, therefore, its bid could not have reasonably met the requirement for five years' experience in turbocharger overhaul under criterion 2. As a result, the Tribunal limited its inquiry to ground (i) of the complaint.

The Non-compliance of Wärtsilä's Bid Is Admitted by PWGSC

34. Subsection 30.14(1) of the *CITT Act* requires that, at the conclusion of an 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.

35. As indicated above, in the present case, PWGSC determined that Wärtsilä's bid had, through inadvertent error, been improperly evaluated as compliant with the mandatory technical criteria of the RFP during the procurement process. In particular, PWGSC indicated that Wärtsilä's bid "had relied on the qualifications of affiliated yet distinct corporations in order to satisfy certain of the mandatory technical criteria."¹⁴

14. GIR at para. 14.

36. Dynamic was not satisfied by PWGSC's response to the complaint. Specifically, Dynamic took issue with the fact that PWGSC, having previously dismissed its initial objection, only reviewed the evaluation of Wärtsilä's bid after the complaint was accepted for inquiry by the Tribunal. It also viewed PWGSC's attempt to negotiate a settlement as a tactic to avoid having to file a GIR and publicly disclose the reason(s) for terminating the contract awarded to Wärtsilä.

37. Dynamic maintained its position that PWGSC conducted the solicitation process in a non-transparent manner, arguing that it remained unclear how the evaluation team could have failed to detect the non-compliance of Wärtsilä's bid with mandatory technical criteria 1 and 2. Dynamic submitted that PWGSC's refusal to release a copy of Wärtsilä's bid, for reasons of confidentiality, prevented it from knowing how PWGSC made an "inadvertent error" in its evaluation. In Dynamic's view, despite PWGSC's admission of having erred in the evaluation of Wärtsilä's bid during the procurement process, there was still a question as to whether Wärtsilä was "given any kind of latitude in order to meet the criteria, and if some prejudice of favouritism was being granted to them" and/or whether PWGSC was negligent in its evaluation.¹⁵ Dynamic argued that, had its own bid been treated with similar latitude in the evaluation of mandatory technical criterion 3, it would have won the contract since it was the lowest-priced bidder.

38. The Tribunal finds that PWGSC admittedly erred in its evaluation of Wärtsilä's bid and its conclusion that the bid was compliant with the mandatory technical criteria of the RFP. This constitutes a violation of Article 515(4) of the *CFTA*, which provides that procuring entities must evaluate bids in accordance with the essential criteria specified in the tender documentation.

39. The Tribunal is of the view that there is no reasonable indication that PWGSC's error was intentional or motivated by bad faith. The allegations of PWGSC having deliberately acted in a non-transparent or biased manner so as to favour Wärtsilä's bid amount to mere speculation by Dynamic, and are not supported by the evidence on the record. Moreover, as stated above, the Tribunal has already found that the complaint did not disclose any reasonable indication of violation of the *CFTA* on the basis of the allegations that PWGSC had been improperly influenced by or biased towards Wärtsilä during the procurement process and, as a result, those grounds of complaint were not accepted for inquiry. While it would have been preferable for PWGSC to have realized its evaluation error at an earlier stage prior to making an award of contract, the point is that ultimately it *was* discovered and PWGSC has now taken appropriate steps to remedy that error, as discussed further below. The fact that PWGSC refused to disclose a copy of Wärtsilä's bid to Dynamic for reasons of confidentiality is reasonable, in the Tribunal's view, given that they are business competitors.

40. In light of the foregoing, the Tribunal finds that ground (i) of the complaint is valid.

REMEDY

41. Having found that Dynamic's complaint is valid in part, the Tribunal must determine the appropriate remedy, in accordance with subsections 30.15(2) and (3) of the *CITT Act*. In this case, the violation in question is PWGSC's admitted failure to evaluate Wärtsilä's bid in accordance with the mandatory technical criteria specified in the RFP, resulting in an improper award of contract to Wärtsilä.

42. PWGSC submitted that its termination, on April 10, 2019, of the contract awarded to Wärtsilä constitutes an appropriate remedy for the above violation. It has indicated that the procurement will be retendered as soon as practicable and a new RFP issued, which would allow Dynamic to submit a proposal

15. Dynamic's comments on the GIR at para. 16.

for consideration. PWGSC further submitted that there is no basis to award compensation for lost profits to Dynamic, as requested in the complaint, because its bid was non-compliant with mandatory technical criterion 3 of the RFP.

43. In response, Dynamic submitted that it would have won the contract but for PWGSC's breach in the evaluation of Wärtsilä's bid, on the sole basis, it claims, of having been the lowest-priced bidder. As a result, Dynamic maintained its request for compensation for lost profits. Dynamic argued that if PWGSC had treated its bid with the same kind of latitude, or leniency, that it allegedly showed Wärtsilä's bid, then Dynamic's bid would have been found compliant with criterion 3. Dynamic further argued that Wärtsilä stands to unfairly benefit from retendering of the procurement because it will have more time to set up its turbocharger workshop and become an authorized agent for Napier turbochargers.

44. In addition to compensation for lost profits, Dynamic requested the following remedies:

- the time period to file a complaint should be increased from 10 to 15 working days because complainants are at a disadvantage in this process and receive less time to file a complaint as compared to the time line for the government institution to file its GIR;
- a further internal investigation conducted by the Government of Canada to determine "the complete truth" regarding the conduct of PWGSC and DND in relation to this matter; and
- discipline and retraining for PWGSC and DND personnel involved in this matter.

45. In recommending the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement in question and is guided by the legislative criteria set out in subsection 30.15(3) of the *CITT Act*, as follows:

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

46. In choosing an appropriate remedy, the Tribunal is further guided by the objectives of the regulatory regime¹⁶ concerning federal government procurement, which provide that the Tribunal is to be an accessible forum for adjudication of procurement disputes in a timely fashion, with the goal of fostering compliance with the trade agreements and remedying violations thereof to promote competition, fairness, and the integrity and efficiency of the procurement system.¹⁷ In the context of this regime, injunctive-like relief – such as rescinding a contract award and retendering – is generally preferred over monetary relief where practical, i.e., before significant performance of the contract by another party.¹⁸

47. Having regard to those general principles, the Tribunal finds that the appropriate remedy in the present case is the termination of the designated contract awarded to Wärtsilä and the retendering of the procurement with the issuance of a new solicitation.

16. Sections 30.1 to 30.19 of the *CITT Act* and the *Regulations*.

17. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, at paras. 21-23.

18. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services – Compensation Order and Reasons* (29 December 2017), PR-2015-051 and PR-2015-067 at para. 71.

48. In the Tribunal's view, this remedy reflects the seriousness of the violation in question, namely, that a contract was improperly awarded on the basis of a bid that did not comply with the essential criteria of the tender documents, in violation of Canada's obligations under the *CFTA*. It also responds to the prejudice that the violation caused Dynamic and any other potential suppliers in the procurement process. With respect to Dynamic, however, the practical effect of that prejudice was lessened given that its own bid was non-compliant with mandatory technical criterion 3.¹⁹ As a result, the Tribunal does not accept that Dynamic would have rightfully received an award of contract but for PWGSC's defective evaluation and it finds no basis for recommending an award of compensation for lost profits to Dynamic.

49. This outcome is also consistent with the public's interest in avoiding unnecessary double payment for procurements and with bidders' interest in having the opportunity to perform the work in question. Here, Dynamic and Wärtsilä will have another opportunity to submit a bid when the procurement is retendered. Both companies are left in a situation where they will have an opportunity to correct the deficiencies in their respective previous bids, where possible, and compete for the new solicitation.

50. To the extent that Dynamic's allegations relate to Wärtsilä's behaviour specifically, it bears repeating that the Tribunal's jurisdiction is limited to reviewing alleged violations of the applicable trade agreements by a government institution in its conduct of the procurement process in relation to a designated contract. The conduct of private parties' competitive business practices is outside the scope of the procurement challenge regime.

51. Similarly, the other remedies sought by Dynamic are beyond the scope of the Tribunal's jurisdiction. As indicated above, for example, the time lines to file a complaint are prescribed by the *Regulations* and, therefore, any changes thereto would need to be raised with the Government of Canada and subject to approval by Parliament. Nor is the Tribunal the appropriate forum to address concerns regarding internal disciplinary or training policies of PWGSC or DND. The Tribunal trusts, however, that all departments of the government of Canada take the opportunity to review the Tribunal's findings to better their procurement practices and training on an on-going basis.

52. Given that PWGSC has already terminated the designated contract, it is unnecessary for the Tribunal to make a recommendation to that effect. The Tribunal therefore recommends retendering the solicitation and acknowledges that PWGSC's stated commitment to do so as soon as practicable.

COSTS

53. Dynamic claimed its bid preparation costs and complaint costs in these proceedings.

54. As indicated in the Tribunal's *Procurement Costs Guideline* (the *Guideline*), bid preparation costs are the direct and indirect costs incurred by a claimant in preparing a bid for a designated contract that was the subject of the complaint.

55. Regardless of PWGSC's violation in relation to the evaluation of Wärtsilä's bid, the Tribunal determined that it was reasonable for PWGSC to disqualify Dynamic's bid as non-responsive to the

19. The Tribunal notes that the terms of the contract set out in the RFP, in section 7.4.1, provided for a start date of April 1, 2018. There is no evidence on the record indicating that Wärtsilä had begun performing the contract prior to its termination on April 10, 2018, but even if that had been the case the Tribunal would not recommend any compensation for lost profits be paid to Dynamic in relation to that 10-day period given the Tribunal's conclusion that PWGSC reasonably determined that Dynamic's bid was non-responsive to the mandatory technical criteria of the RFP.

mandatory criteria of the solicitation. Furthermore, when the solicitation is retendered, Dynamic will have an opportunity to correct the deficiencies in its previous bid. Were it not for PWGSC's violation in relation to the evaluation of Wärtsilä's bid, Dynamic would not have received another opportunity to repeat the process and potentially be awarded a contract. Accordingly, there is no basis for the Tribunal to award bid preparation costs to Dynamic.

56. The Tribunal finds that Dynamic is entitled to an award for its complaint costs in these proceedings. For the purposes of fixing such costs the *Guideline* sets out three levels of complexity on the basis of the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

57. The Tribunal's preliminary indication is that this case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline* ("Level 1"). The complexity of the procurement was low: the mandatory technical evaluation criteria in issue, as set out in the solicitation documents, were straightforward. The Tribunal finds that the complexity of the complaint was low, especially given that only one of the allegations in the complaint was found to meet the legislated conditions for the Tribunal to commence the inquiry. Finally, the complexity of the proceedings was low, as the Tribunal was able to make its determination on the basis of documentary evidence and written representations filed by the parties, which were not extensive, and a hearing was not necessary. In addition, the Tribunal found it unnecessary to grant Wärtsilä's request for intervener status given that there was sufficient evidence on the record to determine the validity of the single ground of complaint that was the subject of the inquiry and the proceedings were completed within the regular 90-day time frame.

58. 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 1, and the preliminary indication of the amount of the cost award is \$1,150.

DETERMINATION OF THE TRIBUNAL

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

60. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, and having regard to the termination of the designated contract by PWGSC on April 10, 2018, the Tribunal recommends, as a remedy, that a new solicitation for the designated contract be issued.

61. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Dynamic its reasonable costs incurred in proceeding with the complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Serge Fréchette
Serge Fréchette
Presiding Member