Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

Files No. PR-2015-051 and PR-2015-067

Oshkosh Defense Canada Inc.

v.

Department of Public Works and Government Services

Order and reasons issued
Friday, December 29, 2017

Canada

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IN THE MATTER OF a complaint filed by Oshkosh Defense 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 the Canadian International Trade Tribunal's determination and recommendation, and its order directing submissions on compensation and costs.

BETWEEN

OSHKOSH DEFENSE CANADA INC.	**Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES	**Government Institution**

ORDER

The Canadian International Trade Tribunal hereby recommends that the Department of Public Works and Government Services compensate Oshkosh Defense Canada Inc. for its lost opportunity as follows (all figures throughout this Order denominated in Canadian dollars):

1. $25,337,931.79, payable now, representing one third of the lost profits for the initial five-year term of the Acquisition Contract and the ISS Contract and spare parts; and
2. Options: one third of its lost profits; lost profits to be calculated as 10% of the revenues (net of any taxes) recognized below, payable only if and when exercised by the Department of Public Works and Government Services in its contracts with the winning bidder:
    a) Acquisition Contract:
        i. Vehicles and related equipment: calculated based on Oshkosh Defense Canada Inc.'s "Vehicles and Related Equipment – Scenario 1 – Options" unit bid prices from its proposal multiplied by the number and variant of SMP vehicles and related equipment optioned; and
        ii. ILS Data and Deliverables: $[redacted]
    b) ISS Contract: $[redacted] for each five-year extension exercised (or a portion thereof calculated on a pro rata basis should any extension be for less than the full five-year increment); and
    c) Spare Parts: Value of any Contract Amendment for Spare Parts.

In its determination of May 20, 2016, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Oshkosh Defense Canada Inc. its reasonable costs incurred in preparing and proceeding with the complaint. The Canadian International Trade Tribunal noted the extraordinary level of complexity in this complaint, and therefore stated it would exercise its discretion to deviate from its *Procurement Costs Guideline*. Having received the submissions of the parties, the Canadian International Trade Tribunal hereby awards Oshkosh Defense Canada Inc. its costs in the

amount of $153,120 for preparing and proceeding with the complaint and directs the Department of Public Works and Government Services to take appropriate action to ensure prompt payment.

Serge Fréchette

Serge Fréchette
Presiding Member

STATEMENT OF REASONS

BACKGROUND

1. In its determination issued on May 20, 2016, the Canadian International Trade Tribunal (the Tribunal), under section 30.16 of the *Canadian International Trade Tribunal Act*,[1] found that the complaints filed by Oshkosh Defense Canada Inc. (Oshkosh) were valid in part.

2. The complaints concerned a Request for Proposal (RFP) (Solicitation No. W8476-06MSMP/L), issued on July 13, 2013, and closed on January 14, 2014, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of Standard Military Pattern (SMP) vehicles for the Medium Support Vehicle System (MSVS) project (Acquisition Contract). The requirement also included "related equipment" (trailers, armoured protection systems (APSs), and associated equipment) for the SMP vehicles, as well as in-service support (the ISS Contract) (collectively with the Acquisition Contract, the Resulting Contracts).

3. The evaluation procedures consisted of both a Proof of Compliance review, and a Technical Compliance Program (TCP) test protocol. For the technical requirements evaluated via the TCP, Oshkosh provided three vehicles for physical testing.

4. The Tribunal held that five of the nine grounds of complaint filed by Oshkosh were valid. In addition to PWGSC not maintaining proper documentation of the evaluation process, the Tribunal found that PWGSC either failed to consider information in Oshkosh's bid respecting Requirement BA-9-5 (Crane Lifting Capacity), or failed to provide a transparent evaluation process by not offering any explanation as to why the initial evaluation was reversed. Moreover, the Tribunal concluded that PWGSC breached the applicable trade agreements by improperly conducting the TCP tests as follows:

A. failed to properly configure the Central Tire Inflation System setting for the Sand Gradeability physical test (Requirement BA-668);

B. failed to consult the vehicle checklist for the Ride Quality (Requirement BA-645), Vehicle Stopping Distance (Requirement BA-516), Maximum Speed (Requirement BA-120), Acceleration Time (Requirement BA-514), Gradeability – High Speed (Requirement BA-542), and Vehicle Payload (Requirement BA-486) physical tests; and

C. failed to follow the testing procedures set out in the RFP for the Vehicle Payload physical test.

5. Given the foregoing, and that the Tribunal was unable to determine what the results of the physical tests would have been had they been properly conducted, the Tribunal recommended that PWGSC conduct physical re-evaluations of the TCP tests listed above.

6. However, the Tribunal was also mindful of the possibility that physical re-evaluations may not have been feasible. As such, the Tribunal directed the parties to determine the feasibility of a physical re-evaluation and report back to the Tribunal. In the event that a physical re-evaluation was no longer feasible, the Tribunal recommended that PWGSC compensate Oshkosh for its lost opportunity.

7. The Tribunal also awarded Oshkosh its reasonable costs incurred in preparing and proceeding with the complaints. Given the extraordinary complexity of the complaints, the Tribunal stated it would exercise its discretion to deviate from the *Procurement Costs Guideline*, and would receive submissions on the appropriate amount of costs to be paid at a later date.

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

PROCEDURAL HISTORY

8. On May 20, 2016, the Tribunal issued its determination regarding the validity of the complaints to the parties, with its statement of reasons following on July 20, 2016.

9. On August 31, 2016, PWGSC informed the Tribunal that a physical re-evaluation was not feasible.

10. On September 1, 2016, the Tribunal asked that the parties engage in discussions to determine the appropriate amount of compensation to be paid by PWGSC, and report back to the Tribunal by October 3, 2016.

11. Between October 7, 2016, and January 18, 2017, the parties requested, and were granted, four extensions of time to report to the Tribunal regarding their discussions on the appropriate amount of compensation to be paid by PWGSC.

12. On March 6, 2017, Oshkosh informed the Tribunal that the parties were unable to agree on an amount of compensation to be paid, and requested that the Tribunal set a timeline for receipt of submissions on the issue of compensation.

13. On March 10, 2017, the Tribunal directed the parties to file submissions regarding the amount of compensation to be paid by PWGSC.

14. On April 3, 2017, Oshkosh filed its submissions regarding compensation, which included evidence in the form of an affidavit from Oshkosh's Vice-President of Finance Mr. Tim Bleck, an affidavit from Mr. Alan Williams (a former government employee proposed as an expert in public procurement), and a report and addendum written by the proposed expert witnesses Mr. Kas Rehman and Mr. Glenn Smith of the accounting firm KPMG on the quantum of compensation.

15. On June 9, 2017, PWGSC filed its responding submissions regarding compensation, which included evidence in the form of the affidavit of Mr. Yves Lortie (the Contract Authority at PWGSC for the RFP at issue), the affidavit of Mr. Steve Walkiewicz (the test engineer at the Nevada Automotive Test Center responsible for testing bidders' vehicles in relation to the RFP), and a report written by the proposed expert witness Mr. Scott Davidson of the accounting firm Duff & Phelps on the quantum of compensation.

16. On July 27, 2017, Oshkosh filed submissions in reply to PWGSC's responding submissions, including a reply report from KPMG.

17. On September 25, 2017, the Tribunal issued a request for information to both parties regarding certain compensation issues. The Tribunal received the parties' responses on October 13, 2017, and their replies to each other's responses on October 25, 2017.

PRELIMINARY MATTERS

18. During the course of the compensation phase of the Tribunal's inquiry, which lasted over a year, the parties made numerous motions regarding admissibility of evidence, qualification of proposed experts, production of documents, and other matters. For some of these motions, the Tribunal issued a decision at the time, after receiving the parties' submissions; for the rest, it deferred to its decision. Below, the Tribunal provides its reasons regarding the former, and its decisions and reasons regarding the latter.

Reasons for Decisions Already Made

Qualification of Experts

19. The parties proposed the following four expert witnesses:

A. Oshkosh – Mr. Kas Rehman (KPMG), Mr. Glenn Smith (KPMG), and Mr. Allan Williams (formerly Assistant Deputy Minister at PWGSC and DND); and

B. PWGSC – Mr. Scott Davidson (Duff & Phelps).

Both parties consented to the qualification of their respective financial experts (Messrs. Rehman, Smith and Davidson), and the Tribunal, on June 23, 2017, recognized those individuals as experts in the valuation of the quantum of compensation for lost opportunity at issue in this matter.[2] However, PWGSC objected to the tendering of Mr. Williams as an expert witness on the grounds that he has no established or demonstrated area of expertise, was not part of the procurement in issue, and was giving an opinion on one of the essential questions of fact before the Tribunal.

20. In response, Oshkosh acknowledged that the majority of the evidence provided by Mr. Williams in his statement was factual in nature, but that Oshkosh sought to have him admitted as an expert witness "out of an abundance of caution". [3] However, Oshkosh contended that Mr. Williams' observations and opinions regarding the government's decision whether or not to exercise options in an RFP are directly relevant to the issues at hand. In addition, Oshkosh argued that Mr. Williams' experience as Assistant Deputy Minister responsible for procurement at both PWGSC and DND has provided him with expertise that the Tribunal does not have, and therefore meets the necessity threshold.

21. Finally, Oshkosh submitted that there was no applicable exclusionary rule, while Mr. Williams' considerable and direct experience on the issues demonstrates that he is a properly qualified expert. As such, Oshkosh contended that Mr. Williams should be recognized as an expert witness.

22. As set out by the Supreme Court of Canada, the test to determine whether a witness may be recognized as an expert is comprised of two steps:[4]

> At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose . . . .
>
> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways . . . [including] "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion" . . . .

23. As communicated to the parties in its letter of June 23, 2017, the Tribunal is not satisfied that Mr. Williams' opinion evidence tendered in this case is sufficiently relevant for the Tribunal to recognize him as an expert witness. The relevance requirement means that the evidence must "have a tendency as a

2. Tribunal's letter dated June 23, 2017, Vol. 3C.
3. Oshkosh's letter dated June 22, 2017, Vol. 3C.
4. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at paras. 23-24.

matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence."[5] The Tribunal is mindful of Mr. Williams' substantial procurement experience at both PWGSC and DND; however, the fact remains that Mr. Williams left the federal government in 2005, well before the procurement in issue was undertaken. While the Tribunal does not doubt that Mr. Williams' opinions on the factors and policy the federal government considers when deciding whether or not to exercise options in an RFP were accurate during his tenure, much may have changed in the intervening years, and every procurement undertaken by a government institution is done under different sets of circumstances, often with unique objectives to be met. Therefore, his evidence is of minimal relevance.

24. Further, the necessity element is also not met. "When it comes to necessity, the question is whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact."[6] It is well established that it is not necessary that fact witnesses be qualified as experts for the purpose of providing their fact evidence. The purpose of qualifying such a witness as an expert is to permit the witness "to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate."[7]

25. Mr. Williams's affidavit is five pages long, two of which address his career experience. The remaining three pages contain examples of other contracts where the government has exercised options and his description of general PWGSC/DND contracting practices based on his observations. At the end of his affidavit, he states that "it is my opinion that in cases where assets are purchased or upgraded in batches over time or when the government is contracting in 5-year increments to maintain an asset, it will generally exercise the option periods included in its proposals . . . ."[8] Neither the underlying facts related in his affidavit nor the above inference he makes is so technical or scientific that any expertise is required. Therefore, it is not necessary for him to be qualified as an expert.

26. Nonetheless, the Tribunal agrees with Oshkosh's statement that much of Mr. Williams' proposed evidence is factual in nature, as it relates to observations of what occurred during his tenure at both PWGSC and DND. To the extent that the evidence is factual in nature, the Tribunal considers it admissible in that regard.

27. However, given that Mr. Williams' evidence relates exclusively to the likelihood that the government will exercise its options under the awarded contract and conduct a mid-life reset and that the Tribunal has (as explained below) decided that, as a legal matter, Oshkosh has no entitlement to any lost profits for a mid-life reset and that it will not speculate as to whether options might or might not be issued (recommending instead that compensation be paid to Oshkosh only if and when they are), Mr. Williams' evidence and the question of its admissibility and weight are largely moot.

Request to Strike

28. On June 14, 2017, Oshkosh filed a request for an order or declaration striking portions of PWGSC's submissions and supporting evidence on the grounds that PWGSC was – via the affidavit of Mr. Walkiewicz sworn on June 2, 2017, testifying that the failures identified by the Tribunal in its determination had no effect on the testing of Oshkosh's vehicles – improperly attempting to relitigate issues already decided by

5. *R. v. Abbey*, 2009 ONCA 624, at para. 82.
6. *R. v. D.D.*, 2000 SCC 43, at para. 21.
7. *R. v. Abbey*, [1982] 2 SCR 24, at 42.
8. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 4, Affidavit of Alan Williams, at para. 12, Vol. 4.

the Tribunal in its determination and reasons of July 20, 2016. Specifically, Oshkosh contended that PWGSC was attempting to relitigate the Tribunal's finding regarding Requirement BA-486 that PWGSC prematurely terminated the Vehicle Payload – Speed on Grade test before reaching a grade of 5% and failed to consult the vehicle checklist for the same test. Oshkosh stated that the Tribunal should categorically dismiss all arguments and evidence submitted by PWGSC in an attempt to re-argue the Tribunal's finding, as well as PWGSC's concomitant contention that Oshkosh could not have been the highest-ranking bidder and therefore was not entitled to any compensation for lost opportunity.

29. In its response filed on June 21, 2017, PWGSC maintained that it was not afforded an opportunity during the Tribunal's inquiry on the merits to put new evidence regarding the BA-486 testing into the record. PWGSC further stated that it had no knowledge at that time of the significance of the points (5.1188) available for this test, because it did not yet have the benefit of the Tribunal's decision on the validity of any of Oshkosh's grounds of complaint. PWGSC also distinguished between challenging, on the one hand, the Tribunal's earlier findings that, contrary to the RFP, the Speed on Grade test was terminated short of the 5% grade required and the vehicle checklist was not consulted, and challenging, on the other hand, whether those failures prevented Oshkosh from being the highest-ranked bidder. PWGSC submitted that the challenged evidence concerns only the latter, which is a different question not governed by issue estoppel. PWGSC maintained that the Tribunal's determination left open the question of whether or not Oshkosh would have performed better but for the testing errors. Alternatively, PWGSC argued that issue estoppel does not apply because this is not another judicial proceeding but the same one in which appeal routes have not been exhausted.

30. In its reply filed on June 23, 2017, Oshkosh argued that the Tribunal's determination did conclusively find that the testing errors could have affected Oshkosh's ranking and that the prejudice was sufficient to warrant retesting or, in lieu thereof, an award of lost opportunity. Oshkosh submitted that it raised the issue of the BA-486 testing on April 7, 2016, and PWGSC responded to it (with a sworn letter from Mr. Walkiewicz) on April 15, 2016. Oshkosh noted that at no point prior to or after the issuance of the Tribunal's determination and reasons did PWGSC object to the process for making submissions on this issue.

31. As stated in its letter dated June 29, 2017, the Tribunal finds that the affidavit of Mr. Walkiewicz does indeed re-argue issues that were already conclusively decided by the Tribunal in its determination and reasons.

32. In *Danyluk v. Ainsworth Technologies Inc.*, the Supreme Court of Canada identified the preconditions to the operation of the issue estoppel doctrine as follows:[9]

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

33. The first two conditions clearly apply here, and the third is conceded by PWGSC. The challenged evidence relates to PWGSC's failure to conduct the Vehicle Payload – Speed on Grade test up to the 5% grade as required and to consult the vehicle checklist.

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9. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25.

34. With respect to the grade requirement, the Tribunal found in its determination and reasons that:[10]

> 202. . . . [b]y only testing to a maximum [redacted] percent grade load, PWGSC collected an incomplete data set, contrary to the provisions of the RFP.
>
> 203. By finding as it does, the Tribunal is cognizant that Oshkosh's results for the "Speed on Grade" test *would not necessarily have been better* if the full range of tests were fulfilled. However, the fact remains that, by not collecting the data required by the testing procedures, PWGSC could not have produced the complete linear trend line described in the RFP and that *Oshkosh's test results were necessarily impacted. Without these higher grade loads being tested and incorporated into the linear trend link, it is not possible for the Tribunal to determine how Oshkosh's vehicle would have performed.*
>
> 237. Since the errors made in the evaluation process impacted the actual conduct of the TCP tests, the Tribunal finds that the *only way* to determine what score Oshkosh *should have received* under *proper testing procedures* is to conduct physical re-evaluations of the following TCP tests . . . .
>
> 240. . . . If both PWGSC and Oshkosh determine that re-testing is not feasible, the Tribunal recommends that PWGSC instead compensate Oshkosh for its lost opportunity. . . .
>
> [Emphasis added]

Thus, the Tribunal explicitly considered and rejected the (now renewed) argument in its determination and reasons that halting the grade testing prematurely had no effect on Oshkosh's scoring. Nevertheless, in his affidavit, Mr. Walkiewicz writes that "the fact is that the Oshkosh Vehicle did not sustain a speed of [redacted] at a [redacted] grade. . . . Clearly and unquestionably, this vehicle could not meet the requirement."[11] This is a direct attack on the Tribunal's determination above that "Oshkosh's test results were necessarily impacted" and "it is not possible for the Tribunal to determine how Oshkosh's vehicle would have performed."

35. With respect to the checklist, the Tribunal found in its earlier determination and reasons that:

> 186. . . . despite Oshkosh providing a checklist in the cab of its test vehicles, PWGSC failed to consult it. . . .
>
> 188. By admitting that the checklist was not consulted, PWGSC acknowledged that it did not follow the directives of the RFP. The Tribunal finds that this ground of complaint is valid.

36. Notwithstanding the foregoing, the Walkiewicz Affidavit represents that [redacted]"[12] This too directly contradicts the Tribunal's reasons, which found the opposite to be the case.[13]

37. The second condition for issue estoppel (finality) is also met. The Tribunal's determination was a final decision. Indeed, the determination is currently the subject of judicial review at the Federal Court of Appeal, and the Tribunal is *functus officio* for purposes of revising it.

38. With regard to PWGSC's argument concerning procedural unfairness, the record discloses that PWGSC had ample opportunity to make submissions on the validity of Oshkosh's complaint regarding the checklist and grade testing for Requirement BA-486. Oshkosh raised the issue of the grade testing on

10. Determination and Confidential Reasons [SOR] at paras. 202-203, 237, 240.
11. PWGSC's Confidential Brief of Evidence (June 8, 2017), Affidavit of Steve Walkiewicz [Walkiewicz Affidavit] sworn June 2, 2017, at para. 17, Vol. 4A.
12. Walkiewicz Affidavit at para. 23.
13. SOR at paras. 201-202.

April 7, 2016, and PWGSC responded on April 15, 2016, with a letter from Mr. Walkiewicz reading in relevant part as follows: "'The loads achieved during Speed on Grade testing of Oshkosh's test vehicles appropriately simulated the required grades for the purpose of the test' and that '[t]he data collected during the conduct of the Speed on Grade test of Oshkosh's vehicles generated a regression line that accurately and reliably provided the required test results.'"[14] These lines are quoted verbatim at paragraph 16 in the Walkiewicz Affidavit, followed by his supplementary observations that "the Oshkosh Vehicle did not sustain a speed of [redacted] km/h at a [redacted]% grade. . . . Clearly and unquestionably, this vehicle could not meet the requirement." The challenged inference in the final sentence of the affidavit is implied in the quoted excerpt from the letter, and, regardless, could have been explicitly included in the latter at that time.

39. The Tribunal also disagrees that PWGSC was at any disadvantage in terms of realizing the significance of the grade testing. PWGSC was aware from the day it completed the RFP evaluation that the wining bidder's score was [redacted] points higher than Oshkosh's and that the latter stood to gain up to [redacted] points from retesting.[15] From the day it received Oshkosh's complaint, PWGSC knew as well that among the requirements complained about, BA-486 had the highest number of points available to Oshkosh in terms of points received ([redacted]) and points available (5.1188).[16] It also knew that the Speed on Grade testing encompassed several requirements in the RFP, including BA-122, BA-542, and BA-486.[17]

40. Regardless, even if PWGSC had any genuine concerns with the fairness of the process, the law required it to raise them "at the earliest practical opportunity".[18] In its submissions, PWGSC recounts the sequence of filings in detail, but nowhere in the record does it identify where it asked the Tribunal to make further submissions on Requirement BA-486 in response to Oshkosh raising the grade as a ground of complaint on April 7, 2016. It notes that on April 25, 2016, the Tribunal denied Oshkosh's request to file further submissions, but that does not give PWGSC standing to claim its procedural fairness rights were violated.

41. For these reasons, the Tribunal, in its letter dated June 29, 2017, granted Oshkosh's request and struck the following: section 3 ("Oshkosh is Entitled to Compensation for Lost Opportunity Valued at Nil") of PWGSC's submissions filed on June 9, 2017; the Walkiewicz Affidavit; and paragraphs 58 and 60 of Mr. Lortie's affidavit summarizing the Walkiewicz Affidavit.

42. One final note for future guidance. PWGSC's attempt to supplement its submissions on the prejudice to Oshkosh of the testing errors does reflect an aspect of the Tribunal's inquiry process that is worthy of clarification. As a result of its rigorous statutory deadlines, the Tribunal must usually issue its decision on the validity of the grounds of a complaint and on its recommendation of remedy at the same time. Often, not unreasonably given time constraints, parties' submissions will focus on the former to the exclusion of the latter. This is problematic because the issue of remedy is often as or more important than the issue of whether there was a technical violation of the RFP or trade agreement, given the range of potential remedies the Tribunal can recommend, from mere bid preparation costs to lost profit compensation that, in instances such as this case, can be of a high dollar amount.

43. The proper course for parties to take to minimize the risk of an inappropriate remedy being awarded is to provide fulsome arguments and evidence on the section 30.15 criteria found in the *CITT Act*, in particular on prejudice (causation) in the complaint, the GIR, and the reply. Additionally, where there is a claim for compensation and parties cannot meaningfully make submissions on causation before knowing

14. Walkiewicz Affidavit at para. 16.
15. Exhibit PR-2015-051-24A, Government Institution Report (protected) [GIR] at 963, Vol. 2G.
16. SOR at para. 48.
17. *Ibid.*
18. *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, at para. 67.

the Tribunal's finding on the validity of the grounds of complaint, they should request that the Tribunal reserve jurisdiction to consider additional evidence and arguments on the likelihood, based on the grounds of relief the Tribunal has found to be valid, that the complainant would have won the RFP absent the errors. Where the Tribunal issues such a reservation in its determination, there would be no final finding for the purpose of determining the *amount* of compensation, though its determination on validity and the *type* of recommended remedy would remain final for purposes of judicial review.

Decisions Made in These Reasons

Cabinet Confidences

44. On April 18, 2017, Oshkosh requested that PWGSC file Treasury Board submissions made by PWGSC or DND relating to the MSVS program, and an unredacted copy of DND's internal audit of this project (together, the materials).[19]

45. PWGSC objected to the production of the materials on the grounds that they could constitute cabinet confidences, and therefore any request for their release had to be reviewed by the Department of Justice and the Privy Council Office.

46. The Tribunal acknowledged PWGSC's contention that the documents could constitute cabinet confidences, and that the ultimate determination resided with the Department of Justice and the Privy Council Office. The Tribunal requested that PWGSC confirm the status of the documents and, if they ultimately were not deemed to be cabinet confidences, file them with the Tribunal as soon as possible.[20] PWGSC never confirmed the status of the documents or filed the documents.

47. The Tribunal denies the request because it finds the documents could not be relevant as a matter of law. The Tribunal has concluded that Oshkosh should only be awarded compensation for options actually exercised by the government. The Tribunal finds it inappropriate to recommend an award of a fixed amount of compensation that includes or excludes lost profits for options that might or might not be exercised 5, 10, 15 or 20 years later by the same or a different government. As described below, the Tribunal finds such an exercise, even if it were to be based on high-level Treasury Board, PWGSC, and DND documents, to be inherently speculative and, as such, inappropriate. As the Tribunal's decision whether to award options is founded in law, whatever evidence of the likelihood of their exercise might be found in the Treasury Board submissions and DND internal audit is irrelevant. Therefore, the request is denied.

Unredacted Legal Invoices

48. In support of its claim for costs, Oshkosh filed copies of its invoices for legal and expert services on July 27, 2017, alongside its reply submissions on compensation. The invoices were filed for the Tribunal's eyes only in a sealed envelope in "single copy", meaning not to be shared with the public or even PWGSC's counsel. By letter dated August 4, 2017, the Tribunal requested that Oshkosh justify its request for filing in single copy. By letter dated August 10, 2017, Oshkosh took the position that the description in the accounts of services rendered are solicitor-client privileged and not subject to disclosure to opposing counsel, citing the Supreme Court of Canada decisions in *Canada (National Revenue) v. Thompson*, 2016 SCC 21, and *Maranda v. Richer*, 2003 SCC 67. It further argued that filing the invoices with the Tribunal did not constitute waiver of privilege, per *Richard A. Kanan Corporation v. The Queen*, 2011 TCC 211.

49. In an attempt to provide some meaningful disclosure without waiving privilege, Oshkosh attached two tables to its letter dated August 10, 2017, showing the amounts invoiced by KPMG since 2016 and the

19. Oshkosh's letter dated April 18, 2017, Vol. 3.
20. Tribunal's letter dated May 25, 2017, Vol. 3.

amounts invoiced by Oshkosh's lawyers since late 2015. In lieu of the claimed privileged narrative of services rendered, Oshkosh provided a general description of services performed.

50. By response letter dated August 11, 2017, PWGSC characterized the alternative disclosure as inadequate, as it broke down invoices only by firm and month and lacked information regarding specific time keepers, their hourly rates, and the services performed by each. As a result, PWGSC claimed it was unable to make meaningful submissions on whether the amounts claimed were reasonable, particularly in terms of work allocation and delegation between senior and junior time keepers. PWGSC requested that Oshkosh provide further information to be restricted to PWGSC's counsel's eyes only, namely, (i) the identity of each time keeper billed for each invoice; (ii) their hourly rate; (iii) the number of hours charged by each; (iv) a description of services rendered by each time keeper during the period covered by the invoice (monthly); (v) particulars of any disbursements included; and (vi) clarification as to whether amounts are inclusive of HST.

51. On August 16, 2017, Oshkosh responded via a letter, which appended the information PWGSC had requested in categories (i)-(iii), (v)[21], and (vi)[22]. It refused to provide additional detail regarding category (iv) (description of services) on the grounds that this would "completely erode" its privilege claim, relying on *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 NLTD(G) 185, in which the court held with regard to legal invoices (subject to an access to information request) that their disclosure could enable someone to infer legal strategy or client communications.

52. By letter dated August 21, 2017, the Tribunal acknowledged Oshkosh's further disclosure of information, and provided PWGSC an additional opportunity to comment on it.

53. PWGSC filed its comments on September 11, 2017. PWGSC submitted that, given the disagreement between the parties, the Tribunal should defer its decision on costs until after deciding the issue of compensation, as at that time Oshkosh's concerns about disclosure of invoices during ongoing litigation would not apply.

54. Oshkosh responded by letter dated September 18, 2017, arguing that the information disclosed to date was sufficient and that the Tribunal's decision on costs should not be deferred.

55. The courts have repeatedly recognized that legal invoices are presumptively solicitor-client privileged because they tend to contain information that directly or indirectly conveys the substance and timing of solicitor-client communications and advice.[23] The privilege "can be rebutted by evidence showing either (1) that there is no reasonable possibility that disclosure of the requested information will lead,

21. Oshkosh also clarified that the only disbursements it had claimed were those of its experts.
22. Oshkosh confirmed HST was included.
23. *Canada (National Revenue) v. Thompson*, 2016 SCC 21, at para. 41, finding accounting records of lawyers presumptively privileged. *Maranda v. Richer*, 2003 SCC 67, at para. 33: "Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum . . . ." *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 NLTD(G) 185, at para. 38: "The information requested relates to invoices for legal services . . . . That information is presumptively subject to solicitor-client privilege."

directly or indirectly, to the exposure of solicitor-client communications, or (2) that the requested information is not linked to the merits of the case and its disclosure does not prejudice the client."[24]

56. Oshkosh has disclosed everything requested except the invoiced description of services in each time entry docket for each time keeper. PWGSC argued that a description of services rendered is not linked to the merits of the case and does not prejudice Oshkosh if it is disclosed only to PWGSC's (external) legal counsel and not until after the Tribunal has finally settled all other issues in the case.

57. The Tribunal has reviewed the unredacted copies of the legal invoices and finds that the narratives do not contain particularized information revealing the opinions or advice of legal counsel or other solicitor-client communications, rather than a generic description of the work performed relating to each step of the proceedings.

58. However, the Tribunal finds that this issue is moot, given that it has decided to rule in PWGSC's favour by applying a substantial deduction to Oshkosh's claimed legal fees based on reasonable lawyer hourly rates and allocation of work, for the reasons provided at the end of this decision.

Unredacted Expert Invoices

59. Oshkosh also resisted the disclosure of its expert witnesses' invoices based on litigation privilege.

60. "Litigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation."[25] The privilege relating to experts applies only until if and when the expert's evidence is proffered into the record (via a report or testimony). The authors of the KPMG reports were qualified as experts, and their reports were admitted into evidence. As the courts have held, "[w]hen the reports were served, the die was cast and privilege was waived. To the extent that litigation privilege applied prior to the defendants' decision to serve their reports that privilege no longer exists."[26] Oshkosh provided no reason why litigation privilege regarding the expert invoices should not be deemed waived (nor why or how solicitor-client privilege would attach to its experts' invoices).

61. The Tribunal has reviewed the unredacted invoices from Oshkosh's experts and finds the narratives do not contain particularized information revealing the opinions of legal counsel, legal advice, or other solicitor-client communications.

62. However, the Tribunal finds that this issue is moot, given that it has decided to rule in PWGSC's favour by refusing to award any disbursements for expert fees.

Oral Hearing

63. PWGSC submitted an oral hearing is necessary, because the quantum of compensation sought is "unprecedented" and the "procurement, and the issues to be determined in this proceeding, are extremely complex."[27] Further, Mr. Bleck's evidence of the authenticity of Oshkosh's internal cost data would benefit from being tested in cross-examination. Likewise, Mr. Williams should be cross-examined. PWGSC also submitted that the Tribunal would benefit from an oral hearing where parties can highlight critical

24. *R. v. Singh*, 2016 ONCA 108, at para. 62.
25. *Moore v. Getahun*, 2015 ONCA 55, at para. 68.
26. *Sturdy v. Dhadda*, 2016 BCSC 505, at para. 25.
27. PWGSC's Confidential Submissions (June 9, 2017) at para. 295, Vol. 4A.

submissions and answer the Tribunal's questions. PWGSC cited no case law on the standard for determining when the Tribunal should hold an oral hearing to ensure a party's procedural rights are met.

64. Oshkosh, relying on a Federal Court of Appeal precedent, submitted that, in order to be entitled to an oral hearing, a party must show that "written submissions did not afford it a reasonable opportunity to participate effectively in the decision-making process."[28] It noted that the Court has stated that an oral hearing is not necessary "merely because conflicting evidence on an issue may make it difficult to resolve."[29]

65. Oshkosh observed that PWGSC has not provided any reason warranting departure from the normal Tribunal's practice of deciding compensation on the written record. Oshkosh submitted there are only two areas of factual dispute between the experts (risk and material costs), which have been addressed in detail in written submissions. There is no genuine issue of credibility to necessitate an oral hearing.

66. The Tribunal finds that an oral hearing is not necessary for PWGSC to be able to meaningfully argue its case on compensation. With regard to cross-examination of affiants (the strongest grounds for an oral hearing), the need is moot. The Tribunal's decision regarding options is not based on the evidence of Mr. Williams, Mr. Bleck, or any other fact witness, but rather on the law. Further, the Tribunal's evidence on reasonable profit margin is informed by the law, its policy discretion, and the opinions of the experts and arguments of counsel. PWGSC's arguments against the reliability of Mr. Bleck's affidavit evidence regarding costing data are well articulated in its written submissions and its expert's report. Cross-examinations would only cast more heat (not light) on the contested issues.

67. With regard to the request to have an oral hearing to simply make arguments, the Tribunal finds this unnecessary given the length and breadth of submissions made in writing over the course of the past year. No new issues could properly be raised in such oral submissions (without inviting yet another round of submissions). The Tribunal is already well-served by counsel's comprehensive treatment of the issues in writing.

ANALYSIS

Introduction

68. Neither the *CITT Act* nor the applicable regulations prescribe a particular methodology for determining "compensation" in a procurement inquiry – even the word itself is left undefined. Thus, the Tribunal has been left by Parliament with wide-ranging discretion on how to arrive at this important conclusion to its inquiry.

69. For the benefit of parties, the Tribunal has articulated its general approach to compensation in its *Procurement Compensation Guidelines* (the *Guidelines*).[30] They are not binding on the Tribunal in any individual case, nor do they have the force of legislation or regulations.[31]

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28. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA), at para. 62.
29. *Ibid.* at para. 64.
30. Online at: http://www.citt-tcce.gc.ca/en/Procurement_compensation_guidelines_e.
31. *Guidelines*, art. 1.1.4. See, for example, *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, at para. 62: "[W]hile agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law."

70. In these proceedings, the compensation phase lasted over a year, and parties' submissions included six affidavits, four expert reports, and several requests to strike or compel disclosure of documents. The volume of submissions (including supporting evidence) well exceeds 2,000 pages. The complainant alone reports legal and expert fees (just for the compensation phase) of nearly [redacted] dollars collectively.

71. The complexity, length, and cost to the parties of these proceedings demonstrate that a restatement of the law governing remedies and compensation at the Tribunal would be useful. To that end, below are the legal principles that provide the foundation of the Tribunal's jurisdiction and discretion to award remedies for procurement complaints determined to be valid.

1. In designing remedies, the Tribunal is guided by the legislative criteria found in section 30.15 of the *CITT Act*, and by the policy objectives articulated by the Federal Court of Appeal in *Almon*.[32] These 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. Under the trade agreements, the legislation, and the case law, the Tribunal functions as an alternative forum for the resolution of federal procurement disputes – it is intended and designed to *complement* not *duplicate* court procedures, rules of evidence and liability, and remedies.[33]

2. Injunctive-like relief is preferred over monetary relief where practical, i.e., before significant performance of the contract by another party. This is evidenced by the Tribunal's broad injunctive powers (consistent with the requirement of the trade agreements that administrative review procedures provide for "rapid interim measures to preserve the supplier's opportunity to participate in the procurement"),[34] including its authority to order retesting, rescoring, retendering, rescinding of contract award, and postponement of contract award, and the short time lines in the *CITT Act* and *Regulations* for bringing complaints and for the Tribunal to make its determinations, all of which facilitate the above injunctive-like relief. It is also consistent with the public's interest in avoiding unnecessary double payment for procurements and with bidders' interest in having the opportunity to actually perform the contract in question, which is often more valuable than compensation because of the experience acquired (which may qualify bidders for later solicitations throughout Canada and abroad). The broad injunctive-like relief readily available to complainants at the Tribunal is an important feature

32. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 [*Almon*], at paras. 21-23.
33. Each of the trade agreements on which the Tribunal's jurisdiction is founded require signatory governments to establish or designate either an impartial judicial or independent administrative authority for hearing supplier challenges. See, for example, arts. 514(2)(e) of the *Agreement on Internal Trade*; 518(6) of the *Canadian Free Trade Agreement*; 1017(g) of the *North American Free Trade Agreement*; and XVIII(1) of the *Revised Agreement on Government Procurement*.
34. *Revised Agreement on Government Procurement*, art. XVIII(7), online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014). *Canadian Free Trade Agreement*, art. 518(9), 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 July 1, 2017) [*CFTA*]. See also *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, art. 514(3) (outlining remedial authority), online: Internal Trade Secretariat <https://www.cfta-alec.ca/agreement-on-internal-trade/> [*AIT*].

that distinguishes it as a forum for procurement challenges from the courts, where injunctive relief is narrower, often less timely, more difficult to obtain, and historically rarer.[35]

3. Common-law principles of damages inform but do not define compensation awards. Parties before the Tribunal are alleging violations of the trade agreements, not violation of their contract rights (for which they may bring an action for damages for breach of contract at the courts). Further, the Tribunal's mandate as a regulator of the procurement system is distinct from the mandate of a court to simply ensure private parties' rights are protected. Thus, the Tribunal may award compensation to a complainant for breach of the trade agreements even where the strict requirements for obtaining damages for breach of contract are not met.[36] However, this also means that complainants are not necessarily entitled to lost profits or lost opportunity as of right or calculated in the same manner that they would be at common-law for a breach-of-contract claim.[37] Fundamentally, a complaint alleging a violation of the trade agreements grounded in administrative and statute law is not the same as a private action for breach of contract. Neither the trade agreements nor the *CITT Act* and *Regulations* mandate the scope and nature of the compensation to be recommended. Thus, compensation is largely a matter of discretion for the Tribunal so long as it is guided by the objectives articulated in item 1 above.

4. Monetary remedies serve multiple purposes. These include deterring violations of the trade agreements, incentivizing the use of the Tribunal's complaint resolution procedures, and compensating wronged bidders in terms of lost profits, bid preparation costs, and costs of

35. See discussion in Paul Emanuelli, *Government Procurement*, 3rd ed., 2012, at 887-896. In particular, the availability of lost profits damages in a court action makes it difficult for a plaintiff to establish the "irreparable harm" element for an injunction. Courts apply "a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it" (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 [*Google*], at para. 25, citing *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). "To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction" (*Google* at para. 66). Further, while the Tribunal's remedies include several types of positive relief (e.g., to order retesting, retendering, etc.), mandatory injunctions are extraordinary in the common law. See *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, at para. 57: "Mandatory injunctions are rarely ordered . . . ."

36. *Canada (Attorney General) v. Envoy Relocation Services*, 2007 FCA 176 [*Envoy*], at para. 21: "[T]he CITT performs a regulatory role in the administrative process. In order that an agency may discharge the mandate entrusted to it in the public interest, reviewing courts should not assume that the legislature intended the agency under review to exercise its remedial powers on exactly the same bases as those on which courts exercise analogous powers to resolve disputes governed exclusively by private law."

37. In regard to the reluctance of the law to assume, without statutory direction, that the mere violation of a legislation or regulation automatically gives rise to a claim for damages, see, for example, *Kim v. Canada*, 2017 FC 848, at para. 24, in which the Federal Court, citing the Supreme Court of Canada's decision in *Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), confirmed that "the simple breach by a servant of the Crown of a duty imposed by statute, regulation or directive does not automatically constitute an actionable wrong, or give rise to a cause of action for damages. An independent tort of statutory breach is not recognized in Canadian law."

bringing a complaint to the Tribunal.[38] The scope and quantum of monetary remedies must be weighed against the other goals of the procurement challenge regime that the Tribunal oversees, including avoiding double payment for goods, avoiding windfalls for complainants, and giving force to lawful terms in RFPs.[39]

5. The calculation of lost profits is not simply (or even primarily) an expert accounting exercise.[40] The process for determining compensation for breach of a trade agreement should, as much as possible, avoid hypothetical estimates about future revenues and expenses that tend to devolve into a battle of the experts. Instead, recognized revenues should be based on the terms in the solicitation documents – primarily, the RFP, the appended Resulting Contracts, and the complainant's (financial) proposal or (where using the latter is impractical)[41] the published contract award value. Compensation for options should be recommended only if and when exercised. Finally, a reasonable net profit rate should be estimated based on historical and/or qualitative evidence of firm- and industry-specific net (not gross) profit rates for similar[42] goods or services. As explained further below, the Tribunal is of the view that a baseline reasonable net profit rate for this complaint is 10%. As also explained below, to set a guidepost for the future, the Tribunal is prepared to posit that a reasonable net profit rate in a procurement complaint will typically hover around 10% (plus or minus 5%), to be varied as appropriate based on the above type of evidence. Given its competing imperatives to ensure compensation incentivizes complainants to bring valid complaints while still guarding against providing complainants a windfall, the Tribunal would consider net profit rates of below 5% or above 15% appropriate where compelling circumstances exist.

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38. See *AIT*, arts. 101(3)(d): "Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada"; 101(4)(d): "In applying the principles set out in paragraph 3, the Parties recognize . . . the need for supporting administrative, dispute settlement and compliance mechanisms that are *accessible, timely, credible and effective*"; 501: "[T]he purpose of this Chapter is to establish a framework that will ensure *equal* access to procurement for all Canadian suppliers in order to contribute to a *reduction in purchasing costs* and the development of a strong economy in a context of transparency and efficiency"; and 514(2)(e): recognizing purposes of complaint procedures as, *inter alia*, ensuring complaints are brought "to the attention of an authority, with no substantial interest in the outcome, to receive and consider the complaint and make appropriate findings and recommendations with respect to the complaint" [emphasis added].
39. *Envoy* at paras. 22: "[T]he CITT must exercise its powers with a view to, among other things, *maintaining potential bidders' confidence in the integrity of the procurement system*. An erosion of confidence would have a detrimental impact on the competitiveness of bidding. Hence, it *should not be assumed* that the CITT's power to recommend compensation is exercisable exclusively on the *basis of common-law principles*"; and 23: "It is relevant in this context that Parliament used the generic word 'compensated' in subsection 30.15(2), not the more distinctively legal term 'damages.' Nor did it specify that a complainant is only to be 'compensated' for a loss caused to it by breaches of contract, or other improper conduct, by PWGSC" [emphasis added].
40. *Envoy* at para. 26: "The factors to be considered under subsection 30.15(3) bear little resemblance to the principles on which courts award damages for breach of contract, in the sense that, in recommending the appropriate remedy, the CITT must have regard, not only to the prejudice of the complainant, but also to systemic concerns."
41. See, for example, *Foundry Networks Inc.* (10 October 2002), PR-2001-048 (CITT), compensating complainant, who could not submit proposal, as if it had submitted a proposal for one dollar less than the successful bidder.
42. *Antian Professional Services Inc. v. Department of Public Works and Government Services* (15 August 2007), PR-2006-024 (CITT) at para. 15 ("[I]t is reasonable to determine an appropriate profit margin using Antian's experience with a similar contract . . .").

72. Based on the evidence presented in the present inquiry, these principles result in the following calculation (the constituent revenues of which are based on Oshkosh's own bid price except for spare parts, which is based on the winning bidder's bid price and the contract award amount given the unfeasibility of using Oshkosh's own bid price for spare parts):[43]

A. Revenues from Base Contracts (payable now)

1. Acquisition Contract
   a. Vehicles and Related Equipment: $[redacted]
   b. ILS Data and Deliverables: $[redacted]
   c. Subtotal: $[redacted]
2. ISS Contract
   a. Repair and Overhaul Free-Flow: $[redacted]
   b. Special Tools and Test Equipment List: $[redacted]
   c. Labour, Overhead and Profit: $[redacted]
   d. Program Management and Deliverables: $[redacted]
   e. Subtotal: $[redacted]
3. Spare Parts: $[redacted]
4. Total: $[redacted]

B. Options (payable only if and when exercised)

1. Acquisition Contract
   a. Vehicles and Related Equipment: calculated based on Oshkosh's "Vehicles and Related Equipment – Scenario 1 – Options" unit bid prices from its proposal multiplied by the number and variant of SMP vehicles and related equipment optioned
   b. ILS Data and Deliverables: $[redacted]
2. ISS Contract: $[redacted] for each five-year extension exercised (or a portion thereof calculated on a pro rata basis should any extension be for less than the full five-year increment)
3. Spare Parts: Value of any Contract Amendment for Spare Parts

C. Profit Margin: 10%

1. Subtotal Revenues (payable now): $[redacted]
2. Subtotal Options (payable only if and when exercised): as per B above, times 10%

D. Lost Opportunity Discount: 1/3

E. Total Compensation (Base Contracts) (payable now): $25,337,931.79

F. Total Compensation (Options) (payable only if and when exercised): as per C.2 above, times 1/3

73. The details and reasoning in support of the above are discussed below.

43. All figures throughout these reasons are in Canadian dollars except where otherwise indicated.

Revenues

74. The RFP had only two sources of revenue: the Acquisition Contract and the ISS Contract. The classes of revenue recognized under these contracts were itemized in the RFP and the Resulting Contracts and formed the basis of the financial evaluation of the bidders' bid prices. Nevertheless, Oshkosh did not follow this framework in its submissions or expert reports in presenting its estimated lost revenues. Instead, it decided to go beyond the four corners of the RFP, Resulting Contracts and published contract award to try to estimate all possible future sources of revenue. In the process, it identified four classes of revenue (some, such as Mid-Life Reset, not even identified in the RFP), without regard to the solicitation or contractual framework.

75. The Tribunal rejects this methodology. It is inconsistent with the RFP, the Resulting Contracts, and the published contract award. It also fails to properly distinguish compensation for breach of a trade agreement from an action for damages at common-law for breach of contract. Fundamentally, the Tribunal's discrimination in recommending compensation is limited to considerations surrounding violations of the trade agreements arising during procurement processes. The lodestar of the Tribunal's compensation analysis is the solicitation documents and the complainant's proposal, with reference to the published contract award for revenue figures where recourse to the complainant's proposal is impractical. The compensation phase is not an opportunity for parties to go beyond those and estimate what, if they had won the contract, additional types of revenues they might have been able to negotiate with the government outside or even ancillary to the framework of the RFP.

Acquisition Contract

– Initial (Base) Five-year Contract Term

76. The Acquisition Contract included revenues from the sale of the SMP vehicles and related equipment, as well as integrated logistical support (ILS) Data and Deliverables.[44]

77. The RFP explicitly provided a maximum funding level of $725 million (excluding taxes) for the Acquisition Contract:

> 2.3 Financial Evaluation
>
> 2.3.1 The maximum funding available for Table 1 (Vehicles and Related Equipment) and Table 4 (ILS Data and Deliverables) of Annex C to Part 7 – Acquisition Contract resulting from the bid solicitation is $725,000,000.00 (Applicable Taxes extra). Bids valued in excess of this amount for the two Tables will be considered non-responsive.[45]

78. By submitting a proposal, bidders "agree[d] to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contracts in Part 7 and Part 8."[46]

79. For the Acquisition Contract, the RFP contemplated the purchase of up to 1,537 SMP vehicles, up to 300 trailers and up to 150 APSs, as well as options for up to 650, 240 and 150 additional SMP vehicles, trailers, and APSs respectively.[47] It also contemplated provision of ILS Data and Deliverables.

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44. Exhibit PR-2015-051-01B, RFP, Part 7 Resulting Contract – Acquisition, at 1163-1193, Part 4 – Evaluation Procedures and Basis of Selection, Attachment 4 – Acquisition Scenarios Financial Evaluation, at 178, Part 4 – Evaluation Procedures and Basis of Selection, at 154-155, Vol. 1.
45. *Ibid*. at 52, 152.
46. *Ibid*., Part 2 – Bidder Instructions, art. 1.2, at 54.
47. *Ibid*., Part 1 – General Information, art. 2.3, at 59.

80. Oshkosh bid $[redacted] for the vehicles and related equipment in the Acquisition Contract, and it claims the same amount in its compensation submissions, though it asks (here and throughout) for the award to be expressed in US dollars calculated based on the exchange rate existing at the time of its bid: 1.065 Canadian dollars to 1 US dollar.[48] It bid $[redacted] for ILS Data and Deliverables, and it claims the same amount in its compensation submissions.[49] The initial Acquisition Contract award value, exclusive of taxes, to the winning bidder, Mack Defence LLC (Mack), was $684,479,955.[50]

81. The Tribunal finds it appropriate to recognize lost revenues for the Acquisition Contract based on Oshkosh's bid price for the base contract (i.e., the initial five-year term) in this case. The bid price was compliant with the RFP maximum-funding term for the Acquisition Contract. The bid price reflects both what Oshkosh would have earned and the expectations of the parties, including any maximum-funding levels.[51] Further, there is no evidence that the revenues in the bid price understate revenues that could have been expected in the Acquisition Contract.

82. PWGSC has suggested using the contract award price, but has provided no reason to do so. There is nothing to suggest that this approach would make the calculation easier, more reliable, or fairer. The amount is simply lower because the successful supplier bid at a lower price. In particular, the Tribunal notes that the RFP ranked compliant proposals based on an overall score, with the technical evaluation comprising 70% of the total and the bid price evaluation comprising the remaining 30%.[52] Oshkosh's technical and financial scores were both [redacted] than Mack's, but its overall score was only [redacted] points [redacted].[53] The points at issue in the tests at issue totalled [redacted], out of which Oshkosh received [redacted], resulting in total available incremental points of [redacted] additional points available that it could have won through retesting; thus, it could still have been the highest-ranked bidder even at its higher bid price.[54]

Options

83. Oshkosh requests that the Tribunal recognize all (or at least 50%) of the revenue from the options exercisable by the government in the Acquisition Contract, based on various affidavit and documentary evidence that, Oshkosh submits, demonstrates it is more likely than not the options will be exercised.

84. PWGSC opposes any award of options, now or in the future if and when exercised, on the grounds that Oshkosh has no right to any options as a matter of law. PWGSC acknowledges that the Tribunal's *Guidelines* contemplate options being awarded, and that in past cases the Tribunal has awarded options, but submits that this practice should be changed to align with breach-of-contract case law.

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48. Oshkosh's Confidential Submissions on Compensation (April 3, 2017), at 18, Vol. 4. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 1, Oshkosh's Financial Proposal, at 46, 60, Vol. 4. Exhibit PR-2015-051-01B, RFP, Part 7 – Resulting Contract – Acquisition, Annex C, Price and Delivery, at 1008, Vol. 1.
49. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 1, Oshkosh's Financial Proposal, at 46; Tab 6, KPMG's Report, Schedule 7, at 224, Vol. 4. In KPMG's Addendum and Reply Report, the figure for ILS Data and Deliverables is reported as $[redacted], but this appears to be a typo, as there is no explanation for why it would have changed and the same citation is used in Oshkosh's proposal.
50. PWGSC's Confidential Brief of Evidence (June 8, 2017), Tab 1, Affidavit of Yves Lortie [Lortie Affidavit], at para. 34. Inclusive of taxes, the total is $784,714,220.
51. *Mechron Energy Ltd.* (26 October 1995), PR-95-001 (CITT) [*Mechron*] at 5: "In any tender process, the contracting authority has budgetary limits within which it must work. If all tenders are for an amount greatly in excess of its budgetary capacity, it is reasonable to expect that it would rethink the need for the contract as originally proposed or see if it could raise the budgetary ceiling."
52. Exhibit PR-2015-051-01B, RFP, Part 4 – Evaluation Procedures and Basis of Selection, art. 4.2, at 155, Vol. 1.
53. Exhibit PR-2015-051-24A, GIR, Exhibit 20 (protected) at 963, Vol. 2G.
54. SOR at para. 48. Lortie Affidavit at para. 57.

85. PWGSC argues that the Tribunal's default policy of awarding compensation for options (often, as here, on an if-and-when-exercised basis) is inconsistent with precedent of the Supreme Court of Canada, namely, *Hamilton v. Open Window Bakery Ltd.*, in which the Court held as follows:[55]

> 11. . . . Generally speaking, where there are several ways in which the contract might be performed, *that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant*.
>
> 20. The assessment of damages required only a determination of *the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant*. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.
>
> [Emphasis added]

86. PWGSC submits that it is undisputed that the exercise of the option rights (for either vehicles, parts, or services beyond the initial five-year term) are in the complete discretion of the government under the terms of the RFP and Resulting Contracts. It argues that this unilateral option term affected the other terms in the RFP and Resulting Contracts, namely, price, delivery schedules, production capabilities, etc. Oshkosh did not bargain for and give anything up in return for a right to claim all its lost profits for options that are completely in the discretion of the government to exercise.

87. In response, Oshkosh submits that *Hamilton* is a breach-of-contract case that has not been applied to procurement cases before either at common-law or at the Tribunal. It maintains that *Hamilton* should not be extended to the procurement context because it concerns damages for breach of Contract B (the resulting contract) not Contract A (the RFP). It argues that PWGSC has misread *Hamilton*, which even if applicable does not prevent a court from determining the probability of whether the government would have, if the complainant had been awarded the contract, in fact exercised the options. Finally, it observes that however binding *Hamilton* may be in the courts, its application is limited here, because the Tribunal's authority to award compensation is found in statute and based on breaches of a trade agreement, not breaches of contract.

88. Whether the Supreme Court's decision in *Hamilton* curtails the Tribunal's discretion to award options appears to be a question of first impression.

89. As a preliminary matter, Oshkosh is correct that *Hamilton* governs only claims at common-law for damages for breach of contract, not compensation for breach of a trade agreement. In that sense, therefore, it is distinguishable from the case at bar. Nevertheless, contract damages principles clearly inform (though they do not define) the Tribunal's authority to recommend compensation – this is self-evident in the fact that the Tribunal looks to "lost profits" under contract law to determine how to "compensate" bidders in the first place.

90. The Tribunal concludes, for the reasons that follow, that *Hamilton* likely does apply to damages in the wrongful procurement context at common-law. However, as stated above, it only informs rather than limits the Tribunal's authority to recommend compensation. Therefore, the Tribunal concludes that an apt application of *Hamilton* in the procurement administrative review process constitutes refusing to recommend compensation for options until if and when they are exercised in fact. Recommending an award of compensation based only on speculation or even a balance of the probabilities assessment would be inconsistent, both with common-law damages principles and the administrative compensation principles

55. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 [*Hamilton*], at paras. 11, 20.

articulated above. On the other hand, strictly and wholly applying *Hamilton* to automatically preclude any compensation for options would likewise be inappropriate, as it would conflate the Tribunal's and the courts' roles in procurement disputes, ignore the fact that a public entity may want to exercise options, and unduly limit the Tribunal's authority under the relevant legislation and trade agreements to craft flexible recommendations.

91. With regard to Oshkosh's argument that *Hamilton* only applies to breaches of Contract B not Contract A, this observation is misguided. First, the RFP itself sets out the parameters of Contract A – when a government institution publishes an RFP it agrees to be bound to its obligations set out therein when a supplier submits a compliant bid and vice versa. The parties' obligations under Contract A are set by the written terms found in the RFP and any terms implied by the courts (duty to avoid bias, duty to award to highest-ranked compliant bidder, etc.). The determination of lost profits damages under Contract A has always been based on (1) what were the explicit and implied terms under the RFP (for example, here, a clause prohibiting claims for bid preparation costs); and (2) typically the lost profits under Contract B (the resulting contract). This conclusion is reinforced by the fact that Contract B is (as here) usually expressly incorporated into and made part of Contract A by being attached as an appendix to the RFP and by being referenced in provisions of the RFP requiring parties to agree to the terms of the appended contract.

92. Second, contrary to Oshkosh's arguments, the continued existence of the contract with the winning bidder and the likelihood that the government would have exercised any options is irrelevant under *Hamilton*, which clearly states that the court is not to speculate how the contract would have been performed but merely to identify the minimum legal responsibilities of the defendant and then calculate damages on that basis:[56]

> 18. In this case, the relevant contractual duties have been expressly set out by the parties in the agreement. Hamilton is entitled to OWB's performance of these voluntarily assumed duties. Hamilton has no compensable interest in the advantages she might have expected under any particular performance of the contract, since the contract itself provided for alternative methods of performance at the election of the defendant. If Hamilton wanted to secure herself the benefits associated with a given particular method of performance, she should have contracted for only that method of performance.
>
> 19. *The trial judge erred in this case in engaging in a tort-like inquiry as to what would have happened if OWB had not breached its contractual obligations to Hamilton, and in concluding that OWB would not have terminated at the earliest opportunity*.
>
> 20. The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.
>
> [Underlining in original, emphasis added]

93. Oshkosh relies on the subsequent paragraph from *Hamilton* as support for the proposition that the court can still consider the factual likelihood that an option would be exercised:

> 21. This is not to say that the general principle will never require a factual inquiry. The method of performance that is most advantageous or least costly for the defendant may not always be clear at the outset from the contract's terms. A court may have to consider evidence to determine an estimated cost of the various means of performance. In some cases it will only be after this factual investigation that a court can confidently conclude that a certain mode of performance would have

56. *Hamilton* at paras. 18-20.

> been the least burdensome for the defendant. That this factual investigation might need to be conducted in some instances does not undermine the general principle.

94. However, in the very next sentence, the Court clarifies that this factual investigation applies only where the contract's terms are not clear regarding the minimum required performance:

> 22. A factual investigation of this type is not necessary on the facts of this case. The case at bar raises only a question of the extent of time the contract will be performed which, with three months' notice given after the expiration of the 18th month, is entirely at the election of the defendant.

95. The Ontario Court of Appeal confirmed this reading of *Hamilton* in *Agribrands Purina Canada Inc. v. Kasamekas*, explaining:[57]

> [46] The trial judge distinguished *Hamilton* [at para. 106], finding that it applied only where the parties acted honestly and in good faith, and that Purina had not done so, having [page 441] "conducted itself in a manner that 'defeated or eviscerated the very purpose and objective' of its agreement with Raywalt".
>
> [47] With respect, I do not agree. The trial judge erred in finding *Hamilton* to be premised on good faith conduct by the breaching party. Contrary to his view, there was no finding by the trial judge in *Hamilton* that Open Window had acted in good faith at all material times. Nor is there any suggestion in the Supreme Court's decision that good faith conduct is a pre-requisite for the least burdensome principle to apply. Indeed, Open Window had wrongfully terminated Ms. Hamilton by repudiating the entire contract, thereby defeating its very purpose, yet the least burdensome principle of calculating damages was applicable.
>
> [48] In my view, *Hamilton* cannot be distinguished as the trial judge did, and should have been followed in assessing the breach of contract damages in this case, *even if Purina did not act in good faith in breaching the contract.*
>
> [49] *Had that been done, the trial judge would not have embarked on a hypothetical inquiry into how Purina would likely have performed its obligations under the contract if it had not breached the contract. That is the very sort of inquiry that Hamilton says should not be done in approaching breach of contract damages where there are alternate modes of performing the contract.*
>
> [50] The contract provided that Purina had the unconditional right to cancel the contract at any time on 60 days' notice. Article V(B) of the contract reads, "Notwithstanding anything to the contrary in this article, either of the parties may cancel this Agreement at any time by giving sixty (60) days advance notice to the other party." *There is no doubt that this is the least burdensome mode of performance for Purina. It should have been used as the basis for calculating the damages for breach of contract.*
>
> [Emphasis added]

96. In contrast to the above appellate decisions confirming PWGSC's interpretation of *Hamilton*, Oshkosh relies on a single trial-level Ontario superior court decision that did not consider *Agribrands*, and was not followed by an appellate decision endorsing the court's reasons.[58]

97. However, while the Tribunal does find *Hamilton* informative on the scope of compensation in a procurement complaint under the trade agreements, as stated above, it is not convinced that it should go so far as to apply *Hamilton* to bar complainants from obtaining compensation for options as a matter of course.

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57. *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at paras. 46-50. The Alberta Court of Appeal has echoed this approach in *Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1, finding that good faith dealing principles in contract law do not affect the analysis.
58. *Envoy Relocation Services Inc. v. Canada (Attorney General)*, 2013 ONSC 2034.

The implication of doing so is in fact more rigorous than PWGSC understands. *Hamilton* does not only prevent recovery for options but even for lost profits over *any* portion of the initial term of a contract in which the government may terminate without cause. If this was applied strictly in this case, it would preclude compensation altogether, as the Resulting Contracts include a clause permitting the government to terminate for convenience upon written notice at any time.[59]

98. While *Hamilton* may be logically sound, the Tribunal doubts that the terms of the RFP and Resulting Contract in this case reflect the parties' negotiation of risk and reward for this procurement. Although the Tribunal finds it on point, no court has yet applied *Hamilton* in the procurement context to limit damages. Further, while the RFP contains a clause prohibiting recovery of bid preparation costs, it has no term limiting or excluding damages or compensation for breach of the RFP. Of course, a term *wholly* excluding liability for damages or compensation for breach of an RFP might be suspect given the Tribunal's legislated authority to recommend compensation and the Supreme Court's decision in *Tercon*.[60]

99. In sum, although the Tribunal agrees with Oshkosh that *Hamilton* does not bar recovery of options, it finds nevertheless that *Hamilton* provides additional legal grounds for the Tribunal to not award compensation for options that have not even been exercised yet. On this point the Tribunal agrees with PWGSC, Oshkosh has no legal entitlement to options as a matter of law. By the terms of the RFP and the Resulting Contract, the exercise of options is entirely within the discretion of the Government.

100. In this context, the Tribunal finds that, as a matter of policy and discretion, it should be very wary of conducting a fact-finding inquiry into whether options would or would not in fact be exercised. In the context of a military procurement with a potential 20-year term involving nearly one billion dollars, such an exercise is inherently speculative, given the sums involved and likely changes in government during the term. Further, it unnecessarily intrudes into the purview and deliberations of the government in a highly sensitive area – as Oshkosh's request for potential cabinet confidences illustrates. Such an inquiry might be necessary if the Tribunal had no authority to craft a flexible recommendation including compensation if and when options are exercised, but that is not the case here. To the contrary, the risk lies entirely in making a premature yet final decision now whether to include options or not. Given that the contract was awarded to Mack on June 11, 2015, the options clause expires 48 months later (i.e., less than two years from now),[61] and that to date the government has exercised only about 8% of the total option value,[62] there is a real possibility they will not ultimately be exercised. Nevertheless, where hundreds of millions of dollars in a military procurement are at issue, the Tribunal finds that conducting a factual investigation based on a "balance of probabilities" or even a heightened burden of proof standard would be reckless.

101. Accordingly, the Tribunal concludes that the recognized revenue from the Acquisition Contract should include [redacted] for the base five-year term, as well as revenue from options only if and when exercised and based on Oshkosh's Scenario 1 Option unit bid prices for vehicles and related equipment and its bid price ($[redacted]) for options for ILS Data and Deliverables.[63] For the vehicle options, the Tribunal notes that the quoted prices escalate over the five-year term based on the date (Month After Contract Award (MACA)) they are ordered. Therefore, any payment for options exercised shall be

59. Exhibit PR-2015-051-01B, RFP, Part 7 – Resulting Contract – Acquisition, Annex D – 2030 2013/04/25 General Conditions, art. 32, at 1035, Vol. 1.
60. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.
61. Exhibit PR-2015-051-01B, RFP, Part 7 – Resulting Contract – Acquisition, art. 1.3.1, at 394, Vol. 1.
62. Lortie Affidavit at paras. 37-39.
63. See Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 1, Oshkosh's Financial Proposal, Table 2 – Vehicles and Related Equipment – Scenario 1 – Options at 48; Table 5, ILS Data and Deliverables – OPTIONS, at 54.

made according to the quoted price in the applicable period. If the options are exercised after the initial five-year period, revenue shall be based on the highest quoted category (49 MACA to 60 MACA).

ISS Contract

102. The ISS Contract included revenues for four categories,[64] for which Oshkosh bid as follows for the initial five-year term:[65]

- Repair and Overhaul Free-Flow (day-to-day costs of maintenance and support for vehicles in field, in the form of repairs of parts replaced by DND technicians and sent to contractor facility): $[redacted];
- Special Tools and Test Equipment List (costs of machines and equipment required for routine maintenance): $[redacted];
- Labour, Overhead and Profit (for additional contingency work): $[redacted]; and
- Program Management and Deliverables (administration of maintenance program): $[redacted]

103. The RFP did not provide a maximum funding amount for the ISS Contract, but it did incorporate and append the resulting ISS Contract and Acquisition Contract, which both provided for a limitation of expenditures (though there is no evidence what figure was actually entered into the winning bidder's contracts):

> 3.2 Limitation of Expenditure
>
> 3.2.1 Canada's total liability to the Contractor for the Deliverables under the Contract will not exceed **$ To Be Inserted at Contract Award**. Customs duties are subject to exemption and GST or HST is extra, if applicable.[66]

104. The base ISS Contract award value for the initial five-year term of the agreement, exclusive of taxes, to the winning bidder was $42,967,329, which includes the sum of $[redacted] for estimated spare parts (a separate category discussed in the next section).[67]

105. In its compensation submissions, Oshkosh presents revenues calculated under one of two assumptions: ISS services restricted either to the initial five-year contract term (Alternative Calculation 3) or extended for the 20-year life of the vehicles (Alternative Calculations 1 and 2). The low assumption (Alternative Calculation 3) claims the same amount as Oshkosh bid in its proposal for each of the above categories.[68] The high assumption (Alternative Calculation 1) claims nearly four times as much by multiplying each of the categories except Special Tools and Test Equipment List by four to account for the fully extended 20-year term being realized.[69]

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64. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract – ISS, Annex B, Statement of Work, at 1163-1193, Part 4 – Evaluation Procedures and Basis of Selection, Attachment 3 – ISS Financial Evaluation, at 170, Part 4 – Evaluation Procedures and Basis of Selection, at 155, Vol. 1.
65. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 1, Oshkosh's Financial Proposal, at 34.
66. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract – ISS, art. 3.2.1, at 402, Vol. 1.
67. Lortie Affidavit at paras. 75, 99, 103.
68. KPMG's Report, Schedule 7, at 248; KPMG's Addendum, Schedule 7, at 315.
69. KPMG's Addendum, Schedule 7, at 291.

106. Presenting Alternative Calculation 2 as the "balanced choice", Oshkosh seeks revenues for the fully extended 20-year term. These options too are in the total discretion of the government. They allow extensions of the initial contract term in increments of up to five years. They have to be invoked in writing at least 120 calendar days before the expiry date of the initial contract. The ISS Contract expires five years after the contract award date of June 11, 2015.[70] To date, the option to extend has not been exercised. For the same reasons as provided above for the Acquisition Contract, the Tribunal finds it inappropriate to award compensation based on an estimate of the likelihood that the options will be exercised.

107. Accordingly, the Tribunal recommends compensation for the ISS Contract be based on the classes of revenue found in Oshkosh's bid price, which totals $[redacted].

108. As for the option years, there was no pre-agreed pricing structure; rather, prices were to be negotiated according to a methodology set forth in the ISS Contract. The methodology required the contractor to submit 12 months prior to the end of the contract period a description of work expected, including a detailed workload analysis for each option year; its proposed prices, rates and mark-up; detailed breakdowns including all costs, profit, firm rates, and prices; the contractor's actual costing data for the last five years; projected costing data; the contractor's three most recent audited unconsolidated financial statements; and any of the contractor's general company costing data or other information required by the Contracting Authority to establish revised rates and prices.[71] The ISS Contract provided that the "Contractor agrees that the negotiated Prices, Rates and Mark-up must be fair and justifiable."[72] It also required that "[u]nder no circumstances will the escalation rate exceed 3% between two consecutive fiscal years",[73] and that the bidder "certif[y] that the price and rates proposed are based on costs computed in accordance with Contract Cost Principles 1031-2, and includes an estimated profit amount of $_____."[74] Under the Price Certification clause, the "Bidder certifies that the price proposed is not in excess of the lowest price charged anyone else, including the Bidder's most favoured customer, for the like quality and quantity of the goods, services or both."[75] These certifications were all subject to a discretionary government audit.[76]

109. Oshkosh's expert reports calculate the value of exercised options by simply using Oshkosh's bid prices. PWGSC has not objected to this methodology. The Tribunal finds that, in the absence of specific bid prices for the options years, this is a reasonable proxy, particularly as it avoids any cost inflation as the above terms limit. Therefore, the Tribunal recommends that, to the extent that the government extends the ISS contract, Oshkosh shall be entitled to compensation of $[redacted] for each five-year extension exercised (or a portion thereof calculated on a pro rata basis should any extension be for less than the full five-year increment).

Other Revenue Categories Not Found in the Resulting Contracts

110. Oshkosh also seeks compensation for certain classes of revenue not provided for in the Resulting Contracts, or else duplicated under other headings.

70. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract – ISS, arts. 1.3.1 and 1.3.2, at 1120, Vol. 1.
71. *Ibid.*, Annex C, Appendix 9, art. 2.1.
72. *Ibid.*, art. 1.3.
73. *Ibid.*, art. 4.1.
74. *Ibid.*, art. 6.1.
75. *Ibid.*, art. 7.1.
76. *Ibid.*, art. 11.

Spare Parts and Preventative Maintenance Checks and Services (PMCS)

111. Oshkosh seeks compensation for estimated spare parts and PCMS. The ISS evaluated bid price did include a figure for estimated life cycle cost of vehicles for spare parts. However, the actual ISS Contract does not contain any requirement that Canada purchase spare parts from the wining bidder – it only requires the wining bidder to maintain the capability to supply them.[77] The ISS Contract further contemplated that all repairs and maintenance would be performed by DND (with the exception of Level Three and Level Four repairs, which PWGSC characterizes as "catastrophic" damage, such as from an explosion).[78] KPMG acknowledges this in its own report, writing: "We understand that outside of the initial parts provision, special tools and test equipment required as a part of the ISS Contract, the provision of parts to support ongoing maintenance of the MSVS vehicles and other deliverables were not linked to a contract to be awarded from the RFP process. . . . [P]arts and maintenance requirements were requested by the RFP for comparative purposes only."[79]

112. While the ISS Contract did not obligate DND to purchase any spare parts from the winning bidder, the ISS Contract award value, exclusive of taxes, to the winning bidder was $42,967,329, of which approximately $[redacted] comprises an estimate for spare parts required for the initial five-year term of the agreement.[80] Oshkosh's bid for spare parts for the fully extended 20-year term was $[redacted].[81] In its submissions, it now seeks revenues based on one of three alternative calculations:

A. AC1: All spare parts and PMCS provided solely by Oshkosh over 20-year life of vehicles (US$[redacted] and US$[redacted] respectively);

B. AC2: A 95% probability proprietary spare parts and PMCS will be provided over 20-year life of vehicles; and a 95% probability non-proprietary parts and PMCS provided in years 1-5, 75% for years 6-9, and 50% for years 11-20 (US$[redacted] and US$[redacted]); and

C. AC3: Only proprietary spare parts and PMCS provided over 20-year life of vehicles (US$[redacted] and US$[redacted]).

113. PWGSC challenges the divergence of the requested revenues for spare parts from Oshkosh's bid price and the attempt to recover for the fully extended 20-year term.

114. Oshkosh argues that this additional revenue (from 1.5 to almost 4 times as much as it bid) for spare parts and PMCS (which was not bid in the RFP or contemplated by the ISS Contract) is justified based on a predicted failure rate of parts multiplied by the probabilities that the spare parts would be purchased from Oshkosh as opposed to a third-party parts supplier. It also submits that it and the winning bidder's bid for spare parts was not a comprehensive quote for all parts that might be required over even the initial five-year term, but merely a selection of an enumerated list of 46 parts to allow the evaluators to compare the life cycle costs of different bidders' vehicles. It notes that this is a small fraction of the [redacted] parts (of which approximately [redacted]% are proprietary) included in the Bill of Materials for Oshkosh's vehicles.[82] It

77. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract – ISS Annex B, Statement of Work, art. 1.1.3.3, at 1165, Vol. 1.
78. *Ibid.*, art. 1.1.3.2, at 1164.
79. KPMG's Report at paras. 21, 49.
80. Lortie Affidavit at paras. 75, 99, 103.
81. *Ibid.*, Exhibit A, at 9 of 10.
82. Oshkosh's Confidential Reply Submissions (July 27, 2017) at para. 115.

also (correctly) notes that, as defined in the RFP, the type of work contemplated by Level Three and Level Four maintenance is broader than just the "catastrophic" field damage that PWGSC represents.[83]

115. Based on the terms of the RFP, the parties' bids, the ISS Contract, and the ISS Contract award, the Tribunal finds that the most appropriate, non-speculative award to Oshkosh is $[redacted] for spare parts for the initial term of the ISS Contract. While normally Oshkosh's bid value would be the reference point for compensation, here that is not practical because the bids contain only a sample of parts for financial evaluation purposes. Further, while PWGSC is correct that the ISS Contract does not include a requirement to purchase spare parts, it does include an obligation on the contractor to supply them as requested and the RFP did include a proxy for pricing spare parts over the life of the vehicles. Additionally, PWGSC's evidence is that the $[redacted] contract award value for parts reflects its actual estimated need for parts for the initial five-year term. Thus, revenue for spare parts is distinguishable from revenue for a service more speculative and without reference in the RFP, Resulting Contract and contract award, such as mid-life reset or PMCS.

116. As for options for spare parts, the Tribunal finds that, just as with options for the Acquisition Contract and ISS Contract, an award at this time of a fixed amount for spare parts would be speculative and, as such, inappropriate. It is conceded by all that there is no requirement in the contract to buy spare parts from the winning bidder. PWGSC has published a contract award to the winning bidder that includes estimated spare parts for the first five-year period. However, it has not published any amendments indicating that it has exceeded that figure for parts yet – nor is there any evidence on the record that it has in fact.

117. The Tribunal finds that compensation should be based on the value of any future contract amendments rather than Oshkosh's expert report figures because it is not practical or fair for those to be used. As to practicality, the Tribunal's recommendations should be relatively simple to follow and impose as minimum a burden as possible on both parties to calculate compensation. Awarding compensation based on Oshkosh's expert report prices would require the government to (i) itemize the purchases of potentially thousands of Mack parts; (ii) match those parts to the equivalent Oshkosh parts; and then apply Oshkosh's prices (many of which were never bid or even negotiated) to those items. This is not a straightforward, arithmetic exercise, but rather one involving wide exercises of discretion and inviting inevitability future conflict. As to fairness, the Tribunal finds that the profit margins proposed by Oshkosh are not reasonable. According to KPMG, the margins applied for the spare parts quoted in Oshkosh's bid are [redacted] but the margins for all other parts is over [redacted].[84] A [redacted] margin departs from both the prices Oshkosh bid and the terms of the Resulting Contracts giving the government's full transparency regarding spare parts margins and leverage in the form of no obligation to purchase from the winning bidder while the bidder is required to maintain capacity to supply on request.

118. As for using Oshkosh's bid prices, that would be practical but not fair. As Oshkosh has noted, not all parts were priced in the RFP, therefore its bid price undercounts revenue. Additionally, the proposition that PWGSC's estimated spare parts needs significantly exceed Oshkosh's bid price is evidenced by the fact that PWGSC's estimated figure for only the first five years is about half of Oshkosh's bid price for spare parts for the full 20-year life cycle.

119. Based on the above, the Tribunal finds that any compensation for options for spare parts exercised in the future should be based on amendments to the contract award value. Accordingly, the Tribunal recommends that, if the government extends the ISS Contract and publishes a contract amendment that awards any amounts for spare parts to the winning bidder in any future term, Oshkosh shall be entitled to

83. *Ibid.* at para. 122.

84. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 6, KPMG's Report at para. 104.

compensation for spare parts in a future contract amendment or extension based on, for reasons explained below, a 10% fixed percentage of the value of the contract amendment.

120. As for PMCS, the Tribunal does not believe that any compensation is owed for these speculative revenues which are not found in the RFP, were not part of the parties' bids, and are not recognized in the ISS Contract. The scope for maintenance provided by the winning bidder, while not as limited as PWGSC submits, is still more restricted than what Oshkosh has included in PMCS – for example, KPMG describes PMCS as including "maintenance packages to perform routine scheduled maintenance"; however, the RFP defines Level Three and Level Four maintenance (those the bidder would perform) as much more intensive, including "reconditioning" and "reclamation and limited manufacture" for the former and "complete fabrication or manufacture to design specifications, retrofit, mid-life improvements and likely a production line capability" for the latter.[85] "[O]perator maintenance and preventative maintenance" and "corrective maintenance by repair or replacement of parts and assemblies, limited only by time . . . usually . . . 24 hours" is specifically captured in the definitions of Level One and Level Two maintenance, which are the exclusive purview of DND technicians.[86]

121. Further, the RFP specifically provides that the "Repair and Overhaul program service outlined in this SOW is included as Level Three repairs" – meaning revenues for this is already captured under the Repair and Overhaul Free-Flow heading under the ISS Contract.[87] Granted, the RFP provided that the financials for Repair and Overhaul Free-Flow was "for bid evaluation purposes only"; however, it provides on the same page that "[t]he evaluation of the items listed herein is not a commitment to purchase any of the items listed."[88] Further, Oshkosh is double-counting Repair and Overhaul Free-Flow by including this class of revenue with PMCS.

122. The Tribunal notes in particular that Oshkosh's affidavits and KPMG's reports never address the distinction between Level 1 and Level 2 maintenance (to be performed by DND) and Level 3 and Level 4 (to be performed by the contractor) – in the appendices to its reports, KPMG merely states that PCMS and Spare Parts figures are based on "[a]nnual revenue and cost estimates of Spare Parts and PCMS for the Base Contract and options were aggregated from a detail Bill of Materials ("BoM") provided by Oshkosh."[89] Mr. Bleck states that Oshkosh calculated Spare Parts and PMCS by multiplying part failure rates by the number of parts found in a vehicle, the total number of hours the vehicle will be operated over the contract period, and the number of vehicles in the contract.[90] But this evidence too bears no relation to the terms of the RFP and the ISS Contract regarding division of labour between the contractor and DND. It is the classes of revenue found in the ISS bid evaluation that the ISS Contract award and the parties' bids were based on, not PMCS.

123. Accordingly, the Tribunal awards no compensation for PMCS revenue.

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85. Oshkosh's Confidential Reply Submissions (July 27, 2017) at para. 122.
86. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract ISS, Annex B, Statement of Work, art. 1.1.3.2, at 1164, Vol. 1.
87. *Ibid.* at 1165.
88. Exhibit PR-2015-051-01B, RFP, Part 4 – Evaluation Procedures and Basis of Selection, ISS Financial Evaluation, Table 1 – Repair and Overhaul Free-Flow (Evaluation), at 171, Vol. 1.
89. KPMG's Report, MSVS Lost Profit Analysis: Alternative Calculation 1, Schedule 1, at 216.
90. Oshkosh's Confidential Book of Documents (April 3, 2017), Tab 2, Affidavit of Tim Bleck [First Bleck Affidavit], at para. 52.

Mid-Life Reset

124. Oshkosh admits there is no specific provision in the RFP stating that the winning bidder will be required to perform a mid-life reset for the SMP vehicles. However, it claims that refurbishment and upgrades would likely be performed within the 20-year life cycle of the vehicles. It notes that Attachment BI-2 to Appendix BI of the Statement of Work of the ISS Contract requires the contractor to develop a Long-Term Plan that includes the contractor's "recommendations regarding maintenance, upgrade and refurbishment activities to achieve cost effective long-term logistics support, over the Estimated Life Expectancy."[91] Oshkosh relies on the affidavit evidence of Messrs. Williams and Bleck and a document published on DND's Defence Acquisition Guide 2016 website for the proposition that a mid-life reset would likely occur.

125. PWGSC maintains that there is no entitlement to revenues for a mid-life reset contemplated in the RFP, the bid prices and financial evaluation contained no element of mid-life reset, the Resulting Contracts did not promise any revenues for mid-life reset, no mid-life reset has ever been proposed, tendered or awarded for this procurement, and no mid-life reset has even been the subject of a funding request by DND or approval by Treasury Board.[92] PWGSC also notes that Oshkosh's own proposal never mentioned a mid-life reset[93] and that KMPG admits that "the RFP does not contract the requirement to conduct a Mid-Life Reset for the MSVS vehicles . . . ."[94]

126. In reply, Oshkosh admits that a mid-life reset was not a specified requirement in the RFP or ISS Contract, and that no bidder's proposal contained pricing for it. However, it maintains the Statement of Work of the ISS Contract contemplated it, citing the Long-Term Plan, the reference to "mid-life improvements" in the description of Level Four repair responsibilities, and the reference to "mid-life refits" in reference to electronic equipment requirements in the SOW. Oshkosh argues that it is entitled to compensation for any classes of "anticipated revenues (and profits derived therefrom) that were reasonably foreseeable over the life of the contract and vehicle's service lifetime."[95]

127. This fundamentally misstates as a matter of law what a complainant is entitled to at the Tribunal for compensation for breach of a trade agreement. The principle Oshkosh articulates (recovery for any type of damages reasonably foreseeable) may be contemplatable for recovery of "damages" at common-law in the courts for breach of contract. It is not standard satisfactory basis for "compensation" for breach of a trade agreement at the Tribunal. Compensation is tied first and foremost to the obligations the parties assumed in the RFP and their proposals and (where compensation cannot be practically calculated based on those) the ultimate published contract award value – it should not be based on conducting a but-for, factual or accounting inquiry into what additional potential ancillary or follow-on services and goods might also likely have been procured. Further, a compensation recommendation from the Tribunal contains a flexible, discretionary element consistent with the Tribunal's mandate to ensure that it remains a timely, low-cost accessible forum, that its recommendations be practical and likely to be enforced, and that complainants not receive a windfall and the government not be required to duplicate procurement costs. These considerations result in compensation being more likely to be awarded (and likely to be received sooner) upon proof of liability at the Tribunal rather than a court, but, concomitantly, the scope of revenues captured by a compensation award and the level of profit recognized may be lower.

128. The Tribunal concludes that as a matter of law Oshkosh is not entitled to mid-life reset revenues. A finding on the factual likelihood that such a reset would be exercised is therefore not warranted.

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91. Exhibit PR-2015-051-01B, RFP, Part 8 – Resulting Contract – ISS, Annex B – Statement of Work, Appendix BI – Contract Data (CDRL, DIDs), Attachment BI-2 – Data Item Descriptions, at 1295, Vol. 1.
92. Lortie Affidavit at para. 46.
93. PWGSC's Confidential Submissions (June 8, 2017) at paras. 139-142.
94. KPMG's Report at para. 61.
95. Oshkosh's Confidential Reply Submissions (July 27, 2017) at para. 135.

Systems Technical Support

129. Oshkosh claims revenue for systems technical support which it describes as "contractor-supplied services including kit development, design studies, testing and secondary logistics support."[96] Mr. Bleck states that "[v]arious provisions of the MSVS RFP provided that the successful bidder would provide support and other services to DND . . .", but does not cite any sections of the RFP supporting this statement.[97] Instead, he cites to KMPG's Report, which merely states that "[s]ystems technical support and maintenance of data effort were additional support requirements identified by Oshkosh."[98] Further, he admits later that systems technical support and maintenance of data efforts are "streams of possible revenue that do not fall directly under the resulting contracts from the MSVS procurement."[99] The revenue and cost figures for systems technical support was not derived from Oshkosh's proposal, the RFP, the ISS Contract, or the contract award but rather from its HEMTT A4 vehicle experience in other contracts.[100]

130. PWGSC maintains that there was no provision in the RFP for systems technical support and it should not be recognized. Oshkosh does not defend this class of claimed revenue in its reply submissions.

131. For the same reasons as provided above regarding mid-life reset, the Tribunal finds that as a matter of law revenues from systems technical support should not be included in the compensation recommendation. A finding on the factual likelihood that an ancillary contract for such services would be entered into by PWGSC is therefore not warranted either.

Maintenance of Data Efforts

132. Oshkosh claims revenue for maintenance of data efforts, which it describes as services to "ensure that the logistics products sold to customers, like DND, would be updated to allow customers to purchase spare parts, and maintain vehicles based on configuration changes as the vehicles age, and undergo configuration adjustments."[101] The revenue and cost figures for maintenance of data efforts was not derived from Oshkosh's proposal, the RFP, the ISS Contract, or the contract award but rather from its HEMTT A4 vehicle experience in other contracts.[102]

133. PWGSC maintains that there was no provision in the RFP for maintenance of data efforts and it should not be recognized. Oshkosh does not defend this class of claimed revenue in its reply submissions.

134. For the same reasons as provided above regarding mid-life reset and systems technical support, the Tribunal finds that as a matter of law revenues from maintenance of data efforts should not be included in the compensation recommendation. A finding on the factual likelihood that an ancillary contract for such services would be entered into by PWGSC is similarly unwarranted.

US vs. Canadian Dollars

135. The RFP contained a Foreign Exchange Adjustment option permitting bidders to be paid in US dollars calculated according to a stated formula for goods and services originating outside Canada during the contract.[103] The purpose of the provision was to manage the risk for both parties of significant fluctuations in the foreign exchange market.[104]

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96. Oshkosh's Confidential Submissions (April 3, 2017) at para. 72.
97. First Bleck Affidavit at para. 56.
98. KPMG's Report at para. 68.
99. First Bleck Affidavit at para. 58.
100. *Ibid.* at para. 59.
101. Oshkosh's Confidential Submissions (April 3, 2017) at para. 72.
102. First Bleck Affidavit at para. 59.
103. Exhibit PR-2015-051-01B, RFP, Part 7 – Resulting Contract – Acquisition, art. 3.6, Part 8 – Resulting Contract – ISS, art. 3.7, Vol. 1.
104. Lortie Affidavit at para. 118. Exhibit PR-2015-051-01B, RFP, Part 3 – Bid Preparation Instructions, art. 2.3.7: "Bidders may request Canada to assume the risk for exchange rate fluctuation for each Contract."

136. Oshkosh claims it is entitled to revenues based on its bid prices converted to U.S. dollars based on the exchange rate (1.065 CD:1 USD) prevailing at the date of its bid.

137. PWGSC challenged the calculation of the exchange rate as overstating the loss suffered by Oshkosh given the change in the value of the Canadian dollar between the bid date and the present, and proposed an adjustment, which Oshkosh accepted.[105]

138. However, the Tribunal finds that according any exchange rate adjustment is inappropriate in this case. Oshkosh submitted a bid in Canadian dollars. It has a claim at the Tribunal for compensation for breach of the trade agreements. The purpose of the exchange rate adjustment in the RFP was not to protect potential bidders from the risk of a decrease in the value of the Canadian dollar (or reciprocally to deprive them of the benefit of an increase in the value of the Canadian dollar) for purposes of a potential future claim of compensation. It was to manage the risk of significant swings in exchange rate fluctuation in the context of the actual manufacture and provision of goods and services originating in the U.S. during the course of the contract. Oshkosh is engaged in no such production, and the exchange rate provision in the RFP contains no language stating it extends to cover hypothetical production in the course of a calculation of lost profits for compensation or damages awards.

139. Oshkosh provided no case law authority for why the Tribunal should adjust its compensation awards as a matter of course for RFPs in which a party has chosen to hedge the risk of exchange rate fluctuations vis-à-vis its cost of production.

140. Further, the Tribunal has determined that the most appropriate basis for calculating compensation is by applying a reasonable profit margin to either Oshkosh's bid prices or, where those are not available or practical, the contract award value, which were both denominated in Canadian dollars. Therefore, it is not necessary to employ an exchange rate adjustment to align revenues and expenses.

141. Because Oshkosh has no entitlement for its compensation award to be adjusted to reflect currency fluctuations since 2014, and because as a practical matter the calculation of compensation does not require it, the Tribunal makes no adjustment for foreign exchange rate.

Profit Margin/Expenses

142. The complainant bears the burden of proving the quantum of compensation on a preponderance of the evidence standard.[106]

143. In this case, the Tribunal finds it more appropriate to apply a reasonable profit margin to calculate lost profits than to derive the latter from revenue-less-expenses. As discussed above, Oshkosh did not follow the framework of the RFP, financial proposal, and Resulting Contracts in preparing its lost profit analysis based on revenue-less-expenses. Further, it expressed expenses and lost profits in US dollars, though its bid was in Canadian dollars. It also departed from the Tribunal's preferred practice of assessing lost profit based on the expectations of the parties at the time of the bidding by inappropriately incorporating contemporary data regarding material cost and exchange rate fluctuation, and by inappropriately reducing estimated expenses by omitting an appropriate amount for fixed-cost overhead and bid preparation costs (the latter of which the RFP excluded from recovery). In these circumstances, the Tribunal finds that it cannot reliably or practically adjust expenses to account for these factors. Therefore, it will, as it has in past cases and as the

105. Oshkosh's Confidential Reply Submissions (July 27, 2017) at para. 172.
106. *3202488 Canada Inc. o/a Kinetic Solutions* (25 June 2015), PR-2014-025 (CITT) [*Kinetic Solutions*] at para. 11.

Guidelines contemplate when expenses are not substantiated, proceed via a determination of the reasonable profit rate to apply to the revenues recognized above.[107]

Reasonable Profit Rate

– General Considerations

144. The Tribunal recognizes that the *Guideline* does not purport to be a strict, formulaic code for determining appropriate rates of compensation but rather a statement of underlining general principles. The Tribunal also recognizes that each case is distinct, and that circumstances particular to each matter will influence the establishment of a reasonable rate of compensation. Nevertheless, the Tribunal would like to seize the opportunity here to provide an update on the status of its case law and to highlight some considerations that are central to its analysis regarding compensation. In that respect, the Tribunal considers that the particularities of the procurement review process, when compared with an action for damages under the common law, are fundamental.

145. First, the Tribunal is mindful that Parliament has afforded the Tribunal wide discretion to remedy trade-agreement violations when overseeing federal procurements, for the betterment of that system as a whole, and not just as an adjudicator of disputes between private parties. In that context, the Tribunal is concerned with the competing imperatives of, on the one hand, ensuring that compensation deters violations of the trade agreements and encourages complainants to bring valid complaints and, on the other hand, avoiding providing windfalls to complainants.[108]

146. Second, the Tribunal remarks that the Federal Court of Appeal has emphasized that the Tribunal's compensation recommendations are informed but not limited by the common law of damages.[109].

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107. *Guidelines*, art. 3.2.6: "In cases where a complainant fails to substantiate its profit margin, the Tribunal may reduce the compensation suggested by a profit margin percentage rate that it deems to be appropriate in the circumstances." *Almon Equipment Limited* (14 October 2011), PR-2008-048R (CITT) [*Almon Remand*], at paras. 8-9, 23.
108. *Maritime Fence Ltd.* (1 April 2011), PR-2009-027 (CITT) at para. 5; *Envoy* at para. 22; *Conair Aviation, A Division of Conair Aviation Ltd.* (30 January 1997), PR-95-039 (CITT) at 4: "The Tribunal does not expect its recommendation to be a windfall to the complainant."
109. *Envoy* at para. 21. The Tribunal also believes there is an inherent distinction between compensation based on trade-agreement violations and lost-profit damages based upon breach of contract. This is illustrated by the well-recognized principle that the mere violation of a law, a regulation, or the duty of fairness by the government does not by itself entitle a complainant to damages. See *Kim v. Canada*, 2017 FC 848, at para. 24. *Chuang v. Royal College of Dental Surgeons of Ontario*, 2007 CanLII 24075 (ON SC), at para. 32. Of note, the *CITT Act* does not explicitly specify a remedy for "damages", as Parliament has enacted elsewhere. Compare *CITT Act* at subsection 30.15(2) (providing that a complainant may "be *compensated* by an amount specified by the Tribunal"; the French version maintains the distinction, using the term "indemnité" as opposed to "dommages") with *Competition Act*, RSC 1985, c C-34, at section 36 (providing a private right of action in court for "an amount *equal* to the loss or *damage* [in the French version, "la perte ou des dommages"] proved to have been *suffered*"); *Patent Act*, RSC 1985, c P-4, at section 55 ("A person who infringes a patent is liable to the patentee . . . for all *damage* sustained by the patentee . . . after the grant of the patent, *by reason of* the infringement"); and *Copyright Act*, RSC 1985, c C-42, at section 35 (providing that an infringer is liable to pay "such *damages* to the owner of the copyright as the owner has suffered *due to* the infringement") [emphasis added].

147. Third, historically, the Tribunal has frequently recommended compensation at a profit rate of around 10%.[110] The Tribunal has remarked that in most federal procurements a reasonable profit rate falls in the range of 10%, justified in part by the relative absence of risk in government contracts (and enforceable monetary awards).[111] The Tribunal remains of the same view. Such a rate is typically high enough to represent more than merely a risk-free rate of return (i.e., 2-4%), to deter violations of the trade agreements as a cost of doing (government) business, and to (while avoiding windfalls) properly compensate compliant bidders with valid grounds of complaint when injunctive-like relief is impractical.

148. As such, the Tribunal suggests that the case law indicates that 10% is a typical starting-point baseline for the establishment of a reasonable rate of profit. The Tribunal also recognizes that variances from such a level have been awarded from time to time, but that the calculation of compensation is not simply (or even primarily) an expert accounting exercise. The process for determining compensation for breach of a trade agreement should, as much as possible, avoid hypothetical estimates about future revenues and expenses that tend to devolve into a battle of the experts. Instead, subject to any terms to the contrary in the solicitation documents, a reasonable net profit rate should be estimated based on historical and/or qualitative evidence of firm- and industry-specific net profit rates for similar goods or services.[112] Having compensation determinations turn on collecting, vetting, and debating contemporaneous, granular cost estimations impedes the Tribunal's objectives of serving as an accessible forum for timely, inexpensive remedies on procurement complaints.

149. This approach is consonant with Parliament having established an administrative, quasi-judicial procurement review regime that complements rather than simply duplicates the procedures and remedies

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110. See, for example, *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT) at para. 30; *Papp Plastics & Distributing Limited* (31 January 2002), PR-2001-038 (CITT) [*Papp*] at 7; *Service Star Building Cleaning Inc.* (23 May 2002), PR-2001-063 (CITT) at 1; *Valcom Ltd. (Ottawa)* (2 December 2002), PR-2002-014 (CITT) at 2. The Tribunal has identified six cases with lost profit rates outside a 6-14% range. *Dr. John C. Luik* (28 November 2000), PR-99-035 (CITT) (57% lost profits on $100,000 consumer study with minimal expenses); *Foundry Networks Inc.* (16 November 2001), PR-2000-060 (CITT) (23% on $159,341 of networking equipment); *Knowledge Circle Learning Services Inc.* (24 June 2014), PR-2013-014 CITT [*Knowledge Circle*] (45.2% on $171,282 for French language training); *Foundry Networks Inc.* (10 October 2002), PR-2001-048 (CITT) (23%); *Freebalance Inc.* (4 July 2012), PR-2011-041 (CITT) (17.06% for software licences); *Almon Equipment Limited* (14 October 2011), PR-2008-048R (CITT) at para. 29 (15-20% range for service contracts, with higher rates for specialized services).

111. *Spacesaver Corporation* (27 April 1999), PR-98-028 (CITT) at 3, noting PWGSC's evidence that accepted standard for reasonable profit margins in non-competitive acquisitions or low-value procurements is 10% and ruling that, "given the absence of risks normally associated with the performance of this type of contract, the Tribunal determines that the compensation for lost opportunity on the basis of profit should be set at 10 percent . . . ." *Wescam Inc.* (19 April 1999), PR-98-039 (CITT) at 9-10: "Given the nature of the goods procured, the amount of profit that reasonably could have been expected is approximately 10 percent of the total value of the contract awarded, excluding GST." *IBM Canada Ltd.* (7 September 2000), PR-99-020 (CITT) at 5: "The Tribunal is aware that the Department has established a guideline to determine an appropriate level of profit when negotiating contracts for the acquisition of commercial goods. That amount is 10 percent of the contract price. Accepting that the issue before the Tribunal in this case does not deal with a negotiated contract, the Tribunal nevertheless believes that 10 percent of the contract price is a fair amount of compensation." *Papp* at 7. *FreeBalance Inc.* (4 July 2012), PR-2011-041 (CITT) at para. 42, identifying reasonable rates applied by the Tribunal in absence of substantiated profit margins of 10% and 15%, depending on facts of case. *ACE/ClearDefense* at 5, where a 10-12% reasonable profit rate was accepted. Specialized services may attract a profit premium because of limited competition. *Almon Remand* at para. 29.

112. *ACE/ClearDefense Inc.* (17 April 2002), PR-99-051 (CITT) [*ACE/ClearDefense*] at 5 (discussing types of evidence – financial statements, similar contracts, industry standard – relevant to establishing a reasonable profit margin).

already available at common law for breach of contract at a court. Having two forums for suppliers to bring their complaints with different rules, procedures, and remedies promotes systemic efficiency by permitting parties to select the adjudicative forum that best matches their needs. The Supreme Court of Canada expressly recognized the jurisprudential benefit of multiple, complementary forums in *Telezone*, where it endorsed an alternative two-track path for parties aggrieved by government action: an application for judicial review for only injunctive relief, or an action for only damages under breach of contract or tort.[113] Declaring that the question was "fundamentally about access to justice", the Court held that "[p]eople who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind."[114] Access to justice and simplicity are as if not more important in the fulfilment of the Tribunal's procurement review mandate.

– Tribunal's determination in this case

150. Turning to the facts of this case, as discussed below, Oshkosh did not present any evidence that its *net* lost profit margin was greater than 10%, and PWGSC's own expert took the position that a rate around 10% was reasonable. The Tribunal agrees that a 10% profit rate is reasonable on the facts of this case for the following reasons.

151. KPMG calculated Oshkosh's lost profits by subtracting its expected expenses (based on its US costing data for the vehicles from actual contracts) from its expected revenues (converted to US dollars per the foreign exchange adjustment discussed above). KPMG based its expense estimates on the financial model Oshkosh used when preparing its bid, as well as supporting data and documents.

152. KPMG's estimated profit margins vary based on the alternative calculation scenarios and assumptions applied, but in what Oshkosh submits is the "balanced assessment" (AC 2), it identifies a [redacted]% profit margin as reasonable and consistent with Oshkosh's own margins in the years 2007-2015 and the average industry margin of 19.5%.[115] The profit margins for the other calculations are in the same range: [redacted]% (AC3) and [redacted]% (AC1).[116]

153. PWGSC's expert has established lost profit margins significantly lower ranging from [redacted]% to [redacted]%.[117] PWGSC criticizes KMPG's reports from a number of stances.

154. First, it objects that Oshkosh has not provided it all the documents and data it has requested. The Tribunal dismisses this argument, because PWGSC has not filed a request to compel such disclosure. The onus is on the party seeking access to supporting documents or data to, failing their voluntary provision, make a formal request for an order compelling their disclosure in a timely fashion.

155. Second, it challenges the sufficiency of the affidavit of Tim Bleck. PWGSC describes it as mostly containing testimony on information and belief as opposed to personal knowledge. It submits that Mr. Bleck's vouchsafing of the integrity and reliability of the U.S. costing data by reference to the fact that it

113. *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 [*TeleZone*], at paras. 75, 79-80. See also *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, at paras. 15-20.
114. *TeleZone* at para. 18.
115. Oshkosh's Confidential Submissions (April 3, 2017) at para. 8.
116. *Ibid.* at paras. 155-157.
117. PWGSC's Confidential Brief of Evidence (June 8, 2017), Tab 3A, Expert Report of Duff & Phelps [D&P Report] at para. 3.9.

is subject to U.S. government oversight and audit and costing standards and such data was acquired in a U.S. procurement involving the same vehicles is inadequate from an evidentiary standpoint.

156. The Tribunal dismisses this argument as well. Even in court actions, affiants may attest to evidence on information and belief – there is no requirement that affiants have personal knowledge, which simply goes to weight. *A fortiori*, at the Tribunal, whose evidentiary rules are more liberal than the courts', there is no requirement that an affiant in a compensation determination only testify to their personal knowledge.[118] Further, with regard to the sufficiency of his verification of the origins of the costing data, has PWGSC wanted to concretely verify it on a granular level, it should have filed a request to compel disclosure.

157. Third, PWGSC also criticizes the structure of KPMG's analysis as not corresponding to the RFP or Oshkosh's own financial proposal but rather Oshkosh's own internal accounting model called *Pro Pricer*. The Tribunal agrees with this argument, as discussed in its treatment above of KPMG's and Oshkosh's claim for certain categories of revenue not found in the RFP, Resulting Contracts, or contract award. This, however, goes to recognizable revenue not expenses.

158. Fourth, PWGSC criticizes KPMG for applying a contingency discount only to the options (based on the likelihood they would (not) be exercised) and not to the base contracts as well. In support of applying such a contingency, it identifies multiple risks to actually recovering full estimated lost profits including performance/execution risk (labour force, suppliers, etc.); margin risk (cost increases); timing risk (delays re raw materials, production, rework, regulation); and model-assumption risks (regarding fixed overhead costs, life of vehicles, usage rate, failure rate, spare parts).

159. The Tribunal dismisses this argument. As explained above, the compensation phase is not a free-wheeling factual investigation to how the contract would have been performed in the real world – it is a simple determination of revenue with a reasonable profit margin.

160. Fifth, PWGSC objects that in KPMG's Addendum, it increased its estimate of lost profits primarily due to favourable assumptions regarding raw material costs. Its expert Duff & Phelps (D&P) objects, on the grounds that KPMG undertook no independent analysis to verify the cost savings; that business realities (such as Oshkosh earlier representing it would have obtained fixed-cost long term contracts) do not support such a long-term outlook (as opposed to variances being due to short term volatility); and that the adjustments are speculative. The savings amount to about [redacted]% of material costs.[119]

161. Oshkosh replies that the Tribunal should use the known materials costs of today rather than the non-binding quotes obtained at the time of the bid. The Tribunal disagrees. For the same reasons rejecting Oshkosh's request for an exchange rate adjustment, the Tribunal finds that a compensation recommendation should not be inflated (or deflated) simply because of a fluctuation in material costs realized in future years.

162. Sixth, D&P opines that KPMG improperly relied on management estimates of fixed costs for incremental costs. D&P requested various data from Oshkosh to calculate a "bottoms up" analysis of how costs fluctuate in response to difference production volumes, but Oshkosh did not provide the requested data.

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118. See section 35 of the *CITT Act*: "Hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit." *MRP Retail Inc. v. President of the Canada Border Services Agency* (27 September 2007), AP-2006-005 (CITT) at para. 51: "the Tribunal's normal practice is to admit evidence liberally, but only to give each item of evidence the weight that it deserves."
119. Oshkosh's Confidential Submissions (July 27, 2017) at para. 151.

163. Because PWGSC did not file a request to compel disclosure of the requested documents, the Tribunal dismisses the objection to Oshkosh not creating a "bottoms up" cost analysis. The Tribunal also finds that such an analysis is not reasonably required. As mentioned, this RFP involved the procurement of hundreds of units of five variants of military vehicles and related equipment with parts totalling in the thousands. Oshkosh provided KPMG with costing data based on the financial model it used to make its bid and the data it has collected from sales of the same model vehicles to the U.S. military. Those sources are sufficiently reliable that a "bottoms up" approach was not warranted here, given the disproportionate cost and expense that would entail.

164. Seventh, D&P contests the amount of overhead fixed costs that KPMG included in lost profits. It is important to note here that all of the profit margins presented by KPMG are gross (not net) profit margins; that is, they only include incremental revenue and incremental costs associated with the contract – they exclude fixed overhead costs (sometimes referred to as Manufacturing and Selling, General, and Administrative (SG&A)). By contrast, the financial model used by Oshkosh in its proposal for the RFP, on which KPMG relies, reflected its full cost of production, including an appropriately allocated portion of (fixed) overhead costs. In preparing its lost profit estimate, KMPG included an adjustment to remove fixed overhead costs that are assumed to have been incurred in any event and are, thus, not incremental to the contract. KPMG estimates, based on information and representations from Oshkosh, that approximately 60% of overhead costs ($[redacted]) are fixed. D&P finds this estimate unsupported and recommends reducing it to 40% instead of 60%.[120]

165. The Tribunal finds that the appropriate profit margin is net income, not gross margin, which includes an appropriate deduction for fixed (overhead) costs, including bid preparation costs, fairly allocated to the contract.

166. First and foremost, that is the profit margin Oshkosh actually used in preparing its proposal for the RFP – it is therefore directly tied to its bid, the competition, and its own expectations.[121] Second, the complainant cannot actually perform the contract without at least some amount of overhead, whether incremental or not – just as it cannot win the RFP without incurring some bid preparation costs. There is no reason why some portion of that overhead (and all of the bid preparation costs, especially given the RFP provision barring recovery of same) should not be allocated to the Resulting Contracts. Oshkosh does not allege that all its overhead has already been assigned to other work – in which case some additional incremental costs would need to be assigned anyways. Regardless, the Tribunal's compensation practices should not result in the government implicitly providing a windfall in terms of general overhead for contractors: treating each contract as incremental results in every contract being incremental, with no (fairly allocated) deduction for overhead in any contract.

167. Third, while the Tribunal has endorsed exclusion of non-incremental fixed costs in the past, that was based on an approach of simply by default mirroring the common-law approach to calculation of damages.[122] Since *Envoy* and *Almon*, however, the Federal Court of Appeal has made clear that the Tribunal should not slavishly adopt common-law limitations as its own. Fourth, even under the Tribunal's prior practice, it recognized exceptions "where a contract would have seen a large increase in revenue, [in which case] overhead costs would inevitably rise, at least incrementally, and therefore should be deducted accordingly."[123] This RFP involved nearly a billion dollars of revenues over 20 years – it is unlikely there

120. D&P Report at 12, 75.
121. KPMG's Report at para. 174.
122. *Immeubles Yvan Dumais Inc.* (7 June 2010), PR-2007-079 (CITT) at paras. 69-72.
123. *Kinetic Solutions* at para. 12.

would have been no incremental increase in overhead as a result. Fifth, historically, except in cases where the complainant would otherwise be left with no compensation,[124] the Tribunal has deducted both direct and indirect costs from gross revenue to derive lost profit,[125] including bid preparation costs and an amount allocated for overhead.[126]

168. The Overhead Adjustment is presented in Schedule 4 of the appendices to KPMG's Reply Report right next to the column entitled Unadjusted Cost. It constitutes roughly [redacted]% of the unadjusted cost. If these fixed costs and the alleged (but not claimed) US$[redacted] in bid preparation costs are added back to the total costs, as at least the former were originally in Oshkosh's bid proposal, then the estimated profit rate in each of the three alternative calculations drops dramatically, i.e., to below 10%.

169. In sum, the Tribunal is of the view that a profit rate of 10% is reasonable on the facts of this case. In particular, the Tribunal finds that as a matter of law and policy reasonable profit rates should be established based on net profit not gross profit, including a fair allocation of overhead, which justifies a considerable downward departure from Oshkosh's estimate in the [redacted]. Further, the Tribunal finds that the better evidence of reasonable profit rate is what Oshkosh expected to earn at the time of its bid. This informed its bid price and was based on the information known at the time. Incorporating information from later developments is not consistent with the parties' expectations or predictability for stakeholders in the award of compensation in procurement complaints. Incorporating the above adjustments results in a reasonable profit margin of under 10%. However, given that PWGSC's own expert deems up to 11% to be reasonable, the Tribunal sets the rate at 10%.

Reductions to Overall Profit Rate Claimed by PWGSC

170. PWGSC submits that, for either each revenue and cost line item or for the quantum of compensation calculated as a whole, the Tribunal should apply a significant contingency risk discount of 50% or more. It further submits that this 50% discount should be applied on top of the discount already to be applied for lost opportunity, on the basis that not only were there two other higher-scoring compliant bidders but that Oshkosh had little chance of surpassing either of them through retesting.

171. Oshkosh opposes applying any contingency risk as gratuitous and unfounded in law or evidence.

172. The Tribunal dismisses PWGSC's argument for several reasons. First, the Tribunal has already ruled per the motion to strike that reopening the question of Oshkosh's likelihood of wining the RFP based on retesting is *res judicata*. Second, PWGSC has provided no empirical or qualitative evidence to support its proposal of a 50% discount. Third, PWGSC has provided no legal authority or policy reason for why the Tribunal should apply a 50% contingency discount to lost profit calculations. PWGSC cites to article 3.2.4 ("Amount for Contingency") of the *Guidelines*, which appears (along with reductions for "remoteness",

124. *Averna Technologies Inc.* (10 October 2006), PR-2005-035 (CITT) at para. 18.

125. *CSI Consulting Inc.* (22 March 2006), PR-2003-070 (CITT); *Bluedrop Performance Learning Inc.* (19 February 2009), PR-2008-017 (CITT) at para. 38; *Les Systèmes Equinox Inc.* (1 June 2011), PR-2006-045R (CITT) at para. 20, upheld in *Systèmes Equinox Inc. v. Canada (Public Works and Government Services)*, 2012 FCA 51, at para. 9; *Kinetic Solutions* at paras. 12-15.

126. *Douglas Barlett Associates Inc.* (7 January 2000), PR-98-050 (CITT) at 3, criticizing that "DBA has not subtracted any costs other than the cost of goods sold to arrive at its expected profit. Nor has DBA argued that the project was over and above normal work and that, therefore, all overhead had been previously assigned. Even bid preparation costs were not removed as a cost." *Antian Professional Services Inc.* (15 August 2007), PR-2006-024 (CITT) at paras. 16-18, finding deduction of a pro rata share of total overhead costs to be reasonable. *Foundry Networks Inc.* (10 October 2002), PR-2001-048 (CITT) at 2, where the recommendation based on net profits.

"mitigation", "time value of money", and "failure to substantiate profit margin") under the heading "Reductions in Recommended Compensation". However, these reductions should only be applied in the framework of the concrete terms of the solicitation documents (including the RFP and amendments, Resulting Contracts, and Question and Answer responses), bidders' proposals, and the ultimate published contract award. They are not opportunities for parties to construct an elaborate "but for" scenario (untied to the terms of the solicitation documents) in which the complainant would have won the contract, in order to guess what types of other costs they would have incurred.

173. PWGSC also argues that, in addition to a global 50% contingency discount, there should be a downward adjustment based on the risk of timing, delay and the additional costs of successfully fulfilling a procurement of this size and complexity. PWGSC relies principally on the affidavit evidence of Mr. Lortie for this argument. Oshkosh opposes this on the same grounds as the proposed contingency discount.

174. The Tribunal dismisses this argument for several reasons. First, in terms of risk of cost overrun and lost revenue, it is speculative – Mr. Lortie does not testify that this has in fact happened with Mack's performance. Even if he had, that is no reason for assuming Oshkosh's performance would fail to meet the contract's performance standards. Second, where Mr. Lortie does testify about cost overruns and delays he does so only in general terms, but does not provide examples from other specific procurements (much less this one). Third, as discussed above at length, compensation submissions should be tied to the solicitation documents, the proposals, and the contract award. They are not an opportunity for a separate trial and a battle of the fact and expert witnesses on how this or similar contracts would unfold. Such an inquiry is inherently hypothetical, and is inconsistent with the role of the Tribunal as a forum of accessibility and predictability for complainants who raise valid grounds of complaint and are deemed entitled to some level of compensation.

175. In conclusion, the Tribunal finds no ground for reducing the profit rate determined above.

Lost Opportunity Discount

176. The Tribunal recommended in its determination and reasons issued on July 20, 2016, that, if retesting was not feasible, Oshkosh should be compensated for its lost opportunity.

177. Lost opportunity is awarded in lieu of lost profits when the Tribunal is unable to clearly determine that the complainant would have won the RFP but for the government institution's breach(es) of the trade agreement(s). The objective in determining lost opportunity is to assess the likelihood that the complainant would have won the bid. Under the *Guidelines* and under the facts of most cases, the best reliable indicator of that is the number of other compliant bidders. However, parties are free to present any additional relevant evidence they think might assist the Tribunal in determining the probability of success. The goal is a probabilistic assessment founded in the evidence and common sense.

178. Oshkosh submits that the Tribunal should find there were only two bidders likely to win the competition (it and Mack), because there were only three compliant bidders and Oshkosh's score was only [redacted] points lower than Mack's. It submits that the other compliant bidder did not challenge the procurement, there is no evidence what its score was, and therefore the Tribunal cannot conclude it was prejudiced or that it could have scored as high as Oshkosh. In the alternative, Oshkosh argues that the numerator should be three, including the third compliant bidder.

179. PWGSC submits that all six bidders should be included, because three were deemed non-compliant on a mere technicality (omission of a minor document from their proposals). Alternatively, it submits that at

least the three compliant bidders should be included. It submits that Oshkosh ranked third out of the three compliant bidders, so there is no reason to believe it had a 50% or better chance.

180. In reply, Oshkosh argues that dividing lost profits by all bidders is illogical because there were only three compliant bidders – the other bidders could not have won. It also notes that PWGSC has not advanced any qualitative assessment of Oshkosh's chances of winning, and the Tribunal's ruling on the motion to strike precludes reliance on the Walkiewicz Affidavit regarding the likelihood of a successful retesting. It would also be unfair as the Tribunal denied Oshkosh's request for the scores of the other compliant bidder as irrelevant.

181. The Tribunal has already decided that, based on the finality of its determination and reasons, it will not consider any evidence on Oshkosh's chances of success due to retesting. A necessary corollary to this is that the Tribunal will not consider any evidence on any other parties' chances of success due to retesting either. Neither party has presented any other qualitative evidence regarding the different bidders' likelihood of success (nor could they practically since the grounds found valid all related to the testing). Therefore, the determination of probability of success turns on simply the number of compliant bidders – here, three.

182. Oshkosh maintains that there is no evidence regarding the third bidder's likely performance, but that position is contradicted by the record. The Lortie Affidavit states that Oshkosh was the third-ranked compliant bidder, and this is corroborated by the bid evaluation forms, the GIR, and PWGSC's letter dated November 9, 2015, to Oshkosh.[127] In its decision dated May 25, 2017, the Tribunal denied Oshkosh's request for disclosure of the third bidder's score on the basis that, due to the nature of the errors made in the evaluation process, it is not possible to determine with any certainty what the scores of the respective bidders would have been if the evaluation had been properly carried out. It is important to note that Oshkosh did not just request the final overall score of the third compliant bidder to verify that PWGSC's and Mr. Lortie's representations regarding Oshkosh's overall ranking were well-founded; rather, it sought "the full (i.e., non-'rolled-up') scores . . . in their original state . . . ."[128] The Tribunal denied this request because it went well beyond the purview of a compensation inquiry – the only point of seeking the full non-rolled-up scores would be to launch a point-by-point challenge on the financial score and each rated requirement to try to prove that PWGSC had improperly determined and/or calculated the third compliant bidder's overall score. This is something that, if Oshkosh felt it to be necessary, either should have been requested at the validity inquiry stage or deferred until the compensation phase based on a request for reservation of jurisdiction. Oshkosh's own motion to strike based on finality precluded this relief.

183. Oshkosh has not submitted any evidence, figures or calculations showing that it would have matched or exceeded Mack's score as a result of the testing – further, its motion to strike PWGSC's evidence to that effect likewise precludes it from making such submissions. Thus, there is no reason to find that it had any greater likelihood of success than the third compliant bidder – to the contrary, its lower ranking suggests, if anything, the opposite. However, in the absence of any evidence from PWGSC demonstrating that a probability of lower than 33% is appropriate, the Tribunal finds that the number of bidders is the most reliable, accurate proxy in this case for the likelihood of success.

184. Accordingly, the Tribunal finds that the total compensation for lost opportunity to Oshkosh should be divided by three.

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127. Lortie Affidavit at para. 54 and Exhibit A at 3. Exhibit PR-2015-051-24A, GIR at para. 3 at 8, Vol. 2G. *Ibid.* at Exhibit 25, at 14.
128. Oshkosh's letter dated May 8, 2017, at 1.

Net Present-Value Discount

185. In its *Guidelines*, the Tribunal advises that it may request submissions from parties regarding how to make a present value calculation where the Tribunal makes a lump sum payment today when the contract in question involves a future payment.[129]

186. Oshkosh's estimates of lost profits are discounted to present value to account for the time value of money using a risk-free rate of return (2%).[130]

187. The Tribunal finds it would be inappropriate to apply a net present-value discount to the lost profits it has determined to recommend be awarded to Oshkosh for compensation. First, a discount is unnecessary for the option awards, given that those will only be paid if and when exercised. Second, for the compensation relating to the initial five-year term of the ISS Contract and the Acquisition Contract, such a calculation would be impractical. As Mr. Lortie reports, the timing of the payments for these contracts was tied to the delivery of the goods and services procured, which was itself staggered for each year of the contract. He reports that the first delivery (and payment) has already been delayed over a year, with anticipated first delivery in December 2017. In the anticipated schedule of payments, about one sixth of the contract award value for the Acquisition Contract is due 2017-2018, two-thirds due 2018-2019, and one sixth due 2019-2020.[131] The delivery of services and receipt of payment for the ISS Contract is triggered by the delivery of the vehicles under the Acquisition Contract as well.

188. The Tribunal finds there is insufficient certainty as to when payments will actually be delivered to apply a present-value discount to the lost profits awarded to Oshkosh for the initial contract term. Therefore, it exercises its discretion to apply no discount in this case.

Costs

Parties' Positions

189. Oshkosh claims legal costs incurred since December 2015 (when Oshkosh objected to PWGSC's decision) of [redacted] – it seeks an award of [redacted] in legal costs calculated on a partial indemnity (33.3%) basis, and also its full disbursements of [redacted] for KPMG's fees.

190. Oshkosh notes the efforts it had to make to obtain disclosure of documents, and the incomplete record keeping by PWGSC. It relies on *Knowledge Circle* where the Tribunal concluded such circumstances warranted an award at a partial indemnity rate of 50%. It also refers the Tribunal to the costs considerations found in Rule 400(3) of the *Federal Courts Rules*, which include result, amounts claimed, importance/complexity, liability, amount of work, public interest, fault of parties, etc. Oshkosh cites *Canada v. Corel Corp*[132] in support of its right to claim full indemnity for expert disbursements. It also relies on *ACE/ClearDefense* where the Tribunal recommended compensation for work of the complainant's senior staff.

191. PWGSC acknowledges that in its reasons the Tribunal stated it would deviate from the *Guideline for Fixing Costs in Procurement Complaint Proceedings* [the *Guideline*] the but submits that hundreds of thousands of dollars for legal fees and full recovery of expert fees is unreasonable. It notes that Oshkosh was

129. *Guidelines*, art. 3.2.5.
130. Oshkosh's Confidential Submissions (April 3, 2017) at para. 125. KPMG's Report at para. 58.
131. Lortie Affidavit at paras. 73-76.
132. 1999 CanLII 7868 (FCA) [*Corel*].

only successful on four of nine grounds of complaint. It also notes that, even when departing from the *Guideline*, the Tribunal has awarded only modest costs. There is no evidence of bad faith here as well. It submits that $[redacted] is reasonable.

192. With regard to disbursements, PWGSC submits the flat-rate system includes these. It distinguishes *Corel* as involving only whether the Tribunal had authority to consider the section 30.15 factors in crafting a compensation remedy, not whether the Tribunal could create a new costs award category providing 100% indemnity for disbursements. It also distinguishes *ACE/ClearDefense* as involving a claim for 93 hours, which the Tribunal found excessive and for which it only awarded an amount of $2,139.

193. PWGSC submits that the total amount of time billed ([redacted] billable hours over 18 months) is unreasonable. Particularly, it objects to 47% of the time being billed by the most senior partner on the file. It objects to the hourly rate of Mr. DeRose ($[redacted]) as being equal or greater than that of Mr. Stobo, who is more senior and was first called to the Bar in 1981 (20 years earlier).

194. It has technical objections as well. Four accounts relate to a judicial review. Also, there is a duplication of fees regarding preparing and filing of the complaint totalling $[redacted] because the complaint filed is essentially the same as that filed earlier in PR-2015-042 but denied as premature.

195. Further, PWGSC objects to KPMG using [redacted] time keepers billing [redacted] hours from May to July 2016. It also objects to paying KPMG's bills in US dollars rather than Canadian when Oshkosh chose to incur that premium itself – moreover, two of the time keepers (Rehman and Smith) are in KPMG's Ottawa office, so should be claiming Canadian dollars anyways.

196. In reply, Oshkosh states that its letter dated August 10, 2017, confirmed that fees associated with judicial review had been removed. It also clarifies that the fees from Oshkosh's legal counsel for the first complaint are not included.

Analysis

197. The authority of the Tribunal to award costs is found in section 30.16 of the *CITT Act*, which reads as follows:

> (1) Subject to the regulations, the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.

198. This authority is independent from the authority to award bid preparation costs or recommend compensation.

199. The Federal Court of Appeal has confirmed that "the Tribunal's power to award costs is exercisable on essentially the same principles as those governing the award of costs by the courts, including the principle that, in the absence of exceptional circumstances, the successful party is normally awarded its costs."[133] The current and prior Tribunal's *Guideline* recognizes that awards should be made on a partial indemnity basis.[134] In *Knowledge Circle*, the Tribunal stated that, if costs beyond the *Guideline* are to be awarded, they should be limited to work likewise beyond the normal parameters of a procurement

133. *Canada (Attorney General) v. EDS Canada Ltd.*, 2004 FCA 122, at para. 6, citing *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199, at paras. 25-28.
134. See *Med-Emerg International Inc. v. Canada (Public Works and Government Services Canada)*, 2006 FCA 147.

complaint.[135] In that case, it limited the extraordinary costs to the complainant's efforts in obtaining disclosure and establishing compensation.

200. The highest costs awards from the Tribunal that Oshkosh has identified ($20,000 in *CGI Information Systems*[136] and $22,416 in *Knowledge Circle*) pale in comparison to the amount it seeks here: $[redacted]. The Tribunal finds that Oshkosh's claim for costs is inconsistent with the Tribunal's practice and the principles of costs award at courts. The Tribunal's practice is to keep costs awards limited to avoid overwhelming the administrative bid recourse system with prohibitively expensive complaints and litigation. Federal and provincial court practice is to calculate awards based on a tariff or other guideline limiting the amount claimable for counsel's hourly rates (usually based on seniority). The hourly rates claimed by Oshkosh's counsel are high: with partners' fees at $[redacted], $[redacted] and $[redacted]; associates at $[redacted], $[redacted], $[redacted], and $[redacted]; a paralegal at $[redacted]; and a student-at-law at $[redacted]. Taking this into consideration, the Tribunal finds that a more reasonable rate for purposes of costs in the context of the bid recourse system would be 60-70% of these rates.[137]

201. Regarding the quantum of docketed hours, it is well established that, when it comes to considering the reasonableness of a cost award against an opposing party, a decision maker "should give effect to the principle of proportionality by reducing the costs sought where a party has not taken reasonable steps to delegate work to lower billing time-keepers. Rare is the case which would necessitate the singular attention of senior counsel . . . ."[138] That said, the Tribunal does not wish to second-guest file management and time allocation decisions that may have been taken by counsel of the complainant in this case. The Tribunal is not positioned to judge whether such decisions were appropriate in the circumstances. Such decisions are no doubt taken on the basis of professional and strategic considerations. However, ensuring that its cost decisions accord with the principle of proportionality is very important for the Tribunal as a forum with a legislative mandate of facilitating access to justice. One aspect of this is ensuring that file management and time allocation decisions, whatever rationale lies behind those decisions, do not become deterrent elements when they are taken into consideration in the context a costs award.

202. The total number of lawyer hours spent by Oshkosh is [redacted] over approximately 18 months. The lion's share of the total time docketed was billed by two partners, the most senior of which (Mr. Stobo) himself billed approximately 47% of the total time invoiced: Mr. DeRose: [redacted] hours; Mr. Stobo: [redacted]; other lawyers: [redacted]. Even while agreeing that this case was particularly complex, it is hard for the Tribunal to understand how approximately 75% of the total amount of work was ultimately performed by two senior lawyers. Much of the written submissions involved summarizing the various expert reports and PWGSC's positions – a task suitable for junior lawyers.

203. The Tribunal cannot ignore that the proportion of billable time allocated to the most senior counsel here is objectively high. As indicated above, the management and allocation of time to a litigation file by law firms among its lawyers is a matter that is very closely associated with professional considerations that intimately relate to the relationship between client and counsel. However, for purpose of fixing cost in this

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135. *Knowledge Circle* at para. 25.
136. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (12 January 2015), PR-2014-016 and PR-2014-021 (CITT).
137. *Federal Courts Rules*, SOR/98-106, Tariff B – Counsel Fees and Disbursements (calculating costs based on unit value of, currently, $140), online at: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Court_costs. *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577 (ON CA), at para. 4, holding that "the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant."
138. *Pytka v. Pytka*, 2010 ONSC 6406 [*Pytka*], at para. 21.

case, keeping in mind the principle of proportionality, the Tribunal finds it more reasonable to allow for an allocation of work that would have resulted in no more than half of the work performed by partners and half by junior lawyers.[139] Again, this decision should not be interpreted as questioning the management and time allocation decisions of Oshkosh's counsel or the high calibre of the services they provided, which no doubt were commensurate with their fees.

204. As to the hourly rate, the Tribunal similarly finds that a more reasonable rate for Mr. DeRose and Mr. Stobo, based on their over 20 years' experience each and the amounts at stake in the complaint, is $350 per hour.[140] A reasonable rate for a junior lawyer is $150 per hour. Dividing the [redacted] in half between partners and junior lawyers results in [redacted] hours for each – or amounts of $[redacted] and $[redacted] – for a subtotal of $[redacted].

205. With respect to the indemnity rate, the Tribunal finds that 33% is a reasonable partial indemnity rate. Partial indemnity rates generally range from 33-66% of costs, depending on a variety of factors, including forum (provincial court versus federal court versus tribunal), result, amounts claimed, importance/complexity, liability, amount of work, public interest, fault of parties, etc. Here, applying a rate of 33% (as Oshkosh requests) at the lower end is warranted. The factors weighing in favour of a higher rate are that the lost profits at stake were unusually high, and PWGSC did unnecessarily complicate matters during steps of the inquiry, as Oshkosh recounts in its submissions. The factors favourable to a lower rate are that Oshkosh was successful only on five of nine grounds of complaint, and its expert report deviated so substantially from the RFP, bids, Resulting Contract, and contract award that it was of limited utility compared to the amount of legal hours of work it entailed. The Tribunal finds that given that the bulk of costs relate to Oshkosh's expert reports and compensation submissions thereon, the factors favouring a lower rate outweigh those favouring a higher one. A partial indemnity of the subtotal calculated at 33% totals $153,120. The Tribunal finds this to be a reasonable costs award consistent with the methodology for calculating costs in deviation from the *Guideline* but also proportionate to the unprecedented complexity of this case, the sums at stake, and the Tribunal's role as a forum of accessibility, with limited cost recovery.

206. As concerns KPMG's fees, it is well-settled law that expert fees are disbursements, which are fully compensable under the rules of courts, subject to adjustment for reasonability. The losing party should not have to pay for the "Cadillac" of experts: where billable rates and hours are unreasonably high, the court may reduce them.[141]

207. Under the *Guideline*, the Tribunal has not typically indemnified parties separately for their expert disbursements – on the basis that the Tribunal has an obligation to ensure accessibility (including expeditiousness and cost-effectiveness) as a forum of redress to all parties, bidders and government institutions alike.[142]

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139. Allocations split 50:50 or with greater delegation of work to juniors are commonly seen in costs judgments. See, for example, *Pytka* at para. 22; *Ayangma v. Eastern School Board*, 2010 PECA 14, at para. 9.
140. See, for example, *Kalra v. Mercedes Benz*, 2017 ONSC 4692 (using rates suggested in Civil Rules Committee's Information to the Profession of $225 for a 10-year call, $300 for a 20-year call and $350 for those with more than 20 years at the bar); *Sedge v. Toronto Police Services Board*, 2017 ONSC 6266 (fixing reasonable rate of $200/hr.); *Painter v. Richardson*, 2017 ONSC 6247 (describing rates of $102 and $93 for senior and junior counsel as reasonable and even "modest"); *Leblond v. Standard-Modern Lathes Inc.*, 2017 ONSC 6042 (accepting rates of $300 and $260 for senior counsel and $220 for others).
141. *Apotex Inc. v. Merck & Co. Inc.*, 2008 FCA 371, at para. 9.
142. *Guideline*, art. 4.1.2.

208. Although the Tribunal found in its determination issued on May 20, 2016, that the level of complexity of the complaints warranted deviating from the *Guideline*, and it has now done so with respect to legal fees, it finds no reason to do so with respect to expert fees. First, in the particulars of this case, the Tribunal finds that Oshkosh's expert reports deviated significantly from the framework of the RFP, Resulting Contracts, and Contract Awards. As such, they were of limited, if any, assistance in estimating lost profits. Parties should recognize that a decision in a determination of validity to deviate from the *Guideline* does not automatically result in indemnification of all prospective disbursements made during the compensation phase: it is not a blank cheque. Unreasonable or unnecessary disbursements should not be covered.

209. For these reasons, the Tribunal awards no costs for expert fees.

210. Based on the above, the Tribunal awards Oshkosh its costs in the amount of $153,120 for preparing and proceeding with the complaint.

CONCLUSION

211. In sum, the Tribunal recommends that PWGSC compensate Oshkosh for its lost opportunity through the following formula (all denominated in Canadian dollars):

A. Revenues from Base Contracts (payable now)

1. Acquisition Contract
   a. Vehicles and Related Equipment: $[redacted]
   b. ILS Data and Deliverables: $[redacted]
   c. Subtotal: $[redacted]
2. ISS Contract
   a. Repair and Overhaul Free-Flow: $[redacted]
   b. Special Tools and Test Equipment List: $[redacted]
   c. Labour, Overhead and Profit: $[redacted]
   d. Program Management and Deliverables: $[redacted]
   e. Subtotal: $[redacted]
3. Spare Parts: $[redacted]
4. Total: $[redacted]

B. Options (payable only if and when exercised):

1. Acquisition Contract
   a. Vehicles and Related Equipment: calculated based on Oshkosh's "Vehicles and Related Equipment – Scenario 1 – Options" unit bid prices from its proposal multiplied by the number and variant of SMP vehicles and related equipment optioned
   b. ILS Data and Deliverables: $[redacted]
2. ISS Contract: $[redacted] for each five-year extension exercised (or a portion thereof calculated on a pro rata basis should any extension be for less than the full five-year increment)
3. Spare Parts: Value of any Contract Amendment for Spare Parts

C. Profit Margin: 10%

1. Subtotal Revenues (payable now): $[redacted]
2. Subtotal Options (payable only if and when exercised): as per B above, times 10%

D. Lost Opportunity Discount: 1/3

E. Total Compensation (Base Contracts) (payable now): $25,337,931.79

F. Total Compensation (Options) (payable only if and when exercised): as per C.2 above, times 1/3

212. The Tribunal awards Oshkosh its costs in the amount of $153,120 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

Serge Fréchette

Serge Fréchette
Presiding Member