Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2017-006

Rockwell Collins Canada Inc.

v.

Department of Public Works and Government Services

Order and reasons issued
Monday, May 28, 2018

Canada

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

AND FURTHER TO the Canadian International Trade Tribunal's determination and recommendation, and its order directing submissions on compensation and costs.

BETWEEN

ROCKWELL COLLINS 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 Rockwell Collins Canada Inc. for its lost opportunity in the amount of $146,936, representing half of its lost profits calculated on a net profit margin basis for the value of goods actually purchased under call-ups under the cancelled Request for Standing Offer (Solicitation No. W8474-156921/A).

Should the Department of Public Works and Government Services rescind the cancellation of this Request for Standing Offer and not proceed to issue a new retender, then it shall compensate Rockwell Collins Canada Inc. in the amount of half of its lost profits for any future call-ups issued under the Request for Standing Offer calculated based on the value of the call-ups multiplied by a net profit margin of [redacted]%, divided by two.

The Canadian International Trade Tribunal awards Rockwell Collins Canada Inc. its reasonable costs incurred in preparing and proceeding with this complaint, assessed at a Level 3 complexity at the amount of $4,700.

Peter Burn
Peter Burn
Presiding Member

STATEMENT OF REASONS

1. On September 11, 2017, the Canadian International Trade Tribunal (the Tribunal) issued its determination in this matter, finding the complaint of Rockwell Collins Canada Inc. (Rockwell Collins) valid; recommending an award of 50% of its lost profits for Phase 1 work and, to the extent the Department of Public Works and Government Services (PWGSC) exercises them, Phase 2 and Phase 3 work; and preliminarily awarding Rockwell Collins its reasonable costs of bringing the complaint with a preliminary indication of Level 3 complexity at an amount of $4,700 under the *Procurement Costs Guideline* (the *Guideline*).

2. The parties (and the Federal Court of Appeal in which PWGSC and the intervener have filed applications for judicial review of the Tribunal's determination) are currently awaiting the Tribunal's decision on costs and compensation. The Federal Court of Appeal has adjourned PWGSC's application until June 29, 2018.

3. For the reasons provided below, the Tribunal recommends PWGSC provide compensation to Rockwell Collins in the amount of $146,936,[1] representing half of its lost profits calculated on a net profit margin basis for the value of goods actually purchased under call-ups for the (now-cancelled) Request for Standing Offer (RFSO). Should PWGSC rescind the cancellation of this RFSO and not proceed to issue a new retender, then it shall compensate Rockwell Collins in the amount of half of its lost profits for any future call-ups issued under the RFSO calculated based on the value of the call-ups multiplied by a net profit margin of [redacted]%, divided by two. Finally, the Tribunal awards Rockwell Collins its reasonable costs incurred in preparing and proceeding with this complaint, assessed at a Level 3 complexity at the amount of $4,700.

PROCEDURAL HISTORY

4. Rockwell Collins's submissions on costs were filed on October 23, 2017, followed by PWGSC's response on October 30, 2017.

5. Rockwell Collins's submissions on compensation were filed on November 10, 2017 (in the form of a lost profits report created by its internal accounting team and supporting legal submissions filed by counsel), followed by PWGSC's response on November 27, 2017, and Rockwell Collins's reply on December 5, 2017, which included two further supporting affidavits responding to issues raised in PWGSC's submissions.

6. On December 13, 2017, the Tribunal decided, pursuant to Rule 26 of the *Canadian International Trade Tribunal Rules*,[2] to hold its decision on compensation and costs in abeyance pending the decision of the Federal Court of Appeal (in Court File No. A-295-17) reviewing the Tribunal's determination that the complaint was valid.

7. On February 5 and 7, 2018, the parties wrote to the Tribunal asking it to take the matter back up, in light of the fact that on January 15, 2018, the Federal Court of Appeal issued an order holding Court File No. A-295-17 in abeyance pending the earlier of the Tribunal's issuance of a decision on compensation or June 29, 2018.

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1. Note that all figures herein are denominated in Canadian dollars except where otherwise indicated.
2. SOR/91-499.

8. On February 9, 2018, the Tribunal granted the parties' request to lift the abeyance. It also referred the parties to the Tribunal's compensation determination in *Oshkosh* issued on December 29, 2017,[3] i.e., after their submissions on compensation had already been filed, and provided them an opportunity to file further submissions on any relevant issues raised therein. The parties filed their supplementary submissions regarding the impact of *Oshkosh*, which is currently under judicial review, on March 2, 2018.

COMPENSATION

9. The crux of the dispute between the parties regarding compensation comprises four discrete issues:

   a. Should compensation be based on the financial limitation cap of $17,250,000 expressed at article 6.8.1 of the RFSO or on the value of actual call-ups to date under the Standing Offer which amounts to $[redacted]?

   b. Should the Tribunal award compensation for test equipment purchased from the winning bidder but never offered by Rockwell Collins in its bid?

   c. Should compensation be based on gross profit margins (including indirect costs) or net profit margins (deducting indirect costs)?

   d. Should the relevant margin (whether gross or net) be determined based on the margin for the goods in issue in this specific procurement or based on Rockwell Collins's firm-wide profit margin?

Issue A (Basis of Revenues – Financial Limitation Cap or Call-ups)

Position of the Parties

10. Rockwell Collins claims the Tribunal should recognize its right to lost profit based on the maximum financial value of the RFSO, i.e., $17,250,000. PWGSC submits that the financial limitation cap in the RFSO does not establish any expected or promised purchase amount; rather, it simply sets the maximum that the Department of National Defence (DND) may call-up against the Standing Offer. It is well-settled law, PWGSC argues, that an RFSO is not a contract to purchase any minimum amount or value of goods at all; indeed, the only contract formed is when a call-up is issued. The RFSO at issue here itself had no minimum dollar value.

11. PWGSC admits that the total value of the call-ups made against the Standing Offer was $[redacted]. However, it argues that this figure represents the maximum amount of revenue that Rockwell Collins can claim against the RFSO, since PWGSC has now cancelled the RFSO following the Tribunal's determination in this matter of September 11, 2017. PWGSC now intends to retender the requirement, at which time Rockwell Collins will have an equal opportunity to win any further work. Finally, PWGSC notes that this issue is already settled by the Tribunal's own determination in this matter, in which it recommended that PWGSC compensate Rockwell Collins for its lost profits for options that it has already or intends to exercise, i.e., not work it will never call-up.

12. In reply, Rockwell Collins submits that in common-law actions, the courts often assess damages where there is evidentiary uncertainty about future events in the form of "lost chance of profits". It argues

3. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) [*Oshkosh*].

that the elements of proof for lost chance of profits are well met here given the terms of the RFSO identifying DND's real, present need for the goods in issue.

13. With regard to the cancellation of the RFSO, Rockwell Collins argues that the Tribunal should accord this event no significance because PWGSC has not filed any evidence as to why the RFSO was cancelled, when it will be retendered, what the terms of such as retender would be, and what impact the retender will have. It further notes that the legality of PWGSC's decision to cancel the RFSO has been challenged by the intervener Rohde & Schwarz Canada Inc. (R&S) in the Federal Court of Appeal. It hypothesizes that PWGSC could re-activate the RFSO if the Tribunal were to determine that compensation should be made only for the value of actual call-ups to date.

14. In response to the Tribunal's letter referring the parties to the recent *Oshkosh* decision, PWGSC submits that *Oshkosh* is directly on point, holding that compensation should only be recommended if and when options are actually issued. Here, none will be; therefore, compensation should be limited to call-ups. Rockwell Collins submits that *Oshkosh* only addresses compensation for options, not for the term of the contract; therefore, it is inapplicable.

Analysis

15. *Oshkosh* stands for the proposition that the Tribunal should not recommend compensation for goods or services not actually yet purchased by the government because they may in fact never be procured; thus, awarding compensation for them might result in a windfall to the complainant. In paragraph 100 of *Oshkosh*, the Tribunal explained:

> 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.

16. Although the issue here is revenues expected over the base term of an RFSO rather than revenues expected afterwards from options, the principle is the same: complainants should not be compensated for goods or services that the government has not yet procured. In *Oshkosh*, it could not be known whether they would actually be procured; therefore, the Tribunal conditioned its compensation recommendation on options being exercised. Here, it is clear that no further call-ups will be issued because the RFSO has been set aside.

17. Moreover, although Rockwell Collins argues that options are distinguishable, the principle applies to RFSOs and call-ups as strongly given that call-ups are equivalent to options in the sense that under an RFSO the government has no minimum purchase obligation and contracts are only formed when a call-up is exercised. Notably, article 2.1 of the RFSO expressly incorporated the 2006 (2016-04-04) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements, which

"[o]fferors who submit an offer agree to be bound by".[4] Those Standard Instructions expressly inform bidders that:[5]

> [a] RFSO is an invitation to suppliers to provide PWGSC with a standing offer. The quantity of goods, level of services and estimated expenditure specified in the RFSO are only an approximation of requirements given in good faith. A RFSO does not commit PWGSC to authorize the utilization of a standing offer or to procure or contract for any goods, services or both. A standing offer is not a contract. The issuance by PWGSC of a Standing Offer and Call-up Authority to successful suppliers and to departments and agencies authorized to make call-ups does not constitute an agreement by Canada to order any or all of the goods, services or both offered.

18. Those same Standard Instructions also provide that:

> Canada reserves the right to:
>
> . . .
>
> d. cancel the RFSO at any time;
>
> e. reissue the RFSO;
>
> . . .

19. The RFSO also explicitly provides in article 6.3.1 that the 2005 (2016-04-04) General Conditions – Standing Offers – Goods or Services "apply to and form part of the Standing Offer".[6] This condition reads as follows:[7]

> The Offeror acknowledges that a standing offer is not a contract and that the issuance of a Standing Offer and Call-up Authority does not oblige or commit Canada to procure or contract for any goods, services or both listed in the Standing Offer. The Offeror understands and agrees that Canada has the right to procure the goods, services or both specified in the Standing Offer by means of any other contract, standing offer or contracting method.

20. Here, PWGSC has cancelled the RFSO and intends to retender. This too is consistent with *Oshkosh*, which explains that the particular advantage to bidders in bringing a complaint to the Tribunal rather than a court is the Tribunal's wider remedial powers to order injunctive relief, including retendering, which is to be preferred where possible over monetary relief which may require the government to pay suppliers for goods or services that the latter never actually supplied and the former never received.

21. Furthermore, the cancellation and retendering is consistent with the Tribunal's findings in its determination, which identified a retender as the preferable remedy but ultimately recommended compensation based on the fact that PWGSC had already begun purchasing radios from the intervener.[8] It is also consistent with the Tribunal's decision to only award compensation for options if exercised, i.e., if PWGSC did not go back to tender for that work.

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4. Exhibit PR-2017-006-14 at 45, Vol. 1C.
5. PWGSC, *Standard Acquisition Clauses and Conditions (SACC) Manual*, 2006 (2016-04-04) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements [Standard Instructions], online at: https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/20.
6. Exhibit PR-2017-006-14 at 53, Vol. 1C.
7. PWGSC, *SACC Manual*, 2005 (2016-04-04) General Conditions – Standing Offers – Goods or Services, online at: https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2005/13.
8. *Rockwell Collins Canada Inc. v. Department of Public Works and Government Services* (11 September 2017), PR-2017-006 (CITT) [*RC Determination*] at paras. 91-94 (considering feasibility of retender).

22. Regarding Rockwell Collins's suggestion that PWGSC might re-activate the RFSO if the Tribunal limits the compensation recommendation to only call-ups to date, this involves a matter currently under review at the Federal Court of Appeal via the intervenor's application for judicial review challenging the cancellation of the RFSO. If, as a result of that proceeding, PWGSC ultimately revives the RFSO, the Tribunal's compensation recommendation will apply to any call-ups issued under the RFSO as well, calculated on the same basis, i.e., the value of actual call-ups, multiplied by Rockwell Collins's net profit margin of [redacted]%, divided in half.

Issue B (Basis of Revenues – Test Equipment)

Position of the Parties

23. PWGSC submits that Rockwell Collins should not be compensated for test equipment purchased by PWGSC from the intervener because, unlike the intervener, Rockwell Collins did not offer such equipment in its bid, as, it argues, article 7.1 of Annex A of the RFSO requires. No call-ups, therefore, could have been made as against these goods.

24. Rockwell Collins responds that PWGSC has never before disputed that it was a compliant bidder and cannot now change that position. Rockwell Collins further argues that PWGSC is misreading article 7.1, which is part of the Statement of Requirements (Annex A) for performance of the resulting contract but not part of the evaluation for bids (Annex H). Finally, it submits that the issue is irrelevant, as PWGSC has confirmed the purchase price of all items it would have purchased from Rockwell Collins is $[redacted], which Rockwell Collins has not disputed.[9]

Analysis

25. Article 7.1 of Annex A reads as follows:

> **7.1 Special Tools**
>
> The vendor must identify and provide any OEM specialized test equipment, adapters, tools, or connectors required by DND technicians to perform preventive and/or corrective maintenance and repairs.

26. Rockwell Collins denies, via the sworn affidavit of one of its business directors who was also a member of the complainant's procurement team on this RFSO, that there is any OEM specialized test equipment, adapters, tools or connectors required to maintain or repair the radios bid by Rockwell Collins, which it describes as "off the shelf". PWGSC has not filed any evidence to the contrary.

27. Article 7.1 does not expressly state test equipment must be identified and described "in the initial bid", as articles 7.2 and 7.3 do so expressly state in relation to sole-source parts and parts with special storage and packaging. Further, PWGSC does not identify any other article of the RFSO that prohibits Rockwell Collins from being compensated for test equipment not identified in its initial bid.

28. Accordingly, the Tribunal does not find this argument by PWGSC to be supported by the evidence or the terms of the RFSO. Regardless, the Tribunal finds the issue to be moot, as the parties are agreed that if

9. Confidential Submissions of PWGSC filed November 27, 2017, Tab A. Confidential Reply Submissions of Rockwell Collins filed December 5, 2017, at para. 47.

the revenues are recognized on actual call-ups only, then the appropriate figure is US$[redacted] (which equals C$[redacted] using the exchange rate applicable on the date of contract award).[10]

Issue C (Gross v. Net Profit Margin)

Position of the Parties

29. PWGSC submits that compensation should be based on net, not gross, profit margins. It argues that the Generally Accepted Accounting Principles (GAAP) provide that profits are determined by deducting direct and indirect costs from revenue. PWGSC observes that in 2017, the year in which the call-ups occurred, Rockwell Collins recovered [redacted] of their general, administrative, and sales and marketing costs. Therefore, not deducting an appropriate amount for indirect cost would result in compensating Rockwell Collins to cover costs [redacted]. It would thus enable complainants to apply those (inflated) gross margin profits towards losses incurred on other contracts. PWGSC cites as an example foreign currency exchange losses which could be treated as indirect costs; an award of lost profits that does not deduct some overhead apportionable to the revenues received from a procurement contract will, in effect, subsidize such indirect costs.

30. Rockwell Collins disputes that indirect or fixed costs should be deducted from revenue, relying on Tribunal case law predating *Oshkosh*[11] and the sworn affidavit evidence of Linda Tang, its Assistant Controller and a Chartered Professional Accountant in the Province of Ontario who helped prepare its lost profits report.[12] Her evidence is that, under GAAP, overhead costs (called General and Administrative and Selling costs or SG&A) are excluded in measuring profits for a specific contract. Instead, they are "charged to expense as incurred" and "treated as period costs for financial measurement that are not linked to specific programs or to the profitability of specific contracts".[13]

31. Rockwell Collins also contends that its fixed costs would have been incurred regardless of whether it won the bid and that they not have increased under the contract – assertions substantiated, it argues, in its lost profits report and which PWGSC has not challenged. It distinguishes *Oshkosh* on these grounds, and on the basis that its proposed profit margins are based on those it used in preparing its RFSO bid, which likewise did not deduct indirect costs.

Analysis

32. In *Oshkosh*, which is currently under judicial review on this and other grounds, the Tribunal held that indirect costs should be deducted from revenue for multiple reasons:

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10. Confidential Submissions of PWGSC filed November 27, 2017, at para. 25 and Tab A. In its submissions, PWGSC identifies the $[redacted] figure in Canadian dollars; however, the actual evidence at Tab A denominates the purchases in U.S. dollars. See Confidential Reply Submissions of Rockwell Collins filed December 5, 2017, at para. 47. PWGSC did not file any further submissions contesting Rockwell Collins's characterization of this as an error.
11. *Immeubles Yvan Dumais Inc. v. Department of Public Works and Government Services* (7 June 2010), PR-2007-079 (CITT); *Averna Technologies Inc. v. Department of Public Works and Government Services* (10 October 2006), PR-2005-035 (CITT).
12. Confidential Reply Submissions of Rockwell Collins filed December 5, 2017, Tab 9, Affidavit of Linda W. Tang Sworn December 5, 2017 [Tang Affidavit].
13. Tang Affidavit at para. 12 and Exhibit A.

> 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. 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. 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." This RFP involved nearly a billion dollars of revenues over 20 years – it is unlikely there 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, the Tribunal has deducted both direct and indirect costs from gross revenue to derive lost profit, including bid preparation costs and an amount allocated for overhead.

33. The Tribunal finds no reason to depart from *Oshkosh* in this instance. While Ms. Tang's evidence was credible, the Tribunal finds it inapplicable to its calculation of compensation in the procurement context, which is informed but not limited by common-law damages and GAAP accounting principles. In *Oshkosh*, the Tribunal held that lost profits should include an appropriately allocated deduction for all expenses necessary to perform a contract. Those, by definition, include overhead costs that must be incurred for a firm to perform any work, even if they are not incremental to any individual contract.

Issue D (Firm-wide Profit Margin v. Goods-specific Profit Margin)

Position of the Parties

34. In its submissions filed on December 5, 2017, Rockwell Collins included in Scenario No. 5 of Table 2 of the Tang Affidavit its estimated lost profits based on the value of the actual call-ups issued for the now-cancelled RFSO at issue in this complaint. However, the estimation was based on gross, not net, margins. The Tribunal therefore requested by letter dated April 6, 2018, that Rockwell Collins provide an updated figure including an appropriate deduction for fixed (overhead) costs fairly allocated to the contract. Rockwell Collins filed supplementary submissions on April 20, 2018, providing a revised lost profits figure in Scenario No. 5 including two types of indirect costs: SG&A costs and proposal preparation costs. This reduced the estimated profit margin put forth by Rockwell Collins from [redacted]% to [redacted]%.

35. PWGSC filed its response on April 23, 2018. PWGSC submits that the Tribunal should calculate lost profits based on Rockwell Collins's firm-wide profitability using its 2017 financial statement. It submits that absent [redacted], Rockwell Collins's net profit for 2017 was [redacted]% or $[redacted] out of $[redacted].

36. Rockwell Collins replies that lost profits should be calculated on the expected profits for the contract at issue, not its business's firm-wide profitability. This, it argues, is a fundamental tenet of damages and compensation law, including under *Oshkosh*.

37. Regarding SG&A costs, PWGSC submits that Rockwell Collins had a duty to include supporting documentation, including a certification from an independent accountant. PWGSC argues that, in the absence of such evidence, it does not have an opportunity to test the accuracy of the estimates.

38. Regarding bid preparation costs, PWGSC submits that Rockwell Collins has improperly reduced these to only [redacted]% of their total value (i.e., from $[redacted] to $[redacted]) on the grounds that the $[redacted] in work called up under the RFSO to date is only [redacted]% of the anticipated $11.7 million estimated contract value for its initial three-year term as stated in article 1.2.1 of the RFSO.[14] PWGSC argues that there is no basis to pro-rate bid preparation costs as there was no promise under the RFSO for any minimum amount of work. Therefore, it submits, the full amount of bid preparation costs should be deducted from gross revenues to determine net profit.

39. For all these reasons, PWGSC submits that profit margin should be estimated based on firm-wide financials.

Analysis

40. PWGSC has not persuasively articulated why the Tribunal should determine compensation based on firm-wide profitability when Rockwell Collins has provided a detailed report and supporting documents for its expected expenses and revenues from the contract at issue. *Oshkosh* does not stand for the proposition that evidence of lost profits related to the specific procured goods in issue should be ignored, but only that other evidence can be useful to supplement or verify such evidence and, if necessary, serve as a substitute when the former is not readily available, credible, or substantiated. Compensation for lost profits remains, in the first instance, based on the actual expected net margin of profits for the individual contract at issue as governed by the terms of the related solicitation documents. There is no basis in law for the Tribunal to calculate compensation on a complainant's firm-wide profitability, which is affected by a multitude of factors entirely unrelated to the procurement process at issue.

41. Rockwell Collins's methodology for identifying and allocating its costs is, but for bid preparation costs discussed below, reasonable and well substantiated. To substantiate its costs, Rockwell Collins has provided graphs and screenshots from its internal [redacted] accounting database; documents prepared contemporaneously with its proposal including spreadsheets, PowerPoints, and management approval forms; letters verifying costs from its [redacted] corporation; third-party vendor quotations; its two most recent financial statements; and a sworn affidavit from Linda Tang, a chartered professional accountant and a member of its own accounting team who worked on its proposal and co-wrote Rockwell Collins's compensation report dated November 10, 2017.[15] Its explanations are clear, logical, and succinct. PWGSC has not identified any technical errors in Rockwell Collins's methodologies or assumptions or provided any rebuttal report or evidence of its own. The report was prepared by the very individuals who worked on its

14. This estimated contract value figure is distinct from the $17,250,000 financial limitation cap expressed at article 6.8.1 of the RFSO.
15. Confidential Submissions of Rockwell Collins filed November 10, 2017, Tabs 2-9. Confidential Reply Submissions of Rockwell Collins filed December 5, 2017, Tab 9. Confidential Submissions of Rockwell Collins filed April 20, 2018, Figure 3 and Annex A.

proposal and were most familiar with Rockwell Collins's estimated costs. The assumptions and data in the report are substantiated by contemporaneously created documents and sworn witness testimony.

42. In sum, this is precisely the type of report and supporting evidence that the Tribunal requested in *Oshkosh*, that is, submissions that are "directly tied to [the complainant's] bid, the competition, and its own expectations" and that "avoid hypothetical estimates about future revenues and expenses that tend to devolve into a battle of the experts".[16] As the Tribunal held in *Oshkosh*, a granular or "bottoms up" cost analysis is not required for compensation inquiries where it would result in disproportionate burden in terms of time and expense.[17] The goods at issue here are off-the-shelf radios that Rockwell Collins sources from its [redacted] company. The level of detail and substantiation provided by Rockwell Collins is more than sufficient to meet its *prima facie* burden for establishing its lost profits, especially absent any particularized rebuttal by PWGSC.

43. With regard to fixed costs, the method proposed by Rockwell Collins of allocating SG&A costs to the procurement contract is also reasonable. To fulfill this order, Rockwell Collins would have sourced the goods from [redacted].

44. Using the above framework, Rockwell Collins estimated the number of labour hours [redacted] employees ([redacted]) would require to complete these [redacted] tasks. It then multiplied those numbers for each employee by their respective hourly labour rates, which (crucially) Rockwell Collins alleges includes, as a result of its accounting practices, "all indirect costs such as wages, lease holds, utilities and the like".[18] The resulting figure represented Rockwell Collins's SG&A costs, which were deducted from its gross profit to obtain a net profit rate.

45. PWGSC has not proposed any different methodology for estimating costs for the Tribunal to consider and weigh against Rockwell Collins's. PWGSC claims that it is unable to test the accuracy of Rockwell Collins's data and methodology without a certification from an independent accountant. The Tribunal disagrees. Rockwell Collins's supplementary report on fixed costs is nine pages long, uses data directly from its [redacted], and provides a detailed explanation of its methodology and assumptions. This is more than sufficient for PWGSC to challenge either on its own or, if it felt necessary, by retaining its own expert to critique. It is notable that PWGSC's two-page response was filed one business day after Rockwell Collins's submission and does not include any allegation that Rockwell Collins had refused to produce any requested documents. In these circumstances, the Tribunal gives no weight to PWGSC's objections.

46. However, as for Rockwell Collins's treatment of bid preparation costs, the Tribunal agrees that as a matter of law, Rockwell Collins has not identified any principled basis for reducing this expense by nearly

16. *Oshkosh* at paras. 71 and 166.
17. *Oshkosh* at para. 163.
18. Confidential Submissions of Rockwell Collins filed on April 20, 2018, at 4 of 9.

[redacted]% simply because the RFSO was cancelled. As explained above, suppliers have no expectation in an RFSO to any minimum amount of work unless the terms of the RFSO provide otherwise. Further, this bid preparation work was incurred solely for the purposes of this solicitation, i.e., it cannot be allocated to another contract. There is no reason, therefore, to reduce the amount of the expense incurred to reflect the fact that the value of the call-ups is less than the total expected value of the RFSO. For this reason, the Tribunal finds it appropriate to deduct the full amount of the bid preparation costs from the lost profits.

Conclusion on Compensation Recommendation

47. Figure 4 of Rockwell Collins's submission dated April 20, 2018, contains revised net profit estimates as requested by the Tribunal. The Tribunal has found that SG&A costs are appropriately allocated to the contract, but that the full amount of the bid preparation costs should be deducted from total lost profits. This results in total lost profits of $[redacted] rather than $[redacted], for a net profit rate of [redacted]% rather than [redacted]%.[19]

48. When using a revenue-less-expenses methodology for estimating lost profits, the Tribunal will also consider the more general types of evidence discussed in *Oshkosh* to test the soundness of the resulting profit margin, as an extremely high or low figure may suggest that the methodology is not reliable.[20] In *Oshkosh*, the Tribunal observed that under normal circumstances a reasonable profit margin will often be around 10% (plus or minus 5%).[21] The profit margin here of [redacted]% is somewhat high for what Rockwell Collins has itself described as goods of a "[redacted]",[22] but it is within the range of reasonability for a military procurement involving a multifunctional (i.e., both UHF and VHF capable) radio system.[23] Further, it is consistent with the contemporaneous analyses that Rockwell Collins prepared and used for its offer.[24] It is not an estimate created after the fact with a view to substantiating a favourable position in litigation but rather reflects the actual business expectations that Rockwell Collins held at the time and, most importantly, relied on in establishing a competitive bid price. The evidence also shows that Rockwell Collins's procurement team had to justify this profit margin analysis to upper management;[25] thus, it had an incentive to produce an accurate (i.e., not inflated) estimate as the team would, presumably, have been held to account for its analysis if it had won the RFSO and its actual profits had been lower. This gives the estimate an aura of authenticity that an estimate prepared by third-party experts after the fact only for the purpose of supporting a position in litigation might lack. Moreover, PWGSC has not provided any particularized rebuttal evidence. Further, its proposed alternative methodology results in a net profit rate that is so low as to be unreasonable absent compelling evidence of the inability of Rockwell Collins to deliver the goods profitably.

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19. Net profit calculated as follows: Gross Profit ($[redacted]) minus SG&A ($[redacted]) and minus bid preparation costs ($[redacted]), equals $[redacted]. Net profit percent calculated as follows: Net Profit ($[redacted]) divided by sales ($[redacted]), equals [redacted]%.
20. *Oshkosh* at para. 148.
21. *Oshkosh* at para. 71.
22. Confidential Submissions of Rockwell Collins filed on April 20, 2018, at 3 of 9.
23. See *Oshkosh* at footnotes 110-111.
24. See, for example, Confidential Submissions of Rockwell Collins filed November 10, 2017, at 5-6 of 16 and Tabs 2 and 5. The figure is slightly higher than the [redacted]% that Rockwell Collins estimated for purposes of pricing its bid; however, this differential is low and likely simply reflects the different volume and type of goods that were the subject of the bid analysis versus the call-ups issued to the intervenor under the prematurely cancelled RFSO.
25. Confidential Submissions of Rockwell Collins filed November 10, 2017, at 5 of 16 and Tab 5.

49. Accordingly, the Tribunal recommends PWGSC provide compensation to Rockwell Collins in the amount of $146,936, representing half[26] of its lost profits calculated on a net profit margin basis for the value of goods actually purchased under call-ups for the (now-cancelled) RFSO. Should PWGSC rescind the cancellation of this RFSO and not proceed to issue a new retender, then it shall compensate Rockwell Collins in the amount of half of its lost profits for any future call-ups issued under the RFSO calculated based on the value of the call-ups multiplied by a net profit margin of [redacted]%, divided by two.[27]

COSTS

Position of the Parties

50. Rockwell Collins submits that the Tribunal should depart from the *Guideline* and award it partial indemnity costs of $[redacted] calculated in accordance with the rules of the Superior Court of Justice of Ontario or, alternatively, costs of $[redacted] calculated in accordance with Tariff B, high-Column V of the *Federal Courts Rules*. Rockwell Collins argues that a departure is warranted based on (i) the actual cost of litigation; (ii) the importance of the issues at stake; (iii) Rockwell Collins's substantial success; (iv) the complexity of proceedings; and (v) Rockwell Collins's counsel's expertise in procurement law.

51. Regarding the actual cost of litigation, Rockwell Collins alleges that it has incurred $[redacted] in legal fees and $[redacted] in expert disbursements, which dwarf the *Guideline*-suggested maximum award of $4,700. Rockwell Collins observes that the Federal Court, in *Philip Morris*,[28] departed from Tariff B to provide a costs award that more closely reflects actual costs. It further notes that footnote 1 of the *Guideline* acknowledges that the flat rates were "established at a level generally consistent with the Federal Court of Canada tariff for fees". Further, in *CGI*, the Tribunal accepted that, when "unusual complexity" and other circumstances warrant departing from the *Guideline*, using the cost methodology of the *Federal Court Rules* could be "an appropriate reference point to begin its determination" of costs.[29]

52. Regarding the importance of the issues, Rockwell Collins submits that the radios were for air traffic control at Canadian military bases and needed on an urgent basis; the integrity and efficiency of the procurement system was engaged and found to be "at a low" by the Tribunal in its reasons; and the monetary amounts at stake were significant, with the ceiling for call-ups set at $17,250,000.[30]

53. Regarding success on the merits, Rockwell Collins submits that it was successful on all issues.

54. Regarding experience of counsel, Rockwell Collins submits that its counsel was called to the bar in 1991, has appeared before all levels of courts in Canada, and is a recognized expert in procurement law. Therefore, his billing rate of $[redacted] per hour warrants a rate of $[redacted] per hour under the partial indemnity scale in the Ontario Superior Court of Justice or alternatively a $[redacted] unit rate under Tariff B of the *Federal Courts Rules*.

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26. The lost profits award is divided by two to reflect the fact that there were two bidders deemed compliant: Rockwell Collins and R&S. See *RC Determination* at paras. 15, 96 and 104. See also *Guideline* at art. 3.1.5.
27. *Ibid.*
28. *Philip Morris Products S.A. v. Marlboro Canada Ltd.*, 2014 FC 2 [*Philip Morris*].
29. *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) [*CGI*] at para. 20.
30. Exhibit PR-2017-006-014 at 55, art. 6.8.1, Vol. 1C.

55. In opposition, PWGSC submits that this case falls squarely within the parameters of a costs award under Level 3 of the *Guideline* for four reasons.

56. First, PWGSC argues that the flat-rate system of the *Guideline* fosters the Tribunal's mandate as an administrative tribunal to ensure access to justice; it is not meant to duplicate parties' rights to cost recovery at the higher levels anticipated in courts, which can be a deterrent to bringing complaints and encourage parties to over-litigate cases. This case is appropriately categorized as a Level 3 complexity case, which the *Guideline* describes as one involving more than one motion, supplementary submissions, an extended 135-day time frame, and a public hearing – all of which occurred here. Thus, it is irrelevant whether Rockwell Collins's actual costs are significantly higher than $4,700; had it wanted greater costs, it could have filed a court case in one of the venues whose cost policies it is now asking the Tribunal to apply.

57. Second, PWGSC argues that the amounts claimed ($[redacted] for [redacted] billed hours) are unrealistic. Rockwell Collins's current counsel was only retained at the mid-point of the proceedings on approximately June 20, 2017, after Rockwell Collins had submitted a complaint prepared by itself on April 28, 2017. The level of work performed in this case comes nowhere close to that at issue in *Philip Morris*, which was, regardless, an exceptional departure from Tariff B for the Federal Court. The Tribunal, PWGSC submits, has never used Tariff B or the Ontario *Rules of Civil Procedure* for calculating costs. Even in *CGI*, the Tribunal declined to award costs as calculated under Tariff B, reducing an award under the latter of $57,820 to $20,000 on the basis, *inter alia*, that a "cost award at the Tribunal is expected to be modest, all things considered".[31]

58. Third, the importance of the issues does not justify a departure from the *Guideline*. Radios are no more important or unique than many other goods procured for DND. PWGSC's declaration that they were needed urgently is irrelevant to costs. There was no bad faith in the procurement, merely an expression of a preference for one type of radio solution and ambiguities surrounding the use of challenging technical language.

59. Fourth, the bulk of the work for which costs are claimed (the comments on the GIR and the preparation for and attendance at the hearing) were unnecessary, inappropriate and disproportionate. The comments constituted inappropriate reply containing expert evidence and attempting to amend the original complaint. Had Rockwell Collins's original complaint contained its expert report and more fulsome submissions, a hearing might have been avoided. The expert report filed by Rockwell Collins went beyond its field of expertise into the law of contract, as the Tribunal found. Rockwell Collins's costs claim includes hours billed for its costs submission, which is itself unduly lengthy and ineligible as a component of costs under Tribunal case law.[32] Finally, Rockwell Collins is not even entitled to costs at all, as its original complaint did not seek them. Leave to amend the complaint to bring a claim of costs was never requested or granted until Rockwell Collins's submissions on costs. The Tribunal has consistently ruled that unless costs are requested in a complaint none will be awarded.[33]

31. *CGI* at para. 22.
32. *Hewlett-Packard (Canada) Ltd.* (31 March 2003), PR-2001-040R (CITT) at 2.
33. *1091847 Ontario Ltd. v. Department of Public Works and Government Services* (27 January 2011), PR-2010-071 (CITT) at para. 38. *Foundry Networks* (16 November 2001), PR-2000-060 (CITT).

Analysis

60. Costs are largely a matter of the Tribunal's discretion, but the *Guideline* is usually applied absent extraordinary circumstances. Such circumstances have often included one or more of the following: improper refusal to disclose documents; failure to keep records; extreme complexity of issues; extremely voluminous documents and submissions; and misbehaviour of a party. The five factors Rockwell Collins reviews in its submissions are pertinent to the calculation of costs once the Tribunal has decided to depart from the *Guideline*, but (aside from complexity) they are not in themselves circumstances justifying a departure.

61. Of the traditional indicia for departing from the *Guideline*, none appears here. In its determination, the Tribunal found that:[34]

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

62. In comparison to other cases where the Tribunal has departed from the *Guideline*, Rockwell Collins's claim lies on the high end. The Tribunal awarded $20,000 and $22,416 in *CGI* and *Knowledge Circle*, respectively. Only in *Oshkosh* has it awarded more ($153,120) than Rockwell Collins requests here. In *Oshkosh*, the circumstances justifying departure from the *Guideline* were unique, as the Tribunal found:[35]

> . . . The RFP for this procurement was almost 1,500 pages in length and contained over 500 mandatory and point-rated technical requirements. The evaluation consisted of both a "paper" process which evaluated Oshkosh's bid and physical vehicle testing at the NATC facilities which took approximately five months to complete. . . .
>
> . . . In total, there were 9 different grounds of complaint, involving 10 different point-rated technical requirements, in addition to Oshkosh's complaints regarding PWGSC's debriefing and record-keeping obligations. . . . Moreover, the methods of evaluation involved multifaceted assessments and often involved exceedingly technical nuances. . . .
>
> . . . The intervention request by Mack Defense was accompanied by several rounds of submissions regarding the access limitations necessitated by the application of the *Defence Production Act*. . . .

63. Here, the complaint was relatively simple (the issue was whether the winning bidder was compliant) and involved a straightforward interpretation of the requirements of the RFSO (involving the mandatory requirement that the radios have both VHF and UHF capabilities). Further, there is no bad faith or misconduct by PWGSC alleged or proven by the complainant. Although the proceedings involved a public hearing, the bulk of the work and the legal costs claimed were incurred by Rockwell Collins's counsel after he was retained to respond to the GIR. Had Rockwell Collins retained counsel from the beginning of the case and raised all of the arguments and evidence in its complaint rather than its reply to the GIR, the costs may have been lower. There is simply nothing about this complaint sufficiently extraordinary to justify a cost award above Level 3 of the *Guideline*.

34. *RC Determination* at para. 99.
35. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (20 May 2016), PR-2015-051 and PR-2015-067 (CITT) at paras. 246-248.

Conclusion on costs

64. The Tribunal awards Rockwell Collins its reasonable costs incurred in preparing and proceeding with this complaint, assessed at a Level 3 complexity at the amount of $4,700 to be paid by PWGSC.

Peter Burn

Peter Burn
Presiding Member