



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2017-067

ALS Canada Ltd

v.

Statistics Canada

*Determination and reasons issued
Monday, June 4, 2018*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

ALS CANADA LTD

Complainant

AND

STATISTICS CANADA

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Statistics Canada compensate ALS Canada Ltd in an amount equal to one fourth of the profit that it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the price of the contract awarded, calculated from the date of March 16, 2018, until the results of any retender. The Canadian International Trade Tribunal further recommends that the said retender be completed, and a new contract awarded, as soon as practical but, in any event, before the expiration of the initial one-year term of the contract, such that any work required for any foreseen option years 1 and 2 will only be awarded pursuant to an open competition, should the requirement continue to exist.

Should the parties be unable to agree on the amount of compensation, ALS Canada Ltd shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. Statistics Canada will then have seven working days after receipt of ALS Canada Ltd's submission to file a response. ALS Canada Ltd will then have five working days after the receipt of Statistics Canada's submission to file any additional comments. The parties are required to serve each other and file with the Canadian International Trade Tribunal.

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

Peter Burn

Peter Burn

Presiding Member

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STATEMENT OF REASONS

1. On March 28, 2018, ALS Canada Ltd (ALS) filed a complaint with the Canadian International Trade Tribunal (Tribunal) concerning an advance contract award notice (ACAN) with respect to a procurement (Solicitation No. J012173) conducted by Statistics Canada for the provision of laboratory services for the analysis of municipal wastewater in Canada regarding evidence of cannabis consumption.
2. ALS objects to the mandatory requirement in the ACAN that interested suppliers must demonstrate in their statement of capabilities that their laboratories are accredited by the Sewage analysis CORE group – Europe (SCORE or the SCORE network).
3. For the reasons provided below, the Tribunal finds that the complaint is valid and recommends that ALS be compensated and that the work procured be tendered in an open competition.

BACKGROUND

4. In November 2017, Statistics Canada began to consider research projects to gather data-measuring potential changes in the use of cannabis resulting from its legalization, anticipated then to occur in July 2018. Statistics Canada currently uses population surveys as a source of data for cannabis consumption, which raise reliability concerns due to issues of sample size and response bias. During their research, Statistics Canada employees became aware of a more scientific source of data: municipal wastewater analysis, a technique used in Europe by a group of researchers operating under the name of the SCORE network.¹
5. Statistics Canada determined that performance testing (a process which ensures the accuracy of a laboratory's results) would be necessary for this project given its sensitivity (city-specific drug-use levels) and experimental nature. Since Statistics Canada had never conducted performance testing on waste water analysis for cannabis, it concluded that it would have to rely on third parties to conduct the testing. Based on experience, it concluded that performance testing could take six to eight months. At the same time, Statistics Canada learned that membership in the SCORE network was contingent on a laboratory successfully passing performance testing conducted by SCORE.²
6. Statistics Canada asserts that, in its research, it learned of only one laboratory in Canada that was already a member of the SCORE network: the 3Cs Laboratory at McGill University.³
7. Since Statistics Canada anticipated cannabis legalization would come into effect on July 1, 2018, it believed it was essential that it obtain a few months of data prior to implementation. Statistics Canada believed that such data collection and analysis could take up to eight weeks. Given the above, Statistics Canada determined that work needed to commence before April 1, 2018. In early January 2018, Statistics Canada began work on drafting an ACAN for its procurement needs.⁴
8. Statistics Canada posted the ACAN on February 12, 2018, identifying the 3Cs Laboratory at McGill University as purportedly being the only qualified supplier. The ACAN required other interested

1. Exhibit PR-2017-067-09 at paras. 9-10, Vol. 1.

2. *Ibid.* at paras. 11-14.

3. *Ibid.* at para. 16.

4. *Ibid.* at paras. 17-18.

suppliers to submit a statement of capabilities demonstrating compliance with two mandatory requirements, the first of which was accreditation by the SCORE network, by February 26, 2018.⁵

9. On February 23, 2018, ALS e-mailed Statistics Canada, objecting to the requirement that a supplier's laboratory be accredited by the SCORE network. ALS submitted that there was no evidence that SCORE is actually an accrediting body. ALS further submitted that ISO 17025 standards for testing applied to waste water analysis and should be acceptable in lieu of SCORE accreditation.⁶

10. On February 26, 2018, Statistics Canada e-mailed ALS in reply, stating that SCORE would remain a mandatory requirement but that ALS could describe alternatives in its statement of capabilities for Statistics Canada's consideration.⁷ ALS submitted its statement of capabilities the same day on time.⁸

11. On March 14, 2018, Statistics Canada e-mailed ALS to advise it that its statement of capabilities had not been accepted because ALS did not meet the SCORE accreditation requirement.⁹

12. Two other suppliers also submitted statements of capabilities but were determined by Statistics Canada to be non-compliant with the first mandatory requirement.¹⁰

13. A contract was awarded to the 3Cs Laboratory for a one-year period (March 16, 2018, to March 31, 2019) for a value of \$198,876.61 (HST included), with an option to extend for up to two additional years.¹¹

14. On March 16, 2018, Statistics Canada e-mailed ALS to provide a more detailed explanation for its decision. Statistics Canada stated that it had made SCORE accreditation a requirement because it needed to begin work a few months before legalization. It also needed the supplier's laboratories to be performance tested. Therefore, it required SCORE accreditation to ensure reliability of results and methodology in the requisite short timeframe.¹²

15. On March 23, 2018, ALS replied by e-mail. It submitted that performance testing was not a requirement identified in the ACAN. It also maintained its position that SCORE standards were not the "only existing international standards for waste water analysis", as stated in the ACAN. ALS proposed that if performance testing were a true precondition, then the work could be divided up, with SCORE accredited laboratories performing initial work, and then other laboratories being assigned work later after successfully completing performance testing.¹³

16. On March 27, 2018, Statistics Canada responded by e-mail, maintaining its position that the contract as awarded to the 3Cs Laboratory at McGill University would stand.¹⁴

17. On March 28, 2018, ALS filed this complaint with the Tribunal.¹⁵

5. *Ibid.* at para. 19.

6. *Ibid.* at 189-90.

7. *Ibid.* at 189.

8. *Ibid.* at 188.

9. *Ibid.* at 187-88.

10. *Ibid.* at para. 41.

11. *Ibid.* at 178.

12. *Ibid.* at 184.

13. *Ibid.* at 183.

14. *Ibid.*

15. *Ibid.* at 42.

TRADE AGREEMENTS

18. Section 4 of the ACAN states that it is subject to the World Trade Organization *Revised Agreement on Government Procurement*,¹⁶ the *Canadian Free Trade Agreement*,¹⁷ the *Canada-European Union Comprehensive Economic and Trade Agreement*¹⁸ and the *North American Free Trade Agreement*.¹⁹

19. As relevant here, the *CFTA* permits limited tendering, as follows:

Article 513: Limited Tendering

1. Subject to paragraphs 2 and 3, and provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects its own suppliers, a procuring entity may use limited tendering in the following circumstances:

...

(b) if the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:

...

(iii) due to an absence of competition for technical reasons;

...

(d) if strictly necessary, and for reasons of urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering;

20. The limited tendering provisions of the *AGP*, *NAFTA* and *CETA* use similar language, the principal variance with the *CFTA* being that they each have an augmented *extreme* urgency requirement in order to justify a departure from open competition:

AGP**Article XIII — Limited Tendering**

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV only under any of the following circumstances:

...

16. *Revised Agreement on Government Procurement*, 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) [*AGP*].

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

18. *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017) [*CETA*].

19. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

- b. where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:

...

- iii. due to an absence of competition for technical reasons;

...

- d. insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

NAFTA

Article 1016: Limited Tendering Procedures

1. An entity of a Party may, in the circumstances and subject to the conditions set out in paragraph 2, use limited tendering procedures and thus derogate from Articles 1008 through 1015, provided that such limited tendering procedures are not used with a view to avoiding maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other Parties or protection of domestic suppliers.

2. An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:

...

- (b) . . . where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of open or selective tendering procedures;

CETA

Article 19.12 – Limited tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 19.6 through 19.8, paragraphs 7 through 11 of Article 19.9, and Articles 19.10, 19.11, 19.13 and 19.14 under any of the following circumstances:

...

- b. if the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:

...

- iii. due to an absence of competition for technical reasons;

...

- d. only when strictly necessary if, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

ANALYSIS

Statistics Canada's Positions

21. Statistics Canada submits that it correctly determined that ALS' statement of capabilities was non-compliant with a properly conducted ACAN process.

22. Statistics Canada submits that ALS' statement of capabilities does not assert that ALS meets the first mandatory criterion—accreditation by the SCORE network. It alleges that, therefore, on its face, ALS' statement of capabilities does not satisfy the mandatory criteria of the ACAN.

23. Statistics Canada further submits that the mandatory requirement that suppliers be accredited by the SCORE network meets its legitimate operational requirement, necessitated by the tight deadline until decriminalization of cannabis, for a laboratory that has already met performance testing for waste water analysis. In this respect, Statistics Canada submits that ALS has not discharged its burden to prove that the performance testing requirement (including the use of the SCORE network accreditation as a proxy for such testing) is not a legitimate, reasonable requirement.

ALS' Position

24. ALS submits that Statistics Canada's positions are not supported by the evidence.

25. First, Statistics Canada has not supported the statement in the first mandatory criterion of the ACAN that the SCORE network contains "the only existing international standards for wastewater analysis". ALS identifies two²⁰ other Government of Canada (Environment Canada) procurements for laboratory wastewater analysis services in which accreditation to ISO 17025 is identified as a mandatory requirement. There are three recognized laboratory accrediting bodies in Canada, each of which accredits for analyses from non-potable or wastewater samples: the Canadian Association for Laboratory Accreditation (CALA); the Standard Council of Canada; and the Centre d'expertise en analyse environnementale du Québec. In its statement of capabilities, ALS provided its CALA certification of accreditation to ISO 17025:2005 (issued on July 29, 2016, with an expiry date of January 27, 2019). ALS submits that there is no evidence that McGill University's 3Cs Laboratory is accredited by any of these organizations.

26. Second, ALS maintains that there is no evidence that the SCORE network is an accreditation body. The Government Institution Report (GIR) contains no evidence of the SCORE network describing itself as an accreditation body, or any documents showing how such accreditation from SCORE is obtained. ALS submits that neither the SCORE network's nor the 3Cs Laboratory's websites disclose any accreditation status.²¹ In particular, ALS notes that there is no evidence how the SCORE network would have become an accrediting body or performance-testing provider. For example, its website does not indicate that it has been certified as an accrediting body under ISO 17011 or as a performance-testing provider under ISO 17043.

TRIBUNAL'S ANALYSIS

27. Subsection 30.14(1) of the *Canadian International Trade Tribunal Act*²² requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the

20. Exhibit PR-2017-067-11 at 112 and 159, Vol. 1.

21. *Ibid.* at 2-3.

22. *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [Act].

conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which in this case are the *CFTA*, *NAFTA*, the *AGP* and *CETA*.²³

28. Under the trade agreements, competitive solicitations are the norm, and limited tendering procedures are the exception.²⁴ That being the case, the threshold for the successful challenge of a sole-source procurement or limited tendering procedure is relatively low.²⁵ A complainant does not need to demonstrate the case for a competitive solicitation. Rather, the complainant need only present evidence to suggest that a limited tendering procedure is not justified. Where evidence is presented to suggest that a limited tendering procedure is not justified, the onus falls upon the government institution to show that the use of a limited tendering procedure is, in fact and in law, appropriate.²⁶

29. This complaint presents the following questions: is there justification for the mandatory criteria of the ACAN regarding supplier accreditation by the SCORE network either (1) because there is “no reasonable alternative or substitute . . . services . . . for technical reasons”; or (2) because of “extreme urgency” caused by “unforeseeable events”?

Reasonable Alternatives Existed

30. Since limited tendering is the exception to the norm of competitive procurement, the Tribunal has long been of the view that the exceptions should be read narrowly and that the onus upon the government institution to demonstrate their applicability is stringent.²⁷ Here, that requires Statistics Canada to demonstrate that ISO 17025 accreditation by CALA is not a reasonable alternative to SCORE accreditation.

31. ALS’ assertion that ISO 7025 and other standards cover wastewater analysis and include some general performance testing is supported by the evidence in the record. The certifications of ALS laboratories submitted by the complainant include reference to analysis of chemicals in “aqueous” and “non-potable water” environments.²⁸ The complainant also filed revision 1.4 of CALA’s Laboratory Proficiency Testing Plan (March 6, 2014), which requires accredited laboratories to maintain a Proficiency Testing Plan

23. *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 [*Regulations*].

24. *Array Systems Computing Inc.* (16 April 1996), PR-95-023 (CITT) [*Array*] at 9; *Sybase Canada Ltd.* (30 July 1997), PR-96-037 (CITT) [*Sybase*] at 9; *Information Builders (Canada) Inc. v. Department of Public Works and Government Services* (16 July 2007), PR-2007-009 (CITT) [*Information Builders*] at para. 17; *Wescam Inc.* (19 April 1999), PR-98-039 (CITT) [*Wescam*] at 8.

25. *Information Builders* at para. 19.

26. *Knowledge Circle Learning Services Inc. v. Department of Health* (13 January 2014), PR-2013-014 (CITT) [*Knowledge Circle*] at para. 42; *Environmental Growth Chambers, Ltd. and Enconaire (1984) Inc.* (14 January 1991), D90PRF6631-021-0017 and D90PRF6631-021-0018 (PRB); *Sybase* at 9; *Information Builders* at para. 17.

27. *FreeBalance Inc. v. Canada Revenue Agency* (24 January 2012), PR-2011-041 (CITT) at para. 46; *Array* at 8; *Patlon Aircraft & Industries Limited v. Department of Public Works and Government Services* (12 August 2003), PR-2003-015 (CITT) [*Patlon Aircraft*] at 6; *Cognos Incorporated v. Department of Public Works and Government Services* (29 November 2002), PR-2002-017 (CITT) [*Cognos*] at 7; *InBusiness Systems Inc.* (29 November 2002), PR-2002-020 (CITT) at 6; *Foundry Networks* (23 May 2001), PR-2000-060 (CITT) at 7; *Novell Canada, Ltd.* (17 June 1999), PR-98-047 (CITT) at 12; *Sybase* at 9; *Information Builders* at para. 17; *Wescam* at 8.

28. Exhibit PR-2017-067-11 at 9, 30, Vol. 1.

with CALA.²⁹ ALS was accredited by CALA in 2016, i.e. after the issuance of this document requiring performance testing.

32. Statistics Canada has provided no evidence or argument in the GIR that ISO 7025 does not cover wastewater testing. Statistics Canada asserts that it considered ISO qualification insufficient because ISO standards do not include confirmation of accuracy of results through performance testing.³⁰ This assertion is contradicted by the CALA Laboratory Proficiency Testing Plan, which does require preliminary proficiency testing for accreditation and then monitoring through an ongoing performance-testing plan.³¹

33. Statistics Canada also asserts that the SCORE network's protocols are superior to CALA's and ISO 7025 (in terms of both performance testing of cannabis samples and best practices in general) because of SCORE's specialization in the analysis of wastewater for drugs. The only evidence provided by Statistics Canada in support of this proposition is a one-and-a-half page printout of SCORE's website, which provides no relevant information; and six chapters from a 2016 publication by the European Monitoring Centre for Drugs and Drug Addiction, which describe, inter alia, Europe-wide wastewater testing studies performed by SCORE since 2011. The GIR does not pincite any part of the publication for details on accreditation or the process for obtaining membership in SCORE or SCORE's best practices. The GIR also contains no assertion (much less testimonial or documentary evidence) that anyone from Statistics Canada actually contacted any officials from the SCORE network to learn more about the program or verify Statistics Canada's assumptions.

34. On inspection, the only part of the publication of relevance on SCORE membership, protocols or performance testing appears to be pages 108-109.³² Page 108 titled "SCORE 2018" provides a map of participating cities and dates for shipment of samples and testing results. Page 109 titled "Agreed protocol for the sampling, analysis and report" contains a table outlining SCORE's agreed-upon protocol for sampling and analysis. The table is half a page long and does not appear to reference any other (more detailed) documents. It is followed by a few lines of instruction on how to receive samples for performance testing. Statistics Canada filed no other evidence in support of limiting tendering based on the specific benefits of SCORE accreditation.

35. None of the documents that it did file disclose the timing, cost or process for becoming accredited by, or a member of, SCORE. Despite this evidentiary gap, Statistics Canada provided no explanation on how it determined that the 3Cs Laboratory of McGill University met the mandatory requirement of SCORE accreditation. Nor did it submit an explanation or evidence on how it determined that one of the three suppliers who submitted a statement of capabilities was in the process of becoming a SCORE member but was not anticipated to become one until after the ACAN closing date.

36. Further, the Tribunal notes that Statistics Canada's claim that SCORE protocols and procedures are superior is not made in the ACAN, but only in the GIR as a result of this complaint. The Tribunal was therefore unconvinced by the justification.³³ The Tribunal concludes that Statistics Canada failed, in fact and in law, to properly justify the absence of a reasonable alternative for technical reasons; on that basis alone, Statistics Canada's choice to sole source the requirement was not properly justified.

29. *Ibid.* at 70-73.

30. Exhibit PR-2017-067-09 at para. 12, Vol. 1.

31. Exhibit PR-2017-067-11 at 70-73, Vol. 1.

32. Exhibit PR-2017-067-09 at 108-9, Vol. 1.

33. *Dr. John C. Luik v. Department of Public Works and Government Services* (28 March 2000), PR-99-035 (CITT) [*Dr. Luik*] at 9 (finding argument invoked "post facto in the GIR" without merit).

Extreme Urgency

37. Statistics Canada's decision also fails for lack of urgency, let alone extreme urgency: the requirement was sufficiently foreseeable for normal tendering procedures to be followed. The Tribunal has held that in order to justify limited tendering under the ground of urgency, the government institution must show both that there is extreme urgency and that it was caused by unforeseeable events.³⁴

38. Statistics Canada has not explained why it waited until November 2017 to begin considering research projects for measuring potential changes in the use of cannabis in Canada resulting from legalization. Decriminalization of cannabis was a major plank in the current government's platform in the 2015 general election. Bill C-45 (the bill to decriminalize cannabis) was introduced in the House of Commons on April 14, 2017, with a second reading by June 8, 2017, followed by the presentation of a report dated October 5, 2017, by the Standing Committee on Health.³⁵ Statistics Canada failed to articulate any reason why it did not recognize cannabis consumption as a subject worthy of research until November 2017, some eight months after the government bill was first introduced. Other government agencies had already issued procurements for services related to decriminalization as early as July 2017.³⁶ In that government-wide operational context, and given the ubiquitous coverage of the issue in Canadian and foreign media, the Tribunal finds that the behaviour exhibited by Statistics Canada under the circumstances of the impending decriminalization cannot be justified as being in response to an unforeseeable event. The Tribunal has previously found that government institutions cannot claim delay or inaction of their own causing as an excuse for recourse to sole sourcing under the guise of urgency.³⁷

39. In the present circumstances, even assuming that Statistics Canada behaved reasonably in waiting until November 2017 to begin its research, it provided no evidence to support any of its assumptions as to the required length of time (1) for suppliers to join the SCORE network; or (2) to conduct its own performance testing on suppliers.

40. In particular, even if one were to assume any superiority of the SCORE network protocols and performance testing, Statistics Canada provided no evidence that it ever contacted any official at the SCORE network. Statistics Canada also failed to explain or substantiate with evidence at all how its employees estimated the time required for performance testing conducted by Statistics Canada itself³⁸ or becoming accredited (and performance-tested) by the SCORE network. Further, as ALS has observed, there

34. *Knowledge Circle* at para. 43.

35. Parliament of Canada, Bill C-45, online at: <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8886269&Language=E>.

36. See, for example, Request for Proposal of PWGSC on behalf of Public Safety and Emergency Preparedness Canada (Solicitation No. 0D160-181489/A) issued on July 4, 2017, for services "to develop and deliver a multi-media, multi-phased social marketing campaign to raise awareness about the risks of drug-impaired driving", online at <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-CZ-002-73070>. See also Request for Proposal of PWGSC on behalf of Health Canada (Solicitation No. HT399-172780/A) issued on September 20, 2017, for marketing services "to support the propose[d] legislation and regulation of cannabis by raising awareness of the health and safety risks and engaging with the target audiences", online at: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-CX-026-73451>.

37. See *Dr. Luik* at 9.

38. The GIR merely asserts (without citation to any evidence in the record) that Statistics Canada estimated this would take "six to eight months" based on "previous experience". Exhibit PR-2017-067-09 at para. 13, Vol. 1.

is no evidence from SCORE itself, either in response to ALS' e-mails or as found on its website, as to the timeframe for joining the network.³⁹

41. Finally, and very fundamentally, Statistics Canada failed to adhere to some fundamental precepts. First, that "requirements should be expressed in terms of results required, not solutions".⁴⁰ Second, that ACANs "should not replace the process of open competition in the selection of suppliers, nor should [they] be treated as a flexible, more expeditious means of running or attempting to run a competitive procurement action".⁴¹

42. In this regard, the Tribunal encourages officials to heed their first judgment, rather than to follow a path of improper expediency: internal e-mails of Statistics Canada show that personnel were not confident that they had in-depth information about SCORE before issuing an ACAN.⁴² In the face of this uncertainty, Statistics Canada should not have included a proprietary solution, which acted as a *de facto* barrier to competition. Statistics Canada should have issued an open procurement stating its requirements in terms of results, i.e. being able to complete performance testing on cannabis samples conducted by any reliable third party by the March deadline.

43. Alternatively, if more time was needed, Statistics Canada could have issued an ACAN that was limited to 3Cs Laboratory for the initial stage (e.g. the first two to three months) of the project, and then expanded it via a competitive RFP or RFSO open to all for later stages, preconditioned on the completion of performance testing. This is what ALS submits Statistics Canada should have done under the deadlines.⁴³ This approach is also consistent with what Statistics Canada employees themselves expected could occur, given 3Cs Laboratories' reluctance to be responsible for an expanded number of municipalities (greater than 15) after the pilot project.⁴⁴ Thus, at the very least, Statistics Canada should have divided the required work to minimize the amount of sole sourcing necessary.

CONCLUSION

44. For the reasons above, the Tribunal concludes that the mandatory criterion of accreditation by SCORE, which was Statistics Canada's justification for departing from the default requirement of open competition, is not justified on either the ground of no reasonable alternative for technical reasons or the ground of urgency, extreme or otherwise.

45. The Tribunal accordingly concludes that the issuance of a sole-source contract under the ACAN violated the applicable trade agreements.

39. The evidence as a whole suggests that SCORE does not "accredit" laboratories; rather it has members in its network who participate in its wastewater analysis studies, adopt its drug testing protocols and receive performance-testing validation.

40. *Information Builders* at para. 18. See also *Patlon Aircraft* at 6 ("In the Tribunal's view, it would have been quite reasonable and possible, in this case, for DND's requirement to be written in terms of performance criteria and opened up to competition.").

41. *Cognos* at 8.

42. Statistics Canada employees expressed their uncertainty in several instances, writing the following: "Perhaps I should have done more homework about the accreditation."; "This is problematic . . . we've gone out there with potential misleading information . . ."; "I just wish that more information about the SCORE network would have been provided before we posted." Exhibit PR-2017-067-09 at 149-50, Vol. 1.

43. Exhibit PR-2017-067-01 at 32, Vol. 1.

44. Exhibit PR-2017-067-09 at 172, Vol. 1.

46. Therefore, the Tribunal finds that the complaint is valid.

REMEDY

47. Pursuant to subsection 30.15(2) of the *Act*, the Tribunal has wide discretion to craft flexible remedies:

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

48. Pursuant to subsection 30.15(3) of the *Act*, in determining an appropriate remedy the Tribunal must consider each of the following:

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

49. The seriousness of the deficiency in the procurement process is important. Statistics Canada excused itself from the open tendering requirements of the trade agreements on the basis of limited information, regarding a subject matter (wastewater analysis for illicit substances) on which, by its own admission, it had no expertise.⁴⁵

50. The complainant and the two other interested suppliers who submitted a statement of capabilities were seriously prejudiced because, though able to perform the work, they were denied the opportunity to do so on grounds not substantiated by Statistics Canada.

51. The integrity and efficiency of the competitive procurement system was prejudiced to a serious degree. In order for the procurement system to remain competitive and trusted by suppliers, it is necessary that government institutions view and, in fact, treat sole sourcing as a last resort, not a matter of convenience. Statistics Canada acted unreasonably in delaying commencement of its own research into its procurement requirements and then attempted to justify its lack of proaction by claiming urgency. Statistics Canada then compounded its error by failing to exercise due diligence in investigating SCORE to create the necessary evidentiary basis to a lawful invocation of the limited tender provisions of the trade agreements.

52. There is no evidence that any party acted in bad faith.

53. The contract awarded to 3Cs Laboratory commenced on March 16, 2018, and runs in its initial one-year term until March 31, 2019, approximately 10 months from the release of this determination.

45. *Ibid.* at para. 9 and pp. 149-150.

54. Based on all of the above, the Tribunal recommends that Statistics Canada compensate ALS for one fourth of the profit that it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the price of the contract awarded,⁴⁶ calculated from the date of March 16, 2018, until the results of any retender, which should be accomplished as soon as practical. Bid preparation costs are insufficient to remedy the serious breaches to the procurement system and the prejudice suffered by the complainant. However, full lost profits would overstate the compensation owed to the complainant, as there is no certainty that it would have won an open competition. In these circumstances, the Tribunal's normal practice is to award the complainant compensation for lost opportunity calculated at its lost profits divided by the number of responsive bidders.⁴⁷ Here, including 3Cs Laboratory, there were four suppliers who met the second mandatory requirement of the ACAN. Therefore, the appropriate denominator is four.

55. The Tribunal further recommends that a retender be completed, and a new contract awarded, as soon as practical but in any event before the expiration of the initial one-year term of the contract, such that any work required for any foreseen option years 1 and 2 will only be awarded pursuant to an open competition. Where feasible, the Tribunal's preferred remedy is that the complainant be put in the position in which it would have been had the procurement process been conducted fairly and in accordance with the disciplines of the trade agreements.⁴⁸ Here, that requires providing the complainant (and all other potential suppliers) an opportunity to compete in an open competition. Further, retendering the later part of the work is consistent with what Statistics Canada itself internally considered during the procurement process.⁴⁹

56. For clarity, during the retender, Statistics Canada may define its requirements to include whatever legitimate operational requirements it chooses, including, so long as they are not intended as a barrier to competition, familiarity with SCORE protocols, procedures and membership therein. However, if it plans to do so, it must first make sure (as it failed to do here) that such requirements are well-justified, well-documented, well-defined, clear, accessible and made known sufficiently in advance so that otherwise capable suppliers can reasonably meet them.

COMPLAINT COSTS

57. Pursuant to section 30.16 of the *Act*, the Tribunal may award costs of, and incidental to, any procurement complaint proceedings.

58. In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

59. In this instance, the complexity of all three subjects was low. The solicitation documents comprised a three-page ACAN. The complaint contained one ground of complaint—the propriety of one of two

46. For the calculation of lost opportunity in the ACAN context where the complainant submitted no bid, see, for example, *InBusiness Systems Inc.* (29 November 2002), PR-2002-020 (CITT) at 8-9; and *Cognos Inc.* (29 November 2002), PR-2002-017 (CITT) at 10, in which the denominator was based on the total number of successful complainants and the contract awardee, and the price was based on the contract award amount minus one dollar.

47. *Procurement Compensation Guidelines* at art. 3.1.4.

48. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) at para. 71(2).

49. Exhibit PR-2017-067-09 at 172, Vol. 1.

mandatory requirements. Finally, the inquiry proceeded expeditiously without requiring additional filings or a departure from the Tribunal's 90-day regular schedule.

60. As such, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and the preliminary indication of the amount of the cost award is \$1,150.

DETERMINATION

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

62. Pursuant to subsections 30.15(2) and (3) of the *Act*, the Tribunal recommends that Statistics Canada compensate ALS in an amount equal to one fourth of the profit it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the price of the contract awarded, calculated from the date of March 16, 2018, until the results of any retender. The Tribunal further recommends that the said retender be completed, and a new contract awarded, as soon as practical but, in any event, before the expiration of the initial one-year term of the contract, such that any work required for option years 1 and 2 will only be awarded pursuant to an open competition.

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

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

Peter Burn

Peter Burn

Presiding Member