



Ottawa, Thursday, December 6, 2001

File No. PR-2001-026

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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

### DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards McNally Construction Inc. its reasonable costs incurred in relation to preparing and proceeding with the complaint.

Ellen Fry  
Ellen Fry  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Determination: December 6, 2001  
Date of Reasons: December 20, 2001

Tribunal Member: Ellen Fry, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: McNally Construction Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke  
Christianne M. Laizner  
Ian McLeod



Ottawa, Thursday, December 20, 2001

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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

## STATEMENT OF REASONS

### COMPLAINT

On September 7, 2001, McNally Construction Inc. (McNally) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. F7047-000054/C) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO) for the construction, testing and delivery of a jet-propelled boat.

McNally alleged that, contrary to Article 506(6) of the *Agreement on Internal Trade*,<sup>2</sup> Article 1015(4)(d) of the *North American Free Trade Agreement*<sup>3</sup> and Article XIII(4)(c) of the *Agreement on Government Procurement*,<sup>4</sup> PWGSC failed to make an award in accordance with the criteria specified in the tender documents. In particular, it is alleged that McNally's proposal was improperly found to be non-responsive with respect to three mandatory requirements listed in the Request for Proposal (RFP) regarding financial statements, the cost breakdown and the contractor quality control system. McNally argued that the financial statements that it submitted clearly provided information for the two years requested, that it met the cost-breakdown requirement, as the requirement did not define what level of cost breakdown PWGSC required, and that it provided evidence of a contractor quality control system by addressing each element of the ISO 9001 model as required.

McNally requested, as a remedy, that its proposal be found responsive and that it be awarded the contract.

On September 17, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup> That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On September 18, 2001, PWGSC informed the

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].
5. S.O.R./93-602 [hereinafter Regulations].

Tribunal that no contract had been awarded. On September 27, 2001, the Tribunal informed the parties that ABCO Industries Limited had been granted intervener status in the matter. On October 15, 2001, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> On October 25, 2001, McNally filed comments on the GIR with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

## **PROCUREMENT PROCESS**

A Notice of Proposed Procurement (NPP) for this solicitation was issued along with an RFP on June 11, 2001, and posted on Canada's Electronic Tendering Service (MERX) on June 12, 2001. The closing date for the bids was initially set for August 2, 2001, but was subsequently amended to August 9, 2001. The NPP indicated that the solicitation was being conducted under the AIT.

The following provisions of the RFP are relevant to this case:

### **SECTION B: EVALUATION CRITERIA**

#### **B-2 BASIS OF SELECTION**

(2) The technically and contractually compliant lowest Evaluation Priced responsive bid will generally be recommended for the award of a contract being contemplated as a result of the Request For Proposal.

#### **B-5 FINANCIAL STATEMENTS**

(1) In order to confirm the Bidders' financial capability to perform the subject requirement, Bidders shall provide with their Proposal, their audited Financial Statements for their two (2) Fiscal Years immediately prior to the date of their Proposal. The Financial Statements shall include:

- Income Statement;
- Balance Sheet;
- Retained Earnings;
- Auditor's Endorsement;
- Notes to Statements.

(4) Where the Bidder is a division or subsidiary of a company, the aforementioned information of the parent company shall also be provided

#### **B-11 COST BREAKDOWN**

(1) The Bidder shall include with its proposal a complete cost breakdown of its bid price for the Work. Each item of work or services in the bid is to be priced individually to indicate labour and/or material, overhead, and profit. Each item of cost shall be cross referenced to a specification item where applicable.

(2) This cost breakdown shall itemize all costs included in its price for the Work in accordance with the Bidder's cost accounting or cost schedule system.

#### **B-15 CONTRACTOR QUALITY CONTROL SYSTEM**

(1) The Bidder shall provide objective evidence that it has a Quality Assurance System which addresses each element in the ISO 9001 Model. The objective evidence may be in the form of a

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6. S.O.R./91-499.

registration certificate, or a copy of its Quality Assurance Manual which addresses each element in the ISO 9001 Model. Bidder facilities may be audited by the Crown, or its authorized representative, prior to award of contract to ensure that a system is in place in accordance with the foregoing requirement.

The Statement of Requirement (SOR) also contained the following provisions relevant to the issue of quality assurance and quality control:

**G 1.2 Bidder's Proposal**

1.2.3 The Bidder's proposal shall address each article or section of this SOR and indicate an understanding of and compliance with each requirement.

**G 1.10.1 Quality Assurance and Quality Control**

1.10.1 The [Bidders] shall provide evidence, in their proposal that their Quality Assurance (QA) System is currently certified to the ISO 9001 model. Alternatively, [Bidders] who do not possess this certification are required to demonstrate, in their proposal, how their QA system meets the ISO 9001 model. [Bidders] not certified to the ISO 9001 Model, but have satisfactorily demonstrated in their proposal that their QA system in place meets the ISO 9001 model may be audited by the CG Technical Authority or his authorised representative prior to award of contract to ensure that the requirement of this SOR is satisfied.

According to the GIR, three proposals were received by the bid closing date. The evaluation team determined that all three bids had failed to meet various mandatory requirements in the solicitation and, therefore, all bids were found to be non-compliant. On August 23, 2001, McNally was notified, in writing, by PWGSC that all three bids had been found to be non-responsive with respect to mandatory requirements and that, as a result, a contract would not be awarded. The letter also identified the three mandatory requirements with respect to which McNally's proposal was declared non-compliant. In addition, PWGSC indicated that the solicitation would be re-issued no later than August 28, 2001.

McNally filed its complaint with the Tribunal on September 7, 2001. On September 10, 2001, PWGSC re-issued the solicitation with a closing date of October 11, 2001.

## **POSITION OF PARTIES**

### **PWGSC's Position**

PWGSC submitted that the procurement was subject only to the provisions of the AIT and that this fact was not at issue. In this context, it submitted that the solicitation was excluded from NAFTA given that the jet-propelled patrol boat that is the subject of the solicitation was covered by the specific exclusion for "shipbuilding and repair".<sup>7</sup> Similarly, PWGSC submitted that the General Notes for Canada in the AGP also exclude "shipbuilding and repair".<sup>8</sup> Accordingly, PWGSC submitted that the provisions of the AGP did not apply to the procurement.

PWGSC submitted that it acted in good faith, correctly evaluated McNally's proposal in a manner consistent with the requirements of the AIT and properly concluded that the proposal was non-compliant

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7. Annex 1001.2b to NAFTA specifically excludes, in the Schedule of Canada, shipbuilding and repair from the application of Chapter Ten.

8. Section 1 of the General Notes for Canada in the AGP.

with the mandatory requirements regarding the financial statements, the cost breakdown and the quality control and quality assurance.

In response to McNally's allegation that PWGSC erred in finding its bid to be non-compliant on the basis that the financial information provided in response to clause B-5 of the RFP did not meet the mandatory requirements, PWGSC submitted that the requirement for two sets of audited financial statements, one for each of the bidder's last two fiscal years, was clearly set out in the mandatory terms of the RFP. Furthermore, it argued that the requirement clearly envisioned the provision of two sets of audited financial statements. In addition, PWGSC submitted that it is common practice to provide, in any set of financial statements, comparative data covering two fiscal years. Given this common practice, the purpose of the requirement was to obtain, from each bidder, two sets of financial statements, one for each of the last two fiscal years, which, taken together, would provide financial information covering the last three fiscal years.

With respect to the information provided by McNally in response to clause B-11 of the RFP, PWGSC submitted that McNally limited its cost breakdown to the broad sections of the SOR, which were reproduced in the unrelated Appendix B to the RFP, instead of pricing "[e]ach item of work or services", as requested by clause B-11. PWGSC added that the wording of this clause was explicit in its requirement that a breakdown be done on an item-by-item basis.

PWGSC further submitted that McNally had no basis for relating the word "item" with the broad categories set out in Appendix B. It asserted that there was nothing in clause B-11 of the RFP that related those requirements to Appendix B or the categories in the SOR.

PWGSC noted that McNally appeared to suggest in its proposal that by providing a level 2 breakdown,<sup>9</sup> it had met the item-by-item standard required. In the GIR, PWGSC quoted an example and paragraphs of a leading text<sup>10</sup> in the field of management control systems regarding levels of detail for cost breakdowns. PWGSC submitted that, according to the leading text that it quoted in the GIR, there is a standard expectation that costs are to be provided at a level 3 basis to permit the measurement of future contract performance, and that, therefore, there was no reasonable basis for McNally to assume that level 2, a more limited cost breakdown, would suffice to meet the requirement in clause B-11 for an item-by-item cost breakdown.

With respect to the issue of McNally's proposal not meeting the mandatory requirement regarding quality control and quality assurance, PWGSC submitted that both clause B-15 of the RFP and section G 1.10.1 of the SOR clearly set out the standard required by a bidder to meet the mandatory requirements. It submitted that the evaluation team found McNally's proposal to be non-responsive because its proposal contained insufficient detail for the majority of the elements in the ISO 9001 model. Consequently, the evaluation team was unable to conclude that McNally's proposal addressed all the requirements of each element.

PWGSC further submitted that McNally's failure to meet any one of these three mandatory requirements would have rendered its bid non-responsive. It also noted that, in the absence of responsive bids, the procurement was cancelled and re-issued and that McNally submitted a new proposal.

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9. PWGSC submitted that the term "level 2" is a standard cost management term and refers to major subsystems in a project.

10. Quentin W. Fleming, *Put Earned Value into Your Management Control System* (Publishing Horizons Inc., 1983).

PWGSC requested the opportunity to make further submissions with respect to the issue of the award of costs in this matter.

### **McNally's Position**

In its response to the GIR, McNally submitted that the RFP required financial statements for the past two fiscal years, not two "sets" of financial statements. In hindsight, McNally believes that PWGSC wanted three years of financial information, but that was not what was required by the RFP. McNally noted that the new RFP clarified this requirement.<sup>11</sup>

McNally also submitted that "[t]he RFP was silent as to what items to use or not use" in replying to the requirement regarding the cost breakdown, and that the RFP referred to items of work but did not define them. McNally submitted that, after the fact, it seems clear which level of detail PWGSC anticipated receiving, but that PWGSC should have listed the items required in detail or specified the level of detail required.

With regard to the quality control and quality assurance requirement, McNally stated that "[i]f PWGSC [wanted] the RFP to have a fully developed project [manual] submitted they should have specifically made that request."

In conclusion, McNally submitted that "[t]he level of detail submitted with the proposal was not what was anticipated by the people performing the evaluation." It added that "the RFP was not specific as to the level of detail that the evaluators would require" and that the new RFP clarified the requirements for the financial statements and the quality control program. McNally submitted that "[t]he bidders can hardly be expected to anticipate what may be required in absence of clearly detailed instructions especially with mandatory requirements."

### **TRIBUNAL'S DECISION**

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the 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 further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

As a preliminary issue, the Tribunal needs to determine whether the procurement is covered by the AIT, NAFTA and/or the AGP.

The Tribunal notes that McNally filed its complaint under the three trade agreements. The Tribunal agrees with the parties that the procurement is covered by the provisions of the AIT. However, PWGSC submitted that the procurement was excluded from NAFTA and the AGP by virtue of the specific

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11. McNally provided portions of the new RFP with its comments. Clause B-5, "Financial Statements", in the RFP for Solicitation No. F7047-000054/D reads, in part, as follows: "Bidders shall provide with their Proposal, their audited Financial Statements for their two (2) Fiscal Years immediately prior to the date of their Proposal. These statements will provide three (3) years of financial information required for evaluation."

exclusions for “shipbuilding and repair”.<sup>12</sup> The Tribunal agrees with the parties that the procurement is covered by the provisions of the AIT, and needs to determine whether the procurement constitutes a procurement in respect of “shipbuilding and repair” for the purposes of NAFTA and AGP exclusions.

Neither NAFTA nor the AGP provides a definition of “shipbuilding” or any other guidance on how the word “shipbuilding” should be interpreted. Accordingly, the Tribunal will look to other sources for assistance.

The *Gage Canadian Dictionary*<sup>13</sup> defines “shipbuilding” as follows:

1 the designing or building of ships. 2 the art of building ships.

Therefore, the Tribunal will determine whether the jet-propelled patrol boat that is the subject of the procurement is a “ship”. PWGSC proposed three sources to assist the Tribunal in this regard: federal statutes, legal dictionaries and general purpose dictionaries. The Tribunal agrees that these sources are useful aids to interpretation.

These three sources indicate that there are two possible approaches to defining a “ship”. The first possible approach is to use an extremely broad definition that essentially indicates that a ship is any kind of boat. Using this approach, vessels as diverse as canoes, log rafts, oil tankers and warships could all be considered ships.

PWGSC provided the Tribunal with several definitions that use this broad approach. For example, one legal dictionary provides the following definition:

**SHIP.** –*n.* 1. Includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion. 2. Includes any structure launched and intended for use in navigation as a ship or as a part of a ship. . . . 3. Any kind of vessel, or boat, propelled by sails, steam, gasoline or otherwise.<sup>[14]</sup>

Similarly, section 673 of the *Canada Shipping Act* provides the following definition:

“ship” includes any description of vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion.<sup>[15]</sup>

The second possible approach to the definition is a narrower one that confines the use of the word “ship” to a specific kind of boat. For example, PWGSC referred the Tribunal to the definition of “vessel” in the *Harbour Commissions Act*.<sup>16</sup>

“vessel” includes any ship, boat, barge, raft, dredge, floating elevator, scow, sea-plane or other floating craft.

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12. Annex 1001.2b to NAFTA, in the Schedule of Canada, reads, in part:

1. This Chapter does not apply to procurements in respect of:  
(a) shipbuilding and repair.

Section 1 of the General Notes for Canada in the AGP reads, in part:

1. Notwithstanding anything in these Annexes, the Agreement does not apply to procurements in respect of:  
(a) shipbuilding and repair.

13. 1997, s.v. “shipbuilding”.

14. *The Dictionary of Canadian Law*, 1995, s.v. “ship”.

15. *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 673.

16. R.S.C. 1985, c. H-1, s. 2.

Unlike section 673 of the *Canada Shipping Act*, this definition from the *Harbour Commissions Act* does not use “ship” as an all-encompassing word. It does not actually define the word “ship”, but does indicate that a “ship” is only one of several kinds of craft that are included in the word “vessel”.

PWGSC also referred the Tribunal to several definitions from general-purpose dictionaries that take the narrower view of the word “ship”. These definitions indicate that the distinguishing features of a ship are that it is large and seagoing. For example, one of the definitions of “ship” provided by PWGSC was the following:

any large seagoing vessel.<sup>[17]</sup>

Given the fact that both broad and narrow definitions of the word “ship” are possible, the Tribunal needs to determine whether a broad or narrow definition should be adopted in this context.

Generally speaking, the purpose of the procurement provisions of NAFTA and the AGP is to promote trade liberalization by ensuring that tendering procedures are applied in a non-discriminatory and transparent manner. In order to address this purpose as broadly as possible, the Tribunal considers that the categories of procurements excluded from coverage by NAFTA and the AGP should normally be construed narrowly. Accordingly, the Tribunal adopts the narrower definition of “ship” and considers that, in this context, a ship is “any large seagoing vessel”.

In order to determine whether a jet-propelled patrol boat meets this definition, the Tribunal must first decide whether such a boat is a large vessel.

Section G 1.3.1 of the SOR sets the following mandatory requirements for the dimensions of the patrol boat:

- |                      |   |
|----------------------|---|
| a. Length (Overall)  | 13.11 m to 14.02 m (43 feet to 46 feet) |
| b. Breadth (Overall) | 1/3 Overall Length (approximately)      |

In other words, to put these dimensions into a common frame of reference, the length of the patrol boat must be approximately the combined height of eight adults, and its breadth approximately the combined height of two or three adults. It is common knowledge that these dimensions are not large in relation to the size range of vessels in general. For example, it is clear that a vessel such as an oil tanker or a warship is much larger than the jet-propelled patrol boat at issue. Accordingly, the Tribunal considers that the jet-propelled patrol boat is not a large vessel.

This determination alone is sufficient to conclude that the jet-propelled patrol boat is not a ship. However, the Tribunal also wishes to consider whether the patrol boat is a seagoing vessel. *The Concise Oxford Dictionary of Current English*<sup>18</sup> defines “seagoing” as follows:

(of ships) fit for crossing the sea.

Similarly, *The Oxford English Dictionary*<sup>19</sup> provides the following definition of “seagoing”:

Going on the sea, applied to a vessel which makes distant journeys as opposed to a coasting, harbour, or river vessel.

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17. *The Concise Oxford Dictionary of Current English*, 7th ed., s.v. “ship”.

18. *Ibid.* s.v. “sea”.

19. Second ed., s.v. “sea-going”.

Section G 1.1 of the SOR describes the required function of the jet-propelled patrol boat, in part, as follows:

- 1.1.1 Fisheries & Oceans Canada (DFO), Canadian Coast Guard (CCG), Maritimes Region requires a fast inshore patrol boat for fisheries enforcement purposes. The patrol boat shall operate as a station-mode patrol boat in the coastal waters within the Region during all seasons of the year.
- 1.1.2 The primary mission for the patrol boat shall be to allow fisheries officers to recover and haul (bring to port), untagged or illegal lobster traps and other fishing gear.
- 1.1.3 The secondary mission for the patrol boat shall be other fisheries enforcement duties such as boarding and surveillance, and Search and Rescue (SAR) duties, which are within the reasonable capabilities of this type and size of patrol boat. There are times that the patrol boat will be required to provide ambulance service to evacuate persons from Grand Manan Island.

In summary, the SOR indicates that the patrol boat is to be based in a home port, out of which it will be deployed to various work areas in coastal waters to perform such duties as bringing illegal lobster traps to port, boarding and surveillance and providing SAR and ambulance services.

Thus, although the patrol boat must operate at sea, it is required to operate only in coastal waters. It is not required to cross the sea or to travel long distances over the sea. For example, it is not required to be capable of making an extended ocean voyage, such as a voyage to Europe. Hence, the Tribunal does not consider that the jet-propelled patrol boat is a seagoing vessel.

The Tribunal notes that this determination in itself would have been sufficient to conclude that the patrol boat is not a ship, if the Tribunal had not already determined that it is not a large vessel.

Accordingly, the Tribunal considers that the jet-propelled patrol boat is not a ship and that the procurement of a jet-propelled patrol boat is not a procurement in respect of “shipbuilding” within the meaning of NAFTA and the AGP. Therefore, the Tribunal has jurisdiction to consider the complaint not only under the AIT but also under NAFTA and the AGP.

Article 506(6) of the AIT provides, in part, that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.” Article 1015(4)(d) of NAFTA provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”. Article XIII(3)(c) of the AGP provides likewise. Therefore, the Tribunal must decide whether the solicitation documents clearly indicated the requirements of PWGSC and DFO for the procurement and whether PWGSC acted according to the provisions of the trade agreements when it declared McNally’s proposal non-compliant.

With respect to McNally’s allegation that PWGSC incorrectly evaluated its proposal regarding the requirement to provide financial statements, the Tribunal finds that there is no merit to this allegation. The Tribunal does not accept the contention of PWGSC that in requesting financial statements for two fiscal years it was requesting financial information for three years. However, the Tribunal notes that clause B-5 of the RFP was clear, in that it requested the audited financial statements for two fiscal years and these audited statements were to include, in addition to the income statement, the balance sheet and retained earnings, the auditor’s endorsement and the notes to statements. Although the non-consolidated financial statements as of April 30, 2001, provided by McNally in its proposal, included two fiscal years of financial information, i.e. for the year ending April 30, 2001, and the year ending April 30, 2000, they did not however include the auditor’s endorsement or the notes to statements for the first year. The Tribunal notes that McNally’s

auditor, in a letter to PWGSC dated August 28, 2001,<sup>20</sup> indicated that its audit opinion extended to the year ending April 30, 2000. However, the Tribunal notes that this letter did not form part of McNally's bid, and did not address the omission of the notes to the financial statements for the first year. Consequently, the Tribunal finds that McNally did not meet the mandatory requirement of providing all documents required for two fiscal years.

With respect to McNally's allegation that PWGSC incorrectly evaluated its proposal concerning the mandatory requirement to provide a cost breakdown, the Tribunal finds that PWGSC did not clearly identify, in the RFP, its requirement for each bidder to provide "a complete cost breakdown of its bid price". The Tribunal notes that nowhere in the RFP are the terms "specification item", "item of work" and "item of cost" defined, even though these are the terms used in clause B-11 of the RFP. Furthermore, nowhere in the tender documentation was there a reference to a level 2 or level 3 breakdown of costs being necessary to meet the mandatory requirement of clause B-11 of the RFP. A reference or explanation to that effect, in the Tribunal's opinion, would have been necessary for the bidders to understand clearly what was required. In these circumstances, the Tribunal finds that it was reasonable for McNally to construe the requirement in the way that it did, using Appendix B to the RFP, which provided a list of requirements under several headings, as a list of "items". The Tribunal is of the opinion that PWGSC did not fully describe its requirements in the tender documentation, contrary to Articles 506(6) of the AIT, 1015(4)(d) of NAFTA and XIII(3)(c) of the AGP.

With respect to McNally's allegation that PWGSC incorrectly evaluated its proposal concerning the mandatory requirement regarding quality control and quality assurance, the Tribunal finds that PWGSC failed to state this requirement clearly in the RFP.

The GIR makes it clear that McNally's proposal was found to be non-compliant, not because it did not address the elements of ISO 9001, as required by clause B-15, but because it did not provide sufficient detail in this regard.<sup>21</sup> However, PWGSC did not indicate in the RFP what level of detail would be required, and hence did not fully describe its requirements. The Tribunal is therefore of the view that PWGSC breached Articles 506(6) of the AIT, 1015(4)(d) of NAFTA and XIII(3)(c) of the AGP.

Furthermore, the Tribunal notes that the relevant requirements of the RFP are stated in two different provisions: clause B-15 of the RFP and section G 1.10.1 of the SOR, which is incorporated in the RFP. Clause B-15 indicates that "The Bidder shall provide objective evidence that it has a Quality Assurance System which **addresses each element in the ISO 9001 Model.**" On the other hand, section G 1.10.1 indicates that Bidders who do not possess ISO 9001 certification "are required to demonstrate, in their proposal, how their QA system **meets the ISO 9001 certification model.**"(emphasis added). These two provisions impose two different, inconsistent standards and do not indicate which of the two standards is the one expected for bids.

## **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the provisions of the AIT, NAFTA and the AGP and that the complaint is therefore valid in part.

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20. Complaint, Attachment 3.

21. GIR, tab 7.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards McNally its reasonable costs incurred in preparing and proceeding with the complaint.

Ellen Fry  
Ellen Fry  
Presiding Member