Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Monday, March 29, 2004

File No. PR-2003-076

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

AND FURTHER TO 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.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Bosik Vehicle Barriers Ltd. by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder. The starting basis for the calculation of the lost profit should be the total value of the contract awarded to the winning bidder of Solicitation No. W0103-031TAY/A. The Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to it within 30 days of the publication of this determination.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bosik Vehicle Barriers Ltd. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and the amount of its cost award is $1,500. If any party disagrees with the preliminary indication of the level of complexity or the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

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Date of Determination:	March 29, 2004
Date of Reasons:	April 7, 2004
Tribunal Member:	Ellen Fry, Presiding Member
Investigation Officer:	Michael W. Morden
Counsel for the Tribunal:	Reagan Walker
Complainant:	Bosik Vehicle Barriers Ltd.
Counsel for the Complainant:	Paul W. Donovan
Intervener:	SPX Canada
Counsel for the Intervener:	Mark N. Sills Jennifer L. Egsgard
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater Christianne M. Laizner Susan D. Clarke Ian McLeod

Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

Ottawa, Wednesday, April 7, 2004

File No. PR-2003-076

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

AND FURTHER TO 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 February 12, 2004, Bosik Vehicle Barriers Ltd. (Bosik) filed[1] a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[2] The complaint concerned the procurement (Solicitation No. W0103-031TAY/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply, installation, testing and putting into proper operation of rising road barricades at Canadian Forces Base (CFB) Esquimalt.

Bosik alleged that PWGSC failed to provide it with adequate time to prepare its bid. More particularly, Bosik claimed that PWGSC released critical information only two days before the closing date of the solicitation and only one day before it had to finalize its proposal. Bosik submitted that it had insufficient time to refine its design and associated costs before it had to submit its bid.

Bosik is requesting, as a remedy, that PWGSC cancel the contract and award it to Bosik. Alternatively, Bosik requested that it be awarded compensation for lost profit or lost opportunity as a result of being denied the opportunity to perform the contract. Bosik also requested that the Tribunal award it its reasonable bid preparation costs for this solicitation, as well as its complaint costs. Finally, Bosik requested that the Tribunal deal with this complaint under the express option set out in rule 107 of the *Canadian International Trade Tribunal Rules*.[3]

On February 16, 2004, 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*.[4] The Tribunal also informed the parties that, in accordance with subrule 107(4) of the *Rules*, the Tribunal would apply the express option in this case. On February 26, 2004, SPX Canada (SPX), the contract awardee, asked for leave to intervene in the matter before the Tribunal and it was granted. On the same day, PWGSC filed its Government Institution Report (GIR) with the Tribunal. Bosik and SPX filed comments on the GIR

1. The complaint was initially received by the Tribunal on February 6, 2004; however, the Tribunal required additional information, which was subsequently provided by Bosik on February 12, 2004.
2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
3. S.O.R./91-499 [*Rules*].
4. S.O.R./93-602 [*Regulations*].

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on March 5, 2004. On March 11, 2004, PWGSC objected to Bosik's comments on the GIR and, on March 12, 2004, Bosik and SPX responded to this objection.

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

PROCUREMENT PROCESS

According to the GIR, a Request for Proposal (RFP) was issued by PWGSC, on behalf of DND, on December 22, 2003, with a closing date for the receipt of bids of January 16, 2004.

Page 2 of Part 2 of the RFP contained the following provision regarding the submission of the proposal:

> NON-ACCEPTANCE OF ELECTRONIC PROPOSALS: "WARNING": Due to the nature of this solicitation a complete technical proposal with supporting information is required to allow a proper evaluation to be conducted. Electronic transmission of this documentation by such means as facsimile to the Bid Receiving Unit of Public Works and Government Services is not considered to be practical and therefore will not be accepted.

Page 3 of Part 2 of the RFP contained the following provisions regarding communications during the solicitation period:

> 1. To ensure the integrity of the competitive bid process, enquires and other communications regarding the bid solicitation, from the issue date of the solicitation up to the closing date, are to be directed ONLY to the individual named on page one (1) of the bid solicitation.
>
> 2. Enquires must be **IN WRITING**.
>
> 3. Enquires must be received **no less than three calendar days** prior to the bid closing date to allow sufficient time to provide a response. Enquires received after that time might not be answered prior to the bid closing date.

Amendment No. 002, issued on January 12, 2004, provided, among other things, the following information:

> 1. Vehicle mass: 15,000 LBS.

Amendment No. 003, issued on January 14, 2004, provided that the following specifications were added:

> Certified by: U.S. Department of State
> Certification Level: K4/L1
> Gross Vehicle Weight: 15,000 pounds/66.7 kN
> Crash Speed: 30 mph/48kph
>
> or substitute equivalent.
>
> All other terms and conditions remain unchanged.

"Certification Level" refers to U.S. State Department specification SD-STD-02.01, in which "K4" represents a speed of 30 mph and "L1" represents a penetration distance of 20-50 ft.

According to PWGSC, three proposals were received, including one from Bosik and one from SPX. The third proposal was determined to be non-compliant for unspecified technical reasons. PWGSC determined that SPX had submitted the lowest-priced responsive proposal and, on January 30, 2004, it awarded the contract to SPX and informed the other potential suppliers accordingly.

On January 23, 2004, prior to the award of the contract, Bosik made an objection by telephone to PWGSC. On February 2, 2004, Bosik was informed by PWGSC, by telephone, that the objection had been reviewed and denied. Bosik sent a letter to PWGSC on February 3, 2004, making a written objection. Bosik's complaint was received by the Tribunal on February 6, 2004. On February 11, 2004, the Tribunal requested that Bosik file PWGSC's response to the letter of February 3, 2004. On February 12, 2004, Bosik provided the additional information. On February 12, 2004, the Tribunal accepted the complaint for inquiry.

POSITIONS OF THE PARTIES

Bosik's Position

Bosik's complained that the specifications were amended so late to add a requirement for allowable perimeter penetration that it was impossible to adequately modify its proposal to take into account the significant change.

Bosik also submitted that, because, in its view, the RFP was vague, the specification must have been improperly based on a specific product from a specific manufacturer, namely, the eventual winner of the contract—SPX.

Bosik submitted that three key variables must be considered when specifying, designing and manufacturing a crash-rated vehicle barrier system, such as the one being requested in the subject RFP. Manufacturers/service providers must know: (1) the speed of the approaching vehicle; (2) the weight of the approaching vehicle; and (3) the allowable perimeter penetration (i.e. the distance that a vehicle attempting to drive through the barrier will be able to go before the barrier stops it). Bosik noted that, when the RFP was initially released, only the speed (30 mph) was specified. Bosik observed that the vehicle weight (15,000 lbs) was not provided until Amendment No. 2, issued on January 12, 2004, and the perimeter penetration (up to 50 ft.) was not provided until Amendment No. 3, issued on January 14, 2004. Bosik also indicated that there was another amendment issued on January 15, 2004. Bosik submitted that the late issuance of Amendment No. 3 failed to provide bidders sufficient time to amend their proposals, with respect to this significant amendment. Bosik submitted that the prohibition in the RFP on faxed or electronically submitted proposals meant that it had to have its proposal completed and ready to be sent by courier by January 15, 2004, only one day after it received Amendment No. 3.

Bosik argued that, prior to receiving Amendment No. 3, it had prepared its bid using a perimeter penetration figure of 10 ft., which, it argued, was based on its experience with other secure facilities. Bosik submitted that, when its representative visited CFB Esquimalt on January 9, 2004, he mentioned this fact to the government representatives present, but was not given any indication that the CFB Esquimalt requirement would be 50 ft. Bosik submitted that a change as significant as the one provided in Amendment No. 3 would have meant that it would have had to review the size of the ballast boxes, the amount of concrete contained within the ballast boxes, the size of the connecting hardware, the shipping of the boxes and the amount of labour required for installation.

Bosik submitted that, although it did submit a technically compliant proposal, the change to a 50-ft. perimeter penetration came too late in the procurement process to respond adequately to the requirement in terms of technical response and associated costs.

PWGSC's Position

PWGSC responded to Bosik's claim of not having received enough time to respond to Amendment No. 3 by submitting that Amendment No. 3 made little change to the specifications and had only an insignificant impact on Bosik's proposal. PWGSC noted that Bosik's bid was technically compliant and contained at least two references to the K4/L1 specification. PWGSC also noted that Bosik documented a number of assumptions throughout its proposal, yet did not include any relating to the perimeter penetration. It argued that, if perimeter penetration was as important as alleged, both from a technical and financial perspective, there should have been assumptions to that effect noted in the proposal. PWGSC also submitted that, in section 1.1 of its proposal, Bosik acknowledged that the proposal was submitted in response to the RFP and Amendment Nos. 1, 2 and 3 and that, therefore, Bosik had sufficient time to demonstrate compliance and, by extension, to change its financial proposal if required.

PWGSC also submitted that, if the allowable perimeter penetration was a key parameter, then it is inexplicable why Bosik, or any other prospective bidder, did not request this parameter. PWGSC submitted that another alleged key parameter, the vehicle weight, was not available when the solicitation was published and was the subject of a clarification question. PWGSC stated that, if the perimeter penetration was as important as the vehicle weight, Bosik should have requested it at some point prior to bid closing.

Regarding communications during the solicitation period, PWGSC noted that the provisions of the RFP stated that three calendar days were required to guarantee that PWGSC would be able to respond to enquires; however, Bosik was free to submit questions, in accordance with these provisions, up to the closing date. PWGSC submitted that the final amendment, dated January 15, 2004, was issued as a result of questions that were received on January 14, 2004.

PWGSC submitted that Bosik's bid was technically compliant, as was that of SPX; hence, there was adequate time between the time of the release of Amendment No. 3 and the bid closing time.

PWGSC requested that the complaint be dismissed and that it be awarded its costs.

SPX's Position

SPX concurred in general with the positions set out by PWGSC in the GIR. However, SPX disagreed with PWGSC's assertion that Amendment No. 3 did not constitute a material change to the RFP. SPX submitted: (1) that Bosik could have requested additional information regarding the RFP, including the perimeter penetration, at any time up until the bid closing date; (2) that Bosik had sufficient time to comply with the RFP; and (3) that there was no merit to Bosik's claim that the RFP was based on one of SPX's products. SPX also submitted that, if Bosik had concerns about the closing date, it could have requested an extension to the bid closing date. SPX noted that neither PWGSC nor Bosik submitted any evidence to suggest that Bosik had taken this course of action.

SPX submitted that it received Amendment No. 3 at the same time as Bosik and that it was forced to substantially revise its bid as a result of the information provided in the amendment. SPX asserted that, since it was able to make the necessary changes, Bosik could reasonably have done the same.

SPX submitted several affidavits stating that, in the life safety products industry, it is standard practice for RFP amendments to be made within several days of the closing date. It argued that, in a previous case,[5] the Tribunal had noted that "'industry standards' are the backdrop upon which one can judge the reasonableness of the time period used by the Department". SPX also submitted that it had to switch suppliers and products as a result of Amendment No. 3, thus addressing Bosik's argument that the RFP was based on a product furnished by SPX.

Finally, SPX noted that its head offices are in Ontario, the same province as Bosik's; therefore, in its view, the trade agreements did not apply to this complaint, as there was no indication of discrimination based on the place of origin of the bidder or the goods.

SPX requested "indemnity" costs and, if the Tribunal were to recommend a re-tender of the contract, reimbursement for its full costs of preparing its bid, of performing the contract and of defending this action.

TRIBUNAL'S DECISION

Subsection 30.14(1) 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, which, in this case, are the *Agreement on Internal Trade*,[6] the *North American Free Trade Agreement*[7] and the *Agreement on Government Procurement*.[8]

Express Option

In its complaint, Bosik requested that the Tribunal apply the express option, which is provided for by rule 107 of the Rules:

> 107. (1) When the complainant, the government institution or an intervener requests an expeditious determination of a complaint, the Tribunal shall consider the feasibility of using the express option procedure set out in subrule (5).
>
> (2) The Tribunal may apply the express option in the case of any complaint that is suitable for resolution within 45 days.
>
> (3) A request for the express option shall be made in writing and submitted to the Secretary not later than three days after a notice of inquiry is given under subsection 30.12(3) of the Act.
>
> (4) The Tribunal shall determine whether or not to apply the express option within two days after receiving a request for it and shall notify the complainant, the government institution and all of the interveners of its determination.

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5. *Re Complaint Filed by Global Upholstery Co. Inc.* (1 November 2000), PR-2000-028 (CITT) [*Global Upholstery*].
6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].
7. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

> (5) Where the express option is applied, the time limits set out in this Part for filing documents shall not apply and the following procedure shall be followed:
>
> (*a*) the government institution shall, within 10 days after the day on which it is notified by the Tribunal that the express option is to be applied, file with the Tribunal a report on the complaint containing the material referred to in subrule 103(2);
>
> (*b*) the Secretary shall, forthwith after receiving a report referred to in paragraph (*a*), send to the complainant a copy of the documents referred to in paragraph 103(3)(*a*) and make a copy of that material available to all interveners;
>
> (*c*) the complainant and an intervener shall, within five days after the day on which the Secretary sends the statement of the government institution referred to in paragraph 103(2)(*d*) to the complainant pursuant to paragraph (*b*), file with the Secretary comments on that statement or a request that the case be decided on the existing record;
>
> (*d*) the Secretary shall, forthwith after receiving the comments referred to in paragraph (*c*), send a copy thereof to the government institution and all interveners; and
>
> (*e*) the Tribunal shall issue a determination on the complaint within 45 days after determining that the express option will be applied.

Accordingly, in cases where the express option is applied, the Tribunal must make its recommendation within 45 days of the filing of the complaint, rather than the 90 days normally allowed, and the parties must file their submissions within time frames that are shorter than normal. For example, PWGSC must file its GIR within 10 days, which is shorter than the 25 days normally allowed, but similar to the 10-working-day time frame that a potential supplier must meet in filing a complaint.

As provided by rule 107 of the *Rules*, the Tribunal may apply the express option where a complaint is "suitable for resolution within 45 days." The Tribunal must decide whether to grant the request to use the express option within 2 days of receiving the request and notify the parties subsequently of its decision. Rule 107 does not call for submissions prior to the Tribunal's decision, and the 2-day time frame would make it impractical for any to be filed.

Nevertheless, if the Tribunal decides to grant a request for the express option, nothing prevents the parties from subsequently making submissions to request the Tribunal to reconsider this decision. Because of the tight time frame in which the Tribunal must provide its findings concerning the complaint under the express option, any such submissions would need to be made immediately after the Tribunal's decision to apply the express option. In this instance, although the GIR appears to indicate dissatisfaction by PWGSC over the use of the express option, neither PWGSC nor the intervener requested the Tribunal to reconsider the decision to apply the express option. Furthermore, even if PWGSC had made such a request in the GIR, it would have been largely academic at that point, considering that the main effect of rule 107 of the *Rules*, as far as the government institution is concerned, is to abridge the time for filing the GIR.

In finding that this was a suitable complaint for resolution within 45 days, the Tribunal took into account that it involved a single, straightforward issue: whether the issuance of an amendment to specifications at a particular point in the procurement process violated the "adequate time" requirements of the trade agreements. In addition, the procurement at issue involved goods that were relatively simply defined. The Tribunal also noted the short time frame for delivery under the contract, which was requested before March 31, 2004. SPX's evidence confirms that the contract would be expected to be performed

rapidly, since SPX was asked by PWGSC to order the necessary equipment even before the contract was signed, so as to ensure delivery by the above date.[9]

In deciding to apply the express option, the Tribunal was mindful of its duty to adjudicate procurement disputes in a timely fashion. In this regard, for example, section 35 of the *CITT Act* provides as follows: "Hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit." The Tribunal considers that its procurement inquiries are "hearings" for the purpose of section 35.

It might be argued that this section does not apply to procurement inquiries, based on the fact that, ordinarily, procurement inquiries are conducted through the exchange of written submissions and do not involve oral hearings, despite the fact that rule 105 of the *Rules* expressly provides for oral hearings in this context. However, formal hearings, in which witnesses are heard and evidence is presented, are not required for a broad range of administrative decisions. As stated by Professor Mullan, in referring to such hearings, "many administrative processes adhere very closely to this traditional model of adjudication. . . . However, the range of processes that can satisfy the common law requirements of a hearing is far more extensive than that".[10] In procurement cases, the Tribunal has generally found that written submissions provided sufficient information to determine the validity of a complaint without necessitating the additional cost of an oral hearing. Absent prejudice to one or more parties, such as an inadequate opportunity to address novel or complex points, the most expeditious but fair procedure for such file hearings is the express option contained in rule 107.

Moreover, the trade agreements emphasize the importance of bid challenge authorities, such as the Tribunal, adjudicating disputes in a timely fashion.

Article 514(2) of the *AIT* requires the federal government to "adopt and maintain bid protest procedures for procurement covered by this Chapter that. . . (c) ensure that its entities accord fair and *timely* consideration to any complaint regarding procurement covered by this Chapter" (emphasis added).

Article 1017(1) of *NAFTA* reads, in part, as follows: "In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following:. . . (c) each Party shall ensure that its entities accord *fair and timely consideration* to any complaint regarding procurement covered by this Chapter" (emphasis added).

Article XX(2) of the *AGP* reads as follows: "Each party shall provide *non-discriminatory, timely, transparent and effective* procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest." Article XX(8) reads as follows: "With a view to the preservation of the commercial and other interests involved, the challenge shall normally be complete in a *timely* fashion" (emphasis added).

9. Affidavit of Mr. Kevin Hincks, para. 20.
10. David Mullan, *Administrative Law* (Toronto: Irwin Law, 2000) at 244, as quoted in *Potter v. Halifax Regional School Board* (2002), 215 D.L.R. (4th) 441 (N.S.C.A.) at para. 86.

Merits

Article 506(5) of the *AIT* reads:

> Each Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement.

Article 1010(7) of *NAFTA* reads:

> Where. . . it has become necessary to amend. . . the notice or tender documentation. . . [a]ny significant information given by an entity to a supplier with respect to a particular procurement shall be given. . . so as to provide all suppliers concerned adequate time to consider the information and to respond.

Article IX(10) of the *AGP* reads, in part:

> Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

As outlined above, Bosik complained that Amendment No. 3, which specified an allowable permissible penetration of 50 ft., was released too late to allow it to respond adequately in its bid.

The submissions indicate that Amendment No. 3 was issued on January 14, 2004, and received by Bosik a little before 4:00 p.m. Eastern standard time (1:00 p.m. Pacific standard time). Bids were required to be submitted by 2:00 p.m. Pacific standard time on January 16, 2004, and as indicated above, the RFP provided that bids could not be submitted by electronic means, such as by fax. Accordingly, Bosik would have needed to send its bid by courier from its office in Ottawa to PWGSC in Victoria, British Columbia, in order to submit it by the bid closing date. Bosik submitted that, as a result, it had less than one working day to make any changes to its bid required to respond to Amendment No. 3. The Tribunal finds that Bosik's time frame for responding to Amendment No. 3 was approximately one working day. The issue is whether this time frame violates the requirement for "a reasonable period of time to submit a bid" or "adequate time" to consider the information and respond, as contemplated by the respective trade agreements.

PWGSC submitted that the change in allowable perimeter penetration was not a significant change in relation to Bosik's technical or financial proposal. The Tribunal does not agree.

The allowable perimeter penetration is an important performance requirement, given that the purpose of the vehicle barriers that are the subject of the procurement is to prevent the entry of vehicles that might pose a security threat to a military base.

Furthermore, both Bosik and SPX, the successful bidder, disagreed with PWGSC's position that this amendment was not a material change. Bosik submitted that, in order to change its bid to meet the revised, less rigorous, perimeter penetration specification, it would need to make technical and financial adjustments concerning materials, shipping and labour, requiring, among other things, input from local installers. SPX submitted that, "[a]s a consequence of RFP Amendment No. 3, SPX was forced to

completely revise its bid plans in relation to the road barricades".[11] An affidavit by SPX's Vancouver Island Operations Manager outlined the considerable effort that this entailed.[12]

In considering whether a time frame of approximately one working day constituted "a reasonable period of time to submit a bid" or "adequate time" to consider the relevant information and respond, the Tribunal noted the overall time frame for bidding contemplated by the trade agreements. Article 1012 of *NAFTA* and Article XI of the *AGP* both require that bidders be given at least 40 days to prepare their bids in response to a call for tenders. In this context, to allow only approximately one working day to respond to such a significant change to the technical specifications is clearly not to allow "adequate time" to consider the relevant information and respond, as required by Article 1010(7) of *NAFTA* and Article IX of the *AGP*, and the total time to submit a bid is not a reasonable period of time, as required by Article 506(5) of the *AIT*.

PWGSC submitted that Bosik's conduct proves that it did not really consider allowable perimeter penetration to be significant, because it did not ask for information on this parameter. It is not clear whether Bosik did in fact ask for such information, because Bosik and PWGSC made contradictory submissions on this point, and neither submitted evidence in support of their claim. However, the Tribunal accepts Bosik's statement that, in the absence of information to the contrary, it had assumed that the procurement was based on a 10-ft. penetration standard, since, in its experience, this was the norm for these types of products when supplied to similar facilities. The Tribunal is of the opinion that this was not an unreasonable way to address a significant parameter in the circumstances.

PWGSC also submitted that, if it considered the parameter of allowable perimeter penetration to be truly important, Bosik would have stated its assumptions for the parameter in its proposal. The Tribunal is of the opinion that, given that Bosik's response to Amendment No. 3 had to be prepared under an exceptionally tight time frame, it would be wrong to draw such an inference simply because, in parts of the proposal, Bosik took the extra step of stating its assumptions in writing.

SPX submitted that adequate notice of Amendment No. 3 was provided because the practice of the life safety products industry is to regularly accept amendments during the last day or two of a procurement solicitation. The Tribunal does not agree. The tendering process must follow the rules established by the trade agreements, which, in this instance, as discussed above, prohibit the inadequate time frame provided to respond to Amendment No. 3. While it may be useful to consider industry standards in certain circumstances, they cannot be invoked for the purpose of supplanting the requirements of the trade agreements. The Tribunal notes that *Global Upholstery*, the case cited by SPX in support of its submission, dealt with industry standards in the context of what governments may require in terms of delivery times. Unlike notice periods for amendments to an RFP, this is not an area where the trade agreements have stipulated specific requirements.

Furthermore, it is not clear to the Tribunal to what extent the industry standards cited by SPX are relevant to the products covered by this procurement. The Tribunal notes that one of the affidavits provided by SPX in support of this contention concerns products relating to fire hazards, which do not necessarily call for the same procurement practices as rising road barricades.[13] Nor is it clear to what extent the other affidavits provided by SPX apply to rising road barricades as opposed to other products in the life safety products industry, which may well cover a broad range of products.

11. SPX's comments on the GIR dated March 5, 2004, para. 19.
12. Affidavit of Mr. Kevin Hincks, para. 16-19.
13. Affidavit of Mr. George Lafrenière.

PWGSC argued that Bosik should have asked for an extension of the time for submitting its proposal, had it required more time to respond to Amendment No. 3. The Tribunal is of the view that, given the extremely short time frame and associated pressures being experienced by bidders in connection with responding to Amendment No. 3, one must be cautious in drawing any adverse inferences from the failure of any bidder to take proactive steps of this nature. The failure to ask for an extension of time may simply reflect the fact that all of Bosik's energies were focussed on responding to the new parameter.

SPX submitted that there was sufficient time to respond to Amendment No. 3, since both SPX and Bosik were able to submit their proposals by the published closing time. However, the Tribunal is of the opinion that the fact that both managed to address Amendment No. 3 by the deadline does not necessarily mean that either had adequate time to respond to Amendment No. 3 in a way that was most advantageous to their respective bids.

In light of the above, the Tribunal finds that PWGSC violated Article 506(5) of the *AIT*, Article 1010(7) of *NAFTA* and Article IX(10) of the *AGP* and that, therefore, the complaint is valid.

As noted above, Bosik also alleged that, because, in its view, the RFP was vague, it was improperly based on a specific product from a specific manufacturer. Bosik did not indicate whether it wished this allegation to be considered as a separate ground of complaint. However, the context of the allegation, in the Tribunal's view, indicates that it was not so intended, rather it was simply a further argument to support its complaint that PWGSC "released pertinent information far too close to the bid closing time."[14] In any event, even if the Tribunal were to consider this allegation to be a further ground of complaint, that portion of the complaint would have been filed beyond the 10 working days allowed by section 6 of the *Regulations*. PWGSC's submissions indicate that Bosik downloaded the RFP on or about January 6, 2004, while Bosik's counsel first raised this issue in a letter to PWGSC dated February 3, 2004, more than 10 working days after Bosik should reasonably have become aware of the issue.

On a procedural matter, the Tribunal notes that PWGSC and SPX each filed submissions claiming that Bosik was using its comments on the GIR improperly as a mechanism to modify its allegations and supplement its complaint by adding new grounds. PWGSC also submitted that, if Bosik's comments were not removed from the record, the Tribunal's decision would constitute a breach of the *CITT Act* and PWGSC's procedural rights. The Tribunal rejects these submissions.

Paragraph 107(5)(*c*) of the *Rules* expressly authorizes the complainant to file comments on the GIR in instances where the express option is applied.[15] This right to have the last word reflects the widespread practice, under the common law rules of natural justice, of giving the final right of argument to the party bearing the onus of proof in a quasi-judicial proceeding. Other parties cannot be considered to be prejudiced by the exercise of such a right when the right was provided under the legislation for use in that very context.

The Tribunal carefully considered the substance of Bosik's comments on the GIR and does not consider that they add new grounds of complaint. They merely respond to the content of the GIR in relation to the existing ground of complaint, as contemplated by paragraph 107(5)(*c*) of the *Rules*. For example, Bosik submitted that the GIR was incorrect to read the complaint as saying that ballast was the *only* element needing modifications as a result of the L1 specification and to allege that Amendment No. 3 was not a

14. Complaint, para. (i).
15. Bosik filed its comments on the GIR within the time frame established by paragraph 107(5)(*c*) of the *Rules*, although PWGSC alleged incorrectly that this was not the case.

significant amendment. Bosik's right, under paragraph 107(5)(*c*), to comment on the GIR should not be construed so narrowly as to prohibit the addition of any material not already contained in the complaint, since that would make the rule virtually meaningless. To the contrary, the Tribunal is obliged to give the *Rules* "such fair, large and liberal construction and interpretation as best insures the attainment of [their] objects."[16]

Remedy and Costs

In recommending an appropriate remedy, the Tribunal has considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. The Tribunal did not find any evidence indicating bad faith on the part of any of the parties to this proceeding. However, the Tribunal does consider that giving inadequate response time to bidders for a significant amendment to the RFP, as occurred in this case, is a serious deficiency in the procurement process, a deficiency that could bring into question the overall integrity of the competitive procurement process.

The contract for phase one was awarded to SPX on January 30, 2004, with final delivery and installation by March 31, 2004. It is therefore probable that a significant part of the work has been performed and the Tribunal does not consider that it would be useful at this stage to recommend a re-tender of the requirement.

However, Bosik and conceivably the third bidder were both potentially prejudiced. Given adequate time to react to Amendment No. 3, either bidder might have been able to submit a lower-priced, technically compliant bid, that resulted in one of them winning the contract. Accordingly, the Tribunal recommends that Bosik be compensated for this lost opportunity, as outlined below.

In determining the amount of costs to be awarded for this complaint, the Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (*Guideline*). The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The *Guideline* contemplates classification of the complexity level of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurement was quite low, in that the goods were simply defined. However, the procurement did involve installation of the goods and some consideration of basic engineering parameters. The complexity of the complaint is low, in that it involved a single, simple issue (allowing bidders adequate time to respond to an amended procurement requirement) and a single aspect of the applicable trade agreements. Finally, the complexity of the complaint proceedings is quite low, as there was a single intervener, there were no motions, no public hearing was held, and the complaint was resolved within the 45-day "express option" time frame. However, issues raised by PWGSC concerning Bosik's response to the GIR increased the complexity of the proceedings somewhat. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of its cost award is $1,500.

If any party disagrees with the level of complexity or the amount of the award, it may make submissions to the Tribunal within 10 working days from the date of issuance of this determination, in accordance with the procedure contemplated by the *Guideline*.

16. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Bosik by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder. The starting basis for the calculation of the lost profit should be the total value of the contract awarded to the winning bidder of Solicitation No. W0103-031TAY/A. The Tribunal recommends that the parties develop a joint proposal for compensation to be presented to it within 30 days of the publication of the determination.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Bosik its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and the amount of its cost award is $1,500. If any party disagrees with the preliminary indication of the level of complexity or the amount of the cost award, it may make submissions to the Tribunal, as contemplated by its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry

Ellen Fry
Presiding Member