



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-007

CAE Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, September 7, 2004*

*Reasons issued
Wednesday, September 22, 2004*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL	i
STATEMENT OF REASONS	1
COMPLAINT	1
PROCUREMENT PROCESS	2
POSITIONS OF THE PARTIES	2
CAE's Position	2
PWGSC's Position	3
TRIBUNAL'S DECISION	5
Evaluator's Relationship with Bombardier	5
Pre-RFP Visits	6
Scoring	8
HFE Report	8
Costs	8
DETERMINATION OF THE TRIBUNAL	8

IN THE MATTER OF a complaint filed by CAE Inc. 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*.

BETWEEN

CAE INC.

Complainant

AND

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

**Government
Institution**

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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by CAE Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is \$4,100. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in 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

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

Tribunal Members:	Ellen Fry, Presiding Member Pierre Gosselin, Member Zdenek Kvarda, Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	John Dodsworth Dominique Laporte
Complainant:	CAE Inc.
Counsel for the Complainant:	Gordon LaFortune Peter Clark
Interveners:	Bombardier Aerospace, Military Aviation Training, a division of Bombardier Inc. L-3 Communications, Link Simulation & Training
Counsel for the Interveners:	Richard A. Wagner and Paul D. Conlin, for Bombardier Aerospace, Military Aviation Training, a division of Bombardier Inc. Gregory O. Somers, for L-3 Communications, Link Simulation & Training
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On April 22, 2004, CAE Inc. (CAE) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. W8475-02BJ06/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of a CF-18 Advanced Distributed Combat Training System.

2. CAE alleged that PWGSC and DND failed to ensure that the tendering procedures gave equal access to the procurement and were applied in a non-discriminatory manner, in violation of the applicable trade agreements. The Tribunal accepted this ground of complaint for inquiry only insofar as it did not relate to alleged bias in the solicitation document. CAE requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with Bombardier Inc. (Bombardier) and award the contract to CAE. In the alternative, CAE requested that the Tribunal recommend that the procurement process be terminated and that a new, open, fair and transparent procurement process that fully accords with the trade agreements be undertaken. In the further alternative, CAE requested that the Tribunal recommend that PWGSC compensate CAE for its bid preparation costs and its lost profit. In addition, CAE requested its reasonable costs incurred in preparing and proceeding with the complaint.

3. On May 3, 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*.² On May 4, 2004, CAE filed a motion requesting that the Tribunal order PWGSC and DND to produce additional documents and to respond to specific questions. On May 6, 2004, PWGSC informed the Tribunal that a contract had been awarded to Bombardier. On May 7, 2004, the Tribunal granted intervener status to Bombardier Aerospace, Military Aviation Training, a division of Bombardier Inc. On May 11, 2004, PWGSC filed a motion with the Tribunal requesting particulars with respect to the ground of complaint subject to the Tribunal's inquiry. On May 13, 2004, the Tribunal dismissed PWGSC's motion, since it was satisfied that its letters to parties dated May 3, 2004, were sufficiently clear regarding which of the grounds of complaint would be subject to inquiry. Also on May 13, 2004, the Tribunal granted intervener status to L-3 Communications, Link Simulation & Training. On May 17, 2004, PWGSC provided its comments on CAE's motion of May 4, 2004. On May 19, 2004, CAE filed its comments on PWGSC's submission. On May 31, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 11, 2004, the Tribunal granted CAE's motion in part and requested that PWGSC provide certain documents to the Tribunal. On June 16, 2004, PWGSC filed the requested documents. On June 23, 2004, CAE filed comments on the GIR. On July 13, 2004, PWGSC filed comments on CAE's submission and, on July 16, 2004, CAE filed its response to PWGSC's submission.

4. 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.

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

2. S.O.R./93-602 [*Regulations*].

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

PROCUREMENT PROCESS

5. According to PWGSC, a Request for Proposal (RFP) for the provision of an Advanced Distributed Combat Training System was issued on March 27, 2003. The closing date for the submission of proposals was June 20, 2003.

6. The RFP reads in part as follows:

EVALUATION

L. DEMONSTRATIONS

It has been pre-determined that Bidder "Bombardier" will conduct their demonstrations during Week 3 after bid closing date and Bidder "CAE" will conduct their demonstrations during Week 4 after bid closing date. Bidders will be free to conduct any demonstrations they wish during this two-day demonstration period, including re-doing past demonstrations if so desired. Other than the two-day demonstration period, no other demonstrations will be scheduled.

Bidders will be able to refer, in their written proposal, to formal demonstrations that were conducted prior to the Procurement Phase II. The evaluation team will only use the results of these pre-procurement Phase II demonstrations to validate the contents of the written Proposal.

The confirmation by Canada that a demonstration conducted before the Procurement Phase II has been witnessed, shall not be interpreted as a determination of the quality of either the demonstration or of the capability demonstrated or as acceptance of any solution proposed by the bidder in its subsequent proposal. Above all, it in no way implies that a bidder will be given top, or any, marks for their proposal for that requirement item.

A witnessed demonstration will only be of any benefit to bidders for bid scoring purposes if the demonstration, as witnessed, directly supports and validates the written proposal.

Nothing related to the acknowledgement of witnessing demonstrations in any way relieves the bidder of the responsibility to present a fully developed and well-supported written proposal.

7. Two companies were pre-qualified to bid on the RFP, Bombardier and CAE, and both submitted bids in response to the RFP. Bombardier conducted its demonstrations as contemplated by article L, "Demonstrations", of the RFP on July 23 and 24, 2003, and CAE conducted its demonstrations on July 29 and 31, 2003. According to PWGSC, bid evaluation took place between August 14 and September 30, 2003. On March 19, 2004, a contract was awarded to Bombardier. On March 31, 2004, PWGSC held a debriefing session with CAE and provided CAE with a copy of the Fairness Monitor's Report. On April 1, 2004, CAE submitted a number of questions to PWGSC concerning the procurement process and the evaluation process adopted by PWGSC for the procurement. On April 6, 2004, PWGSC responded to some of CAE's questions and declined to respond to the others. On April 15, 2004, CAE sent a letter to further object to PWGSC and, on April 22, 2004, CAE filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

CAE's Position

8. CAE submitted that the Fairness Monitor's Report⁴ makes it clear that the pre-RFP demonstrations were used to develop the evaluation criteria in the RFP and the "word pictures" for many of the evaluation

4. Confidential version of the complaint, Exhibit 16.

criteria. It argued that those members of the evaluation team who attended the pre-RFP demonstrations⁵ were placed in a position of influence through their ability to prepare and distribute written summaries of the demonstrations. CAE contends that DND's subcontractors influenced the evaluation process in favour of Bombardier's proposal and against CAE's proposal.

9. With respect to the proposal risk assessment report prepared by The HFE Group (HFE),⁶ CAE submitted that, while the report focussed on risks associated with the proposed early delivery schedule, it did not provide the same analysis with respect to other portions of the proposals. It submitted that the evaluators were permitted to rely on the report where they considered it relevant and that this meant that the evaluators were given the ability to justify their opinions in areas where the HFE report was irrelevant. CAE submitted that it considers that PWGSC and DND's decision to allow the evaluators to rely on the HFE report in this manner demonstrates that the evaluation was not properly conducted. CAE also submitted that the HFE report might be biased for reasons indicated in CAE's confidential argument.

10. CAE submitted that two of DND's subcontractors, who were members of the evaluation team, made several comments in the evaluators' notes concerning CAE's proposal, which demonstrate a bias in favour of Bombardier, and that, in particular, one of the individuals made inflammatory comments that impugned CAE's motives in submitting its proposal and disclosed bias. CAE argued that the relationship between one of DND's subcontractors and Bombardier is more than sufficient to raise a reasonable apprehension of bias. CAE contended that it was not sufficient that the subcontractor terminated his contractual relationship with Bombardier before the RFP was issued because of conflict of interest concerns. Rather, it submitted, the individual should have been removed from the evaluation team.

11. CAE submitted that, applying the test in *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,⁷ the informed person, considering all the facts realistically and practically, would necessarily conclude that it is more likely than not that the RFP was developed so that it could not be applied fairly and that the evaluators considering bids submitted in response to the RFP would not, either consciously or unconsciously, evaluate those bids fairly.

PWGSC's Position

12. PWGSC submitted that the specifications in the RFP are fully performance based and show no preference for any bidder or technical solution. It further submitted that the technical statement of requirements and their evaluation criteria were posted on the project Web site on November 1, 2001, and that the statement of work and its evaluation criteria were posted on the project Web site on January 11, 2002, and further that they were prepared collectively by the project team, including DND's subcontractors, with input from all project team members.

13. PWGSC submitted that the use of the pre-RFP demonstrations for evaluation purposes was specified in the RFP. Regarding CAE's allegation that evaluators present at the pre-RFP demonstrations had greater influence during meetings of the evaluation team and that their opinions held sway, PWGSC submitted that the pre-RFP meetings were attended by some or all members of the project team and that CAE's RFP demonstrations were witnessed by the six core evaluators, two subject matter experts and the

5. The pre-RFP demonstrations are the formal demonstrations that were conducted by the bidders prior to the "Procurement Phase II" as referred to in article L of the RFP.

6. Confidential version of the GIR, Exhibit 15. The HFE report provided a conventional risk assessment in which risks were identified and categorized in terms of probability of occurrence and consequences to the project if they did occur.

7. (28 November 2000), A-421-99 (F.C.A.) [*Cougar*].

PWGSC representative. PWGSC submitted that, following the completion of the RFP demonstrations, the people present at those demonstrations collaborated to prepare a written summary listing of all items demonstrated by CAE during its pre-RFP and RFP demonstrations. PWGSC submitted that, through its exchange of correspondence with CAE between March 7 and April 30, 2003, CAE was well aware of the “written submissions of the pre-RFP demonstrations” and the use to which they would be put in evaluating proposals. PWGSC contended that CAE has not provided any evidence to support its allegation that the pre-RFP demonstrations were used to prepare the evaluation criteria and scoring directives.

14. With respect to the HFE report, PWGSC submitted that the evaluators were fully entitled to rely on the report to the extent that they considered it relevant and appropriate. It submitted that the RFP provided for the use of third-party consultants to assist in the evaluation of proposals. PWGSC contended that it is clear from the RFP that proposals were to be evaluated using three evaluation factors: capability, compliance and risk. Furthermore, it argued that risks associated with early delivery may be relevant to the evaluation of risks associated with other aspects of a bidder’s proposal.

15. Regarding the evaluators that were DND’s subcontractors, PWGSC submitted that, as early as February 2002, CAE was aware of a contractual arrangement between an independent contractor and Bombardier. PWGSC submitted that the independent contractor was not a Bombardier employee. PWGSC contended that CAE knew or ought to have known, no later than February 2002, of the alleged conflict of interest or bias, whether real or perceived, involving DND’s subcontractors, with respect to their role in preparing the performance-based specifications of the RFP. By correspondence dated July 7, 2003, CAE advised PWGSC of the location of its demonstrations and asked for the names of the participants attending the demonstrations. On July 10, 2003, PWGSC advised CAE of the names of those participants. PWGSC submitted that CAE knew or ought to have known, no later than July 31, 2003, of the alleged conflict of interest or bias, whether real or perceived, involving DND’s subcontractors at the demonstrations and that, therefore, CAE’s complaint with respect to the role of DND’s subcontractors in the procurement process was filed outside the time frame specified by the *Regulations*. It submitted that, in *Cougar*, the Federal Court of Appeal advised that allegations of bias must be raised at the earliest practicable opportunity.⁸

16. Regarding the evaluators’ notes, PWGSC submitted that the technical proposals were evaluated using the consensus scores of six to eight evaluators. It further submitted that the individual evaluator’s scores and their notes were viewed by the evaluation team leader to determine in part whether consensus discussions were warranted. PWGSC noted that CAE referred to selected passages from only 4 of 298 notes prepared by one of DND’s subcontractors and to a single comment by another subcontractor. PWGSC submitted that individually, and collectively, those excerpts do not demonstrate a pattern of personal hostility toward CAE or its proposal, which may have improperly influenced their decisions. Rather, they are particular responses to particular aspects of CAE’s proposal.

17. PWGSC submitted that identifying weaknesses and expressing criticisms of particular aspects of CAE’s proposal does not demonstrate bias on the part of an evaluator. It further submitted that the full text of the evaluators’ notes shows a balanced and thorough consideration of CAE’s proposal and that evaluators identified both the strengths and weaknesses of the proposal and awarded an appropriate score on that basis.

8. *Ibid.* at 43. The Federal Court of Appeal stated: “it should be noted that, from the beginning, Cougar had been aware of the identity of the members of the evaluation committee and knew that two of them had worked with officials from PAL. Allegations of bias must normally be raised at the earliest practicable opportunity; if not taken in timely fashion, an objection will be regarded as waived. It cannot be used by the unsuccessful party to impugn the validity of the decision after the administrative process has been allowed to run its course without objection.”

Regarding the test in *Cougar*, PWGSC contended that an informed person having regard to the totality of circumstances would conclude that CAE's proposal was evaluated fairly.

18. Finally, PWGSC requested its costs in responding to the complaint.

TRIBUNAL'S DECISION

19. 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 instance, are the *Agreement on Internal Trade*,⁹ the *North American Free Trade Agreement*¹⁰ and the *Agreement on Government Procurement*.¹¹

20. Article 501 of the *AIT* provides in part that "the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers".

21. Article 1008(1)(a) of *NAFTA* provides in part that "[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a nondiscriminatory manner".

22. Article VII(1) of the *AGP* provides that "[e]ach Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI."

Evaluator's Relationship with Bombardier

23. CAE alleged that there was a reasonable apprehension of bias as a result of the relationship of one of the evaluators with Bombardier.

24. According to PWGSC, from April 2000 to approximately January 18, 2002, one of the evaluators had a contractual relationship with Bombardier whereby his services were provided to DND as Bombardier's subcontractor. The individual invoiced Bombardier and was paid by Bombardier. Bombardier was in turn paid by DND. In practice, the individual received direction from DND rather than from Bombardier. In the summer of 2001, the individual became aware that Bombardier might bid on the project at issue and brought the situation to the attention of DND to avoid any possible perception of conflict of interest. The individual's relationship with Bombardier was subsequently terminated at close of business on February 1, 2002; however, the individual continued his role with DND as a subcontractor with Valcom Ltd.

25. The individual was named by DND as one of the members of the evaluation team, which was comprised of six core members, seven subject matter experts and a representative from PWGSC.

26. A member of the CAE project team indicated that this individual visited CAE on behalf of DND at least six times between January 2000 and June 2002 and that he met with the individual on or about

9. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].

10. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

11. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

February 20, 2002, to discuss some of DND's requirements for the project at issue. The evidence on file¹² indicates that the CAE project team member was aware in February 2002 that the individual worked for Bombardier.

27. In July 2003, the individual attended two demonstrations at CAE facilities, one in St. Louis, Missouri, and one in Montréal, Quebec, as part of the evaluation process. A total of 10 government representatives attended the demonstrations, of whom 8 were evaluators. Before the demonstrations, PWGSC gave CAE a list of participants and, as part of the exchange, CAE stated: "I would appreciate if you could provide me with a list of 'who does what' in the evaluation team."¹³ There is no evidence on file regarding any reply from PWGSC. However, the statement by CAE indicates that it considered the visitors to be the evaluation team. Therefore, the Tribunal is of the opinion that, even though it was not formally confirmed by PWGSC until after CAE filed its complaint, CAE should reasonably have known that the individual was an evaluator at the time of the demonstrations in July 2003. CAE states that the demonstrations did in fact give rise to this belief.¹⁴

28. Pursuant to subsection 6(1) of the *Regulations*, CAE had 10 working days after the day on which the basis of its complaint became known or reasonably should have become known to it in order to file a complaint with the Tribunal. Since CAE did not file a complaint with respect to this ground in the time frame provided for in the *Regulations*, the Tribunal finds that CAE is out of time to complain about bias or reasonable apprehension of bias as a result of the individual's relationship with Bombardier. Accordingly, the Tribunal does not have jurisdiction to inquire into this ground of complaint. The Tribunal notes in this regard that, in accordance with *Cougar*, reasonable apprehension of bias should be raised "at the earliest practicable opportunity".

29. The Tribunal also notes that the test for reasonable apprehension of bias, as indicated by the Supreme Court of Canada, is as follows:¹⁵

[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly.¹⁶

30. In this instance, the individual in question had a recent and continuous contractual relationship with Bombardier for more than a year and a half, whereby Bombardier paid him for the work that he performed for DND. This relationship would have been an important factor had the Tribunal been called upon to apply the *Cougar* test.

Pre-RFP Visits¹⁷

31. CAE alleged that two of the evaluators formed a preference for the Bombardier product as a result of their pre-RFP visits to the bidders, which resulted in bias in the evaluation process.

12. Confidential version of the complaint, Exhibit 12.

13. Confidential version of the GIR, Exhibit 13.

14. Confidential version of the complaint, para. 60.

15. De Grandpré, J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*, as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*, *Bell Canada*, 2003 SCC 36.

16. [1978] 1 S.C.R. 369 at 394.

17. When the term "pre-RFP visits" is used, the Tribunal is referring to the pre-RFP demonstrations plus any other pre-RFP visits that may have been made to the bidders.

32. Information concerning the pre-RFP demonstrations was recorded in charts and trip reports provided by PWGSC. The Tribunal finds that neither these documents nor any other evidence on file indicates any bias in favour of Bombardier as a result of the pre-RFP visits. Therefore, the Tribunal finds that this ground of complaint is not valid.

33. CAE also alleged that there was bias in the evaluation process because these two evaluators had a greater influence regarding the pre-RFP demonstrations than the other evaluators who had not attended those demonstrations. CAE stated that the two evaluators visited CAE at least six times between January 2000 and June 2002.

34. On March 7, 2003, PWGSC notified CAE that a list of the pre-RFP demonstrations that were considered by Canada to have been witnessed would be provided to the potential bidders and outlined the way in which the demonstrations would be used in the evaluation process.¹⁸ In order to provide CAE a list of the items that it demonstrated during the pre-RFP demonstrations, CAE was first required to identify the items that it believed it had demonstrated. CAE's list was then reviewed by the project team, which confirmed which items it considered "witnessed". On April 30, 2003, PWGSC provided CAE with its list of witnessed demonstrations. There were clear rules set out in the RFP regarding how the demonstrations would be used in the evaluation of proposals,¹⁹ and these rules are consistent with the process set out in the notification to CAE on March 7, 2003.

35. The RFP also indicated clearly that a number of the technical requirements would be scored based on "word pictures", which referred to the degree to which the demonstrations validated the information in bidders' proposals. For example, for item CRT-171, the scoring directive reads in part as follows:

3 – Based on the information contained in the written proposal, and supported by the oral presentation (if performed) *and the demonstration (if performed)*, the bidder claims to be capable of accomplishing the proposed compliant solution and has a credible approach. However, there is limited direct evidence of their capability. The bidder is perhaps capable of accomplishing the proposed solution.

6 – Based on the information contained in the written proposal, and supported by the oral presentation (if performed) *and the demonstration (if performed)*, the bidder claims to be capable of accomplishing the proposed compliant solution and has a credible approach. There is also reasonable evidence of this contention as supported by corroborating contacts from previous customers. The bidder is probably capable of accomplishing the proposed solution.

[Emphasis added]

36. It is true that the evaluators who attended the pre-RFP demonstrations could reasonably be expected to have greater influence than the other evaluators on aspects of the evaluation where the pre-RFP demonstrations were relevant. However, CAE knew who attended the pre-RFP demonstrations at its facilities, knew what the summary of the demonstrations witnessed indicated and knew from the RFP how the demonstrations would be used. Therefore, the Tribunal finds that CAE should reasonably have known at the time the RFP was issued that the evaluators who attended the pre-RFP demonstrations could be expected to have greater influence in this context. Accordingly, this allegation was not filed within the time frame required by the *Regulations*, and the Tribunal does not have jurisdiction to inquire into this ground of complaint.

18. Confidential version of the GIR, Exhibit 9.

19. Refer to article L of the RFP.

Scoring

37. CAE submitted that a number of comments by two evaluators in their evaluators' notes were evidence of actual bias in scoring the bids. The Tribunal carefully reviewed the examples provided by CAE and, although they might generally have been characterized as gratuitous and/or sarcastic, the Tribunal does not consider that they necessarily indicate bias on the part of the two evaluators. The Tribunal notes that these examples are a small sample of the many notes made by the two evaluators. Accordingly, in the Tribunal's view, this ground of complaint is not valid.

HFE Report

38. CAE alleged that the HFE report might be biased for reasons indicated in CAE's confidential argument.²⁰ Very little evidence or argument was provided in support of this allegation. The Tribunal considers that the evidence does not indicate actual bias and that the circumstances described in this allegation merely reflect normal commercial behaviour that would not in itself necessarily give rise to a reasonable apprehension of bias. Therefore, the Tribunal considers that this ground of complaint is not valid.

39. With respect to CAE's allegation that the HFE report was used improperly by the evaluators, the Tribunal notes that the RFP provided evaluators with wide latitude to use the report as appropriate. The RFP provides as follows: "During the evaluation period, 3rd parties will be consulted and have access to Bidder's proposals subject to the Crown's discretion." The evidence does not indicate that PWGSC and DND used the HFE report in a manner that was inconsistent with the RFP. Therefore, the Tribunal considers that this ground of complaint is not valid.

40. In light of the foregoing, the Tribunal determines that CAE's complaint is not valid.

Costs

41. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint, the Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*, which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the third level of complexity referred to in Appendix A of the *Guideline* (Level 3). The procurement was very complex, given that it involved the provision of a CF-18 Advanced Distributed Combat Training System comprising numerous components and technical specifications, and bidders were required to submit bids using very complex formats. The complaint itself was very complex in that it involved multiple allegations relating to bias in the evaluation of proposals. Finally, the complaint proceedings were very complex. There were two interveners and several motions, and the process required the use of the 135-day time frame. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$4,100.

DETERMINATION OF THE TRIBUNAL

42. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

20. Confidential version of the complaint, para. 75.

43. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by CAE. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is \$4,100. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry

Ellen Fry

Presiding Member

Pierre Gosselin

Pierre Gosselin

Member

Zdenek Kvarda

Zdenek Kvarda

Member