Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-008

CAE Inc.

v.

Department of Public Works and Government Services

Determination issued
Tuesday, September 7, 2004

Reasons issued
Friday, September 10, 2004

Canada

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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 valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services, along with CAE Inc. and AMS Limited, renegotiate the original equipment manufacturer offer with Lockheed Martin Corporation to replace or confirm the existing offer of March 5, 2004, to be used by all parties. The Canadian International Trade Tribunal also recommends that all original bidders who submitted a bid by the bid closing deadline (i.e. CAE Inc., AMS Limited and Lockheed Martin Corporation) be allowed to resubmit their proposals by September 29, 2004, in order to include the renegotiated original equipment manufacturer offer and any consequential amendments.

Patricia M. Close
Patricia M. Close
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

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STATEMENT OF REASONS

COMPLAINT

1. On April 23, 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]. The complaint concerned the procurement (Solicitation No. W8472-03CQ01/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for a Submarine Command Team Trainer (SCTT) and related support services.

2. CAE alleged that the Request for Proposal (RFP) failed to ensure equal access to the procurement, that PWGSC failed to apply the requirements of the RFP and that PWGSC did not provide it with a reasonable period of time to submit its proposal. More specifically, CAE alleged that a bidder that was an original equipment manufacturer (OEM) of some of the equipment to be incorporated into the SCTT (OEM bidder) had a competitive advantage in the RFP over a bidder that was not an OEM (non-OEM bidder), such as CAE. It also alleged that, while the RFP required that all bidders negotiate agreements with some specified OEMs, in the case of the Submarine Fire Control System (SFCS), PWGSC negotiated with the OEM of the SFCS—Lockheed Martin Corporation (Lockheed)—which put CAE at a disadvantage because it was unable to negotiate to its own benefit. Finally, CAE alleged that, as some government-specified OEMs had not provided it with timely information that it required to complete its proposal, CAE was not afforded a reasonable time period to submit its bid.

3. CAE requested, as a remedy, that the RFP and procurement process be amended to ensure that all potential bidders are treated equally and that it be given a reasonable period of time to revise and resubmit its bid. It also requested that it be awarded the costs of preparing and submitting its bid and of filing its complaint.

4. Between May 26 and June 10, 2004, Lockheed, Thales Systems Canada (Thales) and AMS Limited (AMS) requested and were granted intervener status in the case. On June 9, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal. Between June 18 and June 21, 2004, CAE, Thales and AMS provided their respective comments on the GIR. Included in CAE's comments was information that it had designated as confidential. Counsel for Lockheed requested that it be allowed to show its client this information, as it felt that there was new information upon which it should comment. After seeking comments from all interested parties, on July 7, 2004, the Tribunal ruled that a portion of the designated information did not appear, on its face, to be confidential and requested that CAE review the designation. On July 13, 2004, CAE withdrew a portion of the confidential information and provided the Tribunal with new pages to its comments on the GIR that had the relevant information expunged. PWGSC and Lockheed provided comments on CAE's comments on the GIR. On July 16, 2004, CAE submitted its final response to PWGSC's response to its comments on the GIR, as well as its comments on AMS's and Thales's comments on the GIR. On August 3, 2004, CAE submitted its final response to Lockheed's comments on its comments on the GIR. On August 10, 2004, the Tribunal requested additional information from CAE regarding when it discovered that Lockheed could be a possible prime contractor, specifically:

> At what point in time did CAE become aware that original equipment manufacturers would be involved in bidding on the Submarine Command Team Trainer (SCTT) e.g. did CAE receive a list of qualified suppliers and, if so, when did it receive that list? Specifically, when and how did CAE become aware that Lockheed Martin could potentially be competing as a prime contractor for the SCTT contract?

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

5. CAE responded to this request on Aug 11, 2004. Lockheed and PWGSC submitted comments on CAE's response. On August 26, 2004, the Tribunal returned PWGSC's correspondence. The Tribunal forwarded Lockheed's comments to CAE on August 25, 2004, for information only. CAE responded to these comments on August 31, 2004. The Tribunal returned this final piece of correspondence to CAE on September 2, 2004.

6. 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

7. The procurement process for an SCTT was broken down into three distinct phases:

- The Options Analysis (OA) study ran from July 2000 to November 2000. It was conducted by the Canadian Submarine Group (CSG) made up of CAE and Computing Devices Canada (a division of General Dynamics Canada Ltd.). The study reviewed and reported on different SCTT design and development options.
- A Solicitation of Interest and Qualification (SOIQ) ran from April 2002 to May 2002. It established the procurement process for the SCTT and was used to qualify bidders in order to identify firms capable of undertaking the work and to establish a source list. Four companies/consortia were qualified, including the one led by CAE.
- The RFP was released on January 16, 2004, and had a closing date for the receipt of bids of April 13, 2004. The resulting contract will result in the design, fabrication, testing, delivery, installation and integrated logistics support of the SCTT. Simply put, the SCTT is made up of the Fire Control Trainer (FCT), which includes the SFCS, other related operational equipment and integrated training systems. Combined, they will train submariners in the operation of the Victoria class submarine.

The third phase is the subject of this complaint.

8. For the third phase, a notice was not posted on MERX,[2] as the SOIQ had been used to establish a source list. The RFP was sent directly to the four qualified companies/consortia under cover of a letter from PWGSC on January 16, 2004. The RFP advised that proposals were to be submitted to PWGSC no later than 2:00 p.m., April 6, 2004. On March 22, 2004, CAE requested a two-week extension to the bidding period. On March 29, 2004, PWGSC granted a one-week extension, and three proposals—those of CAE, Lockheed and AMS—were submitted by the revised closing date for the receipt of bids of April 13, 2004.

9. The RFP reads in part as follows:

> **3.2 Subcontracts**
>
> It is the responsibility of the Bidder to negotiate with the original equipment manufacturer (OEM) of the Submarine Fire Control System (SFCS) and shall include with your proposal, a copy of the negotiated proposal from the OEM and a letter from the OEM confirming their bid and their willingness to enter into subcontract on award of the contract and to provide the necessary design data required to develop the SCTT. Bidder's Proposals shall clearly identify in Schedule A to the Model Contract, the SFCS trainer portion as a separate line item.

2. Canada's electronic tendering service.

> It is the responsibility of Bidders to negotiate with the other original equipment manufacturers (OEM) of the weapon and communication systems as required and to identify with their proposal those OEMs contacted and negotiated with and include a letter from each OEM, indicating their willingness to enter into subcontract on award of the contract and to provide the necessary design data required to develop the SCTT.

10. On March 5, 2004, Lockheed sent, to all SCTT prime contract bidders, a copy of the FCT offer (OEM offer), negotiated between it and PWGSC. It reads in part as follows:

> In recognition that all potential prime contractors are required to include an SFCS component in their SCTT offerings; that PWGSC and DND do not desire the SFCS to be provided as Government Furnished Property; that all competitors (including [Lockheed]) need a level pitch as concerns SFCS requirements; and that a prime/subcontractor relationship will occur should [Lockheed] not be the successful Prime Contractor, PWGSC and [Lockheed] have therefore established the following offer which is available to all qualified potential prime contractors . . . [Lockheed] will build and deliver the FCT . . . for a Firm Price of $3,024,350 (U.S.). This price is available to all Prime Offerors. The price has been negotiated with PWGSC and will not be reopened.

11. On March 18, 2004, by e-mail sent to all bidders, PWGSC confirmed that Lockheed would also use the same price in its proposal.

12. On March 15 and March 25, 2004, CAE wrote to PWGSC objecting to the procurement process, noting that OEM bidders had an unfair competitive advantage, given that they were also bidding on the RFP. The letters also offered potential solutions for PWGSC to use to remove this alleged disparity. The Assistant Deputy Minister of PWGSC's Acquisition Branch responded to these letters on April 8, 2004, by stating that the RFP had been structured in a manner to secure a complete SCTT in a fair, open and transparent manner in accordance with Article 501 of the *Agreement on Internal Trade*.[3]

13. CAE filed its complaint with the Tribunal on April 23, 2004.

POSITIONS OF THE PARTIES

PWGSC's Position

14. PWGSC submitted that the allegation regarding any advantage that an OEM bidder has over a non-OEM bidder is untimely and without merit. It submitted that CAE is taking issue with unavoidable circumstances regarding intellectual property (IP) and international security considerations (International Traffic in Arms Regulations [ITAR]) relating to the SFCS, an integral part of the SCTT. It submitted that CAE has been aware of the significance of the SFCS since 2000 when it conducted the OA study as part of the CSG. PWGSC submitted that the SOIQ also alerted potential bidders to the need for OEM involvement[4] and made it clear that non-OEM bidders would not be permitted access to the SFCS components that contained IP- and ITAR-related information unless working agreements with the SFCS OEM were established.[5] PWGSC submitted that, in its response to the SOIQ, CAE acknowledged and fully accepted the requirement to seek OEM licences and the technical assistance agreement approvals for rights to use specific IP.

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3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].
4. GIR, Exhibit 2 at 3.
5. GIR, Exhibit 2 at 7, 8, 9.

15. PWGSC stated that the SCTT technical specification attached as Appendix B to the Statement of Work (SOW)[6] of the RFP, which was sent to CAE on January 16, 2004, describes the SFCS, the FCT and the restrictions on non-OEMs bidders with respect to access to proprietary information. It submitted that any objections relating to this aspect of any perceived differences between OEM bidders and non-OEM bidders should have been made no later than 10 working days following the issuance of the RFP. PWGSC submitted that CAE's first objection was on March 15, 2004, two months after its receipt of the RFP.

16. Regarding the allegation that the negotiation of the OEM offer failed to apply the requirements of the RFP, PWGSC submitted that CAE's argument is contradictory, when considered in the context of CAE's position that the OEM bidders enjoyed an advantage in the procurement process. PWGSC submitted that CAE cannot, on one hand, argue that it is disadvantaged by the uncertainty of the terms of its subcontracted relationship with Lockheed and then, on the other hand, object to PWGSC's actions to ensure that all bidders are treated fairly and equally by the SFCS OEM. PWGSC also submitted that the words of clause 3.2 of the RFP impose a "responsibility" on the bidders to negotiate with the OEMs and that the OEM offer relieved the bidders of this responsibility and ensured that all bidders would have the same contracted price.

17. PWGSC submitted that CAE's claims of being able to negotiate better than PWGSC were based on unrelated circumstances and are not proof of CAE's ability to negotiate a superior OEM offer. PWGSC submitted that the terms and conditions that CAE did negotiate in another instance were based on the same "Most Favored Customer", government-negotiated rates that form the basis of the OEM offer.

18. PWGSC submitted that the allegation that CAE did not have a reasonable period of time to submit a bid was also untimely. PWGSC submitted that CAE requested, on March 15, 2004, a two-week extension to the bidding period. PWGSC submitted that a one-week extension was granted on March 29, 2004. It submitted that on that date CAE knew, or should have known, that it was not being granted its requested two-week extension and should therefore have submitted its objection within 10 working days of March 29, 2004. As the complaint was not filed with the Tribunal until April 23, 2004, PWGSC submitted that this ground of complaint was untimely and ought to be dismissed.

19. In the alternative, PWGSC submitted that the evidence in the complaint demonstrated that CAE made no effort to contact the relevant OEMs, Thales Underwater Systems Ltd. (TUS) and Lockheed, until five weeks and seven weeks, respectively, after the RFP had been released. It also submitted that CAE did not request the extension until 10 weeks after it had received the RFP. PWGSC noted that no other bidder requested additional time and that CAE was able to submit its proposal prior to the revised bid closing date.

20. In addition to the above, PWGSC submitted that DND and PWGSC have the overriding responsibility to determine the requirements of the solicitation and that it is not appropriate for CAE to attempt to direct the operational requirements of the solicitation through the suggestion of alternative procurement approaches (e.g. provide the FCT as government furnished equipment;[7] sole-source the FCT to Lockheed and procure the remainder through an open competition;[8] disallow Lockheed as a bidder for the project;[9] cancel the OEM agreement and allow CAE to negotiate directly with Lockheed;[10] obtain data

6. GIR, Exhibit 6 at 19, 20.
7. Complaint, para. 149.
8. *Ibid*.
9. *Ibid*.
10. Comments on the GIR, para. 105.

rights so that other bidders can provide a better solution[11]) and/or operational capability options (e.g. allow alternative SFCS solutions, such as simulations instead of actual equipment[12]).

21. PWGSC submitted that the complaint should be dismissed and that it should be awarded its costs in this matter.

CAE's Position

22. CAE submitted that PWGSC and DND violated provisions of the *AIT* and the *North American Free Trade Agreement*[13] when it allowed two distinct classes of bidders—OEM bidders and non-OEM bidders—to compete for the SCTT contract. It argued that the *AIT* and *NAFTA* establish a duty of fairness that requires that all bidders be given equal access to procurements and that the provisions of the RFP, specifically clause 3.2, which required that bidders negotiate with OEMs of the SFCS and other weapons and communication systems, violated that duty. It submitted that OEMs that were also planning to bid for the SCTT contract had used this to their benefit and to the distinct disadvantage of CAE. It submitted that the OEM offer negotiated between PWGSC and Lockheed, as well as Lockheed's firm offer for optional requirements (Option 2) in the RFP, further exacerbated the situation.

23. CAE submitted that the OEM offer and Option 2 discriminated against CAE because they provided Lockheed with the opportunity to use the profits and markups of these offers to cross-subsidize other aspects of its bid. It argued that these additional costs will be borne by the non-OEM bidders. In addition, it argued that the OEM offer was incomplete and that CAE would be forced to negotiate, under an artificial deadline imposed by that offer, terms and conditions relating to warranty, support and access to the FCT. CAE submitted that Lockheed would not be faced with this uncertainty.

24. CAE submitted that the OEM offer also ensures that only the winning bidder will be granted access to the FCT. It submitted that Lockheed has undertaken to provide the full document package to the prime contractor, not to other bidders. It also submitted that Lockheed has provided "sanitized" documents for the RFP, as it asserts that the full documents are proprietary. It submitted that Lockheed has access to the FCT and data relating to the FCT and has the ability to be certain that its solution is fully integrated. CAE submitted that Lockheed, by denying CAE access to this information, has denied CAE the ability to confidently prepare a proposal, thereby forcing a certain degree of risk onto CAE regarding the possibility of problems associated with integrating the FCT into the SCTT.

25. CAE submitted that TUS, a sonar provider and subcontractor to Lockheed on this bid, refused to quote a firm price to CAE for a licence to use its data until the SCTT contract is awarded. This placed CAE at a disadvantage because TUS was able to pass its actual cost information to Lockheed, its partner. CAE argued that, because of TUS's refusal to provide CAE with a proper quote, CAE's proposal had to rely on estimates, whereas Lockheed's bid was able to use the actual numbers and, thus, gain a significant advantage as a result.

26. CAE submitted that clause 3.2 of the RFP causes OEM bidders to become part of the procurement process for which PWGSC is responsible. It submitted that the OEM bidders knew of all the costs associated with the use of their equipment and had access to the equipment and data relating to that equipment. All this vital information, denied to the non-OEM bidders, caused them to rely on estimates,

11. *Ibid*.
12. *Ibid*.
13. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

which prejudiced CAE's own bid. It submitted that PWGSC is accountable for the actions of TUS and Lockheed and failed to properly police them in regards to their actions, as outlined above.

27. CAE submitted that clause 3.2 of the RFP requires it to negotiate with the OEMs and that the provision of the OEM offer took that responsibility and opportunity away from CAE. It submitted that it should have been given the opportunity to negotiate better terms than those achieved by PWGSC. It submitted that the OEM offer between PWGSC and Lockheed is not complete, and leaves a number of key terms and conditions unaddressed, and that no contractor would enter into this type of agreement.

28. CAE submitted that the ability to negotiate directly with the OEMs, as set out in clause 3.2 of the RFP, has significant value to CAE and that the decision by PWGSC to impose the OEM offer improperly stripped CAE of the right to negotiate directly with OEMs, specifically Lockheed. CAE submitted that it has, in the past, demonstrated that it was able to negotiate a better deal than PWGSC. CAE submitted as evidence a contract involving Lockheed, PWGSC and CAE, in which CAE purportedly had been able to significantly reduce the cost of the contract after PWGSC had done the initial round of negotiations.

29. CAE submitted that, as a result of the decisions by OEM bidders to rely on their privileged position to deny it access to required information, the time needed to respond to the RFP was unreasonably short. It also submitted that PWGSC's one-week extension, instead of the two-week extension requested by CAE, was not sufficient and did not fulfill the requirements of the trade agreements to provide bidders with a reasonable period of time to submit bids. CAE submitted that, by virtue of granting that one-week extension, PWGSC acknowledged that the initial bidding period was not sufficient.

30. CAE submitted that PWGSC incorporated certain OEMs into the procurement process by virtue of clause 3.2 of the RFP. It submitted that PWGSC is responsible for the actions of those OEMs and that PWGSC is therefore responsible for TUS, as a subcontractor to Lockheed, delaying and refusing to provide CAE with the necessary quote that it requested. Despite PWGSC's arguments that CAE was the author of its own misfortune by waiting too long to approach TUS and Lockheed, CAE submitted that it acted responsibly and approached both OEMs at a sufficiently early stage in the procurement process.

31. CAE submitted that the facts that no other bidder requested an extension and that CAE itself was able to file a bid by the bid closing date are not evidence of a reasonable period of time to bid.

AMS's Position

32. AMS submitted that it also was a non-OEM bidder and that the procurement was conducted in a fair and equitable manner. It also submitted that the three-month tendering process provided sufficient time to compile the required information from the OEMs to enable it to submit a responsive proposal.

33. AMS submitted that, if the Tribunal grants CAE's request for its costs of preparing and submitting its proposal, AMS requests that the Tribunal award it the same remedy. It also requested that, if the Tribunal grants CAE additional time to revise and resubmit its proposal, AMS be granted the same opportunity to revise and resubmit its own response to the RFP.

Lockheed's Position

34. Lockheed submitted that PWGSC made every effort to create a competitive solicitation when a sole source procurement to Lockheed could have been justified. It submitted that IP rights and ITAR issues are extremely relevant to the procurement. It submitted that the SFCS was conceived, developed, built and

updated by Lockheed and that the IP is solely owned by Lockheed. Regarding the ITAR issue, Lockheed submitted that portions of the SFSC are very tightly controlled and strictly limited. It submitted that it was willing to assist any bidder in obtaining the requisite licence in order to assist it in obtaining information and access to the full documents, but that CAE chose not to apply for the required licence.

35. Lockheed submitted that CAE's evidence regarding its ability to negotiate a better deal than PWGSC on another project involving Lockheed, PWGSC and CAE was not complete. Lockheed submitted that it was as a result of a PWGSC audit and reduction in work scope that CAE obtained a lower price rather than any negotiating skill or power of CAE.

Thales's Position

36. Thales submitted that CAE's attempt to portray it as being deliberately uncooperative or that it purposely misinterpreted CAE's requirements so as to disadvantage CAE is wholly unjustified. It submitted that CAE never provided Thales with enough information to enable it to understand what CAE wanted in terms of data. Thales submitted that at no time did CAE refer to clause 3.2 of the RFP or indicate that it was waiting for a response from Thales.

37. Thales submitted that, between the conclusion of the SOIQ and the release of the RFP, all parties had the opportunity to approach Thales as a subcontractor, but that only Lockheed had entered into formal discussions with it and that it had been able to provide a quote to Lockheed on that basis. It also submitted that another bidder had also requested confirmation that Thales would provide support in the event that it won the SCTT contract. Thales submitted that it responded to the other bidder on the same basis as it did to CAE, which was satisfactory to that bidder.

38. Thales submitted that the contentions against it are not borne out by the facts and that they should be dismissed in accordance with PWGSC's submission in the GIR.

TRIBUNAL'S DECISION

39. 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*[14] 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, CAE claims are the *AIT* and *NAFTA*.

40. As a preliminary matter, the Tribunal notes that, in the GIR,[15] PWGSC challenged CAE's argument that *NAFTA* applied to this solicitation. PWGSC argued that the requirement fell under "Federal Stock Classification . . . N10 Weapons Systems", which is excluded from *NAFTA* pursuant to Annex 1001.1b-1, Section A, General Provisions, paragraph 2. The Tribunal notes that, while there may be elements of the solicitation that fall under the Federal Supply Classification (FSC) 10, the SCTT requirement as a whole should be considered under FSC 69, "Training aids and devices", for which *NAFTA* does include procurement on behalf of DND. The Tribunal therefore finds that both the *AIT* and *NAFTA* apply to this case.

14. S.O.R./93-602 [*Regulations*].
15. Section III at 8, para. 4.

41. In its complaint, CAE claimed that PWGSC and DND failed to properly follow Articles 501, 504(2) and 506(6) of the *AIT* and Articles 1008(1)(a) and 1013(1)(h) of *NAFTA*.

42. Article 501 of the *AIT* provides that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurement for all Canadian suppliers. Article 504(2) of the *AIT* has been interpreted by the Tribunal to mean that federal procurement measures that discriminate between goods, services or suppliers are prohibited whether these measures are provincially or regionally neutral or not. Similarly, Article 1008(1)(a) of *NAFTA* provides that tendering procedures have to be applied in a non-discriminatory manner. In the Tribunal's view, these three provisions are relevant to CAE's first ground of complaint, i.e. failure to ensure equal access to the procurement, and will also be relevant to its second ground of complaint as discussed below. With respect to Article 506(6) of the *AIT* and Article 1013(1)(h) of *NAFTA*, the Tribunal is of the opinion that they are not relevant to the first ground of complaint on the basis that they do not deal with discrimination.

43. Regarding the first ground of complaint that PWGSC and DND failed to ensure equal access to the procurement, the Tribunal does not believe that there is necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. As stated by CAE in its March 15, 2004, letter to PWGSC:[16] "There is no question that certain bidders have certain competitive advantages in certain bids. This is simply part of the ordinary ebb and flow of business." The Tribunal notes that these competitive advantages could be created as a result of incumbency, IP, ITAR or any number of other business factors. The Tribunal is in agreement with CAE's statement as quoted above and is of the opinion that, if a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used by PWGSC are discriminatory.

44. The Tribunal is of the opinion that, in this case, the tendering procedures specified in the RFP, prior to the OEM offer of March 5, 2004, were not inherently discriminatory nor did they heighten the competitive advantages held by the OEMs, Lockheed and Thales, as compared to non-OEM bidders. Despite the IP and ITAR constraints surrounding the FCT portion of the RFP, the Tribunal is of the view that PWGSC has met the intent of Article 501 of the AIT and the requirements of Article 504(2) of the *AIT* and of Article 1008(1)(a) of *NAFTA*. The Tribunal therefore finds that this first ground of complaint is not valid up until the March 5, 2004, OEM offer.

45. Also, in terms of CAE's first ground of complaint, the Tribunal requested, on August 10, 2004, that CAE provide it with additional information as to when it became aware that Lockheed was also to be a prime contractor for the SCTT. Given the Tribunal's finding on this first ground of complaint, outlined above, the information provided by CAE, and the subsequent comments on that response by Lockheed, were ultimately irrelevant to the Tribunal's decision.

46. With respect to its second ground of complaint, CAE first alleges that PWGSC and DND failed to apply the requirements of the RFP in violation of Article 506(6) of the *AIT* and Article 1013(1)(h) of *NAFTA*. The Tribunal notes that these provisions provide that the tender documents shall clearly identify the requirements of the procurement in order for the suppliers to submit responsive tenders.

47. Article 506(6) of the *AIT* reads in part as follows:

> The tender documents shall clearly identify the requirements of the procurement.

16. Complaint, Exhibit 12 at 4.

48. Article 1013 of *NAFTA* reads in part as follows:

> Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders.

49. The Tribunal is of the view that the trade agreements permit procuring entities to make changes or amendments while conducting a tendering procedure, provided the modifications are clear, are given the same circulation as the original tender documents and do not impose additional problems, such as creating a time restriction without an accompanying time extension. The addition or amendment of technical requirements, the extension of the bid closing date and/or the deletion or addition of contracting terms and conditions are examples of revisions that the procurement process may undergo.

50. In this case, however, the Tribunal finds that the OEM offer, and the manner in which it was presented, had a significant impact on the procurement process. Although PWGSC acknowledged the impact that the OEM offer had on the procurement process through the questions and answers provided to all bidders on March 18, 2004,[17] it did so a full 13 days after bidders had become aware of the OEM offer. The Tribunal believes that the OEM offer in effect amended clause 3.2 of the RFP. The Tribunal would normally expect amendments to the RFP to be issued by PWGSC and given the same circulation as the original tender documents. Instead, the Tribunal notes that the OEM offer came to the bidders in the form of an attachment to a letter from Lockheed.[18] PWGSC merely stated, almost two weeks after the fact, that it had taken away the responsibility from the parties to negotiate with Lockheed on the base price of the FCT. In this regard, the Tribunal finds that the manner in which the OEM offer was presented to the bidders had the effect of changing clause 3.2 in an unclear manner, which is inconsistent with the procedure prescribed in the applicable trade agreements.

51. The Tribunal also is of the view that it is important to consider the impact of the OEM offer as it relates to Article 504(2) of the *AIT* and Article 1008(1)(a) of *NAFTA*, which provide for the application of the tendering requirements in a non-discriminatory manner.

52. In this regard, the Tribunal agrees with CAE that the terms negotiated between PWGSC and Lockheed still left considerable uncertainty with the other bidders and gave no flexibility to the other bidders on pricing. The Tribunal is of the view that, by negotiating the OEM offer without the active participation of the other bidders, PWGSC foreclosed the possibility of other advantages that the bidders could have extracted from Lockheed through their own negotiations. The Tribunal notes that the bidders were not afforded the opportunity to determine which conditions (e.g. warranty costs) were the most important to negotiate with Lockheed. As a result, even though the base price of the OEM offer did provide a certain degree of additional predictability, the Tribunal agrees with CAE that the OEM offer negotiated by PWGSC heightened Lockheed's competitive advantage in the bidding process.

53. Therefore, the Tribunal finds that PWGSC failed to adhere to Article 506(6) of the *AIT* and Article 1013 (1)(h) of *NAFTA* with respect to the proper application of the RFP requirements, and also to Article 504(2) of the *AIT* and Article 1008(1)(a) of *NAFTA* with respect to Lockheed's competitive advantage. Based on the foregoing, the Tribunal finds that this second ground of complaint is valid.

54. With respect to CAE's third ground of complaint, that PWGSC and DND failed to provide it with a reasonable period of time to submit its bid, the Tribunal notes that CAE requested, on March 22, 2004, a two-week extension and that PWGSC granted a one-week extension on March 29, 2004. CAE submitted in

17. GIR, Exhibit 12, Question and Answer D-1.
18. Complaint, Exhibit 5.

its complaint[19] that this shorter extension did not allow non-OEM bidders enough time to respond to the RFP. The Tribunal finds that CAE knew, on March 29, 2004, that a longer extension had not been granted. In accordance with section 6 of the *Regulations*, CAE had 10 working days from that date to make an objection to PWGSC or to file a complaint with the Tribunal.

55. The Tribunal can find no evidence on the file to indicate that, prior to submitting its complaint to the Tribunal on April 23, 2004, CAE objected to PWGSC. As April 23, 2004, is more than 10 working days after March 29, 2004, the Tribunal determines that this ground of complaint was filed outside the time limit prescribed in section 6 of the *Regulations*.

56. In light of the above, the Tribunal recommends as a remedy that PWGSC, along with CAE and AMS, renegotiate the OEM offer with Lockheed to replace or confirm the existing offer of March 5, 2004, and that such new offer be used by all parties. The Tribunal recommends that, by September 29, 2004, all bidders, including Lockheed, be allowed to resubmit their proposals with respect to that portion of the work that requires changing, given the OEM negotiations.

57. Given that the complaint is valid in part, each party shall assume its own costs in this matter.

DETERMINATION OF THE TRIBUNAL

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

59. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC, along with CAE and AMS, renegotiate the OEM offer with Lockheed to replace or confirm the existing offer of March 5, 2004, to be used by all parties. The Tribunal also recommends that all original bidders that submitted a bid by the bid closing date (i.e. CAE, AMS and Lockheed) be allowed to resubmit their proposals by September 29, 2004, in order to include the renegotiated OEM offer and any consequential amendments.

Patricia M. Close
Patricia M. Close
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

19. Para. 148.