Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-004

Northern Lights Aerobatic Team, Inc.

v.

Department of Public Works and Government Services

Determination issued
Wednesday, September 7, 2005

Reasons issued
Thursday, October 6, 2005

Canada

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IN THE MATTER OF a complaint filed by Northern Lights Aerobatic Team, 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* and paragraph 25(*d*) of the *Canadian International Trade Tribunal Rules*.

BETWEEN

NORTHERN LIGHTS AEROBATIC TEAM, 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 Northern Lights Aerobatic Team, 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

James A. Ogilvy
James A. Ogilvy
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.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 10 and 11, 2005
Tribunal Members:	Ellen Fry, Presiding Member James A. Ogilvy, Member Meriel V. M. Bradford, Member
Research Director:	Sandy Greig
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Nick Covelli Eric Wildhaber
Assistant Registrar:	Gillian E. Burnett
Complainant:	Northern Lights Aerobatic Team, Inc.
Counsel for the Complainant:	Gerry Stobo Vincent DeRose
Intervener:	Top Aces Consulting Inc.
Counsel for the Intervener:	Benjamin R. Mills
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 25, 2005, Northern Lights Aerobatic Team, Inc. (Northern Lights) 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. W0153-03PM02/C) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of airborne training services. Included with the complaint was a notice of motion filed by Northern Lights requesting that the Tribunal order PWGSC to disclose additional documents.

2. Northern Lights alleged that, with respect to areas of competition R1 and R2 of the solicitation, PWGSC incorrectly declared its proposals non-compliant and issued a standing offer to a non-compliant bidder, Top Aces Consulting Inc. (Top Aces). Specifically, it alleged that PWGSC: (1) incorrectly declared its proposals non-compliant with the Contract Program Manager (CPM) requirement; (2) incorrectly declared its proposals non-compliant with the ejection seat requirement; and (3) incorrectly declared Top Aces' proposal compliant with the cold start capability requirement for the aircraft.

3. Northern Lights requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with Top Aces and issue standing offers for areas of competition R1 and R2 to Northern Lights. In the alternative, it requested that the Tribunal recommend that PWGSC re-evaluate its proposals. In addition, it requested its reasonable costs incurred in preparing and proceeding with the complaint.

4. On April 29, 2005, 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 11, 2005, the Tribunal granted Northern Lights' motion and ordered PWGSC to file certain documents with the Tribunal no later than May 16, 2005, and to file certain other documents with the Tribunal with the Government Institution Report (GIR).

5. Also on April 29, 2005, the Tribunal issued a postponement of award order under subsection 30.13(3) of the *CITT Act*. On May 3, 2005, PWGSC informed the Tribunal that two standing offers had been issued to Top Aces. On May 10, 2005, PWGSC certified to the Tribunal that the procurement at issue was urgent and that a delay in awarding call-ups and taskings would be contrary to the public interest. On May 11, 2005, the Tribunal therefore rescinded its original order.

6. On May 17, 2005, Top Aces requested leave from the Tribunal to intervene in the proceedings. On May 19, 2005, the Tribunal granted intervener status to Top Aces.

7. On May 27, 2005, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[3] On June 16, 2005, Northern Lights and Top Aces each filed comments on the GIR.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499 [*Rules*].

8. On June 16, 2005, Top Aces also filed a notice of motion requesting that the Tribunal order PWGSC and/or Northern Lights to produce a specific document. On June 21, 2005, both PWGSC and Northern Lights filed the requested document. Therefore, the Tribunal did not make a ruling.

9. On June 29, 2005, Top Aces filed a notice of motion requesting that the Tribunal order a specified individual to attend a hearing for the purpose of providing evidence concerning the day on which the basis of the complaint, that Top Aces did not comply with the cold start capability requirement for the aircraft, became known or reasonably should have become known to Northern Lights.

10. On July 11, 2005, the Tribunal notified parties that it would hold a hearing concerning Northern Lights' ground of complaint that Top Aces did not comply with the cold start capability requirement for the aircraft. The hearing was not held in response to Top Aces' motion; rather, it resulted from the Tribunal's view that a hearing solely by way of written submissions would be inadequate to deal with this ground of complaint. Given the decision to hold this hearing, the Tribunal did not make a ruling concerning Top Aces' motion. The hearing was held on August 10 and 11, 2005.

11. Pursuant to paragraph 25(*d*) of the *Rules*, the Tribunal will now dispose of the complaint based on the written submissions, and the evidence and arguments presented at the hearing.

PROCUREMENT PROCESS

12. According to PWGSC, a Request for a Standing Offer (RFSO) for the provision of certain combat support training services for the Canadian Forces was published on June 4, 2004. The closing date for the submission of proposals was October 26, 2004.

13. PWGSC submitted that nine proposals were received from five bidders and that Northern Lights submitted separate proposals for each of the four areas of competition, i.e. R1, R2, R3 and R4. On December 1, 2004, PWGSC sent a letter to Northern Lights seeking clarification with respect to a number of requirements in the solicitation and, in particular, with respect to the requirement for the ejection seat. On December 2 and 3, 2004, Northern Lights responded to the request. On February 23, 2005, PWGSC advised Northern Lights that its proposals had been deemed non-compliant. On March 2, 2005, Northern Lights received a debriefing by PWGSC on the evaluation of its proposals. On March 15, 2005, Northern Lights filed an objection with PWGSC regarding the evaluation of its proposals. On April 11, 2005, PWGSC replied to Northern Lights, dismissing its objections. On April 25, 2005, Northern Lights filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Northern Lights' Position

14. Northern Lights submitted that its proposals were improperly evaluated by the technical evaluators with respect to the CPM requirement and the ejection seat capability of its aircraft. It contended that the evaluators ignored vital information provided in its bids, failed to properly and fairly apply themselves, and did not conduct the evaluation in a procedurally fair way. Northern Lights further submitted that it had reason to believe that Top Aces' proposed aircraft, the Alpha Jet, did not meet the cold start capability requirement for the aircraft.

15. With respect to the individual proposed for the position of CPM, Northern Lights submitted that his résumé clearly indicated that, since 2002, the individual had been performing the functions of CPM for the Canadian Forces under the Maritime Forces Pacific (MARPAC) standing offer dealing with air combat training.[4] Northern Lights submitted that, in performing this role, the individual obtained experience in managing, transitioning to and delivering aviation services, in addition to the leadership and management of aviation maintenance and flight activities.

16. Northern Lights submitted that, in performing the functions of CPM under the MARPAC standing offer, the individual worked closely with officials from both DND and PWGSC. According to Northern Lights, two of the DND officials working on the MARPAC project were on the evaluation team for the procurement that is the subject of the complaint. It contended that at least those two evaluators would have known that the reference in the individual's résumé to the CPM role in the MARPAC standing offer meant that he had the qualifications and experience required for the CPM for the procurement in question. It submitted that for the evaluators to ignore that vital information constitutes an error. Northern Lights submitted that PWGSC unfairly constrained the exercise of the evaluators' discretion in the evaluation of bids when it indicated the following in its letter to Northern Lights dated April 11, 2005: ". . . In order to assess all bids equitably and fairly, DND technical evaluators were instructed that individual evaluator's knowledge/experience with bidders was not to be taken into account in the evaluation process . . . ." It further submitted that, at the very least, the information contained in the résumé should have led the evaluators to seek a clarification of the scope of duties performed by the CPM in the MARPAC standing offer.

17. Northern Lights contended that the résumé of the individual proposed for the CPM was fully, or at least substantively, compliant with the evaluation requirements. It submitted that the ". . . principle of substantive compliance promotes a holistic approach to evaluating a bid against the criteria set out in the procurement in order to avoid an overly mechanical and formalistic approach, where to do so would not affect the integrity of the procurement process and not contravene the provisions of the procurement itself . . . ."[5] It submitted that its bids provided more than enough information to demonstrate that the individual had the qualifications required for the CPM position. It referenced several cases in support of its position.[6]

18. Northern Lights further submitted that a statement by the British Columbia Court of Appeal in *Sound Contracting Ltd. v. Nanaimo (City)*[7] is an acknowledgement that the knowledge and experience of evaluators gained from past dealings with a bidder can help inform the evaluation team.

19. With respect to the ejection seat capability, Northern Lights submitted that the evaluators misread the technical information provided in its bids. It submitted that the technical evaluators improperly interpreted its bids as producing a minimum ejection height of 227 feet, i.e. 27 feet in excess of the mandatory minimum. It argued that the figure of 227 feet is a patent error caused by the technical evaluators' improper and unreasonable introduction of a variance of +/-50 metres to the relevant information contained in its bids. Northern Lights submitted that, in response to a request for clarification from PWGSC, it confirmed that its minimum height for ejection was approximately 65 feet, which exceeds the minimum

4. One of the Government's interim solutions for its short-term air combat training needs was the issuance of a standing offer to provide air combat training to the Canadian Forces' MARPAC.
5. Complaint, para. 68.
6. *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 11; *British Columbia v. SCI Shares & Constructors Inc.* (1993), 22 B.C.A.C. 89 (B.C.C.A.); *Winbridge Construction Ltd. v. Defence Construction Ltd.*, 2004 N.S.C.A. 26.
7. [2000] B.C.C.A.

mandatory requirement by approximately 135 feet. Northern Lights submitted that, by seeking clarification on whether the Original Equipment Manufacturer (OEM) supported the data and relevant claims contained in its proposals, but then failing to give the technical evaluators the pertinent responses, which explained the OEM's statement and confirmed that the OEM supported the data in its proposals, PWGSC fatally undermined Northern Lights' proposals. It further submitted that it was treated unfairly by this random and arbitrary withholding of its clarification response.

20. Northern Lights submitted that it relied upon a graph[8] included with its proposal and that the graph does not identify, nor is it conditioned upon, a variance of +/-50 metres and that, in fact, it is not qualified by any variance at all. It argued that there is only one graph to which a variance of +/-50 metres is applicable[9] and that graph is found on page 30 of Volume 3 of 4, Section A, Subsection 9, chap. I-9 of its proposal.

21. Northern Lights submitted that where graphs are presented unconditionally, with no applicable variance, it is unreasonable for technical evaluators to unilaterally apply a variance. It contended that bidders are entitled to assume that technical evaluators will proceed with their assessment on the basis of the graphs being accurate as presented. It submitted that, if technical evaluators have concerns about the accuracy of a graph, they are entitled to seek clarification.

22. With respect to the cold start capability of Top Aces' proposed aircraft (the Alpha Jet), Northern Lights indicated that it had considered using the Alpha Jet; however, in conducting its review, it received information relating to the operating specifications of the engine used in the Alpha Jet. One of the items addressed by the manufacturer of the engine used in the Alpha Jet dealt with winter operations. The manufacturer confirmed that the Alpha Jet engine is not certified to start at temperatures below –30°C.[10]

23. Northern Lights submitted that it believes that, in response to its objection filed with PWGSC on March 15, 2005, PWGSC made inquiries to Top Aces concerning the cold weather operational requirement. Northern Lights further submitted that it believes that, since the objection was filed, changes were made to the aircraft operating instructions in order to deal with this deficiency, which, it submitted, would amount to bid repair. It submitted that the operating manual for the Alpha Jet does not address the available temperature ranges for starting and operating at ground temperature; rather, it only confirms that the aircraft has been "flight tested" at temperatures as low as –35°C.[11] Northern Lights submitted that the only way that the technical evaluators could grant a passing score to Top Aces' proposal was to infer that the Alpha Jet met this requirement from other non-specific information contained in the material submitted with Top Aces' proposal. However, according to the conflict of interest agreement[12] signed by the evaluators, they were specifically prohibited from inferring information. It further submitted that the fact that the Alpha Jet has been flown at temperatures as low as –35°C does not mean that it can be started at –35°C and that the phrase "flight tested" cannot be equated with the ability to start an engine. It submitted that a test flight is not the process by which the aircraft manufacturer generates a performance rating for functions such as ground level engine starting under extreme weather conditions.

24. Regarding the timeliness of this ground of complaint, Northern Lights submitted that it only learned that Top Aces would be procuring the Alpha Jet on or around March 9 or 10, 2005, when it was reported in the Canadian press. It submitted that it filed its notice of objection with PWGSC on March 15, 2005, within

8. Complaint, Tab 10.
9. Complaint, Tab 11.
10. Complaint, Tab 13.
11 Complaint, Tab 14.
12. GIR, Exhibit 3, Annex A at 2.

the time frame required. Northern Lights submitted that, while there are not many different models of jet fighters that potential suppliers could have proposed (it estimates six to eight), it did not know what aircraft would be selected and proposed by any other bidder.

25. At the hearing, Northern Lights submitted that there is no precision or definition as to what the term "flight tested" means and that the two evaluators assigned to evaluate the portion of Top Aces' proposal dealing with the cold start capability requirement did not understand what that term encompassed. It further submitted that, at the very best, the evaluators would have had to infer information from the bid presented by Top Aces in order to conclude that it was compliant with this requirement. Regarding the timing issue, Northern Lights submitted that one has to have solid knowledge about the basis and facts upon which one can initiate a complaint and that it was not unreasonable, in this case, for Northern Lights to await some independent verification of the aircraft proposed by Top Aces before initiating a complaint.

26. Finally, Northern Lights submitted that it has reason to believe that Top Aces is having difficulty in acquiring the Alpha Jet and has also experienced difficulties in receiving permission to bring the Alpha Jet into Canada.

PWGSC's Position

27. Regarding Northern Lights' proposed candidate for CPM, PWGSC submitted that the experience set out in the résumé is experience in the preparation of proposals and bid documents and does not actually set out any of the requisite relevant substantive experience required for the position of CPM, namely, a minimum 1 year within the last 10 years in managing, transitioning to and delivering aviation services. PWGSC further submitted that the résumé does not demonstrate that the proposed candidate has any requisite experience relating to the leadership and management of aviation maintenance and aviation operations for a number of specialized aircraft operating from a number of "home" bases and at "deployed" locations during the requisite 10-year period. PWGSC submitted that the burden of proof is on the bidder to demonstrate, in its proposal, the type and level of experience that the proposed candidate has obtained while working in support of MARPAC or any other position referred to in the résumé.

28. PWGSC submitted that, in order to assess all bids equitably and fairly, DND technical evaluators were directed to evaluate proposals in accordance with the evaluation plan, which states the following: ". . . The Evaluation Team Member will perform his/her official duties in such a manner that public confidence and trust in the integrity, objectivity and impartiality of the evaluation process is maintained . . . and evaluators shall maintain the integrity of the evaluation by considering only information presented in the proposal, including any subsequent responses to clarifications. No information is to be inferred . . . ."[13]

29. PWGSC submitted that, while, as part of the evaluation process, it is permissible to verify that the information contained in a proposal is accurate or can be substantiated based upon the evaluators' corporate knowledge, it is not permissible for evaluators to use their knowledge or experience to correct a deficiency or omission in bids. PWGSC argued that the experience cited in Northern Lights' proposals could not be verified or clarified, because no such experience was even indicated, and that for evaluators to "fill in the gaps" based upon personal knowledge would constitute bid repair.

13. Exhibit 3 of the GIR, Annex A at 2, 4.

30. PWGSC submitted that the requirements for the MARPAC standing offer were significantly different from those required in the solicitation. It submitted that the evaluators had no knowledge of the proposed candidate's involvement with any of the maintenance, operations, scheduling, contractual issues, exercise operations or invoicing relating to the MARPAC standing offer.

31. Regarding the ejection seat requirement for a minimum ejection height of 200 feet, PWGSC submitted that Northern Lights included two technical documents that, it claimed, demonstrated compliance with this criterion, i.e. the "*Manuel du Pilote (Armée Suisse)*"[14] (Pilot's Manual [Swiss Army]) and the "RAF Pilot's Notes Mk9"[15] (Pilot's Notes). The Pilot's Manual contained three graphs that provided information on safe altitude margins for ejections under different dive and roll angles of the aircraft. PWGSC submitted that nowhere in the proposal did Northern Lights provide any data or information that *precisely* showed the requirement being met. As a result, it submitted that the evaluators were forced to attempt to use their own technical experience to interpret compliance from the information provided. It noted that the supporting information in the Pilot's Notes referred to a different model of ejection seat from the seat proposed by Northern Lights and, therefore, was of no relevance in establishing compliance. PWGSC submitted that the technical evaluators examined the information provided in the technical documents and determined that Northern Lights had not demonstrated that its proposal met the ejection seat requirement.

32. PWGSC submitted that it is a well-established principle that ". . . procuring entities must evaluate bidders' conformance with mandatory requirements thoroughly and strictly . . ."[16] and that this is particularly important where the requirement is one of critical importance for the ". . . safety and survivability . . ." of personnel engaged in or affected by the services to be provided. PWGSC also submitted that it is a well-established rule that bidders must carry the responsibility to respond fully and satisfactorily to each of the requirements of a solicitation.[17] PWGSC further submitted that the provisions of the solicitation documents made it expressly clear that the onus fell on the bidder to demonstrate such compliance and that failure to provide ". . . sufficient detail and depth to permit evaluation against criteria . . ." could lead to a finding of non-compliance.

33. Regarding Northern Lights' allegation that the aircraft proposed by Top Aces does not meet the cold start capability requirement, PWGSC submitted that Top Aces' proposal supplied more than adequate documentation that supported the capability of the Alpha Jet to be started and operated at –35°C. It also submitted that Northern Lights itself has confirmed that the Alpha Jet is compliant with this requirement.[18]

34. PWGSC filed a letter dated February 23, 2005, which informed Northern Lights that the successful bidder in areas of competition R1, R2 and R3 was Top Aces. Consequently, PWGSC submitted that Northern Lights knew or ought to have known its basis of complaint regarding allegations of non-compliance of the Alpha Jet on February 23, 2005, and that, therefore, this ground of complaint is late and should be dismissed.

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14. GIR (confidential), Exhibit 28.
15. GIR (confidential), Exhibit 29.
16. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) [*IBM*] at 6; *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT) at 6.
17. *Re Complaint Filed by Crain-Drummond Inc*. (18 August 2000), PR-2000-009 (CITT); *Re Complaint Filed by Worklogic Corporation* (12 June 2003), PR-2002-057 (CITT).
18. GIR (confidential), Exhibit 31.

35. In response to Northern Lights' argument that a test flight is not the process by which the aircraft manufacturer generates a performance rating for functions such as ground level engine starting under extreme weather conditions, PWGSC submitted that flight testing does address the issue of whether the Alpha Jet can be started in very cold temperatures.

36. At the hearing, PWGSC submitted that the issue is whether it reasonably concluded that Top Aces' proposal complied with the cold start capability requirement. It submitted that this requirement pertains to the aircraft, not the aircraft's engine, and that the technical specifications and evaluation plan relied on by the evaluators in this case were for the German Alpha Jet bid by Top Aces. Also, PWGSC submitted that the requirement does not specify the means by which the aircraft is to be started, simply that it must be able to be started. In addition, PWGSC submitted that there is no certification needed to comply with the requirement, nor is there a success rate associated with it. With respect to the term "flight tested", it submitted that information may be conveyed using different terms and that aircraft operating instructions prepared by design authorities from different countries may also convey that information by different means.

37. With respect to Northern Lights' allegation that there was bid repair to Top Aces' proposal, PWGSC submitted that there was no post-bid communication on this point between DND, PWGSC and Top Aces and that there was no correspondence between PWGSC, DND and Top Aces that related to the aircraft operating instructions of the Alpha Jet.

38. Regarding Northern Lights' allegation that the Department of Transport refused to grant approval for entry of Top Aces' proposed aircraft into Canada, PWGSC submitted that this allegation is without substance or foundation and that, in any case, this is a matter of contract administration and, therefore, not properly a subject of inquiry by the Tribunal. It further submitted that there is no correspondence in the possession of PWGSC and DND between the Government of Canada and Top Aces that relates to this allegation.

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

Top Aces' Position

40. With respect to the evaluation of the CPM, Top Aces submitted that it is improper in law for evaluators to use their knowledge or experience to correct a deficiency or omission in bids. It also submitted that reliance on the evaluators' personal experience is unsustainable in fact, as the evaluators did not have any knowledge of the candidate's alleged experience.

41. With respect to the evaluation of the ejection seat requirement, Top Aces submitted that it agrees with PWGSC's position and that, if PWGSC had accepted the additional information provided by Northern Lights after bid closing, PWGSC and Northern Lights would have been engaged in bid repair. Further, Top Aces agreed with PWGSC that the Tribunal ought to defer to the evaluation team and not substitute its judgement for that of the evaluators, unless it finds that the evaluation process was conducted improperly.

42. Top Aces submitted that the Tribunal does not have the jurisdiction to inquire into the allegation regarding its non-compliance with the cold start capability requirement for the aircraft, as that ground of complaint was filed outside the prescribed time frame. It submitted that the basis for Northern Lights'

complaint on this ground is a facsimile received from Snecma Moteurs on April 30, 2002,[19] and the operating manual for the Alpha Jet.[20] It submitted that the facsimile was received by the President of Northern Lights on April 30, 2002, and that Northern Lights was in possession of the operating manual in 2002. Top Aces submitted that Northern Lights was informed by PWGSC on February 23, 2005, that Top Aces was the successful bidder and that, as a result, Northern Lights was aware of the basis of its complaint on this ground on that date. It further submitted that Northern Lights should have filed an objection with PWGSC or filed a complaint with the Tribunal within 10 working days of February 23, 2005, and that the deadline for filing the objection or complaint pursuant to section 6 of the *Regulations* was March 9, 2005, whereas Northern Lights did not file an objection with PWGSC until March 15, 2005.

43. Top Aces submitted that Northern Lights was fully aware of the fact that it had proposed the Alpha Jet in its bid as a result of discussions between representatives of Northern Lights and Top Aces between October 27, 2004, and February 23, 2005. Top Aces also submitted that a consultant employed by Northern Lights knew prior to February 23, 2005, that Top Aces had proposed the Alpha Jet in its bid. Furthermore, Top Aces submitted that it was general knowledge in the flight training community that Top Aces proposed to use the Alpha Jet in its bid and that it was fully aware of what its competitors were bidding.

44. Top Aces submitted that the evaluators relied on their knowledge and expertise as pilots to interpret technical terms and assign a meaning to them, which it submitted was reasonable. It submitted that the information and knowledge in Northern Lights' possession with respect to the type of aircraft proposed by Top Aces ought to have led it to be vigilant, to exercise due diligence and to react as soon as it became aware or reasonably should have become aware of a flaw in the process.

45. Top Aces submitted that Northern Lights' allegation that PWGSC improperly sought clarifications with regard to Top Aces' proposal subsequent to the filing of an objection by Northern Lights is tantamount to an allegation of fraud and that Northern Lights failed to provide any evidence to support this assertion.

46. With respect to Northern Lights' allegation that the Department of Transport refused to permit Top Aces to import its aircraft into Canada, Top Aces submitted that it, along with PWGSC and DND, fully expect that the Alpha Jet will gain entry into Canada and that there is no reason to believe otherwise. It further submitted that it has not received any communication from the Department of Transport, or any other department or agency of the Government of Canada, purporting to prohibit the importation into Canada of its aircraft. It also submitted that this issue is a matter of contract administration and not a proper matter for inquiry by the Tribunal. Top Aces cited a previous decision by the Tribunal in *Albatross Aviation Services*[21] in support of its position.

47. Finally, Top Aces requested its costs in responding to the proceedings and submitted that such costs ought to be granted at an increased scale due to Northern Lights' failure to substantiate its allegation of fraud.

19. Complaint, Tab 13.
20. Complaint, Tab 14.
21. *Re Complaint Filed by Albatross Aviation Services* (8 April 2005), PR-2004-062 (CITT).

TRIBUNAL'S ANALYSIS

48. Subsection 30.14(1) of the *CITT Act* requires the Tribunal to limit its considerations to the subject matter of the complaint. Furthermore, 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*[22] and the *North American Free Trade Agreement.*[23]

49. Article 506(6) of the *AIT* provides the following: "In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

50. Article 1015(4)(d) of *NAFTA* similarly provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . . ."

51. A procuring entity will satisfy its obligations under these provisions when it makes ". . . a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the [solicitation] . . . ."[24] The Tribunal will interfere only with an evaluation that is *unreasonable*.

52. In *Law Society of New Brunswick v. Ryan*, referring to the Supreme Court of Canada's earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, Iacobucci J., stated as follows:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).[25]

In the Tribunal's opinion, the same principle applies with respect to the Tribunal's review of a procuring entity's evaluations under the trade agreements. In the past, the Tribunal has noted that it will substitute its judgement for that of evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[26]

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22. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].
23. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
24. Re *Complaint Filed by Bosik Vehicle Barriers Ltd.* (6 May 2004), PR-2003-082 (CITT) [*Bosik*] at 5.
25. [2003] 1 S.C.R. 247 at para 55.
26. *Re Complaint Filed by Marcomm Inc*. (11 February 2004), PR-2003-051 (CITT).

Compliance with the CPM Requirement

53. Item 3.C.3 of the Statement of Work (SOW) sets out the following mandatory requirement with respect to personnel qualifications:

> CONTRACTOR PROGRAM MANAGER (CPM): The CPM shall have relevant experience (minimum 1 year within the last 10 years) in managing, transitioning to, and delivery of aviation services. Experience to include: leadership and management of aviation maintenance and aviation operations for a number of specialized aircraft operating from a number of "home" bases and at "deployed" locations.

54. In addition, the RFSO stipulated the following:

> . . . The Bidder must demonstrate that the proposed personnel's qualifications (as per Resume provided) meet the personnel requirements detailed in the SOW, Worksheet # 3.1 – Personnel Requirements, Item 3.C.2 to 3.E.12 . . . . [27]

55. The résumé of the proposed individual indicates that the individual was the ". . . Program Manager for the successful NLAT MARPAC proposal to DND for the provision of Combat Support (CS) services . . ." from October 2002 to May 2004. The slides from the debriefing indicate that PWGSC declared this portion of Northern Lights' proposals non-compliant because ". . . [e]xperience in management of aviation maintenance and flight activities is not shown . . . ."[28] In the GIR, PWGSC advanced the additional argument that the résumé merely indicates experience in preparing the MARPAC proposal, rather than in managing aviation operations.

56. The Tribunal does not accept PWGSC's argument that this item of the résumé merely indicates experience in preparing the MARPAC proposal, given that the experience indicated in the résumé spans approximately a year and a half. Although the language in Northern Lights' proposals could have been more precise, it should reasonably be interpreted to indicate that the individual was the program manager for the combat support services delivered by Northern Lights under the MARPAC contract.

57. That having been said, however, the Tribunal had to consider whether, given the fact that Northern Lights' proposed project manager was the project manager for combat support under the MARPAC contract, it was unreasonable for PWGSC to determine that the CPM requirement was not met in the current case.

58. In this regard, the Tribunal notes that the RFSO states the following:

> . . . Failure of an offer(s) to provide information in sufficient detail and depth to permit evaluation against criteria may render an offer(s) non-compliant. All Bidders are advised that only listing experience without providing any supporting data to describe where and how such experience was obtained will not be considered to be "demonstrated" for the purpose of the evaluation. All professional experience must be fully documented and substantiated in the offer(s) . . . .[29]

Thus, it is the bidder's responsibility to show clearly that the individual meets the CPM requirement.

27. RFSO at 14.
28. The RFSO actually says aviation "operations", not "activities".
29. RFSO at 26.

59. The Tribunal notes that PWGSC's instructions to evaluators did not form part of the RFSO and, therefore, it considers that these instructions are irrelevant to its consideration as to whether the evaluators evaluated the bids correctly in accordance with the instructions contained in the RFSO. In evaluating a bid, evaluators typically need to apply their knowledge of both common and technical usage of pertinent vocabulary to interpret what the bid is saying. For example, they need to use this knowledge to interpret terms such as "aviation maintenance" and "aviation operations".

60. They also may be called upon to have regard to matters of general knowledge. For example, if the bid referred to Cold Lake, evaluators should use their general knowledge that Cold Lake is in Alberta. However, it is not appropriate for an evaluator to apply personally held knowledge that goes beyond the realm of general knowledge or to go outside the bid to supply information that is missing.

61. The nature of the MARPAC contract is not a matter of general knowledge. Rather, to the extent that any of the evaluators or DND as a whole have knowledge concerning MARPAC, it is a matter of personal knowledge, limited to those evaluators, or institutional knowledge limited to that government institution. Bidders should not expect to rely on such knowledge to provide information required by the RFSO but not included in their bids.

62. As noted above, the bid indicates that the individual in question was a program manager for the provision of "combat support services". The question is whether, in terms of the general and technical use of language, "combat support services" would be understood to include the CPM requirement of the RFSO. In the Tribunal's view, "combat support services" in this context would legitimately be understood to include some aspects of aviation services, but would not necessarily include all the elements required specifically by the RFSO (". . . leadership and management of aviation maintenance and aviation operations for a number of specialized aircraft operating from a number of 'home' bases and at 'deployed' locations"). The Tribunal does not accept Northern Lights' argument that it should apply the principle of "substantive compliance" rather than strict compliance with mandatory requirements. As indicated in *IBM*, the Tribunal considers that the proper standard is one whereby ". . . procuring entities must evaluate bidders' conformance with mandatory requirements thoroughly and strictly . . . ."[30] Furthermore, Articles 8.4.e (1) in Section I and 2.1(a) in Section II of the RFSO[31] make it clear that the government institution requires the bids for this procurement to demonstrate strict compliance. In the Tribunal's view, if Northern Lights wanted the evaluators to conclude that MARPAC experience met the CPM requirement, it should have put specific material in its bid to explain how the MARPAC experience was relevant.

63. Therefore, it was not unreasonable for PWGSC to evaluate Northern Lights' bid documents as non-compliant with the CPM requirement and the other RFSO requirement, "Number of Personnel", for which compliance is dependent on compliance with the CPM requirement.

Compliance with the Ejection Seat Requirement

64. Item 6.C.10.1 of the SOW identifies the following requirements for the ejection seat:

> Ejection Seat: It is mandatory that all Type 1 aircraft be equipped with serviceable ejection seats for all crew members. The seat shall be equipped with a seat pack suitable to the environmental conditions (land and/or sea). Items 6.C.10.1.1. through 4. must be supported by Test Data. Item 6.C.10.1.5. is to be supported by Analysis.

30. RFSO at 6.
31. At 14, 26.

65. Item 6.C.10.1.5 of the SOW sets out a number of specific technical requirements for the ejection seat:

> Points that must be within the design envelope are:
>
> a. 200 feet AGL[32] and 600 feet/minute rate of descent, wings level;
>
> b. 5000 feet AGL, 10000 ft/minute rate of descent, any altitude.

This ground of complaint concerns the requirement of paragraph (a), that one of the points that must be within the design envelope is 200 feet above ground level.

It is recalled that item 6.C.10.1 states the following:

> . . . Item 6.C.10.1.5. is to be supported by Analysis.

Further, the RFSO states the following:

> . . . Bidders must demonstrate that the assets they are proposing to use for delivering the services (aircraft, Air Force Targets, and all associated equipment) meet the performance requirements by providing supporting documentation that contains information to substantiate the claimed performance.
>
> . . .
>
> Failure of an offer(s) to provide information in sufficient detail and depth to permit evaluation against criteria may render an offer(s) non compliant . . . .[33]

66. Northern Lights proposed to equip its aircraft with Type 3H ejection seats manufactured by Martin-Baker Aircraft Company Limited. To show that the ejection seats met the minimum ejection height requirement, Northern Lights submitted, with its bids, two technical documents, the Pilot's Manual and the Pilot's Notes, as well as information provided by the manufacturer of the ejection seat.[34]

67. The Pilot's Manual contained three graphs that provided information on minimum ejection heights for different speeds of descent and under different conditions of dive and roll angles of the aircraft. These graphs were on two separate pages of Northern Lights' proposal.

68. The graph on page 30 of the proposal (the first graph) is prefaced by the following text:

> Ground clearance for seat ejection
>
> Using the graph below, it is possible to determine the minimum height required for ejection based on the flying speed, the dive angle and the roll angle.
>
> In the first graph, a 5-second reaction time was used as a safety factor.
>
> The result is an approximation. The height variance is about plus or minus 50 metres.
>
> [Translation]

The graph is entitled "Roll angle nil" [translation]. The graph shows minimum heights ranging from 0 to 3,000 metres, speeds ranging from 300 to 1,200 kilometres per hour, and dive angles ranging from 0 to 90 degrees.

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32. AGL means "above ground level".
33. RFSO at 16, 26.
34. GIR (confidential), Exhibit 30.

69. On page 31 of the proposal, there are two graphs. The header reads "For exclusive use of HUNTER Mk. 58/68" [translation]. The two graphs are prefaced by the following text:

> The following two graphs are approximations and calculated without any safety factor.
>
> [Translation]

The graph on the left-hand side of page 31 (the second graph) is entitled "Dive angle nil" [translation]. The graph shows minimum heights ranging from 0 to 700 metres, speeds ranging from 300 to 1,200 km/hour and a roll angle of 0 to 180 degrees.

The graph on the right-hand side of page 31 (the third graph) is entitled "Roll angle nil" [translation]. The graph shows minimum heights ranging from 0 to 700 metres, speeds from 300 to 1,200 kilometres per hour and dive angles from 0 to 90 degrees. This is the graph that Northern Lights alleged it relied on to meet the ejection seat requirement.

70. The second and third graphs show the minimum heights for safe ejections at various speeds of descent of the aircraft. However, the second graph is shown with no aircraft dive, and the third with no aircraft roll. The first and third graphs both show minimum heights for safe ejections at various speeds of descent of the aircraft with no aircraft roll. However, the first graph shows minimum heights of up to 3,000 metres, while the third graph shows minimum heights of up to 700 metres.

71. The supporting information in the Pilot's Notes contains information on the Type 2H ejection seat. The notes state the following: ". . . The Type 2H ejection seat has a ground level ejection capability provided that the aircraft's flight path is parallel to the ground and the speed is at least 90 knots. If the aircraft is descending, the minimum safe height for ejection is about 100 feet AGL per 1000 feet/minute rate of descent . . . ."

72. The information from the ejection seat manufacturer was a copy of an e-mail exchange wherein Northern Lights had sought confirmation that the safe height above ground for ejection seat deployment was 10 percent of the rate of descent, as claimed by Northern Lights.[35]

73. During bid evaluation, PWGSC sought clarification from Northern Lights regarding this aspect of its proposals by requesting the following: "Where in the proposal is there documentation that supports that the seat meets this specification? The supporting documentation provided indicates that the seat OEM does not support the claim. The bidder must indicate the exact page(s) and paragraph(s) number(s) for each of the R1, R2, and R3 proposals . . . ." In response, Northern Lights provided certain material that was not contained in its bids. The Tribunal is of the view that it would have been improper for the evaluators to have considered this new material.

74. The RFSO indicates that it is the bidder's responsibility to show clearly how it meets Item 6.C.10.1.5 of the SOW. Item 6.C.10.1 indicates that the bidder has a particularly high standard to meet, given that, as noted above, it requires the item to be ". . . supported by Analysis . . . ." The information provided by Northern Lights did not meet this standard.

75. The Pilot's Notes contained material that was for the Type 2H model of ejection seat, which was a different model from the Type 3H ejection seat that was proposed by Northern Lights. The bids did not demonstrate that the parameters for the Type 2H model would also apply to the model that was proposed.

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35. GIR (confidential), Exhibit 30.

76. The information provided by the ejection seat manufacturer was ambiguous.[36] Although it is not clear exactly what information the manufacturer intended to provide, the manufacturer's reply cannot reasonably be interpreted as a confirmation that the ejection seat meets the specification.

77. The graphs provided in the bids are on a scale that makes it difficult to read, with any precision, the values for ejection height. Furthermore, they are not accompanied by the data sets from which they are derived, which, if present, might have clarified this imprecision. Two of the graphs (the first and third) appear to cover the specification at issue, and it is clear from the accompanying caveats that both graphs are intended to give only an approximate indication of ejection seat performance. It is not clear what allowances should be made for imprecision because the three graphs carry different caveats, i.e. the first states as follows: ". . . The result is an approximation. The height variance is about plus or minus 50 metres . . . ." [translation]. The lead-in to the second and third graphs states as follows: ". . . The following two graphs are approximations and calculated without any safety factor . . . ." [translation]. It is not clear whether or how these caveats are intended to relate to each other. For example, the material does not state whether the +/-50 metres in the first graph is also intended to apply to the third graph. It also does not state whether the "safety factor" refers to the same kind of uncertainty as the +/-50 metres, the 5-second reaction time referred to on page 30, or something different. Despite this unclear material, the evaluators still needed to determine if the graphs indicated that the minimum ejection height requirement was met. They concluded that the best technical interpretation of the material was that the +/-50 metres allowance for uncertainty in the first graph should apply to both the first and third graphs, with the result that Northern Lights did not meet the requirement. Given that both graphs cover the same subject matter (although graph 1 covers a greater range of heights), this conclusion is not unreasonable.

78. Therefore, it was not unreasonable for PWGSC to evaluate Northern Lights' bid documents as non-compliant with the requirement of item 6.C.10.1.5 of the SOW concerning minimum ejection heights and with the other RFSO requirements (6.E.1 and 6.F.1) for which compliance is dependent on compliance with item 6.C.10.1.5.

Compliance with the Cold Start Capability Requirement

79. Before addressing Northern Lights' allegation that Top Aces' bid was non-compliant with the cold start capability requirement of the RFSO, the Tribunal will deal with the issue of the timeliness of this ground of complaint.

80. Subsection 6(1) of the *Regulations* states that a complaint must be filed with the Tribunal ". . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Subsection 6(2) of the *Regulations* states that a potential supplier may object to the relevant government institution ". . . within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier" and has 10 more working days ". . . after the day on which the potential supplier has actual or constructive knowledge of the denial of relief" by the government institution within which to file a complaint with the Tribunal.

81. Northern Lights alleges that the aircraft proposed by Top Aces, i.e. the Alpha Jet, does not comply with the cold start capability requirement of the RFSO. Accordingly, to determine whether this ground of complaint was filed within the time frame required by the *Regulations*, the Tribunal must determine when Northern Lights knew or ought to have known that Top Aces was proposing the Alpha Jet.

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36. *Ibid.*

82. At the hearing, representatives of Top Aces testified that they gave information to representatives of Northern Lights and to its independent consultant, before and after bid closing, regarding the type of aircraft proposed. In addition, the Tribunal heard testimony that the type of aircraft proposed by Top Aces was discussed in a congratulatory phone call made by the President of Northern Lights to the Vice-President of Top Aces after the successful bid by Top Aces was announced by PWGSC on February 23, 2005. The President of Northern Lights testified that, although the Alpha Jet was identified in various conversations during these times, deliberate misdirection is a common business tactic in this line of work. Northern Lights' independent consultant agreed with this statement, as did a representative of Top Aces.

83. The Tribunal accepts the evidence that, based on industry practice, Northern Lights would not reasonably have known if the references to proposing the Alpha Jet in conversations within the industry were misdirection or not. The Tribunal considers that Northern Lights reasonably ought to have known that Top Aces was proposing the Alpha Jet as of March 9, 2005, the date of the newspaper articles stating publicly that the Alpha Jet was proposed. Northern Lights filed an objection with PWGSC on this ground of complaint on March 15, 2005, which is less than 10 working days after the publication of these newspaper articles. On April 11, 2005, Northern Lights received a denial of relief from PWGSC and, on April 25, 2005, it filed its complaint with the Tribunal. Therefore, the Tribunal finds that this ground of complaint was filed on time.

84. Turning now to the substance of this ground of complaint, the Tribunal is required to consider the evaluation of Top Aces' bid concerning the mandatory cold start capability requirement of item 6.B.2.2 of the SOW, which states as follows:

> All aircraft must be able to be started and operated at ground temperatures of +40 to –35 degrees Celsius.

85. Top Aces submitted with its bid the Alpha Jet Aircraft Operating Instructions Technical Specifications,[37] which contain information pertaining to the cold weather operation of the aircraft. Top Aces' proposal states as follows: ". . . As per the attached technical specification, the Alpha Jet has been successfully flight tested in temperatures ranging from –35 degrees C to +45 degrees C . . . ."[38] PWGSC submitted that Northern Lights itself had confirmed that the Alpha Jet was compliant with all the requirements. The Tribunal does not accept this argument. The information to support compliance with the cold start capability requirement must be found in Top Aces' proposal and not in Northern Lights' proposals. At the hearing, the Vice-President of Top Aces testified that ". . . in both the technical specifications and the flight manual or the aircraft flight manual, which are the official technical documents and official technical authority on the aircraft, in both of them it states that the aircraft has been flight-tested down to temperatures as low as –35 . . . ."[39]

86. During the course of this inquiry, there was considerable evidence filed on: (1) whether flight testing in this context should be interpreted to include cold start capability to –35 degrees C or merely the capability to fly at that temperature; and (2) whether "flight testing", if it includes cold start capability, should be interpreted to mean that the aircraft is consistently "able to be started" or implies some lower level of capability. The Tribunal notes that some material was filed on the cold start capability requirement that did not appear in Top Aces' bid and, therefore, is not relevant to the issue of whether PWGSC properly evaluated Top Aces bid.

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37. GIR (confidential) Exhibit 33.
38. GIR (confidential), Exhibit 32. This exhibit was made public at the hearing.
39. *Transcript of Public Evidence*, 11 August 2005, at 517.

87. The Tribunal heard evidence at the hearing from the President of Northern Lights that a flight test involves establishing a goal, defining a test plan, executing the plan and recording the data, but does not necessarily involve testing starting capability or imply that the test was successful. Also as part of the evidence before the Tribunal is a letter dated June 27, 2005, from Colonel W.S. Werny, in which he states that "flight testing" of aircraft at a specified temperature normally includes starting the aircraft at that temperature. This was supported by Major R. Cameron's affidavit dated July 21, 2005, in which he states the following: ". . . in my professional experience, being flight tested to a specified temperature includes starting and operating the aircraft to that temperature . . . ." At the hearing, the Tribunal heard evidence from Major Cameron that, when an aircraft is "flight tested", it includes all aspects of the operation of that aircraft: start, taxi, takeoff and departure.

88. The Tribunal notes that there was considerable conflicting evidence on these issues, from which it concludes that the terminology in question does not have a clear, consistent interpretation in military aviation.

89. In determining whether "flight testing" should be interpreted to include cold start capability at –35 degrees C or merely the capability to fly at that temperature, one key element of evidence was the consensus by witnesses for both Northern Lights and Top Aces on the general capabilities of jet aircraft. The witness statement of the Vice-President of Top Aces states as follows: ". . . It is a common knowledge that ALL jet engines are able to operate in temperatures well below minus –35°C . . . ."[40] A witness for Northern Lights agreed with this statement by indicating the following: ". . . If operating means flying into minus 35, yes . . . ."[41] The Top Aces' witness statement also stated as follows: ". . . It is perfectly normal for all jet engines to operate in temperatures lower than minus –60°C, as these temperatures are common at higher altitudes . . . ."[42] The witness for Northern Lights agreed with this statement, as well. The Top Aces' witness statement further stated the following: ". . . The Alpha Jet is cleared to operate at altitudes well above 36,000 feet (11,000 metres). At such altitudes, the standard atmospheric temperature is –56.5°C . . . ."[43] The witness for Northern Lights responded to this statement by stating the following: ". . . as far as the temperature at that altitude, yes . . . ."[44]

90. The Tribunal is of the opinion that if "flight tested" at –35°C meant only the capability to fly at that temperature, and did not include cold start capability, either it would be meaningless to include that statement in the aircraft operating instructions (since capability to fly at about –55°C would be assumed), or the aircraft operating instructions would be indicating that the Alpha Jet is far less capable than normal jets because it cannot operate at many normal jet altitudes. In the Tribunal's view, it is more likely that the specification in question was included in the aircraft operating instructions because flight testing was considered to include cold start capability.

91. With respect to whether the statement on "flight testing", as it appears in the aircraft operating instructions (assuming that it includes cold start capability), should be interpreted to mean that the aircraft is consistently "able to be started" at this temperature, as required by the RFSO, or implies some lower level of capability, there was conflicting testimony on this issue. The Tribunal considers it unlikely that this statement would be included in the aircraft operating instructions if the manufacturer did not consider that the aircraft's cold start capability was at a level that could be relied upon. The Tribunal notes that the RFSO

40. Witness statement, subparagraph 3(i).
41. *Transcript of Public Evidence*, 11 August 2005, at 368.
42. *Supra* note 40.
43. *Ibid*.
44. *Transcript of Public Evidence*, 11 August 2005, at 369.

does not ask for certification that cold start capability meet any specific standard, it merely states that the aircraft "must be able to be started".

92. Therefore, it was not unreasonable for PWGSC to evaluate Top Aces' bid documents as compliant with the aircraft cold start capability requirement.

93. Northern Lights alleged that PWGSC acted improperly by permitting Top Aces to repair its bid with respect to cold start capability after bid closing. Top Aces submitted that this allegation amounted to an allegation of fraud. The Tribunal notes that its inquiry into this ground of complaint does not take into account any information that may have been provided by Top Aces to PWGSC after bid closing, and the evidence does not indicate that any such information was in fact submitted. The Tribunal also notes that, in its view, there is no foundation in law for the position that an allegation of bid repair constitutes an allegation of fraud.

CONCLUSION

94. In light of the foregoing, the Tribunal determines that Northern Lights' complaint is not valid.

Cost Award

95. 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* (the *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 complex, given that it involved the provision of airborne training services involving three types of combat support services in a number of locations across Canada. The complaint itself was complex, in that it involved three grounds of complaint: one dealing with the issue of the CPM, one involving a complex technical issue regarding the ejection seat, and one involving another technical issue regarding the cold start capability of the aircraft proposed by Top Aces. There was also one jurisdictional issue regarding the timing of the ground of complaint relating to Top Aces' aircraft. Finally, the complaint proceedings were complex. There was an intervener, several motions and a two-day hearing pertaining to one ground of complaint; the process required the use of the maximum 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.

96. Top Aces requested its costs incurred in responding to the proceedings and submitted that such costs ought to be granted at an increased scale due to Northern Lights' failure to substantiate its allegation of fraud. It submitted that to withhold an award of costs to Top Aces in these circumstances would be to countenance the making of unfounded allegations of fraud, which are outside the jurisdiction of the Tribunal.

97. The Tribunal has discretion, under section 30.16 of the *CITT Act*, to award costs to or against interveners. It is required to exercise its discretion in awarding costs and to follow the same principles as those that are applied by the courts.[45]

45. *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199.

98. The jurisprudence of the Federal Court of Canada[46] indicates that costs are awarded only infrequently to or against interveners because of the high threshold that must be met before being eligible or liable for costs. In one case, where an intervention was successful, the Federal Court nevertheless held that the interveners were not entitled to costs, since their participation was completely voluntary.[47] In other cases, interveners were entitled to recover or be liable for costs with respect to issues that they, rather than the parties, raised.[48] Only in one case of which the Tribunal is aware was the intervener successful in obtaining complete costs, and that was in a case where the intervener had no choice but to become a party to the proceedings, due to the possibility of the proceedings resulting in an injunction against it.[49]

99. The foregoing principles were applied by the Tribunal in *Bosik*.[50] Applying these considerations to Top Aces' request, the Tribunal is of the preliminary opinion that Top Aces should not be awarded costs in these proceedings, as it chose to intervene.

DETERMINATION OF THE TRIBUNAL

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

101. 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 Northern Lights. 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

James A. Ogilvy
James A. Ogilvy
Member

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

46. The Federal Court of Canada has two divisions: the Federal Court of Appeal and the Federal Court.
47. *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158 (F.C.T.D.).
48. *C.J.A. v. University of Calgary,* [1986] F.C.J. No. 463 (F.C.A.); Florence *v. Canada (Air Transport Committee)*, [1991] F.C.J. No. 80 (F.C.T.D.).
49. *Glaxo Canada v. Canada (Minister of National Health and Welfare)* (1988), 19 C.P.R. (3d) 374 (F.C.T.D.)
50. See *Bosik*.