Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-020

C2 Logistics Incorporated

v.

Department of National Defence

Determination and reasons issued
Friday, January 27, 2006

Canada

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IN THE MATTER OF a complaint filed by C2 Logistics Incorporated 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

C2 LOGISTICS INCORPORATED **Complainant**

AND

THE DEPARTMENT OF NATIONAL DEFENCE **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 that the Department of National Defence compensate C2 Logistics Incorporated for its lost opportunity by an amount equal to one eighth of the profit that C2 Logistics Incorporated would reasonably have earned, had it been the successful bidder in a procurement (Invitation to Tender—Operation AUGURAL—Deployment) by the Department of National Defence for the provision of air charter services. The Canadian International Trade Tribunal recommends that C2 Logistics Incorporated and the Department of National Defence negotiate the amount of that compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome of the negotiations. Within 15 days of that time, should the parties have been unable to agree, they are to make simultaneous submissions to the Canadian International Trade Tribunal on the amount of compensation.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act,* the Canadian International Trade Tribunal awards C2 Logistics Incorporated its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of National Defence. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is $2,400. 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.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

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

Hélène Nadeau
Hélène Nadeau
Secretary

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Government Institution:	Department of National Defence
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STATEMENT OF REASONS

COMPLAINT

1. On September 16, 2005, C2 Logistics Incorporated (C2) 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 (Invitation to Tender—Operation AUGURAL—Deployment) by the Department of National Defence (DND) for the provision of air charter services.

2. C2 alleged that DND: (1) failed to provide suppliers with a reasonable period of time to submit bids; (2) biased the technical specifications against the services offered by C2; (3) failed to clearly identify the evaluation criteria; and (4) failed to ensure that the procurement was conducted in a manner that ensured equal access to all suppliers.

3. C2 requested, as a remedy, that the Tribunal recommend that DND compensate it for its lost opportunity to bid on the solicitation. In the alternative, it requested that the Tribunal recommend that DND and C2 attempt to negotiate appropriate compensation. It also requested that the Tribunal recommend that DND compensate it for its bid preparation costs and for its lost profits. In addition, C2 requested that the Tribunal recommend that DND conduct future solicitations for air freight and air passenger services in compliance with the requirements of the trade agreements. Finally, C2 requested its costs incurred in preparing and proceeding with the complaint.

4. C2 requested that the Tribunal deal with this complaint under the express option set out in rule 107 of the *Canadian International Trade Tribunal Rules*.[2]

5. On September 22, 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*.[3] It also informed the parties that, in accordance with subrule 107(4) of the *Rules*, it would apply the express option in this case.[4]

6. On September 27, 2005, DND informed the Tribunal that a contract had been awarded to Skylink Aviation Inc. (Skylink). Also on September 27, 2005, it requested an extension to file a Government Institution Report (GIR). On September 28, 2005, the Tribunal granted DND a two-day extension to file its GIR. On October 5, 2005, the Tribunal granted intervener status to Skylink. Also on October 5, 2005, DND filed a GIR with the Tribunal in accordance with rule 103 of the *Rules*. On October 14, 2005, C2 and Skylink filed their comments on the GIR. Having received leave from the Tribunal, on October 21, 2005, DND filed additional comments and, on October 25, 2005, C2 filed its response to DND's and Skylink's comments.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./91-499 [*Rules*].
3. S.O.R./93-602 [*Regulations*].
4. Although the Tribunal applied the express option when the complaint was accepted for inquiry, DND requested, and the Tribunal granted, an extension to file the GIR. Therefore, in accordance with paragraph 12(*c*) of the *Regulations*, the Tribunal is required to issue its findings and recommendations within 135 days after the filing of the complaint. The Tribunal found the complaint to be more complex than it initially appeared and, given that the Tribunal permitted a further exchange of submissions by all parties, it was unable to render its decision at an earlier date.

7. The Tribunal will now address a procedural issue concerning DND's submission of October 21, 2005. In its letter dated October 19, 2005, the Tribunal granted DND the right to comment only on paragraphs 13, 17(c) and 52 of C2's comments on the GIR. In its submission, DND included information on matters outside the scope of these paragraphs. In reaching its decision, the Tribunal therefore did not consider information submitted by DND on topics outside the scope of those directed by the Tribunal. It applied the same principle to those parts of C2's response to DND's submission of October 21, 2005, that fell outside the scope of its direction.

8. 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, pursuant to paragraph 25(*c*) of the *Rules,* disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

9. DND submitted that, for the purpose of securing air charter services in support of its operations, it maintains a permanent list of eight potential suppliers and that the list includes C2. According to DND, when airlift requirements arise, the tight time frames within which DND's operations are regularly conducted require it to send a facsimile notice or an Invitation to Tender (ITT) directly to the listed suppliers.

10. DND indicated that, during the planning of the operation, it was questionable whether sufficient aircraft would be available from air carriers with a Canadian Foreign Operating Certificate (CFOC). It submitted that the United Nations (UN) demands adherence to a set of quality standards for airlift charters and places carriers that meet those standards on an approved UN Vendors List. DND amended its conditions-of-carriage clause to allow for air carriers with a CFOC or those on the UN Vendors List.

11. According to DND, on July 18, 2005, it sent a facsimile to the eight suppliers on the permanent list and advised them of its intentions regarding a future need for air transportation of cargo. In the facsimile, DND stated its intention to tender during the week of July 25 to 29, 2005, with a closing date four or five days later.

12. On August 15, 2005, DND issued an ITT for the provision of air freight services for the movement of armoured vehicles, stores and ammunition from Senegal to Sudan in support of Operation AUGURAL (the first solicitation),[5] and the bidding period was to close on August 22, 2005, at 9:30 a.m. local time (i.e. Ottawa, Ontario, time). Flights were to commence no earlier than August 27, 2005, and no later than August 31, 2005. Bid security was to be submitted at least 24 hours prior to bid closing. Due to a logistical problem that arose in Sudan, an amendment to the first solicitation was issued on August 16, 2005, to change the commencement date for the airlifts to September 15, 2005.

13. After the first solicitation was issued, a potential supplier complained about the length of time between the submission of bid security/performance bond and the commencement of operations. As a result, the first solicitation was cancelled on August 16, 2005, and a new ITT was issued on August 22, 2005 (the second solicitation).[6] The second solicitation had an original closing date of August 29, 2005, at 9:00 a.m. local time, which was amended on August 26, 2005, to August 30, 2005 at 10:00 a.m. local time. Flights were to commence on September 15, 2005. The first and second solicitations specified that the

5. Complaint, Attachment 1.
6. Complaint, Attachment 3.

carrier was required to have a ". . . VALID CANADIAN FOREIGN OPERATING CERTIFICATE OR BE AN APPROVED UNITED NATIONS VENDOR . . . ."

14. According to the complaint, DND contacted C2 on August 31, 2005, to clarify who the "carrier" was under the terms of its proposal. According to C2, based on the common industry meaning of the term "carrier" and its use in the tender documents, it advised DND that C2, an approved UN vendor, was the carrier.

15. After conversations with two of the bidders (excluding C2), DND concluded that none of the four proposals submitted for the second solicitation was compliant, because one did not propose the required type of aircraft and the remaining three did not comply with the CFOC or UN vendor requirements. According to DND, it became apparent on August 31, 2005, after conversations with C2, that there may have been some ambiguity regarding the wording of the safety clause.[7] It submitted that it required, and always intended, that the air carriers that actually perform the airlift services have a CFOC or be on the UN Vendors List. However, under C2's interpretation, the requirement was satisfied if the bidder was a carrier on the UN Vendors List, regardless of whether the bidder would be performing the airlift services.

16. On September 2, 2005, at 3:01 p.m., DND cancelled the second solicitation.[8] A new solicitation was issued 24 minutes later, at 3:25 p.m. (the third solicitation).[9] The third solicitation closed at noon on September 6, 2005. The requirements of the third solicitation were identical to those of the second solicitation, except for a change to the safety clause and the provision of a bid security or performance bond; the reference to "carrier" was changed to "air carrier", and the option to be a carrier on the UN Vendors List was removed. In the third solicitation, "air carrier" is defined as follows: ". . . FOR THE PURPOSES OF THIS SOLICITATION, AN 'AIR CARRIER' IS DEFINED AS THE AIRCRAFT OWNER AND OPERATOR WHICH HOLDS A VALID CANADIAN FOREIGN OPERATING CERTIFICATE . . . ."

17. According to DND, at 11:49 a.m. on September 6, 2005, C2 requested by facsimile an unspecified extension of time to the bid closing in order to prepare a compliant proposal.

18. DND submitted that four proposals were received in response to the third solicitation and that only Skylink met all the mandatory requirements. It also submitted that C2 did not submit a bid. On September 6, 2005, at 4:03 p.m., DND informed C2 that Skylink was the successful bidder. On September 16, 2005, C2 filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

C2's Position

19. According to C2, it satisfied the requirements of the first and second solicitations because it is an approved UN vendor. Under the terms of the third solicitation, it was no longer possible to satisfy the terms of the ITT by being an approved UN vendor because the requirement could only be satisfied if the aircraft owner and operator held a valid CFOC. Because C2 charters the aircraft that it offers, it would be required to find aircraft owners and operators that held such a certificate in order to submit a bid for the third solicitation.

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7. DND refers to the requirements that must be satisfied by the "carrier" or "air carrier" as the safety clause. In the first and second solicitations, the requirement was that the "carrier" hold a CFOC or be an approved UN vendor. In the third solicitation, the requirement was that the "air carrier" hold a CFOC.
8. Complaint, Attachment 10.
9. Complaint, Attachment 11.

20. C2 submitted that DND inexplicably cancelled the second solicitation on September 2, 2005, and that the third solicitation was issued on the same day. It submitted that bidders were given less than one working day to respond to the third solicitation (given that it was the Friday before the Labour Day weekend), which, it contended, was insufficient time to permit it to respond to the new requirements of the solicitation.

21. C2 submitted that the fact that DND's past conduct with respect to procurements subject to the *Agreement on Internal Trade*[10] has not been challenged before the Tribunal does not confer legality on that conduct or make it appropriate for subsequent procurements. C2 submitted that the reasonableness of a bidding period in a particular procurement depends on the circumstances of that case. It further submitted that the circumstances surrounding the other air charter procurements referenced by DND in the GIR differ from the circumstances of this case and that, therefore, the bidding periods associated with those prior procurements cannot be used to assess the reasonableness of the time afforded to bidders in this case.

22. C2 submitted that CFOCs[11] are issued by the Department of Transport (Transport Canada) and that Transport Canada was not open for business over the Labour Day weekend. C2 therefore argued that this effectively ensured that it would not be able to locate an alternative carrier and submit a bid within the period allowed by DND.

23. In response to arguments made by DND that the relevant information required by C2 was available on Transport Canada's Web site, C2 submitted that information on Web sites is often dated and unreliable and that, for this reason, C2 wanted to obtain confirmation from Transport Canada as to which carriers had a valid CFOC. C2 also wanted to determine if it would be possible to obtain a CFOC for other operators of the required aircraft. C2 further submitted that it is not possible to obtain a CFOC online.

24. In response to arguments made by Skylink and DND that C2 had information about the requirement on July 18, 2005, C2 submitted that it had no idea until the afternoon of September 2, 2005, that DND would include a new definition of "air carrier" and remove bidders' ability to satisfy the requirements with a carrier on the UN Vendors List.

25. C2 submitted that the introduction of a modified definition of "carrier" in the third solicitation meant that it would be required to locate and charter alternative aircraft in order to submit a proposal. It submitted that DND would have been aware of this fact, having received and reviewed the proposal that it submitted in response to the second solicitation. In its proposal submitted in response to the second solicitation, C2 proposed aircraft that were not owned and operated by parties that held a CFOC. It contended that the requirement in the third solicitation that the aircraft owner and operator hold a valid CFOC significantly narrowed the pool of eligible aircraft. C2 submitted that this requirement biased the specification against it and that this bias was compounded by the extremely short solicitation period. It submitted that aircraft are frequently leased by the operator and, consequently, very few aircraft are both owned and operated by the same company. Further, C2 submitted that, since the requirements of the third solicitation did not include operation of the aircraft in Canada, it is unclear why DND imposed a requirement for the aircraft owner and operator to hold a CFOC.

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10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].
11. C2 submitted that there is no such certificate issued by Canadian aeronautical authorities and that it assumes that the reference is intended to be to a Canadian Foreign Air Operator Certificate. For the purpose of this document, the Tribunal will herein continue to refer to the certificate as a CFOC, as initially described at paragraph 10.

26. In its comments on the GIR, C2 submitted that DND's alleged ambiguity concerning the safety clause did not relate to the qualifications *per se*, but rather to a clarification of which entity was required to hold the qualification. It submitted that, in order to correct the ambiguity, DND could have easily clarified the language of the third solicitation by requiring that the air carrier be on the UN Vendors List or have a CFOC. It further submitted that DND's safety concerns could have been equally satisfied through other internationally recognized standards.

27. C2 submitted that the third solicitation does not reference any evaluation method or criteria. It submitted that, in *Brookfield LePage Johnson Controls Facility Management Services*,[12] the Tribunal found that the failure to publish evaluation criteria prevents bidders from being able to maximize their efforts in responding to an opportunity.

28. Regarding DND's submission that the term "lowest acceptable bid" in the ITT and its contracting policy are reasonably understood to mean that it would select the lowest bid compliant with the mandatory requirements, C2 submitted, in its comments on the GIR, that a passing reference to "lowest acceptable bid" in Annex A of the third solicitation, in a paragraph that deals with withdrawal of an offer, does not satisfy the requirements of Article 506(6) of the *AIT* to clearly identify the evaluation criteria in the tender documents. C2 further submitted that DND's contracting policy was not incorporated into the third solicitation and, therefore, does not form part of the tender. It submitted that, in accordance with Article 506(6) of the *AIT*, the evaluation criteria must be identified in the tender documents themselves, not in some other policy document available on a Web site.

29. C2 submitted that the inclusion of the requirement for a CFOC, combined with the very short solicitation period, precluded C2 from bidding and is inconsistent with the obligation to ensure equal access to all Canadian suppliers in accordance with Article 501 of the *AIT*. In addition, it submitted that this requirement also precludes aircraft operating in Canada from eligibility and, therefore, impairs access to the opportunity.

DND's Position

30. DND submitted that, in order to realize Canada's commitment of support to the African Union, numerous agreements and other arrangements were required with the participating African countries. It submitted that the bidding period was reasonable in the circumstances under which the procurement was conducted and was fully consistent with the custom of the air charter industry and C2's expectations.

31. DND submitted that the airline industry works 24 hours a day, seven days a week and that brokers and agents, like those on DND's permanent list of suppliers, know the industry, the owners and the operators of the aircraft. It further submitted that C2 has regularly worked within short time periods. In support of its position, DND submitted that, in *Global Upholstery Co. Inc.*,[13] the Tribunal stated the following:". . . the Tribunal believes that "industry standards" are the backdrop upon which one can judge the reasonableness of the time period used by the Department" . . . .[14]

32. DND submitted that, between August 26, 2004, and September 6, 2005, it issued 15 ITTs for air carrier services, excluding the third solicitation, which is the subject of the complaint, and that these tenders

12. *Re Complaint Filed by Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT).
13. *Re Complaint Filed by Global Upholstery Co. Inc.* (1 November 2000), PR-2000-028 (CITT) [*Global*].
14. *Global* at 5.

had an average bidding period of 26 hours. It further submitted that C2 received a copy of all 15 ITTs, as well as a copy of the third solicitation, and that C2 submitted bids on some of these tenders.

33. DND submitted that, in addition to the third solicitation that was issued on September 2, 2005, it issued another ITT[15] for air carrier services that also closed on September 6, 2005, and that C2 submitted a timely proposal in response to that tender. It contended therefore that, despite its complaint regarding the third solicitation, C2 was fully capable of working, and was prepared to work, over a long weekend for the purpose of submitting a proposal to supply air carrier services. With respect to C2's submission that Transport Canada was not available over the long weekend, DND submitted that C2 should not be dependent on Transport Canada personnel to confirm which certified air carriers operate the required aircraft. It further submitted that one reason that C2 is on DND's permanent list of air carriers, brokers and agents is because of its claimed contacts and knowledge of the air carrier and charter industries. It submitted that the information, the lack of which allegedly precluded C2 from submitting a bid, is publicly available on Transport Canada's Web site.

34. DND submitted that the safety clause was not in favour of, or against, any particular service or service provider, rather, it applied equally to all potential suppliers. It submitted that a CFOC allows a foreign air carrier to operate an aircraft in Canada and provides DND with an objective assurance that the foreign air carrier has the proven operational and safety capabilities required by Canada. It submitted that, to the best of its knowledge, no Canadian air carrier owns or operates the required aircraft and that, therefore, a CFOC was considered appropriate. It further submitted that it was legitimate to require the air carriers performing the services to demonstrate certain operating and safety capabilities. In support of this submission, DND referenced the Tribunal's decision in *Polaris Inflatable Boats (Canada) Ltd.*,[16] wherein the Tribunal stated as follows: ". . . the Department and the DFO were not acting unreasonably or in a discriminatory manner when they insisted, in various solicitations, that the RHIBs intended for search and rescue activities be SOLAS certified. In the Tribunal's view, this is a legitimate requirement . . . ."[17]

35. With respect to the cancellation of the second solicitation, and to ambiguities in the tender document, DND submitted that it took the most prudent and fair course of action. In support of this submission, DND referenced *Cifelli Systems Corporation*,[18] wherein the Tribunal stated the following:

> . . .
>
> the Department acted diligently upon discovering that the language used in that part of Appendix A to the RFP failed to set out unambiguously all the requirements of the intended procurement. The Tribunal is also of the view that, when this became apparent to the Department, it proceeded expeditiously to correct the situation by cancelling the solicitation and by re-issuing it with a more precise specification . . . . The Tribunal regards the Department's re-issuance of the RFP on February 16, 2001, as legitimate and as further evidence of the Department's diligence in correcting the shortcoming of the original RFP . . . .[19]

36. Regarding C2's allegation that the third solicitation failed to clearly identify the evaluation criteria, DND submitted that Annex A of the third solicitation is reasonably understood to provide that the contract would be awarded to the bidder submitting the "lowest acceptable bid". It submitted that the term

15. GIR, Exhibit 14.
16. *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (14 May 2001), PR-2000-044 and PR-2000-049 to PR-2000-053 (CITT) [*Polaris*].
17. *Polaris* at 17.
18. *Re Complaint Filed by Cifelli Systems Corporation* (21 June 2001), PR-2000-065 (CITT) [*Cifelli*].
19. *Cifelli* at 5.

"acceptable" is reasonably understood by the industry to mean compliant with the mandatory requirements of the solicitation. DND further submitted that, as regular recipients of ITTs, air carriers on its permanent list of potential suppliers are fully aware that contracts are awarded to the bidder submitting the lowest-priced compliant proposal. It referenced its publicly available contracting policy, Defence Administrative Order and Directive 3004-1, dated March 27, 2000, which states that an ITT is used where ". . . the lowest-priced responsive tender is to be accepted without negotiations . . . ."[20]

37. DND submitted that the third solicitation contained a clause that advised bidders to direct any inquiries and other communications to the contracting authority. It submitted that, if C2 truly did not understand the basis upon which the contract would be awarded, it should have made the appropriate inquiry; it submitted that C2 made no such inquiry.

38. With respect to C2's allegation that DND failed to ensure that the procurement was conducted in a manner that ensured equal access to all suppliers, DND submitted that C2 is complaining that the advantage that it gained with the ambiguous safety clause in the second solicitation was removed. DND further submitted that other potential suppliers, under the same circumstances, submitted proposals.

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

Skylink's Position

40. Skylink submitted that the timeline provided for the submission of bids was consistent with industry practices and the expectations of all potential suppliers and was reasonable under the circumstances. With respect to C2's submission that it did not have access to Transport Canada over the long weekend, Skylink submitted that a telephone call to the air services company that C2 intended to propose would have given it the information needed to submit a bid.

41. With respect to C2's allegation that the third solicitation did not clearly identify the evaluation criteria, Skylink submitted that C2 itself acknowledged that the contract was awarded to the lowest-priced compliant bidder. In support of its submission, Skylink referenced the following statement made in the complaint: ". . . If the C2 Logistics bid price was lower than the value of the contract awarded to SKYLINK, the amount of compensation should not be divided by the number of bidders (*i.e.*, two) because, but for the AIT inconsistent requirements, C2 Logistics would have had the lowest cost compliant proposal."[21] Skylink submitted that this statement is evidence of the fact that C2 understood that the bids would be evaluated on the basis of which bid was the lowest-price compliant bid.

42. In response to C2's allegation of bias, Skylink submitted that, by requiring that the air carrier in the procurement at issue have a CFOC, DND was ensuring that the aircraft being used for the airlift were safe and that the company offering the aircraft was financially viable and met appropriate governance standards. Skylink submitted that C2 is not an air carrier, that is, it is not an owner or operator of aircraft.

TRIBUNAL'S ANALYSIS

43. 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

20. GIR, Exhibit 15.
21. Complaint, para. 60.

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, is the *AIT*.

44. The following articles of the *AIT* are relevant to this complaint: 501, 504(1), (2) and (3)(b) and 506(5) and (6).

Bidding Period

45. The Tribunal will first deal with C2's allegation that DND failed to provide suppliers with a reasonable period of time to submit bids.

46. The question before the Tribunal is whether the time that DND allowed for the submission of bids for the third solicitation is reasonable *taking into account both industry practice and the particular circumstances of the procurement at issue*. The Tribunal is of the view that the relevant circumstances include an awareness of the series of solicitations, referred to herein as the first second and third solicitations, which were designed to fulfill the same requirement.

47. The Tribunal accepts the evidence of industry practice that indicates that bidding periods for the provision of air charter services for DND operations are typically short. Nevertheless, it is of the view that, given the circumstances of this particular procurement, the time allowed from the issuance of the third solicitation to bid closing was unnecessarily short.

48. The Tribunal notes that, prior to initiating the first solicitation, DND was aware that this would be a challenging procurement, as indicated in its submission as follows: "During the planning of the subject operation, it became questionable to DND whether sufficient aircraft would be available from air carriers with a Canadian Foreign Operating Certificate . . . DND amended its long-standing conditions-of-carriage clause to allow for air carriers with a Canadian Foreign Operating Certificate or those on the UN Vendors List."[22] The Tribunal also notes that, prior to initiating the first solicitation, DND advised the eight suppliers on its permanent list on July 18, 2005, of the expected future need for air transportation for the subject requirement, an action that gave the suppliers extra time to look for the required aircraft.

49. By bid closing for the second solicitation, August 30, 2005, DND was aware that only a limited number of its eight potential suppliers were, in fact, capable of bidding, or willing to bid, as only four bids were received. After bid evaluation, it became aware that none of the four bidders, in its view, complied with the mandatory requirements of the second solicitation; one bidder failed to offer the specified IL-76 aircraft or equivalent, and the other three bidders proposed one or more air carriers that neither were on the UN Vendors List nor held a CFOC. Accordingly, DND should reasonably have concluded that, as of August 30, 2005, none of its potential suppliers was able to meet its requirements. Nevertheless, in the third solicitation, for which bids were required only a week after the second solicitation closed (September 6, 2005), DND tightened the criteria, including the time allowed to submit bids, rather than opening them up to make compliant bids a possibility.

50. C2 asserted that it required access to Transport Canada officials to confirm which air carriers operating IL-76s currently possessed a CFOC and to obtain a CFOC for other IL-76 aircraft operators, but that the timing of the issuance and bid closing of the third solicitation over the Labour Day weekend made this impossible. The opposing parties responded that C2 should have: (1) consulted the Transport Canada Web site for the required information; (2) called Transport Canada at the emergency numbers listed;

22. GIR, para. 8.

or (3) called the potential carriers directly to ascertain their status. The Tribunal is of the view that there are no assurances that the information contained on the Transport Canada Web site is always current and, given the significant financial undertaking that these procurements represent, it would not expect bidders to rely solely on that source of information without first confirming its accuracy with officials from Transport Canada. The Tribunal also notes that the Transport Canada after-hours numbers on the Web site printout submitted by DND are stated to be "for emergency needs only" and, therefore, do not appear to lead to the officials who could verify CFOC certification or provide CFOC certification for new air carriers. Furthermore, although telephone calls to potential air carriers might elicit the necessary responses concerning their certification, in the Tribunal's view, the financial risk of accepting these responses without verifying them with Transport Canada could be significant to the bidder. Accordingly, the Tribunal considers that, in these circumstances, the Labour Day weekend made the bidding period of four days more onerous than might otherwise have been the case.

51. The Tribunal therefore finds that DND breached Article 506(5) of the *AIT* by not providing suppliers with a reasonable period of time to submit a bid and determines that this ground of complaint is valid.

Technical Specifications

52. The Tribunal now turns to C2's allegation that DND biased the technical specifications against the services that it offered.

53. The Tribunal notes that it is unusual for a procuring entity that has failed to find any successful bidders in response to one solicitation to make even stricter the requirements for a subsequent solicitation for the same requirement, particularly when the closing of the second solicitation occurs only a very short time after the closing of the first. Nevertheless, it finds that there is insufficient evidence on the record to demonstrate that the specifications in the third solicitation were biased to the advantage or disadvantage of any potential bidder. The Tribunal therefore determines that this ground of complaint is not valid.

Evaluation Criteria

54. The Tribunal now turns to C2's allegation that DND failed to identify the evaluation criteria clearly.

55. Although potential bidders may be aware that it is DND's normal practice to award contracts to the lowest bidder (as argued by DND), this does not relieve DND of the obligation to state its evaluation criteria clearly in the tender documents. Annex A to the third solicitation reads as follows:

> . . .
>
> IN CASE THE OFFEROR WITHDRAWS HIS/HER PROPOSAL AFTER THE CLOSING OF THE BID AND IF THE OFFER FROM SAID OFFEROR IS THE LOWEST ACCEPTABLE BID, DND WILL SEEK DAMAGES FROM THE OFFEROR, TO CONTRACT THE SECOND LOWEST BIDDER, IN AN AMOUNT EQUAL TO THE DIFFERENCE BETWEEN THE OFFERS OF THE LOWEST AND SECOND LOWEST OFFEROR.
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> . . .

This paragraph appears to be the only place in the third solicitation that gives any information on the basis on which the evaluation will be done. However, this paragraph does not clearly lay out the evaluation criteria. Rather, its purpose is to provide for damages to DND in the event that a bid is withdrawn, leaving the bidder to deduce that the lowest bid will be selected.

56. In the GIR, DND makes reference to its contracting policy, which it indicates is "publicly-available", as a source of information concerning the basis of selection.[23] However, in the Tribunal's view, public availability is not sufficient; any policy that the procuring entity intends to apply to assess the bids must be incorporated in some manner into the solicitation document if it is to be used. It is sufficient to do this by reference, but even such a reference was absent from the third solicitation.

57. Therefore, the Tribunal finds that DND breached Article 506(6) of the *AIT* by not clearly identifying the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria and determines that this ground of complaint is valid.

Equal Access

58. Finally, the Tribunal turns to C2's allegation that DND failed to ensure that the procurement was conducted in a manner that ensured equal access to all suppliers.

59. Article 501 of the *AIT*, as the purpose clause for Chapter 5 of the *AIT*, comes into play in the Tribunal's consideration of all grounds of the complaint. As a statement of purpose, it does not, in the Tribunal's view, give rise to a ground of complaint that requires separate treatment. Therefore, the Tribunal will not deal separately with this issue.

60. In light of the foregoing, the Tribunal determines that C2's complaint is valid in part.

Remedy

61. In recommending a remedy, the Tribunal is bound by subsection 30.15(3) of the *CITT Act*, which states as follows:

> (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
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> (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (b) the degree to which the complainant and all other interested parties were prejudiced;
>
> (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (d) whether the parties acted in good faith; and
>
> (e) the extent to which the contract was performed.

62. Pursuant to subsection 30.15(2) of the *CITT Act*, the Tribunal recommends, as a remedy, that DND compensate C2 for the opportunity that it lost to participate meaningfully in the procurement process. In recommending an appropriate remedy, it considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3).

63. The Tribunal finds that the failure to provide a reasonable bidding period is a procedural error of a fundamental nature and, hence, a serious violation of the *AIT* and one that significantly prejudices the integrity and efficiency of the competitive procurement system. It also believes that, had C2 been able to submit a compliant proposal, it might have been selected as the winning bidder. Accordingly, C2 was

23. GIR, para. 99.

clearly prejudiced by being deprived of the ability to meaningfully compete for this procurement and of the opportunity to be awarded the contract and to profit therefrom. However, the evidence before the Tribunal does not establish that DND acted in bad faith. Further, the Tribunal notes that the airlifts were scheduled to begin on September 15, 2005, and to continue for no more than 32 days, and, therefore, the contract is most likely completed. Accordingly, the Tribunal does not consider it appropriate to recommend a remedy that would give C2 an opportunity to bid on the contract.

64. In view of all the foregoing factors, the Tribunal considers that C2 should be compensated for its lost opportunity to profit from the contract. Given that DND has established a list of eight pre-qualified suppliers and that they all might have submitted proposals, had they been given more time, the Tribunal estimates the opportunity lost by C2 to be successful would be one chance in eight, and that it should be compensated by an amount equal to one eighth of the profit that it would have earned, had it been the successful bidder.

65. Although the failure to set out the evaluation criteria is also a serious violation of the *AIT* in terms of the integrity of the competitive procurement process, it did not appear to prejudice C2 in this instance, unlike the first ground of complaint. The Tribunal agrees with Skylink's submission that, despite the deficiency in the RFP, C2 did understand that the lowest compliant bid would be successful. As is the case for the first ground of complaint, the evidence does not establish that DND acted in bad faith. The Tribunal is therefore of the opinion that the circumstances of this case do not justify a separate remedy to deal with the lack of evaluation criteria.

66. The Tribunal awards C2 its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this case, it 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 case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurement was moderately complex, involving the provision of air charter services for DND between Senegal and Sudan. The complaint was also moderately complex, as it dealt with multiple grounds of complaint involving bidding periods, evaluation criteria, bias of technical specifications and access to the procurement for all suppliers. The complaint proceedings were moderately complex, as there was one intervener, there were multiple submissions from the parties, and the inquiry process required the use of the 135-day time frame. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $2,400.

DETERMINATION OF THE TRIBUNAL

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

68. Pursuant to subsections 30.15(2) and (3) of the *CITT Act,* the Tribunal recommends that DND compensate C2 for its lost opportunity by an amount equal to one eighth of the profit that C2 would reasonably have earned, had it been the successful bidder in the procurement (Invitation to Tender—Operation AUGURAL—Deployment). The Tribunal recommends that C2 and DND negotiate the amount of that compensation and within 30 of the date of the determination, report back to the Tribunal on the outcome of the negotiations. Within 15 days of that time, should the parties have been unable to agree, they are to make simultaneous submissions to the Tribunal on the amount of compensation.

69. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards C2 its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by DND. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is $2,400. 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.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

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