



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-022

Lengkeek Vessel Engineering
Incorporated

v.

Department of Public Works and
Government Services

*Determination issued
Thursday, November 2, 2006*

*Reasons issued
Thursday, November 9, 2006*

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IN THE MATTER OF a complaint filed by Lengkeek Vessel Engineering 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

LENGKEEK VESSEL ENGINEERING INCORPORATED

Complainant

AND

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

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Lengkeek Vessel Engineering Incorporated for the prejudice that it suffered as a result of the release of its bid price in Solicitation No. W8472-065069/A. The Canadian International Trade Tribunal reserves the jurisdiction to determine the appropriate amount of the compensation after the award of a contract pursuant to Solicitation No. W8472-065069/C and the receipt of submissions from the parties.

Within 10 working days of the award of a contract pursuant to Solicitation No. W8472-065069/C, the Department of Public Works and Government Services shall submit to the Canadian International Trade Tribunal and Lengkeek Vessel Engineering Incorporated the names of the compliant bidders and the amounts of their respective bids. Lengkeek Vessel Engineering Incorporated will have 10 working days from the receipt of this information to file a submission describing, in monetary terms, the prejudice that it suffered to its ability to compete fairly for that solicitation, as a result of the disclosure to a competitor of its bid price in the first solicitation. The Department of Public Works and Government Services will have 7 working days from the time that it receives Lengkeek Vessel Engineering Incorporated's submission to file its response with the Canadian International Trade Tribunal. Lengkeek Vessel Engineering Incorporated shall then file any final comments within 5 working days after receiving the Department of Public Works and Government Services' response. Subsequently, the Canadian International Trade Tribunal will issue its final recommendation in this matter. The parties are required to file their submissions with the Canadian International Trade Tribunal and serve each other simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Lengkeek Vessel Engineering Incorporated its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 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 by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford

Meriel V. M. Bradford

Presiding Member

Zdenek Kvarda

Zdenek Kvarda

Member

Ellen Fry

Ellen Fry

Member

Hélène Nadeau

Hélène Nadeau

Secretary

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

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Senior Investigator:	Michael W. Morden
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STATEMENT OF REASONS

COMPLAINT

1. On August 4, 2006, Lengkeek Vessel Engineering Incorporated (LVE) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation Nos. W8472-065069/A and W8472-065069/C) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) of floating force protection booms (FFPBs) for harbours in Halifax, Nova Scotia, and Esquimalt, British Columbia.

2. LVE alleged that PWGSC improperly refused to award it a contract, even after it had met all the requirements for contract award listed in the first Request for Proposal (RFP) (W8472-065069/A). LVE also alleged that PWGSC revealed its bid price for the first solicitation to a competitor, resulting in LVE not being treated fairly in the second solicitation (W8472-065069/C) for the same FFPBs.

3. On August 15, 2006, 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 the same day, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of a contract until the Tribunal had concluded its inquiry and determined the validity of the complaint. On September 11, 2006, PWGSC submitted the Government Institution Report (GIR). On September 21, 2006, LVE submitted its comments on the GIR.

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

PROCUREMENT PROCESS

5. The solicitations that are the subject of the complaint are for the installation of a system capable of acting as both a floating line of demarcation and a physical barrier designed to protect waterfront assets in the Halifax and Esquimalt harbours (Solicitation No. W8472-065069/A) and the Halifax harbour alone (Solicitation No. W8472-065069/C). The two harbours had different requirements, and bidders were able to submit proposals on either one or both of the FFPB requirements set out in the first solicitation. LVE's complaint relates to the Halifax harbour requirements of both solicitations.

6. On December 22, 2005, a Notice of Proposed Procurement was issued on MERX.³ On the same day, the first RFP was made available to bidders, with a due date for the receipt of bids of January 24, 2006. There were five amendments to the first RFP, and the closing date was extended to February 7, 2006.

7. According to PWGSC, three proposals were received, two of which were judged to be non-compliant with certain mandatory requirements and set aside from further consideration. In PWGSC's view, LVE's proposal, although compliant, did not include all the necessary information regarding the testing required by the first RFP.

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

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

3. Canada's electronic tendering service.

8. On March 6, 2006, PWGSC provided LVE with its *Floating Force Protection Boom—Guidelines for Testing*. After an exchange of information regarding the required testing, LVE conducted a trial on May 9, 2006, and submitted its report regarding that trial to PWGSC on May 17, 2006. PWGSC and DND rejected the results of the first trial and, after considerable discussion relating to the results of this first trial, PWGSC gave LVE the opportunity to conduct a second trial. On June 16, 2006, LVE conducted the second trial and provided PWGSC with a report on June 19, 2006. On June 28, 2006, PWGSC advised LVE that it was going to re-tender the requirement.

9. On July 13, 2006, LVE wrote to PWGSC and maintained that its first trial had demonstrated that its proposed product met DND's stated requirements and that DND had disseminated its original proposal price via e-mail to a large audience, including a company whose proposal had been rejected by PWGSC.

10. On July 24, 2006, PWGSC cancelled the first RFP and issued the second RFP, which contained a number of changes, including one to the mandatory requirement concerning the testing of any proposed FFPB system.

11. On August 4, 2006, LVE filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

12. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreement, which, in this instance, is the *Agreement on Internal Trade*.⁴

13. The Tribunal will first examine LVE's allegation that PWGSC improperly refused to award it the contract under the first RFP. It will then examine the allegation that the release of LVE's bid price in that first solicitation adversely affected LVE's ability to compete fairly during the second solicitation.

PWGSC's Refusal to Award the Contract to LVE

14. This ground of LVE's complaint has two parts, as follows:

- The specification for full-scale testing in the first RFP did not require a physical test that, by itself, demonstrated that the proposed FFPB met the resistance (boat-stopping) requirement, but rather that a combination of physical full-scale testing and engineering calculations could be used to demonstrate compliance; and,
- LVE's proposal, together with the physical full-scale testing and subsequent reports that it provided, complied with all the provisions of the first RFP.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [AIT].

Interpretation of the Requirement to Demonstrate Resistance (Boat-stopping) Capacity

15. The resistance (boat-stopping) capacity and testing requirements set out in the first RFP were as follows:

[section 4.2.1.27 of the Technical Statement of Requirement]: The FFPB for Halifax Harbour shall have a minimum boat-stopping capacity defined in terms of kinetic energy of 650×10^3 Joules.

[section 4.2.1.28 of the Technical Statement of Requirement]: It is desirable for the FFPB for Halifax Harbour to have a boat-stopping capacity defined in terms of kinetic energy of 1.80×10^6 Joules.

[section 4.3 of the Technical Statement of Requirement]: Survivability 1. The contractor shall provide documentation demonstrating the capability of the FFPB to withstand the Design Threat. This evidence shall comprise design calculations supported by the results of full-scale physical testing.

[section 7 of the Technical Statement of Requirement]: Project Deliverables Table The following shall be delivered as part of the contract:

* - Documented evidence of a full-scale trial of the system against the Design Threat supported by engineering calculations.

...NOTE - Items noted with a "*" shall be supplied by the bidder for evaluation as part of the bid assessment.

[Annex C to the RFP, Evaluation Criteria and Basis of Selection, section 7]: The contractor will provide the following: - Documented evidence of a full-scale trial of the system against the Design Threat supported by engineering calculations

16. Although the first RFP provides that the FFPB requires the capability "... to withstand the Design Threat ...", it does not define the term "Design Threat". There appears to be no dispute, however, between the parties that the Design Threat meant a threat with a minimum kinetic energy of 650,000 joules.⁵ Given the provisions of the RFP referred to above, the Tribunal considers that this is a reasonable interpretation. Accordingly, the issue before the Tribunal is whether the testing requirement means:

- a full-scale test with a kinetic energy level of at least 650,000 joules, with documentation that supports the conclusion that the system can withstand a threat of at least that kinetic energy level (PWGSC's view, which, it submits, corresponds to part 7 of Annex A to the first RFP); or
- a full-scale test, not necessarily with a kinetic energy level of 650,000 joules, with calculations that, through extrapolation, demonstrate that the proposed FFPB would resist a design threat with a kinetic energy of 650,000 joules (LVE's view, which, it submits, corresponds to part 4.3 of Annex A to the first RFP). According to LVE, the full-scale test did not, in and of itself, have to physically demonstrate the minimum boat-stopping capacity of the FFPB but, with the aid of extrapolation, the FFPB could be shown to have the necessary minimum boat-stopping power.

17. The rules that apply with respect to time limits to file complaints with the Tribunal are found in subsections 6(1) and (2) of the *Regulations* and read as follows:

6.(1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so 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.

5. GIR, confidential exhibit 22, and LVE's proposed test plan, para. 3.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

18. The following questions need to be addressed:

- At what point did LVE become aware of PWGSC's interpretation of the test requirement?
- At what point did LVE raise an objection and/or file a complaint that PWGSC's interpretation was not, in its view, consistent with the first RFP?

19. The Tribunal notes that, after the closing date for the first RFP, on March 6, 2006, PWGSC supplied LVE with the DND-developed *Guidelines for Testing*. In the e-mail accompanying the *Guidelines for Testing*, PWGSC advised that LVE must either conduct full-scale testing or, "... [i]f testing has been done that meets our Guidelines, please provide us with the test results ...". Within the *Guidelines for Testing*, the minimum testing requirements were spelled out and included the following: "... The test boat selected must ... be tested at the corresponding speed to produce the required kinetic energy of 650×10^3 Joules ...".⁶ In other words, PWGSC was taking the position that the physical testing must reach the level of 650,000 joules.

20. On March 8, 2006, LVE agreed to undertake the testing and provided a detailed response and comments on the *Guidelines for Testing* regarding risks, costs and schedule. LVE then proposed an alternative to the testing, as set out by PWGSC, and offered to investigate "... a detailed and comprehensive finite element model and energy analysis ..." and requested a meeting to discuss the "... alternatives outlined above."⁷

21. On March 16, 2006, PWGSC reiterated its need for full-scale testing. In the Tribunal's view, a reasonable interpretation of the correspondence indicates that, when PWGSC refers to full-scale testing, it means physical testing to a level of 650,000 joules, as contemplated in its *Guidelines for Testing*. For example, PWGSC stated that, although LVE had provided design calculations and examples of current installations in its bid, "... [n]o evidence of boat stopping capacity or results of full scale testing are included ...".⁸ In addition, the Tribunal observes that PWGSC refused the use of a finite element analysis, "since validation of the computer model and verification of the results would require full scale testing."⁹

22. According to the evidence, LVE opposed the *Guidelines for Testing* on a number of grounds, but in the end agreed to them. LVE's testing plan, which was ultimately deemed "acceptable" by PWGSC, was designed to provide physical testing against a kinetic energy level of 650,000 joules. The test proceeded, but both parties agreed that, in terms of physical testing, it did not achieve the planned energy level of 650,000 joules.¹⁰

6. GIR, exhibit 10.

7. GIR, confidential exhibit 13.

8. GIR, exhibit 14.

9. GIR, exhibit 14.

10. GIR, confidential exhibits 26 and 27.

23. Only on May 24, 2006, after being informed by PWGSC on May 23, 2006, that LVE's test results "... did not provide evidence that the barrier is capable of withstanding the 'Design Threat' ..." did LVE argue that its testing had met the RFP requirement without physical testing to the level of 650,000 joules because of calculations that supplemented its testing to a lower energy level. The Tribunal considers this to be LVE's objection, within the time frame required by subsection 6(2) of the *Regulations*, to the Government's interpretation of the testing design requirements.

24. PWGSC responded to LVE on May 30, 2006, by providing a more technical analysis of LVE's test results and re-iterating that "... [t]he RFP clearly indicated that the full-scale trial data had to be collected against the 'Design Threat' which was further defined to include a stopping capacity of 650,000 Joules ..." ¹¹ Although PWGSC stood by its decision of May 23, 2006, it offered LVE the opportunity to conduct another test and stipulated that the second test "... must meet the Design Threat of 650,000 Joules, as stated in the RFP ..." ¹²

25. PWGSC submitted that LVE filed its complaint with the Tribunal outside of the 10 working days contemplated by the *Regulations* and that, accordingly, the Tribunal lacks the jurisdiction to consider it. PWGSC made the following submissions: on March 6, 2006, LVE knew, or ought to have known, of the mandatory requirements of the RFP regarding full-scale testing, including proven stopping power at a kinetic energy level of 650,000 joules; ¹³ LVE did not raise any questions or objections regarding this requirement at any time prior to or during the initial trial of May 9, 2006; it was 86 days after March 6, 2006, on June 1, 2006, subsequent to LVE being advised that its initial trial had not achieved the necessary results, that objections regarding this requirement were raised.

26. On the other hand, LVE submitted that it became aware of its ground of complaint on June 28, 2006, when it was advised by PWGSC of DND's intention to re-tender the requirement. It submitted that it wrote to PWGSC on July 13, 2006, within the 10 working days stipulated by section 6(2) of the *Regulations*. According to LVE, PWGSC's next action with respect to this matter was to issue the second RFP on July 24, 2006, which it considered to be its constructive knowledge of denial of relief, and it then filed its complaint with the Tribunal on August 4, 2006, again within the 10 working days stipulated in the *Regulations*.

27. The Tribunal notes that LVE ultimately accepted the *Guidelines for Testing* that it received on March 6, 2006, which clearly anticipated a test device (test boat) striking the barrier with a minimum of 650,000 joules of kinetic energy. It was only after the results of the first test were reviewed by PWGSC/DND and LVE was informed that, in PWGSC's view, the test results failed to meet the requirements, that LVE, on May 24, 2006, objected to the fact that its engineering calculations would not be used in combination with its physical testing to show its barrier resisted a design threat with a minimum energy level of 650,000 joules. Given that the discussions between LVE and PWGSC concerning the requirements of the *Guidelines for Testing* were completed on May 2, 2006, this objection occurred beyond the 10-working-day time frame for making an objection. Furthermore, even if this objection were considered to be timely, LVE clearly received a denial of relief on May 30, 2006. LVE filed its complaint with the Tribunal on August 4, 2006, 45 working days later.

11. GIR, confidential exhibit 30.

12. GIR, confidential exhibit 30.

13. GIR, exhibit 9, para. 3 of the *Guidelines for Testing*: "Prior to contract award, it is a mandatory requirement that the FFPB be subjected to full-scale testing to evaluate whether the proposed system conforms to the boat stopping capability requirements outlined in the [Technical Statement of Requirement] ..." "

28. Consequently, this ground of complaint was not filed in a timely manner, and the Tribunal does not have the jurisdiction to consider it.

Declaration of LVE's Proposal as Non-compliant for Failing to Meet the Test Requirements

29. The Tribunal will now consider whether LVE complied with the criteria in the first RFP concerning test requirements. Article 506(6) of the *AIT* reads as follows:

... 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.

30. Essentially, there are two formulations of the testing requirement in the first RFP, parts 4.3 and 7 of Annex A, which are inconsistent. In the Tribunal's view, part 4.3 indicates that calculations are to be the primary source of information, supported by physical testing, while part 7 indicates that physical testing is to be the primary source, supported by calculations. PWGSC chose to follow the formulation of the testing requirement in part 7, which, in the Tribunal's view, is not unreasonable. Furthermore, as discussed above, LVE is too late to file a complaint to challenge that interpretation. The question that the Tribunal must address, therefore, is whether LVE provided physical testing to a level of 650,000 joules.

31. LVE's own test results clearly show that the test boat did not achieve the speed necessary to have a total kinetic energy of 650,000 joules when it struck the FFPB, and LVE does not dispute this conclusion.¹⁴

32. In previous determinations, the Tribunal has stated that it will not substitute its judgement for that of the evaluators, unless they had not applied themselves in evaluating a bidder's proposal, had ignored vital information provided in a proposal, had wrongly interpreted the scope of a requirement, had based their evaluation on undisclosed criteria or had otherwise not conducted the evaluation in a procedurally fair way.¹⁵ In this case, the evidence does not indicate that any of these circumstances was present.

33. Consequently, the Tribunal finds that the ground of complaint that PWGSC did not properly apply the criteria of the RFP concerning the testing requirement when assessing LVE's proposal is not valid.

Release of LVE's Proposal Price

34. In the second ground of its complaint, LVE alleged that its bid price was inappropriately disseminated to a competitor. Consistent with the evidence, the parties agree that, on June 1, 2006, via a chain of e-mails, DND staff disclosed the name of the first solicitation's sole remaining compliant bidder, namely, LVE, together with LVE's bid price, to a potential competitor that would be bidding the same product.¹⁶ PWGSC submitted that this disclosure was unintentional and should not have occurred.

35. Article 501 of the *AIT* reads as follows:

... the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

14. GIR, confidential exhibit 26.

15. *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT); *Re Complaint Filed by Excel Human Resources Inc. (operating as excellTR)* (25 August 2006), PR-2005-058 (CITT); *Re Complaint filed by The Impact Group* (14 June 2006), PR-2005-050 (CITT).

16. GIR, confidential exhibit 42.

36. Article 504 of the *AIT* reads as follows:

...

2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

- (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
- (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:

...

- (g) the unjustifiable exclusion of a supplier from tendering.

...

37. In the context of the purpose of Chapter Five of the *AIT*, as outlined in Article 501, federal government procurement shall be conducted in a manner that ensures "...equal access to procurement for all Canadian suppliers..." The Tribunal must assess whether the Government's release of confidential commercial information during the evaluation of the first procurement, which is the subject of this complaint, has prevented LVE from benefiting from access to the second procurement in a manner that violates Article 504(3)(g) of the *AIT*.

38. In an absolute sense, the disclosure of LVE's confidential commercial information could not prevent it from tendering on the second solicitation. However, it is clear that, as a result of this disclosure, at least one significant competitor knows the amount of LVE's previous bid. This means that LVE is likely to be seriously handicapped in setting its price when bidding on the second RFP and, as a result, fundamentally prejudiced in relation to at least one significant competitor when tendering on that solicitation. Thus, LVE has been denied the opportunity to tender properly. Given the objective of equal access to procurement, as outlined in Article 501 of the *AIT*, the Tribunal considers that this situation amounts to being unjustifiably excluded from the procurement process for the second RFP.

39. Accordingly, the Tribunal finds that PWGSC has breached Article 504(3)(g) of the *AIT* and that this ground of complaint is valid

REMEDY

40. Having found the complaint to be valid in part, the Tribunal will recommend an appropriate remedy for the harm to LVE as a result of the improper disclosure of its bid price. In this context, the Tribunal is directed by subsection 30.15(3) of the *CITT Act*, which reads 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

- (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.

41. LVE submitted that it will be severely disadvantaged by the dissemination of its first bid price to its competitor, especially since it understands that the competitor proposed the same product as LVE. LVE submitted that this competitor “will therefore be able to extrapolate the portion of the proposed barrier to which [its] pricing pertained and will be advantaged” in the second solicitation.

42. LVE requested that it be awarded the FFPB contract or, in the alternative, that it be compensated for all its expenses, including: bid preparation, testing costs and lost profits resulting from the non-award of the contract and the dissemination of its bid price to a competitor.

43. PWGSC expressed regret that the disclosure occurred and submitted that such an event is contrary to its customary practices and standards. PWGSC submitted that the consequences of the inadvertent disclosure to a single LVE competitor, with respect to its competitive position in the new solicitation process, are highly speculative. It submitted that the disclosure related only to the overall price bid by LVE in the initial solicitation and to no other factor. According to PWGSC, the contract award for both RFPs was not based on price alone, but on a formula that incorporated price, rated points and the proposed degree of coverage of the Halifax harbour. In addition, PWGSC submitted that the nine-month time difference between the closing dates of the two RFPs (February to October 2006) meant that potential pricing may have changed for both LVE and its competitors.

44. As discussed, above, in the Tribunal’s view, LVE has suffered prejudice to its ability to compete properly in the second procurement. However, the extent of the prejudice that it has suffered cannot be ascertained at this stage, while the process for the second procurement is still underway. In order to recommend the appropriate remedy, the Tribunal will therefore seek submissions from the parties once the contract for the second solicitation has been awarded.

COSTS

45. The Tribunal awards LVE its reasonable costs incurred in preparing and proceeding with the complaint.

46. The *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it involved an off-the-shelf item that included installation. The complexity of the complaint was medium, in that it dealt with complex issues involving potentially ambiguous specifications. Finally, the complexity of the complaint proceedings was low, as there were no interveners, the parties were not required to submit information beyond the normal scope of proceedings, there was no need for a public hearing, and the 90-day time frame was respected. Accordingly, the Tribunal is of the preliminary view that this complaint case has an overall complexity level corresponding to the medium level of complexity referred to in Appendix A of the *Guideline* (Level 2). As contemplated by the *Guideline*, the Tribunal’s preliminary indication of the amount of the cost award is \$2,400. The Tribunal reserves jurisdiction to establish the final amount of the award.

DETERMINATION OF THE TRIBUNAL

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

48. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate LVE for the prejudice that it suffered as a result of the release of its bid price in Solicitation No. W8472-065069/A. The Tribunal reserves the jurisdiction to determine the appropriate amount of the compensation after the award of a contract pursuant to Solicitation No. W8472-065069/C and the receipt of submissions from the parties.

49. Within 10 working days of the award of a contract pursuant to Solicitation No. W8472-065069/C, PWGSC shall submit to the Tribunal and LVE the names of the compliant bidders and the amounts of their respective bids. LVE will have 10 working days from the receipt of this information to file a submission describing, in monetary terms, the prejudice that it suffered to its ability to compete fairly for that solicitation, as a result of the disclosure to a competitor of its bid price in the first solicitation. PWGSC will have 7 working days from the time that it receives LVE's submission to file its response with the Tribunal. LVE shall then file any final comments within 5 working days after receiving PWGSC's response. Subsequently, the Tribunal will issue its final recommendation in this matter. The parties are required to file their submissions with the Tribunal and serve each other simultaneously.

50. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards LVE its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 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 by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford
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