



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-045

Les Systèmes Equinox Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, June 20, 2007*

*Reasons issued
Monday, July 23, 2007*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS 1

 COMPLAINT 1

 PROCUREMENT PROCESS.....2

 TRIBUNAL’S ANALYSIS.....2

 Filing and Retention of Documents.....3

 PWGSC awarded the contract to a bidder whose proposal was not compliant5

 PWGSC allowed LGS to amend its proposal.....8

 Apprehension of bias8

REMEDY9

 Costs9

DETERMINATION OF THE TRIBUNAL 10

IN THE MATTER OF a complaint filed by Les Systèmes Equinox Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

LES SYSTÈMES EQUINOX INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION OF THE TRIBUNAL

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

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 allow the current contract to continue, but that it not exercise any options. Should the requirement continue to exist after the initial contract period, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Les Systèmes Equinox Inc. 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 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Elaine Feldman
Elaine Feldman
Presiding Member

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

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

Tribunal Members:	Elaine Feldman, Presiding Member Meriel V. M. Bradford, Member Serge Fréchette, Member
Director:	Randolph W. Heggart
Senior Investigator:	Cathy Turner
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	Les Systèmes Equinox Inc.
Counsel for the Complainant:	Gordon LaFortune
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 February 5, 2007, Les Systèmes Equinox Inc. (Equinox) 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 a procurement (Solicitation No. 21120-053631/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Correctional Service of Canada (CSC) for the provision of a point of sale (POS) system.

2. Equinox alleged that PWGSC awarded the contract to a bidder, LGS Group Inc. (LGS), whose proposal was not compliant with the mandatory requirements of the Request for Proposal (RFP), that PWGSC allowed LGS to amend its proposal after the deadline for the receipt of bids and that PWGSC did not treat the bidders equally, thereby creating a reasonable apprehension of bias in favour of LGS. Equinox also alleged that PWGSC improperly declared its bid non-compliant. As a remedy, Equinox requested that the Tribunal recommend that the contract awarded to LGS be terminated and awarded to Equinox or, alternatively, that the requirement be re-tendered. In the further alternative, Equinox requested that the Tribunal recommend that PWGSC compensate it for its lost opportunity. Equinox also requested its costs incurred in preparing and proceeding with the complaint.

3. On February 14, 2007, the Tribunal informed the parties that the complaint had been accepted, in part, 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 The Tribunal did not accept Equinox's ground of complaint relating to the improper evaluation of its bid. The Tribunal already decided in a previous complaint, File No. PR-2005-052,³ that the ground of complaint relating to Equinox's bid being found non-compliant for this same procurement was not filed within the time limits prescribed by the *Regulations*. In the present case, the Tribunal found that there was insufficient evidence to demonstrate that Equinox's proposal should have been found compliant and, therefore, that there was no reasonable indication that, with respect to Equinox's bid, the procurement was not carried out in accordance with the applicable trade agreements. On February 16, 2007, PWGSC advised that a contract had been awarded to LGS. On March 19, 2007, PWGSC submitted the Government Institution Report (GIR). On March 27, 2007, Equinox submitted its comments on the GIR.

4. On May 10, 2007, the Tribunal requested that PWGSC provide additional information and documents. On May 15, 2007, PWGSC provided some of the additional documents that were requested by the Tribunal. On May 29, 2007, Equinox provided its comments on these documents. On June 1, 2007, PWGSC again filed additional documents with the Tribunal.⁴ On June 4, 2007, Equinox filed its comments on the latter. On June 5, 2007, PWGSC filed further documents with the Tribunal. On June 6, 2007, Equinox filed its comments on the further documents. On June 8, 2007, PWGSC filed its response to Equinox's comments.

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

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

3. *Re Complaint Filed by Les Systèmes Equinox Inc.* (15 February 2006) (CITT).

4. PWGSC provided additional documents without first informing the Tribunal that there could be additional documents or without asking for an extension.

5. 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

6. PWGSC issued an RFP on June 30, 2005. The bidding period closed on August 15, 2005. According to PWGSC, four proposals were received and, following the technical evaluation, on October 4, 2005, two proposals were deemed non-compliant.

7. PWGSC submitted that Equinox's technical proposal was deemed compliant, with a score of 72 percent, and that LGS's technical proposal was also deemed compliant, with a score of 78 percent. It further submitted that, on or about November 1, 2005, Equinox's financial proposal was deemed non-compliant and that LGS's financial proposal was deemed compliant. According to PWGSC, on November 10, 2005, it sought internal approval to award the contract to LGS and, during the latter half of November 2005, it entered into negotiations with LGS for the purpose of finalizing the contract.

8. On December 11, 2005, PWGSC awarded the contract to LGS. On December 12, 2005, PWGSC advised Equinox that a contract had been awarded to LGS and that Equinox's financial proposal had been deemed non-compliant.

9. On February 3, 2006, Equinox filed a first complaint with the Tribunal, claiming that its financial proposal had been improperly declared non-compliant. On February 15, 2006, the Tribunal issued its decision in that case and found that the complaint had been filed beyond the time limits prescribed in section 6 of the *Regulations*.

10. Equinox received documents through a request for access to information, on October 10 and November 20, 2006. On October 23 and November 24, 2006, Equinox filed objections with PWGSC. On January 24, 2007, PWGSC denied Equinox the relief that it requested. On February 5, 2007, Equinox filed this complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

11. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *Agreement on Internal Trade*,⁵ the *North American Free Trade Agreement*⁶ and the *Agreement on Government Procurement*.⁷

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

6. *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].

7. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

12. The Tribunal accepted the following three grounds of complaint for inquiry: PWGSC awarded the contract to LGS, a bidder whose proposal was not compliant with the mandatory requirements of the RFP; PWGSC allowed LGS to amend its proposal after the deadline for the receipt of bids; and PWGSC did not treat the bidders equally, thereby creating a reasonable apprehension of bias in favour of LGS. Although the Tribunal did not accept another ground of complaint, that PWGSC improperly declared Equinox's bid non-compliant, both Equinox and PWGSC devoted a great deal of their submissions to this ground of complaint. The Tribunal does not consider such submissions to be relevant to the grounds of complaint that were accepted for inquiry and will therefore not consider them.

Filing and Retention of Documents

13. Before turning to the substantive grounds of complaint, the Tribunal will address a preliminary matter.

14. Equinox claims that PWGSC acted contrary to *NAFTA* in not maintaining all relevant documents and that PWGSC did not respond fully to the Tribunal's request for additional information. Equinox asked the Tribunal to adopt adverse inferences with respect to PWGSC's position in this regard.

15. PWGSC submitted that, in preparing a GIR, the government institution is tasked with identifying and filing documents relevant to the complaint and any additional evidence and information that may be necessary to resolve the complaint. It submitted that Equinox is wrong to assert that "... it is not for PWGSC to determine whether documents in its possession are relevant or not..."⁸ PWGSC further submitted that, while the ultimate relevance of a document will be determined by the Tribunal, an initial assessment of relevance was required by PWGSC.

16. Subrule 103(2) of the *Canadian International Trade Tribunal Rules*⁹ reads as follows:

A report referred to in subrule (1) shall contain a copy of the following:

...

(c) all other documents relevant to the complaint;

...

(e) any additional evidence or information that may be necessary in order to resolve the complaint.

17. Article 1017(1)(p) of *NAFTA* reads as follows:

[E]ach Party shall ensure that each of its entities maintains complete documentation regarding each of its procurements, including a written record of all communications substantially affecting each procurement, for at least three years from the date the contract was awarded, to allow verification that the procurement process was carried out in accordance with this Chapter.

18. Following receipt of the GIR and Equinox's reply, on May 10, 2007, the Tribunal requested that PWGSC provide additional information and documents by May 15, 2007, including "... [a]ll evaluators' notes and score sheets, both individual and tabulated..." According to documentation provided by PWGSC,¹⁰ on May 11, 2007, PWGSC was of the view that it had in its possession the documentation relating to this portion of the Tribunal's request. Later that day, PWGSC requested that CSC "... investigate

8. Equinox's submission dated June 4, 2007.

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

10. PWGSC's e-mail dated May 31, 2007, to the Tribunal.

whether CSC has any information concerning evaluators['] notes, individual score sheets, etc. . . . Our (PWGSC) files only contain the summary evaluation sheets and the clarification questions. . . .” On May 14, 2007, CSC responded to one of its employees as follows: “. . . not sure the documents still exist. If they do, given that we have to contact individuals in the field, the information will not be available by end of day today.” Therefore, according to the documents PWGSC submitted, it should have been aware of this situation on May 14, 2007.

19. The Tribunal notes that PWGSC was aware that such notes and score sheets might exist, but failed to advise the Tribunal of this possibility or to request an extension of time to produce the required documents. On June 1, 2007, it produced some notes and score sheets, but only four of the seven evaluators’ notes, with no explanation as to the non-production of the other three evaluators’ notes.

20. On June 1, 2007, the Tribunal requested from PWGSC confirmation that all documents relevant to the complaint had been filed. On June 5, 2007, PWGSC submitted additional information. Equinox submitted that heavily redacted documents received through a request for access to information, which were directly relevant to the complaint, had not been produced by PWGSC. It also submitted that PWGSC had provided no response to this allegation. The Tribunal is of the view that all the redacted documents that Equinox received through a request for access to information had been provided in their entirety by PWGSC, except a letter dated January 20, 2006.¹¹

21. On the specific issue of the individual evaluator’s notes and score sheets, PWGSC alleged that they are not relevant because the evaluation was done by consensus. The Tribunal considers that PWGSC should have produced the notes and score sheets of all the evaluators or informed the Tribunal that three of the evaluators did not use the score sheets. While the Tribunal accepts that the evaluation was done by consensus, it considers the notes and score sheets to be relevant to the development of any consensus and, therefore, to be relevant to the consideration of this complaint. For example, the Tribunal notes that a majority of notes reveal some concern about whether LGS’s bid met the mandatory requirements. However, nothing in the documents provided by PWGSC reveals how the consensus was reached that the mandatory requirements had been met.

22. The Tribunal stresses that all documents associated with a procurement are critical components to ensuring that the competitive procurement system is functioning properly and transparently and that confidence in the system is maintained. In addition, by retaining such documents, the government institution ensures that, in the event of a complaint, the Tribunal will be able to perform a thorough review of the circumstances of a procurement. Indeed, Canada’s obligation under Article 1017(1)(p) of *NAFTA* is to ensure that each of its entities maintains complete documentation regarding each of its procurements. In this case, the Tribunal finds that the government institution failed to meet this obligation.

Limited amount of time to address submissions

23. Without asking for an extension of time or informing the Tribunal that there might be additional documents, PWGSC submitted new documents on June 1, 2007, and, in response to the Tribunal’s letter of the same date inquiring whether all relevant documents had been submitted, filed additional documents on June 5, 2007. PWGSC ought to have known that, in accordance with the rules of natural justice, Equinox had to be given the opportunity to provide its comments on those documents and that PWGSC would then have the opportunity to provide its response.

11. Complaint, Tab 25.

24. In *Canadian North Inc.*,¹² the Tribunal stated the following:

...

37. It is a general principle of law that every administrative tribunal making a decision which affects the rights, privileges or interests of a person owes a duty of procedural fairness. The rules of natural justice involve basic rules of procedure which were formulated to guarantee a basic level of procedural fairness in proceedings before quasi-judicial tribunals. However, it is well settled that the *manner* in which the rules of natural justice are applied by an administrative or quasi-judicial tribunal depends on the context of the proceeding before it.

...

[Footnotes omitted]

25. Accordingly, given the statutory deadline of June 20, 2007, for the Tribunal to render its decision, the Tribunal does not consider that PWGSC suffered any prejudice or denial of natural justice with respect to the limited time that it had to submit its comments on Equinox's submission with respect to documents which PWGSC itself had submitted late in the proceedings.

26. Turning now to the substantive grounds of complaint, the Tribunal will examine them individually.

PWGSC awarded the contract to a bidder whose proposal was not compliant

27. Clauses 2.1 and 2.2 of Section III of Part A of the RFP read as follows:

2.1 The RFP contains Mandatory requirements with respect to the contract terms and conditions, pricing, delivery, bidder experience, personnel qualifications, project management and technical requirements. Mandatory requirements are identified with the word "Mandatory", "M", "mandatory", or the words "shall", or "must". Proposals must comply with each and every mandatory requirement. If a proposal does not comply with a mandatory requirement, the proposal will be considered NON-COMPLIANT and will receive no further consideration.

2.2 The RFP also contains some Mandatory administrative requirements dealing with the submission, format and content of proposals. Mandatory administrative requirements are identified with the words "shall" or "must". If a proposal does not comply with a mandatory administrative requirement, the proposal will be considered NON-COMPLIANT and will receive no further consideration.

28. The section entitled "Evaluation Criteria" found in Annex B to Part A of the RFP reads as follows:

1.0 Statements of Compliance for specific Mandatory Requirements

...

1.3 Bidders must complete and submit with their proposals all of the tables 1 through 6 (refer[r]ed to as Statements of Compliance) shown below. The format of the Statements of Compliance should be similar to the format shown below. In the column titled "Compliance" the Bidder must provide a clear statement of the Bidder's compliance with the Mandatory requirement. This statement must consist of one of the following two responses:

- | | |
|--------------------------|--|
| i) COMPLY | Where the proposal complies with an article in all respects. |
| ii) DO NOT COMPLY | Where the proposal does not comply with the article in all respects. |

12. *Re Complaint Filed by Canadian North Inc.* (5 February 2007), PR-2006-026 (CITT).

Use of terms such as “comply with the following changes”, “understood”, “as per Supplier Agreement”, or the like will be considered **DO NOT COMPLY**. Some articles in this solicitation may contain more than one mandatory requirement. Bidders must only use the term ‘**COMPLY**’ when they can comply with all requirements contained in the article. Partial compliance for mandatory requirements will be deemed to be ‘**DO NOT COMPLY**’.

1.4 Statements of Compliance must include substantiation as follows:

- i) Substantiation of compliance must be provided for each mandatory requirement as indicated in the column titled “Substantiation Required”

...

1.6 There are 47 mandatory requirements in Table 2 identified by an ‘X’ in the column title[d] ‘Current Functionality/Development Required’. The Bidder’s POS System must currently comply (meaning no development work is required) with 80% (38 out of 47) of these mandatory requirements. Proposals that currently comply with less than 80% of the mandatory requirements listed in Table 2 and identified by an ‘X’ in the column titled ‘Current Functionality/Development Required’ will be considered non-compliant and will receive no further consideration.

...

29. Equinox submitted that the letter of September 20, 2005,¹³ from PWGSC to LGS asked questions that indicated that LGS failed to meet the mandatory requirement to provide substantiation of compliance. The letter listed 10 items that LGS was being asked to clarify. According to Equinox, items 2, 4, 5, 6 and 9 were of particular concern as, in each case, “. . . it is evident that LGS failed to meet the mandatory requirements. . . .” Equinox contends that PWGSC’s requests indicate a failure to provide complete substantiation, a failure to substantiate compliance with specific mandatory requirements of the RFP and, in two cases, internal inconsistencies in the LGS bid between information provided in the bid documents and the statements of compliance with the RFP requirements.¹⁴

30. Equinox submitted that LGS has yet to complete the installation of the POS system in the institutions and CSC headquarters, indicating that its system did not fully comply with the mandatory requirements of the RFP.

31. PWGSC submitted that LGS’s proposal revealed confirmation of compliance, at bid closing, with over 90 percent of the mandatory requirements listed in Table 2. Thus, LGS’s proposal complied with the requirements of clause 1.6 of Annex B to Part A of the RFP. PWGSC submitted that LGS only provided substantiation of compliance for all mandatory requirements for which substantiation was required and that the additional information sought by PWGSC was to legitimately clarify all proposals.

32. Equinox submitted that, with respect to PWGSC’s request for confirmation of compliance, the request was to “[c]onfirm compliance for all requirements not specifically addressed in the substantiation provided”¹⁵ and that this clearly demonstrates that LGS’s proposal did not provide all the required substantiation.

13. Complaint, Exhibit 7.

14. Complaint, Exhibit 8.

15. Complaint, Exhibit 7.

33. 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, transition costs, 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.

34. Article 1015(4) of *NAFTA* provides the following:

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . ;

. . .

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

35. Article XIII(4)(a) of the *AGP* provides that, “[t]o be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation” Article XIII(4)(c) provides that “[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

36. The Tribunal notes that LGS’s proposal¹⁶ reveals confirmation of compliance, at bid closing, with almost all of the 47 mandatory requirements identified by an “X” in Table 2. A review of the statement of compliance for the Statement of Work in LGS’s proposal indicates that some explanatory text in each instance was provided where there was a requirement for substantiation of compliance, but that PWGSC had to seek clarification or supporting information from the bidder on specific points.

37. While the Tribunal is cognizant that the RFP allowed evaluators to obtain additional information from bidders, the Tribunal is of the view that PWGSC’s requests for clarification from LGS indicate, in a number of instances, that LGS’s proposal, as submitted, did not clearly meet the mandatory requirements. For example, with respect to requirements 6.1.2(5) and 6.4.2(1), PWGSC said that the information provided for these requirements conflicted with other information. In addition, the proposal, on its face, appears not to be compliant with requirements 5.2 and 5.7.¹⁷

38. After a careful review of the evidence before it, in particular the contemporaneous evaluation notes and the letter requesting clarification, the Tribunal finds that PWGSC failed to follow the rules established in the RFP when it deemed LGS’s proposal compliant. As such, PWGSC failed to conduct this procurement in accordance with Article 506(6) of the *AIT*, Articles 1015(4)(a) and (d) of *NAFTA* and Articles XIII(4)(a) and (c) of the *AGP*. Therefore, the Tribunal finds that this ground of complaint is valid.

16. GIR, Confidential Exhibit 12.

17. PWGSC’s submission dated June 1, 2007—confidential evaluators’ notes.

PWGSC allowed LGS to amend its proposal

39. Equinox submitted that, by accepting LGS's response to the requests for clarification and by requesting that LGS provide prices for printers to be used in connection with the POS system and information concerning a bar code reader that was not provided with its proposal, PWGSC allowed LGS to modify its bid.

40. PWGSC submitted that there are many reasons why additional information may be sought from a bidder and that one cannot assume that a clarification question and the response necessarily imply that the proposal is non-compliant without the additional information. PWGSC contended that it was open to bidders and Canada to supplement the list of optional peripheral equipment, as long as such "amplification" did not have the effect of derogating from an original mandatory provision.

41. According to PWGSC, by correspondence dated November 21, 2005, CSC advised PWGSC that it may have been incorrect in its belief that its current printers would not interface with a Windows POS system. At that time, LGS had already been identified as the winning bidder. Therefore, after a clarification process involving discussions about the ability of certain printers to interface with the system, the option to purchase the printer identified in LGS's proposal and optional printer models SP312 and SP317 was included in the contract with LGS.

42. According to PWGSC, LGS proposed a replacement bar code reader, as required by the RFP, and LGS's proposal was evaluated using the prices quoted against item 9. "LGS's proposal identified a second optional barcode reader, "Option 9b", which ' . . . represents possible cost reduction from the proposed and priced model. . . .'" and the contract awarded to LGS took into account both the originally proposed bar code reader and the proposed option.

43. After a careful review of LGS's responses to PWGSC's request for clarification,¹⁸ the Tribunal is of the opinion that many of the responses go beyond clarification and amount to substantive modifications to LGS's proposal. The Tribunal is of the view that the issue is not whether the material changed the POS system, as argued by PWGSC, but rather whether the additional material changed LGS's bid. The Tribunal considers that the responses provided by LGS did in fact change its bid. The Tribunal finds that PWGSC failed to conduct this procurement in accordance with Article 506(6) of the *AIT*, Article 1015(4)(a) of *NAFTA* and Article XIII(4)(a) of the *AGP*. Therefore, the Tribunal finds that this ground of complaint is valid.

Apprehension of bias

44. Since the Tribunal has found PWGSC to be in violation of the applicable trade agreements with respect to the first two grounds of complaint, it is not necessary to address the issue relating to reasonable apprehension of bias. However, the Tribunal will comment on the proposition advanced by Equinox that acting contrary to the trade agreements is itself sufficient to show reasonable apprehension of bias. The Tribunal does not agree. Reasonable apprehension of bias is demonstrated through measures taken that are above and beyond a breach of the trade agreements.

18. PWGSC's submission dated May 15, 2007, Confidential Exhibit 1.

REMEDY

45. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

...

- (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.

46. In determining the remedy to recommend in this case, the Tribunal must consider the circumstances relevant to the procurement, in addition to the above-mentioned considerations. While the Tribunal found the complaint to be valid with respect to two of the three grounds of complaint, the Tribunal had decided at the outset of the inquiry that it would not inquire into whether Equinox's proposal should have been found compliant. In view of the Tribunal's finding, PWGSC is now faced with the situation of no compliant bids. Since LGS was awarded the contract on December 11, 2005, PWGSC and CSC are already over 18 months into the life of a 5-year contract. Accordingly, the Tribunal can only assume that a substantial portion of the required work has been completed. Therefore, taking into consideration all the circumstances relevant to the procurement, the Tribunal is of the opinion that it is not reasonable to recommend that the current contract be terminated and the requirement re-competed immediately. The Tribunal therefore recommends that PWGSC allow the current contract to continue, but that it not exercise any options. Further, should the requirement continue to exist after the initial contract period, the Tribunal recommends that PWGSC re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

Costs

47. The Tribunal awards Equinox its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint case, the Tribunal 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 had a complexity level corresponding to the third level of complexity referred to in Appendix A to the *Guideline* (Level 3). The procurement was complex, involving the provision of a replacement POS system in 51 CSC institutions across Canada. The complaint was also complex, as it dealt with a range of matters other than whether the winning bid was compliant, including allegations of bid repair and apprehension of bias, and was based in large degree on materials, not always complete, received by Equinox through a request for access to information.

48. As for the complaint proceedings, the Tribunal is of the view that their level of complexity is Level 3, largely because of the delay associated with the production of documents from PWGSC, which complicated the Tribunal's work. The Tribunal twice had to ask PWGSC to produce relevant documents, and some of those documents were produced only on June 5, 2007, almost three weeks after the date given by the Tribunal for production, without PWGSC either informing the Tribunal that there might be additional

documents forthcoming or requesting an extension for submission. This added to the complexity of the proceedings, because it involved the need for additional submissions from Equinox and a reply from PWGSC very late in the proceedings. Moreover, as noted above, it appears that not all the material requested by the Tribunal in its letter of May 10, 2007, was provided. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award was \$4,100.

DETERMINATION OF THE TRIBUNAL

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

50. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC allow the current contract to continue, but that it not exercise any options. Should the requirement continue to exist after the initial contract period, the Tribunal recommends that PWGSC re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

51. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Equinox 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 3, and its preliminary indication of the amount of the cost award is \$4,100.

Elaine Feldman
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Presiding Member

Meriel V. M. Bradford
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