



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-045R

Les Systèmes Equinox Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Thursday, March 12, 2009*

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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 of the Federal Court of Appeal, which partly set aside decisions of the Canadian International Trade Tribunal dated February 14 and 19, 2007, and referred the matter back to the Canadian International Trade Tribunal with directions.

**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 takes note of the recommendation contained in File No. PR-2006-045 that the Department of Public Works and Government Services allow the current contract to continue, but that it not exercise any options and that, should the requirement continue to exist after the initial contract period, it re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services compensate Les Systèmes Equinox Inc. for its lost opportunity by an amount equal to one quarter of the profit that it would have reasonably earned had it been the successful bidder for the provision of the point of sale system for the Correctional Service of Canada. The Canadian International Trade Tribunal recommends that Les Systèmes Equinox Inc. and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, Les Systèmes Equinox Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of Les Systèmes Equinox Inc.'s submission to file a response. Les Systèmes Equinox Inc. will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

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 in relation to these proceedings, 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 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.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Diane Vincent  
Diane Vincent  
Member

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

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## STATEMENT OF REASONS

### BACKGROUND

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*.<sup>1</sup> 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 evaluated its bid as non-compliant.

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*.<sup>2</sup> The Tribunal did not accept Equinox's ground of complaint relating to the improper evaluation of its bid. The Tribunal had decided in a previous complaint<sup>3</sup> that the ground of complaint relating to the evaluation of Equinox's bid as non-compliant was not filed within the time limits prescribed by the *Regulations*. In relation to File No. PR-2006-045,<sup>4</sup> Equinox submitted additional evidence not previously submitted to support this ground of complaint. However, 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. In response to Equinox's further request that the Tribunal reconsider its decision regarding the grounds that it accepted for inquiry, the Tribunal confirmed its February 14, 2007, decision in a letter to Equinox dated February 19, 2007.

4. On March 14, 2007, Equinox applied to the Federal Court of Appeal for a judicial review of the Tribunal's decision in File No. PR-2006-045 not to inquire into all the grounds of complaint raised by Equinox.

5. On June 20, 2007, the Tribunal issued its determination in File No. PR-2006-045, in which it found that the complaint was valid, and recommended, as a remedy, the following:

... 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.

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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), PR-2005-052 (CITT).

4. *Re Complaint Filed by Les Systèmes Equinox Inc.* (20 June 2007) (CITT).

6. Both Equinox and PWGSC filed applications<sup>5</sup> with the Federal Court of Appeal for a judicial review of the Tribunal's June 20, 2007, determination. These judicial review applications have yet to be heard and have been put in abeyance until the Tribunal issues its determination on the present proceedings.

7. On January 16, 2008, Equinox's judicial review application of March 14, 2007,<sup>6</sup> was heard by the Federal Court of Appeal, with Desjardins J. providing the following decision and reasons, which were delivered on January 29, 2008:

...

[32] Based on the disclosure of new documents from the Access to Information request, the complaint raises issues of a fundamental nature related to equal access to a procurement process for all Canadian suppliers, non-discrimination in the tendering procedures, and transparency in the tendering process. These elements are all part of the integrity of the system the invoked legislative provisions are meant to protect. While the decision of whether or not to investigate a complaint has been characterized by this Court in *E.H. Industries Ltd.* as administrative in nature and non adjudicative, the new documents point to the amendment by PWGSC of Equinox's bid in a manner not yet explained, and show an appearance of a preferred treatment of the LGS proposal. The wide discretion accorded to the Tribunal by the case law does not go so far as permitting the Tribunal to set aside evidence of such character while it accepts at the same time to investigate a closely connected facet of the same bid process, i.e. the evaluation of LGS's proposal "in comparison to that of Equinox" (letter of February 19, 2007).

[33] In its letter of February 14, 2007, the Tribunal determined that it would limit its inquiry to three issues, the third one being that "PWGSC did not treat the bidders equally, thereby creating a reasonable apprehension of bias in favour of LGS".

[34] It is difficult to understand how the Tribunal would accept to inquire into "the apprehension of bias in relation to how LGS Group Inc.'s proposal was evaluated in comparison to that of Equinox" (letter of February 19, 2007) and yet refuse to consider the grounds of complaint filed by Equinox "relating to the improper evaluation of Equinox's bid". An acceptance to look into the evaluation of LGS' bid in light of the applicable legislation will throw no light on whether PWGSC treated the bidders equally (letter of February 14, 2007) since all the relevant bidders will not have been included in the inquiry and analysis.

[35] The new evidence obtained by Equinox through the Access to Information request challenges the earlier statement of PWGSC that Equinox's financial proposal was non-compliant and that Canada did not proceed further with an evaluation of Equinox's bid (letter of PWGSC dated December 12, 2005). It appears on the face of the evidence, that Equinox's bid was in fact evaluated and a confidentially disclosed amount of money was added to its bid. It is not open to the Tribunal to refuse to inquire into PWGSC's evaluation of the Equinox bid, without impairing the appearance of equal access of the bidders, as is required by the AIT and the NAFTA.

[36] Such alleged breaches, which challenge the basic principles of AIT and NAFTA, warrant the intervention of this Court.

## CONCLUSION

[37] I would allow, with costs, this application for judicial review, I would set aside partly the decisions of the Tribunal dated February 14, 2007 and February 19, 2007, and I would order that the Tribunal independently inquire into whether Equinox's bid was improperly evaluated and when investigating bias, I would order that it consider bias for and against both Equinox and LGS.

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5. Docket Nos. A-336-07 and A-343-07.

6. *Systèmes Equinox Inc. v. Canada (Public Works and Government Services)*, 2008 FCA 36 (CanLII).

8. Further to the Federal Court of Appeal's decision, on March 26, 2008, the Tribunal advised the parties that it would initiate an inquiry into whether Equinox's bid was improperly evaluated. The Tribunal also indicated that, when investigating bias, it would consider bias for and against both Equinox and LGS. On April 14, 2008, PWGSC submitted the Government Institution Report (GIR). On April 24, 2008, Equinox submitted its comments on the GIR. On May 15, 2008, the Tribunal requested that PWGSC file additional information that the Tribunal considered relevant. On May 29, 2008, PWGSC filed the information requested by the Tribunal. On June 10, 2008, Equinox filed its comments on PWGSC's submission. On June 16, 2008, PWGSC filed its reply. On June 18, 2008, Equinox filed its reply to PWGSC's submission.

## TRIBUNAL'S ANALYSIS

### Scope of Inquiry

9. 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*,<sup>7</sup> the *North American Free Trade Agreement*<sup>8</sup> and the *Agreement on Government Procurement*.<sup>9</sup>

10. In this regard, the Tribunal is of the view that the Federal Court of Appeal, on judicial review, cannot be taken to have ordered the Tribunal to conduct an inquiry that exceeded the authority conferred upon the Tribunal by Parliament under the Tribunal's own enabling legislation.

11. On judicial review, the Federal Court of Appeal did not rule on the Tribunal's June 20, 2007, determination in File No. PR-2006-045. Rather, it found that the Tribunal had made reviewable errors at an earlier stage, in the decisions that it made to limit the grounds on which it would accept the complaint.

12. As part of its judgment, the Federal Court of Appeal ordered the Tribunal to "independently inquire into whether Equinox's bid was improperly evaluated and when investigating bias, . . . it consider bias for and against both Equinox and LGS."

13. Since the Federal Court of Appeal did not remand the Tribunal's determination on the first two grounds of complaint in File No. PR-2006-045, the Tribunal is bound by the *functus officio rule* with regard to those grounds of complaint.

14. That having been said, the Tribunal regards the direction from the Federal Court of Appeal to "independently inquire" to mean that the Tribunal is to carry the present inquiry through to a decision on the merits with respect to the grounds of the present inquiry and to any appropriate recommendations on remedy, as if this were a procurement inquiry *de novo* in respect of these grounds.

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7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

8. *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].

9. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [AGP].



15. The Tribunal also considered the time span for its inquiry. In the present instance, the contract appears to have been awarded on December 11, 2005. The parties provided documentation that extends beyond this period. The Tribunal will accept and consider such documentation to the extent to which it sheds light on the circumstances of the bidding and evaluation periods.

16. In its letter of December 12, 2005,<sup>10</sup> PWGSC declared Equinox's financial proposal non-compliant on two bases:

...

- (1) the per diem rates bid, do not provide a calculable single per diem rate for the work as required by the RFP; and
- (2) no calculable single price was bid for the Entity-wide license in accordance with the terms contained in Appendix C.

...

17. Equinox contested PWGSC's finding of non-compliance and argued the following:

- the RFP did not require that a financial proposal provide either a calculable single *per diem* rate for the work or a calculable single price for an entity-wide licence; and
- documentary evidence obtained under the *Access to Information Act* disclosed a reasonable apprehension of bias on the part of PWGSC in favour of LGS and against Equinox.

18. In conducting its independent inquiry into whether Equinox's financial proposal was improperly evaluated, the Tribunal will therefore confine itself to an examination of the merits of the specific reasons cited by PWGSC for finding Equinox's financial proposal non-compliant, as these reasons formed the subject matter of the original complaint, and the related issue of whether the circumstances gave rise to a reasonable apprehension of bias.

#### **First Issue: Evaluation of Equinox's Bid**

19. The Federal Court of Appeal directed the Tribunal to "independently inquire into whether Equinox's bid was improperly evaluated". There were two components of the solicitation in respect of which each bidder was expected to demonstrate compliance: technical and financial. The evaluators found Equinox's bid compliant on the technical component and non-compliant on the financial component.

20. The Tribunal notes that, in its submission, Equinox appeared to accept the evaluation of its technical proposal and focused instead on the treatment by PWGSC of its financial proposal. As noted above, the Tribunal is constrained to limit itself to the subject matter of the complaint. Therefore, in its examination of the evaluation of Equinox's bid, the Tribunal will confine itself to an inquiry into the evaluation of its financial component.

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10. Complaint, Exhibit 4.

21. Article 506(6) of the *AIT* provides as follows:<sup>11</sup>

... 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.

22. In this regard, the issue is whether the RFP, properly read, either expressly or by implication, required that the bid provide a calculable single *per diem* rate for professional services by installer and trainer and a calculable single price for an entity-wide licence.

23. For its part, Equinox contends that the RFP does not include the terms “calculable single per diem” or “calculable single price”, with these requirements having been improperly read into the RFP by PWGSC, and states the following:

... the RFP does not include the terms “calculable single per diem” or “calculable single price”. Rather, these are terms that PWGSC has developed through extrapolation after the RFP was issued... This is not just an assumption by Equinox. The requirement to provide either a “calculable single per diem” or a “calculable single price” is not set out in the RFP... The fact that PWGSC now effectively admits that the “calculable single per diem” and the “calculable single price” were constructed from the RFP rather than set out in the RFP also demonstrates that the RFP violated AIT Article 506(6)...<sup>12</sup>

#### Per Diem Rates Bid

24. Paragraph 6.2 of Section II of Part A of the RFP, which set out the mandatory minimum information required in a bidder’s financial proposal, explicitly required bidders to include all costs associated with implementing the complete requirement by completing a cost schedule similar to Part B, Annex D, clearly indicating firm unit/lot prices and firm rates:

The Bidder’s separate Cost Proposal *must* contain, as a minimum, the following information:

- a) *all costs associated with implementing the complete requirement, including as-and-when-requested work and options, by completing and submitting a cost schedule, similar to Part B, Annex “ D ” clearly indicating the firm unit/lot prices and firm rates.*...

[Emphasis added]

25. The Tribunal first considered whether the term “similar to” offered bidders sufficient latitude to amend the template for the cost schedule provided in the RFP. In the Tribunal’s view, the concept of similarity, though its meaning is not spelled out in the language of the RFP, would normally refer to aspects of formatting rather than content with respect to the information provided in the prescribed schedule. The Tribunal acknowledges that there may be circumstances in which a modification (addition or splitting for instance) of requested information is legitimate if it in fact responds to the requirement of the RFP. In this instance, the “Cost Proposal must contain... all costs associated with implementing the complete requirement” and the bidder must “*clearly indicat[e] the firm unit/lot prices and firm rates*” and do so “*by completing... a cost schedule, similar to Part B*” [emphasis added]. A bidder that deviated from the

11. In the same vein, *NAFTA* and the *AGP* respectively provide as follows:

#### **Article 1013: Tender Documentation**

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

#### **Article XII - Tender Documentation**

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders...

12. Refer to paras. 49, 50, 52 of Equinox’s public reply submission filed April 24, 2008.

cost schedule template in the RFP would nevertheless be expected to provide the information required in the RFP, including the prescribed schedule, and to meet mandatory requirements. In all circumstances, the bidder must still present clearly the information required by the RFP.

26. Annex D (“Cost Schedule for Deliverables and Services”) to Part B (“Model Contract”) of the RFP includes four tables that identify 18 separate items for which the quotation of firm prices or rates was required. The Tribunal notes that, of these 18 separate items, only item Nos. 001 (“Installer or Trainer”) and 002 (“Programmer or Developer”) of Table 3 (“Professional Services and Equipment Repair”) specify *per diem* rates as the applicable unit of issue. Therefore, these are the only items of relevance to the Tribunal’s assessment of the merits of the first reason, which relates to a “calculable single *per diem* rate”, as presented by PWGSC for declaring Equinox’s financial bid non-compliant.

27. The term “calculable” in the above expression presumably refers to the possibility of reducing the individual amounts quoted for each year of the contract period under each of item Nos. 001 and 002 of Table 3 to cumulative single *per diem* rates for purposes of bid evaluation.

28. The Tribunal agrees with Equinox’s contention that the RFP does not include any explicit requirement for the provision of a calculable single *per diem* rate for these items. The issue therefore becomes whether the requirement for a calculable single *per diem* rate arises by implication from the express terms and conditions of the RFP and from the cost schedule presented in Annex D to Part B of the RFP.

29. The Tribunal finds that a “calculability” requirement indeed arises by implication from a joint reading of the mandatory requirement in paragraph 6.2 of Section II of Part A of the RFP to quote “firm” rates and prices and paragraph 4.1 of Section III of Part A of the RFP, which provides that the evaluated cost will be the total costs submitted as per the cost schedule in Annex D to Part B of the RFP and which reads as follows:

...

Phase IV – Financial Evaluation as per cost schedule in Part B, Annex D. For the purposes of bid evaluation, *Evaluated Cost will be the total costs submitted, as per the cost schedule detailed in Part B, Annex D, by compliant bidders.*

...

[Emphasis added]

30. This stands to reason since, in order to compare financial bids as part of the overall bid evaluation process, PWGSC first had to be able to calculate a total evaluated cost for each bidder.

31. The implied “calculability” requirement could presumably be satisfied on a line item basis or on the basis of the cost schedule as a whole. In either case, the quotation of individual fixed rates (as opposed to variable rates, the fixing of which would depend on unknown future circumstances), or the ability to otherwise extrapolate these from a bidder’s cost schedule, is a *sine qua non* to the calculability of an evaluated cost for each bidder.

32. Instead of providing only firm *per diem* rates for professional services, as required by Table 3, Equinox's bid document introduced new item No. 001-A, "Installer or Trainer (first hour on site) (minimum 1 hour)",<sup>13</sup> which was in addition to existing item No. 001, "Installer or Trainer".

33. The Tribunal is of the view that Equinox introduced confusing information with the addition of item No. 001-A regarding the relationship between the "Item" (which is qualified by the phrase "*first hour on site – minimum 1 hour*"), the "Unit of Issue" (which is expressed as a *per diem*) and the "Contract Period" dollar amounts (which were quoted on an annual basis in Equinox's attempt to clarify after the deadline for the receipt of bids had passed).<sup>14</sup> In the Tribunal's view, the additional item No. 001A, as presented, effectively precluded the possibility of calculating a single *per diem* rate for "installer and trainer" costs.

34. The Tribunal is further of the view that a single *per diem* rate for item No. 001-A could not be extrapolated from Equinox's broader cost schedule. In this regard, the relationship and interplay between existing item No. 001 and the new item No. 001-A are not readily apparent from Equinox's submitted Table 3 cost schedule.

35. Accordingly, the Tribunal finds that the addition of item No. 001-A in Equinox's financial proposal did not comply with the mandatory requirements of the RFP on the calculability of "trainer and installer" costs on a *per diem* basis.

#### Software Licence

36. On the issue of whether or not the RFP called for a calculable single price for an entity-wide licence, paragraphs 3.3 and 3.4 of Annex C ("Software License") to Part B of the RFP provide as follows:

- 3.3 The Contractor hereby grants a single, perpetual non-exclusive license to Her Majesty the Queen in right of Canada for the User to use the Licensed Software in accordance with this Contract.
- 3.4 This Contract grants to Canada the right for the User to install, copy, deploy and use the Licensed Software, which includes the rights to:
- enable an *unlimited number of individual User Personnel* to use the Licensed Software; this license, which entitles an unlimited number of User Personnel to use the Licensed Software, is referred to in this Contract as an "*Entity-Wide*" license;
  - install and use the Licensed Software *at any and all locations* as may be required to meet the User's needs from time to time, including all current and future correctional institutions as well as CSC's National and Regional headquarters.
  - install and use the Licensed Software *on all computer systems* owned, leased, or operated by the User at the date of the Contract and any new computer systems acquired, leased or operated by the User after the date of the Contract
  - use the Licensed Software *in conjunction with any number of computing devices*; a "device" is any hardware or computer of any kind upon which software can be installed, deployed or used.

...

all without affecting *the pricing* contained in this Contract and *without requiring Canada to obtain additional licenses* or accept amended license terms for the Licensed Software.

[Emphasis added]

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13. Confidential complaint, Exhibit 5, letter dated October 11, 2005: "Item 001-A of Table 3 in the Cost Proposal is intended to replace and cover the provision for travel and stand by time."

14. *Ibid.*

37. As to the basis upon which the price for the entity-wide licence was to be quoted, item No. 002 of Table 1 (“Initial Installations and Software”) of Annex D (“Cost Schedule for Deliverables and Services”) to Part B (“Model Contract”) of the RFP, provides as follows, with respect to the single unit of issue, which is the “lot”:

For the provision of the Licensed Software, *in accordance with the Software License, Annex C*, following completion of the acceptance testing of the POS System at CSC’s National Headquarters in Ottawa.

[Emphasis added]

38. When item No. 002 of Table 1 is read in conjunction with Annex C to Part B, the RFP requires the quotation of a single price for an entity-wide licence (i.e. a licence covering all software required by the proposed POS system, including all current and future needs in all current and future CSC institutions), with said licence to be paid for at the time of system acceptance after a successful pilot installation at CSC headquarters.

39. However, rather than quoting a single firm (“lot”) price under item No. 002 of Table 1 for entity-wide licensed software, Equinox limited its item No. 002 quotation to the price of its software licence for CSC headquarters, individually pricing its various software components in Table 4 of Annex D to Part B of the RFP per station, host, server and Touchpad. This is reflected in Equinox’s clarification No. 1, in which Equinox provided individual pricing of software components per station and per institution. Although Equinox also provided an extended cost for each of these items, the potential variability of the number of institutions and stations meant that the cost of the software licence was not fixed, as required under the RFP, but, rather, could vary over the life of the contract.

40. Accordingly, the Tribunal finds that this aspect of Equinox’s financial proposal was also non-compliant with the mandatory requirements of the RFP.

41. Since the Tribunal has determined that Equinox’s financial proposal did not conform to the mandatory requirements of the RFP in two instances, the Tribunal determines that PWGSC was observing the applicable procurement procedures when it declared Equinox’s financial proposal non-compliant.

## **Second Issue: Bias**

### Alleged Bias in Favour of LGS and Against Equinox

42. In support of its claim of reasonable apprehension of bias in favour of LGS, Equinox alleged that the evaluators allowed LGS to engage in bid repair, amended the RFP in respect of receipt printers, requested and accepted additional information on the proposed barcode reader, responded to LGS’s questions outside the time frame allotted, failed to share those questions and answers with Equinox and allowed LGS to violate paragraph 3.4 of the statement of work with respect to the software licence.

43. In support of its claim of reasonable apprehension of bias against it, Equinox alleged *inter alia* that the existence of the financial evaluation document for its proposal demonstrates that PWGSC had in fact accepted its financial bid (with the clarifications that it provided) and that PWGSC took an active role in modifying its bid to the detriment of Equinox and at no point divulged to Equinox that a certain amount had been added to its bid price or explained why this addition was justified.

44. Referring to Equinox's allegations concerning bias,<sup>15</sup> PWGSC submitted the following:

... [I]nadvertently allowing bid repair, which PWGSC expressly denies, does not create or contribute to an apprehension of bias ... adding inconsequential options to the contract awarded to LGS did not create or contribute to an apprehension of bias ... responding to LGS's question did not create or contribute to an apprehension of bias ... statements made by LGS during contract negotiations and after contract award that may have differed from commitments made in its proposal and crystallized in the contract, which statements PWGSC expressly denies, did not create or contribute to an apprehension of bias ... the decision to not circulate the Q&A did not create or contribute to an apprehension of bias ... attempting to estimate the real cost of Equinox's financial proposal did not create or contribute to an apprehension of bias ... concluding that a proposal is non-compliant, at any time, does not constitute evidence of bias.<sup>16</sup>

45. PWGSC submitted that much, if not all, of the "evidence of bias" is wholly unrelated to the decision to declare Equinox's financial proposal non-compliant. Considered realistically and practically, the "evidence of bias" would not lead an informed person to conclude that the decision to declare Equinox's financial proposal non-compliant was motivated for reasons of bias. It submitted that the circumstances within which the salient decision was made do not give rise to a reasonable apprehension of bias.

46. In File No. PR-2002-070,<sup>17</sup> the Tribunal dealt with reasonable apprehension of bias. In its statement of reasons, the Tribunal refers to *Cougar Aviation Ltd. v. Canada*,<sup>18</sup> in which the Federal Court of Appeal found that, under the *AIT*, "... the Tribunal's jurisdiction was not limited to complaints of actual bias, but also included the adjudication of allegations of reasonable apprehension of bias ..."

47. The criterion applied by the Tribunal in determining whether the circumstances of this case gave rise to a reasonable apprehension of bias is the criterion set out by de Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*,<sup>19</sup> confirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,<sup>20</sup> which dissenting opinion stated as follows:

... what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [this person], whether consciously or unconsciously, would not decide fairly?<sup>21</sup>

48. The first ground cited by PWGSC for finding Equinox's financial proposal non-compliant was that the *per diem* rates bid did not provide a calculable single *per diem* rate for the work as required by the RFP.

49. As already explained, the Tribunal is of the view that a "calculability" requirement indeed arises by implication from a joint reading of the mandatory requirement in paragraph 6.2 of Section II of Part A of the RFP to quote "firm" rates and prices and paragraph 4.1 of Section III of Part A of the RFP, which provides that the evaluated cost will be the total costs submitted as per the cost schedule in Annex D to Part B of the RFP.

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15. Complaint, para. 212.

16. GIR, paras. 47, 61, 64, 74, 84, 86, 96.

17. *Re Complaint Filed by Prudential Relocation Canada Ltd.* (30 July 2003) (CITT).

18. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* 2000 CanLII 16572 (F.C.A.).

19. [1978], 1 S.C.R. 369 (S.C.C.).

20. [2003] 1 S.C.R. 884 (S.C.C.).

21. [1978] 1 S.C.R. 369 at 394.

50. However, while the Tribunal's own independent analysis indicates that Equinox's financial proposal did not satisfy the calculability requirement, the Tribunal agrees with the observation of the Federal Court of Appeal, at paragraph 35 of its decision, that "... [i]t appears on the face of the evidence, that Equinox's bid was in fact evaluated and a confidentially disclosed amount of money was added to its bid ..."

51. The word "evaluation" is open to a range of interpretations, from a detailed analysis to a much simpler assessment that is just sufficient to determine whether a proposal on its face contains enough information to allow it to go forward to full analysis.

52. That PWGSC conducted at least a rough evaluation of Equinox's submission is supported by the existence of financial evaluation sheets showing dollar values for the proposals of both Equinox and LGS, itemized by category and also totalled.<sup>22</sup> More importantly, the evaluation was at a level sufficient to yield specific dollar values for the very items that formed the basis for the rejection of Equinox's financial proposal. It is therefore the Tribunal's view that an evaluation of Equinox's financial proposal did take place.

53. The record contains four evaluation score sheets, with the evolving content suggesting that they were not prepared independently by different evaluators but, rather, that they were sequential in nature. This view is supported by the Tribunal's reading of paragraph 61 of GIR-1,<sup>23</sup> where PWGSC presented these sheets as an evolving process in response to clarifications provided by Equinox. In this regard, the last of the four evaluation score sheets contained in the record had amounts entered for each of the 18 separate items for which the quotation of a firm price was required by the RFP.

54. Equinox contends that, in evaluating its financial bid, PWGSC improperly added a significant lump sum to its bid, without notice, explanation or justification.<sup>24</sup> Equinox claims that, but for the unexplained addition of this amount to its bid, the cost per point of its bid would have fallen below that of LGS.<sup>25</sup>

55. It would indeed appear that a detailed evaluation of Equinox's bid was conducted and that the four score sheets were prepared as successive steps in the evaluation team's assessment of Equinox's financial proposal. In any event, whether the four score sheets represent sequential steps in a single evaluation or four separate or independent evaluations, the fact remains that PWGSC should have been able to obtain from its own evaluators, and provide to the Tribunal, a definitive explanation of the significant amount that was added to Equinox's bid in the last of the four score sheets. Its magnitude and the potential implications that it held for the ranking of bidders preclude its being described and dismissed as an incidental fact, the origin and purpose of which could reasonably have been lost in the evaluation process.

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22. Confidential additional documents filed by PWGSC on May 29, 2008, Book 1, item 18, spreadsheet of financial evaluation.

23. GIR-1 refers to the GIR received on March 19, 2007, for the inquiry in File No. PR-2006-045.

24. Equinox further alleges that, during a January 6, 2006, debriefing session, PWGSC evaluators did not explain why this additional amount had been added to Equinox's bid, but simply denied that an evaluation of Equinox's bid was ever undertaken. See complaint, para. 186.

25. Confidential complaint, para. 67.

56. The Tribunal understands from the evidence that the financial evaluation was done by a PWGSC team. This team, or the contracting authority alone, produced four successive score sheet tables on Equinox's financial proposal. PWGSC's submission states the following at paragraph 61 of GIR-1:

Several financial bid evaluation documents are contained in PWGSC's records. As the Contracting Authority struggled to understand and estimate Equinox' financial proposal, and after receiving answers to clarification questions, he produced different working copies of the evaluation document . . . .

At paragraph 63 of GIR-1, PWGSC goes on to state the following:

PWGSC cannot offer a full explanation for the different numbers. It is believed that for this version of the working document the [Contracting] Officer made certain assumptions about the need of Equinox' proposed POS System for some of the additional peripheral equipment and software listed in Table 4, Annex D, of Equinox' financial proposal . . . .

57. In this circumstance, the Tribunal finds that PWGSC did not provide a reasonable and definitive explanation supported by documentary evidence or one or more affidavits from the financial evaluation team or the contracting authority. This figure could not reasonably remain unexplained if a team of four evaluators, as it should be, not one contracting authority, as suggested by PWGSC, had conducted a financial evaluation and produced this score sheet as the last in a succession of score sheets. This additional amount recorded on the score sheet implies that in PWGSC's own view, Equinox's bid was indeed calculable and higher than LGS's bid. The non-calculability of the bid is one of the reasons given for rejecting Equinox's proposal.

58. However, PWGSC chose not to avail itself of the opportunities afforded it to dispel any suggestion of bad faith by providing such an explanation, opting instead for speculation, conjecture and the selective disclosure of information and stating the following:

*PWGSC cannot offer a full explanation for the different numbers.* It is believed that for this version of the working document the [Contracting] Officer made certain assumptions about the need of Equinox' proposed POS System for some of the additional peripheral equipment and software listed in Table 4, Annex D, of Equinox' financial proposal . . . .<sup>26</sup>

[Emphasis added]

59. PWGSC also stated the following:

*PWGSC believes* that the contracting officer used Evaluation Doc. No. 1 to estimate the Evaluated Cost of Equinox's proposal after attempting to correct for the errors described in paragraphs 57 and 63 of GIR No. 1. Evaluation Doc. No. 1 is properly viewed as a working document . . . *PWGSC understands* that the sum alleged to have been added to Equinox's financial proposal represents the additional cost, correcting for these errors, estimated by the contracting officer . . . PWGSC submits that there were no restrictions on PWGSC's right to declare Equinox's financial proposal non-compliant with mandatory requirements after attempts to quantify the proposal and after seeking clarifications.<sup>27</sup>

[Emphasis added]

60. In its initial inquiry, the Tribunal took exception to the inability of the government entities involved in this procurement (PWGSC and CSC) to locate documents pertinent to the procurement in question and the departments' apparent failure to retain such documents.

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26. GIR-1, para. 63.

27. GIR received April 14, 2008, for the inquiry in File No. PR-2006-045R, paras. 31, 32, 37.



61. In the present inquiry, the Tribunal requested the following additional documentation from the government entities:

All documents that are related to the technical and financial evaluation of both Equinox's and LGS's proposals, which are in the possession of either PWGSC or the Correctional Service of Canada. This would include all evaluators' notes, and score sheets, both individual and tabulated. This would also include all communications between PWGSC and CSC, and between PWGSC/CSC and Equinox or LGS up to the time of contract award.<sup>28</sup>

62. Material submitted to the Tribunal, though voluminous, was quite incomplete. For example, although seven evaluators were identified, evaluators' score sheets from only four of those evaluators were produced, all of them pertaining to the successful bidder. None of the seven score sheets from the same seven evaluators pertaining to the technical evaluation of Equinox's bid were provided. No credible explanations were provided of this discrepancy in records between two bidders, when the same evaluators were involved. According to PWGSC's submission, no score sheets for Equinox were located, nor did the Tribunal see direct evidence confirming this loss of official records. In the end, only four of the original score sheets were provided to the Tribunal.

63. The obligation of procuring entities to retain records is clearly spelled out in Article 1017(p) of *NAFTA*, which applies to this procurement and reads as follows:

each 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.

64. Further, Tribunal jurisprudence clearly indicates that the retention of documents is not merely desirable and helpful to the inquiry process but an obligation of any government entity involved in a procurement.

65. The Tribunal understands that evaluation score sheets may be filled in by hand, as in this instance. It also understands that, in this instance, final scoring was done by consensus, in which case the evaluators may have considered their individual handwritten score sheets to be redundant once their results had been incorporated into the consensus document. That view does not, however, explain why score sheets pertaining to the winning bid were retained while those pertaining to Equinox's bid were not retained by the same evaluators or in corresponding departmental files.

66. With respect to electronic documents, such as e-mails, it is the Tribunal's understanding that such items are normally recoverable. Therefore, records in electronic form, such as e-mails, should be at least as reliably available as paper records, if not more so.

67. The Tribunal's request for additional material elicited numerous documents that proved useful in the disposition of this complaint. At the same time, however, the response also included considerable speculation as to the course of events, hypothetical explanations for the disappearance of records and guesses as to the thought processes that led to the rejection of Equinox's bid. Speculation is argument, not evidence, and the Tribunal is struck by the lack of effort to support this speculation with better documentation and/or with statements by the individuals involved in the process.

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28. Tribunal's letter dated May 15, 2008.

68. None of this speculation or reasoning excuses the loss or destruction of the documents that should have been available for production as evidence. Such loss or destruction is clearly contrary to the obligation of procuring entities to retain records.

69. The absence of documents or portions of documents that clearly once existed is an impediment to the Tribunal's full examination of the circumstances surrounding the selection of the successful bidder and the rejection of unsuccessful bidders. Under the circumstances, the Tribunal cannot conclude that the records are unavailable because of wilful concealment. However, at the very least, it is because of carelessness in following the obligations of the applicable trade agreements. Where it is clear that records or portions of records are missing, the Tribunal concludes that this is contrary to trade obligations. It can only draw, at best, neutral inferences and, at worst, negative inferences.

70. In the present circumstances, and given the specific reasons cited by PWGSC for rejecting the Equinox financial bid, the Tribunal considers it appropriate to draw adverse inferences from this lack of reasonable explanation relating to the specific amounts calculated for each of the 18 separate items for which the quotation of a firm price was required by the RFP and, in particular, the additional amount added to Equinox's bid in the evaluation score sheet. It concludes that the manner in which PWGSC evaluated Equinox's financial bid, combined with PWGSC's inability or reluctance to explain the additional amount appearing on the evaluation sheet, supports the finding of a reasonable apprehension of bias.

71. The second ground cited by PWGSC for finding Equinox's financial proposal non-compliant was that no calculable single price was bid for the entity-wide licence in accordance with the terms contained in Appendix C of the RFP.

72. For reasons explained above, the Tribunal finds that the RFP did indeed require the quotation of a single price for an entity-wide licence (i.e. a licence covering all software required by the proposed POS system, including all current and future needs in all current and future CSC institutions).

73. However, while PWGSC insisted on strict compliance by Equinox with this mandatory requirement, it allowed LGS to offer a software licensing arrangement that was not entity-wide but, rather, limited to a specific number of institutions,<sup>29</sup> as reflected in a subsequent contract amendment. In November of 2005, LGS had already clearly indicated to PWGSC its inability to offer an entity-wide software licence. The Tribunal concludes that this indication, given during the financial evaluation process, constitutes knowledge on the part of PWGSC that LGS was unable to comply with this mandatory requirement. The contracting authority could not ignore that, during the same evaluation process, another bidder, from Equinox, was not afforded the same opportunity to change its proposed software licence arrangement.

74. In the Tribunal's view, the difference in treatment that PWGSC accorded to Equinox and LGS in respect of the same mandatory software licensing requirement in the RFP gives rise to a reasonable apprehension of bias.

75. Finally, taking into consideration that the financial evaluation processes for both bids were conducted in a relatively short period of time and relatively simultaneously by necessity of the pressure to finalize the bid process within 120 days (the period for which the bid price would remain valid), and when viewed in their entirety, various aspects of this bid process only serve to reinforce the view that it is reasonable for an apprehension of bias to arise from the unequal treatment of bidders.

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29. Protected Book 3C, e-mail of November 29, 2005.

76. As well the Tribunal observes again that the Contracting authority has the obligation to maintain all the pertinent information in a bid evaluation process, which it did not do.

### Conclusion

77. As a result of the foregoing analysis, the Tribunal, upon independent inquiry, concludes:

- (1) that Equinox's financial bid was non-compliant;
- (2) that PWGSC, notwithstanding its claim to the contrary, evaluated Equinox's financial proposal and added a significant amount, which it failed to explain definitively, thus giving rise to a reasonable apprehension of bias against Equinox;
- (3) that the evaluators allowed LGS to modify its bid after the expiry of the deadline for the receipt of bids, but did not extend the same treatment to Equinox, thus giving rise to a reasonable apprehension of bias against Equinox and in favour of LGS; and
- (4) that the non-compliance of Equinox's bid, combined with the earlier determination in File No. PR-2006-045 of the non-compliance of LGS's bid, leaves this tender without a single compliant bidder.

78. The Tribunal further concludes, in combining its earlier determination in File No. PR-2006-045 with the present determination, that the tender should have been cancelled and re-started.

### REMEDY

79. 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.

80. In view of the Tribunal's finding, at the time of contract award, PWGSC had no compliant bids. Since LGS was awarded the contract on December 11, 2005, PWGSC and CSC are already over three years into the life of a five-year contract. Accordingly, the Tribunal can only assume that a substantial portion of the required work has been completed. Therefore, taking into consideration paragraph 30.15(3)(e) of the *CITT Act*, 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. In this regard, the Tribunal takes note of its recommendation in File No. PR-2006-045 that PWGSC allow the current contract to continue, but that it not exercise any options, and that, should the requirement continue to exist after the initial contract period, PWGSC re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

81. The Tribunal's finding that the circumstances give rise to a reasonable apprehension of bias against Equinox and in favour of LGS reveals a serious deficiency in the procurement process within the meaning of paragraph 30.15(3)(a) of the *CITT Act*. Moreover, by failing to declare both bids non-compliant and instead awarding the contract to LGS, PWGSC deprived Equinox of the opportunity to bid on any re-tendering of the requirement, thus taking action prejudicial to Equinox's interests within the meaning of paragraph 30.15(3)(b). The Tribunal further finds that PWGSC's inability or unwillingness to respond fully to the Tribunal's information requirements was prejudicial to the efficiency, effectiveness and integrity of the procurement system, within the meaning of paragraph 30.15(3)(c).

82. The Tribunal therefore recommends that PWGSC compensate Equinox for its lost opportunity to profit on the provision of the POS system for CSC. The Tribunal notes that four proposals were received in response to the RFP. The Tribunal therefore recommends that the amount by which Equinox is compensated for its lost opportunity be equal to one quarter of the profit that it would reasonably have earned had it been the successful bidder for the provision of the POS system for CSC.

### Costs

83. The Tribunal awards Equinox its reasonable costs incurred in relation to these proceedings. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (Level 3). 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 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. As for the complaint proceedings, the matter was referred back to the Tribunal for determination and therefore required numerous submissions from parties. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$4,100.

### DETERMINATION OF THE TRIBUNAL

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

85. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal takes note of the recommendation contained in File No. PR-2006-045 that PWGSC allow the current contract to continue, but that it not exercise any options and that, should the requirement continue to exist after the initial contract period, it re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable trade agreements.

86. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC compensate Equinox for its lost opportunity by an amount equal to one quarter of the profit that it would reasonably have earned had it been the successful bidder for the provision of the POS system for CSC. The Tribunal recommends that Equinox and PWGSC negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Tribunal on the outcome.

87. Should the parties be unable to agree on the amount of compensation, Equinox shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of Equinox's submission to file a response. Equinox will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

88. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Equinox its reasonable costs incurred in relation to these proceedings, 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. 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.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Diane Vincent  
Diane Vincent  
Member

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Member