



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2007-053 and
PR-2007-054

Serco Facilities Management Inc.

v.

Defence Construction Canada

*Determination and reasons issued
Tuesday, December 18, 2007*

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IN THE MATTER OF two complaints filed by Serco Facilities Management 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 complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

SERCO FACILITIES MANAGEMENT INC.

Complainant

AND

DEFENCE CONSTRUCTION CANADA

**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 complaints are valid.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Serco Facilities Management Inc. its reasonable costs incurred in preparing its proposals for Solicitation Nos. GB18826 and GB18829. Serco Facilities Management Inc. shall file with the Canadian International Trade Tribunal, within 30 days of the date of this determination, a submission concerning the amount of the costs that were incurred. Defence Construction Canada will then have 7 working days after the receipt of this submission to file a reply submission. Serco Facilities Management Inc. will then have 5 working days after the receipt of the reply submission to file any additional submissions. The parties are required to file their submissions with the Canadian International Trade Tribunal and serve each other simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Serco Facilities Management Inc. its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by Defence Construction Canada. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the

amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Member: Ellen Fry, Presiding Member

Director: Randolph W. Heggart

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STATEMENT OF REASONS

1. On September 19, 2007, Serco Facilities Management Inc. (Serco) filed two complaints with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaints concerned procurements (Solicitation Nos. GB18826 and GB18829) by Defence Construction Canada (DCC) for construction services on behalf of the Department of National Defence (DND). Serco requested that the information that it had previously filed with the Tribunal, in File No. PR-2007-030, be included in these complaints.
2. Serco alleged that DCC improperly disqualified the tenders that it submitted in response to the above solicitations.
3. On September 25, 2007, the Tribunal informed the parties that it had accepted the complaints, as they 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 As the grounds of complaint were the same and the solicitations were closely related, the Tribunal decided to combine the two proceedings in accordance with rule 6.1 of the *Canadian International Trade Tribunal Rules*.³ On October 26, 2007, DCC submitted a Government Institution Report (GIR) that covered both complaints. On November 7, 2007, Serco submitted its comments on the GIR.
4. Given that there was sufficient information on the record to determine the validity of the complaints, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the written information on the record.

PROCUREMENT PROCESS

5. The invitations to tender that are the subject of the complaints were for the replacement of windows in Building 564 (Solicitation No. GB18826) and for renovations to Building 271A (Solicitation No. GB18829) of Canadian Forces Base Goose Bay. Solicitation No. GB18826 was made available through MERX⁴ on June 22, 2007, and closed on July 12, 2007. Solicitation No. GB18829 was made available through MERX on June 29, 2007, and closed on July 17, 2007.
6. On July 12, 2007, the bidding results for Solicitation No. GB18826 were made public, and Serco was announced to have submitted the lowest-priced tender. On July 18, 2007, DCC sought clarifications from Serco regarding Serco's corporate signing authorities and whether it had received and addressed in its proposal two amendments that had been issued. On July 18, 2007, Serco responded to DCC's questions and provided the necessary information. On July 24, 2007, Serco requested a status report from DCC.
7. On July 27, 2007, DCC advised Serco as follows: "... an award of a contract to Serco would clearly put [Serco] in a conflict of interest since Serco is also responsible for the preparation of the drawings, specifications, estimate and construction phase services for both projects." DCC indicated that Serco had a contract with the Department of Public Works and Government Services (PWGSC) (Solicitation No. W0153-01FF70/001/ZH), under which Serco had to provide assistance to DCC when there was work to be tendered. DCC advised Serco that, for future projects, including Solicitation No. GB18829, where Serco had been involved in the preparation phase of projects, it would not accept any tenders from Serco.

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

8. On July 31, 2007, Serco objected to DCC's "conflict of interest" decision and requested that DCC cite a clause or reference that forbade Serco from bidding on the solicitations at issue or any future contracts.

9. On August 13, 2007, Serco filed a complaint with the Tribunal (File No. PR-2007-030), alleging that DCC had improperly disqualified its proposals. On August 14, 2007, the Tribunal determined that Serco's complaint was premature, as DCC had not yet responded to Serco's objection.

10. On September 5, 2007, Serco received a facsimile, dated September 4, 2007, in which DCC informed Serco that it had confirmed with PWGSC that Serco was serving as the DND design authority for the project in question (Solicitation No. GB18826) and would be reviewing shop drawings and providing inspection and hand-over assistance. According to DCC, this meant that Serco, if awarded the contracts, would be not only performing the work but also overseeing and inspecting the project. DCC added that awarding a contract to any contractor who is known to be the design engineer of record and thus has a more detailed knowledge of the requirements of the project, would also be unfair to other potential suppliers. For these reasons, DCC confirmed that it would not accept future bids submitted by Serco where Serco had been directly involved in either the design or inspection of the work.

11. On September 19, 2007, Serco filed its complaints with the Tribunal.

TRIBUNAL'S ANALYSIS

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

13. Regarding the evaluation of proposals, subsection 506(6) of the *AIT* provides as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

14. Serco submitted that it is being prejudiced by DCC's application of after-the-fact criteria that were not published in the solicitation materials, despite the fact that DCC was aware of all relevant facts relating to Serco at the time that the solicitation materials were prepared. Serco claimed that it is evident from the GIR⁶ that DCC was prompted to take its current position by correspondence threatening legal action that had been sent to DCC by one of Serco's competitors after the bidding results for Solicitation No. GB18826 had been released.

15. Serco submitted that it was not prohibited from bidding on the contracts in question by any term of its existing contract with PWGSC or any term of the solicitations in question. It submitted that, in the absence of an express prohibition in its contract or in the solicitation documents, Serco could not be excluded on the basis of an alleged conflict of interest.

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

6. GIR at para. 46.

16. Serco submitted that the Tribunal had dealt with similar circumstances in *Dollco Printing (Dollco Corporation)*⁷ (Dollco), in which the Department of Canadian Heritage (CH) had developed a Request for a Supply Arrangement (RFSa) using the services of an outside contractor that was not working for Dollco at the time that the work was done, but was working for Dollco when the bids were submitted. Serco made reference to the following passages of the Tribunal's determination concerning the non-inclusion of a conflict of interest clause, such as can be found in PWGSC's Standard Acquisition Clauses and Conditions Manual:

... CH left the RFSa with no explicit means of making suppliers aware of what CH considered to be a conflict of interest. In the absence of any definition of conflict of interest in the tender documents, it is impossible for the Tribunal to determine what CH's intention was at the time that the RFSa was issued with respect to conflict of interest.

...

The Tribunal finds that CH's decision to disqualify Dollco's bid was not based on the wording of the RFSa or on any specific provision of the *AIT*. Rather, CH's decision was based on a criterion that was not clearly identified in the tender documents and, therefore, was in violation of Article 506(6) of the *AIT*. The Tribunal is of the view that any consequence of a possible conflict of interest and the definition of what constituted a conflict of interest had to be included in the RFSa for CH to legitimately disqualify Dollco's bid. Moreover, the Tribunal is of the view that, had CH believed that there was a possible conflict of interest, it had the option of remedying its failure to include a clause relating to conflict of interest by cancelling the procurement and issuing a new solicitation with the appropriate clause.

...

[Emphasis added by Serco]

17. Serco submitted that DCC, which would necessarily have been aware of the conflict of interest that it now alleges exists, took no steps when preparing the solicitation materials to incorporate conflict of interest provisions that would preclude Serco's participation. It submitted that, if DCC had been of the opinion that Serco was in a conflict of interest position, it:

- would have placed conflict of interest provisions in the solicitations;
- would have raised the conflict of interest issue with Serco as soon as Serco's bids were received;
- would not have opened either of Serco's bids; and
- would not have posted bidding results that included Serco's bid for Solicitation No. GB18826.

18. Serco submitted that all bidders had had access to the same drawings and specifications and that no one, including DCC, had alleged that the drawings were inaccurate or misleading or that they lacked sufficient information for the purposes of bidding. Regarding DCC's argument that the other bidders had detrimentally relied on Serco's cost estimates in pricing their proposals, Serco submitted that the range of prices of more than \$100,000 between the highest and the lowest bids in Solicitation No. GB18826 and the fact that all bidders, including Serco, were above the estimate for Solicitation No. GB18829 do not support that conclusion.

7. *Re Complaint Filed by Dollco Printing (Dollco Corporation)* (5 August 2003), PR-2003-016 (CITT).

19. Serco denied DCC's argument that it lacked a reasonable expectation that its proposals would be accepted. It argued that it would not expend resources to submit bids for contracts for which it had no reasonable expectation of winning. It submitted that the facts demonstrate that DCC itself did not consider that a conflict of interest might exist until after the bidding results for Solicitation No. GB18826 had been published and an unsuccessful competitor threatened litigation.

20. Regarding the three cases, *Averna Technologies Inc.*,⁸ *Spacesaver Corporation*⁹ and *Calian Ltd.*,¹⁰ that, according to DCC, supported its position regarding the issue at hand, Serco submitted that, in *Averna Technologies Inc.*, the Request for Proposal contained a specific clause regarding potential conflicts of interest and the consequences to the bidder (i.e. disqualification of its proposal) if it was found to be in conflict of interest. Serco also submitted that there were significant differences between *Spacesaver Corporation* and the current case, in which Serco submitted the lowest bids. In *Spacesaver Corporation*, the complainant was found non-compliant, and PWGSC made a proposal to pay compensation, as opposed to filing a GIR, and had therefore not defended against the complaint, and there had been no adjudication on the merits. Regarding *Calian Ltd.*, Serco submitted that it is distinguishable on the basis that the conflict of interest in that case was on the part of members of the Canadian Forces (i.e. the Government). Serco argued that the trade agreements regulate the conduct of the Government and not of private entities such as itself.

21. Based on the above, Serco requested that the Tribunal uphold its complaints and order DCC to evaluate the bids as specified in the respective solicitations or, in the alternative, that it be awarded its lost profits, or compensated for its lost opportunity to profit, or its bid preparation costs. It also requested its costs incurred in filing its complaints with the Tribunal.

22. DCC submitted that it possessed an implied, if not express, authority to reject Serco's proposals where to do otherwise would breach the non-discrimination provisions of the *AIT*, specifically Articles 501 and 504, which read as follows:

Article 501: Purpose

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

Article 504: Reciprocal Non-Discrimination

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:

- (a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own such goods and services; and
- (b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.

8. *Re Complaint Filed by Averna Technologies Inc.* (13 February 2006), PR-2005-035 (CITT).

9. *Re Complaint Filed by Spacesaver Corporation* (11 January 1999), PR-98-028 (CITT).

10. *Re Complaint Filed by Calian Ltd.* (21 July 2006), PR-2006-008 (CITT).

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

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

...

23. DCC submitted that Serco was in a conflict of interest and that excluding it from Solicitation Nos. GB18826 and GB18829 was necessary to protect the integrity of those solicitations. DCC also submitted that the Federal Court of Appeal has stated that the *AIT* should be interpreted in a manner consistent with the common law duty of fairness as it applies to the federal procurement contract process and that the mere apprehension of bias constituted a breach of the duty of fairness and, thus, the *AIT*.¹¹

24. DCC submitted that Serco was responsible for establishing the estimated contract values for both Solicitation Nos. GB18826 and GB18829 and that its knowledge of the cost components, and the information that it obtained while designing and engineering the work, gave it a distinct and unfair advantage over the other bidders. DCC submitted that, in the case of Solicitation No. GB18826, it is apparent that the other bidders, which bid between \$194,300 and \$297,500, relied on Serco's estimate of \$221,000 when establishing the value of their respective proposals, whereas Serco's proposal price was \$177,975. With respect to Solicitation No. GB18829, DCC submitted that Serco's estimate for the work was \$130,000, that its bid was \$149,000 and that the other bidders' proposals were between \$159,958 and \$194,000.

25. DCC referenced three previous Tribunal decisions which, it claimed, supported its arguments that Serco was in a conflict of interest and that it was proper for DCC to reject Serco's proposals: *Averna Technologies Inc.*, in which the Tribunal found that one bidder's proposal should have been excluded from consideration after that bidder was found to have assisted in preparing the RFP; *Spacesaver Corporation*, in which the Tribunal found that the Government had failed to apply its tendering procedures in a non-discriminatory manner when it hired a consultant who had a past relationship with the successful bidder to assist with the preparation of the specifications; and *Calian Ltd.* DCC submitted that, if a past relationship between a party preparing the tender specifications and a bidder creates discrimination, then, *a fortiori*, allowing the party that prepared the tender specifications to participate as a bidder in the tender also creates discrimination. In the case of *Calian Ltd.*, DCC submitted that the Tribunal found that circumstances amounting to a conflict of interest, and even an appearance of conflict of interest, constituted a violation of Article 504 of the *AIT*. DCC also submitted that, in *Calian Ltd.*, no provision of the solicitation documents expressly proscribed conflicts of interest.

26. DCC submitted that clause 6.1 of the Instructions to Tenderers found in Solicitation Nos. GB18826 and GB18829 read as follows:

Defence Construction (1951) Limited shall not necessarily accept the lowest or any tender.

27. DCC claimed that this clause advised all bidders that it retained the discretion to reject any tender. It argued that, having regard to the obvious conflict of interest, and with the knowledge of this clause, Serco lacked a reasonable expectation that its proposals would be accepted by DCC.

11. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* (2000), 264 N.R. 49, 26 Admin. L.R. (3d) 30 at para. 23.

28. In addition, DCC submitted that the Tribunal should not interfere with its decision unless that decision is found to be unreasonable based on the evidence or other information judged to be authentic. DCC submitted that, when considering the reasonableness of the contracting authority's decisions, the Tribunal should have regard to the information available to the authority and to whether it can reasonably support those decisions. DCC submitted that, in *Northern Lights Aerobatic Team, Inc.*, the Tribunal held that it would interfere only if the evaluation was unreasonable¹² and that, in quoting *Canada (Director of Investigation and Research) v. Southam Inc.*,¹³ the Tribunal also explained that a reasonable decision is one that is supported by a tenable explanation, even if the explanation is not found to be compelling by the reviewing body.¹⁴

29. Based on the above, DCC submitted that Serco's complaints should be dismissed and that DCC should be awarded its costs. It submitted that, if the complaint is upheld, and having regard to the obvious conflict of interest, Serco should not be provided a "remedy recommendation" or other costs or compensation in the form of complaint costs and bid preparation costs. DCC also submitted that, given the progress of the work performed under the contracts, it would be inappropriate for the Tribunal to recommend terminating those contracts and re-awarding them to Serco. It stated that, to protect the integrity of the solicitations and with regard to its broader interests as a contracting authority, it would not award the contracts to Serco.

30. The following relevant facts of the cases are not in dispute:

- Under its PWGSC contract, Serco assisted DND in the preparation of the drawings, specifications and contract value estimates for both solicitations.
- Under its PWGSC contract, Serco could act as the DND representative in overseeing the work in question and providing other contract administration services.
- Serco bid on both solicitations and, at the outset, at least one of its bids (Solicitation No. GB18826) was treated like any other bid. This is evidenced by the fact that, on July 12, 2007, Serco's bid price was included, as the lowest bid, on the list of bid evaluation results and, on July 18, 2007, DCC requested clarifications from Serco regarding its bid.
- Another bidder complained to DCC about Serco's participation, stating that it felt that Serco was in a conflict of interest.
- Serco was subsequently advised that its bids would not be considered.
- Neither party was able to identify for the Tribunal any clause, in either the solicitations in question or the PWGSC contract that specifically addresses this type of situation.

31. The Tribunal considers that Serco's role in the preparation of solicitations and its expected oversight role in contract administration would have created, at a minimum, a reasonable apprehension of bias on the part of DCC in relation to its evaluation of the bids. If a complaint had been filed in a timely way by another bidder, then that bidder may well have had a basis for a valid complaint before the Tribunal.

12. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at para. 51.

13. [2003] 1 S.C.R. 247 at para. 55.

14. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at para. 52.

32. However, DCC, as a government entity subject to the *AIT*, is required to conduct itself in compliance with the requirements of the *AIT* relative to *all* bidders, including, in this case, Serco. Subsection 506(6) of the *AIT* required DCC to “. . . 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.” As noted above, and agreed by both parties, the solicitation documents did not contain any specific provisions to indicate that a company in Serco’s position could not be the successful bidder.

33. The Tribunal does not agree that DCC is justified in disqualifying Serco through the use of the general clause stating that the lowest or any tender will not necessarily be accepted. If this clause were interpreted in the manner argued by DCC, it would appear to the Tribunal to permit DCC virtually unlimited latitude to disqualify solicitations for reasons inconsistent with the trade agreements. The Tribunal does not consider that the provisions of the *CITT Act* and the *Regulations* concerning procurements can reasonably be interpreted to give DCC this type of latitude to avoid the requirements of the *AIT*. The Tribunal considers that this clause should properly be interpreted to give DCC the power to cancel a tender, rather than to permit it to disqualify a specific bidder in a way that violates the requirements of the *AIT*.

34. Accordingly, the Tribunal finds that DCC’s decision to disqualify Serco was based on criteria that were not clearly identified in the solicitation documents and, therefore, was in violation of Article 505(6) of the *AIT*. For these reasons, the Tribunal finds that the complaints are valid.

35. The Tribunal notes that, in the circumstances of the case, DCC found itself in a situation where it may well have been impossible for it to follow *AIT* requirements for all bidders. However, the Tribunal believes that DCC could have avoided this situation by either: (a) including a clause in the solicitation documents clearly indicating that a company in Serco’s position was not eligible to bid; or (b) by cancelling the solicitations when Serco’s position was brought to its attention and subsequently re-tendering the requirements after adding an appropriate clause to the solicitation documents.

REMEDY

36. Having found that the complaints are valid, the Tribunal must now recommend the appropriate remedy to compensate Serco for the prejudice that it suffered.

37. In recommending a remedy, the Tribunal is governed by subsections 30.15(2), (3) and (4) of the *CITT Act*, which stipulate as follows:

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;

- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

38. The Tribunal notes that neither party has alleged that the other has acted in bad faith and that the evidence does not indicate that this has occurred. It is clear to the Tribunal that there was a deficiency in the procurement process and that Serco was prejudiced. As a result, the Tribunal is of the view that, even though DCC was attempting to preserve the integrity of the process, it did so in an inappropriate manner and was in fact responsible for putting that integrity at risk by failing to include appropriate conflict of interest provisions in its solicitation documents.

39. Given normal commercial considerations, it is highly unlikely that Serco would have expended resources in preparing and submitting bids if it knew that these bids were not going to be considered. As noted above, the Tribunal considers that there was nothing in the solicitation documents that would have led Serco to expect to be disqualified.

40. Despite the foregoing, the Tribunal is also of the view that normal commercial considerations should reasonably have led Serco to know that it was very possible that a company in its position would not be awarded the contract. Therefore, the Tribunal will not recommend compensation for lost profits or lost opportunity. However, with the objective of putting Serco back into the position in which it would have been had it been aware that it was not eligible to participate in the solicitations, and in accordance with subsection 30.15(4) of the *CITT Act*, the Tribunal awards Serco its reasonable costs incurred in the preparation of its proposals. The Tribunal's *Procurement Cost Guidelines (November 1999)* should be used by both parties in formulating their respective submissions.

Costs

41. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Serco its reasonable costs incurred in preparing and proceeding with the complaints.

42. The *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) bases the level of complexity of a complaint on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. According to the Tribunal's preliminary indication, the level of complexity of the complaints is Level 2. The level of complexity of the procurements themselves was medium, since they concerned a defined service project for maintenance and construction services. The level of complexity of the complaints was also medium, as the issue was complex and the circumstances were unusual. The level of complexity of the proceedings was low, as there were no interveners and no motions, and a public hearing was not required. Therefore, in accordance with the *Guideline*, the Tribunal's preliminary indication of the amount of the award is \$2,400.

DETERMINATION OF THE TRIBUNAL

43. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid.

44. Pursuant to subsection 30.15(4) of the *CITT Act*, the Tribunal awards Serco its reasonable costs incurred in preparing its proposals for Solicitation Nos. GB18826 and GB18829. Serco shall file with the Tribunal, within 30 days of the date of this determination, a submission concerning the amount of the costs that were incurred. DCC will then have 7 working days after the receipt of this submission to file a reply submission. Serco will then have 5 working days after the receipt of the reply submission to file any additional submissions. The parties are required to file their submissions with the Tribunal and serve each other simultaneously.

45. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Serco its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by DCC. The Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry
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Presiding Member