Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-079

Immeubles Yvan Dumais Inc.

v.

Department of Public Works and Government Services

Determination issued
Tuesday, June 10, 2008

Reasons issued
Friday, July 18, 2008

Canada

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IN THE MATTER OF a complaint filed by Immeubles Yvan Dumais 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

IMMEUBLES YVAN DUMAIS 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 compensate Immeubles Yvan Dumais Inc. for the profit that it lost in not being awarded the contract in question. The basis for calculating the lost profit will be the price submitted by Immeubles Yvan Dumais Inc. in its proposal in response to Solicitation No. 5224-529468 for the leasing of office space for Service Canada and the Canada Border Services Agency.

Based on this recommendation, the Canadian International Trade Tribunal recommends that Immeubles Yvan Dumais Inc. and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of the statement of reasons for 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, Immeubles Yvan Dumais Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of the statement of reasons for 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 Immeubles Yvan Dumais Inc.'s submission to file a response. Immeubles Yvan Dumais 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 Immeubles Yvan Dumais 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 1, and its preliminary indication of the amount of the cost award

is $1,000. 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.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

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STATEMENT OF REASONS

COMPLAINT

1. On January 29, 2008, Immeubles Yvan Dumais Inc. (Dumais) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] The complaint concerned the procurement (Solicitation No. 5224-529468) by the Department of Public Works and Government Services (PWGSC) for the leasing of office space for Service Canada and the Canada Border Services Agency (CBSA) in Baie-Comeau (Quebec).

2. Dumais alleged that the provisions of the solicitation were ambiguous, that its proposal had been improperly evaluated and that it had been misled by the information given to it by PWGSC.

3. As a remedy, Dumais asked that the contract award be reviewed based on unit costs taking into account that the rentable area is additional information that enables PWGSC to rent the optimum area in view of the available area and its client's requirements. In the alternative, it asked to be compensated for loss of net revenue associated with this 10-year lease, to be awarded its complaint and bid preparation costs and to be compensated for exemplary damages by PWGSC. Also, it requested that the Tribunal order PWGSC to postpone awarding any contract until the Tribunal determined the validity of the complaint.

4. On February 5, 2008, the Tribunal informed the parties that the complaint had been accepted, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[2] On the same day, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of the contract until it determined the validity of the complaint. On February 12, 2008, PWGSC certified that the procurement was urgent and that a delay in awarding a contract would be contrary to the public interest. On February 14, 2008, in accordance with subsection 30.13(4) of the *CITT Act*, the Tribunal issued a rescission of the postponement of award order. On March 12, 2008, PWGSC filed the Government Institution Report (GIR). On March 25, 2008, Dumais filed its comments on the GIR. On April 21, 2008, PWGSC requested that the Tribunal order Dumais to allow PWGSC to conduct an inspection of Dumais' building to confirm whether it complied with the requirements set out in the solicitation. On April 22, 2008, the Tribunal rejected PWGSC's request for an inspection, maintaining that it was not necessary for determining the validity of the complaint.

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 information on the record.

PROCUREMENT PROCESS

6. On October 9, 2007, PWGSC published a notice to solicit letters of interest on MERX,[3] for which the closing date of the "request for information" was November 2, 2007. According to PWGSC, six owners submitted letters of interest. Three owners, including Dumais, were invited to bid and received the solicitation in question. The solicitation stated that PWGSC was seeking offers pertaining to the leasing of office space in Baie-Comeau for a 10-year period.[4] The bid closing date was January 16, 2008. PWGSC indicated having received three bids.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Canada's electronic tendering service.
4. See "Lease Documentation Package for Lease Project Number 529468" [translation] at 2, 4.

7. On January 17, 2008, PWGSC's senior officer responsible for the solicitation prepared a document entitled "COMMENTS" in which he indicated that the bid from Headway Corporation Ltd. met PWGSC's mandate and was the most economical. That same day, Dumais filed an objection with PWGSC. On January 18, 2008, the senior officer e-mailed Dumais's objection to a PWGSC leasing consultant to obtain his comments. On or around January 22, 2008, the senior officer forwarded the comments from the leasing consultant to Dumais, stating that his recommendation in favour of Headway Corporation Ltd. had been accepted by his client and that Dumais's deposit cheque had already been returned.

8. On January 29, 2008, Dumais filed its complaint with the Tribunal.

PRELIMINARY MATTER—TRIBUNAL'S JURISDICTION

PWGSC's Position

9. In the GIR, PWGSC maintained that the Tribunal did not have jurisdiction to conduct an inquiry into this complaint, because the procurement was not in respect of a designated contract within the meaning of subsection 30.11(1) of the *CITT Act*, due to the fact that the procurement pertained to a real estate lease, which does not constitute goods or services covered by the *Agreement on Internal Trade*,[5] the *North American Free Trade Agreement*[6] or the *Agreement on Government Procurement*.[7]

10. PWGSC argued that the definition of the term "goods" in the *AIT* specifically excludes real property and that, despite the fact that *NAFTA* and the *AGP* do not define the term "goods", there is nothing to suggest that the negotiators had wanted to include real estate within the scope of these two agreements. PWGSC therefore argued that a real estate lease did not constitute "goods" within the meaning of the three trade agreements relevant to this case.

11. As for services, PWGSC submitted that, even though real estate leases are not specifically excluded by the *AIT*, they do not constitute "services" because this term does not lend itself to the leasing of real property. PWGSC added that this interpretation is supported by the fact that the Common Classification System (CCS), which is a complete list of services used in *NAFTA*, does not include the leasing of real property.

12. As for *NAFTA*, PWGSC submitted that Appendix 1001.1b-2-B, which contains the CCS for services being procured by the parties' entities, was a comprehensive list of all "services" covered by *NAFTA*. Since real estate leasing does not appear in the CCS, PWGSC concluded that such procurement is excluded from coverage under *NAFTA*.

13. As for the *AGP*, PWGSC submitted that Annex 4 to Appendix I to the *AGP* contained a comprehensive list of the services covered by that agreement and that, since real estate leasing services did not appear in that list, they were excluded from coverage under the *AGP*.

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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*].

Dumais's Position

14. Dumais submitted that Article 518 of the *AIT* defined "services" as being any service except those listed in Annex 502.1B and that, since real estate leases were not part of the excluded services in Annex 502.1B, they were therefore covered under Chapter Five. Dumais also submitted that paragraph 506(12)(l) expressly mentioned real property and that, as a result, this indicated that it was part of the services covered under the *AIT*.

15. With respect to *NAFTA*, Dumais submitted that Section B of Annex 1001.1b-2 listed excluded services and that it contained no mention of real estate leases. Dumais added that the temporary list of included services in Appendix 1001.1b-2-A included real estate services pertaining to owned or leased property (classified according to the services classification system of the United Nations Central Product Classification [CPC]).

16. With respect to the *AGP*, Dumais submitted that the list of included services in Annex 4 to Appendix I to the *AGP* included real estate services pertaining to owned or leased property (code 821 of the CPC) and real estate services on a fixed price or contract basis (code 822 of the CPC). According to Dumais, these codes included real estate leasing services.

Tribunal's Decision on Jurisdiction

17. Subsection 30.11(1) of the *CITT Act* sets out the general parameters for the initiation of a procurement complaint and states the following:

> Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

18. Section 30.1 of the *CITT Act* defines "designated contract" as follows:

> "designated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations.

19. As contemplated by the *CITT Act*, the *Regulations* set more precise parameters for the exercise of the Tribunal's jurisdiction. Subsection 3(1) of the *Regulations* states as follows:

> For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

20. Thus, to determine whether the Tribunal has jurisdiction to conduct an inquiry into the complaint filed by Dumais, it must determine whether the leasing of office space is a procurement of goods or services covered under the *AIT*, *NAFTA* or the *AGP*. If it turns out that this type of commercial activity is covered by the federal government's commitments under the *AIT* or Canada's commitments under *NAFTA* or the *AGP*, the Tribunal will have jurisdiction to conduct an inquiry into the complaint.

21. The Tribunal wishes to clarify that its jurisdiction is not challenged with respect to the application of the trade agreements to PWGSC as a federal institution, nor regarding the value of the procurement that is the subject of this complaint.

AIT

22. Article 502(1) of the *AIT* reads as follows:

> This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:
>
> (a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;
>
> (b) $100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B; . . .
>
> [Footnote omitted]

23. PWGSC submitted that real estate leasing did not constitute "goods" for the purposes of the *AIT*. Dumais did not challenge that position. The Tribunal agrees with PWGSC in this respect because, under the definition of "goods" in Article 518 of the *AIT*, only moveable property is included. Office space leasing does not constitute moveable property in the legal meaning generally attributed to the expression. As such, this activity does not constitute "goods".

24. With respect to services, Article 502(1)(b) of the *AIT* provides that all services, except those excluded by Annex 502.1B, are subject to the obligations listed in Chapter Five of the *AIT*. Similarly, Article 518 defines "services" as follows: ". . . all services including printing, but does not include those services excluded by Annex 502.1B". Therefore, there are not, *a priori*, any restrictions regarding the general intent of the term "services". The only restriction arises from the exclusions found in Annex 502.1B. A careful review reveals that real estate leasing services are not part of the list of services excluded by the *AIT*.

25. With respect to PWGSC's argument that real estate leases are not services because the CCS, which is a complete list of services, does not include real estate leasing, the Tribunal is of the view that there is no indication that the parties to the *AIT* wanted to limit its scope to the services listed in the CCS. There is no reference to the CCS in the definition of "services" in Article 518 or even in Annex 502.1B. Therefore, the descriptions in the CCS list are not relevant, in themselves, for determining the scope of the definition of "services".

26. The Tribunal would like to clarify that it has already stated in *P&L Communications Inc.*[8] that the trade agreements are legally separate and were negotiated by different parties and, therefore, the CCS cannot be determinative for the purposes of interpreting the *AIT*. Thus the Tribunal must defer to the common meaning given to "services" without taking into account any list in the CCS, as PWGSC suggests.

27. The *Nouveau Petit Robert* defines "*location*" (leasing) as follows: ". . . *Action de donner ou de prendre à loyer . . .*"[9] (. . . action of giving or taking possession through a lease . . .).

28. There is no question for the Tribunal that leasing office space is the action of giving or taking possession of office space through a lease and that, as such, this constitutes a service. Therefore, there is no question that the solicitation involved a service within the meaning of Articles 502 and 518 of the *AIT*.

8. (24 July 2001), PR-2000-073 (CITT).
9. *S.v.* "*location*".

29. In the Tribunal's opinion, Article 506(12) of the *AIT* confirms this view. This provision covers situations where a single supplier is able to meet the requirements of a procurement and provides that, in such a situation, an entity can use different tendering procedures from those described in paragraphs 1 to 10 of Article 506 in the stipulated circumstances. One of those circumstances, set out in Article 506(12)(l), is when it involves "the procurement of real property". Thus, this means that, if there is more than one supplier that is able to meet the requirements of a procurement dealing with real property, an entity must use the procedures described in paragraphs 1 to 10 of Article 506. Given that the definition of "goods" set out in Article 518 excludes real property, it therefore seems clear that the *AIT* must cover certain procurements involving services pertaining to real property. The Tribunal also wishes to add that the *AIT* covers procurements involving construction of a building under the definition of "construction". It would therefore be illogical, unless explicitly excepted, to exclude leasing of those same buildings.

30. In light of the foregoing, the Tribunal is of the view that it has, under the *AIT*, full and complete jurisdiction to conduct an inquiry into the grounds of complaint submitted by Dumais.

NAFTA

31. Article 1001(1) of *NAFTA* reads as follows:

> This Chapter applies to measures adopted or maintained by a Party relating to procurement:
>
> . . .
>
> b. of goods in accordance with Annex 1001.1b-1, services in accordance with Annex 1001.1b-2, or construction services in accordance with Annex 1001.1b-3; . . .

32. Similarly, as was the case for the *AIT*, the leasing of office space does not constitute "goods" within the meaning of *NAFTA*. There is no specific definition of "goods" in Annex 1001.1b-1 or elsewhere in *NAFTA*. However, Article 201(1) defines "goods of a Party" by referring to the meaning given to this expression in the *General Agreement on Tariffs and Trade* (*General Agreement*). Based on this definition, it seems clear that "goods", as used in *NAFTA*, means the trade goods covered by the *General Agreement*. However, the *General Agreement* includes a number of disciplines that apply to the international trade of goods in terms of movable property only. Leasing office space clearly does not constitute movable goods and, as such, does not constitute "goods" for the purposes of Article 1001(1)(b) of *NAFTA*.

33. The Tribunal is therefore left to consider whether the procurement covered by the solicitation involves the purchase of a service in accordance with Annex 1001.1b-2 to *NAFTA*. Section A of that annex provides some clarifications as to the types of services for which purchases are covered under Chapter 10 of *NAFTA*. It reads as follows:

> **Annex 1001.1b-2 Services**
>
> **Section A – General Provisions**
>
> 1. This Chapter applies to all services that are procured by the entities listed in Annex 1001.1a-1 and Annex 1001.1a-2, subject to:
>
> (a) paragraph 3 and Section B; and
>
> (b) Appendix 1001.1b-2-A, for the Parties specified in that Appendix.
>
> 2. Appendix 1001.1b-2-B sets out the Common Classification System for the services procured by the entities of the Parties. The Parties shall use this System for reporting purposes and shall update Appendix 1001.1b-2-B at such times as they mutually agree.
>
> 3. Annex 1001.1b-3 applies to contracts for construction services.

34. Paragraph 1 of Section A states that the disciplines in Chapter 10 of *NAFTA* apply to *all services* subject only to what is stated in paragraphs (a) and (b). No other restrictions apply, except the specific exclusions set out in the general notes in Annex 1001.2b,[10] which are not relevant in this case. The reference to paragraph 3 involves construction services and, as such, is not relevant to the present discussion. The same applies for the reference to Annex 1001.1b-2-A, which appears in paragraph 1(b), because it involves the temporary schedule of services for Mexico that was applicable up until July 1, 1995. However, Section B, which is referred to in paragraph 1(a), is indeed relevant because it involves services for which the procurements are specifically excluded from the application of Chapter 10.

35. In light of the forgoing, the Tribunal is of the opinion that the only restriction to the general intent of paragraph 1, Section A, Annex 1001.1b-2 to *NAFTA*, according to which Chapter 10 applies to *all services*, that is relevant to the current discussion is the one arising from Section B that deals with exclusions.

36. Regarding PWGSC's argument that Appendix 1001.1b-2-B (which contains the CCS) is a comprehensive list of all services covered by *NAFTA*, the Tribunal is of the opinion that there is nothing in the wording of paragraph 1 that seems to limit the scope of the general concept of "services" to the CCS. For example, there is nothing specifying that Chapter 10 applies to the services listed in the CCS, which would exclude services that are not listed in it, as PWGSC suggests.

37. Moreover, it is interesting to note that paragraph 2, Section A of Annex 1001.1b-2, states that the parties will use the CCS for *reporting* purposes. According to the Tribunal, this tends to confirm that the services listed in the CCS are only a guide and that it is not a comprehensive list. If the parties had wanted to exclude other services from the application of Chapter 10, they would have done so through the list set out in Section B of Annex 1001.1b-2. Therefore, the Tribunal is of the view that Chapter 10 of *NAFTA* applies to *all services* subject only to the exceptions in Section B.

38. To be excluded from the services covered by Chapter 10 of *NAFTA*, the leasing of real property would have to be included in the services listed in Section B of Annex 1001.1b-2. However, this activity is not listed. Clearly then, the leasing of office space is included in the services for which purchases may be subject to the disciplines in Chapter 10.

39. Thus, the Tribunal is of the view that it has jurisdiction, under *NAFTA*, to conduct an inquiry into the grounds of complaint submitted by Dumais.

AGP

40. Article I(2) of the *AGP* reads as follows:

> This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

41. As was the case for the *AIT* and *NAFTA*, the leasing of office space does not constitute "products" within the meaning of the *AGP*. Even though the *AGP* provides no definition of "products", the meaning that is usually given to this term by all of the disciplines that apply to the international trade of goods under the *General Agreement* excludes real property. Thus, the leasing of office space is not movable property and, therefore, does not constitute "products" for the purposes of paragraph I(2) of the *AGP*.

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10. Article 1001(2)(b) of *NAFTA* provides that Article 1001(1) is subject to the General Notes set out in Annex 1001.2b. Since Article 1001(1)(b) states that Chapter 10 applies to the purchase of services in accordance with Annex 1001.1b-2, the general notes in Annex 1001.2b create applicability conditions additional to those set out in Annex 1001.1b-2.

42. The Tribunal must therefore consider whether the procurement covered by the solicitation involves the purchase of a service subject to the disciplines in the *AGP*. In relation thereto, Annex 4 to Appendix I to the *AGP* lists the services that Canada wanted to subject to the *AGP*. It reads as follows:

> ANNEX 4
>
> Services
>
> . . . With respect to the terms of this Agreement, those services to be included are as identified within the document MTN.GNS/W/120 . . . .
>
> Canada offers to cover the following services with respect to the CPC services classification system:
>
> . . .
>
> 821 Real estate services involving own or leased property
>
> . . .
>
> ***Notes to Annex 4***
>
> 1. The General Notes apply to this Annex.
>
> . . .

43. The Tribunal notes that the specific exclusions set out in the above-mentioned General Notes are not relevant in this case.

44. According to Annex 4 to Appendix I to the *AGP*, Canada clearly decided to subject to the *AGP* disciplines real estate services pertaining to owned or leased property. These services are referred to in code 821 of the CPC services classification system. The services included in Canada's offer, including the services set out in code 821, were taken from the list identified within the MTN.GNS/W/120 document, referred to in Annex 4 above. It is important to note that this document is dated July 10, 1991.

45. To determine the nature of the services set out in code 821, the Tribunal consulted the detailed structure and explanatory notes published by the United Nations Statistics Division regarding code 821. Indeed, the explanatory note associated with code 82102, "Renting or leasing services involving own or leased non-residential property", which was in force as of July 10, 1991, reads as follows:[11]

> Renting or leasing services of industrial, commercial or other non-residential buildings or property by owners or leaseholders to others. Examples include factories, office buildings, warehouses, theatres and multiple use buildings which are primarily non-residential, as well as agricultural, forest and similar properties, and land for mineral or oil exploitation.

46. Under the CPC services classification system that was in place when the *AGP* came into force, it is clear that the services falling within the scope of code 821 included real estate leasing services. Thus, the Tribunal finds that the extent of these services was known by Canada when it decided to include code 821 in the schedule of services offered in Annex 4 above.

47. The Tribunal is therefore of the view that it has jurisdiction, under the *AGP*, to conduct an inquiry into the grounds of complaint submitted by Dumais.

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11. See http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=82102.

TRIBUNAL'S ANALYSIS

48. 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 *AIT*, *NAFTA* and the *AGP*.

49. Dumais submitted that PWGSC did not follow the rules set out in Article 506 of the *AIT* by publishing a solicitation in which the evaluation and weighting criteria, as well as parts of the contract significantly influencing the lease rate, were not well defined.

50. Dumais submitted that it expressed its disagreement on the interpretation of "rentable area" during the initial evaluation of tenders as well as in the following days. According to Dumais, the senior officer did not postpone his decision and did not suggest ways to confirm the validity of its complaint and look for a solution. According to Dumais, the solicitation stated only that, "*. . . for the purposes of the evaluation, the measurements quoted in the offer would be utilized and all costs calculated or estimated by the Lessee would be final . . .*" [emphasis added, translation][12]. Also according to Dumais, even though an area was specified in the solicitation, it was still described as "minimum" or "necessary". Dumais claims that the tender documents did not mention that the rentable area would simply be multiplied by the rate offered. Dumais submitted that the best meaning to ascribe to "rentable area" and "necessary area" could be long debated, but that the law provides for this situation. In this connection, it cited jurisprudence that states that, in the event of ambiguity, the wording of solicitations must be construed against the party that prepared it.[13]

51. Dumais submitted that, regarding the discussion about the meaning of "rentable area" and "necessary area", its interpretation is based on the definitions in Le Petit Larousse Illustré, which reads as follows: "*louable*" (rentable) "*. . . Qui peut être mis ou pris en location . . .*"(that which can be given or taken through a lease) and "*nécessaire*" (necessary) "*. . . Dont on a absolument besoin*; *essentiel*, *primordial . . .* (that which is absolutely needed, essential, primordial).14 Again according to Dumais, in this case, a condition for submitting a bid was that there be a rentable area of 562 square metres. This condition alone made it possible to comply with the offer.

52. Dumais submitted that, when preparing its bid, it asked for clarifications from the senior officer. According to Dumais, the information received was not clear and was incomplete, such that the deficiencies in the solicitation were not corrected, despite the specific requests concerning the poorly defined items. According to Dumais, the evaluation of bids was not done properly because the term "rentable area" was not interpreted consistently with the information received from PWGSC.

53. Dumais claimed that PWGSC had informed it that it would not be penalized if it offered an area 5 percent to 10 percent greater than the 562 square metres requested. Dumais claimed that it was in shock when, after bid opening, PWGSC told it that it was going to multiply the unit cost by the area offered. According to Dumais, because of the use of this calculation, a competitor's bid, with a higher unit cost but

12. See "Lease Documentation Package for Lease Project Number 529468" at 10.
13. *1243573 Ontario Inc. v. Canada*, 2004 FC 1658 (CanLII).
14. 2004, *s.v.* "*louable*" and "*nécessaire*".

smaller area offered, had been considered the lowest responsive bid.[15] According to Dumais, ambiguity resulting from the lack of thoroughness in preparing the solicitation and the answers to the requests for information were directly responsible for the contract being awarded to another bidder whose lease rate per square metre was higher than its own.

54. According to PWGSC, the instructions to bidders were clear about the fact that the evaluation would be based on the area offered and that it could not allow Dumais to amend its offer after bid closing.

55. PWGSC argued that reading the solicitation left no doubt about the fact that the evaluation would be based on the area offered: ". . . For the purposes of the evaluation, the measurements quoted in the offer will be utilized . . ." [translation].

56. In response to Dumais's argument that the information provided by PWGSC regarding the area was not clear and according to which, even though an area was specified, it was still described as "minimum" or "necessary", PWGSC responded that the term "minimum" appeared nowhere in the solicitation. The solicitation stated that the necessary area for the leased premises was ". . . five hundred and sixty-two square metres (562 sq. m.) . . ."[16] [translation].

57. PWGSC argued that the *Nouveau Petit Robert* defines "*nécessaire*" (necessary) as follows: ". . . *Dont l'existence, la présence est requise pour répondre au besoin . . .*"(the existence, presence of which is required for meeting the need).[17] PWGSC therefore required an area of 562 square metres. According to PWGSC, if Dumais offered more, it was to expect the extra square metres to be multiplied by the price per square metre stated in its offer.

58. PWGSC argued that an analysis of all the evidence showed that the senior officer had never told Dumais that the evaluation would be based solely on the price per square metre. According to PWGSC, it was an assumption on Dumais's part. It also argued that the senior officer had been in his position for over 27 years and that it was unlikely that he had given incorrect advice on an issue as central as the evaluation of a real estate lease. According to PWGSC, Dumais would not be penalized if it offered more area because its tender would still be considered. PWGSC is of the view that the solicitation clearly provides that the financial evaluation must be based on the area offered by the bidder.

59. Article 506(6) of the *AIT* provides, in part, that ". . . [t]he 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." Article 1015(4)(d) of *NAFTA* states that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation". Article XIII(3)(c) of the *AGP* provides the same thing. Thus, the Tribunal must determine whether the tender documents clearly identified the requirements applicable to the procurement and whether PWGSC acted according to the provisions of the trade agreements when it declared Dumais's proposal non-compliant.

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15. According to the GIR, the winning bid offered a price of $\$167.00/m^2$, whereas Dumais's bid offered a price of $\$162.57/m^2$. The total annual price in the winning bid was $93,854.00 (562 x $167.00) and the total annual price in Dumais's bid was $97,867.14 (602 x $162.57). If Dumais's argument is accepted, its total annual price will be $91,364.34 (562 x $162.57).
16. See "Lease Documentation Package for Lease Project Number 529468" at 3, "LEASED PREMISES" [translation].
17. *S.v.* "*nécessaire*".

60. Dumais's complaint alleges that its bid was incorrectly evaluated, given that the "rentable area" was interpreted inconsistently with the information in the solicitation and that which it claims to have received from PWGSC's senior officer. In fact, Dumais claimed to have been informed that it could not be penalized if it offered an area 5 percent to 10 percent greater than the minimum 562 square metres. PWGSC later denied that statement. The Tribunal cannot draw any conclusions about what PWGSC really stated. As a result, it will not consider this aspect and will defer to the content of the tender documents.

61. Part 1 of the "Lease Documentation Package for Lease Project Number 529468" contains instructions for bidders. Section 4 of these instructions describes the leased premises—subject of the desired leasing services—as follows:

> 4. **LEASED PREMISES**
>
> a) Category and amount of Leased Premises required:
>
> Basic office space: five hundred and sixty-two square metres (562 sq. m.) in a single block, divided over a maximum of two (2) consecutive floors, one part being preferably on the ground floor in usable area as defined and determined in accordance with the Measurement Instructions found in Part 3 of this Lease Documentation Package and in compliance with them.
>
> b) Leased Premises requirements are set forth in terms of usable area; however, Offerors shall quote rental rates on the basis of rentable area as defined and determined in accordance with the Measurement Instructions. In completing an Offer, Offerors shall set forth both the usable area and rentable area of the Leased Premises offered.
>
> [Translation]

62. Thus, Section 4 of the instructions to bidders describes the leased premises in terms of "leased premises required", namely, "basic office space" measuring 562 square metres.

63. Section 11 of the instructions to bidders deals with the evaluation and reads as follows:

> 11. **EVALUATION**
>
> a) The evaluation of Offers received is an on-going process and the Lessee reserves the right to terminate any further consideration of any Offer at any time during the Acceptance Period.
>
> . . .
>
> e) In carrying out the evaluation of the Offer,
>
> . . .
>
> *v) For the purposes of the evaluation, the measurements quoted in the Offer will be utilized and all costs calculated or estimated by the Lessee shall be final.*
>
> f) Notwithstanding the above, the Lessee reserves the unqualified right to carry out a comparative evaluation of all or any of the Offers and evaluate them based on considerations which in the sole opinion of the Lessee would yield to the Lessee the best value. This evaluation may be on such matters as, but not limited to, the quality of Leased Premises, the efficiency of the Leased Premises offered, building design and access, the degree to which the requirements are already met, or the time within which all requirements will be met.
>
> [Emphasis added, translation]

64. Subparagraph 11e)v) and paragraph 11f) give indications regarding the considerations applicable for the purpose of evaluating tenders.

65. Part 2 of the "Lease Documentation Package for Lease Project Number 529468", entitled "OFFER", had to be used by bidders to prepare their tender. Paragraph 2c) contains a table in which the bidder had to provide information regarding the area of the "basic office space offered". According to this table, the information should be provided in terms of "rentable" area and "usable" area. The table in question is reproduced below:

c) Basic office space offered:

FLOOR NUMBER		**AREA m^2**	
WHOLE	**PART**	**RENTABLE**	**USABLE**
TOTAL			

as identified on the attached and initialled plans.

[Translation]

66. Paragraph 2e) contains a table in which bidders had to provide information about the "annual rental rates offered". That information results in an "all-inclusive rate". The table is reproduced below:

e) Annual Rental Rates Offered:

LEASED PREMISES	**Rate per Rentable Square Metre**			
	BASIC RENT	**PROPERTY TAXES (MUNICIPAL AND SCHOOL)**	**BASIC UNIT OPERATING RATE ***	**ALL INCLUSIVE RATE ****
Basic office space				
Parking	$ per Space per Annum			
	Reserved continuous outdoor			
	Reserved daily outdoor			

* As defined in the Specimen Lease (Part 3 of this Lease Documentation Package).
** The correct arithmetic calculations will always take precedence over the amounts shown as the all-inclusive rate.

[Translation]

67. Finally, the Tribunal notes that, regarding the area, it is stated in Section 5, Part 2 of the "Lease Documentation Package for Lease Project Number 529468", that the amounts to be paid under the lease will be calculated based on the lesser area calculated by the lessee or the "rentable area" of the premises specified in the offer.

68. It appears from the documents produced in support of the GIR that the method used by PWGSC for weighting and evaluating the criteria involves a simple multiplication of the "rentable area" stated in paragraph 2c) in the bidders' offer by the "all-inclusive rate" specified in paragraph 2e) of the offer.[18]

69. The discussion surrounding the present dispute arises from the fact that the parties differ in opinion on the meaning to ascribe to "rentable area" and regarding the use that should be made of the information provided by the bidder in this respect for the purpose of applying the evaluation method.

70. PWGSC claimed that it was clear from the wording of subparagraph 11e)v) of Part 1 of the "Lease Documentation Package for Lease Project Number 529468" that the areas quoted in the tender were going to be used for the evaluation. PWGSC claimed that this is exactly what was done when evaluating Dumais's offer. Dumais submitted a rentable area of 602 square metres. That area was used for the multiplication done with the all-inclusive rate submitted by Dumais.

71. Dumais, on the other hand, claimed that there is nothing in the use of the term "rentable area" in paragraph 2c) of the quotation form and other expressions used in the tender documents that suggest that its offer would be evaluated by multiplying the rentable area offered by the rental price offered for that area.

72. Thus, it is important for the Tribunal, in this case, to determine whether the facts demonstrate, as Dumais's claims suggest, that the evaluation criteria in the tender documents were ambiguous.

73. To do so, the Tribunal must necessarily start with the wording in the table found at paragraph 2c) in Part 2 of the "Lease Documentation Package for Lease Project Number 529468". The expression "rentable area" is fundamental to this exercise. There is no definition of the expression provided in the tender documents. In such circumstances, the Tribunal must defer to the usual meaning of the terms considered. However, in this connection, the adjective "*louable*" (rentable)[19] means: ". . . *Qu'on peut louer* . . . " (that can be rented). Therefore, it amounts to saying that the common meaning to be given to "rentable area" is "area that can be rented".

74. For "rentable area", Dumais provided the area that it had available for rental purposes, i.e. 602 square metres. That area exceeded the area specified in Section 4 of the instructions to bidders as being the "necessary" area of the leased premises, i.e. 562 square metres. PWGSC used the 602 square metres for the purpose of applying the evaluation method, given that the 602 square metres was the area "quoted" within the meaning of subparagraph 11e)v). The quoted rentable area was multiplied by the all-inclusive rate provided by Dumais.

75. The expression "rentable area" must be interpreted in its context, namely, the content of the set of tender documents. However, this context indicates to the Tribunal that, if the tender documents require a potential supplier to provide the "rentable" area, meaning what it can rent out, it means that this information can be useful for evaluation purposes. It also seems logical, unless otherwise indicated, that the usefulness of this information is associated with determining the area to be leased.

18. GIR, Vol. II, tab 2, at 17, 18.
19. *Le Nouveau Petit Robert, s.v.* "*louable*".

76. This reasoning is supported by the reference in Section 4, which refers to the concept of "necessary area", a concept that, using the common meaning of "necessary",[20] suggests that it is completely within PWGSC's discretion to determine the area that it will rent, in view of the rentable area and the minimum area that it needs, i.e. 562 square metres. In other words, it seems reasonable, within the context of the tender documents, that the required information in terms of "rentable" area will be used to evaluate the best offer, taking into account a significant element of discretion regarding the price based on the area to be leased.

77. This way of viewing the use to be made of the requested information seems entirely relevant when considering that there is nothing in the tender documents implying that the larger the "quoted" rentable area, the more disadvantaged the supplier would be during the application of the evaluation formula suggested in subparagraph 11e)v). Although the subparagraph in question specifically states that the quoted areas will be used, it is completely silent as to the way in which this information will be used during the evaluation. There is nothing mentioned about the type of mathematical formula that will be used for the evaluation.

78. It is only when applying this evaluation formula—which is clearly described in the comments from PWGSC's senior officer in charge of the solicitation[21]—that is, after Dumais had submitted its offer regarding the rentable area, that it becomes obvious that there were interpretation differences regarding how the information provided in terms of rentable area was going to be used, as well as the disadvantages with Dumais's interpretation.

79. Article 506(6) of the *AIT* provides that tender documents must clearly indicate 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. It follows from this requirement that the way in which the required information will be used will be clearly stated in the tender documents.

80. In this instance, subparagraph 11e)v) stated that the "quoted areas" would be" "used" for evaluation purposes. As mentioned, there is nothing which specifies how it will be used. To the extent that the subparagraph is supposed to inform the potential supplier about the criteria that will be applied during the evaluation, it is not clear; it is ambiguous. As such, the Tribunal is of the view that it is reasonable for Dumais to think, based on the information in the tender documents, that the square metre unit cost resulting from the information submitted in its tender was going to be considered for the purpose of evaluating the tender.

81. Indeed, the Tribunal is of the view that the different concepts of area found in paragraph 2c) of Part 2 of the solicitation, in Section 4 and subparagraph 11e)v) of Part 1 of the "Lease Documentation Package for Lease Project Number 529468" implies that PWGSC reserved the capacity to use the rentable areas provided by potential suppliers in order to weigh the respective bids from the various offerors, taking into account, for example, the square metre unit cost. Nowhere is it indicated that such weighting was excluded and that the rentable area provided would be used strictly for multiplication with the all-inclusive rate.[22]

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20. According to *Le Nouveau Petit Robert*, this surface is the area ". . . whose existence, presence is required for addressing . . . the operation (of something). . . . **essential**, **desirable** . . ."[translation].
21. Complaint, tab 3.
22. GIR, tab 3.

82. The Tribunal is therefore of the view that there was ambiguity regarding the precise nature of the tender evaluation criteria. This ambiguity is clearly reflected in the parties' respective positions and, in the Tribunal's view, it arises from a lack of clarity in preparing the tender documents. In the past, the Tribunal has determined that a lack of clarity relating to the requirements or criteria of a solicitation must be dealt with in a way that gives the bidders the benefit of the doubt.[23]

83. The evidence shows that Dumais inquired about the relevance of its interpretation of "rentable area" and the potential impact that this interpretation could have on the outcome of the evaluation. As noted previously, it is not necessary to determine whether Dumais or PWGSC's senior officer is right about the actual nature of the information provided by PWGSC. However, it seems reasonable to believe that, if Dumais had understood from this information that it would have been disadvantageous for it to provide a rentable area of 602 square metres instead of 562 square metres, it would have elected to propose a more limited area.

84. In light of the foregoing, the Tribunal finds that the evaluation criteria of the solicitation do not meet the requirements of Article 506(6) of the *AIT*, Article 1015(4)(d) of *NAFTA* and Article XIII(3)(c) of the *AGP* and that the complaint is valid.

Remedy

85. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the harm caused to Dumais.

86. As a remedy, Dumais requested that the contract be awarded on the basis of unit costs. In the alternative, it requested compensation for loss of net income associated with this 10-year lease and for its bid preparation and complaint costs, and compensation for exemplary damages by PWGSC.

87. In recommending a remedy, the Tribunal is governed by subsections 30.15(2), (3) and (4) of the *CITT Act* which provide 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;

23. See, for example, *Re Complaint Filed by IHS Solutions Limited* (8 March 2004), PR-2003-067 (CITT); *Re Complaint Filed by Bell Canada* (13 July 1998), PR-97-054 (CITT).

> (*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.

88. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factor applicable to this case is that Dumais would have won the contract if the interpretation of the evaluation criteria selected by the Tribunal had been applied.

89. Considering that Dumais was proposing the lowest all-inclusive rental rate per unit, the Tribunal is of the view that, if Dumais's interpretation of the tender documents had been adopted during the evaluation, it would have been declared the lowest bidder.

90. The Tribunal notes that Dumais was caused significant harm. However, the evidence regarding the ground of complaint reviewed by the Tribunal does not indicate that PWGSC was acting in bad faith.

91. Had it not been for PWGSC's request for a rescission of the order postponing the award of the contract on the grounds that the request was urgent and that any delay would be contrary to the public interest, the Tribunal would have found it appropriate to recommend awarding the designated contract to Dumais.

92. Since this remedy is no longer a conceivable option, and in light of the foregoing, the Tribunal recommends that PWGSC compensate Dumais for the profit that it lost in being deprived of the contract. The basis for calculating the lost profit will be the price submitted by Dumais in its proposal in response to solicitation No. 5224-529468.

Costs

93. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), the Tribunal awards Dumais its reasonable costs incurred in preparing and proceeding with the complaint.

94. The Tribunal's preliminary view is that this complaint case has a level of complexity that corresponds to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The *Guideline* contemplates classification of the level of complexity of complaint cases based on the following three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings.

95. The complexity of the procurement itself was low, in that it involved routine services by a single party. Although high from a factual perspective, the complexity of the complaint was relatively low. Finally, the complexity of the proceedings was low, because there were no motions or interveners, and a hearing was not necessary. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $1,000.

TRIBUNAL'S DETERMINATION

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

97. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Dumais for the profit that it lost in not being awarded the contract in question. The basis for calculating the lost profit will be the price submitted by Dumais in its proposal in response to Solicitation No. 5224-529468 for the leasing of office space for Service Canada and the CBSA.

98. Based on this recommendation, the Tribunal recommends that Dumais and PWGSC negotiate the amount of compensation and, within 30 days of the date of the statement of reasons for this determination, report back to the Tribunal on the outcome. Should the parties be unable to agree on the amount of compensation, Dumais shall file with the Tribunal, within 40 days of the date of the statement of reasons for this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of Dumais's submission to file a response. Dumais will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

99. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Dumais 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 1, and its preliminary indication of the amount of the cost award is $1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member