



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2009-027

Maritime Fence Ltd.

v.

Parks Canada Agency

*Determination and reasons issued  
Monday, November 23, 2009*

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IN THE MATTER OF a complaint filed by Maritime Fence Ltd. 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**

**MARITIME FENCE LTD.**

**Complainant**

**AND**

**THE PARKS CANADA AGENCY**

**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, as a remedy, that the Parks Canada Agency compensate Maritime Fence Ltd. for the profit that it lost in not being awarded the contract in question. The basis for calculating the lost profit will be the total bid amount submitted by Maritime Fence Ltd. in its proposal in response to Solicitation No. 5P420-09-0289 and the total value of the actual work performed for the Parks Canada Agency under the contract that was awarded.

Using this as the basis, the Canadian International Trade Tribunal recommends that Maritime Fence Ltd. and the Parks Canada Agency 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, Maritime Fence Ltd. 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 Parks Canada Agency will then have 7 working days after the receipt of Maritime Fence Ltd.'s submission to file a response. Maritime Fence Ltd. will then have 5 working days after the receipt of the Parks Canada Agency's reply submission to file additional comments. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of compensation.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Maritime Fence Ltd. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Parks Canada Agency. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, 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 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.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On July 9, 2009, Maritime Fence Ltd. (MFL) 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. 5P420-09-0289) by the Parks Canada Agency (Parks Canada) for W-beam guardrail removal and installation and sign installation on wood posts on roads in Banff National Park, Kootenay National Park and Jasper National Park.

2. MFL alleges that it submitted the lowest-priced compliant tender in response to the solicitation and should have been awarded the contract by Parks Canada. MFL alleges that Parks Canada instead improperly and prejudicially waived irregularities found in the bid of another bidder, Les Clôtures Spécialisées (LCS), and allowed LCS to amend its bid so that it could be awarded the contract. MFL further alleges that Parks Canada's conduct breached the principles of openness, fairness, transparency and non-discrimination central to the tendering process, as reflected in the *Agreement on Internal Trade*.<sup>2</sup>

3. As a remedy, MFL requested that, in addition to being awarded its bid preparation and complaint costs, the Tribunal recommend that Parks Canada re-evaluate the proposals and that it be awarded the contract or, in the alternative, that it be compensated for its lost profit and expenses incurred.

4. On July 16, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup>

5. On August 24, 2009, Parks Canada filed the Government Institution Report (GIR) with the Tribunal. On September 14, 2009, MFL filed its comments on the GIR.

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

### PROCUREMENT PROCESS

7. On May 12, 2009, Parks Canada posted an Invitation to Tender (ITT) on MERX<sup>4</sup> with a closing date of May 27, 2009. The ITT required bidders to complete a "Bid and Acceptance Form" and Appendix 1 to the "Bid and Acceptance Form" (Appendix 1). Appendix 1 required bidders to fill in a "Unit Price Table" with unit and extended prices for four parcels of work identified in the ITT. To these prices was added an ITT-defined, fixed \$100,000 "Prime Cost Sum" amount to arrive at the bidder's "Total Estimated Amount". Bidders were then required to transfer the total estimated amount to a pre-defined field of the "Bid and Acceptance Form", to which a bidder-defined lump-sum amount was added to arrive at the bidder's "Total

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

2. 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*].

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

4. Canada's electronic tendering service.

Bid Amount”. According to Parks Canada, LCS submitted its tender on May 25, 2009, and MFL submitted a revised tender on May 27, 2009.<sup>5</sup>

8. According to the information contained in the complaint, on May 27, 2009, a representative from MFL attended the tender opening at which LCS’s tender was identified as the lowest priced and MFL’s tender was ranked as the second lowest, \$7,468 higher than LCS’s tender. According to Parks Canada, on May 28, 2009, the bid examination committee noticed a discrepancy in the transposition of the “Total Estimated Amount” from Appendix 1 to the “Bid and Acceptance Form”. In other words, the “Total Estimated Amount” at Appendix 1 was not the same as the “Total Estimated Amount” indicated on the “Bid and Acceptance Form”. As a result, the bid examination committee added \$100,000 to LCS’s “Total Bid Amount”. On May 28, 2009, MFL contacted Parks Canada and was advised that the LCS tender price was actually \$100,000 higher than originally thought and that MFL’s tender was the lowest priced. That same day, MFL e-mailed Parks Canada and requested the solicitation results.

9. Also on May 28, 2009, Parks Canada contacted LCS to clarify its “Total Bid Amount”. LCS indicated to Parks Canada that its “Total Bid Amount” was as it appeared in its May 25, 2009, tender (i.e. without the additional \$100,000). According to Parks Canada, LCS advised it that it had thought that the “Prime Cost Sum” amount found in Appendix 1 was the lump-sum amount that had to be filled in on the “Bid and Acceptance Form”. Later that same day, LCS sent Parks Canada a revised “Bid and Acceptance Form” correcting the discrepancy, which Parks Canada described as “. . . a clarification in the presentation of [LCS’s] Total Bid Amount. . . .”<sup>6</sup>

10. On June 2, 2009, Parks Canada responded to MFL’s request for the tender results by providing an e-mail to MFL that contained a listing of the bidders and their respective prices. This e-mail listed MFL as having the lowest-priced tender and also advised MFL that “[b]ids are still subject to mathematical check and technical review.”<sup>7</sup> According to MFL, it immediately localized equipment and purchased materials and inventory necessary for the contract.

11. On June 5, 2009, Parks Canada contacted MFL to advise it that the contract was to be awarded to LCS. On the same day, MFL sent a letter to Parks Canada requesting an explanation as to why the contract was being awarded to the second-lowest bidder. On June 8, 2009, MFL again requested that Parks Canada explain why it was no longer considered the lowest bidder. According to MFL, on June 9, 2009, Parks Canada informed it that the issue had been sent to Parks Canada’s legal department and that the contract had not yet been awarded. On June 12, 15, 22 and 23, 2009, MFL inquired as to the status of the award of the contract.

12. On June 29, 2009, Parks Canada advised MFL that the contract had been awarded to LCS for the price that had appeared in its tender as opened on May 27, 2009, i.e. without the \$100,000 added by the bid examination committee. MFL e-mailed its objection to Parks Canada that same day. On June 30, 2009, MFL requested a debriefing meeting with Parks Canada. On July 3, 2009, Parks Canada advised MFL that a debriefing letter would be mailed to it. That same day, Parks Canada e-mailed MFL, advising it that the bid examination committee had conducted an examination of the tenders and that LCS’s tender was determined to have the lowest total bid amount. On July 7, 2009, MFL claimed to have received Parks Canada’s rejection letter, dated June 29, 2009.

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5. MFL submitted its original tender on May 22, 2009, and then amended the tender on May 27, 2009, prior to the deadline for the submission of tenders to Parks Canada. These changes are not at issue in the complaint.

6. GIR, para. 12.

7. Complaint, tab 14.

13. On July 9, 2009, MFL filed its complaint with the Tribunal.

### TRIBUNAL'S ANALYSIS

14. 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. 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 must determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is only the *AIT*. According to the information in the complaint, the contract had an estimated value below the applicable monetary thresholds for construction services under Chapter Ten of the *North American Free Trade Agreement*,<sup>8</sup> the *Agreement on Government Procurement*<sup>9</sup> and Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*.<sup>10</sup> Accordingly, the Tribunal considers that those agreements do not apply.

15. Article 506(6) of the *AIT* provides the following:

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.

16. Appendix 1 of the "Bid and Acceptance Form" reads as follows:

#### Unit Price Table

- 1) The Unit Price Table designates the Work to which a Unit Price Arrangement applies.
  - (a) The Price per Unit and the Estimated Total Price must be entered for each item listed.
  - (b) Work included in each item is as described in the referenced specification section.

	Specification Reference	Class of Labour, Plant or Material	Unit of Measurement	Estimated Quantity (a)	Price per Unit GST/HST extra (b)	Estimated Total GST/HST extra c (a x b)
1	01 35 33	Weak post W-Beam guardrail (rail and posts) removal – Highway 93 South	meters	920	\$_____	\$_____
2	01 35 33	Weak post W-Beam guardrail (rail and posts) removal – Highway 93 North	meters	8,413	\$_____	\$_____
3	01 35 34	Weak post W-Beam guardrail (rail and posts) Supply and Installation (Highway 93 North)	meters	5,835	\$_____	\$_____

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).

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)>.

10. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.



4	01 35 34	Weak post W-Beam guardrail (rail and posts) Supply and Installation – Norquay road	meters	600	\$_____	\$_____
5	01 21 00	Prime Cost Sum	PC Sum	1	\$100,000.00	\$100,000.00
<b>TOTAL ESTIMATED AMOUNT:</b>						
<b>Transfer amount to subparagraph 1)(b) of BA03</b>						

Note: Bidders are reminded that it is their responsibility to include in their bid all work as described in the drawings and specifications. Pricing for work not accounted for in the Unit Price Table including but not limited to Mobilization, De-Mobilization, etc. is to be included in their Lump Sum Price at subparagraph BA03 a) and transferred to their Total Bid Amount.

17. The “Bid and Acceptance Form” reads as follows:

**BA03 THE OFFER**

1) **The Bidder offers to Her Majesty the Queen in right of Canada to perform and complete the Work for the above named project in accordance with the Bid Documents for the Total Bid Amount of**

**\$\_\_\_\_\_excluding GST/HST, which consists of**  
(to be expressed in numbers only)

- (a) the Lump Sum of \$\_\_\_\_\_for the Work that is not designated in the Unit Price Table and therefore subject to a Lump Sum Arrangement; and
  - (b) the Total Estimated Amount of \$\_\_\_\_\_for the portion of the Work that is subject to a Unit Price Arrangement. (Amount transferred from Appendix 1 – Unit Price Table).
- 2) Any errors in the extension of the Price per Unit and in the addition of the Estimated Total Prices in the Unit Price Table shall be corrected by Canada in order to obtain the Total Estimated amount.
- 3) Any errors in the addition of the amounts in subparagraph 1)(a) and 1)(b) of BA03 shall be corrected by Canada to obtain the Total Bid Amount.

18. The definition of the term “Prime Cost Sum” is found at page 14 of the specification that was attached as Annex A to the ITT and reads as follows:

**1.3 PRIME COST SUM**

- .1 Include in Contract Price a total Prime Cost Sum of \$100,000.00.
- .2 Do not include in the Contract Price, additional contingency allowances for products, installation, overhead or profit.
- .3 Prime Cost Sum provided for in the unit price table is not a sum due the Contractor. Rather, payment will be made against it for miscellaneous work not included in the unit price table under the General Conditions of the Contract.
- .4 Such work may include, but not be limited to:
  - .1 Removal of existing signs and posts
  - .2 Additional guardrail installation
  - .3 Additional sign installation

**.5 The Contract Price, and not Prime Cost Sum, includes Contractor's overhead and profit in connection with the Work.**

19. A breakdown of work items to be included in the lump-sum amount is found at page 34 of the same specification and reads as follows:

**1.10 REQUIRED CONTRACTOR SUBMITTALS**

...

**.2 Lump Sum Price Breakdown Table**

- .1 Submit the breakdown for work items to be included **in the Lump Sum Arrangement of the Invitation to Tender, Section B03 OFFER subparagraph 1a)** to the Departmental Representative for review within ten (10) days of Contract award. The breakdown submittal shall be as attached below.

<b>SECTION</b>	<b>LUMP SUM ARRANGEMENT BREAKDOWN</b>	<b>VALUE in \$</b>
01 25 20	Mobilization and Demobilization	
01 35 31	Traffic Accommodation	
01 35 32	Installation of Signs on Wood posts	

20. The "Special Instructions to Bidders", which formed part of the solicitation documents, indicated that the "General Instructions to Bidders" R2710T (2008-12-12), as set out in the Department of Public Works and Government Services' Standard Acquisition Clauses and Conditions Manual, were incorporated by reference. It reads as follows:

**GI01 (2008-12-12) Completion of Bid**

1) The bid shall be

- (a) submitted on the Bid and Acceptance Form provided through the Government Electronic Tendering Service (GETS) or on a clear and legible reproduced copy of such Bid and Acceptance Form that must be identical in content and format to the Bid and Acceptance Form provided through GETS;

...

- (c) correctly completed in all respects;

...

21. There is no question regarding either the value of MFL's proposal or the manner in which it was evaluated by Parks Canada. The issue is whether Parks Canada evaluated LCS's tender in accordance with the terms set out in the ITT and, thus, in accordance with the provisions of Article 506(6) of the *AIT*.

22. As the Tribunal has indicated in the past, it does not generally substitute its judgment for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair manner.<sup>11</sup>

11. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

23. The Tribunal finds that the ITT instructions regarding the formation of bidders' tenders were clear—costs were to be provided and totalled in the “Unit Price Table” and then transferred to the “Bid and Acceptance Form” with the “Prime Cost Sum” amount and the lump-sum amount being provided at the appropriate junctures. As the Tribunal has noted in previous cases, the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.<sup>12</sup> It is then the responsibility of the procuring entity, in this case Parks Canada, to ensure that it assesses all submitted proposals in accordance with the essential requirements of the solicitation.

24. The Tribunal notes that this ITT allowed bidders to pose questions of Parks Canada and provided a contact name for bidders for any questions regarding either technical or contractual enquiries. There is no evidence that any bidder contacted Parks Canada regarding the manner in which they were to fill out either Appendix 1 or the “Bid and Acceptance Form”. Clause GI01(1) of the “General Instructions to Bidders”, which was incorporated by reference in the ITT, advised bidders that their tenders had to be “. . . correctly completed in all respects . . .”, although the Tribunal does note that sections 2) and 3) of clause BA03 of the “Bid and Acceptance Form” allowed Parks Canada to correct a bidder's tender in the event that certain mathematical errors were made by that bidder.

25. Although MFL made multiple submissions regarding the facts of the case, the crux of its argument is that, by not properly transposing the “Total Estimated Amount” from Appendix 1 to the “Bid and Acceptance Form”, LCS's tender was not correctly completed in all respects and was too vague, which meant that it was non-compliant with the terms of the ITT and thus incapable of acceptance by Parks Canada. It also submitted that Parks Canada improperly allowed LCS to amend its “Bid and Acceptance Form” after the bid closing date and that Parks Canada's conduct in awarding the contract to LCS was contrary to the principles of openness, fairness, transparency and non-discrimination central to the procurement process as reflected in Article 501 of the *AIT*.

26. Parks Canada submitted that it awarded the contract to LCS on the basis of its “Total Bid Amount” as it stood on the bid closing date. It further submitted that it allowed LCS to make a post-close clarification of a *bona fide* error in the presentation of the numbers for the Total Bid Amount and that this did not amount to bid repair, as there was no material change to the tender—the “Total Bid Amount” remained the same.

27. Based on the information on the record, it is clear to the Tribunal that LCS's tender, as submitted on May 27, 2009, was not completed properly. Appendix 1 states that the “Total Estimated Amount” from the “Unit Price Table”, which included the fixed “Prime Cost Sum” amount of \$100,000, was to be transferred to subparagraph 1)(b) of clause BA03. LCS did not do this. As a result, when Parks Canada opened the tenders, it was faced with a situation where either LCS's Appendix 1 information was correct or its “Bid and Acceptance Form” information was correct. However, given the construct of the ITT, it was impossible for Parks Canada to tell which one was correct. This is a situation similar to that arising in the jurisprudence submitted by MFL, i.e. *Maystar General Contractors Inc. v. Newmarket (Town)*.<sup>13</sup>

28. In these circumstances, the Tribunal finds that LCS's bid, as submitted on May 27, 2009, was uncertain and thus not “. . . correctly completed in all respects . . .” as required by the terms of the ITT. As LCS's “Total Bid Amount”, which was a material term of the tender, could not be objectively ascertained by Parks Canada, its bid was incapable of acceptance.

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12. *Re Complaint Filed by Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT); *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT).

13. 2009 ONCA 675.

29. However, on May 28, 2009, LCS sent Parks Canada a revised “Bid and Acceptance Form” which purportedly corrected an error in the presentation of the numbers for the “Total Bid Amount”. While changes were made to the “Bid and Acceptance Form”, including the lump-sum amount, the “Total Bid Amount” remained the same. Parks Canada accepted these changes and later awarded the contract to LCS on the basis of the revised numbers.

30. The Tribunal notes that clause GI10 of the “General Instructions to Bidders”, entitled “Revision of Bid”, only allowed bidders to revise their bids on or before the date and time set for the closing of the solicitation. The Tribunal further notes that, while sections 2) and 3) of clause BA03 of the “Bid and Acceptance Form” allowed Parks Canada to correct arithmetic errors made by bidders, they did not allow LCS to make corrections or revisions of that nature. The changes made by LCS were not the result of a simple arithmetic recalculation.

31. Notwithstanding the foregoing, the Tribunal has recognized that post-close clarifications may be made as long as they do not amount to a substantive revision of the proposal. In *Mechron Energy Ltd.*, the Tribunal stated as follows:

The Department submits that, after bid opening, it is entitled to seek, receive and take into consideration clarifications from bidders in finalizing its evaluation of the proposals. The Tribunal agrees with this position. It is important, however, to have a clear understanding as to what constitutes a clarification. The Tribunal is of the view that a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.<sup>14</sup>

32. However, in this case, the Tribunal is of the view that the changes made by LCS to its “Bid and Acceptance Form” after the bid closing date did not amount to permissible clarifications. The Tribunal considers that changing the lump-sum amount on the “Bid and Acceptance Form” cannot be construed as a clarification of some existing aspect of LCS’s tender, but rather constitutes a material change to a fundamental element of the tender. Parks Canada argued that there was no material change to LCS’s tender, given that the “Total Bid Amount” remained the same. The Tribunal disagrees. While it is true that the “Total Bid Amount” remained the same, this was only made possible by changing some of the numbers for the “Total Bid Amount”, including the lump-sum amount. The Tribunal views these changes as substantive in nature.

33. Such a conclusion is, in the Tribunal’s opinion, consistent with the basic principle of transparency in the procurement process that is provided for in the *AIT*. Article 501 of the *AIT* reads as follows: “. . . the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers . . . in a context of transparency and efficiency.” As the Tribunal stated in *Bell Mobility*, “. . . if bidders were allowed to correct their bids in a substantive way, this would introduce an element of doubt in the supplier community as to the transparency of the competitive bidding process.”<sup>15</sup> This is especially true in this case, given the fact that there was a public tender opening and that the May 28, 2009, letter from LCS to Parks Canada, which included as an attachment a revised “Bid and Acceptance Form”, made it clear that LCS knew that its “Total Bid Amount”, as submitted on May 27, 2009, was the lowest.<sup>16</sup> Therefore, LCS knew exactly the impact that its “clarification” would have on the outcome of the procurement process. This is inherently unfair and works to undermine the principles espoused by the *AIT*.

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14. *Re Complaint Filed by Mechron Energy Ltd.* (18 August 1995), PR-95-001 (CITT), at 9.

15. *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT), para. 37.

16. GIR, tab 5.

34. Therefore, the Tribunal finds that Parks Canada should not have accepted LCS's revised bid and, because the "Total Bid Amount", as submitted on May 27, 2009, was uncertain and could not be objectively ascertained, Parks Canada should have declared LCS's original bid non-compliant.

35. The Tribunal notes that, while clause GI11(1) of the "General Instructions to Bidders" allowed Parks Canada to "... accept any bid, whether it is the lowest or not ...", it did not allow it to accept a non-compliant bid. Procurements by government institutions must, as a general rule, be conducted in accordance with the trade agreements, and the Tribunal does not consider that these types of clauses can reasonably be interpreted in a manner which would limit the application of the trade agreements.

36. The Tribunal therefore finds that Parks Canada contravened Article 506(6) of the *AIT* by failing to declare LCS's bid, as originally submitted, non-compliant.

37. In light of the foregoing, the Tribunal determines that MFL's complaint is valid.

### Remedy

38. Having found the complaint to be valid, the Tribunal must now recommend an appropriate remedy to compensate MFL for the prejudice that it suffered.

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

40. The Tribunal considers that, in order for the procurement process to achieve the purpose defined in Article 501 of the *AIT*, i.e. the establishment of 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”, bidders must have confidence that procurement entities will evaluate proposals in the manner described in the relevant procurement documents. Not to do so is, in the Tribunal’s opinion, a serious deficiency that prejudices the integrity and efficiency of the competitive procurement system and represents a serious deficiency in the procurement process. In this case, the most serious consequence to the procurement process resulted from Parks Canada’s violation of the *AIT*—the contract was awarded to the incorrect bidder.

41. The Tribunal notes that there was no evidence that Parks Canada was not acting in good faith. The Tribunal also notes that, according to the GIR filed on August 24, 2009, the work was almost completed at that time. It therefore considers that the contract has now been completed.

42. The Tribunal will recommend that Parks Canada compensate MFL for the profit that it lost in not being awarded the contract. The Tribunal notes that, given the nature of the work and the methodology of bidding, i.e. the inclusion of the “Prime Cost Sum” amount and lump-sum amount, the value of the work performed by LCS for Parks Canada may have increased as a result of additional work arising during the performance of the contract. There is no evidence on file to suggest that, if MFL had been properly awarded the contract, it would not have also performed any such additional work. Compensation should therefore be based on the total value of the actual work performed by LCS and not simply on the value of the contract when it was initially awarded.

43. The Tribunal notes that MFL requested that it be compensated for expenses incurred as a result of localizing equipment and purchasing materials and inventory necessary for the contract immediately upon being informed by Parks Canada that it was the lowest bidder. However, the Tribunal is not prepared to consider this request, as it is of the view that MFL was not obligated to incur costs on a contract that it had not yet been awarded.

### **Costs**

44. The Tribunal awards MFL its reasonable costs incurred in preparing and proceeding with the complaint.

45. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal’s preliminary indication is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Annex A of the *Guideline* (Level 1). The complexity of the procurement was low, since it concerned routine services on the part of a single supplier. The complexity of the complaint was low, since the issue was simple and involved solving a minor technical interpretation of the solicitation documents. Finally, the complexity of the proceedings was also low as, although the 135-day time frame was required, there were no motions or interveners, a public hearing was not required, and the parties were not required to submit additional material beyond the normal scope of the proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal’s preliminary indication of the amount of the cost award is \$1,000.

### **DECISION OF THE TRIBUNAL**

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

47. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Parks Canada compensate MFL for the profit that it lost in not being awarded the contract in question. The basis for calculating the lost profit will be the total bid amount submitted by MFL in its proposal in response to Solicitation No. 5P420-09-0289 and the total value of the actual work performed for Parks Canada under the contract that was awarded.

48. Using this as the basis, the Tribunal recommends that MFL and Parks Canada negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Tribunal on the outcome. Should the parties be unable to agree on the amount of compensation, MFL shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. Parks Canada will then have 7 working days after the receipt of MFL's submission to file a response. MFL will then have 5 working days after the receipt of Parks Canada's reply submission to file additional comments. The Tribunal reserves jurisdiction to establish the final amount of compensation.

49. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MFL its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Parks Canada. In accordance with the *Guideline*, 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 by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member