



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-066

Halkin Tool Limited

v.

Department of Public Works and
Government Services

*Determination issued
Monday, May 3, 2010*

*Corrigendum issued
Tuesday, May 18, 2010*

*Reasons issued
Tuesday, May 18, 2010*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

CORRIGENDUM..... ii

STATEMENT OF REASONS 1

 BACKGROUND.....1

 Complaint.....1

 Procurement Process2

ANALYSIS3

PWGSC’s Position.....4

 Halkin’s Position.....5

 Discussion of the Merits.....6

 Remedy and Costs9

DETERMINATION OF THE TRIBUNAL 10

IN THE MATTER OF a complaint filed by Halkin Tool Limited pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

HALKIN TOOL LIMITED

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 in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services cancel Solicitation No. W1895-105348/A and issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should the Department of Public Works and Government Services choose to require or refer to a particular design or type, it shall include words such as “or equivalent” in the requirement, as required by the applicable trade agreements.

Diane Vincent

Diane Vincent

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

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

IN THE MATTER OF a complaint filed by Halkin Tool Limited pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

HALKIN TOOL LIMITED

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

CORRIGENDUM

The first sentence of the second paragraph of the determination issued by the Canadian International Trade Tribunal on May 3, 2010, should read: “Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services cancel Solicitation No. W1985-105348/A and issue a new solicitation in accordance with the provisions of the applicable trade agreements.”

By order of the Tribunal,

Dominique Laporte
Secretary

Tribunal Member:	Diane Vincent, Presiding Member
Director:	Randolph W. Heggart
Investigation Manager:	Michael W. Morden
Counsel for the Tribunal:	Alain Xatruch
Complainant:	Halkin Tool Limited
Counsel for the Complainant	Dean Albrecht
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Ian McLeod Karina Fauteux

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

Complaint

1. On December 18, 2009, Halkin Tool Limited (Halkin) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a Request for Proposal (RFP) (Solicitation No. W1985-105348/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of a hydraulic press brake.

2. Halkin alleged that PWGSC based certain mandatory technical specifications on a competitor's product, thereby biasing the procurement in favour of that company. It also alleged that these mandatory technical specifications were not specified in terms of performance criteria, but rather made reference to a particular design or type of cylinder mounting. According to Halkin, this constituted a breach of Article 504 of the *Agreement on Internal Trade*,² Article 1007 of the *North American Free Trade Agreement*³ and Article VI of the *Agreement on Government Procurement*.⁴ Halkin requested that it be awarded the contract at issue.

3. On December 23, 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*.⁵ On December 29, 2009, the Tribunal issued a postponement of award of contract order, in which it ordered PWGSC to postpone the award of any contract until the Tribunal determined the validity of the complaint. On February 1, 2010, PWGSC filed the Government Institution Report (GIR) with the Tribunal. On February 11, 2010, Halkin filed its comments on the GIR.

4. On March 29, 2010, the Tribunal requested additional information from PWGSC. The Tribunal requested that PWGSC advise the Tribunal of its position with respect to certain points made by Halkin in its comments on the GIR. The Tribunal also asked about the number of bids received in response to Solicitation No. W1985-105348/A, the identity of the bidders and the model of product that they proposed, and, if the technical evaluation had been conducted, the number of bids that were found to be compliant with the mandatory technical specifications.

5. On April 8, 2010, PWGSC responded in part to the Tribunal's request. It noted that it could not fully respond to the Tribunal's request, since it had not yet determined which, if any, of the bids submitted were compliant with the requirements of the solicitation. On April 12, 2010, Halkin submitted its comments on PWGSC's reply.

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> [*AIT*].

3. *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*].

4. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

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

6. During the proceedings, counsel for Halkin, who had assisted Halkin in the preparation of its bid in response to the subject solicitation, requested access to PWGSC and third-party confidential information, specifically, the information provided by PWGSC in response to the Tribunal's request of March 29, 2010. On April 26, 2010, the Tribunal denied counsel for Halkin access to the aforementioned confidential information.⁶

7. 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 written information on the record.

Procurement Process

8. The RFP for the solicitation at issue in the complaint was made available through MERX⁷ on November 6, 2009. The bid closing date was initially set for December 21, 2009, but was ultimately extended to February 5, 2010.

9. On December 8, 2009, Halkin wrote to PWGSC, alleging that criteria 2.1.2 and 2.1.17 and the note associated with criterion 2.1.17, found at section 2 of Annex A to the RFP, were biased in favour of Cincinnati Incorporated (Cincinnati). On December 9, 2009, PWGSC advised Halkin that its objections and questions were being sent to the technical authority for consideration and that Halkin's questions, and the answers thereto, would have to be translated prior to being posted on MERX. Between December 9 and 17, 2009, Halkin wrote additional letters to PWGSC asking further questions regarding the requirement.

10. On December 18, 2009, Halkin filed its complaint with the Tribunal.

11. On December 23, 2009, amendment No. 2 to the RFP was published on MERX, answering Halkin's and other bidders' questions. On the same date, the Tribunal advised Halkin and PWGSC that the complaint had been accepted for inquiry.

12. On December 29, 2009, the Tribunal issued its postponement of award of contract order.

13. On January 14, 2010, Halkin asked PWGSC additional questions, the answers to some of which were posted in amendment No. 6 to the RFP on January 25, 2010. PWGSC advised Halkin that some of these questions had already been addressed in previous amendments to the RFP.

14. On February 5, 2010, the bidding period closed.

6. Counsel for Halkin noted that the following appropriate forms had been filed with the Tribunal: Form I—Notice of Participation (Party); Form II—Notice of Representation (Counsel); and Form III—Declaration and Undertaking (Counsel and Consultant). As such, counsel for Halkin argued that access should have been granted. Subsection 45(3) of the *CITT Act* confers on the Tribunal the discretion to refuse to grant disclosure of confidential information to counsel in its proceedings. Such discretion is normally exercised in instances where the Tribunal believes that the disclosure of confidential information to counsel is likely to make it available to a party that is represented by that counsel or any business competitor of the person to whose business the information relates. In this case, given the dual role as counsel and consultant to Halkin, the Tribunal considered the situation as creating, or as susceptible of creating, a reasonable apprehension that a disclosure of confidential information, whether voluntary or not, could occur and that Halkin could unfairly benefit from this information.

7. Canada's electronic tendering service.

ANALYSIS

15. 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 the validity of the complaint 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, are the *AIT*, *NAFTA*, the *AGP* and the *Canada-Chile Free Trade Agreement*.⁸

16. The RFP contains the following clauses, which are relevant to the issue in this case:

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION

...

2. Technical Evaluation and Method of selection

2.1 The following factors will be taken into account during the evaluation of each submission:

a) Technical conformity based on the technical specifications set forth at Annex A. A proposal will be rejected if the proposed equipment is a prototype or the model must undergo changes to conform. Therefore, the equipment must meet all the criteria upon tender and must use proven technology. Evidence that the proposed equipment is in use in other companies has to be provided.

b) Provide descriptive documentation for the purpose of analysis. Only the documents provided will be used to perform the technical evaluation. A proposal will be rejected if the supplier does not provide tangible evidence, ie the supplier must provide photographs of the equipment which permit to see everything in order to confirm that the equipment offered meets all the criteria. Take note that a drawing, sketch or outline will not be accepted.

...

Annex A Statement of Requirements Hydraulic Press Brake 1250 tons (US)

...

2. Mandatory Technical Specifications

The submitted proposal will have to meet all the following elements:

...

2.1 The press-brake system must have:
--

...

8. *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) [*CCFTA*]. Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008. As Halkin filed its complaint before the *Regulations* were amended to allow the Tribunal to determine whether a procurement was conducted in accordance with the requirements set out in the *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009), that agreement does not apply.

2.1.2 Clevis mounted hydraulic cylinders, and center line loading construction since this will confine operating stresses within the main housings to eliminated cylinders and pistons binding and therefore minimize leaks;

...

2.1.17 Cylinders with hardened and ground piston rods are clevis mounted with centerline loading;

Note: These requirements are there to confine operating stresses within the main housings as to eliminate cylinders and pistons binding and therefore minimizing cylinders and pistons leaks

...

PWGSC's Position

17. PWGSC submitted that Solicitation No. W1985-095302/A (not at issue in this complaint) was made available through MERX on January 16, 2009, for the same requirement as the solicitation at issue (i.e. a hydraulic press brake for DND's 202 Workshop Depot in Montréal, Quebec). The bidding period closed on March 2, 2009, and three bids were submitted, including one from Halkin. According to PWGSC, during the evaluation of the bids, as a separate matter, a DND employee, who had been tasked with setting up the plan for the workshop where the proposed press brake would be located, contacted by telephone the three companies that had submitted bids and asked each for the dimensions of their proposed machines.⁹ PWGSC submitted that, while these calls were of no consequence to the solicitation process, it decided that it would be proper in terms of perception to cancel the solicitation and re-tender the requirement.

18. PWGSC submitted that the mandatory requirements of the solicitation at issue are based on, and required in support of, DND's legitimate operational requirements. It submitted that the features in the two requirements at issue provide for a simplified design and increased structural flexibility, thereby leading to an anticipated reduction in long-term maintenance costs.

19. With respect to "clevis-mounted hydraulic cylinders", PWGSC submitted that, compared to a bolt-on design, the use of a clevis mounting provides flexibility in the structure of the machine and reduces the deforming of the side frames as a result of the compression forces exerted by the hydraulic ram. Regarding the "center line loading construction", PWGSC submitted that the placement of the cylinders directly over the ram in the centreline loading construction concept yields a simplified design that reduces the likelihood of ongoing maintenance issues, as compared with the rear-mounted rocker arm design that involves many more moving parts.

20. PWGSC submitted that, although the initial capital cost of a press brake using clevis mountings for the hydraulic cylinders will be greater than that of a bolted-on version, DND anticipated that long-term maintenance costs for a model using clevis mountings would be much lower. PWGSC claimed that it was DND's intent to acquire the proposed press brake for the long-term and to realize cost savings accordingly. It submitted that, as DND is not doing mass manufacturing, it typically keeps its equipment for a longer term than private industry and that, therefore, the equipment has less usage than in the private sector over the same length of time.

9. Halkin submitted that it was one of the companies that had bid on this first solicitation and that it was "absolutely false" that it had been contacted by any DND employee. As noted above, the first solicitation is not at issue in this complaint and, therefore, does not need to be addressed by the Tribunal in the context of the current inquiry.

21. PWGSC submitted that the requirements at issue are not specific to any particular design; they are generic in nature and are well understood by industry. It submitted that, based on publicly available information,¹⁰ at least three manufacturers produce press brakes that use clevis mountings and offer centreline loading construction and that these concepts are therefore not unique to products offered by Cincinnati.

22. PWGSC also noted that, in response to the previous solicitation process for the same requirement, Halkin had submitted a proposal for a press brake equipped with clevis mountings and centreline loading construction.

23. PWGSC submitted that the complaint should be dismissed and that PWGSC should be awarded its reasonable costs for responding to the complaint.

Halkin's Position

24. Halkin submitted that DND's operating requirements for the press brake must be defined in terms of performance and cannot be defined by any particular style of design. It submitted that all of DND's operational requirements could be met without the specific requirements for either clevis-mounted hydraulic cylinders or centreline loading construction. It claimed that DND's requirements have been formulated in such a way as to make them specific, non-generic and biased in favour of Cincinnati.

25. Regarding PWGSC's assertion about the clevis mounted hydraulic cylinders, Halkin submitted that the statement that the style of cylinder mounting somehow reduces deforming of the side frame has little basis in reality. It argued that, given the same tonnage and same shape and thickness of side frame, the style of hydraulic cylinder mounting can have little effect on side frame deflection. In fact, Halkin submitted that, depending on the exact details of the design, there will be an increased potential for side frame deformation at the bearing point where the clevis-mounted cylinder is attached to the side frame. Regarding PWGSC's assertion about the center line loading construction, Halkin submitted that centreline loading was never an issue in this proposal. It claimed that the issue is the assertion that clevis-mounted cylinders with centreline loading on this press brake will eliminate cylinders and pistons from binding.

26. Halkin submitted that PWGSC's claim that one design will cost more than another design cannot be substantiated without knowing the specifics of the cylinder design and side frame design and knowing how these parts will be manufactured. It submitted that there is no proof that a clevis-mounted cylinder design is more expensive to manufacture than a bolt-on cylinder design. Halkin submitted that it appears that DND is trying to "pre-justify" the higher cost of a Cincinnati press brake, which Halkin submitted is not justified by engineering design, but may simply be due to a higher profit margin for Cincinnati. Halkin submitted that, realistically, the long-term maintenance costs of one design over the other are unknown. It argued that the long-term performance of one design over the other is more about quality control, press brake application and frequency of maintenance than about the mounting configuration or the initial cost of the press brake. It submitted that clevis-mounted cylinders are not necessarily leak free, and it challenged PWGSC to demonstrate that DND keeps its equipment running longer than the machines running in private industry, either in terms of pure chronology or in terms of operating machine hours.

27. Halkin submitted that PWGSC's statement that the requirements are not specific to any particular design and are generic in nature is false. It submitted that it is well understood by the industry that Cincinnati makes a press brake using clevis-mounted cylinders, that this design feature is part of its product

10. GIR, exhibit 17 at 7-16.

differentiation and that it markets it heavily. Regarding PWGSC's statement that there are three manufacturers that use clevis-mounted cylinders in some of their products, Halkin argued that all other high-accuracy, high-quality manufacturers use a bolt-on style of cylinder mounting. Halkin submitted that the two manufacturers other than Cincinnati mentioned by PWGSC that use clevis mountings and centreline loading construction in their press brake design are not alternatives to the Cincinnati machine because they fail to meet some of the other mandatory technical specifications and that none of their machines would be considered as viable options for this procurement.¹¹

28. Halkin further submitted that sections 2.1a) and b) of Part 4 of the RFP provided that a proposal would be rejected if the press brake "... [undergoes] changes to conform ...". Halkin argued that this is completely unrealistic and not in keeping with standard industry practice in the machine tool industry. It submitted that press brakes of this size are not sitting in warehouses waiting to be sold and that they are manufactured according to customer requirements and the customer's selection of available options and accessories. According to Halkin, even though it has sold over 10,000 press brakes, the particular combination of tonnage, machine length, options and accessories required by DND may not have been previously assembled. In its comments on the GIR, Halkin argued that section 2.1 of Part 4 of the RFP was another attempt to limit the specification to only one possible manufacturer.¹²

29. Halkin submitted that the mandatory technical specifications need to be amended to remove the requirement for clevis-mounted cylinders or that the words "or equivalent" need to be added as required by Article 1007 of *NAFTA*. As an alternative, Halkin submitted that the bias could be removed by modifying the requirement set out in section 2.1 of Part 4 of the RFP.

Discussion of the Merits

Are the Mandatory Technical Specifications Improperly Formulated?

30. Article 1007 of *NAFTA* provides as follows:¹³

...

2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:
 - a. specified in terms of performance criteria rather than design or descriptive characteristics; and
 - b. based on international standards, national technical regulations, recognized national standards, or building codes.

11. On pages 8 and 9 of its comments on the GIR, Halkin includes the specific reasons for which it believed the other two manufacturers' machines would not meet certain of the other mandatory requirements.

12. The Tribunal is limited to inquiring into the grounds of complaint identified by the complainant in the complaint itself. In instances where, as part of the complaint process, the complainant becomes aware of new grounds of complaint, it may file a new complaint in accordance with subsection 30.11(2) of the *CITT Act* and the conditions set out in the *Regulations*. In this case, the Tribunal considered that Halkin was aware of this alleged ground prior to filing its original complaint on December 18, 2009. This potential ground of complaint, therefore, was not considered by the Tribunal in rendering its final determination.

13. Nearly identical provisions are also found at Article *Kbis-07* of the *CCFTA* and Article VI of the *AGP*. The *AIT* does not contain a similar provision.

3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.

31. Halkin submitted that the mandatory requirements for the solicitation at issue were not specified in terms of performance criteria, but rather made reference to a particular design or type, namely, clevis-mounted hydraulic cylinders and centreline loading construction. PWGSC, on the other hand, submitted that the mandatory requirements support DND’s legitimate operational requirements and are generic in nature and not specific to any particular design.

32. In the Tribunal’s opinion, the requirements set out in mandatory technical specifications 2.1.2 and 2.1.17 refer to a particular design or type and cannot be construed as being generic in nature. It is clear to the Tribunal that, in making reference to clevis-mounted hydraulic cylinders and centreline loading construction, PWGSC was making reference to a design or to descriptive characteristics for the product that it was procuring rather than specifying the performance that it was seeking to achieve through the particular design, even if this type of design is well known in the industry.

33. In its GIR, PWGSC included a letter dated January 28, 2010, signed by a DND employee (a professional engineer) who was involved in establishing the technical specifications for the solicitation at issue in which the employee claims that the concepts of clevis-mounted hydraulic cylinders and centreline loading construction are not specific to any particular design. However, the Tribunal notes that, despite this claim, the letter includes the following passages: “. . . the use of the clevis mounting creates a superior design . . .” and “[t]he placement of the cylinders directly over the ram in the centre-line loading construction concept yields a simplified design . . .” This only serves to reinforce the Tribunal’s belief that the requirements set out in mandatory technical specifications 2.1.2 and 2.1.17 refer to a particular design or type.

34. By not including words such as “or equivalent” in these specifications, as required by Article 1007(3) of *NAFTA* and the similar provisions of the other applicable trade agreements,¹⁴ hydraulic press brakes based on other designs, which can potentially meet DND’s operational requirements, are precluded from being considered by PWGSC. The Tribunal finds that such an omission creates or has the effect of creating an unnecessary obstacle to trade.

35. Therefore, in light of the foregoing, the Tribunal determines that Halkin’s complaint, insofar as it relates to the improper formulation of the mandatory technical specifications, is valid.

Are the Mandatory Technical Specifications Biased in Favour of a Supplier?

36. Article 504(3) of the *AIT* provides that measures which are inconsistent with the non-discrimination objectives of federal government procurement include the following:¹⁵

- (b) the biasing of technical specifications in favour of, or against, particular goods or services . . . or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter.

14. Article *Kbis*-07.3 of the *CCFTA* and Article VI(3) of the *AGP*.

15. *NAFTA*, the *AGP* and the *CCFTA* do not contain similar provisions.

37. Halkin submitted that the mandatory technical specifications at issue are biased in favour of products manufactured by Cincinnati and that press brakes produced by the two other manufacturers mentioned by PWGSC as using clevis mountings and centreline loading construction fail to meet some of the other mandatory technical specifications of the solicitation. PWGSC, on the other hand, submitted that at least three manufacturers produce press brakes that use clevis mountings and offer centreline loading construction and that these concepts are therefore not unique to products offered by Cincinnati.

38. While the Tribunal has already determined that the requirements set out in mandatory technical specifications 2.1.2 and 2.1.17 refer to a particular design or type, this does not automatically result in a finding that these specifications are biased in favour of a particular product or the supplier of such a product.

39. In *FLIR Systems Ltd.*, the Tribunal stated that design-based specifications are not necessarily unfair or discriminatory. It stated as follows:

FLIR has made extensive submissions that design-based specifications versus performance-based specifications, by and of themselves, amount to bias. The Tribunal notes that, contrary to NAFTA, the difference between design- and performance-based specifications is not a distinction expressly set out in the AIT. Furthermore, in the Tribunal's view, specifications based on design criteria are not necessarily unfair or discriminatory.¹⁶

40. Having carefully examined all the evidence, including the additional information received from PWGSC on April 8, 2010, the Tribunal is not convinced that the mandatory technical specifications are biased in favour of Cincinnati. The Tribunal notes that, in exhibit 17 to the GIR, DND wrote to PWGSC explaining that, while it had used language found in Cincinnati's literature when drafting the technical specifications, it had done so in a manner that reflected DND's operational needs and was not intended to preclude competition. DND wrote as follows:

In preparing the technical requirements for the Solicitation, I did refer to descriptive material produced by Cincinnati but the material at issue referenced and incorporated generic concepts and language. In identifying and drafting the technical requirement for this Solicitation, it was and remains my intent that the requirements be generic in name so as to reflect the operational requirements of DND in order to ensure a responsive and competitive process.¹⁷

41. The Tribunal further notes that exhibit 17 of the GIR includes product information from three manufacturers, including Cincinnati, that use clevis-pin designs, in which it appears that the same concept is described in a very similar manner in all of the manufacturers' literature.

42. Cincinnati's product literature reads as follows:

Clevis-mounted cylinders and centerline loading confine operating stresses within the main housings to eliminate cylinder and piston binding.^[18]

43. Betenbender Manufacturing Inc.'s product literature reads as follows:

Clevis mounted cylinders eliminate cylinder binding by reducing the possibi[lity of] oil leaks.^[19]

16. *Re Complaint Filed by FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT) at 15.

17. GIR, exhibit 17 at 4.

18. *Ibid.*, attachment 2 at 2.

19. *Ibid.*, attachment 2 at 4.

44. Hydrapower International Inc.'s product literature reads as follows:

Side frames capable of full off center load. Centerline loading on side frames and tool centerline
Self-aligning clevis mounted cylinders with hard chrome piston rods.

Construction Features

The hydraulic cylinders are connected to the RAM with hardened, self aligning, spherical thrust bearings which provide exceptionally long service without the need for lubrication. Deflections and overloads in the frame and housing have no effect on cylinder and slide alignment.^[20]

45. Although Halkin challenges whether the two manufacturers other than Cincinnati could meet the technical requirements of the RFP, the Tribunal can find no evidence, other than Halkin's submissions, that any of these manufacturers' products would not meet the technical requirements of the RFP and be proposed by a bidder. In addition, the information received from PWGSC on April 8, 2010, indicates that press brakes from other manufacturers were also proposed by bidders in the solicitation at issue. The Tribunal is of the view that bidders do not, as a practice, engage in responding to RFPs unless they have a reasonable expectation of being successful. This leads the Tribunal to conclude that, although the absence of the words "or equivalent" in the mandatory requirements created an unnecessary obstacle to trade, there is no reasonable indication that the technical specifications were biased in favour of Cincinnati.

46. Therefore, in light of the foregoing, the Tribunal determines that Halkin's complaint, insofar as it relates to the alleged biasing of technical specifications in favour of Cincinnati, is not valid.

Remedy and Costs

47. Having found the complaint to be valid in part, the Tribunal must now recommend an appropriate remedy.

48. In this regard, subsections 30.15(2) and (3) of the *CITT Act* 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;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;

20. GIR, exhibit 17, attachment 2 at 5.

- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

49. The Tribunal considers that not framing requirements in accordance with the applicable trade agreements represents a serious deficiency in the procurement process. The Tribunal also believes that such a serious deficiency prejudices the integrity and efficiency of the competitive procurement system. However, in this case, no contract was awarded, and the Tribunal finds no evidence to suggest that the technical authority was not acting in good faith when it drafted the statement of requirements.

50. The Tribunal therefore recommends that PWGSC cancel the solicitation and, if the requirement still remains, that it issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should PWGSC choose to require or refer to a particular design or type, it shall include words such as “or equivalent” in the requirement, as required by the applicable trade agreements.

51. Halkin did not request its costs incurred in preparing and proceeding with the complaint. Therefore, in accordance with Tribunal practice, none shall be awarded.

DETERMINATION OF THE TRIBUNAL

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

53. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC cancel Solicitation No. W1985-105348/A and issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should PWGSC choose to require or refer to a particular design or type, it shall include words such as “or equivalent” in the requirement, as required by the applicable trade agreements.

Diane Vincent
Diane Vincent
Presiding Member