



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2010-012

BRC Business Enterprises Ltd.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Monday, September 27, 2010*

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IN THE MATTER OF a complaint filed by BRC Business Enterprises Ltd. 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**

**BRC BUSINESS ENTERPRISES LTD.**

**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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by BRC Business Enterprises Ltd. 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 in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

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Complainant: BRC Business Enterprises Ltd.

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## STATEMENT OF REASONS

### COMPLAINT

1. On May 14, 2010, BRC Business Enterprises Ltd. (BRC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a Request for Volume Discount (RVD) (Solicitation No. EC015-103359/B) by the Department of Public Works and Government Services (PWGSC) for the supply and delivery of freestanding furniture components for the Public Service Pension Centre in Shediac, New Brunswick. The RVD was issued pursuant to National Master Standing Offer (NMSO) No. E60PQ-080001.

2. BRC alleged that PWGSC improperly evaluated its proposal and unfairly deemed it non-compliant. More specifically, BRC alleged that PWGSC failed to evaluate its proposal in accordance with the express terms of the solicitation documents and that it ignored vital information provided by BRC in connection with its proposal. According to BRC, its proposal was compliant with the requirements of the solicitation and offered the lowest price, and it therefore should have been awarded the contract.

3. As a remedy, BRC requested that the Tribunal recommend that the contract awarded to Next Wood Inc. (Next Wood) be terminated and that BRC be awarded the contract. In the alternative, BRC requested that it be compensated for the profit that it lost in not being awarded the contract. BRC also requested that, in either case, it be awarded its reasonable costs incurred in preparing and proceeding with the complaint.

4. On May 19, 2010, 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>2</sup> On June 28, 2010, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On July 8, 2010, BRC filed its comments on the GIR.

5. 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

6. On October 15, 2008, PWGSC issued a Request for a Standing Offer (RFSO) (Solicitation No. E60PQ-080001/B) to establish NMSOs for the supply, delivery and installation of selected freestanding furniture. The RFSO identified four categories of freestanding office desk products and components, with category 4 pertaining to “Height Adjustable (Seated Position)” furniture. Attached as part of Annex B to the RFSO was a required “basket of goods” for each category consisting of a list of specific furniture types reflecting the Crown’s most likely identifiable requirements. Included in the category 4 “basket of goods” was a “[r]ectangular work surface, user height adjustment, no modesty panel, with one (1) grommet” with a depth of 24 inches and a width of 30 inches.

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

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

3. S.O.R./91-499.

7. Bidders were required to submit proposals that offered technically responsive products that met the descriptions of furniture types identified for the “basket of goods” in at least one category. As part of the mandatory requirements of the RFSO, bidders were also required to submit test reports for their proposed furniture products, as well as copies of their commercial catalogues and price lists. Each successful bidder would be issued an NMSO with respect to its proposed “basket of goods” for a particular category.

8. In addition to the required “basket of goods”, the RFSO also provided that bidders could submit, for evaluation and approval, “optional additional products” of a type falling within a category but not included in the furniture types listed in the “basket of goods” for that category. The RFSO was subsequently amended to allow bidders until March 31, 2010, to submit these proposed new products, along with supporting test reports. If approved, these “optional additional products” would be added to the supplier’s NMSO and would be available for purchase by PWGSC.

9. On December 2, 2008, BRC submitted a proposal in response to the RFSO, which covered categories 2, 3 and 4. On January 26, 2009, BRC was awarded an NMSO with respect to categories 2 and 3. On February 16, 2009, BRC’s NMSO was amended to reflect the approval of its category 4 “basket of goods”. In response to the category 4 requirement in the RFSO for a “[r]ectangular work surface, user height adjustment, no modesty panel, with one (1) grommet” with a depth of 24 inches and a width of 30 inches, BRC’s “basket of goods” included its top crank height adjustable work surface, model No. MWCC3024-A-H1.

10. On March 7, 2009, BRC requested that the remainder of one of its lines of furniture products (i.e. those products not already covered by the “basket of goods”) be considered for evaluation and approval as “optional additional products”. BRC’s NMSO was subsequently revised to include some of the additional products that it had proposed, including its under-surface crank height adjustable work surface, model No. MWCC3024-A-H1-UTS (UTS Model)—an under-surface crank version of its top crank height adjustable work surface, model No. MWCC3024-A-H1 (non-UTS Model).

11. On February 10, 2010, PWGSC issued an RVD (Solicitation No. EC015-103359/A) (RVD/A) for the supply and delivery of freestanding furniture components for the Public Service Pension Centre in Shediac. The due date for the receipt of bids was February 18, 2010. Annex A to RVD/A provided a listing of the various height-adjustable work surfaces that were required by PWGSC, including the following item:

ITEM	ITEM DESCRIPTION	QTY	MODEL NUMBER
...			
5	30" x 24" (762mm x 609mm) CRANK HEIGHT ADJUSTABLE RECTANGULAR WORK SURFACE ON C LEGS. MUST INCLUDE THE HEIGHT RANGE OF 24" TO 32" (610mm x 813mm)  CRANK TO BE MOUNTED AT FRONT OF UNIT UNDER THE WORK SURFACE	11	

12. On February 18, 2010, BRC submitted a bid in response to RVD/A, which proposed its UTS Model for item No. 5.<sup>4</sup> While PWGSC also received a bid from Next Wood, both bids were deemed technically non-compliant. On February 24, 2010, PWGSC sent two e-mails to BRC. The first advised that

4. Public complaint, tab B.

RVD/A had been cancelled and would be re-tendered, as all bids received had been deemed non-compliant. The second informed BRC that its bid was deemed non-compliant in relation to the product that it proposed for item No. 3.<sup>5</sup>

13. On February 24, 2010, PWGSC issued the new RVD (Solicitation No. EC015-103359/B) (RVD/B), which replaced RVD/A. The requirements set out in RVD/B were essentially the same as those of RVD/A, with the requirements of item No. 5 remaining unchanged (i.e. the crank for the height-adjustable rectangular surface was to be mounted in front of the unit and *under* the work surface). RVD/B also provided as follows:

**To be considered responsive, standing offer holders must submit in their bid only approved products for the applicable NMSO.**

...

**BASIS OF SELECTION**

A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

14. On March 2, 2010, PWGSC issued amendment No. 001 to RVD/B, which removed the requirements pertaining to the location of the crank for item No. 5 of Annex A. According to PWGSC, bidders could now propose products with the crank located either on top of or under the work surface and either in front of or at the back of the unit.

15. On March 3, 2010, BRC sent an e-mail to PWGSC asking whether it was mandatory that the access to the crank be provided on both the right and left sides of the work surface. According to PWGSC, on March 8, 2010, it contacted BRC by telephone and requested that it clarify whether its products offered crank access on either the right or left side of the work surface. On the same day, BRC sent an e-mail to PWGSC stating that “. . . ALL BRC crank tables are Universal in Nature . . .”<sup>6</sup> Attached to the e-mail was a letter signed by a BRC employee, which provided as follows:

This is to verify that all of BRC’s E-Motion Crank tables are constructed to be Universal with the crank Handle on both the Top Crank and Under Surface Crank.

The crank handles can be used on either the left side or the right side as a standard feature and does not require an additional cost for this feature.

All top cranks are constructed with a right and a left grommet for crank handles access.

All under surface crank tables have a universal mechanism that can be used on either the left or the right when assembled on site.

16. Also on March 8, 2010, and subsequent to BRC’s e-mail, PWGSC requested that BRC provide “. . . the page of the installation manual that provides details of the Universal crank handle that can be used either left or right when assembled . . .”<sup>7</sup> On March 9, 2010, BRC provided PWGSC with a technical drawing entitled “Installation instructions for E-motion Top Crank and Under Surface Crank”.<sup>8</sup> Included on the drawing were the following notations: “-choose right or left side for undersurface assembly if supplied” and “-top crank usage is right or left handed”, which was directly followed by “-no assembly required”.

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5. *Ibid.*, tab D.

6. *Ibid.*, tab G.

7. *Ibid.*, tab H.

8. *Ibid.*, tab I.

17. On March 18, 2010, PWGSC issued amendment No. 003 to RVD/B, which converted item No. 5 of Annex A into item Nos. 7 and 8. These items now required that the crank be mounted *on top* of the work surface:

ITEM	ITEM DESCRIPTION	QTY	MODEL NUMBER
...			
7	30" x 24" (762mm x 609mm) CRANK HEIGHT ADJUSTABLE RECTANGULAR WORK SURFACE ON C LEGS. MUST INCLUDE THE HEIGHT RANGE OF 24" TO 32" (610mm x 813mm)	7 RIGHT CRANK	
8	CRANK TO BE MOUNTED ON TOP OF THE WORK SURFACE	4 LEFT CRANK	

18. On March 23, 2010, the date of bid closing, BRC submitted a bid in response to RVD/B. In respect of item Nos. 7 and 8, BRC once again proposed its UTS Model, which had been approved as an optional additional product and added to its NMSO.

19. On April 14, 2010, PWGSC advised BRC that the contract had been awarded to Next Wood, the only other bidder that had responded to RVD/B. On the same day, BRC wrote to PWGSC seeking clarification as to why its lower-priced bid had not been accepted. PWGSC responded on the same day as follows:<sup>9</sup>

The bid submitted by BRC was deemed technically non-compliant.

At items 7 and 8, BRC provided a crank height adjustable rectangular work surface with an under surface crank, product code: MWCC3024-A-H1-UTS. The 'UTS' added to the code specified that the crank was under the surface which did not meet the client's requirement that the crank be mounted on top of the work surface.

20. On the same day, BRC sent two further e-mails to PWGSC. In the first e-mail, it stated as follows:<sup>10</sup>

As previously stated and shown in our drawings, BRC's tables are UNIVERSAL in all ways...there is always a top crank available even if the under surface crank has been specified

Why was this not requested as a clarification if that was an issue

In the second e-mail, it stated as follows:

The UTS code at the end of the product code merely dictates that the product will now work under surface as well

All crank tables are still operation through top crank but also now work from the underside

There is NO reason to find BRC Non-Compliant for this

9. *Ibid.*, tab N.

10. *Ibid.*, tabs O and P.



21. On April 15, 2010, BRC sent yet another e-mail to PWGSC informing it that it disagreed with its decision to disqualify BRC's proposal, as its "... UTS (under surface crank) model tables do not lose their top crank feature when UTS is specified-EVER."<sup>11</sup> It also made reference to the technical drawing that it sent to PWGSC on March 9, 2010, which showed "... the top crank handle and the undersurface crank in the same drawing."

22. On the same day, PWGSC responded to BRC by advising it that "[a] clarification would not be permissible in this situation, in view that your bid clearly provides a product code that offers an under the surface crank."<sup>12</sup>

23. Also on April 15, 2010, and after having received PWGSC's response, BRC wrote to a senior official within PWGSC and requested a formal review of the issue.<sup>13</sup> It stated that PWGSC "... made an incorrect assumption in this case without any logical basis and with a drawing in their hands indicating otherwise" and that it "... expect[ed] an immediate reversal of this decision . . . ."

24. On April 22 and 23, 2010, PWGSC and BRC exchanged further e-mails culminating in BRC's request for a final decision from PWGSC. According to BRC, on April 30, 2010, it was advised by telephone that PWGSC would not reverse its decision. On May 3, 2010, PWGSC sent an e-mail to BRC in which it set out the basis upon which it had determined that BRC's bid was non-compliant.

25. On May 14, 2010, BRC filed its complaint with the Tribunal.

## TRIBUNAL'S ANALYSIS

26. 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 is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *North American Free Trade Agreement*,<sup>14</sup> the *Agreement on Internal Trade*,<sup>15</sup> the *Agreement on Government Procurement*,<sup>16</sup> the *Canada-Chile Free Trade Agreement*<sup>17</sup> and the *Canada-Peru Free Trade Agreement*.<sup>18</sup>

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11. *Ibid.*, tab Q.

12. *Ibid.*, tab R.

13. *Ibid.*, tab S.

14. *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*].

15. 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*].

16. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

17. *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.

18. *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) [*CPFTA*].

27. Article 506(6) of the *AIT* provides 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.”
28. Article 1008(1) of *NAFTA* provides that “[e]ach Party shall ensure that the tendering procedures of its entities are . . . applied in a non-discriminatory manner . . . .”
29. Article 1015(4)(a) of *NAFTA* provides that, “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation”.
30. Article 1015(4)(d) of *NAFTA* further provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.
31. The *AGP*, the *CCFTA* and the *CPFTA* contain provisions similar to those found in *NAFTA* noted above.
32. PWGSC submitted that the requirements set out in item Nos. 7 and 8 at Annex A of RVD/B, as amended, were clear and unambiguous and that the product proposed by BRC was inconsistent with those requirements. It submitted that item Nos. 7 and 8 required height adjustable work surfaces with cranks that were “mounted on top of the work surface”, but that, in response, BRC proposed its UTS Model, which featured an under-surface crank. Accordingly, PWGSC submitted that it correctly determined that the UTS Model proposed by BRC was non-responsive to the requirements of the solicitation and that its proposal was therefore non-compliant.
33. PWGSC submitted that, based on the statements made in the documentation provided by BRC for NMSO purposes (i.e. a catalogue containing both descriptive and pricing information for the products falling within the various “baskets of goods”), BRC clearly offered its height adjustable work surface products in two distinct versions. The first version had a top crank (i.e. non-UTS Model), while the second, alternative version had an under-surface crank (i.e. UTS Model).
34. PWGSC noted that, in response to RVD/A, BRC had correctly proposed its UTS Model, which featured an under-surface crank, as required. However, it submitted that, in preparing a response to RVD/B, BRC appeared not to have taken note of the amended specifications for item Nos. 7 and 8 and, once again, proposed its UTS Model. It added that, while the non-UTS Model and UTS Model were both evaluated and approved by PWGSC under the NMSO qualification process and, hence, were both “approved products”, BRC proposed the wrong model in response to RVD/B.
35. PWGSC submitted that the exchange of correspondence between itself and BRC between March 3 and 9, 2010, is irrelevant to the issues raised in the complaint because, at that point in time (i.e. subsequent to the issuance of amendment No. 001 but prior to the issuance of amendment No. 003), the sole issue of concern for PWGSC and BRC was the right or left side placement of the crank. It submitted that, given this context, it can readily be seen that BRC’s e-mail of March 8, 2010, is directed to the question of the equal availability of right and left crank configurations. In this respect, it noted that the e-mail indicates that right and left crank placements are equally available, for both the top crank and the under-surface crank. It further submitted that the installation drawing submitted by BRC on March 9, 2010, is clearly not specific to a particular model (i.e. UTS Model) but, rather, that it shows that both the top crank version and the under-surface-crank version of the work surface can have the crank located on either the

right or the left side of the work surface. In PWGSC's view, the above-noted exchange of correspondence was not intended to, and does not, contradict the distinctions that are demonstrated between the top crank and the under-surface crank versions in the documentation provided by BRC for NMSO purposes.

36. PWGSC further submitted that, to the extent that BRC alleges that it was proposing, in the context of RVD/B, a new or amended (i.e. upgraded) product which differed from the products previously approved under the NMSO process, such a proposal would be inconsistent with the requirement that bidders propose only "approved products" and would therefore render the proposal non-compliant.

37. For its part, BRC submitted that it is fundamental to the integrity of the competitive procurement process that the government institution follow the evaluation criteria established in the solicitation documents. It submitted that, in this case, PWGSC's evaluation of its proposal submitted in response to RVD/B was patently incorrect and unreasonable and that it should have been identified as the successful bidder and awarded the contract.

38. BRC submitted that the UTS Model that it proposed in response to RVD/B had previously been approved by PWGSC for the purposes of BRC's NMSO and was not a new or amended product. It submitted that the UTS Model, as approved in the context of its NMSO, had both a top crank and an under-surface crank and that it only used the term "upgrade" in its correspondence with PWGSC to illustrate the point that the UTS Model was the same as the non-UTS Model, but that it had an additional feature (i.e. an under-surface crank).

39. BRC submitted that PWGSC appears to have misinterpreted some of the descriptive information contained in the documentation (i.e. catalogue) that it provided in connection with the NMSO process and completely ignored some of the other information. According to BRC, a plain reading of the documentation confirms that the work surfaces that it offered had, as a standard feature, a top crank, but that some models also came with both the standard top crank *and* an additional under-surface crank. Moreover, it noted that the engineering report<sup>19</sup> that it provided to PWGSC in connection with the NMSO process confirms that the UTS Model also had a top crank. It submitted that there is nothing in the documentation which establishes that the UTS Model did not also have the standard top crank.

40. BRC submitted that, even if it were reasonable for PWGSC to have initially interpreted the documentation that it provided in connection with the NMSO as suggesting that a work surface either has an under-surface crank *or* a top crank, which BRC expressly denies, any such interpretation would surely have been proven wrong once PWGSC obtained and considered multiple communications from BRC prior to bid closing, which stated that the UTS Model had both a top crank *and* an under-surface crank. BRC submitted that, notwithstanding PWGSC's position that the correspondence that was exchanged during the bidding period was irrelevant, the e-mails at issue dealt directly with the central issue of the complaint and, on the basis of the confidential information on the record, were considered by PWGSC after it issued amendment No. 003 to RVD/B but prior to bid closing (i.e. at a time when the top or under-surface mounting of the crank was relevant). BRC added that PWGSC cannot claim that information brought to its attention in response to questions that it asked is either irrelevant or immaterial to its understanding of the products that it was contemplating purchasing.

41. Finally, BRC submitted that communications that it had with PWGSC after it had been disqualified revealed that PWGSC had contemplated seeking clarification from BRC about the UTS Model but had ultimately decided not to do so. While BRC acknowledged that government entities are under no formal

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19. Confidential complaint, tab V.

obligation to seek clarification from bidders, it noted that the Tribunal has occasionally found instances where it was “prudent” for the government to do so.<sup>20</sup> It submitted that this case clearly falls within the category of cases where prudence would dictate that clarification should have been sought, especially given the fact that PWGSC went out of its way to consult with potential suppliers prior to bid closing in an effort to ensure that there were two compliant bidders. It added that seeking clarification about whether the UTS Model proposed by BRC in response to RVD/B had a top crank would not have resulted in bid repair.

42. As the Tribunal has indicated in the past, a procuring entity must undertake its evaluation and make its award in accordance with the criteria and essential requirements specified in the tender documentation. This obligation will be met where the procuring entity makes a reasonable evaluation, in good faith, of the bids that have been submitted.<sup>21</sup>

43. The reasonableness standard, as it applies to the evaluation of bids, is well established in Tribunal jurisprudence. In this regard, a reasonable evaluation is one that is supported by a tenable explanation, even if that explanation is not one that the Tribunal itself finds compelling.<sup>22</sup> In line with past determinations, the Tribunal is of the opinion that an evaluation by a procuring entity is unreasonable where the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise failed to conduct the evaluation in a procedurally fair manner. It is only in the aforementioned instances that the Tribunal will substitute its own judgment for that of the evaluators.<sup>23</sup>

44. The Tribunal considers that, in response to the requirements set out in RVD/B, bidders could only propose “approved products for the applicable NMSO”.<sup>24</sup> In this regard, there was a difference of views between BRC and PWGSC as to whether the UTS Model, included in BRC’s category 4 NMSO as an approved “optional additional product” and proposed by BRC in response to item Nos. 7 and 8 of Annex A to RVD/B, had a crank mounted on the top of the work surface. The Tribunal notes that, while the assertions made by BRC in the context of this complaint may very well indicate that the UTS Model that it proposed in response to RVD/B did also include, at the time at which it was approved by PWGSC as an “optional additional product”, a crank mounted on the top of the work surface, the question that must be answered is whether this fact was reasonably apparent to PWGSC based on the materials before it at the time at which it evaluated BRC’s proposal in response to RVD/B.

45. In order to have properly applied itself in the evaluation of BRC’s proposal, it was incumbent upon PWGSC to consider the relevant product description contained in the documentation provided by BRC in connection with the NMSO. The evidence, as exemplified by PWGSC’s e-mail dated May 3, 2010, indicates that PWGSC did indeed apply itself in this manner and concluded that the UTS Model offered by BRC did not include a crank mounted on top of the work surface:<sup>25</sup>

The item offered by BRC for this RVD is MWCC3024-A-H1-UTS, which according to our evaluation of your RFSO last year and as presented by BRC at that time, was for a separate “under the surface” crank product and not the top mounted product requested on the RVD.

...

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20. *Re Complaint Filed by Bell Canada* (21 February 1997), PR-96-023 (CITT) [*Bell Canada*].

21. *Re Complaint Filed by Bosik Vehicle Carriers Ltd.* (6 May 2004), PR-2003-082 (CITT); *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

22. *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT); *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

23. *Re Complaint Filed by Excel Human Resources Inc. (operating as excellTR)* (25 August 2006), PR-2005-058 (CITT); *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).

24. Public complaint, tab E.

25. *Ibid.*, tab U.

*We were unable to find anywhere in your RFSO submission any reference to a dual use feature for the product and therefore, it was evaluated as it was presented to us: two different items, one meeting the requirement of the basket of goods and one as an additional item, with two different part numbers and two different prices. In fact, the technical environmental manual submitted with your RFSO clearly shows a UTS table without a top surface crank capability . . . .*

[Emphasis added]

46. BRC argued that a plain reading of the documentation that it provided in connection with the NMSO process confirms that the work surfaces that it offered had, as a standard feature, a top crank and that this necessarily implies that the under-surface crank is complementary rather than a substitute. The Tribunal has not been persuaded by this argument. In the Tribunal's view, the use of the term "standard" in relation to a specific feature is by no means a guarantee that this feature will be maintained in the event that an "optional" feature is ordered or requested. In other words, the term "standard" can reasonably be interpreted to mean the "norm", which can be replaced by something else. In its comments on the GIR, BRC gave as an example the purchase of a new car where, if a buyer selected a CD player as an option, the standard feature—a radio—would still be installed. However, the Tribunal considers that another reasonable illustration would be the purchase of a new car where the selection of power seats, power door mirrors or power windows as an option would replace the standard manually adjustable or operated seats, door mirrors or windows. Therefore, the Tribunal is of the view that the use of the term "standard" by BRC is not determinative in this instance and that PWGSC's interpretation of the documentation provided by BRC as meaning that the under-surface crank, when specified, replaces the top crank was reasonable.

47. The Tribunal notes that for certain other products described in BRC's product literature, the product code is clearly indicative of a specific feature of the particular work surface (e.g. the code "SA" as being indicative of a "single-arm", as opposed to a "dual-arm", mechanism).<sup>26</sup> This further supports the reasonableness of PWGSC's reliance on the "UTS" designation as being indicative of the crank being positioned "under the surface".

48. BRC also argued that the e-mail communications that took place between itself and PWGSC prior to bid closing made it clear that the UTS Model had both a top crank and an under-surface crank. The Tribunal has also not been persuaded by this argument. While the letter attached to BRC's e-mail of March 8, 2010, stated that ". . . all of BRC's E-Motion Crank tables are constructed to be Universal with the crank Handle on both the Top Crank and Under Surface Crank", the Tribunal does not interpret this as meaning that all crank tables, including the UTS Model, have a top crank and an under-surface crank. The Tribunal notes that BRC's letter goes on to make a clear distinction between top-crank tables and under-surface-crank tables and states that, in both cases, the crank handles can be used on either the right side or the left side of the table. Therefore, in these circumstances, and given the fact that this letter was provided to PWGSC in response to a request concerning the right- and left-crank placement at a time when the top or under-surface-crank mounting was not an issue, the Tribunal is of the view that it was reasonable for PWGSC to interpret this letter as simply meaning that right- and left-crank placements were equally available, whether the top crank or the under-surface crank was selected.

49. As for the technical drawing that BRC provided to PWGSC on March 9, 2010, the Tribunal is of the opinion that, while the drawing depicts both top and under-surface cranks for a particular series of furniture, it is clearly not identified as being specific to the UTS Model or other models having the "UTS"

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26. See, for example, confidential GIR, Exhibit 4 at 3, 5, 11, 13, 19, 21, 28, 30.

designation. Rather it appears to cover both the top-crank model and the under-surface-crank model and to have been submitted to show that both the top-crank- and under-surface-crank versions were available with right- and left-crank configurations.

50. The Tribunal acknowledges that, given the assertions made by BRC in the context of this complaint, it may now be possible, in retrospect, to interpret the documentation provided by BRC in connection with the NMSO process and the e-mail communications that it had with PWGSC as suggesting that the UTS Model may have had a top crank. However, given the context within which this information was considered by PWGSC (i.e. at a time when the top and under-surface mounting of the cranks was neither an issue nor a subject of discussion between BRC and PWGSC) and given the absence of a clear indication that the UTS Model also had a top-crank feature, the Tribunal considers that it was entirely reasonable, at that time, for PWGSC to arrive at the conclusion that it did.

51. Finally, BRC argued that it would have been prudent, in this case, for PWGSC to seek clarification from BRC in regard to the UTS Model. The Tribunal is mindful of the fact that providing procuring entities with the discretion to seek clarification is a standard provision in solicitation documents. It also acknowledges that, in previous cases, it has determined that government institutions had been prudent to seek clarification.<sup>27</sup> However, the Tribunal has consistently refused to impose on procuring entities an obligation to seek clarification,<sup>28</sup> even where there is doubt about whether a mandatory requirement is met.<sup>29</sup> As the Tribunal has stated in the past, the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation and that it accurately reflects the bidder's intention ultimately resides with the bidder.<sup>30</sup> Accordingly, it was incumbent upon BRC to exercise due diligence in the preparation of its proposal and the documentation provided in connection with the NMSO process to ensure that it would be unambiguous and that it could be properly understood by PWGSC.

52. In light of the foregoing, the Tribunal can find no basis upon which to conclude that PWGSC failed to make a reasonable evaluation of BRC's proposal or that it unfairly deemed the proposal non-compliant. Therefore, the Tribunal finds that BRC's complaint is not valid.

### Costs

53. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. 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.

54. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The complexity of the procurement was low, in that it was for a few simply defined items. The complexity of the complaint was low, in that the grounds of complaint involved a single criterion. Finally, the complexity of the complaint

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27. See, for example, *Bell Canada*.

28. See, for example, *Re Complaint Filed by Marathon Watch Company Ltd.* (19 May 2010), PR-2010-011 (CITT); *Re Complaint Filed by Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CITT); *Re Complaint Filed by IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT).

29. *Re Complaint Filed by Deloitte & Touche Consulting Group* (4 May 1999), PR-98-046 (CITT).

30. *Re Complaint Filed by Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT).

proceedings was low, as there were no interveners and no public hearing, and the parties were not required to file information beyond the normal scope of proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

#### **DETERMINATION OF THE TRIBUNAL**

55. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

56. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by BRC. 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 in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member