

Ottawa, Monday, June 7, 1999

File No.: PR-98-040

IN THE MATTER OF a complaint filed by Cougar Aviation Limited under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

Date of Determination:	June 7, 1999
Date of Reasons:	June 28, 1999
Tribunal Member:	Pierre Gosselin
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Tamra Alexander
Complainant:	Cougar Aviation Limited
Counsel for the Complainant:	Richard A. Wagner Sally Gomery
Intervener:	Provincial Airlines Limited
Government Institution:	Department of Public Works and Government Services

Ottawa, Monday, June 28, 1999

File No.: PR-98-040

IN THE MATTER OF a complaint filed by Cougar Aviation Limited under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On January 22, 1999, Cougar Aviation Limited (Cougar) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. FP802-8-0015/A) by the Department of Public Works and Government Services (the Department) for the provision of maritime aerial surveillance services² for the Department of Fisheries and Oceans (the DFO).

Cougar alleged that the Department and the DFO failed to conduct this procurement in conformity with the provisions of the *North American Free Trade Agreement*³ (NAFTA), the *Agreement on Government Procurement*⁴ (the AGP) and the *Agreement on Internal Trade*⁵ (the AIT). Specifically, Cougar alleged that: (1) the criteria for the contract award were not fully set out in the Request for Proposal (RFP); (2) the Department failed to reply promptly to reasonable requests for information about the RFP; (3) the deadline for response to the RFP was unreasonable, given the fundamental changes made to the requirements, particularly those in amendment No. 006 issued on September 30, 1998, only nine days prior to the solicitation closing date of October 9, 1998; (4) the Department applied the tendering process in a discriminatory manner in favour of Provincial Airlines Limited (PAL), the incumbent and eventual contract awardee; (5) the evaluation of proposals conducted by the Department and the DFO was unfair or had the appearance of unfairness or bias; and (6) the contract was not awarded in accordance with the criteria and essential and mandatory requirements set out in the RFP.

Cougar requested, as a remedy, that the contract awarded to PAL be cancelled and, instead, be awarded to Cougar. In the alternative, it requested that the contract be cancelled and that a new solicitation be

1. R.S.C. 1985, c. 47 (4th Supp.).
2. These services require suitable aircraft, airborne surveillance systems, data management capability and operational support to provide target acquisition, vessel identification, photography, accurate navigation, and two-way voice and data transmission with the DFO shore-based and sea-based operations. The services have been provided by Provincial Airlines Limited under two previous contracts awarded competitively for the period from April 1, 1990, to March 31, 1994, and the period from June 1, 1994, to May 31, 1999, subsequently extended to September 30, 1999. Source: Government Institution Report.
3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
4. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).
5. As signed at Ottawa, Ontario, on July 18, 1994.

issued. In the further alternative, Cougar requested that it be compensated, along with its co-venturers, for lost profit. In addition, Cougar requested its costs, and those incurred by its co-venturers, for preparing a response to the RFP as well as its costs incurred in proceeding with this complaint.

On January 29, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁶ (the Regulations). On February 17, 1999, the Tribunal granted PAL intervener status in the matter. On March 12, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷ On March 31, 1999, Cougar filed its comments on the GIR with the Tribunal. On April 20, 1999, PAL filed comments on Cougar's comments on the GIR with the Tribunal. On April 23, 1999, the Department filed additional submissions with the Tribunal in response to Cougar's comments of March 31, 1999, and on May 4, 1999, Cougar filed its comments in response.

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

PROCUREMENT PROCESS

On March 4, 1998, the Department received a requisition from the DFO for the procurement of maritime aerial surveillance services. The requisition provides for funding in the amount of \$70 million. A Notice of Proposed Procurement (NPP) for the solicitation was published on Canada's Electronic Tendering Service (MERX) on April 20, 1998. On July 7, 1998, an RFP for the requirement was issued. The requirement is identified as belonging to goods and services identification number V201A, being "Air Charter for Things", and as being covered by the AIT.

The RFP, as amended,⁸ includes, *inter alia*, the following:

APPENDIX "A"

STATEMENT OF WORK

6.0 UTILIZATION, OPERATIONAL CONDITIONS AND BASES OF OPERATION

- 6.1 DFO requires the exclusive use of three fully configured aircraft for a minimum utilization of 3000 "air" hours annually, up to an estimated 5000 "air" hours annually . . .

6. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

7. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

8. Six amendments were issued during the bid solicitation period to clarify and/or modify the terms of the RFP and to extend the time period to submit proposals. Amendment No. 001, dated August 27, 1998, contains the minutes of the bidders' conference and extends bid solicitation closure to September 25, 1998. Amendment No. 002 is an administrative amendment not provided to bidders. Amendment No. 003, dated September 2, 1998, provides revisions to Annex 1 of Appendix "C" to the RFP. Amendment No. 004, dated September 18, 1998, extends bid solicitation closure to October 2, 1998. Amendment No. 005, dated September 24, 1998, extends bid solicitation closure to October 9, 1998. Amendment No. 006, dated September 30, 1998, includes, among other things, information on the capability of the Beechcraft King Air 200 to meet the "dash speed" requirement and clarification on what constitutes a configured aircraft.

- 6.3 The Contractor shall ensure that aircraft meet all DFO equipment and performance specifications as per Appendix "B".
- 6.4 Two aircraft will conduct primary duty for regular service. The third aircraft will have a back-up role unless DFO requests that it be brought into regular service for operational requirements.
- 6.5 One primary aircraft will be based in St. John's and the second primary aircraft will be based in Halifax. The third aircraft (back-up) will normally be based in St. John's but may be positioned at other locations in Canada, as required.
- 6.6 The Contractor shall ensure that each primary aircraft (configured in accordance with Appendix "B") is available 365 days per year, 24 hours per day on a call-up notice of 2 hours except during periods of scheduled major maintenance as approved by DFO.

8.0 CONTRACTOR RESPONSIBILITIES

- 8.1 The Contractor shall provide three fully configured aircraft . . .
- 8.4 The Contractor shall obtain Department of Transport Certificate of Airworthiness and any other approvals required for the aircraft and/or on board systems. A copy of the Contractor's certificate must be provided.
- 8.5 The Contractor shall comply with all provisions of the Canada Transportation Act 1996, the Aeronautics Act and directives, orders, rules and/or regulations pursuant to those Acts.

APPENDIX "B"

EQUIPMENT/PERFORMANCE SPECIFICATIONS **MANDATORY REQUIREMENTS**

2.6 Dash speed

The aircraft must be capable of reaching distance of 250 miles from the main base of operations within one hour of take-off. In addition, this will provide rapid response to suspected violations such as foreign vessels illegally entering the Canadian extended economic zone (EEZ) and fishing illegally in the NAFO [sic] Regulatory Area.

2.8 Runway Capability

- 2.8.1 Configured medium-range aircraft shall be capable of take off and landing on 2,800 ft paved runways or suitable alternative.

2.9 Payload

- 2.9.1 Configured aircraft shall have sufficient floor space, electrical power, and payload weight capability to accommodate the airborne surveillance system and full crew complement (including DFO personnel) to conduct full range surveillance patrol.

APPENDIX "C"

EVALUATION CRITERIA **AND** **CONTRACTOR SELECTION**

1.0 EVALUATION CRITERIA

Proposals will be evaluated and point rated in accordance with the criteria set out in this appendix. Bidders must address these criteria in detail and in the order set out in item 2.0 and 3.0 of this appendix. Any criteria not addressed will be deemed as not meeting the mandatory requirements or given zero points for each criterion not addressed. Proposals not

meeting the mandatory requirements will not be evaluated further and will be deemed non-responsive.

2.0 MANDATORY CRITERIA

2.1 Operators certificate

- 2.1.2 Compliance with all provisions of the Canada Transportation Act 1996, the Aeronautics Act and directives, orders, rules and regulations pursuant to those Acts. A certification to this effect must be provided.

2.3 Appendix "B"

All criteria in Appendix "B" are mandatory.

Item 5.1 of Appendix "C" provides that, to be considered responsive, a proposal had to do the following: (a) meet all the mandatory requirements of the RFP; and (b) achieve a score of 70 percent or better in each of the point-rated categories, as provided in Annex 1 to Appendix "C". Where bidders were fully compliant with all mandatory criteria, extra points were to be assigned for extra features provided by the bidders,⁹ if considered desirable and if these extra features improved service delivery. The selection of the contractor was to be made on the basis of the best overall value to the Crown in terms of technical merits and cost, which was to be determined by dividing the total assessed costs, as indicated by the proposers in the proposed "Basis of Payment", by the total points, so as to establish the lowest cost per point.

On August 5, 1998, in accordance with the RFP, a bidders' conference was held. On August 17, 1998, Cougar requested an extension of the solicitation closing date as, in its opinion, the DFO/Department's responses to the questions raised by bidders at the conference had significantly altered the original RFP.

On August 27, 1998, the minutes of the bidders' conference were issued under amendment No. 001 to the RFP. The minutes cover 58 questions raised by bidders and an additional 10 questions submitted to the Department by potential suppliers after the conference but before the issuance of the minutes of the conference. As a result of questions relating to aircraft endurance, the RFP rating scheme was revised to allow extra points for extra value for one aircraft proposed with extra endurance. The solicitation period was also extended to September 25, 1998.

9.

APPENDIX "B" - EXTRA POINTS FOR SELECTED MANDATORY REQUIREMENTS			
CATEGORY/ITEM (Maximum extra points by category or by item)	DESCRIPTION	CRITERIA REQUIRED TO OBTAIN EXTRA POINTS LE., EXTRA VALUE PROVIDED	AVAILABLE EXTRA POINTS
Category 2.0 - AIRCRAFT (Maximum 7.0 points)			
Item 2.1 (Maximum 4 points)	Aircraft endurance - medium range aircraft shall be capable of completing missions of up to 6 hours duration at sea level.	Aircraft endurance of 8.0 hours or greater. Aircraft endurance of 7.5 to 8.0 hours. Aircraft endurance of 7.0 to 7.5 hours. Aircraft endurance is 6.5 to 7.0 hours.	4.0 3.0 2.0 1.0

The minutes of the bidders' conference include, in part, the following:

Q4. The question was asked whether the three aircraft are currently the same under the present contract and whether all the aircraft would have to be the same under the proposed contract to be issued as a result of this RFP?

A4. No, the aircraft under the current contract are not the same. Yes, all three aircraft have to be fully configured as specified in the RFP for the proposed contract.

Q 16. [Item 2.0 of Appendix "B" - Aircraft] The question is whether the requirement is for larger aircraft than the size currently in use and whether there . . . is an upcoming expansion of activities that would make bigger aircraft an advantage.

A 16. The response is that DFO is not expecting to receive additional funding in the foreseeable future for air surveillance and no expansion in activities is foreseen. Bidders should refer to the "Evaluation and Point award summary" at Annex 1 to Appendix "C" attached to the minutes for information relating to the evaluation of the aircraft requirements. The RFP is amended to include Annex 1 to Appendix "C".

Q25. [Item 2.0 of Appendix "B" - Aircraft] The question is: Can a list of acceptable aircraft types be provided?

A25. The answer is no. The requirements have been stated in the RFP and the decision on the specific type of aircraft is left open to bidders providing DFO requirements are met.

On September 11, 1998, the Department received a facsimile from Cougar requesting additional clarification. In view of the additional questions received, on September 18, 1998, amendment No. 004 was issued, *inter alia*, to extend the solicitation period to October 2, 1998. The amendment also included the following:

Q72. [Item 2.1 of Appendix "B" - Aircraft Endurance] The following questions were raised:

- (i) Annex 1 to Appendix "C" provides extra points for extended aircraft endurance. To receive the extra points for extended aircraft endurance, do all three of the aircraft proposed by the bidder have to meet these criteria?
- (ii) If aircraft with extended endurance are provided, will DFO mission planning reflect the longer endurance by providing for a lower frequency of missions?

A72. The answers are as follows:

- (i) Only one aircraft with extended endurance will be assessed for extra points.
- (ii) Yes.

On September 23, 1998, the Department received two facsimiles from Cougar. The first included a communication dated September 8, 1998, requesting additional clarifications. The second requested clarification regarding PAL's aircraft capability to comply with the requirement of the "dash speed", in view of an enclosed letter dated September 2, 1998, from Field Aviation Company inc. (Field Aviation), one of Cougar's joint venture partners in its proposal. The letter contained, *inter alia*, Field Aviation's opinion that the Beechcraft King Air 200 aircraft cannot meet the "dash speed" requirement of 300 mph.

On September 24, 1998, amendment No. 005 was issued extending the solicitation period to October 9, 1998, and extending the period for inquiries by four working days to September 28, 1998.

On September 30, 1998, amendment No. 006 was issued, in part, to respond to Cougar's clarification requests of September 23, 1998, relating to the flight dash speed of the Beechcraft King Air 200 aircraft.

Amendment No. 006 reads, in part:

- Q98. We have actual test flight data from the [supplemental type certificate] holder for the increased gross weight for Beechcraft 200 indicating that the greatest level flight dash speed would be 292 mph. Will this aircraft still meet the criteria set forward in Appendix "B", 2.6 An **EXPERT** opinion is required as the industry evaluation varies between the manufacturer, the original STC holder (Field Aviation), the incumbent, and Transport Canada regarding what a Beachcraft [*sic*] 200 can really do.
- A98. Based on experience, the Beechcraft King Air 200 with extended gross weight certification (as configured by [PAL]) meets the requirements of DFO.
[Item 2.6 of . . . Appendix "B" of the RFP] is amended as follows:
Delete the title "**Dash speed of at least 300 mph**" in its entirety.
Substitute: "**Dash speed**"
Delete the sentence: "Dash speed requirements will enable patrols to be conducted at the 200 mile limit within 1 hour after take-off."
Substitute: "The aircraft must be capable of reaching a distance of 250 miles from the main base of operations within one hour of take off."
- Q100. Answer #4 states "Yes, all three aircraft have to be fully configured as specified in the RFP for the proposed contract". Answer #72 (1) states only one aircraft with extended endurance will be assessed for extra points. Please be more specific, as these statements seem to be contradictory and pose new questions.
- Does this require that all three aircraft have to be configured the same (which includes fuel capacity) but only one of them is assessed or does it mean that only one aircraft with extended endurance (more fuel capacity) is actually required for this job and if so, which location?
- Please provide a definition of configuration; we have assumed fuel capacity was included in configuration.
- A100. A configured aircraft is one that meets the equipment and performance specifications set out in items 2 through 8 of Appendix "B" (which includes an endurance of up to 6 hours). Notwithstanding, extra points may be awarded to Bidders providing one aircraft which exceeds the 6 hour endurance requirement (refer to the related criteria set out in Annex 1, Appendix C). The extended endurance aircraft must be fully configured i.e., it must meet all requirements of Appendix B (with the exception that it will provide superior endurance). The extended endurance aircraft would normally [be] based at St. John's.
- Bidders should also refer to previous answers A21 and A86 related to endurance. In this regard, note that the same operational parameters will apply to aircraft with extended endurance capabilities (except that the pertinent hours of endurance must be substituted in the definition).

On October 9, 1998, the solicitation closed. Three bids were received, including one from Cougar and one from PAL.

On October 13, 1998, the evaluation team, comprised of three officers from the DFO and headed by the Department's senior procurement officer, was briefed with respect to the evaluation procedures. A memorandum to file dated October 14, 1998, concerning the October 13, 1998, briefing, reads, in part, as follows:

The evaluators were asked to: . . .

- b) a recommendation was made, by [the Department] to DFO, to obtain independent, neutral, and expert review of any area of expertise of the proposals, as a minimum, (data management system and the radar). It was agreed that an independent review of the radar area of expertise of any one proposal would not be required as long as the radar proposed was one of the acceptable radars which formed part of the DFO study . . .

The evaluators were also informed that the safety and air worthiness of the aircraft would be confirmed, by [the Department], with Transport Canada, the certifying authority.

On October 15, 1998, after bid closing, the Department received a letter dated October 9, 1998, from Cougar formally expressing its concerns regarding the process of this RFP.

On October 26, 1998, the Department wrote to the Department of Transport (Transport Canada) requesting confirmation of compliance of all three bidders with the RFP requirement for an air operator's certificate and information with respect to the airworthiness of the proposed aircraft.

On October 27, 1998, in response to a request from Cougar, the Department's senior general counsel met with representatives from Cougar and one of its bidding partners.

On November 19, 1998, the Department sent a letter to Cougar requesting clarification to its proposal in order to finalize the evaluation.

On November 20, 1998, the Department communicated with Transport Canada by facsimile requesting that the comments on the suitability of the Beechcraft King Air 200 operated by PAL, as enumerated in Field Aviation's letter dated September 2, 1998, be considered in the context of Transport Canada's response concerning the safety of the aircraft proposed by PAL.

On November 23, 1998, Cougar responded to the Department's request for clarification. That same day, a representative from Cougar telephoned the Department with respect to the status of the procurement process. The Department informed Cougar that the evaluation of the proposals was ongoing and answered Cougar's query by indicating that the process would possibly be completed by early December 1998.

On November 27, 1998, Transport Canada confirmed the validity of the air operator's certificate for all three bidders. Furthermore, Transport Canada indicated that it was satisfied that the Beechcraft King Air 200 aircraft proposed by PAL were airworthy and met all the requirements to hold a valid certificate of airworthiness.

On December 16, 1998, the reports of the evaluation team were finalized and approved by the team members. Two proposals, that of PAL and that of Cougar, were determined to be compliant with the requirements of the RFP. On January 8, 1999, a contract with a limitation of expenditures of \$39,779,270 was awarded to PAL, the compliant bidder offering the lowest cost-per-point proposal.

That same day, the Department sent a letter to Cougar informing it of the contract award and of the limitation of expenditures therein.

On January 18, 1999, Cougar was provided a verbal debriefing of its proposal at a meeting held at the Department's offices.

VALIDITY OF THE COMPLAINT

Department's Position

In its general comments, the Department submitted that the aspects of the complaint contained in articles 27 through 49, wherein Cougar alleged that (1) the criteria for award were not fully set out in the RFP, (2) the Department did not reply promptly to requests for information about the RFP, (3) the deadline for proposals was unreasonable and (4) the RFP and the timing of the tendering process were biased in favour of PAL, the incumbent contractor, should be dismissed, as the basis of these grounds of complaint had been known to Cougar long before the date of filing the complaint on January 22, 1999, and therefore the deadline for filing a complaint with the Tribunal had expired.

In addition, the Department submitted that there is no evidence to support Cougar's allegation that the evaluation process was unfair and that there was a breach of the rules governing the award of contract (articles 50 through 55 of Cougar's complaint).

The Department organized its specific comments under seven headings as follows.

Lack of Clarity of the RFP

The complaint (articles 27 to 31) alleged that the revised RFP, including amendments, did not fully set out the criteria for the contract award. Specifically, Cougar alleged that the Department did not clarify: (a) whether all three aircraft required in the RFP had to be identically configured; and (b) whether a Beechcraft King Air 200 aircraft could meet the requirements of the RFP.

The Department submitted that the evaluation criteria for the mandatory requirements and rated requirements were set forth in the RFP and that any lack of clarity with respect to the requirements of the RFP and its amendments was apparent to Cougar during the bidding period, which expired on October 9, 1998. Consequently, the time for filing a complaint alleging that the RFP lacked clarity had long since expired.¹⁰ The Department submitted that it would be extremely unfair if a complainant was not required to submit its complaint with respect to the RFP at a time when any shortcomings of the RFP could be remedied.

Alternatively, the Department submitted that there was no lack of clarity in the RFP, as amended, concerning the manner in which the three aircraft had to be configured. Furthermore, questions raised by bidders and the Department's answers thereto made it clear that the RFP did not necessarily contemplate identically configured aircraft. Concerning the question of whether a Beechcraft King Air 200 aircraft would meet the RFP requirements, the Department submitted that it responded to this question in its communication dated September 30, 1998, relating to the flight "dash speed" of the Beechcraft King Air 200 aircraft. In amendment No. 006, the Department stated, in response to question 98, that the Beechcraft King Air 200 aircraft with extended gross weight would meet the requirements of the DFO, and the Department further submitted that the RFP made it clear that the requirements in the RFP are those of the DFO.

10. The Department referred the Tribunal to its decision in *Frontec Corporation*, File No. PR-97-035, *Determination of the Tribunal*, May 6, 1998.

Untimely Response to Requests for Information

The complaint (articles 32 to 34) alleged that the Department did not promptly respond to reasonable requests for information about the RFP. In response, the Department submitted that any shortcomings on its part in this respect were apparent to Cougar during the bidding period and that, in fact, Cougar did not even request an extension of the final bidding period. Consequently, these grounds of complaint are not timely, in accordance with the provisions of section 6 of the Regulations.

In the alternative, the Department submitted that, in this procurement process, all bidders' requests for information were answered in a timely manner with appropriate extensions of the bidding period.

Concerning amendment No. 006, specifically the "dash speed" issue, the Department determined that a further extension of the bidding period was not required to accommodate this change. In addition, the Department observed that Cougar brought its request for information about the "dash speed" issue to the Department's attention 21 days after Field Aviation provided an "opinion", which was the basis of Cougar's inquiry. Nevertheless, Cougar only submitted its questions relative to the attainable speed of a Beechcraft King Air 200 aircraft on September 23, 1998, one week before bid closing.

Unreasonable Deadline for Proposals

The complaint (articles 35 to 42) alleged that a fundamental change to the RFP was effected through the amendments and that, consequently, the RFP should have been cancelled and a new one issued, or the bidding period should have been extended after the issuance of the last amendment on September 30, 1998. In response, the Department submitted that Cougar's concerns with respect to the length of the bidding period, the extensions of the bidding period and its perception that a new process was necessary were known to Cougar during the bidding period, but that Cougar did not articulate any objection with respect to the process until after bid closing. In fact, it did not allude to the unreasonableness of the deadline for bidding until after the completion of the evaluation and the award of the contract. The time for such complaints, the Department submitted, had long since expired by the time the complaint was filed.

In the alternative, the Department submitted that the change to the "dash speed" requirement in the RFP only represented a clarification of the fundamental DFO requirement. Indeed, the Beechcraft King Air 200 aircraft, as modified by PAL, are capable of reaching speeds in excess of 300 mph. The term "dash speed" does not have a definition in Transport Canada's aviation terminology standardization and, therefore, its use is imprecise. The speed of 300 mph was not really relevant, since the true DFO functional requirement is that the aircraft be capable of covering a distance of 250 miles within one hour of take-off to respond to reports of fishing vessels operating illegally within Canada's maritime boundaries. In any event, the Department submitted that concerns regarding the impact of the "dash speed" revision on the ability of Cougar to submit a competitive bid should have been identified by Cougar to the Department for appropriate consideration of possible action, e.g. a further extension of the bidding period before the close of the solicitation.

Bias of the Process in Favour of the Incumbent, PAL

The complaint (articles 43 to 49) alleged that the tendering process was biased in favour of PAL, specifically that the original RFP had a requirement for aircraft with a unique configuration and enhanced speed, payload and endurance capabilities not required of the aircraft supplied by PAL under the two previous five-year contracts. According to Cougar, these enhanced requirements forced suppliers to

submit bids which reflected the cost of purchasing and modifying newer aircraft with upgraded speed and payload capabilities. However, Cougar alleged that the Department altered, during the solicitation period, the original RFP requirements in favour of PAL to accommodate its currently used aircraft.

In response, the Department submitted that this alleged bias was visible before bid closing and that Cougar did not articulate any objection in this regard until after the close of bidding or did not make a complaint to the Tribunal until after completion of the evaluation of proposals and the award of the contract. The Department submitted that it is too late to do so now.

In the alternative, the Department submitted that the requirements of the RFP reflect the DFO's functional requirements, which have changed little since the first RFP was issued in 1990. Further, the RFP was structured to foster competition and equal access to potential suppliers by providing the successful bidder with a period of up to 12 months to become fully operational. In addition, the Department submitted that the RFP did not set out the specific payload of the aircraft to be provided and that the speed and endurance requirements were basically the same as those of the two previous RFPs. Furthermore, the elimination in amendment No. 006 of the requirement that the proposed aircraft be capable of attaining a speed of 300 mph and the addition of the requirement that they be capable of covering the 250-mile distance within one hour of take-off only changed the requirement to a "result-oriented" statement of requirement, i.e. reaching operational areas located at a distance of 250 miles within one hour of take-off. In addition, the Department argued that PAL has submitted factual data which verify that the Beechcraft King Air 200 aircraft, in the maritime surveillance version proposed by PAL, comply with both the original and amended requirements.

Concerning certain specific allegations in article 47 of Cougar's complaint, the Department submitted the following:

- (a) the change from "dash speed" to a functional requirement is just and only that;
- (b) based on experience, the Beechcraft King Air 200 aircraft with extended gross weight certification (as configured by Cougar) meet the requirements of the DFO;
- (c) the requirement that all three aircraft be fully configured in accordance with the RFP was stated in amendment Nos. 001 and 004 and that at no time was it stated that all proposed aircraft had to be configured identically; and
- (d) letters of intent were required to ensure confirmation of the availability of qualified personnel for the contract and that there is nothing uncommon about this practice in federal procurement.

Bias in the Timing of Events

The complaint (articles 48 and 49) alleged that there was bias in favour of PAL in the establishment of the time period for bidding in the context of amendment No. 006.

After stating that these grounds of complaint are late for the reasons set out above, the Department submitted that there is no basis to the allegation that, by issuing the most crucial amendment to the RFP, only nine days prior to the close of bidding, it guaranteed that no other bidder could compete with PAL. Indeed, the Department reiterated that amendment No. 006 clarified, but did not alter, the requirements of the RFP.

Bias or Appearance of Bias or Unfairness in the Evaluation Process

The complaint (articles 50 to 52) alleged that the evaluation process was unfair or had the appearance of unfairness or bias because DFO officials involved in the evaluation of proposals had had extensive contacts with PAL under previous five-year maritime air surveillance contracts and that there was no attempt to obtain independent aviation expertise in the evaluation process.

In response, the Department submitted that the fact that some DFO officials involved in the evaluation process worked closely with PAL as the incumbent contractor does not, in itself, negate their objectivity in the procurement process. Further, Cougar has presented no evidence to support its allegation that the outcome of the competition was attributable to factors other than the objective application of the evaluation criteria. In addition, the Department noted that both PAL's and Cougar's proposals were evaluated as being compliant and that the factor that most significantly distinguished the two bids was the price of the proposals, which was not provided to the evaluation committee. However, PAL's score was significantly higher than Cougar's, and PAL's bid price was significantly lower than Cougar's.

The Department also submitted that some elements of PAL's proposal (aviation safety and airworthiness) and Field Aviation's letter of September 2, 1998, submitted by Cougar were reviewed by Transport Canada's experts. As well, the evaluators were able to review and evaluate the documentation in the proposals which was provided by manufacturers, and they benefited from clarifications provided by the bidders.

Breach of the Rules Governing Award of Contract

The complaint (articles 53 to 55) alleged that the rules governing the award of contract were breached because the contract was awarded on the basis of a proposal which was non-compliant with the requirements of the RFP, in that the PAL Beechcraft King Air 200 aircraft should not have been evaluated as compliant for the reasons set out in Field Aviation's letter of September 2, 1998.

The Department submitted, in response, that the letter from Field Aviation expresses opinions and conclusions based on outdated and incorrect factual information, since, according to PAL, Field Aviation was not involved with any of the modifications, enhancements or weight reduction programs executed on PAL's aircraft after 1986, some 12 years ago. In any event, the Department concluded that Transport Canada has confirmed to the Department that the aircraft proposed by PAL met all of Transport Canada's requirements for the issuance and maintenance of an air operator's certificate and the certificate of airworthiness.

The Department requested the opportunity to make further submissions with respect to the award of costs in this matter.

In its additional submission of April 23, 1999, the Department denied Cougar's assertion that the Department and the DFO relied on confirmation from Transport Canada that PAL had a proper certificate of airworthiness to determine whether PAL's aircraft met the requirements of the RFP. The Department submitted that this determination was made strictly on PAL's declaration in its proposal. In any event, the Department submitted that the demonstration of full operational capability of all components for the aerial surveillance service requirement was required during the first 12 months of the contract and 60 days prior to the commencement of the contract. It is at this time, the Department submitted, that the successful bidder would be held to the commitment and representations made in its proposal.

The Department argued that there is no merit whatsoever to the “wing span life” and “the maximum operating speed and the normal operating or maximum cruise speed” issues raised by Cougar in its comments. Similarly, there is no foundation to Cougar’s allegation that the maximum allowable funding for the contract implies the contemplation by the DFO of more expensive aircraft with additional features.

On the issue of the DFO’s failure to use independent experts in evaluating offers, the Department submitted that the members of the evaluation team are eminently qualified in terms of Canada’s maritime air surveillance program requirements and that they were selected as evaluators because of their demonstrated sound judgement, reasoning capabilities, analytic capabilities and integrity. Furthermore, the evaluators benefited from detailed and precise criteria to apply in the evaluation process. In addition, the Department’s contracting officer assigned to the solicitation was experienced, familiar with the requirements and completely involved in all aspects of the procurement process to ensure fair and proper procedures. The officer did not have any kind of relationship with or knowledge of PAL prior to or during the solicitation.

PAL’s Position

PAL submitted that Cougar has made a number of misleading and false statements about PAL, the aircraft that it operated and its proposal and that Cougar has drawn conclusions from unsupported, incorrect and speculative information.

Specifically, PAL argued that Cougar has submitted no evidence that would put into doubt the safety and suitability of PAL’s aircraft other than a letter from Field Aviation, which has a number of conflicts of interest affecting its participation in the matter. Contrary to Cougar’s assertion made in its memorandum dated September 23, 1998, Cougar does not have “actual test flight data from the STC . . . holder”, but instead computed data extrapolated from information available for unmodified aircraft. Considering that Cougar has no knowledge of or access to the details of PAL’s proposal (some 4,250 pages of technical and engineering support, past performance and other details), PAL submitted that Cougar’s conclusion regarding PAL’s aircraft’s inability to meet the initial or amended RFP requirements is speculative and based on limited knowledge of maritime surveillance system design and operation, limited knowledge and experience in fixed-wing aviation and incorrect information. PAL further submitted that the aircraft is but one element of an integrated intelligence gathering and reporting system and, therefore, that the requirements relating to the type of aircraft play a minor role in the assessment of the overall service. PAL submitted that the distribution of the rated requirements in the RFP support this view.

PAL further submitted that Transport Canada is the most competent, knowledgeable and appropriate agency to provide independent information to the Department and the DFO on matters that relate to the aircraft supplied by PAL and that Transport Canada has clearly and unequivocally confirmed that PAL’s aircraft are secure and airworthy. Furthermore, PAL’s 20-year record of safe operation attests to that fact, as does the Northeast Engineering & Development Ltd. (Northeast) report (the NEED Report).¹¹

Concerning Cougar’s allegation that the data submitted by PAL are flawed, PAL responded that the data that it submitted to the Department were “tried, tested and true”. The information in PAL’s proposal in respect of the “dash speed” and the “maximum operating speed” of the aircraft is neither incorrect nor misleading and has been confirmed in the NEED Report.

11. A report dated April 16, 1999, submitted to the Tribunal by PAL and produced by Northeast Engineering & Development Ltd., an aerospace engineering firm certified by Transport Canada.

Furthermore, PAL submitted that the information provided by Field Aviation is not independent or factual and that the opinions contained therein are based on outdated and incorrect information. For example, Field Aviation has never modified an aircraft for PAL for airborne maritime surveillance. The aircraft modified by Field Aviation in 1986 was designed for ice reconnaissance, which required different equipment and configurations than those used in maritime surveillance. For competitive reasons, PAL submitted, it has excluded Field Aviation from any engineering analysis or participation in enhancement programs undertaken by PAL since the completion of Field Aviation's work in 1986. Since then, PAL has completed 50,000 hours of airborne maritime surveillance and, as a result, has conducted many successful programs for airborne systems weight reduction, of which Field Aviation would have no knowledge. The NEED Report confirms that modifications were made to PAL's aircraft during that period and states that the STCs are proprietary to Northeast and PAL and that Field Aviation would not be aware of the STCs or their contents.

Furthermore, PAL submitted that every significant statement of fact regarding PAL's aircraft contained in Field Aviation's letter, such as weight and loads, fatigue life, wing inspection following 16,200 hours and performance, is incorrect and outdated and probably contaminated the conclusions dated March 25, 1999, arrived at by Raytheon Aircraft Company with respect to the abilities of a modified Beechcraft King Air 200 aircraft.

With respect to the significance of the difference between the requirements in the 1993 RFP and those in the current solicitation, PAL submitted that there is essentially no difference between the service requirements in the two documents. For example, contrary to Cougar's assertion, there is no requirement in the 1998 RFP for an aircraft with greater payload and power. In fact, PAL submitted that advances in technology in areas of electronics, avionics, communications, navigation, photography and computers have resulted in a significant reduction in the size and weight of many components. PAL submitted that the DFO stated clearly during the bidders' conference that it had no requirement for larger aircraft and that it had no additional budget. Furthermore, PAL submitted that the mandatory requirements in the 1998 RFP do not include any new payload requirements. In fact, the RFP actually reduces payload requirements by eliminating the requirements for externally mounted searchlights and requiring that the aircraft be capable of carrying low-light television cameras.

With respect to the "dash speed" requirement, PAL submitted that the NEED Report has analyzed the difference between the initial wording and the revised wording of the RFP on this point and has shown that the requirement of each is similar. As regards the requirement for letters of intent for the personnel proposed, PAL submitted that this task is difficult for Cougar because Cougar does not carry on the business of airborne maritime surveillance.

As regards PAL's relationship with the DFO during this procurement process, PAL submitted that the DFO's agents and officers were unbiased, professional and proper.

In summary, PAL submitted the following: (1) its proposal did meet all the requirements of the RFP; (2) the Department received no information that PAL's aircraft and operations were unsafe and unsuitable, except from Cougar and its co-venturer Field Aviation; (3) Field Aviation is not a credible source of information regarding PAL's aircraft and the operations; (4) PAL's proposal was correct, thorough and well documented; (5) the 1998 RFP did not require an aircraft with greater power and payload; and (6) there was no reduction of requirements during the bidding period as a consequence of the change in wording describing the "dash speed" requirements.

PAL requested its costs associated with preparing a response in this matter.

Cougar's Position

Cougar submitted that, contrary to the Department's position, its complaint is timely, that the procurement process was unfair and that there was unfair bias in favour of the incumbent, PAL, in the procurement and evaluation process.

Timeliness of the Complaint

Cougar submitted that its complaint about the fairness of the procurement process is timely. Cougar raised numerous objections during the procurement process and at bid closure. The Department, Cougar submitted, did not respond to these objections during the bidding or evaluation periods. Cougar did not know that the Department had dismissed its objections and denied it any relief until January 11, 1999, when Cougar received notice of the contract award to PAL.

Specifically, Cougar submitted the following: (1) it sought clarification of the requirements in the RFP at the bidders' conference and in letters addressed to the Department dated September 8, 11 and 23, 1998; (2) it requested an extension of the deadline for the submission of bids on August 31, 1998; and (3) it raised the issue of the suitability of a Beechcraft King Air 200 aircraft in September 1998. The first element of response on this latter point was conveyed by the Department in amendment No. 006. Cougar submitted that, as a result of the contents of amendment No. 006, it became gravely concerned that meaningful competition with PAL would not exist. Cougar, nevertheless, elected to proceed with its proposal, as it hoped that the concerns that it had raised would be properly taken into account and responded to by the Department and the DFO.

In a letter dated October 9, 1998, Cougar specifically objected to: (a) the poor quality of the initial RFP; (b) the perception of bias toward PAL, given the relationship that it had with personnel at the DFO; (c) the suitability and safety of the Beechcraft King Air 200 aircraft in order to meet the requirements of the RFP; (d) the delays in holding the bidders' conference and in answering the questions raised thereat; (e) the inadequate extension of the period to submit proposals, given the changes to the RFP, in particular those changes contained in amendment No. 006; and (f) the changing mandatory requirements which, Cougar alleged, allowed certain aircraft to remain eligible. At the same time, Cougar asked the Department to review its concerns and to respond. No reply having been received from the Department, on October 27, 1998, Cougar sought and obtained, that same day, a meeting with a representative of the Department's legal services, who agreed to address Cougar's concerns with the responsible departmental representatives. Cougar followed up on this matter with the Department on November 23 and 26, 1998, without success. Cougar further submitted that, given its formal objection in its October 9, 1998, letter and the Department's reassurances that the matter was being evaluated, it could not reasonably know before January 11, 1999, that the Department did not, in fact, intend to address any of its concerns.

Unfairness of the Procurement

Cougar submitted that the evaluation team did not itself have the technical expertise in regard to aviation and other matters necessary to evaluate the aircraft proposed in the bids. Considering that the evaluation team was alerted that there were serious questions about the safety and suitability of the aircraft proposed by PAL, Cougar submitted that the Department and the DFO had an obligation to seek independent expert assistance in the evaluation of the technical aspects of the bids. The failure to obtain such independent expertise, Cougar submitted, has resulted in a contract award to PAL, whose proposal is not consistent with the requirements of the RFP.

Specifically, Cougar submitted that no member of the evaluation team had any technical expertise or background in aviation or aviation engineering, in radar or in forward-looking infrared and data management systems, and that the Department's refusal to consult outside experts was fatal to the fairness of the evaluation process, e.g. a certificate of airworthiness does not address whether an aircraft is suitable for specific purposes, it merely attests that the aircraft is licensed to operate and that it conforms to the type approval for the aircraft. Transport Canada's reply about the Beechcraft King Air 200 aircraft did not respond to or provide any information about the suitability of the aircraft with respect to payload, equipment specifications, operating parameters, speed and altitude requirements, runway capabilities, etc., all of which were raised in Field Aviation's letter of September 2, 1998.

Cougar also submitted that the GIR makes clear that the Department relied primarily on data from PAL to conclude that PAL's aircraft met the mandatory requirements of the RFP. However, this information was erroneous or was erroneously interpreted by the evaluation team in respect of PAL's aircraft's capability to cover 250 miles in one hour and have a "dash speed" of 300 mph. These errors of interpretation, Cougar submitted, demonstrate that the evaluation team lacked expertise in aviation. This, coupled with the failure to seek the advice of outside consultants and the reliance on PAL's data, rendered the procurement and evaluation process manifestly unfair to Cougar and other bidders.

Concerning the information provided by Field Aviation and the rejection of that information by the Department on the basis that the information comes from an interested source (Filed Aviation is a co-venturer of Cougar) and is outdated, Cougar submitted that Field Aviation is no more interested in this procurement than PAL is, that Field Aviation is the sole distributor in Canada of Beechcraft King Air aircraft and that Field Aviation is the company which modified the aircraft which PAL proposed to use for the contract and that Cougar understands that PAL's aircraft still bear the same STC number, a fact which shows that no major modifications have been carried out since Field Aviation's involvement in 1986. As well, Cougar submitted that some information now used by the Department to justify decisions made at the time of the evaluation of proposals and the award of the contract was obtained by the Department only after contract award.¹²

Cougar submitted that the Department, instead of seeking easily and readily available independent expert advice, relied on misleading or incomplete information from PAL and incomplete information from Transport Canada. It did so despite credible information that it had from Field Aviation which contained first-hand knowledge of the aircraft proposed by PAL.

Bias in Favour of the Incumbent

Cougar submitted that the Department conducted this procurement process in a way which unduly favoured the incumbent, PAL, by substantially modifying, through a series of solicitation amendments, the mandatory requirements in the original RFP to the advantage of PAL's existing aircraft, by making special exceptions through the solicitation amendments and in the evaluation process for PAL's aircraft and by substantially modifying, at the last hour, the RFP mandatory requirements, thereby, for all practical purposes, preventing bidders from seeking further clarification or modifying their bids to reflect the less stringent requirements for the aircraft. Moreover, Cougar submitted that the close relationship between two members of the evaluation team and PAL gave rise to a perception that PAL had an advantage. Although the evaluation team could have compensated for this bias by consulting outside experts, it failed to do so and, instead, chose to rely on information provided by PAL.

12. Cougar's submissions dated March 31, 1999, para. 55.

Concerning the Department's assertions that the requirements in the RFP were essentially identical to those for the two previous five-year contracts and that the solicitation amendments, in this instance, did not substantially change the requirements of the original RFP, Cougar submitted that these assertions are without foundation. Clearly, Cougar submitted, the 1998 RFP required aircraft with greater payload and power than the aircraft required for the previous RFPs. This was evidenced in amendment No. 006 in which the requirement for a "dash speed" of 300 mph was removed and in which it was stated that only one of the three aircraft would be assessed extra evaluation points for eight hours endurance. This is further evidenced by the fact that, although the requisitions provided for funding in the order of \$70 million, the contract eventually awarded to PAL is slightly less than \$39 million, much lower than the bids of the other bidders. As well, according to Cougar, the fact that the Department provided bidders, in amendment No. 001, with a 12-month fix-up time clearly indicates that the original requirements were more demanding than those required in previous solicitations for the air surveillance services and that these original requirements were significantly lessened during the bid solicitation period.

Moreover, Cougar submitted that changes to payload and speed requirements during the procurement process amounted to substantial changes in the mandatory requirements of the RFP. In particular, Cougar submitted that the substitution of an absolute speed requirement by a lesser functional requirement (250 miles in one hour) nine days before bid closing and the elimination of the original RFP requirement that all three surveillance aircraft be identical enabled PAL to propose its three existing aircraft, of which only one purportedly had extended endurance.

Furthermore, Cougar submitted that special exceptions favouring PAL, such as the pre-approval of PAL's aircraft and the requirement that a letter of intent be provided for each member of personnel proposed by a supplier, were made during the bid solicitation process.

Finally, Cougar submitted that the timing of events in this procurement, particularly amendment No. 006, the relationship between the evaluation team and PAL (Cougar does not take the position that this close relationship was, by itself, unfair), the fact that this situation was not mitigated by the Department by obtaining neutral and objective inputs and the additional fact that, on September 30, 1998, before bid closing and the receipt of PAL's proposal, the Department, in responding to question 98, indicated that PAL's aircraft would meet the requirements of the 1998 RFP, all point to special treatment for PAL in this procurement process by the Department and the DFO.

In additional comments filed with the Tribunal on May 4, 1999, Cougar submitted that, if Field Aviation's assessment of PAL's aircraft must be disqualified because Field Aviation is a business partner of Cougar, for the same reason, the opinions expressed by PAL and its contractor, Northeast, must be disregarded. Cougar also disputed several assertions made by PAL in its submissions concerning flight data, the importance of the aircraft in this maritime surveillance project, the certificate of airworthiness, the "dash speed" issue, the involvement of Field Aviation in modifying PAL's aircraft, the payload issue and the special treatment extended to PAL by the DFO and the Department. In any event, Cougar submitted that the issue before the Tribunal is not the thoroughness of PAL's proposal, but rather the fairness of the procurement process.

With respect to the additional comments made by the Department, Cougar argued that these ought to be disregarded by the Tribunal, as these do not reply to any new issue raised by Cougar.

On the issue of the timeliness of certain grounds of complaint in this matter and the Department's view that potential suppliers should immediately complain to the Tribunal whenever there is any perceived

problem in the tender, bidding or evaluation process, Cougar submitted that a supplier should attempt to resolve problems with the government institution before pursuing any formal legal recourse.

In making a number of points with respect to the information used by the evaluators to assess the proposals, the advice received from Transport Canada and the alleged exclusive reliance by the Department and the DFO on the information in the proposals for their evaluation, Cougar indicated that all these questions point to the same issue, namely, the lack of aviation expertise of the evaluation committee and its failure to benefit from independent expert advice in assessing proposals.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT.

The requirement is identified in the NPP as belonging to services category V201A, being "Air Charter for Things". This classification is not disputed by Cougar, and the Tribunal finds it appropriate in the circumstances. The Tribunal also notes that, although no one so represented, part of the services involved in this solicitation could be viewed as belonging to services category F030, being "Fisheries Resources Management Services".

The Tribunal finds that both services categories V201 and F030 are excluded from NAFTA by virtue of Section B of Annex 1001.1b-2 of NAFTA. The Tribunal is also satisfied that the above-mentioned categories of services are not listed for Canada in Annex 4 of Appendix I of the AGP. On this basis, the Tribunal determines that the solicitation is not in relation to services covered by the AGP and NAFTA and, therefore, the solicitation is not a designated contract in that respect. However, the maritime surveillance services being procured are not excluded from the AIT and, therefore, the Tribunal will determine whether the complaint has merit under the AIT.

Cougar alleged that, contrary to Article 506(6) of the AIT, the criteria for the contract award were not fully set out in the RFP. Article 506(6) of the AIT provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the method of weighting and evaluating the criteria".

The Tribunal is of the view that the fact that six amendments to the RFP were issued and that more than 100 clarification questions were answered during the solicitation period is not abnormal for a complex procurement such as the one in dispute, which included potential suppliers not previously involved in bidding for the requirement. In the Tribunal's opinion, these facts, alone, do not support a conclusion that the RFP, as amended, was unclear.

With respect to Cougar's specific assertions that the RFP never clarified (1) whether all three aircraft had to be identically configured and (2) whether a Beechcraft King Air 200 aircraft would meet the requirement for the RFP, the Tribunal finds that there is no support for these allegations. In the Tribunal's opinion, the Department's answers to questions 4, 72 and 100 make it abundantly clear that the three aircraft had to be "fully configured", i.e. they had to meet all the requirements of Appendix "B" of the RFP, and that

one aircraft, and only one, with extended endurance would receive extra evaluation points. In the Tribunal's opinion, the RFP never required that the three aircraft be identically configured, rather the aircraft had to be fully configured, a notion entirely compatible with the concept that one or more aircraft could also have extra endurance.

With respect to Cougar's second assertion, the Tribunal is satisfied that the Department never indicated before bid closing whether the Beechcraft King Air 200 aircraft would meet the requirements of the RFP. Given the structure of the RFP, wherein the Department chose not to indicate what particular make or type of aircraft would be acceptable, but instead set out the criteria that any aircraft had to meet in order to be accepted, in the Tribunal's opinion, there was clearly no obligation on the Department to provide this information.

Cougar alleged that, contrary to the procedures mandated by the AIT, the Department did not reply promptly to reasonable requests for information that it made about the RFP.

Subsections 6(1) and (2) of the Regulations¹³ provide that a potential supplier shall file a complaint or make an objection within 10 working days after the day on which the basis of the complaint/objection became known or reasonably should have become known to the potential supplier. The Tribunal finds that Cougar failed to meet these prescribed time limits in respect of this ground of complaint. The Tribunal is of the view that Cougar knew the period of time that the Department took to answer its requests for information at the very latest by the solicitation closing date on October 9, 1998. In this respect, the Tribunal notes that Cougar's objection letter, also dated October 9, 1998, only refers to a "one month lapse between the issue date of the RFP and the Bidders Conference" and to the 24-day period to respond to the questions raised by bidders at the conference through amendment No. 001 dated August 27, 1998. In the Tribunal's opinion, these two occurrences became known or reasonably should have become known to Cougar some 43 days before Cougar's October 9, 1998, objection letter to the Department and 148 days before January 22, 1999, the day on which Cougar filed its complaint with the Tribunal. Cougar failed to raise these grounds of complaint in a timely manner and, therefore, the Tribunal dismisses this ground of complaint.

Cougar alleged that, contrary to Article 506(5) of the AIT, the Department failed to provide all potential suppliers with a reasonable period in which to prepare responsive bids. According to Cougar, this is particularly evidenced by the fact that the Department issued amendment No. 006, which contained fundamental changes to the RFP, on September 30, 1998, only nine days prior to the solicitation closing date.

Article 506(5) of the AIT provides that "[e]ach Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement".

13. 6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

The Tribunal notes that bidders cannot reasonably expect that the Department will automatically extend the solicitation deadline every time a modification is introduced. Bidders are in a position to assess the full impact which modifications may have on their ability to submit responsive bids and the time required to do so and, therefore, are responsible, as the need arises, to ask for extensions to the solicitation period.

The Tribunal finds that Cougar failed to meet the prescribed time limits to make an objection and/or file a complaint in respect of this ground of complaint. In the Tribunal's opinion, it was apparent to Cougar that the bid solicitation period closed on October 9, 1998. Cougar did not raise this issue in its objection letter of October 9, 1998. Furthermore, the Tribunal is satisfied that at no time between the solicitation closing date and January 22, 1999, the date on which Cougar filed its complaint with the Tribunal, did the Department indicate that the solicitation would be cancelled, re-issued, re-opened and/or re-activated in any way. In fact, the evidence shows that the Department and the DFO were proceeding with the evaluation of the proposals, including seeking clarifications from Cougar on November 19, 1998, which Cougar provided to the Department on November 23, 1998. Therefore, in the Tribunal's opinion, Cougar knew or should reasonably have known the grounds for its allegation that the bidding period was inadequate on or about October 9, 1998. Cougar did not raise this ground of complaint until 105 days later when it filed its complaint with the Tribunal. The Tribunal, therefore, dismisses this ground of complaint.

Cougar alleged that, contrary to the provisions of Article 504 of the AIT, the Department failed to apply the tendering process in a non-discriminatory manner, in that the amendment of certain mandatory technical requirements of the RFP and the timing were biased in favour of PAL.

In part, Article 504 of the AIT prohibits the following forms of discrimination:

- [2](b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.
- [3](b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;
- [3](c) the timing of events in the tender process so as to prevent suppliers from submitting bids.

The Tribunal notes that this allegation is based on the premise that the original RFP issued on July 7, 1998, called for aircraft with a unique configuration and enhanced speed, payload and endurance requirements compared to the two previous RFPs and that the aircraft supplied by PAL under the two previous five-year contracts would not meet these enhanced requirements. Consequently, Cougar argued, the requirements of the original RFP had to be altered during the solicitation period so that PAL's aircraft could qualify for the RFP.

Certain technical specifications were modified during the solicitation period. The Tribunal is of the opinion that the Department is entitled to modify its statement of requirements during the solicitation period, be it upward, to widen it to allow for equivalent solutions, or even downward, to better reflect the needs of its client and to accommodate greater competition, provided all potential suppliers are informed of the modifications and given a fair opportunity to react.

The question as to the impact of the changes introduced by the Department in this case is a difficult one to answer. Cougar alleged that changes to the speed, payload and endurance requirements were substantial, while the Department argued that these changes were marginal, non-existent or irrelevant.

Concerning the “dash speed” issue, the Tribunal notes that all parties agreed that the term “dash speed” is not a defined term of Transport Canada’s aviation terminology standardization and, therefore, has no recognized and accepted meaning in the industry. The Tribunal finds that the Department acted reasonably when it revised section 2.6 of Appendix “B” of the RFP to communicate more clearly the DFO true speed requirement in the form of a performance requirement, i.e. that aircraft be capable of covering a distance of 250 miles from the main base of operations within one hour of take-off so that a rapid response to suspected violations by foreign vessels of the Canadian extended economic zone or the NATO regulatory area may be provided. Furthermore, the Tribunal is not persuaded that the redrafting of section 2.6 of Appendix “B” substantially modified the speed requirement as originally drafted. The Department and PAL both attested that PAL’s aircraft met the speed requirements in both the original and the revised RFPs, and the Tribunal has not been convinced otherwise.

Concerning payload, the Tribunal is not convinced that this requirement was modified at all during the solicitation period. Although Cougar alleged that the original specification required bigger, faster aircraft, the Tribunal is not persuaded that this is the case. In fact, when asked about this very point during the bidders’ conference, the Department never indicated, in its answer, that bigger aircraft were required, and it stated that it was not expecting to receive additional funding or that the surveillance program would be expanded in the foreseeable future. In addition, PAL submitted that the payload requirement was less onerous in the current RFP than in the previous ones because the requirements for externally mounted searchlights and low-light television cameras had been removed. With respect to the requirement for enhanced endurance, the Tribunal finds that it was communicated early in the bidding process and that the requirement was not a mandatory requirement, but one which gave access under the best circumstances to only four additional evaluation points.

For the above reasons, the Tribunal is not persuaded that the original RFP differed substantially from the previous ones or, more importantly, that the original RFP was modified substantially during the solicitation period. Consequently, in the Tribunal’s opinion, there is no basis to support Cougar’s allegation that significant changes were made to the original RFP to accommodate PAL’s aircraft. In the Tribunal’s view, the changes were not of major importance; therefore, their introduction late in the solicitation process is also that much less critical.

In addition, Cougar may not have acted in its own best interest by failing to send the Field Aviation letter of September 2, 1998, until September 23, 1998. If that information had been submitted to the Department earlier, it is conceivable that the Department’s answer to the “dash speed” issue might have been known earlier, thus providing Cougar with additional time to adjust as appropriate.

The Tribunal must also determine whether, in answering question 98, the Department inadvertently or otherwise deemed compliant, before bid closing, PAL’s aircraft, thereby giving PAL an unfair advantage.

The Tribunal is of the opinion that the Department did not declare PAL’s aircraft compliant to the current RFP in answering question 98. However, the Tribunal understands how Cougar arrived at this conclusion, particularly in light of the Department’s response to question 25 that any aircraft meeting DFO requirements will be acceptable. Nevertheless, the Tribunal is of the view that the Department’s response to question 98 must be interpreted narrowly within the context of the question itself, which, in the Tribunal’s opinion, focussed primarily on whether an expert opinion was required to determine the “speed” capability of the modified Beechcraft King Air 200 aircraft as opposed to determining whether the aircraft were acceptable under the RFP. The Tribunal interprets the Department’s response as stating that an expert

opinion is not required, as, “based on experience”, the said aircraft have amply demonstrated that they can meet DFO speed requirements.

With respect to the letters of intent, the Tribunal finds that this requirement became known to Cougar on August 27, 1998, with the issuance of amendment No. 001. Cougar did not object to the amendment until October 9, 1998, and, therefore, the Tribunal dismisses this ground of complaint, as it was not filed within the time limits allowed by subsection 6(2) of the Regulations.

Cougar alleged that the Department’s and the DFO’s personnel who assessed Cougar’s and PAL’s bids and decided to award the contract to PAL had a long-standing relationship with PAL and that the bid evaluation process was, therefore, unfair or had the appearance of unfairness or bias.

The Tribunal notes that the contracting officer in charge of this procurement was unknown to and did not know any of the bidders before this procurement was initiated. In the Tribunal’s opinion, in the absence of any evidence to the contrary, this officer cannot be accused of bias or the appearance thereof. It is a fact that two of the three members of the evaluation committee from the DFO have worked closely with PAL as the incumbent contractor for a number of years. These individuals are eminently qualified in the conduct of maritime aerial surveillance programs and their expertise in that respect is not disputed. In fact, Cougar does not object, in principle, to the fact that DFO personnel were involved in the evaluation of offers. Cougar did not present any evidence of actual bias on the part of the evaluation team; therefore, its allegation must rest on any unfairness or the appearance of unfairness or bias.

Cougar raised the issue as to whether the failure to engage an aviation expert was unfair or created an appearance of unfairness or bias. The evidence on the record shows that none of the members of the evaluation committee was an expert in aviation. It appears to the Tribunal that, with the exception of the requirement that bidders hold a valid air operator’s certificate and that aircraft hold a valid certificate of airworthiness, which requirements were confirmed by Transport Canada, the Department and the DFO accepted at face value all bidders’ declarations with respect to the capability of the aircraft proposed, applying the judgement of reasonably informed individuals, not that of experts. The Tribunal is satisfied that the evaluation committee was assisted in its task by the existence of a detailed evaluation grid, established beforehand, which governed the distribution of the evaluation points between the various evaluation categories. Furthermore, the Tribunal notes that, properly speaking, the requirement in dispute is not a requirement for aircraft, but for maritime aerial surveillance services. Therefore, the Tribunal finds that the failure to engage an independent aviation expert did not result in any unfairness.

There remains the question as to whether there reasonably exists an appearance of unfairness or bias. The Tribunal finds that the appearance of unfairness or bias is not a matter provided for by the AIT and adjudicable thereunder. The Tribunal will state, however, that, by failing to secure independent third-party expertise from within the government or the private sector when completing the evaluation of certain technical aspects of the proposals, the Department and the DFO unnecessarily exposed themselves to criticism. This is particularly so because of PAL’s long-standing incumbency situation, the close working relationship of two of the evaluators with PAL as the incumbent contractor and the lack of aviation expertise of all the members of the evaluation committee.

Cougar alleged that, contrary to Article 506(6) of the AIT, the Department used, in the evaluation of PAL’s proposal, evaluation criteria not set out in the RFP and, consequently, improperly awarded the contract to PAL. Specifically, Cougar alleged, on the basis of an opinion provided by Field Aviation, that the aircraft proposed by PAL do not meet the speed requirements and do not have the minimum six-hour

endurance required under the RFP, given the payload requirements, and that some of the aircraft used in the previous contracts may have already met or exceeded the maximum number of hours which Transport Canada would normally permit such aircraft to fly, thereby failing to meet the implicit requirement in the RFP that the aircraft proposed survive the length of the new five-year contract.

The Tribunal finds that this ground of complaint has no merit. In the Tribunal's opinion, the assertions made by Cougar, in this respect, are not based on first-hand information provided by PAL to the Department. PAL's proposal is a confidential business document not available to Cougar. In addition, it appears to the Tribunal that the information used by Field Aviation to base its opinion is, at least in part, outdated. The aircraft used by PAL have been modified on a number of occasions, since Field Aviation did some modification work on PAL's aircraft in 1986. Because the STCs documenting these changes are not available to Cougar or Field Aviation, in the Tribunal's opinion, Field Aviation is not in a position to comment on PAL's aircraft with the full knowledge of their current capabilities. The Tribunal also observes that Field Aviation's opinion has been challenged by Northeast in the NEED Report. In any event, the evidence shows that neither Field Aviation nor Northeast is an independent, third-party expert (Field Aviation is a co-venturer with PAL, and Northeast, the author of the NEED Report, is the firm that did modification work on PAL's aircraft in recent years) and, for this reason, the Tribunal has given little weight to their submissions. Furthermore, the Tribunal cannot ignore the fact that Transport Canada has confirmed that PAL's aircraft are safe, secure and airworthy and that PAL currently holds a valid air operator's certificate. For these reasons, the Tribunal is of the view that Cougar has not established that the Department and the DFO have improperly evaluated PAL's proposal and improperly awarded the contract to PAL. In reaching this conclusion, the Tribunal is also mindful that the aircraft is but a component, admittedly an important one but not the most important one, of the maritime aerial surveillance services requirement, that the majority of the evaluation rating points were not assigned to the aircraft, that PAL's evaluation score is significantly higher than Cougar's evaluation score and that PAL's bid price is significantly lower than that proposed by Cougar.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the AIT and that, therefore, the complaint is not valid.

The Department has requested, in the GIR, the opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal has determined that the circumstances of this case do not warrant costs against Cougar. While the complaint is not valid, it was not without merit.¹⁴

Pierre Gosselin
Pierre Gosselin
Member

14. *Flolite Industries*, Canadian International Trade Tribunal, File No. PR-97-045, *Addendum*, August 7, 1998.