Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2011-007

Acklands-Grainger Inc.

v.

Department of Public Works and Government Services

Determination issued
Monday, September 19, 2011

Reasons issued
Tuesday, January 31, 2012

Canada

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IN THE MATTER OF a complaint filed by Acklands-Grainger Inc. 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

ACKLANDS-GRAINGER INC.	**Complainant**
AND	
THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES	**Government Institution**

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is 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 Acklands-Grainger Inc. 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 3, and its preliminary indication of the amount of the cost award is $3,000. 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.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 26, 2011
Tribunal Member:	Jason W. Downey, Presiding Member
Director:	Randolph W. Heggart
Senior Investigator:	Michelle N. Mascoll
Counsel for the Tribunal:	Alain Xatruch
Complainant:	Acklands-Grainger Inc.
Counsel for the Complainant:	Paul Conlin Alison FitzGerald Alexandra Pietrzak Jenna Anne de Jong
Government Institution:	Department of Public Works and Government Services
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STATEMENT OF REASONS

BACKGROUND

1. On May 5, 2011, Acklands-Grainger Inc. (AGI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning a Request for a Standing Offer (RFSO) (Solicitation No. E60HN-10FSRE/A) issued by the Department of Public Works and Government Services (PWGSC) for the purposes of establishing National Master Standing Offers (NMSOs) for the supply of firefighting, safety and rescue equipment (FSRE) to various government departments and agencies[2] on an as-and-when-required basis.

2. AGI alleged that the pricing mechanism established by the RFSO operates in a discriminatory and unpredictable manner and is thus inconsistent with the obligations of the applicable trade agreements. More specifically, AGI alleged that, because the solicitation is based on a structure in which bidders are asked to propose discounts from prices established by manufacturers whose products (i.e. FSRE) are identified in the RFSO, the acceptance of bids from those same manufacturers raises conflicts of interests. It also alleged that the price update mechanism established by the RFSO creates an incentive for manufacturers to discriminate between bidders, restricts competition and creates unnecessary obstacles to trade.

3. As a remedy, AGI requested that the Tribunal recommend that PWGSC cancel the solicitation and re-issue a revised RFSO that complies with the obligations of the applicable trade agreements and that it be compensated for any lost profit as a result of the discriminatory and/or anti-competitive structure of the solicitation. AGI also requested the reimbursement of its actual costs incurred in preparing and proceeding with the complaint and its bid preparation costs.

4. On May 12, 2011, 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*.[3] On the same day, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of any contract until it determined the validity of the complaint.

5. On May 20, 2011, PWGSC certified that the procurement of FSRE was urgent and that a delay in awarding contracts would be contrary to the public interest. On May 26, 2011, in accordance with subsection 30.13(4) of the *CITT Act*, the Tribunal rescinded its postponement of award of contract order of May 12, 2011.

6. On June 7, 2011, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] On June 17, 2011, AGI filed its comments on the GIR.

7. On July 13, 2011, the Tribunal notified the parties that, in accordance with subrule 105(6) of the *Rules*, it intended to hold a public hearing to clarify the material facts underlying the complaint and to hear argument. On July 15, 2011, the Tribunal notified the parties that the hearing would be held on July 27, 2011, and that it intended to hear evidence and arguments regarding the functioning of the price update mechanism as contemplated by the RFSO, the role of manufacturers in the price update mechanism and whether any alleged unfairness resulting from its application may be speculative in nature.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. According to the RFSO, all departments and agencies listed in Schedules I, II and III of the *Financial Administration Act* are authorized to make call-ups against the standing offers.
3. S.O.R./93-602 [*Regulations*].
4. S.O.R./91-499 [*Rules*].

8. On July 20, 2011, both parties advised the Tribunal that they intended to call witnesses at the hearing. AGI advised that it intended to call, among others, Mr. George McClean, Vice-President and General Counsel of AGI. On July 22, 2011, the parties filed additional documents, including a document produced by PWGSC that contained the preliminary results of the RFSO.

9. Also on July 22, 2011, PWGSC requested that the Tribunal order AGI to produce a copy of Mr. McClean's files in advance of the hearing. On the same day, AGI requested that the Tribunal reject PWGSC's request. Later that day, PWGSC reiterated its request, stating that, by calling Mr. McClean as a witness, AGI was waiving privilege over Mr. McClean's entire file.

10. On July 25, 2011, AGI advised the Tribunal that, while it was firmly of the view that PWGSC had not established that there had been a waiver of privilege, it would not be calling Mr. McClean as a witness out of concern that this issue would become an unnecessary distraction at the hearing. It therefore requested that the hearing be adjourned so that another witness could be identified. The Tribunal granted AGI's request that same day.

11. On July 28, 2011, the Tribunal notified the parties that the hearing would now be held on August 26, 2011. On the same day, PWGSC filed a motion requesting that the Tribunal exercise its authority pursuant to subsection 30.13(5) of the *CITT Act* and cease to conduct the inquiry on the ground that the complaint was trivial, frivolous and vexatious. On August 4, 2011, AGI filed its reply to the motion.

12. On August 9, 2011, PWGSC advised the Tribunal that it would rely on the submissions that it made on July 28, 2011, and that, accordingly, it would not be filing any comments on AGI's reply. On August 19, 2011, the Tribunal dismissed PWGSC's motion. Reasons for that dismissal are provided below.

13. On August 22, 2011, PWGSC informed the Tribunal that 28 suppliers had each been issued a standing offer[5] and provided the Tribunal with a list of their names and addresses. On August 23, 2011, the Tribunal advised the standing offer holders that a complaint had been filed by AGI concerning the RFSO.

14. On August 24, 2011, Code 4 Fire & Rescue Inc. (Code 4) and HeartZAP Services Inc. (HeartZAP), both standing offer holders, filed submissions with the Tribunal regarding the complaint. On August 25, 2011, the Tribunal added the submissions from Code 4 and HeartZAP to the record and advised the parties that they would be afforded an opportunity to respond to the submissions during the course of the hearing.

15. The hearing was held in Ottawa, Ontario, on August 26, 2011. The Tribunal heard evidence from two witnesses. Mr. John Kaul, Vice-President, National Accounts, at AGI, appeared as a witness for AGI, while Mr. Michael McLaughlin, Supply Officer, Electrical and Electronics Products Division at PWGSC, appeared as a witness for PWGSC.

PROCUREMENT PROCESS

16. On February 3, 2011, PWGSC issued an RFSO for the purposes of establishing NMSOs for the supply of a wide range of FSRE to various government departments and agencies on an as-and-when-required basis. The closing date for the solicitation was April 4, 2011.

5. Suppliers having been issued standing offers are referred to as "standing offer holders".

17. The RFSO identified 7 categories of "Firefighting Equipment", 12 categories of "Safety Equipment" and 5 categories of "Rescue Equipment".[6] Manufacturers of products falling within each category were listed.[7] Potential suppliers were invited to submit offers with respect to the products of one or more of the listed manufacturers, within one or more of the identified categories. The ranking of such offers was to be based on percentage discounts from common (i.e. benchmark) price lists supplied by the listed manufacturers. Provided there were sufficient responsive offers, three standing offers were to be issued with respect to the products of each manufacturer in each category. Although the percentage discounts were to remain fixed for the duration of the standing offer, the RFSO incorporated a provision that allowed for the potential revision of the common price lists, every six months, on the basis of market conditions.

18. According to PWGSC, the decision to use a pricing mechanism based solely on percentage discounts from common price lists is a result of its experience with the previous procurement of FSRE (the 2008 RFSO). Under the 2008 RFSO, suppliers had the option of submitting offers based on specific unit prices, discounts from submitted price lists or both. Since there was no specification as to the nature of the price lists to be submitted, suppliers submitted a wide variety of non-comparable price lists, which, according to PWGSC, caused serious administrative problems. This was echoed by Mr. McLaughlin who testified that the use of different price lists under the 2008 RFSO made comparisons between offers very difficult and time consuming.[8]

19. The provisions of the RFSO that are relevant in the context of the current complaint provide as follows:

> **PART 1 – GENERAL INFORMATION**
>
> . . .
>
> **5. Key Terms**
>
> . . .
>
> **Manufacturer's Suggested Retail Price (MSRP)**
>
> For purposes of this Standing Offer, Manufacturer's Suggested Retail Price (MSRP) is defined as any common price list provided by the manufacturers listed in Annex "A" directly, whether it be published or unpublished, it is the price suggested by the manufacturer for small quantity sales directly to the consumer. For this Standing Offer all offerors must provide the same identical MSRP as created by the manufacturer.
>
> . . .
>
> **PART 3 – OFFER PREPARATION INSTRUCTIONS**
>
> **1. Offer Preparation Instructions**
>
> . . .

6. Although these 24 categories are referred to as "sub-categories" in the RFSO, the Tribunal will refer to them as "categories" for the purposes of these reasons.
7. The lists of manufacturers for each category were the result of previous solicitation processes and of a Letter of Interest/Request for Information (LOI/RFI) process, whereby PWGSC invited the industry to review existing lists and to supply it with names of manufacturers that they believed should be removed, edited or added to a specific category. The LOI/RFI, which was issued by PWGSC on September 17, 2010, required that, for each new recommended manufacturer, specified supporting information be provided and that there be a minimum of three qualified suppliers capable of providing that manufacturer's products.
8. *Transcript of Public Hearing*, 26 August 2011, at 45-46, 99.

Technical Documentation

. . . All suppliers must offer a percentage discount off of a common MSRP provided to all offerors by the manufacturer.

Manufacturers Authorization Letters

Offerors must provide a recently completed Manufacturers Authorization Letter (See Annex "D") for each manufacturer being offered. The manufacturer's letters must be provided with the offer at time of bid closing. . . .

. . .

An Offeror cannot provide a percentage discount for a manufacturer that has not been validated by providing the Standing Offer Authority with a rightfully signed authorization letter.

. . .

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

. . .

1.1 Mandatory Criteria for the RFSO

The following factors will be taken into consideration during the evaluation of your offer:

Mandatory 1. Compliance with the terms and conditions of the RFSO and Annex "A"

Mandatory 2. Provide the names of the equipment manufacturers and a copy of the most recent manufacturer's suggested retail price (MSRP) at time of bid closing;

Mandatory 3. Provide duly completed Manufacturers Authorization Letters: Annex "D" (1 copy),

Mandatory 4. Offerors must be capable of providing a minimum of 90% of the manufacturers products for each percentage discount they offer, in order to be considered for issuance of a Standing Offer

Mandatory 5. Possess a toll-free telephone number and Internet Web Address

Mandatory 6. All Offerors must base their percentage discounts off of the identical COMMON PRICE LIST (MSRP) as provided directly by the Manufacturers listed in Annex "A" valid at time of bid closing.

FAILURE TO COMPLY WITH ANY ONE OF THE MANDATORY CRITERIA WILL RENDER YOUR OFFER NON-RESPONSIVE.

2. Evaluation Methodology:

. . .

Annex "A"

The percentage discounts for those categories of items described at Annex "A" will be evaluated in descending order of firm percentage discounts from the Manufacturer's most current common price list (MSRP).

3. Basis of Selection

Firm Percentage Discounts, DDP (Delivered Duty Paid) Incoterms 2000, for all destinations across Canada excluding any land claims areas.

. . .

4. Only those offers ranked #1, #2 or #3 will be issued a Standing Offer.

. . .

6. Only those Manufacturers for which PWGSC has received a minimum of three (3) responsive offers per [category], will be considered for Standing offer and inclusion in Annex "A" of the Standing Offer Index

. . .

ANNEX "A"
FIRM PERCENTAGE DISCOUNT OFFERED
FROM THE MANUFACTURERS SUGGESTED RETAIL PRICING

Offerors must provide their percentage discounts by completing this Annex

Identification of Manufacturer's Suggested Retail Pricing (MSRP)

It is the responsibility of all Offerors to ensure that they provide the manufacturers most recent common price list effective at date of bid closing.

All Offerors must base their percentage discounts off the same identical common price list as provided directly by the manufacturers listed in Annex "A" effective at date of bid closing.

Percentage discounts provided by each Standing Offer holder will remain fixed for the duration of the Standing Offer. However the Manufacturers Suggested Retail Price (MSRP) list as provided directly by the manufacturer will be allowed to fluctuate based on current market conditions.

Updates to the Manufacturer's suggested retail price lists will only be accepted on a bi-annual basis and must be approved by the Standing Offer Authority prior to implementation. Updated price lists must only be submitted according to the following schedule:

1st submission: April 1st
2nd submission: October 1st

Standing Offer holders using updated price lists not approved by the Standing offer authority, will have Canada set[ ]aside their Standing Offer.

Any Offeror who fails to provide the manufacturer's most recent common price list (MSRP) effective at date of bid closing or provides inconsistent pricing from that of what the manufacturer has provided to the majority of its distributors, will be deemed non-compliant, removed from the process and will not be considered any further for that specific manufacturer.

. . .

ANNEX "D"
MANUFACTURERS AUTHORIZATION LETTERS

Authorization Letters;
Template 1 MFGR authorizes Offeror

. . .

This letter certifies that Offerors Company Name is an authorized dealer of Manufacturers Company Name products and is approved to supply our Fire, Safety and Rescue Equipment to the Government of Canada through the standing offer E60HN-10FSRE.

Manufacturers Company Name guarantees that it has directed its products to be organized in the identical [categories] for all Offerors authorized for the same product lines.

Manufacturers Company Name has agreed to utilized "MSRP" as a pricing base point as indicated on the supplied common MSRP price list and guarantees that all Offerors will provide identical common MSRP for their product lines.

20. On March 7, 2011, PWGSC issued amendment No. 001 to the RFSO, which provided responses to a number of questions submitted by potential suppliers. The responses provided to questions 4, 5 and 21 are particularly relevant to this complaint. They read as follows:

> Q.*4* [In Annex "A"], it states that Offerors can resubmit catalogues and pricing updates in April and October. We formally request that the Crown accept price changes once annually on a December 1 anniversary date to reduce multiple manufacturer price increases in the same calendar year.
>
> *A.4 Updates to price lists are an optional requirement and will only be accepted when all 3 ranked Offerors provide identical updates to the manufacturers' MSRP for each product category they hold a Standing Offer for. Inconsist[e]nt updated price lists among ranked Offerors will render the optional update void and the manufacturers' MSRP will remain unamended for 6 months.*
>
> *Any Standing Offer holder using updated price lists not approved by the Standing offer authority, will have Canada set[ ]aside their Standing Offer.*
>
> *At this time, there has been no significant issues with the requested timeline of April 1st and October 1st. Should industry dictate that these dates are problematic, then and only then will the Crown entertain the idea of a modified format.*
>
> Q5 It is possible for manufacturers to have different MSRP's for different market place, how are offerors to be sure they are providing same list as all other offerors?
>
> *A5 Answer – To avoid inconsistencies among the manufacturer's suggested price lists, all Offeror's are strongly encouraged to contact their respective manufacturers directly to ensure they are offering identical price lists as directed for the purposes of this RFSO.*
>
> . . .
>
> Q21 [In Annex "A"] paragraph 3 please clarify what is meant by MSRP will be allowed to fluctuate based on curr[e]nt market conditions.
>
> *A21 Price lists will not be required to be fixed for the duration of the NMSO. It[']s understood that as the market fluctuates (steel prices go up/down etc[.]) so should unit prices be allowed to move as costs of production increase or decrease. Therefore, Standing Offer holders will have the opportunity to adjust their price lists every 6 months if they so choose. The percentage discount off of this price list will remain fixed, but the unit prices will be allowed to change.*

21. On March 17, 2011, AGI wrote to PWGSC to highlight a concern raised by the response provided by PWGSC to question 4 in amendment No. 001 to the RFSO and to request an extension to the RFSO closing date. It submitted that, in order to comply with PWGSC's proposed price update mechanism, standing offer holders would be required to communicate and coordinate the submission of price updates with manufacturers, thereby raising concerns about compliance with Canada's competition laws. It therefore requested that the RFSO be amended to allow individual standing offer holders to update prices, without the need for all standing offer holders to submit identical updates.

22. In an ensuing exchange of e-mails between PWGSC and AGI, which took place on the same day, PWGSC stated that price lists were to be obtained directly from manufacturers only and that communication with other standing offer holders was not required or suggested. It also stated that price updates by individual standing offer holders had been considered but had been deemed problematic.

23. On March 18, 2011, AGI wrote to PWGSC, essentially reiterating the concerns outlined in AGI's letter of March 17, 2011, to PWGSC.

24. On March 23, 2011, PWGSC issued amendment No. 002 to the RFSO, which extended the closing date of the RFSO to April 21, 2011.

25. On March 25, 2011, PWGSC issued amendment No. 003 to the RFSO, which included a question and answer reflecting the exchange of correspondence that took place between PWGSC and AGI on March 17, 2011. They read as follows:

> Q. We are writing to highlight a concern raised by the answer to one of the questions issued in Amendment No. 001 to the [RFSO], which was issued on March 7th, 2011. (See Q4 and A4) The answer indicates that updates to price lists will only be accepted when all three ranked offerors provide identical updates to the manufacturers' MSRP for each product category that they hold a standing offer for. The proposed price update mechanism raises concerns about compliance with Canada's competition Law. In order to comply with the price update mechanism outlined in answer 4, ranked offerors would be required to communicate and coordinate the submission of updates to the MSRP pricing for each product category. The Competition Act imposes stringent restrictions on communications between competitors related to pricing. On its face, the proposed pricing update mechanism establishes a procedure that is inconsistent with the requirements of the Competition Act.
>
> A. Through signing the "Manufacturer's Authorization Letter" of Annex D, all Manufacturers have agreed to utilize "MSRP" as a pricing base point as indicated on the supplied common MSRP price list and guarantee that all Offerors will provide identical common MSRP for their product lines. Therefore, updates to the Manufacturer's Suggested Price List (MSRP) are ONLY to be received from the manufacturer. If for any reason, the Standing Offer Authority believes that communication between ranked suppliers has occurred, the Competition Bureau will be immediately notified.

26. On April 8, 2011, AGI sent a detailed objection[9] letter to PWGSC, wherein it submitted that the pricing mechanism established by the RFSO was inconsistent with the *Competition Act*,[10] as well as with Canada's obligations under various trade agreements. It therefore requested that PWGSC cancel and re-issue the solicitation in a manner consistent with Canada's competition and trade laws.

27. On April 19, 2011, PWGSC responded to the concerns expressed in AGI's letter of April 8, 2011; however, it declined to amend the RFSO or to cancel the solicitation, as requested by AGI.

28. On April 21, 2011, AGI submitted a proposal in response to the RFSO. Bids closed on the same day.

29. According to AGI, it became aware on May 4, 2011, that at least one manufacturer of FSRE, whose products are listed in the RFSO, also submitted a proposal in response to the RFSO.

30. On May 5, 2011, AGI filed its complaint with the Tribunal.

PRELIMINARY MATTER—MOTION TO CEASE INQUIRY

31. On July 28, 2011, PWGSC filed a motion requesting that the Tribunal exercise its authority pursuant to subsection 30.13(5) of the *CITT Act* and cease to conduct the inquiry on the grounds that the complaint was trivial, frivolous and vexatious. The following are the Tribunal's reasons for dismissing the motion.

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9. AGI characterized the objection as being made pursuant to subsection 6(2) of the *Regulations*.
10. R.S.C. 1985, c. C-34.

32. PWGSC submitted that, while AGI's complaint was speculative and anchored on the theory that manufacturers possess an advantage in a procurement process, as they are always in a position to undercut the second level traders (i.e. distributors), AGI had no direct knowledge or information regarding the results of the procurement at issue and whether that theory was accurate. However, it submitted that the preliminary results of the RFSO, which were filed with the Tribunal on July 22, 2011, showed that manufacturers performed far worse than distributors in all categories and thus provided clear evidence that AGI's theory was mistaken, simplistic and unsupported by the facts.

33. PWGSC added that, even if manufacturers had been eliminated from the procurement process, the preliminary results of the RFSO showed that, in those categories where manufacturers submitted bids, other suppliers would still have ranked above AGI. It therefore submitted that, even if the theory advanced by AGI were correct, which PWGSC denied, and the complaint held to be valid, AGI would still not be entitled to a remedy, as it was not adversely affected in any way by this procurement (i.e. it would not have won in any of those categories where it competed against manufacturers).

34. PWGSC submitted that the Tribunal has the authority, pursuant to subsection 30.13(5) of the *CITT Act*, to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious. It submitted that, given the preliminary results of the RFSO, both as a whole and as they relate specifically to AGI, the complaint satisfied all three elements. It added that there is precedent for ceasing an inquiry that is without purpose and, in this respect, referred to the Tribunal's decision in File No. PR-2009-058.[11]

35. In that case, the Tribunal ceased to conduct the inquiry after it found that PWGSC's cancellation of the procurement provided the essential remedy sought by the complainant and therefore rendered the complaint trivial. PWGSC submitted that this is no different from the case at hand where AGI would not be entitled to a remedy, regardless of the outcome of the complaint.

36. AGI responded by arguing that the motion itself should be dismissed, as the preliminary results of the RFSO were not final results and thus did not provide a valid basis to conclusively determine the issues in this inquiry and to cease the inquiry. It added that, even if the preliminary results of the RFSO showed that there was no actual harm caused to AGI, which it denied, those results have no bearing on two of the three grounds of complaint, which relate to the operation of the price update mechanism and not the evaluation of proposals.

37. AGI submitted that, in any event, actual harm is not required to have been suffered in order for the Tribunal to determine that a complaint is valid. It submitted that, in accordance with section 30.14 of the *CITT Act*, the purpose of an inquiry is not to assess the harm suffered but rather to determine whether the solicitation *process* has respected both procurement procedures and trade agreement provisions. It also submitted that, since the limitation period applicable to procurement review is triggered by actual or constructive knowledge of a breach of the trade agreements, as opposed to the existence of harm, waiting to prove actual harm would make it virtually impossible for a timely complaint to be filed. In this regard, it noted that there are many examples of cases where the Tribunal conducted inquiries and held complaints to be valid despite the complainants not having suffered actual harm.[12]

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11. Re Complaint Filed by MetOcean Data Systems (8 January 2010), PR-2009-058 (CITT) [MetOcean].
12. AGI mentioned a number of cases, including Re Complaint Filed by Femme Cachee Productions Inc. (25 November 2009), PR-2009-031 (CITT) [Femme Cachee]; Re Complaint Filed by Krista Dunlop & Associates Inc. (14 April 2010), PR-2009-064 (CITT) [Krista Dunlop]; Re Complaint Filed by Adware Promotions Inc., Canadian Spirit Inc., Contractual Joint Venture (15 June 2010), PR-2009-088 (CITT) [Adware Promotions].

38. AGI submitted that, in all six reported instances where the Tribunal had ceased inquiries pursuant to subsection 30.13(5) of the *CITT Act*, it had done so because the government institution cancelled the underlying solicitations that were the subject of the inquiries, which had the effect of providing the complainants the essential remedy that they were seeking.[13] It submitted that these circumstances stood in contrast to those of the present inquiry where the primary relief sought by AGI (i.e. the cancellation of the solicitation) had not been obtained. It therefore submitted that the complaint had not been rendered trivial.

39. Finally, AGI submitted that PWGSC's motion omitted any discussion of the meaning of the terms "frivolous" or "vexatious". It submitted that case law has established that a proceeding will be found to be frivolous and vexatious where it ". . . has no reasonable prospect of success . . ."[14] and will only be discontinued ". . . in the clearest of cases where it is plain and obvious that the case cannot succeed . . . ."[15] It submitted that PWGSC had failed to establish that the complaint, which argued that the RFSO does not provide equality of competitive conditions to all bidders and creates a conflict of interest, had met this high threshold.

40. Before addressing the issue of whether it should have ceased to conduct the inquiry on the grounds that the complaint was trivial, frivolous and vexatious, the Tribunal wishes to comment on the approach that AGI took by filing its complaint with respect to the pricing mechanism established by the RFSO before it had obtained any information regarding the results of that RFSO.

41. Subsection 7(1) of the *Regulations* sets out three conditions which must be met before the Tribunal may conduct an inquiry in respect of a complaint, one of which is that the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

42. In considering this provision, the Tribunal notes that there is no requirement that the information also disclose a reasonable indication that the alleged breaches of the applicable trade agreements have resulted in actual harm to the complainant. In fact, breaches of the trade agreements can and do exist independently of actual harm to complainants. As noted by AGI, there are many examples of cases where the Tribunal has conducted inquiries and found complaints to be valid in the absence of any evidence of actual harm to complainants.[16]

43. While complainants are not required to provide evidence of actual harm in order for the Tribunal to conduct an inquiry, it is imperative that their complaints be filed with the Tribunal within the time limits established by subsections 6(1) and (2) of the *Regulations*.

44. These provisions make it clear that complainants have a very short period of time to take action after they first become aware, or reasonably should have become aware, of their grounds of complaint (i.e. the reasons why a procurement is alleged to not have been carried out in accordance with the applicable trade agreements). As stated by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard*

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13. Re Complaint Filed by Enterasys Networks of Canada Ltd. (8 November 2010), PR-2010-068 (CITT); Re Complaint Filed by Enterasys Networks of Canada Ltd. (10 November 2010), PR-2010-069 (CITT); Re Complaint Filed by Tyco International of Canada o/a SimplexGrinnell (2 February 2011), PR-2010-081 (CITT) [Tyco International]; Re Complaint Filed by Det Norske Veritas (Canada) Ltd. (11 March 2011), PR-2010-084 (CITT) [Det Norske Veritas]; MetOcean; Re Complaint Filed by TPG Technology Consulting Ltd. (30 August 2007), PR-2007-020 (CITT).
14. *Carten v. Gibbs*, 2011 FCA 48 (CanLII) at para. 17.
15. *Miguna v. Toronto Police Services Board*, 2008 ONCA 799 (CanLII) at para. 21.
16. See, for example, Femme Cachee, Krista Dunlop and Adware Promotions.

(Canada) Ltd.,[17] "[i]n procurement matters, time is of the essence. . . . [P]otential suppliers . . . are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process."

45. Therefore, in consideration of the above, the Tribunal is of the view that AGI took the correct approach in this case by filing its complaint when it did rather than waiting for information regarding the results of the RFSO. In fact, had AGI waited any longer, its complaint would likely have been filed outside the prescribed time limits, and the Tribunal would likely have decided not to conduct an inquiry.

46. That being said, the question now before the Tribunal in the context of this motion is whether the preliminary results of the RFSO, which were made available subsequent to AGI's complaint being accepted for inquiry, constituted a sufficient basis for the Tribunal to determine that the complaint had been rendered trivial, frivolous and vexatious and, therefore, to decide to cease to conduct the inquiry.

47. In previous decisions, the Tribunal has consistently relied on the definition of the word "trivial" found in the *Shorter Oxford English Dictionary*[18] to state that the ordinary meaning of "trivial" is ". . . concerned only with . . . unimportant matters."[19] The *Canadian Oxford Dictionary* similarly provides that something is trivial if it is "of little importance or consequence . . . ."[20] In the Tribunal's view, the availability of the preliminary results of the RFSO by PWGSC did not render the complaint trivial or unimportant.

48. First, as noted by AGI, in all six instances where the Tribunal ceased to conduct inquiries pursuant to subsection 30.13(5) of the *CITT Act* on the basis that the complaints had become trivial, the underlying solicitations had been cancelled by the government institution, and the Tribunal determined that the cancellation provided the complainants with the essential remedy that they were seeking.[21] The Tribunal also notes that, in some of these cases, the complainants had even consented to the cessation of the inquiries.[22] This was manifestly not the case here. The solicitation was not cancelled, AGI had not obtained the essential remedy that it was seeking, and AGI strenuously opposed PWGSC's motion.

49. Second, the Tribunal did not consider that the results of the RFSO, which were only preliminary in nature when they were initially made available on July 22, 2011,[23] provided a sufficient basis for it to conclusively determine that AGI would not have been entitled to a remedy, as claimed by PWGSC. This was especially true given that, as argued by AGI, the preliminary results of the RFSO had no bearing whatsoever on AGI's grounds of complaint pertaining to the operation of the price update mechanism and the alleged unfair advantage that may be conferred to certain distributors having preferred relationships with manufacturers whose products are covered by the RFSO.

50. Finally, as the Tribunal has stated above, breaches of the trade agreements can and do exist independently of actual harm to complainants. Therefore, even if the results of the RFSO had been final at the time at which they were initially made available and even if they had pertained to all aspects of AGI's three grounds of complaint, this would not have meant that the Tribunal could not have continued to conduct the inquiry and possibly find the complaint to be valid.

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17. 2002 FCA 284 (CanLII) at paras. 18, 20.
18. Fifth ed., *s.v.* "trivial".
19. See, for example, *Det Norske Veritas* at para. 6; *Tyco International* at para. 6; *MetOcean* at para. 6.
20. Second ed., *s.v.* "trivial".
21. *Supra* note 13.
22. See *Det Norske Veritas* at paras. 5, 7; *MetOcean* at para. 8.
23. At the hearing, which took place after the Tribunal dismissed PWGSC's motion, Mr. McLaughlin confirmed that the preliminary results of the RFSO had become final. *Transcript of In Camera Hearing*, 26 August 2011, at 2.

51. As for the words "frivolous" and "vexatious", they are respectively defined in the *Canadian Oxford Dictionary* as ". . . silly or wasteful . . . having no reasonable grounds"[24] and "not having sufficient grounds for action and seeking only to annoy the defendant."[25] The Tribunal has also previously stated that, ". . . in order to be vexatious, a proceeding must be obviously devoid of merits, or instituted maliciously or with the intention to harass or annoy the other party."[26] Given the Tribunal's above reasoning for determining that the preliminary results of the RFSO had not rendered the complaint trivial and given the Tribunal's decision to conduct an inquiry into AGI's complaint,[27] the Tribunal failed to see how it could have then found that the complaint had no reasonable grounds or was filed with the intention to harass or annoy PWGSC.

52. For these reasons, the Tribunal determined that it would not cease to conduct the inquiry on the grounds that the complaint had been rendered trivial, frivolous and vexatious and, therefore, dismissed PWGSC's motion.

TRIBUNAL'S ANALYSIS

53. 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* 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*,[28] the *Agreement on Internal Trade*,[29] the *Agreement on Government Procurement*,[30] the *Canada-Chile Free Trade Agreement*[31] and the *Canada-Peru Free Trade Agreement*.[32] The *Canada-Colombia Free Trade Agreement*[33] does not apply in this case, as it only came into force after the issuance of the RFSO and after AGI filed its complaint.

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24. Second ed., *s.v.* "frivolous".
25. Second ed., *s.v.* "vexatious".
26. *Re Complaint Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para. 71.
27. The Tribunal's decision to conduct an inquiry meant that, pursuant to paragraph 7(1)(*c*) of the *Regulations*, it was satisfied that the information provided by AGI disclosed a reasonable indication that the procurement had not been conducted in accordance with the applicable trade agreements.
28. 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].
29. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
30. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
31. *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
32. *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*].
33. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx> (entered into force 15 August 2011).

54. In its complaint, AGI alleged the following three specific grounds of complaint: (i) the acceptance of bids from manufacturers raises conflicts of interest; (ii) the price update mechanism established by the RFSO incentivises manufacturers to discriminate; and (iii) the price update mechanism restricts competition and creates unnecessary obstacles to trade.

55. However, upon a closer examination of the submissions filed by AGI in support of these three grounds of complaint, including the additional submissions filed as part of its reply to PWGSC's motion and the arguments made at the hearing, it becomes readily apparent that the overarching issue in this inquiry is whether the pricing mechanism established by the RFSO operates in a discriminatory manner by providing manufacturers and their preferred suppliers with an unfair competitive advantage over other potential suppliers (i.e. other bidders or standing offer holders).

56. Indeed, the majority of arguments made by AGI with respect to each of its three grounds of complaint were essentially aimed at demonstrating that the operation of the pricing mechanism, both at the bidding stage and standing offer stage of the procurement, provides manufacturers and their preferred suppliers with an unfair competitive advantage.

57. Therefore, while AGI did make specific allegations to the effect that manufacturers that participate as bidders in the solicitation process are in a conflict of interest with other potential suppliers that rely on them for goods and pricing information and that the price update mechanism restricts competition and creates unnecessary obstacles to trade, the Tribunal does not believe that these allegations warrant separate consideration in the present reasons. The Tribunal notes that, should it conclude that the pricing mechanism established by the RFSO does not provide manufacturers and their preferred suppliers with an unfair competitive advantage, these allegations, which are subsidiary in nature, would necessarily be rendered moot.[34]

58. The Tribunal will therefore proceed with its analysis by examining whether the pricing mechanism established by the RFSO operates in a discriminatory manner, both at the bidding stage (initial price-setting mechanism) and the standing offer stage (price update mechanism), by providing manufacturers and their preferred suppliers with an unfair competitive advantage (i.e. an advantage that is above and beyond any natural competitive advantage that they may already possess).

59. If the Tribunal determines that an unfair competitive advantage is being provided by the pricing mechanism established by the RFSO, there would be a violation of the non-discrimination provisions of the relevant trade agreements, most notably, Article 504 of the *AIT*, Articles 1003 and 1008 of *NAFTA* and Articles III and VII of the *AGP*.[35]

Initial Price-setting Mechanism

60. AGI submitted that the primary basis for competition between potential suppliers is discounts from MSRP lists that are specifically established by the manufacturers whose products are identified in the RFSO. In this regard, it submitted that, although the solicitation relies on a "guarantee" that manufacturers will offer all bidders uniform and standardized MSRP pricing, neither PWGSC nor the potential suppliers have any contractual ability to ensure that manufacturers will comply with such a guarantee.

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34. The Tribunal notes that, with respect to the issue of conflict of interest, AGI made it clear that it was not requesting that manufacturers be eliminated from the procurement process, but that the pricing mechanism be revised to ensure equality of competitive conditions for all bidders. An absence of unfair competitive advantages logically implies that there is equality of competitive conditions.
35. The *CCFTA* and *CPFTA* also contain similar provisions.

61. AGI submitted that there are many valid business reasons why manufacturers may choose to discriminate between their various distributors by offering, for example, different MSRP pricing on the basis of regional and customer segments, or even preferred distributor relationships. It therefore submitted that the pricing mechanism established by the RFSO provides manufacturers that have a direct commercial interest in the solicitation, either by virtue of their participation as bidders or through the participation of their preferred suppliers as bidders, the opportunity and incentive to discriminate against other suppliers.

62. AGI submitted that, because manufacturers know their own costs and their customers' acquisition costs (by virtue of setting the price that customers must pay for their goods), and establish the MSRP lists, they are aware of the maximum percentage discount that may be profitably offered by any of their customers bidding on the solicitation. It further submitted that, by bidding directly, manufacturers also unfairly benefit from having a lower cost than their customers because there is no reseller markup. In its view, this places manufacturers in a unique and privileged position in the bidding stage by comparison to other potential suppliers.

63. AGI submitted that PWGSC's position that the pricing advantage enjoyed by manufacturers is a commercial reality and that, as a consumer, PWGSC is simply seeking the best price available in the marketplace places the commercial attractiveness (i.e. low price) of a bid or offer above fairness and transparency considerations. It submitted that, while the government should strive to obtain value for money, it is not an ordinary "consumer" that is free to sacrifice fairness and transparency in order to obtain a low price. In this regard, it submitted that commercial gain or expediency is not a recognized exception to the fairness and transparency obligations imposed on public entities by the trade agreements.

64. AGI also added that, contrary to PWGSC's assertion, it does not follow, from the principle that government entities are not required to compromise their legitimate technical or operational requirements to accommodate a supplier's particular circumstances, that the government is at liberty to establish a bidding structure that is biased against non-manufacturer bidders where the bias is unrelated to any such technical or operational need.

65. PWGSC submitted that, in the normal commercial marketplace, manufacturers (that price from their production costs) will usually have a price advantage over the distributors of their products (that price from the acquisition price paid to the manufacturers) in selling directly to consumers and that this advantage is a well-understood, everyday commercial reality. It submitted that, while manufacturers may choose, for good business reasons, not to enter into the market of selling directly to consumers, they may regard it as being in their interest to engage in such direct sales in certain circumstances.

66. PWGSC submitted that a government entity is fully entitled to seek the best available price for its requirement and that, in this regard, there is nothing inherently unfair in going into the marketplace and asking all potential suppliers of a required product, whether manufacturers, distributors or other resellers, to offer their best price. It submitted that all suppliers will have certain advantages and disadvantages that may affect their pricing and that these factors form a normal and acceptable part of the competitive pricing in a procurement process.

67. For example, PWGSC submitted that distributors can gain advantages not on the cost of goods sold but by maintaining infrastructure and by amortizing their storage, transportation, handling and administrative costs. It submitted that, in this case, the results of the RFSO show that manufacturers were in fact less successful than distributors. It also submitted that manufacturers can gain an advantage by increasing the price at which they choose to sell their goods to distributors. It submitted that this type of behaviour exists independently of the way in which a procurement is structured.

68. PWGSC submitted that it would be inappropriate and contrary to the basic principles of good procurement policy for a government entity to seek to eliminate or compensate for any existing commercial pricing advantages that one supplier may have over another by setting aside its own interest in obtaining the required products at the best price available. It submitted that this principle is analogous to the well-established principle that government entities are not required to compromise their legitimate operational requirements to accommodate a supplier's particular corporate, technical or commercial circumstances.[36]

69. In order to determine whether the initial price-setting mechanism established by the RFSO provides manufacturers and their preferred suppliers with an unfair competitive advantage, the Tribunal must first examine the level at which competition between bidders actually occurs.

70. The terms of the RFSO make it clear that the ranking of offers with respect to the products of listed manufacturers within each category of FSRE was to be based on category-wide percentage discounts from prices set out in common (i.e. benchmark) MSRP lists supplied by those same manufacturers. Therefore, competition between bidders actually occurs at the percentage discount level—the greater the discount offered, the greater the probability that a bidder will be awarded one of the three standing offers available for the products of each manufacturer within each category.

71. Although it may initially appear that the establishment of MSRP lists by manufacturers plays an important role in the ensuing competition that takes place between bidders, it is in reality just a starting point from which all bidders, including those manufacturers that decide to bid their own products, offer a discount. In his testimony, Mr. McLaughlin confirmed this fact by stating that MSRP lists were just a starting point and that, as long as all bidders used the same lists, it did not matter whether the lists were newly created or already in existence.[37]

72. Mr. McLaughlin also testified that PWGSC's decision to have all bidders use common baseline prices made it much easier to compare discounts and evaluate offers.[38] However, the Tribunal notes that the objectives of administrative ease and efficiency do not serve to justify a failure to comply with the substantive obligations imposed by the trade agreements. Therefore, regardless of the reasons that led PWGSC to choose the current pricing mechanism, if the Tribunal believes that an unfair competitive advantage is being provided, it will conclude that there has been a violation of the non-discrimination provisions of the trade agreements.

73. It is clear that, under normal commercial circumstances, all suppliers, whether manufacturers, distributors or resellers, will possess certain natural competitive advantages vis-à-vis other suppliers. For manufacturers, advantages may lie in their ability to produce goods efficiently while keeping costs, such as input costs and labour costs, as low as possible. For distributors or resellers, advantages may lie in their ability to carry a larger selection of products and to reduce logistical costs normally associated with getting those products in the hands of consumers. For example, they may have warehouses located across the country, established distribution networks and special freight agreements or rates.[39]

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36. PWGSC referred to the following decisions made by the Tribunal in support of this principle: *Re Complaint Filed by Computer Talk Technology, Inc.* (26 February 2001), PR-2000-037 (CITT); *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Re Complaint Filed by Bajai Inc.* (7 July 2003), PR-2003-001 (CITT).
37. *Transcript of Public Hearing*, 26 August 2011, at 46-47.
38. *Ibid.* at 45.
39. The Tribunal notes, in particular, Mr. Kaul's testimony where he explained that AGI, itself a distributor, maintains an infrastructure of 175 branches nationally. *Transcript of Public Hearing*, 26 August 2011, at 7.

74. It is also understood that, under normal commercial circumstances, distributors may have preferred relationships with specific manufacturers, which results in their obtaining advantageous pricing and commercial terms. Mr. Kaul specifically recognized that such relationships are commonplace.[40] Notwithstanding the existence of preferred relationships, the Tribunal tends to believe that manufacturers generally want to foster positive relationships with all their distributors and resellers, as they help to ensure that the products fabricated by these manufacturers actually make it to market.

75. Thus, in the context of a solicitation where manufacturers, distributors and resellers compete against each other, it is entirely reasonable to expect that they will each rely on their respective natural competitive advantages in order to offer the lowest possible price or, in the context of the current solicitation, the greatest percentage discount from the prices set out in common MSRP lists. These inherent advantages, which exist independently from the manner in which a solicitation is structured, do not lead to the conclusion that tendering procedures are discriminatory.

76. This principle was explicitly recognized by the Tribunal in *CAE Inc.*,[41] where it stated the following:

> 43. Regarding the first ground of complaint that PWGSC and DND failed to ensure equal access to the procurement, the Tribunal does not believe that there is necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. As stated by CAE in its March 15, 2004, letter to PWGSC: "There is no question that certain bidders have certain competitive advantages in certain bids. This is simply part of the ordinary ebb and flow of business." The Tribunal notes that these competitive advantages could be created as a result of incumbency, [intellectual property], [International Traffic in Arms Regulations] or any number of other business factors. The Tribunal is in agreement with CAE's statement as quoted above and is of the opinion that, if a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used by PWGSC are discriminatory.
>
> [Footnote omitted]

77. Therefore, while the trade agreements impose fairness and transparency obligations upon government entities, the Tribunal is of the view that these obligations cannot be interpreted in a fashion that would require the government to adopt tendering procedures that seek to eliminate the effects of any natural or legitimate competitive advantages that may be held by suppliers. In fact, such tendering procedures, if they were adopted, would likely be construed as discriminatory.

78. AGI specifically argued that manufacturers and their preferred suppliers are being provided with unfair competitive advantages because manufacturers are aware of the maximum percentage discount that may be profitably bid by their customers and, unlike their customers, they have no distributor or reseller markup. However, in the Tribunal's view, these are advantages that are inherent to a manufacturer, and such advantages would exist regardless of whether PWGSC had established a pricing mechanism based on percentage discounts from MSRP lists supplied by manufacturers of FSRE.

79. For example, had PWGSC allowed potential suppliers to submit offers based on unit prices instead, manufacturers would be aware of the lowest unit price that could be profitably bid by their customers, they would still have no distributor or reseller markup, and they could still establish preferred relationships with distributors whereby such distributors would receive preferential pricing.

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40. *Transcript of Public Hearing*, 26 August 2011, at 18-19.
41. *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT).

80. AGI also argued that manufacturers and their preferred suppliers are being provided with unfair competitive advantages because neither PWGSC nor potential suppliers have any contractual ability to ensure that manufacturers will offer all bidders uniform and standardized MSRP pricing.

81. The Tribunal acknowledges that the authorization letters provided by manufacturers (see Annex "D" of the RFSO), wherein they guarantee that all bidders will provide PWGSC with identical common MSRP lists for their product lines, are not legally enforceable. In addition, the Tribunal notes that Annex "A" of the RFSO specifically states that bidders that fail to provide the manufacturer's most recent common MSRP list, or that provide pricing that is different from what the manufacturer has provided to the majority of its distributors, will be deemed non-compliant and removed from the process.

82. As such, it is clear that manufacturers have a certain ability to cause bidders to be excluded from the process simply by providing them with inconsistent MSRP lists. However, the Tribunal notes that the RFSO provides that only those manufacturers for which PWGSC receives three responsive offers per category will be considered for inclusion in the standing offer.[42] This essentially means that, in order to sell their products to the government, manufacturers must provide the same MSRP lists to at least three bidders (or two if the manufacturers are themselves bidders).

83. While the Tribunal is of the view that this constitutes a strong incentive for manufacturers to provide all bidders with identical common MSRP lists, it does not negate the fact that manufacturers could theoretically have a competitive advantage in being able to cause one or more bidders to be excluded from the process by providing them with inconsistent MSRP lists. However, in the Tribunal's opinion, such an advantage would exist even if PWGSC had allowed potential suppliers to submit offers based on unit prices (i.e. not based on common MSRP lists).

84. Manufacturers can always cause bidders to be effectively excluded from participating in a solicitation by significantly increasing the price that they charge those bidders for their products, by providing them with unfavourable commercial terms or by simply refusing to sell them their products.

85. In light of the foregoing, the Tribunal finds that the initial price-setting mechanism established by the RFSO does not provide manufacturers and their preferred suppliers with an unfair competitive advantage.

Price Update Mechanism

86. AGI submitted that the price update mechanism established by the RFSO allows manufacturers to adjust their MSRP lists so as to make it unprofitable for other standing offer holders to sell their products, thereby ensuring the selection of the manufacturers or one of their preferred suppliers. It submitted that, since manufacturers know and can vary the standing offer holders' costs for the manufacturers' products, and since the terms of the solicitation allow for the disclosure of standing offer holders' prices (i.e. discounts),[43] they can squeeze out those standing offer holders by lowering the prices set out in their MSRP lists to such an extent that they will either not make a profit or even incur a loss. It submitted that manufacturers can also squeeze out standing offer holders and eliminate competition by increasing their costs but not making commensurate adjustments to the MSRP lists.

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42. See section 3, "Basis of Selection", of Part 4, "EVALUATION PROCEDURES AND BASIS OF SELECTION", of the RFSO.
43. AGI referred to PWGSC's General Conditions—Standing Offers—Goods or Services 2005 (2010-01-11), which were incorporated by reference into Part 6, "**STANDING OFFER AND RESULTING CONTRACT CLAUSES**", of the RFSO. Section 09 provides that standing offer holders agree to the disclosure of their standing offer unit prices or rates.

87. AGI submitted that the price update mechanism also allows manufacturers and their preferred suppliers to submit greater percentage discounts at the bidding stage of the solicitation (thereby increasing their chances of being awarded standing offers) with the knowledge that they will have an opportunity to increase prices by updating their MSRP lists six months later. In other words, they only have to guarantee the bid price for a period of six months as opposed to the other bidders that do not have the same opportunity and must instead assume that the MSRP lists will remain unchanged for the entire duration of the standing offers.

88. AGI further submitted that manufacturers are not bound by any legal obligation to adjust their MSRP lists in a manner that permits standing offer holders to comply with the terms of the RFSO. It submitted that, under the amended terms of the RFSO, a manufacturer could, for example, increase the prices set out in its MSRP list and inform PWGSC and only two of the three standing offer holders. It submitted that, if the third standing offer holder subsequently supplied FSRE under the previous MSRP list, it would be in violation of the terms of the RFSO.

89. As a further example, AGI submitted that a manufacturer could send a revised MSRP list to one or more standing offer holders, but not to PWGSC. It submitted that, if a standing offer holder subsequently supplied FSRE under the revised MSRP list, it would also be in violation of the terms of the RFSO and would have its standing offer set aside.

90. AGI disagreed with PWGSC's position that amendment No. 001 to the RFSO applies and that updates to MSRP lists can therefore only be accepted when all three standing offer holders of a particular category submit identical updates to PWGSC. In its view, amendment No. 003, which supersedes amendment No. 001, requires that updates be provided directly to PWGSC from manufacturers and not through standing offer holders, effectively granting manufacturers exclusive control over pricing.

91. AGI submitted that such an interpretation is warranted, given that amendment No. 003 to the RFSO was issued after AGI wrote to PWGSC expressing concern that having standing offer holders communicating with each other for the purpose of adjusting prices raised concerns under the *Competition Act* and given that the amendment also specifically states that the Competition Bureau will be notified if PWGSC believes that communication between standing offer holders has occurred.

92. AGI also submitted that, contrary to PWGSC's suggestion that it will exercise discretion in determining when to accept proposed updates to MSRP lists on the basis of what is reasonable, no parameters for the exercise of that discretion are defined in the RFSO. It submitted that there is considerable discretion for manufacturers to propose price updates and that such updates would normally be accepted by PWGSC.

93. For its part, PWGSC submitted that AGI's allegations regarding the potential manipulation of the price update mechanism by manufacturers demonstrates that it has fundamentally misunderstood some of the essential principles and requirements of the procurement process at issue, as expressly set out in the terms of the solicitation.

94. PWGSC submitted that Annex "A" to the RFSO makes it very clear that PWGSC exercises oversight approval authority over any proposals for the update of MSRP lists. It added that, as explained by Mr. McLaughlin at the hearing, PWGSC would make some inquiries to see if proposed price increases are reasonable. It submitted that, by having the discretion to refuse unreasonable price increases, PWGSC can ensure that there is no abuse. It therefore submitted that, contrary to AGI's assertion, any update to the MSRP lists is subject to the scrutiny and approval of PWGSC and is not a matter of unilateral action by a manufacturer.

95. PWGSC added that answer 4 in amendment No. 001 to the RFSO indicates that no one standing offer holder can act unilaterally to update the operative MSRP list and that any such update has to be the result of identical submissions from all three standing offer holders (which themselves obtain the updated MSRP list from the manufacturer) to PWGSC for approval.

96. PWGSC submitted that, if updates are not received from all three standing offer holders, or if the updated MSRP lists are not identical, then no update will be approved, and the existing MSRP list remains in effect. It therefore submitted that any one of the standing offer holders can essentially veto any change in the MSRP list that it believes may be detrimental to its interests by simply not submitting or otherwise agreeing to an update.

97. In response to AGI's argument that amendment No. 003 to the RFSO supersedes and takes precedence over amendment No. 001, PWGSC submitted that there is no language in any of the amendments to suggest that one supersedes the other. It added that, when an amendment is intended to replace another, it is explicitly stated. It therefore submitted that, in this case, amendment Nos. 001 and 003 have to be read as a whole, thereby complementing each other as opposed to one replacing the other.

98. As for AGI's assertion that the terms of the solicitation provide for the disclosure of standing offer holders' prices, PWGSC submitted that, just because the terms of the solicitation allow for such disclosure, it does not mean that PWGSC will actually disclose the prices.

99. The Tribunal notes that AGI's specific allegations regarding the circumstances under which the price update mechanism provides unfair competitive advantages to manufacturers and preferred suppliers are premised on a certain understanding of how that mechanism actually functions. That understanding differs significantly from PWGSC's understanding. Therefore, before addressing AGI's specific allegations, the Tribunal must first determine how two important aspects of the price update mechanism operate or, at least, are intended to operate.

100. The first and most disputed aspect of the price update mechanism that the Tribunal will examine relates to the manner in which updates to MSRP lists are to be submitted to PWGSC. AGI claimed that updates are required to be provided directly to PWGSC from manufacturers, whereas PWGSC claimed that updates are required to be provided to PWGSC by all three standing offer holders of a category of FSRE.

101. This particular aspect of the price update mechanism was only addressed in amendments to the RFSO. The response provided by PWGSC to question 4 in amendment No. 001 to the RFSO clearly indicates that updates to MSRP lists ". . . will only be accepted when all 3 ranked Offerors provide identical updates . . ." and that "[i]nconsist[e]nt updated price lists among ranked Offerors will render the optional update void . . . ."

102. However, part of the confusion seems to lie in the response provided by PWGSC to the question in amendment No. 003 to the RFSO, which states that ". . . updates to the [MSRP list] are ONLY to be received from the manufacturer" and that "[i]f for any reason, [PWGSC] believes that communication between ranked suppliers has occurred, the Competition Bureau will be immediately notified."

103. AGI argued that amendment No. 003 to the RFSO is clear and amends, or takes precedence over, amendment No. 001. The Tribunal does not agree. There is no indication that the response provided by PWGSC in amendment No. 003 was intended to replace the response provided by PWGSC to question 4 in amendment No. 001. The Tribunal notes that, generally speaking, when information is intended to replace previously issued information, that intention is made abundantly clear through a statement to that effect. For

example, amendment No. 003 explicitly states that a specific clause of the RFSO (unrelated to the issues in this inquiry) is *deleted* and *replaced* with a revised version. This is manifestly not the case with the responses in amendment Nos. 001 and 003.

104. Therefore, the Tribunal is of the view that amendment Nos. 001 and 003 to the RFSO must be read together. The response to question 4 in amendment No. 001 leaves absolutely no doubt that updates to MSRP lists are to be submitted to PWGSC by all three standing offer holders of a category of FSRE, not directly by the manufacturer. As for the response to the question in amendment No. 003, the Tribunal interprets it as meaning that standing offer holders, as opposed to PWGSC, are only to receive updates to MSRP lists directly from manufacturers.

105. This interpretation is consistent with amendment No. 001 to the RFSO and other provisions of the RFSO. In fact, a number of provisions of the RFSO indicate that, at the bidding stage of the solicitation (i.e. initial price-setting stage), bidders, not manufacturers, are the ones that provide MSRP lists to PWGSC.[44] If identical MSRP lists must be provided to PWGSC by bidders at the bidding stage of the solicitation, it only makes sense that the same procedure apply to standing offer holders at the standing offer stage (i.e. price update stage).

106. AGI also argued that the response to the question in amendment No. 003 to the RFSO, which states that PWGSC will notify the Competition Bureau if it believes that communications between standing offer holders has occurred, supports the view that updates to MSRP lists must be provided directly to PWGSC from manufacturers. The Tribunal is not persuaded that such is the case.

107. First, if PWGSC really intends to notify the Competition Bureau in instances where communications between standing offer holders occur in the context of price updates, it would then have had to notify the Competition Bureau at the bidding stage of the solicitation where, as discussed above, bidders had to provide identical MSRP lists to PWGSC (thereby requiring communications between bidders). However, there is no evidence to indicate that PWGSC did actually notify the Competition Bureau or that concerns were raised by potential suppliers regarding the possibility of communications between bidders at that stage of the solicitation.

108. Second, even if the Tribunal assumes that PWGSC is willing to notify the Competition Bureau in instances where communications between standing offer holders occur in the context of price updates, the additional procedures outlined by PWGSC in the GIR indicate that communications between manufacturers that are standing offer holders and other standing offer holders would be conducted through PWGSC, thereby avoiding direct communications.[45] Although this clarification was only provided by PWGSC after AGI filed its complaint, it was still provided before the first scheduled price update. As such, the Tribunal accepts that, if PWGSC is intent on preventing communications between standing offer holders, it will proceed as outlined in the GIR.

109. Finally, while the Tribunal does not have jurisdiction to determine whether communications between standing offer holders in the context of price updates contravenes provisions of the *Competition Act*, it notes that such communications do not lead to a change in the percentage discounts (i.e. the basis on which competition occurred and suppliers were ranked) offered by standing offer holders,

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44. See, for example, the definition of the term "MSRP" at section 5 of Part I of the RFSO (". . . all offerors must provide the same identical MSRP as created by the manufacturer") and the language used in Annex "A" to the RFSO ("It is the responsibility of all Offerors to ensure that they provide the manufacturers most recent common price list . . . . Any Offeror who fails to provide the manufacturer's most recent common price list . . .").
45. See GIR at para. 32. This would entail updates to MSRP lists being submitted to PWGSC by manufacturers and then passed along to standing offer holders by PWGSC. Standing offer holders, if they agreed with the updates, would then resubmit them to PWGSC.

as those percentages are fixed for the duration of the standing offer. Such communications only pertain to a possible increase in prices that would apply equally to all standing offer holders and for which PWGSC reserves the right to reject.

110. In light of the foregoing considerations, the Tribunal finds that identical updates to MSRP lists are required to be submitted to PWGSC for approval by all three standing offer holders of a given category of FSRE. In accordance with the response to question 4 in amendment No. 001 to the RFSO, if updates are not received from all three standing offer holders, or if the updates are not identical, then no update will be approved by PWGSC, and the existing MSRP list will continue to apply for another period of six months.

111. As a result, any one standing offer holder has the power—essentially a veto power—to prevent an update if it believes that such an update is not in its best interests. This, in the Tribunal's view, serves to place manufacturers and distributors on an equal footing.

112. The second aspect of the price update mechanism that the Tribunal will examine relates to the criteria that PWGSC will apply when deciding whether or not to approve updates to MSRP lists. Annex "A" to the RFSO states that MSRP lists ". . . will be allowed to fluctuate based on current market conditions" and that updates ". . . must be approved by [PWGSC] . . . ." In addition, the response provided by PWGSC to question 21 in amendment No. 001 to the RFSO indicates that market fluctuations (the rise and fall of steel prices are given as an example), which have an impact on costs of production, will form a proper basis upon which to request a price update.

113. At the hearing, Mr. McLaughlin testified that some of the criteria that will be considered for purposes of determining whether there are changes in market conditions that justify a price increase include commodity prices, exchange rates, costs of transportation, insurance costs and inflation rates.[46] In the Tribunal's view, the overriding consideration that emerges from the terms of the RFSO and Mr. McLaughlin's testimony is that price increases will be approved if they are deemed reasonable.

114. Although the Tribunal acknowledges that this approval process is somewhat less sophisticated than those processes used in the private sector and described by Mr. Kaul at the hearing,[47] this does not imply that PWGSC will approve or reject proposed updates to MSRP lists in an arbitrary or complacent manner. PWGSC will ultimately have an obligation to ensure that the approval process is applied in a fair manner.

115. AGI argued that there is considerable discretion for manufacturers to propose price updates and that such updates would normally be accepted by PWGSC. The Tribunal does not agree.

116. If PWGSC is very lenient in its approval of proposed updates to MSRP lists, it will in effect be undermining the benefits of the competitive process. PWGSC issued an RFSO for the purposes of obtaining competitive offers from a number of potential suppliers, each one of them proposing a percentage discount from prices set out in MSRP lists. By reserving the right to deny unreasonable or unjustified price increases, PWGSC is simply protecting itself against potential future abuse by standing offer holders and maintaining the good functioning of the NMSOs.

117. In the Tribunal's view, the requirement that identical updates to MSRP lists be submitted to PWGSC by all three standing offer holders of a given category of FSRE together with PWGSC's discretion to refuse updates that it considers unreasonable serves to ensure that unfair competitive advantages are not conferred upon manufacturers and their preferred suppliers.

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46. *Transcript of Public Hearing*, 26 August 2011, at 77-79.
47. *Ibid.* at 13-14.

118. Having satisfied itself as to the operation of the price update mechanism, the Tribunal will now turn to AGI's specific examples of circumstances under which manufacturers and their preferred suppliers would allegedly be provided with unfair competitive advantages.

119. AGI argued that manufacturers can squeeze out standing offer holders by decreasing the prices set out in their MSRP lists so that they will either not make a profit or incur a loss. However, as standing offer holders have the power to block or prevent updates to MSRP lists, it is reasonable to assume that updates that are designed to squeeze a given supplier out will be blocked by that same supplier per its veto power conferred by the RFSO.

120. AGI argued that manufacturers can also eliminate competition by increasing costs to standing offer holders, but not making any adjustments to the MSRP lists. As discussed above, it is entirely reasonable for manufacturers to rely on their natural competitive advantages in the context of a competitive solicitation. The fact that manufacturers can increase costs to standing offer holders constitutes such a natural competitive advantage and is not unfair.

121. While it is true that standing offer holders could offset increases in costs dictated by manufacturers if they had the ability to individually update MSRP lists, the Tribunal is of the view that manufacturers would still possess the same advantage by virtue of being able to increase costs immediately after a scheduled price update period, such that standing offer holders would have to wait another six months before another opportunity to increase prices arose.[48]

122. AGI also argued that manufacturers and their preferred suppliers have the advantage of being able to submit greater percentage discounts at the bidding stage of the solicitation with the knowledge that prices can be increased six months later. However, as PWGSC has the discretion to refuse updates to MSRP lists that it considers unreasonable, the Tribunal is of the view that such an advantage does not in fact exist.

123. In order to gain a real advantage at the bidding stage, manufacturers would have to offer a percentage discount which would require a subsequent price increase beyond what market conditions could justify. Also, as the Tribunal alluded to above, this is precisely the type of situation where PWGSC's right to reject proposed price increases helps to prevent abuse in the form of initially submitting low prices only to attempt to unreasonably increase them later on.

124. Finally, AGI argued that manufacturers can provide standing offer holders and PWGSC with inconsistent updates to MSRP lists with the result that standing offer holders would rely on unapproved MSRP lists and thus have their standing offer set aside pursuant to the terms of the RFSO. However, since the Tribunal has already determined that identical updates to MSRP lists must be submitted to PWGSC by all three standing offer holders, these standing offer holders will necessarily know whether an update is being proposed and, ultimately, will be informed by PWGSC of its approval or rejection. Therefore, the Tribunal finds that manufacturers cannot unilaterally cause standing offer holders to have their standing offer set aside.

125. In light of the foregoing, the Tribunal concludes that the pricing mechanism established by the RFSO operates in a non-discriminatory manner, both at the bidding stage and standing offer stage of the solicitation, as it does not provide manufacturers and their preferred suppliers with unfair competitive advantages, which would otherwise violate the non-discrimination provisions of the relevant trade agreements. Having reached this conclusion, the Tribunal must also conclude that AGI's allegations regarding the existence of conflicts of interests, the restriction of competition and the creation of unnecessary obstacles to trade are unfounded.

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48. The Tribunal also notes that, regardless of whether or not the fixed percentage discounts offered by standing offer holders will be disclosed by PWGSC, manufacturers will always have the ability to increase costs to standing offer holders and thereby reduce their profit margins. Again, this is part of a manufacturer's natural competitive advantage.

126. For these reasons, the Tribunal determines that AGI's complaint is not valid.

Costs

127. 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.

128. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (i.e. Level 3).

129. The complexity of the procurement is deemed to be intermediate, as it involved the provision of a large number of items falling within 24 different identified categories of products.

130. As for the complexity of the complaint, the Tribunal finds that it was high, in that it contained multiple grounds of complaint and concerned the interpretation of complex provisions of the solicitation document.

131. Finally, the complexity of the proceedings themselves was high, as there was a preliminary motion, submissions were made outside of the normal scope of the proceedings, the Tribunal also held an oral hearing, and the use of the 135-day time frame was required. The Tribunal, however, recognizes that PWGSC's motion to have the Tribunal cease to conduct the inquiry was dismissed.

132. Accordingly, the Tribunal's preliminary indication of the amount of the cost award is $3,000.

DETERMINATION OF THE TRIBUNAL

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

134. 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 AGI. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $3,000. 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.

Jason W. Downey

Jason W. Downey
Presiding Member