



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2011-022

Almon Equipment Limited

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, January 3, 2012*

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IN THE MATTER OF a complaint filed by Almon Equipment Limited pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

ALMON EQUIPMENT LIMITED

Complainant

AND

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

**Government
Institution**

DETERMINATION

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 Almon Equipment Limited. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey
Jason W. Downey
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Tribunal Member:	Jason W. Downey, Presiding Member
Director:	Randolph W. Heggart
Senior Investigator:	Cathy Turner
Counsel for the Tribunal:	Georges Bujold
Complainant:	Almon Equipment Limited
Counsel for the Complainant:	Michel W. Drapeau
Intervener:	Inland Technologies Canada Inc.
Counsel for the Intervener:	George Caines
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Ian McLeod Roy Chamoun Corinne Cameron

Please address all communications to:

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

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

STATEMENT OF REASONS

1. On August 19, 2011, Almon Equipment Limited (Almon) 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 procurement (Solicitation No. W0125-11X006/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of aircraft de-icing glycol recovery services.
2. Almon alleged that the requirements of the solicitation intentionally exclude it and other companies from competition and that they are anti-competitive, overly restrictive and biased, and represent a restraint of trade.²
3. On August 30, 2011, the Tribunal informed the parties that the complaint had been accepted, in part, 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
4. The Tribunal limited its inquiry to the allegations that the mandatory requirements with regard to personnel and experience set out in the solicitation are overly restrictive. The Tribunal also decided to inquire into Almon's allegations concerning section 3.2.7 of the Statement of Work (SOW). The Tribunal decided not to accept for inquiry the allegation regarding the time period for bidding and provides its reasons for this decision below.
5. On August 31, 2011, PWGSC advised the Tribunal that the procurement process was ongoing. On September 23, 2011, PWGSC advised the Tribunal that a contract had been awarded to Inland Technologies Canada Inc. (Inland). On October 4, 2011, the Tribunal granted intervener status to Inland.
6. On October 12, 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 October 26, 2011, Almon filed its comments on the GIR. Inland did not file any comments.
7. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

8. On July 4, 2011, PWGSC issued a Letter of Interest giving notice to potential suppliers of the forthcoming procurement for the provision of aircraft de-icing glycol recovery services.
9. On August 4, 2011, PWGSC issued a Request for Proposal (RFP) for the provision of aircraft de-icing glycol recovery services at Canadian Forces Base (CFB) Trenton.⁵
10. On August 19, 2011, Almon filed its complaint with the Tribunal.

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

2. Almon also alleged that the time allotted by PWGSC to potential suppliers to prepare and submit bids was unreasonable. However, as discussed below, this ground of complaint was not accepted for inquiry.

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

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

5. The RFP was posted on MERX, Canada's electronic tendering service, on August 5, 2011.

11. On August 25, 2011, PWGSC issued amendment No. 004 to the RFP providing answers to bidders' questions.⁶ On August 31, 2011, PWGSC issued amendment No. 005 to the RFP in order to provide additional responses to bidders' questions and to modify requirement No. 4 of Annex I to the RFP pertaining to the requisite bidder experience, which is at issue in this inquiry.⁷

12. On September 14, 2011, the bidding period closed. According to PWGSC, two bids were received: one from Almon and one from Inland. According to PWGSC, on September 22, 2011, it advised Almon of the evaluation results. PWGSC determined that Almon's proposal was not compliant with six of the nine mandatory technical criteria set out in the RFP.

GROUND OF COMPLAINT NOT ACCEPTED FOR INQUIRY

13. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,⁸ Chapter Five of the *Agreement on Internal Trade*,⁹ the *Agreement on Government Procurement*,¹⁰ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,¹¹ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*¹² or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*¹³ applies. In this case, all the trade agreements apply, with the exception of the *CCOFTA*, which was not in force at the time the RFP was issued.

14. In its complaint, Almon alleged that the amount of time that PWGSC gave bidders to respond to the solicitation was unreasonable. It submitted that potential suppliers were required to prepare detailed proposals within six weeks from the date of publication of the RFP and that, considering the level of detail required to prepare responsive proposals, this time period was unreasonable and precluded companies to bid for this procurement.

15. Article 1012(2)(a) of *NAFTA* provides as follows:

in open tendering procedures, the period for the receipt of tenders is no less than 40 days from the date of publication of a notice

6. GIR, exhibit 24. Amendments No. 001, 002 and 003 to the RFP are not relevant to the complaint.

7. GIR, exhibit 26.

8. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

9. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

10. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

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

12. *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*].

13. *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) [*CCOFTA*].

16. Article Kbis-05(1) of the *CCFTA* provides as follows:
An entity shall provide no less than 30 days between the date on which it publishes the notice of intended procurement and the deadline for submitting tenders.
17. Article 506(5) of the *AIT* provides as follows:
Each 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.
18. The *AGP* and the *CPFTA* have similar provisions.
19. Bids closed on September 14, 2011. The Tribunal notes that this is a period of 40 days. The Tribunal is of the view that PWGSC set a reasonable period of time for bidders to submit proposals and that the period of time allowed for bidding is consistent with the minimum requirements of the applicable trade agreements. The complaint did not contain detailed explanations or evidence that could have persuaded the Tribunal that the complexity of the procurement might have warranted a longer period of time for suppliers to prepare and submit bids.
20. Therefore, the Tribunal found that, for this ground of complaint, there was no reasonable indication that the procurement was not conducted in accordance with the requirements of the applicable trade agreements. This ground of complaint was therefore not accepted for inquiry.

TRIBUNAL'S ANALYSIS

21. 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 *NAFTA*, the *AIT*, the *CCFTA*, the *AGP* and the *CPFTA*.
22. Article 504(3)(b) of the *AIT* prohibits the biasing of technical specifications in favour of, or against, particular goods or services, or the suppliers of such goods or services, for the purpose of avoiding the obligations of Chapter Five.
23. Article 1007(1) of *NAFTA* provides as follows:
Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.
24. Article 1009(2)(b) of *NAFTA* provides as follows:
2. The qualification procedures followed by an entity shall be consistent with the following:
...
b. conditions for participation by suppliers in tendering procedures . . . shall be limited to those that are essential to ensure the fulfillment of the contract in question;
...
25. The *CCFTA* and the *CPFTA* contain similar provisions.

26. Article VIII(b) of the *AGP* provides as follows:
- (b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question. . . .
27. The relevant requirements of the RFP, as amended, provide as follows:

ANNEX I

TECHNICAL EVALUATION CRITERIA

#	Mandatory Criteria
...	
4	Bidders must demonstrate experience providing aircraft de-icing glycol fluid recovery service at a minimum of one (1) airport meeting the classification requirements for a NAS airport or NON NAS Regional airport as defined in the Canadian National Airports Policy . . . with similar climatic conditions. Similar climatic conditions are defined as the same amount or more annual snowfall and the same or a lower average temperature than the average winter temperature at CFB Trenton in accordance with the national environmental service. These services must have been performed for a minimum of 3 de-icing seasons since 2006, of which 2 de-icing seasons must be since 2008. . . .
...	
9	RESUMES OF PROPOSED PERSONNEL The Bidder must provide resumes of all personnel dedicated to performing the tasks detailed in the SOW, directly relating to the reclamation of aircraft de-icing glycol fluids. Project Personnel must have a minimum of one (1) de-icing season of experience within the past two (2) years directly relating to the reclamation of aircraft de-icing glycol fluids at an airport which had similar climatic conditions as CFB Trenton. Similar climatic conditions are defined as the same or greater amount of annual snowfall and the same or lower average temperature than the average winter temperature at CFB Trenton in accordance with the national environmental service.
...	

28. In turn, the SOW includes the following requirements:
- 3.1.4 The contractor must adhere to Reference 2.2; the acceptable glycol release concentration guideline is a maximum of 100 [parts per million (ppm)].
- 3.1.5 The contractor must test the glycol concentration of the standing water in the de-icing area and once it is below 100 ppm, the contractor will then notify the DWO [Duty Watch Officer] who will call the duty WEnv Tech [Wing Environmental Technologist] to retest and verify the reading.
- ...
- 3.2.7 Glycol analytical equipment must be approved by the Wing Environment Officer.

Personnel and Experience Requirements

29. Regarding mandatory criterion 4, Almon submitted that there have only been five de-icing seasons since 2006 and three seasons since 2008.¹⁴ Thus, the requirement is to show services that have been provided in two of the last three years and three of the last five years. Almon submitted that it is overburdensome and unnecessary to require a company to demonstrate that it has experience in two of the last three years, especially for long established companies like itself.

14. According to Almon the services are generally required for the seasonal period from October 1 to April 30, hence the reference to "season".

30. Regarding mandatory criterion 9, Almon submitted that there is no requirement to have staff with such recent aircraft de-icing glycol fluid recovery experience, as the glycol spray and recovery procedure used today is relatively unchanged since the 1980s and that, by requiring experience with climatic conditions similar to those at CFB Trenton, the contract is biased towards the company which held the contract at CFB Trenton for the past two seasons. It also submitted that it is uncertain what is meant by “. . . one (1) de-icing season of experience within the past two (2) years . . .”, as the glycol recovery season straddles two calendar years. Thus, only one full “season” has occurred in the past two calendar years, that being 2010-2011.

31. Almon contended that, by phrasing the requirement in such a way, it can be interpreted as meaning that the contract will be awarded to the company that provided the services last year. Almon submitted that an operator with 10 years of experience is more qualified than an operator that has only collected glycol fluid over the past two years.

32. PWGSC acknowledged that the requirements for recent experience in the services at issue are demanding. However, it submitted that, in the circumstances of the particular operational requirements of CFB Trenton, including aircraft safety and environmental concerns, these rigorous requirements are both reasonable and well founded.

33. In particular, PWGSC stated that CFB Trenton is required to be prepared to support, without delay, a wide variety of critical flight operations in all climatic conditions in support of the Canadian Forces’ operations, including military transportation, search-and-rescue flights, and sovereignty missions. It submitted that, in such circumstances, there is no room for a contractor that needs time for it or its personnel to “get up to speed”; hence, the requirement for recent experience.

34. PWGSC further submitted that, in the case of the services required under the procurement at issue, CFB Trenton is extremely mindful of its responsibilities with respect to the environmental concerns posed by the close proximity of CFB Trenton to the Bay of Quinte and its watershed. Given these concerns, PWGSC submitted that it is entirely reasonable to require that any glycol recovery services provided at CFB Trenton be of a high standard of reliability. PWGSC contended that the likelihood of a contractor being able to meet such standards is strongly enhanced by the requirement that a bidder and its proposed personnel all have recent experience, as set out in the RFP.

35. Regarding Almon’s allegation that, by requiring experience with climatic conditions similar to those at CFB Trenton, the contract is biased towards the company which held the contract for the past two seasons, PWGSC submitted that the term “similar climatic conditions” is broadly defined and not specific to CFB Trenton. In other words, in PWGSC’s view, since the required experience can be obtained by potential suppliers at a significant number of airports in Canada, such requirements are not discriminatory or biased in favour of any particular suppliers.

36. PWGSC also submitted that it is reasonable for the procurement at issue to require that a contractor have the specified experience at a location with a comparable climate and, therefore, with similar glycol usage conditions.

37. In its comments on the GIR, Almon submitted that the process of glycol reclamation is a crude and basic procedure, analogous to an over-sized vacuum cleaner and storage tank. It submitted that “[g]lycol fluid recovery involves a hose, connected to a vacuum pressurized tank that sucks up liquid.” This liquid is stored and taken away, which, Almon contended, is hardly a specialized or abstract process.

38. With respect to environmental concerns, Almon submitted that all concerns regarding glycol reclamation at CFB Trenton are mitigated by virtue of the separate spraying area on the base that is used for de-icing prior to take-off. According to Almon, this procedure not only contains much of the fluid but also allows it to be collected in predictable areas, thereby preventing it from leaching into and contaminating the soil or running off into the watershed.

39. The Tribunal notes that PWGSC admits that the mandatory criteria at issue are demanding. However, this does not mean that they are inconsistent with the applicable trade agreements.

40. Indeed, the Tribunal has stated repeatedly that the Government has the right to define its procurement requirements, to the extent that they meet its operational requirements.¹⁵ The Tribunal's jurisprudence also indicates that the Government is under no obligation to compromise its legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs.¹⁶

41. Moreover, the Tribunal has indicated that an invitation to tender is not necessarily discriminatory if the bidders are not on an equal footing when they participate in a bidding procedure. Some competitive advantages for certain suppliers over others may arise from the fact that a company holds a contract or intellectual property rights, or from other commercial factors.¹⁷

42. Thus, PWGSC is entitled to require that its procured services be of the highest possible standards, provided demanding conditions for the qualification of potential suppliers are justified by legitimate operational requirements and are not otherwise inconsistent with the provisions of the applicable trade agreements. In this case, the Tribunal finds that there are specific concerns that warrant PWGSC to impose such stringent conditions to ensure a firm's capability to perform the contract in question satisfactorily.

43. First, it is not disputed that CFB Trenton is in very close proximity to the Bay of Quinte and its watershed. The Tribunal considers that this poses significant environmental concerns, as was argued by PWGSC. This fact supports PWGSC's decision to require that potential suppliers be up to date with glycol collection procedures and be ready, from the outset, to operate with precision and efficiency in order to minimize the risk of accidental escape of any waste glycol into the Bay of Quinte watershed. In the Tribunal's opinion, requiring recent experience increases the likelihood of awarding the contract to an effective and reliable supplier.

44. Second, the Tribunal notes that it is not disputed that CFB Trenton is an operational military base conducting critical missions using aircraft involved in protecting Canada's sovereignty, supporting combat operations abroad and flying multiple search-and-rescue missions throughout central Canada on a yearly basis.

45. The Tribunal also notes that, consequently, search-and-rescue missions are most often the result of the same inclement weather that this procurement seeks to address. Since the services are to be provided at such a strategic airbase with very specific requirements, the Tribunal accepts PWGSC's submissions that there is a need for the procuring entity to ensure that the contractor be operational at the outset and that there is no time to allow the contractor or its staff to get "up to speed". Again, requiring recent experience for the supplier and its staff furthers these legitimate objectives.

15. *Re Complaint Filed by Inforex Inc.* (24 May 2007), PR-2007-019 (CITT); *Re Complaint Filed by FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT); *Re Complaint Filed by Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

16. *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).

17. *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT).

46. In these circumstances, the Tribunal is of the view that the requirement that the contractor and its staff be operational from the outset is reasonable. In addition, the Tribunal is of the view that the need for recent experience is a legitimate requirement and that PWGSC has established sound reasoning for requiring immediate operability and including the experience requirements being challenged by Almon.

47. In short, the Tribunal finds that these requirements enhance the likelihood of awarding the contract to a supplier that is able to provide services that meet the high standards of quality and reliability that the procuring entity is entitled to demand in view of its legitimate operational requirements for this procurement. Such requirements are not in contravention with any of the applicable trade agreements.

48. The Tribunal also notes that the burden of proof for demonstrating that the requirements at issue are “overburdensome and unnecessary” lies with Almon. Apart from simply stating that such a high degree of operability and experience is not required, Almon has not established, either through manuals, procedures, norms or any other form of direct evidence, that such a demand by PWGSC goes beyond what is reasonable in the circumstances.

49. In fact, apart from simply stating its own operational procedures of using a giant vacuum cleaner to collect glycol and that nothing has changed in glycol recovery over the last 30 years, there was no demonstration of industry procedures which could convince the Tribunal that PWGSC’s requirements were unreasonable.

50. As for the similar climatic conditions requirement, it is common knowledge that CFB Trenton is one of Canada’s southernmost military bases. Again, the burden of demonstrating that this requirement is discriminatory or biased towards the incumbent lies with Almon.

51. Mandatory criteria 4 and 9 give a very general and broad definition of the phrase “similar climatic conditions”, a definition which invariably covers a wide range of airports in Canada. The Tribunal therefore accepts PWGSC’s submissions that, since the required experience could be acquired at locations other than CFB Trenton, where comparable climatic conditions prevail, the procurement is not biased in favour of the incumbent supplier at CFB Trenton. Moreover, Almon has not demonstrated, with positive evidence, how this definition prevented it from being on an equal footing with other bidders, including the incumbent supplier.

52. In *Re Complaint Filed by 723186 Alberta Ltd.*,¹⁸ the Tribunal stated as follows:

19. It is well established in Tribunal jurisprudence that a government institution is entitled to define and satisfy its legitimate operational requirements. However, while a government institution has the right to establish the parameters of the solicitation, it must do so reasonably, as it does not have licence to establish conditions that are impossible to meet. Thus, the prerogative of the procuring entity to define its procurement needs is circumscribed by “reasonableness”.

20. The Tribunal has also held that a government institution, in satisfying its legitimate operational requirements, need not structure a procurement to accommodate any particular supplier. In its recent decision in *Daigen Communications* [File No. PR-2011-021], the Tribunal noted that, as long as a procurement is not deliberately constructed to preclude certain suppliers or to direct the procurement to a favoured supplier, a government institution may choose to procure a combination of services by way of a single solicitation, even though this might have the effect of excluding some suppliers.

18. (12 September 2011), PR-2011-028 (CITT).

21. Moreover, as the Tribunal has stated in the past, the fact that certain bidders have competitive advantages regarding a particular tendering process is simply part of the ordinary ebb and flow of business; if a bidder is at a disadvantage, it does not necessarily follow that the procurement process is discriminatory.

[Footnotes omitted]

53. In *Re Complaint Filed by Daigen Communications*,¹⁹ the Tribunal stated as follows:

16. The Tribunal has also held that a government institution, in satisfying its legitimate operational requirements, need not structure a procurement to accommodate any particular supplier. Therefore, provided that a procurement is not deliberately constructed to preclude certain suppliers or to direct the procurement to a favoured supplier, a government institution may choose to procure a combination of services by way of a single solicitation, even though this might have the effect of excluding some suppliers.

17. Moreover, as the Tribunal has stated in the past, the fact that certain bidders have competitive advantages regarding a particular tendering process is simply part of the ordinary ebb and flow of business; if a bidder is at a disadvantage, it does not necessarily follow that the procurement process is discriminatory.

[Footnotes omitted]

54. Again, the Tribunal is of the view that Canada has the right to define its procurement requirements, taking into account its legitimate operational requirements. Almon has not presented evidence demonstrating that the requirements of the procurement at issue are discriminatory, impossible to meet or unreasonable. There is also no evidence on the record that could suggest that PWGSC included the requirements at issue in order to deliberately exclude Almon or to favour the incumbent supplier. In the absence of positive evidence in this regard, the fact that Almon cannot presently meet these requirements only means that they are outside the scope of Almon's capabilities, not that the requirements are inconsistent with the applicable trade agreements.

55. In summary, the Tribunal is of the view that Almon has not presented any evidence to indicate that PWGSC deliberately constructed the procurement to exclude Almon from the competition. Accordingly, the Tribunal finds that, for this ground of complaint, the evidence does not disclose that the procurement was conducted in violation of the applicable trade agreements.

Requirement 3.2.7 of the SOW

56. Almon submitted that requirement 3.2.7 of the SOW is ambiguous and does not allow a company wishing to bid an opportunity to determine, before drawing on significant firm resources, if its current equipment inventory will satisfy the requirement. There is no indication as to the nature of the equipment that will be approved or the minimum standard that is necessary for approval. It further submitted that granting such absolute power to the Wing Environmental Officer puts the entire tendering process in a position of perceived bias.

57. PWGSC submitted that, inherent in requirements 3.1.4 and 3.1.5 of the SOW referenced above, is the requirement that a contractor have the technical capacity to measure glycol dilutions to a standard of parts per million. In order to take such measurements, a contractor must have measurement tools calibrated to the precision of parts per million. PWGSC submitted that the purpose of requirement 3.2.7 of the SOW is to indicate that, through the Wing Environmental Officer, CFB Trenton will exercise its due diligence to ensure that the contractor has the tools to properly meet these requirements. It therefore contended that these requirements are reasonable.

19. (23 August 2011), PR-2011-021 (CITT).

58. PWGSC submitted that, having been awarded the glycol recovery contract for the 2007-2008 de-icing season, Almon commenced work equipped with glycol analytical equipment that was calibrated only to high percentages and was not capable of taking readings in parts per million. PWGSC also submitted that, since the specifications for the work in 2007-2008, like the provisions of the procurement at issue, required measurements to 100 ppm, Almon's glycol analytical equipment was not able to perform the required analysis. After a review with the Wing Environmental Officer at that time, Almon was directed to acquire new glycol analytical equipment with the required calibration. This was done by Almon, and the equipment was in turn approved by the Wing Environmental Officer; this suggests that Almon would or should still own that equipment today. PWGSC further submitted that the RFP for glycol recovery services for the 2008-2009 de-icing season had similar requirements for parts per million calibration measurement, which was not challenged by Almon.

59. PWGSC contended that, notwithstanding its allegations, Almon, through its prior experience at CFB Trenton, understands the standard of analytical equipment that is required, has worked with such equipment and understands the purpose of the inclusion of requirement 3.2.7 of the SOW.

60. The Tribunal notes that requirement 3.2.7 of the SOW falls under the "**Technical Requirements**" section of the SOW. The wording in this section indicates that these requirements pertain to the "contractor" and not to the "bidder" at the bid solicitation stage. In this regard, Part 7 of the RFP titled "**RESULTING CONTRACT CLAUSES**" provides as follows: "The *Contractor* must perform the work in accordance with the Statement of Work at *Annex A*" [emphasis added].

61. In contrast, Part 4 of the RFP titled "**EVALUATION PROCEDURES AND BASIS OF SELECTION**" makes it clear that "[e]ach bid will be reviewed to determine whether it meets the mandatory requirements of *Annex I of the bid solicitation which is entitled 'Technical Evaluation Criteria'*" [emphasis added]. There is no reference to requirement 3.2.7 of the SOW in Annex I, which provides the list of the mandatory criteria of the RFP. This means that requirement 3.2.7 is not a mandatory technical criterion.

62. Accordingly, there is nothing in requirement 3.2.7 of the SOW that would prevent Almon from bidding and obtaining the contract. Requirement 3.2.7 pertains to a post-contract award approval of the "contractor's" glycol analytical equipment. The Tribunal is of the view that it is not unreasonable for DND to perform an inspection and acceptance of equipment to be used in the glycol recovery services after the award of the contract.

63. The Tribunal notes that, having been awarded the glycol recovery contract for the 2007-2008 season, Almon was not able to perform the required measurements with its glycol analytical equipment at the time and that Almon was directed to acquire new glycol analytical equipment. Almon subsequently acquired new equipment, which was approved by DND. With respect to Almon's allegation that the inclusion of requirement 3.2.7 of the SOW gives absolute powers to the Wing Environmental Officer and results in a situation of perceived bias, the Tribunal finds that this allegation is speculative and, in any event, has not been substantiated with positive evidence. Accordingly, the Tribunal finds that, for this ground of complaint, the evidence does not disclose that the procurement was conducted in violation of the applicable trade agreements.

64. On the basis of the foregoing, the Tribunal finds that the complaint is not valid.

Costs

65. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.
66. 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 on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.
67. The Tribunal's preliminary indication is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Annex A of the *Guideline* (Level 1). The complexity of the procurement was low, as it involved the provision of a single type of services. The Tribunal finds that the complexity of the complaint was low, as the issues were straightforward and dealt with whether PWGSC used restrictive requirements. Finally, the complexity of the proceedings was low. The issues were addressed by the parties through documentary evidence and written representation, and a hearing was not necessary. While there was one intervener, it did not file any submissions with the Tribunal.
68. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

69. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.
70. 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 Almon. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey
Presiding Member