



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2011-023

Almon Equipment Limited

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, January 3, 2012*

*Reasons issued
Tuesday, January 17, 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 \$500. 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

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

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:	Péto Air Services Inc.
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. W0125-11X012/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, de-snowing and anti-icing services.
2. Almon alleged that the time allotted by PWGSC to potential suppliers to prepare and submit bids was unreasonable. Almon also alleged that certain requirements of the solicitation intentionally exclude it and other companies from competition and that they are anti-competitive, overly restrictive, biased and represent a restraint of trade.
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*.²
4. The Tribunal limited its inquiry to the allegations that the time period for bidding was unreasonable and that the mandatory requirements set out in the solicitation concerning personnel and experience were overly restrictive. The Tribunal decided not to accept for inquiry the allegation that the equipment requirements were also overly restrictive 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 27, 2011, PWGSC informed the Tribunal that a contract had been awarded to Péro Air Services Inc. (PAS). On October 7, 2011, the Tribunal granted intervener status to PAS.
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*.³ On October 25, 2011, PAS filed its comments on the GIR. On October 26, 2011, Almon filed its comments on the GIR.
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 (LOI) giving notice to potential suppliers of the forthcoming procurement for the provision of aircraft de-icing, de-snowing and anti-icing services.
9. On August 5, 2011, PWGSC issued a Request for Proposal (RFP) for the provision of aircraft de-icing, de-snowing and anti-icing services at Canadian Forces Base (CFB) Trenton.⁴ The original closing date for the receipt of bids was August 25, 2011.

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

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

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

4. According to PWGSC, although the RFP was dated August 5, 2011, it was not published on MERX, Canada's electronic tendering service, until August 8, 2011. GIR at 5, paras. 11, 14.

10. On August 18, 2011, Almon submitted 21 questions to PWGSC concerning the RFP. Other suppliers also submitted questions.
11. On August 19, 2011, PWGSC issued amendment No. 005 and amendment No. 006 to the RFP, which provided answers to bidders' questions (other than those of Almon) and extended the bid closing date by five days, to August 30, 2011.⁵ The Tribunal notes that Almon filed its complaint regarding the RFP with the Tribunal also on August 19, 2011.
12. On August 23, 2011, Almon requested an extension to the bidding period of five business days from the receipt of answers to questions that it had previously submitted to PWGSC.⁶
13. On August 24, 2011, PWGSC issued amendment No. 007, amendment No. 008 and amendment No. 009 to the RFP, which provided answers to questions previously submitted by Almon and another potential supplier and extended the bid closing date by two additional days, to September 1, 2011.⁷
14. On August 25, 2011, PWGSC issued amendment No. 010 to the RFP, which provided additional answers to bidders' questions. Later that day, Almon submitted additional questions to PWGSC.⁸
15. On August 26, 2011, PWGSC issued amendment No. 011 to the RFP, which provided answers to the questions posed by Almon the previous day.
16. On August 30, 2011, PWGSC issued amendment No. 012 to the RFP, which extended the bid closing date by six additional days, to September 7, 2011.⁹
17. On August 31, 2011, PWGSC issued amendment No. 013 to the RFP, which amended the original text of the mandatory criterion pertaining to the requisite bidder experience that is at issue, namely, mandatory criterion 4 of Annex I to the RFP, in order to correct an omission. According to PWGSC, the original text inadvertently would have excluded experience acquired at large airports from the scope of acceptable experience.¹⁰
18. On the same date, Almon requested another extension to the bidding period. PWGSC responded to this request on September 2, 2011, stating its belief that the most recent extension of time granted on August 30, 2011, was more than adequate to address Almon's concerns and that, given the operational requirements for this procurement, it was no longer possible to extend the bidding period.¹¹
19. On September 7, 2011, the bidding period closed. According to PWGSC, two bids were received, one from Almon and one from PAS. According to PWGSC, on September 16, 2011, it advised Almon of the evaluation results. PWGSC determined that Almon's proposal was not compliant with seven of the nine mandatory criteria set out in the RFP.

5. GIR, exhibits 12, 13. Amendment No. 001, amendment No. 002, amendment No. 003 and amendment No. 004 to the RFP are not relevant to the complaint.
6. GIR, exhibit 17.
7. GIR, exhibits 18, 19, 20.
8. GIR, exhibits 21, 22.
9. GIR, exhibit 25.
10. GIR at 10, para. 38; exhibit 26.
11. GIR, exhibit 28.

GROUND OF COMPLAINT NOT ACCEPTED FOR INQUIRY

20. 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*,¹² Chapter Five of the *Agreement on Internal Trade*,¹³ the *Agreement on Government Procurement*,¹⁴ Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*,¹⁵ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*¹⁶ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*¹⁷ applies. In this case, only the *AIT* applies.¹⁸

21. Article 503 of the *AIT* generally prohibits measures that discriminate between goods or services or the suppliers of such goods or services. In particular, Article 504(3) provides as follows:

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 [of Article 503] include, but are not limited to, the following:

...

(b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;

...

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12. *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*].
13. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
14. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
15. *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.
16. *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*].
17. *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*].
18. In *Re Complaint Filed by Almon Equipment Limited* (23 June 2009), PR-2008-048 (CITT), the Tribunal determined that only the *AIT* applied to a procurement for similar services. Indeed, the required aircraft de-icing services constitute transportation services falling under Group V of the Common Classification System. As such, the required services are excluded from coverage under *NAFTA* by virtue of Annex 1001.1b-2, Section B - Excluded Coverage, the *CCFTA* by virtue of Chapter *Kbis*-01.1-4 and the *CPFTA* by virtue of Annex 1401.1-4. A review of these provisions indicates that all classes of transportation services falling under Group V of the Common Classification System (except travel agent services) are not covered by *NAFTA*, the *CCFTA* and the *CPFTA*. The services at issue are also not subject to the *AGP*, as transportation services were not offered for coverage in accordance with Annex 4 to Canada’s Appendix 1 to the *AGP*. The *CCOFTA* did not come into force until August 15, 2011, which was after the issuance of the solicitation. Therefore, the *CCOFTA* does not apply to this procurement.

22. Annex I to the RFP, which sets out the mandatory technical evaluation criteria for the solicitation at issue, provides as follows:

The Bidder must demonstrate how they meet the Minimum Application Equipment stipulations under point 3.2.7 of the Statement of Work (SOW) in Annex A. In particular, the Bidder must demonstrate that at bid closing it either owns the equipment identified or has an executed agreement, a copy of which must be provided with the bid.

23. The SOW, which is found in Annex A to the RFP, provides as follows:

3.2.7 Minimum Application Equipment: The contractor must provide four (4) application vehicles and personnel for the de/anti-icing process: two (2) vehicles to de/anti-ice the aircraft wings (55 foot boom) and two (2) vehicles to de/anti-ice the aircraft tail (75 foot boom).

24. Almon submitted that this requirement is overly restrictive and anti-competitive because it is not necessary and the purchase of two such vehicles, namely, vehicles with a 75-foot boom, in such a short time, is untenable. It further submitted that it held a previous contract for the de-icing services at CFB Trenton and that it was able to successfully and safely de-ice the largest airplane with a 75-foot tail, by making a simple modification to a 55-foot de-icing and anti-icing vehicle by incorporating a platform device.

25. Almon also submitted that a de-icing and anti-icing vehicle with a 75-foot boom is not readily available for purchase by companies wishing to compete for this requirement since there is insufficient lead time left before the commencement of the 2011-2012 de-icing season for the acquisition of such specialized equipment. Almon further submitted that it was unreasonable to expect potential suppliers to spend large sums to acquire the required equipment on the basis of the possibility that they may be granted a contract.

26. The Tribunal notes that, other than the statements themselves, no actual evidence was tendered as to the availability of such equipment on the market, time restrictions potentially involved in procuring such equipment or any attempts by Almon to somehow execute an agreement for the use of such equipment in the procurement at issue.

27. In File No. PR-2000-078,¹⁹ the Tribunal found that a procuring entity is entitled to express any real and reasonable needs that it may have and is under no obligation to compromise its legitimate operational requirements to accommodate a bidder's particular corporate circumstances.

28. Moreover, in File No. PR-2004-008,²⁰ the Tribunal found that there is not necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. The Tribunal noted that competitive advantages for certain suppliers could be created as a result of incumbency or any number of other business factors. Thus, if a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used by PWGSC are discriminatory. For this reason, the fact that the requirement for a specific type of equipment is onerous and could be more burdensome for certain potential suppliers than others is not sufficient to conclude that the tendering procedures are discriminatory.

19. *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001) (CITT).

20. *Re Complaint Filed by CAE Inc.* (7 September 2004) (CITT).

29. After having carefully examined the information provided by Almon in light of these overarching principles, the Tribunal was of the view that the requirement for vehicles was not unreasonable, given the nature of the services required, and found that the procuring entity was in the best position to determine the type of equipment required to fulfill its needs. In the Tribunal's opinion, the fact that Almon does not apparently have such vehicles does not in itself indicate that the requirement is overly restrictive, anti-competitive or discriminatory.

30. Accordingly, the Tribunal was of the view that the information in the complaint did not indicate that the vehicle requirement was biased in favour of, or against, any potential suppliers of such goods for the purpose of avoiding the obligations of the *AIT*. With respect to Almon's argument that vehicles with a 75-foot boom were not necessary or required to provide the aircraft de-icing services at CFB Trenton in previous contracts, the Tribunal notes that a procuring entity has no obligation, in preparing a solicitation, to incorporate the terms of a previous solicitation. Bidders should treat all solicitations as independent, and the terms of a previous solicitation are not determinative of those of a new one.²¹ 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 *AIT*. Therefore, this ground of complaint was not accepted for inquiry.

TRIBUNAL'S ANALYSIS

31. 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, is the *AIT*.

Time Period for Bidding

32. 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.

33. Almon submitted that bidders are required to submit detailed proposals and, considering the level of detail required, that the bid closing date of August 25, 2011, was not reasonable. It also submitted that DND had known for a long time that a new tendering process would be required for the 2011-2012 season and that it was unreasonable to have waited until August 5, 2011, to issue the RFP. Almon contended that the solicitation could have been issued as early as May.

34. PWGSC submitted that, as a result of amendments to the RFP, the bid closing date was ultimately extended to September 7, 2011. Consequently, the bidding period was actually 30 days, not 20 days, as claimed by Almon. It submitted that this was a reasonable amount of time, given all the circumstances of the procurement in question.

21. *Re Complaint Filed by The Spallumcheen Band* (26 April 2001), PR-2000-042 (CITT).

35. Moreover, PWGSC submitted that Almon failed to provide the Tribunal with all the pertinent facts, including the amendments to the RFP that PWGSC issued prior to August 19, 2011, that is, the date of the filing of the complaint. According to PWGSC, Almon's failure to inform the Tribunal of its own actions during the solicitation process and the results arising from these actions is relevant and should be taken into account by the Tribunal in the disposition of this complaint.

36. PAS submitted that it found the time allocated for bidding to be appropriate. It submitted that the industry involved in these types of services has known for three years that the contract at CFB Trenton would be renewed in 2011. It further submitted that PWGSC published an LOI on July 4, 2011, advising suppliers of the forthcoming procurement. PAS noted that the bid closing date had been extended three times and that the length of time given to submit bids was considerable, particularly for suppliers used to responding on a daily basis to requests on short notice. PAS added that it is up to suppliers to prepare themselves accordingly.

37. PWGSC submitted that the procurement was not one of great or unusual complexity. The list of mandatory criteria was not extensive, and there were no rated requirements. It contended that the technical requirements, while demanding and rigorous in some respects, reflected DND's legitimate operational requirements and addressed the skills, knowledge and capacities to be expected of participants in the industry.

38. PWGSC further contended that, since the procurement at issue was a successor to a series of preceding contracts awarded for similar services at CFB Trenton, the issuance of the RFP with requirements of this nature should have been readily anticipated.

39. In its comments on the GIR, Almon submitted that, from a practical perspective, granting brief extensions shortly before a bid becomes due is inconsequential, since any serious bidder would have prepared the lion's share of the submission by that time and any bidder that considered the initial bidding period overly restrictive would have elected not to compete from the outset for lack of time.

40. Almon further submitted that the fact that only two bidders managed to prepare and submit proposals in response to the RFP, despite seven potential suppliers being present at an optional site visit at CFB Trenton on August 17, 2011, supports the view that the time period for submitting a bid was not reasonable and prevented a competitive procurement process to take place.

41. The Tribunal notes that Almon filed its complaint with the Tribunal on August 19, 2011, the same day on which PWGSC extended the bid closing date from August 25, 2011, to August 30, 2011. The Tribunal also notes that the bidding period was again twice extended, to a final closing date of September 7, 2011, effectively providing bidders with a 30-day bidding period. On the basis of this evidence, the Tribunal is of the view that PWGSC was open to discussion from bidders on extending the bid closing period.

42. The Tribunal is unable to accept Almon's argument that a 30-day bidding period was unreasonable in the circumstances. On the whole, the evidence on the record establishes that PWGSC extended the bidding period as much as it could, taking into account its legitimate operational requirements, and the Tribunal is not convinced that the procurement was of a level of complexity that warranted providing suppliers with a longer period of time to submit bids.

43. Almon argued, in effect, that it was put in a difficult position to properly respond to the solicitation because of the fact that PWGSC only issued the RFP in August 2011. However, there is no evidence that this was done to give a competitive advantage to the incumbent supplier.

44. In any event, the Tribunal notes that Almon was a former, not previous, contract holder for the same services at the same airport. Through a previous complaint, File No. PR-2008-048,²² Almon closely monitored and followed the award process of two contracts—one for the removal of snow and ice from aircraft to prepare them for flight, and another for the reclamation and disposal of glycol and glycol-contaminated materials resulting from the snow and ice removal.

45. The Tribunal's decision in that case was subsequently appealed to the Federal Court of Appeal and was remanded back to the Tribunal for further review. The Tribunal's decision in the remand was made on March 1, 2011,²³ with a compensation order in Almon's favour issued on October 14, 2011. Through this process, the timing of the expiration of the last contract and the probability that the requirement would again need to be filled for the 2011-2012 season should reasonably have been clear to Almon. All this previous activity tells the Tribunal that Almon should have been aware of this contract and should have had a general idea of its requirements and its renewal process.

46. The Tribunal also notes that an LOI was issued on July 4, 2011, on MERX,²⁴ effectively notifying all potential bidders that the requirement would soon be ready for the solicitation stage. Although the LOI principally concerns expected security requirements, the Tribunal is of the view that it would also serve as fair notice to any potential bidder that the requirement would soon be going to tender.²⁵

47. The Tribunal is of the view that given the fact that Almon was a former contract holder and that the LOI signalled an expected contract start date, Almon knew or reasonably should have known that the contract requirement was slated to begin on October 1, as has been the case in at least the last five years at CFB Trenton. Almon very well could have begun at least part of its organizational processes in July, as opposed to waiting until August. Again, there is no evidence that it was the fact that the RFP was issued in August as opposed to May (as put forward by Almon) or the length of the bidding period that prevented Almon or other potential suppliers from submitting responsive bids.

48. Regarding this ground of complaint, with the issuance of the LOI and PWGSC's responsiveness in extending the bidding period, which ultimately amounted to 30 days, the Tribunal finds that the evidence does not disclose that the procurement was conducted in violation of the *AIT*.

Personnel and Experience Requirements

49. 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.

22. *Re Complaint Filed by Almon Equipment Limited* (23 June 2009) (CITT).

23. *Re Complaint Filed by Almon Equipment Limited*, PR-2008-048R (CITT).

24. Canada's electronic tendering service.

25. The notice indicated an expected contract start date of October 1, 2011.

50. Mandatory criteria 4 and 9 of Annex I, “**TECHNICAL EVALUATION CRITERIA**”, to the RFP, as amended, provide as follows:

4	Bidders must demonstrate experience providing de-snowing services and the application of aircraft de-icing and anti-icing fluids 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 3 de-icing seasons since 2006, of which 2 de-icing seasons experience must be since 2008. . . .
9	<p>RESUMES OF PROPOSED PERSONNEL</p> <p>The Bidder must provide resumes of all proposed dedicated and backup Project Personnel. Project Personnel must have a minimum of one (1) de-icing season of experience within the past two (2) years providing aircraft de-snowing services and/or the application of aircraft de-icing and anti-icing 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 environment service.</p>

51. Regarding mandatory criterion 4, Almon submitted that there have only been five de-icing seasons since 2006 and three de-icing seasons since 2008.²⁶ 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 show that it has experience in two of the last three years, especially for long established companies like itself.

52. Regarding mandatory criterion 9, Almon submitted that there is no requirement to have staff with such recent de-icing and anti-icing experience 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 Trenton for the past two seasons. It also submitted that it is uncertain what is meant by one of the past two years, as the de-icing and anti-icing season straddles two calendar years.

53. PAS submitted that the requirements are appropriate and justified. It submitted that the aviation industry is in constant evolution and that recent and specialized expertise is of prime importance for air safety. Many significant changes have taken place over the last few years in the following areas: the use of de-icing liquids, the type of equipment, procedures and standardized techniques for de-icing, the impact on the environment, the technical control of product spills, risk management and security, and product performance protocols and quality control systems. PAS contended that a supplier that has not performed these services in the last several years could find the requirements complex and demanding.

54. PWGSC submitted that it understands that the requirements at issue are rigorous and demanding. It further submitted that it is not required to compromise its requirements in order to accommodate the capacities of particular suppliers. Further, it contended that, in this instance, the requirements are not only reasonable but also essential.

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

55. In particular, PWGSC underscored that CFB Trenton must be prepared to support a variety of critical flight operations in all climatic conditions, particularly icing conditions. In addition to providing the air transport support for the Canadian Forces' domestic and foreign operations, CFB Trenton is the principal base for its search-and-rescue operations in Central Canada. PWGSC noted that these operations are often initiated by emergencies caused by or associated with inclement weather, including icing conditions.

56. PWGSC submitted that, being in possession of recent experience increases the likelihood of a contractor being effective from the outset in providing prompt and skillful de-icing and anti-icing services. Although a company or its personnel may have had experience in providing the required services in the past, if the experience is not recent, the knowledge and skill base inevitably will have eroded and will need to be restored, a process that cannot be accommodated at CFB Trenton. PWGSC contended that, given critical flight operations at CFB Trenton, there is no room for a contractor or personnel to "get up to speed", to "get it back" or to require on-the-job training.

57. 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, far from being exclusive to CFB Trenton itself, includes a wide range of airports in Central Canada, at a minimum. PWGSC further submitted that it is reasonable for the procurement at issue to require that a contractor have the specified de-icing and anti-icing experience at a location with comparable icing conditions.

58. In its comments on the GIR, Almon submitted that aircraft de-icing, de-snowing and anti-icing are crude and basic procedures, unchanged for at least 30 years. It submitted that the aircraft de-icing process involves a hose connected to a pressurized tank that manually sprays a heated fluid to melt ice.

59. The Tribunal notes that it is beyond dispute that the mandatory criteria at issue are demanding. However, as the Tribunal stated in the disposition of another complaint filed by Almon concerning a solicitation for the provision of aircraft de-icing glycol recovery services at CFB Trenton which contained similar mandatory criteria,²⁷ this does not mean that they are inconsistent with the applicable trade agreements.

60. 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.²⁸ 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.

61. 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.²⁹

27. *Re Complaint Filed by Almon Equipment Limited* (3 January 2012), PR-2011-022 (CITT).

28. *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).

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

62. 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. 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 satisfactorily perform the contract in question.

63. In this regard, 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. The Tribunal also notes that search-and-rescue missions are consequently most often the result of the same inclement weather that this procurement seeks to address.

64. Since the services are to be provided at such a strategic airbase with very specific requirements, the Tribunal accepts 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.

65. 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. In short, the Tribunal finds that the procuring entity is entitled to demand what can reasonably be considered to constitute legitimate operational requirements for this procurement.

66. 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 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. In fact, apart from the statements that the aircraft de-icing process involves a hose connected to a pressurized tank that manually sprays a heated fluid to melt ice, there was no demonstration of industry procedures which could convince the Tribunal that PWGSC's requirements were unreasonable.

67. 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.

68. 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.

69. Therefore, the Tribunal accepts PWGSC's submissions that, since the required experience could be acquired at locations other than CFB Trenton, where comparable climatic conditions prevail, this 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.

70. In *Re Complaint Filed by 723186 Alberta Ltd.*,³⁰ 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.

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]

71. In File No. PR-2011-021,³¹ 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]

72. 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 *AIT*.

73. 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 *AIT*.

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

30. (12 September 2011), PR-2011-028 (CITT).

31. *Re Complaint Filed by Daigen Communications* (23 August 2011) (CITT).

Costs

75. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.
76. 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.
77. 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).
78. 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; the issues were straightforward and dealt with whether or not PWGSC used restrictive requirements.
79. Finally, the complexity of the proceedings was low. The issues were addressed by the parties through documentary evidence and written representations, and a hearing was not necessary. The Tribunal notes however that Almon filed two separate complaints, this complaint and the related one in File No. PR-2011-022.³² Since both complaints were accepted for inquiry at the same time, covered in part the same issues and generally were treated by PWGSC and the Tribunal at the same time through similar evidence and paperwork, costs for this complaint will be reduced by 50 percent. While the Tribunal granted a request by PAS for intervener status and PAS filed a short submission, its participation did not increase the complexity level of the proceedings.
80. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$500.

DETERMINATION OF THE TRIBUNAL

81. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.
82. 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 \$500. 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

32. *Re Complaint Filed by Almon Equipment Limited* (3 January 2012), PR-2011-022 (CITT).