



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2011-017

BRC Business Enterprises Ltd.

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, November 28, 2011*

*Reasons issued  
Friday, December 23, 2011*

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

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

**BETWEEN**

**BRC BUSINESS ENTERPRISES LTD.**

**Complainant**

**AND**

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

**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 BRC Business Enterprises Ltd. 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 its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

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

Tribunal Member: Serge Fréchette, Presiding Member

Director: Randolph W. Heggart

Senior Investigator: Michelle N. Mascoll

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## STATEMENT OF REASONS

1. On July 14, 2011, BRC Business Enterprises Ltd. (BRC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. E60PQ-090004/B) by the Department of Public Works and Government Services (PWGSC) for the supply, delivery and installation of freestanding furniture.
2. BRC alleged the following:
  - PWGSC improperly declared its offer in response to the Request for a Standing Offer (RFSO) non-compliant; and
  - PWGSC failed to evaluate its offer in accordance with the express terms of the solicitation documents.
3. In particular, BRC alleged that PWGSC did not comply with the terms of the RFSO and interpreted the terms in a previously undisclosed manner. Additionally, BRC alleged that PWGSC applied the wrong testing standard in its evaluation.
4. BRC requested, as a remedy, that the Tribunal recommend that it be awarded a standing offer or, in the alternative, that its offer be re-evaluated in a manner consistent with the solicitation documents. Additionally, BRC requested that it be awarded costs for preparing and proceeding with the complaint.
5. On July 22, 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*.<sup>2</sup>
6. On August 26, 2011, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On September 8, 2011, BRC filed its comments on the GIR. On September 20, 2011, PWGSC submitted a response to BRC's comments on the GIR, as PWGSC alleged that BRC's comments contained new arguments which merited a response. On September 23, 2011, BRC submitted a response to PWGSC's additional comments. On September 28, 2011, the Tribunal advised the parties that the new submissions would be added to the official record.
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.<sup>4</sup>

## PROCUREMENT PROCESS

8. On March 18, 2010, PWGSC issued an RFSO, Solicitation No. E60PQ-090004/B, for the supply, delivery and installation of freestanding furniture.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499 [*Rules*].
4. Pursuant to rule 105 of the *Rules*, the oral hearing of a procurement complaint is not mandatory. Paragraph 25(c) allows the Tribunal to proceed by way of written submissions.

9. Part 4 of the RFSO, “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, provides as follows:

**1.1 Submission of Substantiating documentation for Mandatory Evaluation Criteria**

1.1.1 Mandatory Criteria must be submitted with the offer or within 5 business days upon request from the Contracting Authority (Failure to do so will render the offer non-responsive).

10. Article 1.2.1 of Part 4 of the RFSO defines the mandatory technical criteria as follows:

1.2.1 Mandatory Technical Criteria

	<b>Mandatory Technical Criteria</b>	<b>Provide as required or refer to previous bid submission for RFSO E60PQ-080001/B</b>
<b>MT1</b>	All products, components and accessories offered must conform to the specifications at Annexes A-1 and A-2	
...		
<b>MT5</b>	Test reports detailed at Annex A-1 and Annex A-2	
<b>MT6</b>	Completion of test report forms as per Annex C	

11. Annex A-1 to the RFSO, “**FREESTANDING OFFICE DESK PRODUCTS AND COMPONENTS - GENERAL OFFICE FURNITURE (PURCHASE DESCRIPTION TO ACCOMPANY [Canadian General Standards Board (CAN/CGSB)] 44.227-2008) SPECIFICATION**”, provides as follows:

**6.0 TESTING REQUIREMENTS**

6.1 All freestanding office desk products and components offered under this solicitation, shall meet the acceptance criteria provided in [American National Standards Institute/Business and Institutional Furniture Manufacturer’s Association (ANSI/BIFMA)] X5.5, and CAN/CGSB 44.227-2008 when tested in accordance with the appropriate tests from the referenced standard and purchase description.

6.2 All freestanding and mobile pedestals and freestanding storage units offered under this solicitation, shall meet the acceptance criteria provided in ANSI/BIFMA X5.9 when tested in accordance with the appropriate test from the referenced standard and purchase description.

6.3 Test reports shall be not more than five (5) years old at the time of submittal.

12. Annex C to the RFSO “**TEST REPORT FORMS For Freestanding Office Desk Products and Components**”, provides as follows:

**IN ADDITION TO THE TEST REPORTS WHICH MUST BE SUBMITTED WITH YOUR PROPOSAL; TEST REPORT FORMS MUST ALSO BE COMPLETED FOR EACH SERIES OFFERED AND SUBMITTED WITH YOUR PROPOSAL. FAILURE TO DO SO WILL RENDER YOUR [FIRM’S] PROPOSAL NON-COMPLIANT AND NO FURTHER EVALUATION WILL BE UNDERTAKEN.**

13. The RFSO sought proposals for four categories of freestanding office furniture. Only the Category 2 freestanding furniture, “**General Office – Fixed Height, Full panel**”, is at issue in the present complaint.

14. On April 20, 2010, PWGSC issued amendment No. 001 to the RFSO. This amendment included a number of changes to the provisions of the RFSO, as well as responses by PWGSC to questions raised by offerors. Relevant to this complaint were the following questions and answers:

**Question no 3:**

Regarding testing; In Annex C test report forms the forms have a column which requires the respondent answer if the testing is completed yes/no. Is there a provision for manufacturers to complete testing after the solicitation closing date of April 30th? If so how much time is permitted? Would article 1.1.1 on page 8 of 42 cover . . . this question for mandatory criteria; given that testing forms part of this section.

**Answer no 3:**

As per Part 4, 1.1.1 of the solicitation: ‘Mandatory Criteria must be submitted with the offer or within 5 business days upon request from the contracting Authority. (Failure to do so will render the offer non-responsive).

. . .

**Question no 8:**

Will test reports reflecting ANSI/BIFMA “Worst case” scenarios be acceptable?

**Answer no 8:**

Yes, providing that all testing has been conducted in accordance with ANSI/BIFMA X5.5 Section 2.56 – worst case condition.

15. On May 6, 2010, PWGSC issued amendment No. 005 to the RFSO, which included the following amendment to article 1.1.1 of Part 4 of the RFSO:

1.1.1 Mandatory technical and Environmental Criteria must be submitted with the offer or within 5 business days upon request from the Contracting Authority (Failure to do so will render the offer non-responsive).

Mandatory procurement Criteria (MP2; MP3 and MP4) must be submitted with the offer (Failure to do so will render the offer non-responsive).

16. The deadline for the receipt of offers in response to the RFSO was May 14, 2010.

17. According to the GIR, BRC submitted a timely offer in response to three of the four categories of freestanding furniture of the RFSO. In addition to other items, BRC’s offer for the Category 2 freestanding furniture included a lateral file, identified as model FSLAT 3624, which measured 36 in. wide by 24 in. deep. BRC submitted, with its offer, a test report form that referred to test report MI-8-3017-25, which related to tests conducted on a lateral file whose dimensions were different from those of model FSLAT 3624, i.e. measuring 36 in. wide by 20 in. deep.<sup>5</sup>

18. Throughout PWGSC’s technical evaluation of BRC’s offer, PWGSC sought clarifications from BRC with respect to portions of all three categories of freestanding furniture in its offer. Specific to the Category 2 freestanding furniture was PWGSC’s request, on February 1, 2011, related to the characteristics of some products, but not to the test report or products mentioned above. On February 8, 2011, BRC provided its response.<sup>6</sup>

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5. GIR at para. 22.

6. Confidential GIR, exhibit 15.

19. On March 31, 2011, PWGSC advised BRC that its offer for the Category 2 freestanding furniture had been evaluated as non-compliant because of incomplete testing with respect to the lateral file, model FSLAT 3624.<sup>7</sup> According to the GIR, the evaluators determined that test report MI-8-3017-25, which BRC submitted for the lateral file in question, did not meet the testing requirements of article 6 of Annex A-1 to the RFSO. In particular, PWGSC determined that the test report was neither a test report for that item nor a test report for a different item that could apply to that lateral file on a typical “worst-case condition” testing basis.<sup>8</sup>

20. On April 8, 2011, BRC sent an e-mail to PWGSC seeking a review of PWGSC’s decision not to award BRC a standing offer with respect to the Category 2 freestanding furniture.<sup>9</sup> In this e-mail, BRC submitted a letter from Micom Laboratories Inc., dated April 3, 2011, which claimed that the unique characteristics of the lateral file in question justified the “worst-case condition” testing.<sup>10</sup>

21. In an e-mail dated April 15, 2011, PWGSC responded to BRC’s letter, advising that its decision remain unchanged.

22. On April 18, 2011, BRC sent an e-mail in response to PWGSC’s e-mail of April 15, 2011.

23. In a letter to BRC dated June 29, 2011, PWGSC set out its final decision regarding the evaluation of BRC’s offer.

24. On July 14, 2011, BRC filed its complaint with the Tribunal.

## POSITIONS OF PARTIES

### Allegation that PWGSC improperly declared BRC’s offer non-compliant

25. In its complaint, BRC submitted that the express language of article 1.1.1 of Part 4 of the RFSO, both initially and as amended, created an unambiguous, reasonable and legitimate expectation that the offeror could choose to submit the criteria with its offer or “. . . upon request from the Contract Authority”. According to BRC, the use of the disjunctive term “or” instead of the term “and” clearly conveyed to offerors that they had an option in this regard.

26. BRC submitted that this interpretation is supported by the context. BRC submitted that, originally, article 1.1.1 of Part 4 of the RFSO provided that all mandatory criteria could be submitted either with the offer or within five business days upon request from the contracting authority. This language was amended by amendment No. 005 to the RFSO to clarify that only “Mandatory procurement Criteria”, not mandatory technical criteria, had to be submitted with the offer. BRC further submitted that this interpretation was reiterated in PWGSC’s answer to question No. 3 in amendment No. 001.

27. BRC submitted that, during the evaluation of its offer, PWGSC contacted BRC on several occasions to confirm or clarify other mandatory elements of its offer. It submitted that PWGSC asked BRC to provide a list of dealers, which, BRC submitted, was a mandatory procurement criterion of the RFSO and should have been submitted with its offer. Yet, BRC further submitted, it was only with respect to the test

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7. According to the GIR, BRC’s offer with respect to the Category 3 and Category 4 freestanding furniture was found compliant, and BRC was so advised on March 23, 2011.

8. BIFMA International defines “worst-case condition” as “[t]he condition (i.e. size and construction of a given type) most likely to be adversely affected by the test.” See complaint, tab I.

9. Confidential GIR, exhibit 17.

10. *Ibid.*, exhibit 18.



reports that PWGSC decided that requesting additional information would constitute bid repair. BRC submitted that PWGSC cannot, in good faith, ask for information to be provided after bid closing and choose not to ask for other information that it requires.

28. BRC noted PWGSC's response in an April 15, 2011, e-mail<sup>11</sup> in which PWGSC advised that the intent of article 1.1.1 of Part 4 of the RFSO was to request missing information only where the offer indicated that information was omitted. BRC submitted that no such intention was disclosed in the RFSO.

29. In reply, PWGSC submitted that article 1.1.1 of Part 4 of the RFSO was intended to mean, and should reasonably be interpreted to mean, that PWGSC had the option to go back to offerors and seek additional information if it so chose, but that it was not obliged to do so.

30. PWGSC submitted that article 1.1.1 of Part 4 of the RFSO advised that an offer would be found non-compliant if it did not meet the requirements of the mandatory technical and environmental criteria, or if PWGSC requested information after bid closing and the offeror did not provide the requested information within five business days.

31. In the GIR,<sup>12</sup> PWGSC made reference to the Tribunal's decision in File No. PR-2009-032.<sup>13</sup> PWGSC submitted that, in *Greenbank*, the Tribunal reiterated the fundamental procurement principles that the offeror must ensure that its offer is compliant with all essential elements of a solicitation and that the failure to meet any mandatory criteria renders an offer non-compliant.

32. In its response to the GIR, BRC submitted that the issue in *Greenbank* was not the proper interpretation of a provision, stating that an offeror could provide a commercial catalogue either at bid closing or within five days of written notification from the contracting authority, as PWGSC claims, but rather whether what had been submitted after such a request satisfied the mandatory requirement.

#### **Allegation that PWGSC failed to evaluate BRC's offer in accordance with the terms of the RFSO**

33. BRC submitted that PWGSC evaluated its offer using an incorrect or outdated definition of the term "worst-case scenario" testing. BRC submitted that ANSI/BIFMA X5.5<sup>14</sup> and ANSI/BIFMA X5.9<sup>15</sup> define the term "worst-case condition" as "[t]he condition (i.e. size and construction of a given unit type) most likely to be adversely affected by the test" and that, if this worst-case condition is not readily apparent, then it is up to the manufacturer and designated testing facility to make this determination, not PWGSC.

34. BRC submitted that PWGSC used the wrong standard for the following reasons:

- It used the 1998 ANSI/BIFMA testing guidelines, which are outdated and have been superseded by the 2008 ANSI/BIFMA standards;
- The 1998 guidelines relate to panel systems, not freestanding furniture, as contemplated by the RFSO; and
- The guidelines relate to ANSI/BIFMA X5.6,<sup>16</sup> not X5.5, as referenced in the question and answer portion of amendment No. 001.

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11. Complaint, tab E.

12. GIR at paras. 11-14.

13. *Re Complaint Filed by Greenbank Custom Woodworking Ltd.* (14 October 2009) (CITT) [*Greenbank*].

14. Complaint, tab I.

15. GIR, exhibit 4.

16. Complaint, tab H.

35. BRC submitted that, if PWGSC applied the wrong ANSI/BIFMA standard for “worst-case condition” testing in its evaluation of BRC’s offer, its determination that its offer was non-compliant on the basis of that standard must necessarily be wrong.

36. PWGSC submitted that neither test report MI-8-3017-25, as submitted by BRC in relation to lateral file model FSLAT 3624, nor any other test submitted by BRC met the typical “worst-case condition” testing requirements of the RFSO, as generally understood in the industry. PWGSC submitted that it is generally understood in the industry that there are the following three approaches to the submission of appropriate test reports:

- An offeror could submit a test report specific to each proposed item;
- An offeror could submit a test report for items on a typical “worst-case condition” testing basis which, in effect, is testing conducted on a larger product, other than the proposed product, and is representative of all models or units of the type of product tested; and
- An offeror could submit a test report for an item on an atypical “worst-case condition” testing basis as the “worst-case condition” is not readily evident in view of special attributes of the proposed product; in this case, the offeror must identify the special attributes considered during testing to justify that the testing conducted on the proposed product was based on an atypical condition.

37. PWGSC submitted that it is generally understood in the industry that, in order for a test report to apply to a proposed lateral file on a typical “worst-case condition” testing basis, the lateral file that is the subject matter of the test report must be larger than the proposed lateral file. PWGSC submitted that BRC did not identify any unique features or characteristics of model FSLAT 3624 to indicate that PWGSC should consider the test report as applying on an atypical “worst-case condition” testing basis. PWGSC therefore submitted that it reasonably understood that BRC had submitted a test report for model FSLAT 3624 on a typical “worst-case condition” testing basis. It submitted that, since the test report was conducted on a lateral file that was smaller than model FSLAT 3624, the evaluators determined that the submitted test report did not meet the typical “worst-case condition” testing standard for model FSLAT 3624 and therefore found the item non-compliant.

38. PWGSC submitted that the determination that model FSLAT 3624 was non-compliant was reasonable, given the general understanding in the industry, as reflected by a letter submitted by the CGSB.<sup>17</sup> It submitted that it was only after being advised by PWGSC that its offer was non-compliant because of deficient testing with respect to model FSLAT 3624 that BRC suggested to PWGSC that the item had unique characteristics that could justify the applicability of the test report as an atypical “worst-case condition” testing basis.

39. In its response to the GIR, BRC submitted that the products at issue are lateral files—products that are properly tested using ANSI/BIFMA X5.9, not ANSI/BIFMA X5.5. BRC submitted that this is “. . . exactly what [it] did in respect of its lateral files.”<sup>18</sup> BRC also submitted that PWGSC introduced the twin concepts of “typical worst case scenario testing” and “atypical worst case scenario testing”<sup>19</sup> for the first time in the GIR, rather than in the RFSO, and that the RFSO makes no mention of the definitions as understood either by “the industry” or the CGSB.

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17. GIR, exhibit 23.

18. Confidential reply submissions dated September 19, 2011, at 10.

19. *Ibid.* at 8.

## TRIBUNAL'S ANALYSIS

40. 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,<sup>20</sup> are the *Agreement on Internal Trade*,<sup>21</sup> the *North American Free Trade Agreement*,<sup>22</sup> the *Canada-Chile Free Trade Agreement*,<sup>23</sup> the *Agreement on Government Procurement*,<sup>24</sup> and the *Canada-Peru Free Trade Agreement*.<sup>25</sup>

41. Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

42. Article 1015(4) of *NAFTA* provides that the contracting entity shall award contracts to bidders whose tenders, “. . . at the time of opening, conform to the essential requirements of the notices or tender documentation . . .” and that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.

43. The *CCFTA*, the *AGP* and the *CPFTA* contain provisions similar to those found in *NAFTA*.

### **Did PWGSC fail to properly apply article 1.1.1 of Part 4 of the RFSO to BRC's bid, as BRC claims?**

44. Article 1.1.1 of Part 4 of the RFSO falls under the heading “**Submission of Substantiating documentation for Mandatory Evaluation Criteria**”. It specifies the rule that applies to the timing of the submission of substantiating documentation for the mandatory technical, environmental and procurement criteria of the RFSO.

45. Article 1.1.1 of Part 4 of the RFSO originally stated the following:

1.1.1 Mandatory Criteria must be submitted with the offer or within 5 business days upon request from the Contracting Authority (Failure to do so will render the offer non-responsive).

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20. The Tribunal notes that the *Canada-Colombia Free Trade Agreement (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*]) had not yet entered into force when the solicitation in question was issued. As such, the *CCOFTA* does not apply.

21. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*].

22. *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*].

23. *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.

24. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

25. *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*].

46. However, article 1.1.1 of Part 4 of the RFSO, as amended by amendment No. 005, states the following:

1.1.1 Mandatory technical and Environmental Criteria must be submitted with the offer or within 5 business days upon request from the Contracting Authority (Failure to do so will render the offer non-responsive).

Mandatory procurement Criteria (MP2; MP3 and MP4) must be submitted with the offer (Failure to do so will render the offer non-responsive).

47. The effect of amendment No. 005 to the RFSO was that mandatory procurement criteria had to be submitted with the offer, while mandatory technical and environmental criteria were still subject to the original requirement.

48. The parties seem to agree that the substantiating documentation (i.e. a test report) relates to mandatory technical criteria. Therefore, it is the meaning of the first part of article 1.1.1 of Part 4 of the RFSO, as amended, that is in dispute.

49. The Tribunal is of the view that the plain meaning of article 1.1.1 of Part 4 of the RFSO leaves no doubt that the offeror could legitimately submit the substantiating documentation with the offer or, after bid closing, upon the request of the contracting authority.

50. The debate, however, is whether the contracting authority had an obligation to make such a request where, as in this case, the offeror did not submit the substantiating documentation with its offer.

51. BRC claimed that the applicable language of article 1.1.1 of Part 4 of the RFSO, as amended, created such an obligation upon PWGSC. PWGSC, however, argued that the applicable language makes no change to the general obligation of an offeror to ensure that its offer meets all the mandatory criteria at the time of submission.

52. An RFSO is akin to a contractual offer and, in that sense, it is important to determine the intent of the parties involved in the transaction. Such an intent can be derived from the language of article 1.1.1 of Part 4 of the RFSO when examined in its context, which can be found in the other sections of the RFSO.

53. Article 1, “**Standard Instructions, Clauses and Conditions**” of Part 2, “**OFFEROR INSTRUCTIONS**”, of the RFSO provides as follows:

All instructions, clauses and conditions identified in the Request for Standing Offers (RFSO) by number, date and title are set out in the Standard Acquisition Clauses and Conditions [SACC] Manual . . . issued by Public Works and Government Services Canada.

Offerors who submit an offer agree to be bound by the instructions, clauses and conditions of the RFSO and accept the clauses and conditions of the Standing Offer and resulting contract(s).

The 2006 (2010-01-11) Standard Instructions - Request for Standing Offers - Goods or Services - Competitive Requirements [2006 Standard Instructions], are incorporated by reference into and form part of the RFSO.

Subsection 4.4 of [the 2006 Standard Instructions] . . . is amended as follows:

Delete: sixty (60) days

Insert: one hundred and twenty (120) days

54. The only aspect of the 2006 Standard Instructions<sup>26</sup> that are modified for the purpose of the RFSO is subsection 4.4, which, as indicated in article 1 of Part 2 of the RFSO, deals with the acceptance period of offers.

55. Subsection 4.2 of the 2006 Standard Instructions also outlines the responsibility of offerors. Specifically, it provides as follows:

It is the Offeror's responsibility to:

- (a) obtain clarification of the requirements contained in the RFSO, if necessary, before submitting an offer;
- (b) prepare its offer in accordance with the instructions contained in the RFSO;
- (c) submit by closing date and time complete offer;
- (d) send its offer only to PWGSC Bid Receiving Unit specified on page 1 of the RFSO or to the address specified in the RFSO;
- (e) ensure that the Offeror's name, return address, RFSO number, and RFSO closing date and time are clearly visible on the envelope of the parcel(s) containing the offer; and,
- (f) provide a comprehensible and sufficiently detailed offer, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the RFSO.

56. Section 15, "**Conduct of Evaluation**", of the 2006 Standard Instructions also sets forth the manner in which PWGSC will conduct the evaluation of offers. It provides that, "[i]n conducting its evaluation of the offers, Canada may, but will have no obligation to . . . seek clarification or verification from offerors regarding any or all information provided by them with respect to the RFSO . . . ."

57. Nothing in these provisions supports the proposition that PWGSC had an obligation under article 1.1.1 of Part 4 of the RFSO to seek additional information should an offer not be accompanied with substantiating documentation in respect of mandatory technical criteria. To the contrary, these provisions indicate that the obligation to ensure that an offer meets all the conditions remains with the offeror and that PWGSC is under no obligation to seek clarification or verification. Section 15 of the 2006 Standard Instructions specifically indicates that it is an option for Canada, PWGSC in this case, but not an obligation. In other words, PWGSC retained the discretion to seek clarification or verification.

58. It is evident that, where PWGSC intended to change the terms of the standard instructions to the RFSO (i.e. the 2006 Standard Instructions), it did so very specifically. The absence of any specific language indicating that PWGSC was modifying the terms of the 2006 Standard Instructions would indicate that it did not intend to do so. Nothing in article 1.1.1 of Part 4 of the RFSO specifically changes the standard instructions in terms of the obligations of the offeror or PWGSC.

59. Article 1.1.1 of Part 4 of the RFSO describes two scenarios for the submission of "**Substantiating documentation for Mandatory Evaluation Criteria**", as is indicated by the title of the section. In light of the overall context within which article 1.1.1 must be read, the Tribunal understands the first scenario, where the mandatory information and documentation must be submitted with the offer, as the one that applies in all circumstances, in accordance with the general instructions which stipulate that the obligation is for the offeror to ". . . prepare its offer in accordance with the instructions contained in the RFSO . . ." and to ". . . submit by closing date and time [a] complete offer . . . ."

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26. <http://ccua-sacc.tpsgc-pwgsc.gc.ca/pub/rqqr.do?lang=eng&id=2006&date=2010-01-11&eid=1>.

60. In light of the same context, the Tribunal understands the second scenario, where mandatory information and documentation can be submitted after the deadline for the receipt of bids, as the one where PWGSC exercises its discretion to seek “clarification” or “. . . verification . . . regarding any or all information provided with respect to the RFSO . . .” In the present case, PWGSC did use that discretion to seek clarification in respect of some of the information provided in support of certain mandatory requirements but not in respect of the specific information at issue.

61. This interpretation is consistent with the well-established principle that it is the offeror that bears the onus to demonstrate compliance with mandatory criteria.<sup>27</sup>

62. Considering the approach taken by PWGSC to amend the terms of the standard instructions that are incorporated into the RFSO by including specific language in subsection 4.4 of the RFSO to that effect, the Tribunal cannot conclude, given the general language used in article 1.1.1 of Part 4 of the RFSO, that PWGSC intended to modify the respective obligations of the contracting authority or the offeror. Had PWGSC so intended, the Tribunal is of the view that it would have so indicated either specifically in article 1 of Part 2 of the RFSO or more precisely in article 1.1 of Part 4 of the RFSO.

63. In its submissions, BRC refers to the change to article 1.1.1 of Part 4 of the RFSO introduced in amendment No. 005 to the RFSO and the answer to question No. 3 in amendment No. 001 as further support for its position. The Tribunal is of the opinion that amendment No. 005 indicated nothing more than the fact that PWGSC abandoned its discretion to seek clarification or verification in respect of certain mandatory procurement criteria. Amendment No. 005 did not however modify or change the manner in which mandatory technical or environmental criteria must be interpreted or applied.

64. As to PWGSC’s answer to question No. 3 in amendment No. 001 to the RFSO, this response in no way changed the nature or substance of article 1.1.1 of Part 4 of the RFSO. If anything, by simply restating the content of the provision, PWGSC reaffirmed the meaning of the provision in the context in which it was used. Had BRC believed at that point that its interpretation might differ from that of PWGSC, BRC should have sought additional clarification, which, as the standard instructions suggested, was the responsibility of the offeror.

65. In its submissions, BRC argued that PWGSC cannot, in good faith, ask for some information to be provided after bid closing, yet choose not to ask for other information that was not submitted with the bid. The Tribunal is of the view that this “good faith” can only be considered when taking into account the nature of the obligations of the parties under the RFSO. Even if, as suggested by BRC, PWGSC may not have exercised its discretion in a manner that seems entirely consistent, nothing suggests to the Tribunal that PWGSC was not acting in good faith when it exercised what it believed to be a proper application of its discretionary authority under article 1.1.1 of Part 4 of the RFSO, when considering both the context of the mandatory criterion under examination and the particular obligations of the parties under the RFSO. Possible inconsistencies in the application of a discretionary authority do not necessarily equate to bad faith. The Tribunal can simply not conclude, on the basis of the evidence submitted by the BRC, that PWGSC’s possible inconsistencies were in any way due to bad faith.

66. In the present case, PWGSC did not exercise its discretion in respect of the test report in question and the applicable mandatory technical criteria. It did not, after the submission of the offer, seek clarification or verification and was under no obligation to do so. As a result, BRC’s offer was found not to be accompanied by the necessary information and documentation to be responsive to the applicable mandatory technical criterion. The Tribunal cannot find an error with this conclusion in light of the language of article 1.1.1 of Part 4 of the RFSO.

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27. For example, *Re Complaint Filed by Info-Electronic H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT).

67. In light of the above, the Tribunal cannot find that, by declaring BRC's bid non-compliant with regard to the Category 2 freestanding furniture on the basis of article 1.1.1 of Part 4 of the RFSO, PWGSC acted in a manner that was inconsistent with the provisions of the RFSO and as well as with any of the applicable provisions of the trade agreements. Considering the above, it becomes unnecessary for the Tribunal to examine the issue of whether PWGSC evaluated BRC's offer in accordance with the express terms of the solicitation documents, i.e. the worst-case scenario testing issue. Even if BRC's second allegation was proven to be founded, it would not correct the failure of its offer *vis-à-vis* the mandatory requirement of article 1.1.1.

68. The Tribunal therefore finds that the complaint is not valid.

### Costs

69. 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.

70. The Tribunal's preliminary view is that this complaint has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The procurement was not complex, as it was for the delivery of goods. The complaint was not complex, as it primarily dealt with a single issue, the evaluation of BRC's offer. The complaint proceedings were not complex, as there were no motions and no interveners, and each party submitted only one additional submission.

71. 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

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

73. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by BRC. 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.

Serge Fréchette  
Serge Fréchette  
Presiding Member