



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2012-013

Team Sunray and CAE Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Thursday, October 25, 2012*

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

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

**BETWEEN**

**TEAM SUNRAY AND CAE INC.**

**Complainants**

**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 Team Sunray and CAE Inc. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint 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 by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Stephen A. Leach

Stephen A. Leach  
Presiding Member

Dominique Laporte

Dominique Laporte  
Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On August 3, 2012, Team Sunray (a contractual joint venture comprised of CAE Inc., and Elbit Systems Land and C4I Ltd.) and CAE Inc. (Team Sunray and CAE) 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>

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. W8476-112965/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of an integrated soldier system (ISS) and in-service support. PWGSC declared Team Sunray's proposal<sup>2</sup> non-responsive for failing to comply with a pre-selected mandatory requirement.

3. In their complaint, Team Sunray and CAE alleged that PWGSC misinterpreted the requirements of the RFP and misapplied the evaluation criteria to Team Sunray's proposal. As a remedy, Team Sunray and CAE requested the postponement of the contract award, a declaration that Team Sunray's proposal is compliant with the pre-selected mandatory requirement, a recommendation that the evaluation of Team Sunray's proposal be completed, and the costs of filing the complaint and such other relief that the Tribunal deems appropriate. In the event that the contract could not be postponed or that the evaluation of Team Sunray's bid could not be completed, Team Sunray and CAE requested monetary compensation for lost opportunity.

4. On August 9, 2012, 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>3</sup> The Tribunal also ordered the postponement of the contract award.

5. On August 13, 2012, in accordance with rule 102 of the *Canadian International Trade Tribunal Rules*,<sup>4</sup> PWGSC informed the Tribunal that no contract had been awarded. On September 4, 2012, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103. On September 14, 2012, in accordance with rule 104, Team Sunray and CAE filed their comments on the GIR.

6. 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

7. The RFP was for the provision of an integrated suite of communication and data equipment for use by the Canadian Forces (CF). The RFP was made available through MERX<sup>5</sup> on February 11, 2012, and the amended due date for the receipt of bids was June 11, 2012. At bid closing, Team Sunray submitted its proposal in response to the RFP.

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

2. The Tribunal notes that, although the complaint was filed by Team Sunray and CAE, the bid was submitted to PWGSC in the name of Team Sunray alone.

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

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

5. Canada's electronic tendering service.

8. The RFP considered the award of two contracts to a single bidder. The first contract was for the acquisition of 1,600 ISS units over a four-year period (with an option to purchase up to 2,512 additional units), as well as logistics support and training. The second contract was for ISS in-service support and improvement activities. The first contract comprised two phases; the first involved the qualification of the selected bidder's system, and the second involved the purchase of a number of ISS suites and the implementation of an upgrade to previously delivered suites. It is the pre-screening process of the first contract that is at issue.

9. Article 1.5 of Volume 1 to the RFP describes the pre-screening process and lists the pre-selected mandatory requirements. It provides as follows:

**1.5. ISSP Procurement Process Overview**

1.5.1. Following the bid solicitation closing date, Canada will proceed with a pre-screening of the bids. It will consist of reviewing the compliances of bidders on a pre-selected number of mandatory requirements. *Bids not meeting the pre-selected mandatory requirements will be declared non-responsive.* A regret letter will be sent to the unsuccessful bidders. These bidders will not be invited to the physical Performance Evaluation (PE). Once the Bidders have received their invitation to the PE, the evaluation process will follow its course up to the end. The pre-selected mandatory requirements are as follows:

...

-Requirement in RFP article 6.5.2 to Volume 1;

...

[Emphasis added]

10. Of particular relevance to this inquiry is the pre-selected mandatory requirement listed in Article 6.5.2. of Volume 1 to the RFP, which provides as follows:

6.5.2. *The Bidders must provide, for the LCSS radios (PRC 117, 148, 152) and the DAGR (if the ISS-S provides military GPS capability via an interface to the CF in-service DAGR [Defense Advanced GPS Receiver]), a **certification** note with their bid submission from the Original Equipment Manufacturer (OEM) indicating that they will furnish the required ICD's [Interface Control Documents] to bidders and assist the Bidder in the required integration/engineering effort thereby allowing the winning Bidder to complete the work and fully qualify the ISS-S once in contract.* In order to obtain contact information for the applicable OEM's bidders should submit a request to the Contracting Authority.

ICD Certification:

We, (Name of OEM), hereby certify that we will furnish the required Interface Control Documents to (Name of bidder) and assist (Name of bidder) in the required integration/engineering effort thereby allowing the (Name of bidder) to complete the work and fully qualify the ISS-S once in contract.

Name of OEM:

Per: \_\_\_\_\_  
(Name and Title)

It is expected that Technical Assistance Agreements (TAA's) will be required for the provision of ICD's for these devices noted above and will need to be in place post contract award between the winning bidder and the respective OEM's. It is also expected that Canadian Controlled Goods Certification will be mandatory in obtaining this documentation.

As Non-Disclosure Agreements (NDA's) are to be arranged fully by the OEM's of these devices and prospective ISSP bidders, the Canadian Department of National Defence (DND) is acting solely in a facilitating role with regards to this process.

[Bold in original, emphasis added]

11. The other relevant provisions of the RFP are as follows:

**4.2. Definitions:**

...

4.2.2. "Bidder" is the person or entity (*or, in the case of a Joint Venture, the persons or entities (Parties)*) submitting a bid for the provision of the work. *It does not include the parent, subsidiaries or other affiliates of the Bidder, or its subcontractors.* When successful, the Bidder becomes the Contractor. The Contractor is the person or entity or entities named in the Contract that will perform a contract and that will be responsible for the successful execution of the entire work.

4.2.3. A "joint venture" is an association of two or more persons or entities (Parties) who combine their money, property, knowledge, skills, time or other resources in a joint business enterprise agreeing to share the profits and the losses and each having some degree of control over the enterprise.

4.2.4. *For the purposes of the Technical, Management and IRB requirements only, "a bidder", when submitting a bid, may choose to have a part or the whole of the work carried out by one or more eventual first tier subcontractors, and in substance may retain only the general control and supervision of the work for itself. The Bidder can therefore be compliant to all the Technical, Management and IRB requirements of a bid solicitation document by offering its own property, knowledge, expertise or other resources (in the case of a Joint Venture, any of its parties resources) in combination, if any, with the resources of eventual first tier subcontractors. . . .*

...

**6.1. Security requirement**

...

6.1.4.1 In order to submit a bid the Bidder must provide with their Section I General Bid (See RFP clause 7 to Annex AA to Volume 1), proof that the following conditions are met:

...

(b) the Bidder must currently hold a valid Facility Security Clearance with approved Document Safeguarding that satisfy the security requirements indicated in RFP article 3 to Volumes 2 and 3 Resulting Contract Clauses with the following clarifications:

- i) If the Bidder is a Joint Venture (an association of two or more persons or entities (Parties)):
  - All parties must hold the requisite valid Facility Security Clearance;

...

**6.4. Insurance Requirements**

...

**6.4.3. Joint Venture Bidders**

All companies that comprise the joint venture must be included in each of the resulting contracts insurance coverage. This can be accomplished with individual certificates or letters for each member of the joint venture indicating that the member will be covered in accordance with the Insurance

Requirements of the Contract, a single certificate or letter in the name of all members of the joint venture indicating that all members will be insured in accordance with the Insurance Requirements of the Contract, or a single certificate or letter issued in one of the joint venture member's name, with the other members listed as Named Insureds.

[Emphasis added]

12. As can be seen from the foregoing, the RFP included a requirement that bidders proposing to interface with a CF in-service DAGR provide a certification note from the OEM indicating that it will furnish the required DAGR ICDs to bidders and assist them in the required integration/engineering effort. Team Sunray's bid contained DAGR ICD certifications in the name of one member of the joint venture, that is, CAE, and in the name of its first-tier subcontractor, but did not include DAGR ICD certification in the name of Elbit, the other member of the joint venture. In addition to these certifications, Team Sunray submitted an e-mail which indicated that the OEM was "... committed to providing all ISSP bidders with the DAGR ICD as requested by DND ..." and describing the process for obtaining U.S. export approvals so that Elbit could access the DAGR ICD.

13. On July 13, 2012, PWGSC notified Team Sunray by e-mail that its bid was declared non responsive for failing to comply with a pre-selected mandatory requirement.

14. On July 16, 2012, Team Sunray sent an e-mail to PWGSC indicating that it was confident that its proposal addressed each mandatory requirement of the RFP and asking PWGSC to identify the mandatory requirement that it had failed to meet. On the same day, PWGSC replied that Team Sunray had failed to meet the requirement of Article 6.5.2<sup>7</sup> of Volume 1 to the RFP. In its e-mail, PWGSC stated that: "TEAMSUNRAY had two choices here since it is bidding as a joint venture. Either have a ICD certification for each of the joint venturers or have one in the name of the joint venture. Your team provided neither of them."<sup>8</sup>

15. On July 17, 2012, Team Sunray sent an e-mail to PWGSC expressing its view that PWGSC had erred in its finding of non-compliance and requesting a meeting. PWGSC responded that Team Sunray's questions should be submitted in writing.

16. On July 18, 2012, Team Sunray sent PWGSC a letter objecting to PWGSC's decision and asking PWGSC to reassess its determination that Team Sunray's bid was non-responsive. On July 23, 2012, PWGSC declined Team Sunray's request and reconfirmed its earlier decision that the proposal was non-responsive. PWGSC also invited Team Sunray to contact PWGSC if it had any additional questions and advised Team Sunray that it could file a complaint with the Tribunal.

17. On July 25, 2012, Team Sunray requested a detailed explanation as to why the information in its proposal was deemed non-responsive. On the same day, PWGSC responded by stating that it had "...nothing further to add to [its previous] correspondence."<sup>9</sup> Team Sunray re-sent its letter of July 25, 2012, and stated that it was simply responding to PWGSC's invitation to answer any further

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6. Confidential Complaint at 28.

7. On the basis of the Tribunal's review of the correspondence, it appears that PWGSC mistakenly referred to the requirement of Article 6.5.1. of Volume 1 to the RFP in its e-mail; however, it is evident from the text of the e-mail that PWGSC was actually referring to Article 6.5.2.

8. Complaint, Vol. 7, tab 10.

9. Complaint, Vol. 7, tab 16.



questions that Team Sunray may have. On July 26, 2012, PWGSC replied by e-mail and reiterated that it had nothing further to add to its previous correspondence.

18. On August 3, 2012, Team Sunray and CAE filed their complaint with the Tribunal.

## **POSITIONS OF PARTIES**

### **Team Sunray and CAE**

19. Team Sunray and CAE submitted that Team Sunray's bid met the mandatory pre-screening requirement of Article 6.5.2. of Volume 1 to the RFP by providing ICD certification from the OEM in the name of CAE. Team Sunray and CAE claimed that, when interpreted in the overall context of the RFP, the requirement to provide ICD certification could be met by one party to the joint venture.

20. Team Sunray and CAE argued that the use of the term "Parties", in the plural form, in the definition of "Bidder" indicated that each of the members of the joint venture is considered a bidder, either individually or collectively, depending on the context in which the term is used.

21. Team Sunray and CAE also submitted that, where a requirement had to be met by each member of a joint venture, this was explicitly identified in the RFP. In their submissions, Team Sunray and CAE referred to a number of examples, such as Article 6.4.3. of Volume 1 to the RFP, which required proof that all parties to a joint venture were covered by or named in the necessary insurance coverage, and Article 6.1.4.1, which required the bidder to hold a valid Facility Security Clearance and specified that, if the bidder was a joint venture, all parties must hold the requisite valid Facility Security Clearance. Team Sunray and CAE argued that Article 6.5.2. did not specify that each member of the joint venture had to meet the requirement of providing ICD certification and that, therefore, this requirement could be met by one member.

22. Team Sunray and CAE also submitted that, under the terms of Team Sunray's proposal, CAE is the joint venture member that would provide the integration/engineering work.

23. In the alternative, Team Sunray and CAE submitted that the mandatory pre-screening requirement in Article 6.5.2. of Volume 1 to the RFP was met by providing ICD certification in the name of its first-tier subcontractor, in combination with the ICD certification provided for CAE. Team Sunray and CAE referred to Article 4.2.4., which, they argued, allowed a bidder to meet a technical requirement on the basis of the resources of any party to a joint venture in combination with the resources of a first-tier subcontractor.

24. In the further alternative, Team Sunray and CAE submitted that the substance of the e-mail provided by the OEM fulfilled the substantial requirements of Article 6.5.2. of Volume 1 to the RFP with respect to Elbit and that disregarding the e-mail constituted an unreasonable adherence to form over substance by PWGSC.

### **PWGSC**

25. PWGSC submitted that it did not breach the trade agreements by declaring Team Sunray's bid non-responsive. It submitted that it had a duty to reject Team Sunray's bid, as it was non-compliant with a pre-selected mandatory criterion. It also argued that the terms of the RFP do not support the interpretation that a mandatory requirement can be met by only one of the parties to a joint venture.

26. PWGSC referred to Article 1.5.1. of Volume 1 to the RFP which stated that “[b]ids not meeting the pre-selected mandatory requirements will be declared non-responsive.” While PWGSC acknowledged that Team Sunray had provided ICD certification in the name of CAE, it submitted that the ICD certification had to be in Team Sunray’s name or CAE *and* Elbit each had to be named in the ICD certification. PWGSC argued that, in the case of a joint venture, the use of the term “Parties” in the definition of “Bidder” found in Article 4.2.2. denotes that the bidder is composed of all the parties forming the joint venture, not just one of them.

27. PWGSC referred to the Tribunal’s decision in File No. PR-99-018,<sup>10</sup> where the Tribunal held that the term “Tenderer”, used in the context of a bid bond requirement, meant that both parties to the joint venture had to provide bid security and that security provided in the name of only one party rendered the bid non-compliant.

28. PWGSC argued that one of the reasons for requiring all parties to a joint venture to obtain ICD certification is to limit the situations where a party cannot perform the contract after it has been awarded because it does not have access to the requisite information. It submitted that this is an important consideration, despite members of a joint venture being jointly and severally liable for the performance of the contract, as the Crown would rather have the contract completed than be forced to litigate. PWGSC also pointed to certain provisions of Team Sunray’s joint venture agreement, which specified possible situations where one party may have to complete the other party’s workshare, and argued that this could not be done if both parties are not able to access the necessary information.

### TRIBUNAL’S ANALYSIS

29. 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. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides 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 *Agreement on Internal Trade*.<sup>11</sup>

30. Article 506(6) of the *AIT* provides that “[...] [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.”

31. The issue in this inquiry is therefore whether PWGSC applied the proper evaluation requirements to Team Sunray’s proposal and whether Team Sunray’s proposal should have been declared compliant with the mandatory requirement of Article 6.5.2. of Volume 1 to the RFP.

32. Before turning to an examination of Team Sunray and CAE’s allegations, the Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of proposals. In File No. PR-2011-043,<sup>12</sup> the Tribunal confirmed that it “[...] will interfere only with an evaluation that is *unreasonable* [...]” and will substitute its judgment for that of the evaluators “[...] only when the evaluators

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10. *Re Complaint Filed by Am-Tech Power Systems Ltd.* (29 September 1999) (CITT).

11. 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].

12. *Re Complaint Filed by Excel Human Resources Inc.* (2 March 2012) (CITT) [Excel Human Resources] at para. 33.

have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way." In other words, if the Tribunal considers that the evaluators have applied themselves adequately to the task of evaluating the submission and applied the evaluation requirements as per the terms of the RFP, it will not substitute its opinion for that of the evaluators.

33. It is also well established that there is an onus on bidders to demonstrate compliance with mandatory criteria.<sup>13</sup> The Tribunal has stated that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential respects.<sup>14</sup>

34. Finally, the Tribunal stated in File No. PR-99-020<sup>15</sup> that procuring entities must evaluate bidders' conformance with the mandatory requirements of a solicitation thoroughly and strictly, indicating however that there could be exceptions for matters of form over substance. In the same vein, the Tribunal has stated that "[w]hile bids must be read strictly, in the absence of a clear format for providing information, in the opinion of the Tribunal, some latitude must be given to the bidders."<sup>16</sup>

35. It is in light of these principles that the Tribunal will assess whether PWGSC's evaluation of Team Sunray's proposal complied with the requirements of the *AIT*.

36. The Tribunal will first address Team Sunray and CAE's first ground of complaint, namely, that PWGSC incorrectly interpreted the term "Bidder" as it applied to the mandatory pre-screening requirements set out in Article 1.5.1. of Volume 1 to the RFP. Team Sunray and CAE submitted that PWGSC misinterpreted the terms of the RFP by requiring either ICD certification in the name of the joint venture or separate ICD certification in the name of *each* member of the joint venture.

37. The definition of "Bidder" is found in Article 4.2.2. of Volume 1 to the RFP and provides that the Bidder "... is the person or entity (or, in the case of a Joint Venture, the persons or entities (Parties)) submitting a bid for the provision of the work." The Tribunal is of the view that a plain reading of the definition of "Bidder", including the use of the plural form of persons, entities and parties to describe joint venture bidders, signifies that the bidder is comprised of all the parties forming the joint venture, not just one of them. In other words, the Tribunal agrees with PWGSC's interpretation of the term "Bidder".

38. Although the Tribunal is of the view that the definition of the term "Bidder" is clear, even if it were to carry out a contextual reading of the definition of "Bidder" in light of other provisions in the RFP, it is not persuaded by Team Sunray and CAE's submissions that one member of the joint venture can comprise the "Bidder" in this case. As noted above, Team Sunray and CAE argued that, because certain provisions of the RFP explicitly required both parties to the joint venture to comply individually with certain provisions of the RFP, where such a requirement is not explicit, it cannot mean that both parties must comply. Team Sunray

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13. For example, *Excel Human Resources Inc.; Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT).

14. *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT). In that case, the Tribunal also found that, while a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, it is not under any duty to do so.

15. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999) (CITT).

16. *Ibid.* at 7.

and CAE also submitted that the use of different words in different places in the RFP must have different meanings.

39. The Tribunal finds that the examples to which Team Sunray and CAE referred do use different wording than the certification requirement of Article 6.5.2. of Volume 1 to the RFP. In the examples to which Team Sunray and CAE referred (such as the insurance and facility security clearance requirements), it was clear that each member of the joint venture had to comply with the requirement on its own and that it was not possible for Team Sunray to satisfy the requirement, in and of itself, as a joint venture.

40. However, PWGSC's position is that Article 6.5.2. of Volume 1 to the RFP required ICD certification to be provided in the name of the joint venture *or* separate ICD certification to be provided by each member of the joint venture. In other words, in the examples given by Team Sunray and CAE, a document in the name of Team Sunray would not have been sufficient, whereas for the purposes of Article 6.5.2., it would have been sufficient.

41. In the Tribunal's view, Team Sunray and CAE have not demonstrated that PWGSC's interpretation of Article 6.5.2. of Volume 1 to the RFP is unreasonable or that the provision only required one member of the joint venture to comply. Moreover, Team Sunray and CAE have not referred the Tribunal to any examples in the RFP where the term "Bidder", as defined in Article 4.2.2., was used to describe a requirement that could be met by one member of a joint venture.

42. The Tribunal also notes the argument raised by Team Sunray and CAE in their reply that the use of the plural form of the words persons, entities and parties is necessary to accurately describe the fact that there are multiple parties to a joint venture. Team Sunray and CAE submitted that this does not indicate that every member must meet every requirement. As the Tribunal has noted above, the definition of "Bidder" does not require every member of a joint venture to meet every requirement. Rather, the definition of "Bidder" requires that the joint venture or each member of the joint venture meet those requirements that must be met by the bidder, unless there is qualifying language found in the provision which directs the bidder to do otherwise.

43. In response to Team Sunray and CAE's argument that the definition of the term "Bidder" should be construed against PWGSC, the Tribunal does not consider the *contra proferentem* principle applicable in the circumstances, as there was no ambiguity as to the definition of the term "Bidder", properly read.

44. Turning next to Team Sunray and CAE's second ground of complaint, namely, that the mandatory pre-screening requirement in Article 6.5.2. of Volume 1 to the RFP was met by providing ICD certification for CAE and a first-tier subcontractor, Team Sunray and CAE rely on Article 4.2.4., which reads as follows:

4.2.4. For the purposes of the Technical, Management and IRB requirements only, "*a bidder*", when submitting a bid, may choose to have a part or the whole of the work carried out by one or more eventual first tier subcontractors, and in substance may retain only the general control and supervision of the work for itself. The Bidder can therefore be compliant to all the Technical, Management and IRB requirements of a bid solicitation document by offering its own property, knowledge, expertise or other resources (in the case of a Joint Venture, any of its parties resources) in combination, if any, with the resources of eventual first tier subcontractors. . . .

[Emphasis added]

45. At this juncture, it is also useful to revisit the definition of "Bidder", which provides as follows:

4.2.2. "Bidder" is the person or entity (or, in the case of a Joint Venture, the persons or entities (Parties)) submitting a bid for the provision of the work. *It does not include the parent, subsidiaries*

*or other affiliates of the Bidder, or its subcontractors.* When successful, the Bidder becomes the Contractor. The Contractor is the person or entity or entities named in the Contract that will perform a contract and that will be responsible for the successful execution of the entire work.

[Emphasis added]

46. While the Tribunal acknowledges that Article 4.2.4. of Volume 1 to the RFP permitted a part or the whole of the technical work to be carried out by a first-tier subcontractor, the Tribunal does not find this provision relevant to the requirement of Article 6.5.2., which speaks of the obligation of a *bidder* to provide a certification note from the OEM with its bid submission. It makes no reference to which party will actually be performing the integration and engineering work. Moreover, the Tribunal notes that the definition of “Bidder” expressly states that a bidder does not include subcontractors. Therefore, the Tribunal is of the view that the requirement of Article 6.5.2. could not be met by providing ICD certification in the name of a subcontractor, and the Tribunal sees no error in PWGSC’s treatment of the ICD certification provided by Team Sunray’s subcontractor.

47. Having determined that either Team Sunray or CAE and Elbit were required to supply PWGSC with ICD certification from the OEM, the Tribunal will now consider whether the substance of the e-mail provided by the OEM fulfilled the substantial requirements of Article 6.5.2. of Volume 1 to the RFP with respect to Elbit and whether disregarding the e-mail amounted to an unreasonable adherence to form over substance by PWGSC.

48. Although sample ICD certification language was provided in the RFP, Article 6.5.2 of Volume 1 to the RFP does not specify a mandatory form for the certification. As a result, the Tribunal will assess whether the contents of the e-mail that Team Sunray submitted as part of its bid met the mandatory requirement of Article 6.5.2.

49. The Tribunal notes that the e-mail from the OEM did not contain the sample ICD certification language provided in the RFP nor did it include the words “we certify”. The Tribunal also finds that the e-mail is ambiguous as to whether Elbit would be able to access the DAGR ICD, as this access was subject to the requirements of U.S. export control laws. As such, the Tribunal is of the view that the e-mail submitted by Team Sunray does not provide any guarantee that the OEM will supply the ICD certification to Elbit and assist with the integration and engineering effort, which, in the Tribunal’s view, was precisely the intent of this mandatory requirement. Indeed, PWGSC submitted that it had a compelling interest in having all parties obtain this certification note in order to avoid situations where a bidder cannot perform the contract because it does not have access to the requisite information. Without this assurance, it was entirely reasonable for PWGSC to conclude that the requirements of Article 6.5.2. of Volume 1 to the RFP were not met with respect to Elbit, and, as a result, for it to conclude that Team Sunray’s bid was non-responsive to Article 6.5.2.

50. In light of the foregoing the Tribunal finds that there is no basis to interfere with PWGSC’s evaluation of Team Sunray’s proposal, since it was reasonable in the circumstances and did not contravene the relevant provisions of the *AIT*. Therefore, the Tribunal concludes that the complaint is not valid.

## **Costs**

51. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

52. 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 complaint cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

53. The Tribunal's preliminary indication is that this complaint 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 medium, as it involved the provision of complex items which included an element of service for support and improvement. The Tribunal finds that the complexity of the complaint was low, as the issues were straightforward and dealt with the interpretation of one provision and whether PWGSC properly evaluated Team Sunray's proposal against one mandatory criterion. Finally, the complexity of the proceedings was low, as the issues were resolved by the parties through documentary evidence and written representations, there were no motions or interveners, a hearing was not necessary, and the 90-day time frame was respected.

54. 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**

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

56. 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 Team Sunray and CAE. In accordance with the *Guideline*, 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 by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Stephen A. Leach  
Stephen A. Leach  
Presiding Member