



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2018-016

Harris Corporation

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, October 22, 2018*

*Reasons issued  
Thursday, November 7, 2018*

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

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**

**HARRIS CORPORATION**

**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 valid in part.

The Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services re-evaluate the proposals submitted by Harris Corporation and the winning bidder in accordance with the [REDACTED] testing methodology set out in the RFSO, as soon as practicable, but in any event no later than within six months of this Determination. The Canadian International Trade Tribunal recommends that the current standing offer remain with the current winning bidder until such time as the re-evaluation is complete. However, the Canadian International Trade Tribunal recommends that no further call-ups, task authorizations or any other form of expenditure under the contract be undertaken by the Department of Public Works and Government Services pending the re-evaluation.

In the event that the Department of Public Works and Government Services' re-evaluation of the [REDACTED] testing results in the winning bidder being non-compliant, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the existing standing offer and issue a new solicitation for this requirement.

In the event that the Department of Public Works and Government Services' re-evaluation of the [REDACTED] testing results in the winning bidder being non-compliant, the Canadian International Trade Tribunal awards Harris Corporation its reasonable bid preparation costs. In such case, the Canadian International Trade Tribunal directs Harris Corporation and the Department of Public Works and Government Services to negotiate the quantum of reasonable bid preparation costs and, within 30 days from the date of receiving notice of the results of the re-evaluation, report back to the Canadian International Trade Tribunal on the outcome of the negotiations.

Should the parties be unable to agree on the quantum of reasonable bid preparation costs, if any are necessary, Harris Corporation will have 45 days from the date of receiving notice of the results of the re-evaluation to file a brief narrative summary of the work undertaken to prepare the bid and detailed and itemized schedules of the costs incurred, along with supporting documentation, with a copy delivered to the Department of Public Works and Government Services. The Department of Public Works and Government

Services will then have 10 days to file a response with the Canadian International Trade Tribunal, with a copy delivered to Harris. The Canadian International Trade Tribunal retains jurisdiction to establish the quantum of reasonable bid preparation costs.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Harris Corporation its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity is Level 1 and the preliminary indication of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or 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 *Procurement Costs Guideline*.

The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Jean Bédard  

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Jean Bédard, Q.C.  
Presiding Member

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

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## STATEMENT OF REASONS

[1] On July 23, 2018, Harris Corporation (Harris) filed a complaint with the Canadian International Trade Tribunal (Tribunal) concerning a request for standing offer (RFSO) with respect to a procurement (Solicitation No. M7594-5-4254/B) conducted by the Department of Public Works and Government Services (PWGSC) for the provision of [REDACTED] night-vision binocular systems and recommended spare parts (binoculars) for the Royal Canadian Mounted Police. This is the second complaint filed by Harris regarding this RFSO.<sup>1</sup>

[2] Harris alleges that

(1) PWGSC allowed the winning bidder to [REDACTED] [REDACTED], contrary to the terms of the RFSO;

(2) certain aspects of the laboratory testing were not conducted in accordance with the RFSO; and

(3) PWGSC kept insufficient records of the laboratory testing methodology and results.

[3] PWGSC reiterates its position taken in File No. PR-2018-001, i.e. that the Tribunal lacks jurisdiction to hear the complaint on the basis of the RCMP's invocation of the national security exception (NSE) to the trade agreements in relation to this procurement. Regardless, it submits that there is no evidence that the evaluation of bids was conducted otherwise than as provided for in the tender documents.

[4] For the reasons provided below, the Tribunal finds that the NSE does not bar the Tribunal from adjudicating the complaint, which the Tribunal finds to be valid in part.

## BACKGROUND

[5] On February 9, 2017, PWGSC issued the RFSO for the provision of the aforementioned binoculars on an as and when required basis, for delivery across Canada. The RFSO was issued to certain suppliers invited to bid after signing a non-disclosure agreement. The RFSO resulted in the issuance of a Standing Offer with an initial term of three years, with an option to extend for seven additional one-year periods.

[6] The RFSO is a retender of a solicitation (Solicitation No. M7594-5-4254/A) issued a year earlier, on February 4, 2016. That solicitation was the subject of a complaint by M.D. Charlton Co Ltd. and an inquiry by the Tribunal in File No. PR-2015-070. At the conclusion of that inquiry, the Tribunal found in favour of the complainant and recommended that the RFSO be "cancelled and a new solicitation be issued [that does] not include technical requirements that favour a particular supplier."<sup>2</sup>

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1. The first complaint was the subject of the Tribunal's inquiry and decision in *Harris Corporation v. Department of Public Works and Government Services* (23 August 2018), PR-2018-001 (CITT).

2. *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (10 August 2016), PR-2015-070 (CITT) [*M.D. Charlton*] at para. 67.

[7] Bids in connection with the RFSO were ultimately received from Harris and [REDACTED] other bidders [REDACTED], for a total of [REDACTED] bids.

[8] The evaluation process had six phases, each of which (except for the pricing phase) bidders had to pass to progress to the next.<sup>3</sup> The relevant details of the evaluation procedure set out in the RFSO are confidential and are included in the confidential annex to this statement of reasons.

[9] On November 1, 2017, PWGSC notified Harris that it had not won the Standing Offer. In addition to identifying the winning bidder and its evaluated price, the regret letter identified the points assessed for each of the laboratory and user trial evaluations for Harris and the winning bidder. It also provided Harris' scores for each of the constituent rated criteria for the laboratory and user trial evaluations.<sup>4</sup>

[10] On November 3, 2017, Harris requested a debriefing with PWGSC, which was eventually held on December 5, 2017.<sup>5</sup>

[11] On November 30, 2017, PWGSC provided Harris with a document in response to some of Harris' preliminary questions, which included, *inter alia*, the average values Harris scored on the laboratory results and the aggregate points Harris was awarded by each participant in the user trials.<sup>6</sup> PWGSC also forwarded testing notes prepared by the user trial participants documenting the conditions of testing (weather, lighting, start and end time, etc.), though not the actual evaluations or scores for Harris.<sup>7</sup>

[12] On December 7, 2017, Harris e-mailed PWGSC to confirm the list of documents and information that it had asked for and understood PWGSC had agreed to provide during the debriefing.<sup>8</sup> PWGSC also provided Harris the individual score sheets from the user trials for Harris' binoculars.<sup>9</sup>

[13] On December 19, 2017, Harris sent an objection letter to PWGSC.<sup>10</sup> Harris objected that the participants were not reasonably instructed, resulting in an arbitrary and unfair evaluation inconsistent with the evaluation criteria in the RFSO.

[14] On March 26, 2018, PWGSC sent Harris a letter denying its objections.<sup>11</sup>

[15] On April 2, 2018, PWGSC sent Harris, *inter alia*, the individual and consensus score sheets pertaining to all phases of its bid evaluation.<sup>12</sup>

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3. Exhibit PR-2018-001-01A (protected) at Appendix 1, Part 1, art. 1.2 at 58-59, Vol. 2.

4. *Ibid.*, Appendix 6 at 398.

5. *Ibid.*, Appendix 7 at 401.

6. *Ibid.*, Appendix 10 at 406.

7. *Ibid.*, Appendix 11 at 412.

8. *Ibid.*, Appendix 13 at 433-34.

9. *Ibid.*, Appendix 15 at 440-68.

10. *Ibid.*, Appendix 16 at 469.

11. *Ibid.*, Appendix 4 at 225.

12. *Ibid.* at para. 53.

[16] On April 10, 2018, Harris filed its first complaint with the Tribunal, raising the same grounds of complaint identified in its objection letter to PWGSC. The Tribunal accepted the complaint for inquiry in PR-2018-001.

[17] After being served with the Government Institution Report (GIR) in inquiry PR-2018-001 on July 10, 2018, and relying on confidential information contained in it, Harris filed the present complaint on July 23, 2018. PWGSC filed its GIR in this inquiry on August 27, 2018, and Harris filed its comments on the GIR on September 4, 2018.

[18] Given that the parties were afforded opportunities to file submissions as well as evidence, and given that no oral hearing was requested, the Tribunal disposed of the matter on the basis of the written record.

## TRADE AGREEMENTS

[19] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint.<sup>13</sup> 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 and their provisions,<sup>14</sup> which in this case include the *Agreement on Internal Trade*,<sup>15</sup> the *North American Free Trade Agreement*<sup>16</sup> and the *Revised Agreement on Government Procurement*.<sup>17</sup>

[20] The trade agreements stipulate that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.

[21] When considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. As the Supreme Court of Canada has repeatedly underlined, “. . . reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”<sup>18</sup> As a result, the Tribunal does not generally substitute its judgments for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a proposal, have based their information on

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13. *Canadian International Trade Tribunal Act*, R.S.C., 1985, c 47 (4th Supp.) [*CITT Act*], s. 30.14.

14. *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 [*Regulations*], s. 11.

15. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-internal-trade/>> [*AIT*].

16. *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, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

17. *Revised Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014) [*Revised AGP*].

18. *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (CanLII) at para. 11 (citing *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)).



undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>19</sup> In addition, the Tribunal has often stated that the responsibility for ensuring that a proposal is compliant with all essential criteria of a solicitation ultimately resides with the bidder.<sup>20</sup>

[22] *NAFTA* and the *Revised AGP* also require procuring entities to maintain complete documentation regarding each of their procurements.

[23] The proper retention of documents is an integral part of a fair procurement process. It allows for verification that the procurement process was in fact carried out in accordance with the trade agreements. The Tribunal has previously indicated that evaluators' individual score sheets comprise an important component of the record of a solicitation process and that it must be retained.<sup>21</sup>

### **PWGSC'S NSE MOTION**

[24] PWGSC reiterated the motion it filed in PR-2018-001, i.e. that the Tribunal does not have jurisdiction to deal with this complaint, and adopted its submissions from that inquiry in support of the motion. For the same reasons articulated by the Tribunal in PR-2018-001, the Tribunal dismisses the motion.

### **MERITS OF THE COMPLAINT**

[25] Harris has essentially raised three grounds of complaint. Firstly, it argues that the successful bidder was non-compliant as that bidder [REDACTED]. Secondly, it submits that the laboratory testing was not done in accordance with the RFSO. Thirdly, it submits that there was insufficient record-keeping of the laboratory testing methodology and results.

[26] Having the benefit of all of the relevant evidence, the Tribunal finds that the grounds of Harris' complaint are valid in part.

### **Was the successful bidder non-compliant?**

#### Positions of the Parties

[27] Harris submits that the RFSO prohibited the [REDACTED]. It submits that PWGSC's [REDACTED] by the successful bidder was contrary to the terms of the RFSO and, therefore, awarding the contract to that particular bidder was also contrary to the terms of the RFSO.

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19. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.

20. *Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

21. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 115; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) at paras. 62-65.

[28] PWGSC submits that the RFSO expressly permitted [REDACTED] and that PWGSC issued a Q&A and an amendment to the RFSO that specifically addressed the question of [REDACTED].

### Tribunal's Analysis

[29] The relevant provisions of the RFSO, as amended by Amendment 1, are reproduced in the Confidential Annex.

[30] PWGSC [REDACTED].

[31] Despite the awkward phrasing of the relevant provisions, the Tribunal does not consider PWGSC's interpretation to be unreasonable. [REDACTED].

[32] Since the provisions of the RFSO deem a [REDACTED] to include the [REDACTED], they permit the [REDACTED]. Indeed, Harris submitted that one interpretation of these provisions is that [REDACTED] may in fact be permissible.

[33] PWGSC applied this interpretation to the RFSO. As did the winning bidder, Harris could have [REDACTED]. If Harris objected to these provisions *per se*, it could have raised its concerns in a timely manner; it did not do so.

[34] Accordingly, the Tribunal finds this ground of complaint to be not valid.

### **Was the laboratory testing done in accordance with the RFSO?**

[35] At the outset, the Tribunal notes that the ground of complaint related to laboratory [REDACTED] testing has been abandoned.<sup>22</sup> Accordingly, the Tribunal's analysis will focus on the remaining testing in question, being the [REDACTED] test.

[36] Harris submits that the RFSO required [REDACTED] testing to be performed by three trained observers on [REDACTED] that were selected for testing and that the results of all three observers were to be averaged. It submits that, based on the Compliance Verification Table and the score sheets provided by PWGSC on March 26, 2018, it understood the [REDACTED] score sheet as reporting the average results of all three evaluators [REDACTED] and that the [REDACTED] would have contained the individual results.<sup>23</sup> Harris submits that it was not until PWGSC wrote to the Tribunal in the context of PR-2018-001, indicating that the score sheets provided to Harris on March 26, 2018, were in fact [REDACTED] and that there was [REDACTED], that Harris realized that there was [REDACTED] of the [REDACTED] that underwent [REDACTED] testing.<sup>24</sup> In Harris' submission, if the [REDACTED]

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22. Exhibit PR-2018-016-13A (protected) at para. 32, Vol. 2.

23. Exhibit PR-2018-001-01A (protected) at 348-351, Vol. 2.

24. Exhibit PR-2018-001-37A (protected) at 4, Vol. 2.

results were not an average of the three observers' results [REDACTED], then the [REDACTED] test was not done in accordance with the RFSO.

[37] PWGSC submits that the [REDACTED] testing was conducted in accordance with the terms and conditions of the RFSO and that the records properly reflect the results of the evaluations. It submits that [REDACTED] of Harris' selected units underwent [REDACTED] testing and that the scores of the three evaluators for the best-performing unit of each bidder were averaged and recorded.

[38] The RFSO provides that each unit was to undergo [REDACTED] testing by three evaluators applying three different parameters. The relevant RFSO provisions are reproduced in the Confidential Annex.

[39] As can be seen from the Confidential Annex, there is no provision in the RFSO for [REDACTED] scoring on the basis of [REDACTED]; neither is the methodology of selecting the best-performing unit present in the RFSO. The RFSO clearly stated that [REDACTED] [REDACTED] [REDACTED] [REDACTED] from each bidder would undergo [REDACTED] testing. Indeed, in his affidavit, Sgt. Montpetit states that a complete [REDACTED] evaluation was performed for both units from each bidder.<sup>25</sup>

[40] However, the results of the "worst-performing" units, if any results were indeed recorded,<sup>26</sup> were ignored by PWGSC; instead, only the results for the best-performing units were averaged and used in the calculation of each bidder's scores for this element of the laboratory testing.<sup>27</sup>

[41] The Tribunal finds that PWGSC conducted the [REDACTED] evaluation on the basis of criteria that were not stated in the RFSO. By its own admission, PWGSC only considered the results of the best-performing units when there was nothing in the RFSO stating that only the results of the "best-performing" units would be averaged. As a result, the Tribunal finds that PWGSC's application of the [REDACTED] testing provisions was unreasonable.

[42] The Tribunal therefore finds that the [REDACTED] tests were not done in accordance with the RFSO, violating the requirements of Article 506(6) of the *AIT*, Article 1015(4)(d) of *NAFTA* and Article XV(1) of the *Revised AGP*. Moreover, if both units were indeed tested, records regarding these tests were not kept, violating Article 1017(1)(p) of *NAFTA* and Article XVI(3)(a) of the *Revised AGP*.

[43] Accordingly, the Tribunal finds these grounds of complaint to be valid.

## CONCLUSION

[44] For the reasons above, the Tribunal concludes that the complaint is valid in part.

## REMEDY

[45] Having found Harris' complaint to be valid in part, the Tribunal must determine the appropriate remedy, in accordance with subsections 30.15(2) to (4) of the *CITT Act*.

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25. Exhibit PR-2018-016-11 at para. 7, Vol. 1; Exhibit PR-2018-016-11A (protected) at para. 7, Vol. 2.

26. The Tribunal has no evidence of the existence of such records.

27. Exhibit PR-2018-016-11A (protected), Vol. 2 at para. 7, and Exhibit PR-2018-001-51, Vol. 2B at p. 4.

[46] Harris requests that the Tribunal recommend cancelling the Standing Offer issued pursuant to the RFSO and reissuing the solicitation. Alternatively, Harris requests that the Tribunal recommend that PWGSC compensate Harris for the lost profits that it would have otherwise earned had it been awarded the contract.

[47] PWGSC made no submissions with respect to the appropriate remedy.

[48] To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including the following:

1. the seriousness of the deficiencies found;
2. the degree to which the complainant and all other interested parties were prejudiced;
3. the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
4. whether the parties acted in good faith; and
5. the extent to which the contract was performed.

[49] In this case, the trade agreements were breached when PWGSC evaluated bids on the basis of undisclosed criteria. This breach is a serious deficiency. The evaluation of proposals in accordance with the criteria stated in a bid solicitation is at the heart of the scheme established under the *CITT Act* and the applicable trade agreements.

[50] Harris may have been prejudiced by this breach. The methodology that PWGSC followed for the [REDACTED] evaluation, as opposed to using the results from each of the bidders' units, could have prejudiced Harris by artificially inflating the winning bidder's score, including a potential result where the winning bidder could have otherwise been non-compliant.<sup>28</sup> This is because the scoring of the [REDACTED] tests was based on a sliding scale from the results of the highest-scoring unit. Had Harris' unit received the best scores, the winning bidder (whose bid received the minimum overall score for being compliant) would have been non-compliant.<sup>29</sup>

[51] As a result, this breach also had a negative impact on the integrity of the procurement process. The situation is further complicated because PWGSC failed to keep adequate records with respect to the [REDACTED] testing, such that the Tribunal is unable to verify whether Harris was in fact prejudiced by this breach.

[52] There is no indication that any party acted in bad faith with respect to this procurement process.

[53] Finally, the Tribunal acknowledges that the Standing Offer was awarded in October 2017 and that the contract has likely been performed to some degree. However, the Tribunal also acknowledges that the initial period of the Standing Offer is three years, with the option of extending

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28. Exhibit PR-2018-016-10A (protected) at para. 46, Vol. 2; Exhibit PR-2018-016-13A (protected) at para. 30, Vol. 2.

29. Exhibit PR-2018-001-01A (protected) at 59 and 398, Vol. 2.

that period for seven additional one-year periods. Thus, there is potentially a significant period of time remaining for this Standing Offer.

[54] In view of the above, the Tribunal recommends that PWGSC re-evaluate the proposal submitted by Harris and the winning bidder in accordance with the [REDACTED] testing methodology set out in the RFSO as soon as practicable, but in any event no later than within six months of this Determination. That is to say, the testing procedures set out in section [REDACTED] of the RFSO should be followed with respect to both selected units for each of these bidders and the results of each unit should be used in calculating each of these bidders' [REDACTED] scores. PWGSC should then recalculate a total score for each of these bidders to determine, *inter alia*, whether the winning bidder was compliant.

[55] In making its recommendation to re-evaluate certain aspects of the technical proposals, the Tribunal is mindful of time and the related costs to all parties involved, and of the public interest in the continuation of the Standing Offer, until and unless the re-evaluation arrives at a different result.

[56] Accordingly, the Tribunal also recommends that the current Standing Offer remain with the current winning bidder until such time as the re-evaluation is complete. However, it is recommended that no further call-ups, task authorizations or any other form of expenditure under the contract be undertaken by PWGSC pending the re-evaluation.

[57] Should the results of the re-evaluation show that the winning bidder no longer meets the minimum score required and is therefore non-compliant, the Tribunal recommends that PWGSC cancel the existing Standing Offer and issue a new solicitation for this requirement. In the Tribunal's view, this outcome is consistent with the public's interest in avoiding unnecessary double payment for procurements as well as the bidders' interest in having the opportunity to supply the goods in question.<sup>30</sup>

## **BID PREPARATION COSTS**

[58] The Tribunal also has authority under subsection 30.15(4) of the *Act* to "award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract." This authority is distinct from and additional to that of the Tribunal under subsection 30.15(3) to recommend a remedy.

[59] In the event that PWGSC's re-evaluation of the [REDACTED] testing results in the winning bidder being non-compliant, the Tribunal finds it appropriate to award Harris its reasonable bid preparation costs. In such case, the Tribunal directs Harris and PWGSC to negotiate the quantum of reasonable bid preparation costs and, within 30 days from the date of receiving notice of the results of the re-evaluation, report back to the Tribunal on the outcome of the negotiations.

[60] Should the parties be unable to agree on the quantum of reasonable bid preparation costs, if any are necessary, the Tribunal will require that Harris produce a brief narrative summary of the work undertaken to prepare the bid, along with detailed and itemized schedules of the costs incurred, supported by documentation. In the event that the winning bidder is found to be non-compliant,

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30. *Dynamic Engineering Inc. v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CITT) at para. 49.

Harris will have 45 days from the date of receiving notice of the results of the re-evaluation to file this information with the Tribunal, with a copy delivered to PWGSC. PWGSC will then have 10 days to file a response with the Tribunal, with a copy delivered to Harris.

[61] The Tribunal retains jurisdiction to establish the quantum of reasonable bid preparation costs.

### COMPLAINT COSTS

[62] Pursuant to section 30.16 of the *Act*, the Tribunal may award costs of, and incidental to, any procurement complaint proceedings.

[63] Having found the complaint to be valid in part, the Tribunal finds that Harris is entitled to its reasonable costs.

[64] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (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.

[65] The procurement here was not complex; neither was the proceeding (the latter factor to be contrasted with PR-2018-001). The RFP was not hundreds of pages, and the goods procured were fairly straightforward night-vision binoculars.

[66] As such, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of complexity is Level 1 and its preliminary indication of the amount of the cost award is \$1,150.

### DETERMINATION

[67] Pursuant to subsection 30.14(2) of the *Act*, the Tribunal determines that the complaint is valid in part.

[68] The Tribunal recommends that PWGSC re-evaluate the proposals submitted by Harris and the winning bidder in accordance with the [REDACTED] testing methodology set out in the RFSO as soon as practicable, but in any event no later than within six months of this Determination.

[69] The Tribunal recommends that the current standing offer remain with the current winning bidder until such time as the re-evaluation is complete. However, the Tribunal recommends that no further call-ups, task authorizations or any other form of expenditure under the contract be undertaken by PWGSC pending the re-evaluation.

[70] In the event that PWGSC's re-evaluation of the [REDACTED] testing results in the winning bidder being non-compliant, the Tribunal recommends that PWGSC cancel the existing Standing Offer and issue a new solicitation for this requirement.

[71] In the event that PWGSC's re-evaluation of the [REDACTED] testing results in the winning bidder being non-compliant, the Tribunal awards Harris its reasonable bid preparation costs. In such case, the Tribunal directs Harris and PWGSC to negotiate the quantum of reasonable bid preparation costs and, within 30 days from the date of receiving notice of the results of the re-evaluation, report back to the Tribunal on the outcome of the negotiations.

[72] Should the parties be unable to agree on the quantum of reasonable bid preparation costs, if any are necessary, Harris will have 45 days from the date of receiving notice of the results of the re-evaluation to file a brief narrative summary of the work undertaken to prepare the bid and detailed and itemized schedules of the costs incurred, along with supporting documentation, with a copy delivered to PWGSC. PWGSC will then have 10 days to file a response with the Tribunal, with a copy delivered to Harris. The Tribunal retains jurisdiction to establish the quantum of reasonable bid preparation costs.

[73] Pursuant to section 30.16 of the *Act*, the Tribunal awards Harris its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Jean Bédard  
\_\_\_\_\_  
Jean Bédard, Q.C.  
Presiding Member

**CONFIDENTIAL ANNEX**

Provisions of the RFSO referred to at paragraph 29:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[74] Provisions of the RFSO referred to at paragraph 38:

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]