



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2018-049

Accipiter Radar Technologies Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Friday, April 26, 2019*

*Reasons issued
Monday, May 13, 2019*

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IN THE MATTER OF a complaint filed by Accipiter Radar Technologies Inc. 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

ACCIPITER RADAR TECHNOLOGIES INC.

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.

Pursuant to subsection 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services (PWGSC) compensate Accipiter Radar Technologies Inc. (Accipiter) in an amount equal to its reasonable costs incurred in responding to the Compliance Assessment Report issued to it on June 18, 2018, including its supplementary response provided to PWGSC on September 8, 2018.

Should the parties be unable to agree on the amount of compensation, Accipiter shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after receipt of Accipiter's submission to file a response. Accipiter will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal awards Accipiter its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and its preliminary indication of the amount of the cost award is \$4,700. 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.

Ann Penner

Ann Penner

Presiding Member

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

Tribunal Panel: Ann Penner, Presiding Member

Support Staff: Helen Byon, Counsel

Complainant: Accipiter Radar Technologies Inc.

Counsel for the Complainant: Nicholas McHaffie
Anisha Visvanatha

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan Clarke
Ian McLeod
Kathryn Hamill
Roy Chamoun
Nick Howard
Peter J. Osborne
Margaret Robbins

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

1. This inquiry concerns a complaint filed by Accipiter Radar Technologies Inc. (Accipiter) in relation to a procurement (Solicitation No. F7048-160039/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans. The solicitation was issued by way of a Request for Proposal (RFP) to satisfy the requirement for coastal radar equipment for the Canadian Coast Guard (CCG).

2. The Canadian International Trade Tribunal (the Tribunal) accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*¹ and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *CITT Act*. For the reasons that follow, the Tribunal finds that the complaint is valid, in part.

SUMMARY OF COMPLAINT

4. Accipiter alleged that the procurement was not conducted in accordance with Chapter Five of the *Canadian Free Trade Agreement (CFTA)* on the basis that PWGSC conducted the procurement process in a manner that was unfair. Specifically, Accipiter alleged that it was prejudiced because PWGSC disclosed to other bidders more details regarding issues related to areas of non-compliance than Accipiter was given, improperly applied the scope of several requirements of the RFP, improperly cancelled the RFP when Accipiter should have been awarded the contract, and demonstrated bias for the non-Canadian bidders.

5. Given that PWGSC had cancelled the solicitation process and announced that it would retender a new RFP for the same requirement, Accipiter asked the Tribunal to order PWGSC to postpone the award of any future contract until the Tribunal determined the validity of its complaint. Accipiter also included a motion requesting an order for the production of certain documents should they not be included in the Government Institution Report (GIR).

6. As a remedy, Accipiter asked the Tribunal to recommend either that it be awarded the contract or be awarded bid preparation costs in the case that the Tribunal found that its bid was non-compliant. Accipiter also requested its costs of proceeding with this complaint. If the Tribunal deemed neither of these remedies appropriate, Accipiter requested such further or other remedy as the Tribunal considered just and appropriate.

OVERVIEW OF THE RFP

7. The RFP at issue in this complaint included very technically complex requirements. Moreover, this complaint raised several issues that relate to the process of the solicitation, including a preference for the evaluation of bids with Canadian content certification, a phased bid evaluation process, and most importantly, the issuance of clarification questions by PWGSC. Accordingly, a framework for the pertinent aspects of the process is provided below.

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

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

– Mandatory Technical Requirements

8. The RFP set out the mandatory technical requirements in four separate annexes. In this complaint only requirements contained in Annexes C and D of the RFP are at issue.

9. Annex C set out the requirements for the Solid-State Radar System, the configuration of which required (1) antenna systems, (2) radar transceiver equipment and (3) separate or built-in radar extractors/trackers. Annex C included criteria with respect to equipment, range performance, operational and surveillance requirements, replacement radar antenna requirements, general antenna system requirements, radar transceiver specifications, safety requirements, environmental requirements and approval of equipment.³

10. Annex D of the RFP set out the mandatory technical requirements for the Radar Extractor/Trackers for CCG's Marine Communications and Traffic Services radar sites. The extractor/tracker was required to interface with existing solid-state radar transceivers and had to meet various parameters with respect to performance and functionality, interfaces, and safety and environmental considerations.⁴

– Canadian Content

11. This solicitation was subject to a preference for Canadian content. Bids with a Canadian content certification would be evaluated before bids without the certification.⁵

12. The requirements for the Canadian content certification were set out in section 5.1.2.1 of the RFP. The relevant parts of this section are the following:

Failure to provide this certification completed with the bid will result in the goods and services offered being treated as non-Canadian goods and non-Canadian services.

The Bidder certifies that:

() a minimum of 80 percent of the total bid price consist of Canadian goods and Canadian services . . .⁶

13. Paragraph 4.1(c) of Part 4 – Evaluation Procedures and Basis of Selection in the RFP stated the following with respect to the evaluation of bids with a Canadian content certification,

(c) The evaluation team will determine first if there are two or more bids with a valid Canadian Content certification. In that event, the evaluation process will be limited to the bids with the certification; otherwise, all bids will be evaluated. If some of the bids with a valid certification are declared non-responsive, or are withdrawn, and less than two responsive bids with a valid certification remain, the evaluation will continue among those bids with a valid certification. If all bids with a valid certification are subsequently declared non-responsive, or are withdrawn, then all the other bids received will be evaluated.⁷

3. Exhibit PR-2018-049-15A, Vol. 1 at 14.

4. Exhibit PR-2018-049-15A, Vol. 1 at 18.

5. Exhibit PR-2018-049-06, Vol. 1 at 6, 9.

6. Exhibit PR-2018-049-06, Vol. 1 at 12.

7. Exhibit PR-2018-049-06, Vol. 1 at 9.

– Phased Bid Evaluation Process

14. The Phased Bid Evaluation Process was set out in paragraph 4.1(d) the RFP. It encompassed two phases. Phase I included a compliance assessment of the required financial information, providing bidders an opportunity to provide any missing financial information within a specified period. Bids with all the required financial information as established in Phase I would proceed to Phase II, where the evaluation team would assess the bids for compliance with all other eligible mandatory requirements. Once this assessment had been completed, bidders would be issued a Compliance Assessment Report (CAR) which would inform bidders either that PWGSC would continue to consider their bid or identify an eligible mandatory requirement for which the bid or offer did not yet demonstrate compliance. Upon receipt of the CAR, bidders were invited to submit additional or different information “only for the purpose of rendering the re-evaluation of the eligible mandatory requirements identified in the CAR as compliant.” Various rules were set out in the RFP governing the submission of information in response to the CAR, including:

- iii. All bidders . . . will receive the same length of time in which to respond to their CAR;
- iv. An acceptable response to the CAR must:
 - a. address only the eligible mandatory criteria identified in the CAR;
 - b. clearly identify any additional or different information, as well as the precise location in the bid where this information applies;
 - c. subject to a. above, identify any other changes to the original bid that are necessitated by the additional or different information the bidder provides in response to the CAR; and
 - d. otherwise follow the Bid Preparation Instructions in the RFP document.
- . . .
- vi. Any response to the CAR that is received after the required time and date will not be given any consideration.

15. Responses to the CAR would then be evaluated to determine whether the bids were compliant with the mandatory requirements set out in the CAR. Compliant bids would proceed to Phase III where the evaluation process would continue until a successful bidder could be identified.⁸

– Clarification Questions

16. PWGSC issued questions to clarify or verify information related to bids in accordance with the 2003 (2017-04-27) Standard Instructions – Goods or Services – Competitive Requirements of the *Standard Acquisition Clauses and Conditions Manual* (SACC), which were incorporated by reference under section 2.1 of the RFP. Clause SACC 16 (2008-05-12) states the following:

- 1. In conducting its evaluation of the bids, Canada may, but will have no obligation to, do the following:
 - a. seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;
- . . .
- 2. Bidders will have the number of days specified in the request by the Contracting Authority to comply with any request related to any of the above items. Failure to comply with the request may result in the bid being declared non-responsive.

8. Exhibit PR-2018-049-06, Vol. 1 at 10-11.

17. The clarification questions at issue in this complaint were provided to the bidders *prior* to the issuance of the CAR. Upon receiving bidders' responses to the clarification questions, CARs were issued to the bidders in accordance with the terms described above.

PROCEDURAL BACKGROUND

The RFP Process

18. PWGSC issued the RFP on December 1, 2017, with a closing date of March 26, 2018.⁹
19. Accipiter submitted its bid on March 21, 2018. It included a Canadian content certification.
20. On March 29, 2018, PWGSC requested information from Accipiter to validate its Canadian content certification. Accipiter responded on April 4, 2018.¹⁰ Discussions with Accipiter concerning PWGSC's verification of Canadian content requirements continued on through to May 4, 2018.¹¹
21. On May 10, 2018, Accipiter objected to Canada's calculation of Canadian content, which included consideration of extended pricing in the calculation of Total Bid Price, for the purposes of section 5.1.2.1 of the RFP.¹²
22. On June 13, 2018, PWGSC sought clarification from Accipiter regarding its proposal on prices in Schedule A to the RFP as well as clarification on questions relating to various references in Annex I Matrix for Statement of Work, Annex J Matrix for Solid State Radar System reference, and Annex K Matrix for Radar Extractor Tracker.¹³ Accipiter responded on June 15, 2018.¹⁴
23. On June 18, 2018, PWGSC issued Accipiter's CAR.¹⁵ Accipiter responded to the CAR on June 25, 2018.¹⁶
24. On September 4, 2018, Accipiter was advised of certain information relevant to the complaint from an outside source.¹⁷
25. On September 8, 2018, Accipiter provided a supplemental response to the CAR.¹⁸ On October 19, 2018, PWGSC rejected this information as outlined below.
26. On September 10, 2018, Accipiter objected to PWGSC for starting to evaluate bidders without Canadian content certifications. For Accipiter, any determination that its proposal was non-compliant and any evaluation of bidders that did not provide the Canadian content certification at this stage of the solicitation process would be in breach of PWGSC's common-law duties and its obligations under the CFTA.¹⁹

9. In response to the RFP, PWGSC received bids with Canadian content certifications and other that were not. Exhibit PR-2018-049-13A, Vol. 2 (protected) at 11; Exhibit PR-2018-049-15A, Vol. 1 at 11.

10. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 75-80; Exhibit PR-2018-049-01C, Vol. 1 at 76-81.

11. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 81-94; Exhibit PR-2018-049-01C, Vol. 1 at 82-100.

12. Exhibit PR-2018-049-01C, Vol. 1 at 101-104.

13. Exhibit PR-2018-049-01C, Vol. 1 at 105-106.

14. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 97-102; Exhibit PR-2018-049-01C, Vol. 1 at 107-112.

15. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 103-106; Exhibit PR-2018-049-01C, Vol. 1 at 113-116.

16. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 107-174; Exhibit PR-2018-049-01C, Vol. 1 at 117-137.

17. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 58.

18. Exhibit PR-2018-049-01C, Vol. 1 at 149, 150; Exhibit PR-2018-049-01D, Vol. 2 (protected) at 183, 184.

19. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 185-187; Exhibit PR-2018-049-01C, Vol. 1 at 151-153.

27. On October 19, 2018, PWGSC addressed various objections that Accipiter had raised including the manner in which it had calculated the Canadian content certification of its bid and when it proceeded to evaluate non-Canadian bids. PWGSC also advised Accipiter in response to its letter of September 8, 2018, that it could not accept new information after the close of the CAR deadline.²⁰

28. Also, on October 19, 2018, PWGSC advised Accipiter that it had cancelled the solution because it did not receive a compliant bid. The letter also outlined the technical criteria with which Accipiter's bid was non-compliant (Cancellation Letter). It announced that it would retender the requirement in the future.²¹

29. On November 2, 2018, Accipiter objected to PWGSC's cancellation of the RFP.²²

30. On November 8, 2018, PWGSC provided a debrief session to Accipiter; it was conducted by teleconference.²³

31. On November 30, 2018, PWGSC replied to Accipiter, to re-affirm why it cancelled the RFP.²⁴

Complaint Proceedings

32. On December 14, 2018, Accipiter filed its complaint with the Tribunal.

33. On December 21, 2018, the Tribunal informed the parties that it had accepted the complaint for inquiry. For reasons that will be described below, the Tribunal also informed Accipiter that it could not issue an order to postpone the award of any contract under subsection 30.13(3) of the *CITT Act*.

34. On January 8, 2019, PWGSC requested that the Tribunal grant an extension of time for the filing of the GIR until February 11, 2019. The Tribunal granted the request.

35. On February 9, 2019, Accipiter requested that it be given until February 25, 2019, to comment on the GIR. The Tribunal granted the request.

36. On February 11, 2019, PWGSC filed protected and public versions of the GIR.

37. On February 15, 2019, Accipiter built on the motion included in its complaint by requesting an order requiring PWGSC to produce certain documents. Specifically, Accipiter requested:

- a. copies of the original evaluation notes of each individual evaluator with respect to the evaluation of Accipiter's bid at all phases of the evaluation;
- b. responses provided by other bidders to PWGSC's pre-CAR clarification inquiries and CARs;
- c. evaluation notes in respect of other bidders' responses, at the pre-clarification, pre-CAR, and final stages;
- d. correspondence from Canada to other bidders regarding the cancellation of and intention to issue a new solicitation;

20. Exhibit PR-2018-049-01C, Vol. 1 at 156-158.

21. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 188-190; Exhibit PR-2018-049-01C, Vol. 1 at 159-161.

22. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 191-202; Exhibit PR-2018-049-01C, Vol. 1 at 167-178.

23. Exhibit PR-2018-049-01C, Vol. 1 at 162-166.

24. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 221-225; Exhibit PR-2018-049-01C, Vol. 1 at 197-201.

- e. the portions of other bidders' bids pertaining to the requirements for which Accipiter was found non-compliant;
 - f. internal notes, records and correspondence within PWGSC, within the CCG, or between PWGSC and CCG, in respect of the Solicitation and its evaluation, including correspondence in respect of the pre-CAR clarifications and responses, CARs, assessments of non-compliance, and any consideration or discussion of preferred suppliers.
38. On February 19, 2019, The Tribunal requested submissions from the parties on Accipiter's request for the production order.
39. On February 20, 2019, the Tribunal directed Accipiter to review the vast amount of information contained in its complaint that it had designated as confidential and to refile its complaint. The Tribunal was concerned that it would be significantly impaired when issuing well-documented public reasons for its determination.
40. On February 21, 2019, Accipiter requested that the Tribunal provide its ruling on issues relating to the confidentiality of information it had designated in its complaint.
41. On February 22, 2019, PWGSC filed its submissions with respect to Accipiter's request for the production of documents and Accipiter filed its response thereto.
42. On February 25, 2019, the Tribunal granted Accipiter's request for a further extension to comment on the GIR to March 4, 2019.
43. On February 27, 2019, the Tribunal ordered the production of the individual evaluations of Accipiter's bid. The Tribunal also accepted the revised public version of the GIR, which removed from the previously filed public version of the GIR certain paragraphs which Accipiter identified as being confidential.
44. On March 1, 2019, PWGSC filed the individual evaluations of Accipiter's bid.²⁵
45. On March 4, 2019, Accipiter submitted its comments on the GIR and the individual evaluations of its bid.
46. On March 8, 2019, the Tribunal issued an order for the production of certain documents requested by Accipiter, pursuant to subsection 17(2) of the *CITT Act*.
47. On March 15, 2019, Accipiter filed a revised public and confidential version of its complaint.
48. Also on March 15, 2019, PWGSC filed documents pursuant to the Tribunal's order.²⁶
49. On March 22, 2019, Accipiter submitted its comments with respect to the documents produced by PWGSC. PWGSC responded to Accipiter's comments on the documents on March 27, 2019. Accipiter provided its reply on April 1, 2019.
50. On April 26, 2019, the Tribunal issued its determination with respect to the complaint.

25. Exhibit PR-2018-049-29A, Vol. 2 (protected).

26. Exhibit PR-2018-049-32A, Vol. 2 (protected).

51. On May 9, 2019, the Tribunal issued a draft copy of its determination and reasons to confirm with the parties that it did not contain confidential information.

PRELIMINARY MATTERS

Postponement of Contract Award

52. As noted above, Accipiter requested that the Tribunal order PWGSC to postpone the award of any future contract until the Tribunal determined the validity of its complaint.

53. The Tribunal determined that it had no authority to issue such an order under subsection 30.13(3) of the *CITT Act*, which states:

30.13(3) Where the Tribunal decides to conduct an inquiry into *a complaint* that concerns a *designated contract proposed to be awarded* by a government institution, the Tribunal may order the government institution to postpone the awarding of *the contract* until the Tribunal determines the validity of the complaint.

[Emphasis added]

54. This provision applies only in respect of the designated contract that is the subject of a complaint and is proposed to be awarded. In the present case, as the solicitation process for awarding the designated contract was cancelled, there is no proposed contract award for the purposes of subsection 30.13(3) of the *CITT Act*.

Confidential Designations

55. As noted above, the Tribunal directed Accipiter to refile the complaint after reviewing the information that it had designated as confidential. In response, on February 21, 2019, Accipiter requested that the Tribunal provide its ruling on whether:

- a. in the circumstances of this case, the specific mandatory requirements for which a bidder was found non-compliant during the evaluation process is confidential; and
- b. if so, whether disclosure of portions of the RFP that would thereby identify those specific mandatory requirements, are similarly confidential in context, even though the portions themselves are derived from a public document.²⁷

56. Accipiter submitted that the mandatory requirements for which it was non-compliant and PWGSC's reasons for its non-compliance were confidential in nature. Disclosure of that information would provide to competitors insight into Accipiter's bid and the solution it had proposed, matters that were of particular concern given the resolicitation of the requirement for radar equipment. Accipiter noted that in the GIR, PWGSC had protected similar information in respect of the other bidders.²⁸ Additionally, Accipiter noted *Lengkeek Vessel Engineering*, a decision in which the Tribunal found that the release of a bidder's total bid price from the first solicitation to a competitor meant that the bidder was "likely to be seriously handicapped in setting its price when bidding on the second RFP" and that this amounted to being "unjustifiably excluded from the procurement process for the second RFP."²⁹ In *Lengkeek*, the Tribunal

27. Exhibit PR-2018-049-20, Vol. 1 at 1.

28. Exhibit PR-2018-049-20, Vol. 1 at 2.

29. *Lengkeek Vessel Engineering Incorporated v. Department of Public Works and Government Services* (9 November 2006), PR-2006-002 (CITT) [*Lengkeek*] at paras. 38; see also *Hawboldt Industries v. Department of Public Works and Government Services* (27 April 2018), PR-2017-045 (CITT) at para. 47.

took into account Article 501 of the *Agreement on Internal Trade* (AIT), which requires that the procurement be conducted in a manner that ensures “equal access to procurement for all Canadian suppliers”.³⁰

57. Consistent with its finding in *Lengkeek* and in light of Article 502 of the CFTA, a provision that applies to this complaint, the Tribunal determined that non-discriminatory access to the next procurement necessitates protecting from disclosure aspects of Accipiter’s bid. The Tribunal accepted Accipiter’s submissions that information in its bid could be understood by sophisticated competitors in the technical field of radar based on gaining knowledge of the requirements for which Accipiter was non-compliant.³¹ This would have placed Accipiter at a significant disadvantage when submitting a bid in the forthcoming procurement process.

58. Accordingly, to maintain the confidentiality of the information so designated by the parties, the Tribunal will not refer to the specific mandatory requirements of the RFP relevant to Accipiter’s complaint. Instead, mandatory requirements will be referred to as Requirement Issue 1 through 4 as so identified in the confidential version of the complaint.³² Likewise, bidder identities will be protected as well as any technical information relating to their bids.

Production of Documents

59. The GIR did not contain all of the documents Accipiter had requested in its complaint. PWGSC asserted that these were not relevant to the determination of the complaint. As noted above, the Tribunal ordered PWGSC to disclose certain documents requested by Accipiter.

60. In order to assist it in its inquiry, the Tribunal held to its long-standing view about the significance and relevance of notes from individual evaluators, namely, that those notes can be determinative when the Tribunal seeks to understand why a bid was found to be compliant or non-compliant as the case may be.³³

61. With respect to the other categories of documents requested by Accipiter, PWGSC maintained that they were not relevant to the determination of the complaint, calling them “unnecessary” and “overbroad”.³⁴ Accipiter’s production request for confidential information of other bidders was based on an unsubstantiated and unsupported allegation of bias and therefore access to all manner of documents not relevant to the complaint itself should not be permitted.³⁵ In its reply to PWGSC’s submissions, Accipiter asserted that its allegations were not limited to bias, but included ones about PWGSC’s unfair and improper evaluation of its bid. PWGSC chose not to respond to those submissions.

62. The Tribunal must ensure that it has sufficient information on the record to determine the validity of the grounds of complaint.³⁶ In considering Accipiter’s comments on the GIR, copies of correspondence that

30. In this regard, the Tribunal notes that Article 502 of the CFTA contains the obligation to “provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.”

31. Exhibit PR-2018-049-20, Vol. 1 at 2.

32. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 31, 39, 45, 51.

33. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) [CGI] at para. 62; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 95.

34. Exhibit PR-2018-049-22, Vol. 1 at 1.

35. Exhibit PR-2018-049-22, Vol. 1 at 2.

36. *Vireo Network Inc. v. Department of Public Works and Government Services* (23 April 2014), PR-2013-037 (CITT) [Vireo Network] at para. 58.

detailed the clarification questions provided to the other bidders,³⁷ and evaluation notes with respect to Accipiter's bid,³⁸ the Tribunal found Accipiter's allegations were not speculative. The questions sent to the other bidders prior to the issuance of the CAR were substantively different than the ones it had received. The Tribunal required documents to consider the manner in which PWGSC actually responded to other bids at various steps during the solicitation process, particularly prior to the issuance of the CAR. As such, documents relating to the bids submitted by the other bidders and evaluation thereof were relevant.

63. That said, the determination of whether PWGSC's conduct was unfair necessitated review of only those correspondence, evaluation notes, etc., that related to the mandatory requirements for which Accipiter remained non-compliant. Moreover, with respect to one of the bidders, the Tribunal determined from reviewing its response to PWGSC's inquiries that the clarification sought was entirely administrative in nature, i.e. it was not based on any particular substantive issue arising from the bidder's proposal to the RFP.³⁹

64. The Tribunal's inquiry into whether Accipiter was prejudiced by PWGSC's conduct also required examination of any impact that PWGSC's clarification questions had on the compliance assessment of other bids both before and after the CAR was issued. Accipiter submitted that the other bidders' responses to the clarifications questions and the CAR would either confirm or deny its allegation that the other bidders benefited from the more detailed questions they received from PWGSC prior to the CAR. The Tribunal agreed that in order to determine whether any differences in the clarification questions amounted to some opportunity to which Accipiter was denied, the disclosure of bidders' responses would be necessary. Similarly, based on the form of the cancellation letter issued to Accipiter, the Tribunal was of the view that the cancellation letters to the other bidders would provide a list of the mandatory requirement(s) for which the other bidders were ultimately non-compliant.

65. The last category of documents requested by Accipiter, i.e. records and correspondence concerning CCG, relates to Accipiter's allegation that PWGSC's conduct was preferential to another supplier during the solicitation process. The Tribunal was of the view that the production of these documents would be considered only as needed, i.e. if no evidence found in the other documents disposed of the issues related to the complaint.

66. Based on the foregoing reasons, on March 8, 2019, pursuant to subsection 17(2) of the *CITT Act*, the Tribunal ordered PWGSC to produce the following documents:

- a. correspondence to Bidder B and Bidder C regarding the cancellation of solicitation F7048-160039/B and intention to issue a new solicitation;
- b. responses provided by Bidder B and Bidder C to PWGSC's pre-CAR clarification inquiries and Compliance Assessment Reports that addressed each of the mandatory requirements set out in the Request for Proposals for the above-noted solicitation (RFP) for which Accipiter remains non-compliant;
- c. portions of the bids submitted by Bidder B and Bidder C in response to each of the mandatory requirements set out in the RFP for which Accipiter remains non-compliant; and
- d. evaluation notes made in respect of the information described in paragraphs (b) and (c) above.⁴⁰

37. Exhibit PR-2018-049-13B, Vol. 2 (protected) at 12-19.

38. Exhibit PR-2018-049-13A, Vol. 2 (protected) at 196-200, 220-221, 261, 274-275.

39. Exhibit PR-2018-049-13B, Vol. 2 (protected) at 1-11.

40. Exhibit PR-2018-049-31, Vol. 1.

ANALYSIS

67. 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, for the purposes of this complaint is CFTA.⁴¹

68. The provisions of the CFTA which Accipiter alleges to have been breached by PWGSC include Articles 502(1), (2) and (3); Article 503(2); Article 507(3)(b); Article 509(1); and Article 515(1), (4) and (5). The text for each of these provisions can be found in Appendix I.

69. Using these provisions as the framework for its analysis, the Tribunal will determine the validity of the grounds of complaint by considering whether PWGSC (1) reasonably concluded that Accipiter's bid was not compliant with the relevant technical mandatory requirements, (2) cancelled the solicitation in a manner that breached the trade agreements, (3) conducted the solicitation process fairly, and (4) demonstrated a bias towards the other bidders during the solicitation process.

I. Evaluation of Mandatory Requirements

70. As recently stated by the Tribunal in *Horizon*,⁴² when considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. The Tribunal has previously indicated that a determination would be considered reasonable if it was supported by a tenable explanation, regardless of whether or not the Tribunal itself found that explanation compelling.⁴³ As the Supreme Court of Canada underlined in a different context, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."⁴⁴ As a result, the Tribunal does not generally substitute its judgments for that of the evaluators, and does not interfere with an evaluation, 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 undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.⁴⁵

71. In addition, the Tribunal has consistently held that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation at the time of bid closing.⁴⁶ The Tribunal has also made it

41. Section 1.5 of the RFP describes the CFTA as the applicable trade agreements. For the purposes of this inquiry, the Tribunal will refer to the provisions of the *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

42. *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (2 January 2019), PR-2018-023 (CITT) at para. 45.

43. *Samson & Associates v. Department of Public Works and Government Services* (13 April 2015), PR-2014-050(CITT) [*Samson*] at para. 35.

44. *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)).

45. *Harris Corporation v. Department of Public Works and Government Services* (22 October 2018), PR-2018-016 (CITT) at para. 21; *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.

46. *Samson* at para. 36; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

clear that bidders bear the responsibility of preparing their bids diligently in accordance with the instructions in the solicitation, taking care to ensure that the information provided clearly demonstrates compliance.⁴⁷ Put another way, bidders must carefully and explicitly “connect the dots” for evaluators, drawing together details and specifications that may be included in various places throughout a bid when demonstrating why and how it satisfies the mandatory and technical requirements of the solicitation. This is clear from the language found in section 3.1 of the RFP, which requires that “[t]he technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated. Simply repeating the statement contained in the bid solicitation is not sufficient.”⁴⁸

72. Furthermore, bidders are responsible for obtaining clarification of the requirements of a solicitation “if necessary, before submitting the bid”, particularly in the circumstances described below.⁴⁹

73. Accipiter submitted that PWGSC’s approach to the evaluation of the requirements was unreasonable as the evaluators failed to interpret the requirements in light of the purpose and objectives of the RFP. Accipiter referred to the Federal Court of Appeal’s decision in *Siemens Westinghouse* in support of this purposive approach. The relevant part of that decision reads:

I also accept that procuring entities must evaluate a bidder’s conformance with mandatory requirements thoroughly and strictly. But this is not to suggest that mandatory requirements should be construed in an isolated and disjunctive manner. As was held in *Re E.D. Elections Inc.*, [1998] C.I.T.T. No. 44 at 5, they should “be interpreted as a whole with consideration of the overall purpose and objectives of the [Request for Proposal]”.⁵⁰

74. As will be discussed more fully below, the Tribunal finds that Accipiter’s interpretation of the evaluated criteria went beyond the purposive approach described by the Federal Court of Appeal. Indeed, the Tribunal finds that the obligation to consider the overall purpose and objectives of the RFP does not amount to permitting a bidder to propose a solution different from what the procuring entity prescribed in its solicitation documents nor does it allow mandatory requirements to be applied selectively.

75. The Tribunal has consistently held that, as a general rule, a procuring entity is entitled to define its own procurement needs, provided, of course, it does so reasonably and in compliance with the rules of the applicable trade agreements; the conditions of the solicitation cannot be impossible to meet.⁵¹ The Tribunal has also pronounced on the meaning of what constitutes an “obstacle to internal trade” for the purposes of Article 403 of the AIT, which is similarly worded to Article 509(1) of the CFTA. In those cases, the Tribunal has said that it is not an obstacle to trade if a requirement has the effect of precluding a bidder

47. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at 150; *ADR Education v. Department of Public Works and Government Services* (18 October 2013), PR-2013-011 (CITT) [ADR] at para. 59.

48. Exhibit PR-2018-049-06, Vol. 1 at 8.

49. Paragraph 2(a) of clause 05 (2018-05-22) Submission of Bids of SACC 2003 (2017-04-27) Standard Instructions – Goods or Services – Competitive Requirements incorporated by reference under section 2.1 of the RFP. The Tribunal has previously stated that bidders are “solely responsible for seeking clarification” before submitting an offer. See ADR at para. 59.

50. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA), at para. 18.

51. See, for example, *Primex Project Management Limited v. Department of Public Works and Government Services* (12 December 2012), PR-2012-032 (CITT) at para. 24; *723186 Alberta Ltd. v. Public Health Agency of Canada* (12 September 2011), PR-2011-028 (CITT) at para. 19; *Global Upholstery Co. Inc. v. Department of Public Works and Government Services* (6 July 2009), PR-2008-052 (CITT) at para. 10.

because its bid cannot comply with that requirement.⁵² The procuring entity is under no obligation to compromise its legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs.⁵³ It follows then that to the extent that a bidder proposes a solution that is inconsistent with the requirements of the RFP as they are stated, the relevant requirements need not be interpreted in a manner that preserves the bidder's standing in the solicitation process. It is incumbent on a bidder to, *before* submitting its bid, seek clarification from the procuring entity to assure itself that it has not made incorrect assumptions regarding how the requirement ought to apply.⁵⁴ The trade agreements do not shield a bidder when its interpretation of the requirement turns out to be incorrect.

76. For the reasons set out below, the Tribunal finds that PWGSC reasonably evaluated the criteria for which Accipiter was found non-compliant. This ground of complaint is therefore not valid. To protect confidential information, the Tribunal will discuss the relevant matters in a general way with references to the protected submissions and evidence.

Requirement Issue 1

77. Accipiter asserted that the basis for which PWGSC found its bid to be non-compliant in respect of Requirement Issue 1 (as reflected in the Cancellation Letter), did not properly account for its proposed solutions for the relevant criteria.⁵⁵ Each proposed solution was to address the relevant parameters of Requirement Issue 1 that are discussed below.⁵⁶

78. With respect to the first parameter of Requirement Issue 1,⁵⁷ the Tribunal finds that PWGSC reasonably evaluated Accipiter's bid.⁵⁸ The RFP clearly described the parameter that had to be met. It did not provide any exceptions to its applicability.⁵⁹ The Tribunal finds that Accipiter made an assumption regarding the particular solution it proposed to use.⁶⁰ Based on that assumption, it chose not to sufficiently explain how the required parameter would be met.⁶¹ Accipiter did not meet its burden of seeking clarification from PWGSC that its bid could respond to the requirements in a particular manner not clearly contemplated in the RFP.

79. For these reasons, the Tribunal does not accept or need not consider Accipiter's other submissions on this matter.⁶²

52. *Entreprise Marissa Inc. v. Department of Public Works and Government Services*, PR-2010-086 (13 June 2001) [*Marissa*] at paras. 59-60.

53. *Marissa* at para. 62.

54. Further, to the extent that a bidder considers that a particular requirement, or an interpretation thereof, is inconsistent with any aspect of the trade agreements, it is incumbent on it to either make an objection to the government institution or file a complaint with the Tribunal within the timelines prescribed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. See *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*, 2002 FCA 284, paras. 20-21.

55. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 105.

56. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 108.

57. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 107-115.

58. Exhibit PR-2018-049-13A, Vol. 2 (protected) at para. 103; Exhibit PR-2018-049-13A, Vol. 2 (protected) at 948-966.

59. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 108-111.

60. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 109.

61. Exhibit PR-2018-049-01A, Vol. 2 (protected) at 2058, 2077; Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 99-101.

62. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 111; Exhibit PR-2018-049-30A, Vol. 2 (protected) at paras. 83-87.

80. With respect to the second parameter of Requirement Issue 1,⁶³ Accipiter submitted that the requirement could be met with its proposed solution. In its view, PWGSC's application of the criteria was arbitrary given that it accepted in the evaluation of other criteria "functional equivalence" or "recognized a criterion as being inapplicable" depending on a radar systems configuration.⁶⁴

81. The Tribunal finds, however, that Accipiter's bid did not provide a solution that was prescribed in the stated criteria; it submitted a different solution that it believed would serve as a functional equivalent of what was asked for. This is reflected in the bid itself.⁶⁵ Consistent with the principles set out above, PWGSC is entitled to define its own procurement needs bearing that they are not unreasonable or contrary to a requirement of the trade agreements. Insofar as the solution proposed by Accipiter was not the item specifically stated in the criteria, it was incumbent on Accipiter to seek clarification prior to submitting its bid as to whether such a solution would be acceptable as a functional equivalent. Instead, Accipiter chose to submit a bid that was different from what was specifically required by the RFP based on assumptions that PWGSC would accept a functional equivalent of the requirement.

Requirement Issue 2

82. Accipiter submitted that its proposed solution in response to the relevant criteria should have been compliant, even if it did not meet one of the parameters (as reflected in the Cancellation Letter). Accipiter argued that PWGSC applied the criteria in a manner that did not account for the particular configuration of its proposed solution.⁶⁶ Based on the evidence, which confirms that Accipiter's bid did not meet the criteria, the Tribunal finds that, on balance, the determination of non-compliance was reasonable.⁶⁷ That said, the issue is now moot given that the solicitation has been cancelled by PWGSC and will be retendered. In this regard, the Tribunal notes that the cancellation of a solicitation based on inadequate technical specifications preserves the integrity of the tendering process, and as such has been held to be valid, unless the refusal of all tenders was perverse and based on irrelevant considerations.⁶⁸ The Tribunal finds no evidence that would suggest that the solicitation was cancelled for improper purposes.

Requirement Issue 3

83. Accipiter submitted that PWGSC's finding of non-compliance (as reflected in the Cancellation Letter) was based on a misinterpretation of certain values presented in its bid.⁶⁹ For its part, PWGSC submitted that the manner in which it interpreted the values in Accipiter's bid was due to the manner in which Accipiter had presented the information.⁷⁰

84. The Tribunal finds that PWGSC's interpretation of the data was reasonable based on the way the information was presented in Accipiter's bid; the ways in which Accipiter used terms of the RFP were either misleading or used incorrectly.⁷¹ Suggesting that PWGSC should have otherwise picked up on the anomalies would unfairly relieve Accipiter of its responsibility to clearly explain how its bid met the applicable requirements.

63. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 116-126.

64. Exhibit PR-2018-049-01C, Vol. 1 at 38.

65. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 121.

66. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 40, 132, 136.

67. Exhibit PR-2018-049-01A, Vol. 2 (protected) at 2083; Exhibit 13A, Vol. 2 at 220-221, 1055-1059.

68. *Glenview Corp v. Canada*, [1990], F.C.J. No. 480.

69. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 152-156, 160-162.

70. Exhibit PR-2018-049-13A, Vol. 2 (protected) at paras. 121-123.

71. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 154-155.

Requirement Issue 4

85. Accipiter submitted that its proposed solution in response to the relevant criteria should have been compliant and that PWGSC's determination was based on an improper application of the criteria. The evaluators wrongly considered a particular component to be part of the system for which the criteria applied.⁷² For its part, PWGSC justified its evaluation for the reasons described in its submissions, which included the principle that bidders cannot be *selective* regarding how the criteria applies.⁷³

86. In the Tribunal's view, the RFP gave precise parameters for this requirement. The RFP provided no exceptions to the parameters that were required to be met. Insofar as Accipiter decided to submit a solution that was not consistent with the language of the RFP,⁷⁴ it was incumbent on it to seek clarification before submitting its bid. As such, the Tribunal finds that PWGSC reasonably concluded that Accipiter's bid was non-compliant; Accipiter applied the criteria incorrectly. The evidence confirms that its bid either included parameters that did not meet the criteria or they were omitted altogether.⁷⁵

II. Cancellation of Solicitation

87. Accipiter submitted that PWGSC breached Article 503(2) of the CFTA by cancelling the procurement as it did not award the contract to the lowest-cost bidder who met the requirements as published and as fairly and reasonably applied. Given the above reasons, the Tribunal finds that Accipiter did not meet the relevant mandatory requirements, which were reasonably applied by PWGSC. Consequently, there was no contravention of Article 503(2). This ground of complaint is therefore invalid.

III. Clarification Questions and the Phased Bid Evaluation Process

88. The clarification questions that are relevant to this complaint were those that were asked prior to the issuance of the CAR.

89. According to PWGSC, the purpose of the clarification questions was to clarify aspects of the bid which were unclear; not to determine compliance with mandatory technical criteria. The notification of non-compliance was to occur during Phase II with the issuance of the CAR. PWGSC submitted that clarification questions were unique to each bid; each bidder would not be issued the same clarification questions. Instead, clarification questions would necessarily be different as they were dependent upon the nature of the bids themselves.⁷⁶ With respect to the CARs, PWGSC submitted that the CARs were unique to each bidder because they set out the requirements which the evaluators had determined to be non-compliant in respect of each individual bid. However, the form and scope of information provided to each bidder was the same. As no additional information was provided in the CARs, PWGSC maintained that all bidders were treated fairly.

90. For its part, Accipiter submitted that PWGSC's conduct contradicted the purpose of the clarification questions as described by PWGSC in the GIR. Moreover, Accipiter claimed that the clarification questions it received were different than those provided to the other bidders in that the questions sent to other bidders

72. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 170-183.

73. Exhibit PR-2018-049-13A, Vol. 2 (protected) at paras. 131-136; Exhibit PR-2018-049-15A, Vol. 1 at para. 131.

74. Exhibit PR-2018-049-01D, Vol. 2 (protected) at paras. 172-174; Exhibit PR-2018-049-13A, Vol. 2 (protected) at para. 133.

75. Exhibit PR-2018-049-01D, Vol. 2 (protected) at 223; GIR at 133.

76. Exhibit PR-2018-049015A, Vol. 1 at 22, 25, 49, 50.

contained “substantially greater information and detail”.⁷⁷ They advised bidders of areas of non-compliance relating to their bids. Accipiter described the clarification questions it received on June 13, 2018, as being limited to technical questions regarding the structure of its bid, such as which items were included in Accipiter’s pricing proposal, what assumptions were being made in respect of the Statement of Work (SOW), which antenna was proposed for a particular location, and which response took precedence in a case of conflict.⁷⁸ No references were made with respect to potential areas of non-compliance with any mandatory criteria.⁷⁹ As Accipiter was allegedly not provided an opportunity to specifically address those issues, it claimed that it did not have the opportunity to provide PWGSC with the information necessary to determine whether its bid was indeed compliant or not. In this regard, Accipiter asserted that it was unfairly discriminated against as it was not provided a clarification process and/or CAR process that was comparable to those provided to the other bidders.

91. The Tribunal concurs. Based on its review of the relevant evidence, the Tribunal finds that there were *prima facie* differences between the clarification questions that Accipiter received in contrast to other bidders, both in form and substance. However, the Tribunal finds that the CARs issued to all bidders during Phase II of the evaluation were similar both in form and substance (i.e. each CAR included a list of requirements for which PWGSC determined the bid was non-compliant). Accordingly, the issue of fairness arises in respect of the clarification questions, not the CARs themselves.

92. The key question for the Tribunal then is to determine whether the *prima facie* differences in the clarification questions amounted to a breach of the applicable provisions of the CFTA.⁸⁰ To do this, the Tribunal must first determine whether the clarification questions were legitimately unique to the other bids, i.e. Bidders B and C. Insofar as the clarification questions were unique to those bids, it would be less likely that there would be any fairness issues concerning PWGSC’s conduct. However, if in fact they addressed issues that were also relevant to the contents of Accipiter’s bid, and Accipiter was not provided with the same questions, the other bidders would have received a comparative advantage. This prejudice would not have been limited to Accipiter’s opportunity to respond to the clarification questions, but also its ability to respond to the CAR in a more effective manner guided by insight into what issues PWGSC was grappling with in determining compliance from the clarification questions. The Tribunal notes that this may not have been the intention or purpose behind the clarification questions, but nevertheless the manner in which they were crafted provided the other bidders with specific knowledge regarding areas impacting their compliance.

93. In order to protect confidential information, the Tribunal will discuss the differences in the clarification questions as found in the evidence in a general way.

Did the clarification questions address issues unique to the bids?

94. To assess whether PWGSC’s clarification questions to the other bidders stemmed from issues unique to each of their bids or whether such issues were also relevant to Accipiter’s proposal, the Tribunal first assessed PWGSC’s reasons for seeking clarification from the other bidders. The Tribunal therefore

77. Exhibit PR-2018-049-16, Vol. 1 at 4.

78. Exhibit PR-2018-049-01C, Vol. 1 at 38.

79. Exhibit PR-2018-049-30, Vol. 1 at para. 11.

80. The Tribunal has previously stated “[o]ne of the cornerstones of the fair and transparent procurement process envisioned by the trade agreements is the equal sharing of significant information with all potential suppliers.” See *Partnering & Procurement Inc. v. Department of the Environment* (24 August 2006), PR-2006-015 at para.40. Accipiter submitted that a fair procurement process necessitates providing an equal degree of information with the parties in respect of their bids to allow them to respond.

reviewed technical bids, evaluation notes, clarification questions and responses put to, and received from, Bidders B and C. The Tribunal then compared this evidence with corresponding aspects of Accipiter's bid. To keep the review as focused as possible, the Tribunal limited its comparison of evidence to the same criteria for each of Requirement Issues 1-4, where applicable.

95. From its review of the evidence, the Tribunal finds that the clarification questions PWGSC posed to other bidders dealt, in part, with issues similar to those that PWGSC had identified in respect of Accipiter's bid.⁸¹ These issues included missing or insufficient information in the bids to determine compliance with specific criteria; in some cases, comparable information was also missing from Accipiter's bid. While clarification questions on such issues were provided to the other bidders, questions of a similar nature and in respect of similar issues were *not* provided to Accipiter.

96. Moreover, in evaluating Accipiter's bid with respect to Requirement Issue 1, the evaluators noted questions for further clarification; these however were absent from the correspondence sent to Accipiter on June 13, 2018.⁸² PWGSC did not explain why it did not pose these clarification questions to Accipiter.⁸³

97. In sum, based on its comparison of the evaluation of relevant parts of Accipiter's bid and of the other bids, the Tribunal can only conclude that the clarification questions provided to the other bidders did not, on balance, address issues that were unique to their bids.

How was Accipiter prejudiced?

98. The Tribunal finds that Accipiter was prejudiced by the manner in which PWGSC did – or did not ask – bidders for clarifications. The Tribunal agrees that as a result of this process, Accipiter was not provided with the same opportunity to address areas of non-compliance as were other bidders. The evidence demonstrates that PWGSC provided the other bidders an opportunity, prior to the issuance of the CAR, to address specific issues that would impact the evaluators' assessment of compliance. Accipiter was denied this same opportunity.

99. PWGSC had no obligation to seek clarification from bidders regarding information contained in their bids, nor did it have an obligation to advise bidders regarding issues related to non-compliant aspects of their bids. However, when it chose to engage in such a process by posing clarification questions before the CARs, it was required to do so in a reasonable, fair and equitable manner.⁸⁴

100. Moreover, given that Accipiter's CAR provided no indication of specific criteria for which the bid was non-responsive, Accipiter was not able to address the evaluators' issues with the same degree of specificity as the other bidders either before or after the issuance of the CAR. The Tribunal finds the lack of information included in PWGSC's inquiries to Accipiter were directly correlated to whether it was given the same opportunity to consider further consulting its supplier.

101. That said, even though Accipiter was prejudiced by the manner in which PWGSC sought clarification of information in the bids, the evidence falls short of establishing that, had Accipiter been

81. Exhibit PR-2018-049-13A, Vol. 2 (protected) at 193-200, 220-221, 261, 274, 275; Exhibit PR-2018-049-13B, Vol. 2 (protected) at 13, 14, 16; With respect to the other bids, the following evaluation notes describe issues that were similar to issues identified in Accipiter's bid: Exhibit PR-2018-049-32A, Vol. 2 (protected) at 6-8, 11-13, 16-18, 122-126, 128.

82. Exhibit PR-2018-049-13A, Vol. 2 (protected) at 193-199.

83. Exhibit PR-2018-049-34, Vol. 1 at 1.

84. The Tribunal has previously stated that, once the evaluators choose to verify information provided by a bidder where permitted by the *Standard Instructions*, they must do so in a reasonable manner. See *Deloitte Inc. v. Department of Public Works and Government Services* (10 June 2015), PR-2014-055 (CITT) at para. 60; *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) at para. 80.

treated in the same manner as the other bidders before and after the CAR process, its bid would have been found compliant. To reach that conclusion, the Tribunal considered the responses that other bidders submitted to PWGSC's clarification questions and the impact those responses had, if any, on PWGSC's assessment of compliance of those bids. The Tribunal does not find that these responses sufficiently demonstrate that Accipiter's bid, should it have submitted similar information, would have been found compliant.⁸⁵ The responses were specific to each bidder's proposed solution and they did not address all aspects of Accipiter's non-compliance.⁸⁶ Moreover, it would be conjecture to determine compliance based on any information Accipiter claims it would have submitted to PWGSC had it received more detailed clarification questions.⁸⁷

IV. Bias

102. In consideration of the extent to which Accipiter was prejudiced during the solicitation process as described above, the Tribunal finds that there was a reasonable apprehension of bias.⁸⁸

103. To determine whether the circumstances of this case give rise to a reasonable apprehension of bias, the Tribunal applied the informed person test as established by Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*,⁸⁹ confirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,⁹⁰ which dissenting opinion stated as follows:

[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [this person], whether consciously or unconsciously, would not decide fairly?

104. What constitutes a reasonable apprehension of bias will vary depending on the individual facts and circumstances under consideration. As with any ground of complaint, there must be some evidentiary basis in support of such allegation.⁹¹ Moreover, the Tribunal generally “presumes the good faith and honesty both of the bidders and of the public servants mandated to evaluate their bid.”⁹²

85. Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 58; Exhibit PR-2018-049-33A, Vol. 2 (protected) at para. 17.

86. In particular the information described at Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 58 would not have addressed fully the issues raised in Requirement Issue 1.

87. For example, Exhibit PR-2018-049-01D, Vol. 2 (protected) at para. 190; Exhibit PR-2018-049-30A, Vol. 2 (protected) at para. 113.

88. The Tribunal has previously stated that the law normally only requires a litigant to establish a reasonable apprehension of bias in order to impugn the validity of administrative action to which a duty of fairness applies, such that a decision may be set aside. See *CGI Information and Management Systems Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 161. As was stated in *Cougar Aviation (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.) [*Cougar Aviation*], “[a]n insistence on this more demanding standard serves to enhance public confidence in, and thus the legitimacy of, public decision-making.”

89. [1978] 1 SCR 369, 1976.

90. [2003] 1 SCR 884, 2003 SCC 36 (CanLII) at para. 17.

91. *Renaissance Aeronautics Associates Inc. (D.B.A. Advanced Composites Training) v. Department of Public Works and Government Services* (28 May 2017), PR-2017-063 (CITT) at para. 38; *Tyr Tactical Canada, ULC* (16 May 2016), PR-2016-006 (CITT) at para. 26.

92. *MasterBedroom Inc.* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at paras. 15-16.

105. On this basis, the Tribunal will consider whether a reasonable apprehension of bias exists in this case based on the factors described by Accipiter. According to Accipiter, each of these factors would not independently show bias, but rather it is their cumulative effect that should be considered. PWGSC submitted that Accipiter's allegations of bias are unsubstantiated.

106. Accipiter pointed to several indicators of bias, including the manner in which PWGSC implemented the terms of the RFP relating to the Canadian content certification, an amendment to the RFP which introduced a new requirement (the Inter VTS Exchange Format protocol interface), the differential approach to evaluating Accipiter's bid and providing clarification questions to bidders, and the retendering of the RFP. The Tribunal finds that PWGSC's conduct amounted to a reasonable apprehension of bias only in regards to the manner in which it posed clarification questions to Bidders B and C prior to the CARs.

107. With respect to the clarification questions posed to Bidders B and C, Accipiter was treated differently both in terms of the form and substance of the questions. The result: pertinent information was not provided to Accipiter in respect of the issues relating to its non-compliance. Meanwhile, the other bidders were provided this information to varying degrees and this gave them an advantage during the solicitation process. Additionally, they were permitted to provide information in responding to the clarification questions for evaluation outside the rules of the RFP⁹³; those rules explicitly limited the submission of different or additional information to Phase II of the evaluation process.

108. On this basis, the Tribunal finds it appropriate to draw adverse inferences from the lack of explanation on the part of PWGSC for the discrepancies described above.⁹⁴

109. The Tribunal, applying the test of an informed person viewing the matter realistically and practically, and having thought the matter through, considers PWGSC's conduct, as described above, to give rise to a reasonable apprehension of bias. The Tribunal finds this ground of complaint to, therefore, be valid.

CONCLUSION

110. In light of the foregoing, pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal concludes that the complaint is valid in part. Specifically, PWGSC breached Article 502 and Article 515(1) of the CFTA by seeking clarification in respect of the bids in a manner that was prejudicial to Accipiter and conducted the solicitation process in a manner that gave rise to a reasonable apprehension of bias.

REMEDY

111. As the complaint is valid in part, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) to (4) of the *CITT Act*. For its part, PWGSC submitted that no remedy be awarded as it had cancelled the solicitation and will retender the requirement with modifications that address, among other things, issues raised specifically by Accipiter. Accipiter has thus already received its appropriate remedy.

112. To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including the following:

93. For example, see Exhibit PR-2018-049-32A, Vol. 2 (protected) at 19, 74, 76, 79, 101, 103.

94. *Les Systèmes Equinox Inc. v. Department of Public Works and Government Services* (12 March 2009) PR-2006-045R (CITT) at para. 74. The Tribunal's adverse inferences were confirmed by the Federal Court of Appeal. See *Attorney General of Canada v. Les Systèmes Equinox Inc.*, 2009 FCA 304, at para. 3.

- (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.

113. The Tribunal finds the deficiencies were serious. Instead of ensuring a level playing field, PWGSC's confidential communication with Bidders B and C during the solicitation process (and in particular when clarification questions were posed before the CARs were issued) gave those bidders a material advantage over Accipiter. In seeking clarification, PWGSC appeared to take little care in ensuring that the information it disclosed to one bidder was not prejudicial to another.

114. As noted above, Accipiter was prejudiced by the manner in which PWGSC breached the trade agreement. The lack of information concerning its bid and issues regarding its non-compliance, denied Accipiter the same opportunity to efficiently and more effectively address the CAR, which was the only opportunity it was given to respond to any correspondence of PWGSC relating to its non-compliance.

115. The Tribunal also finds that PWGSC's conduct undermined the integrity and efficiency of the procurement process. As a result of its clarification questions, PWGSC provided other bidders a better opportunity prior to the issuance of the CAR to address specific issues that would impact their compliance assessment. PWGSC was, consequently, not in a position to proceed with the next phase of the solicitation process in a way that treated all bidders fairly and equitably. Considering the Tribunal's findings that its conduct gave rise to a reasonable apprehension of bias, the Tribunal would therefore strongly urge PWGSC to give careful thought to how it will proceed in the next solicitation process.

116. With respect to whether the parties acted in good faith, there is insufficient evidence before the Tribunal that PWGSC acted with malicious intent.

117. On the basis that it had a responsive bid with the lowest evaluated price and was the only remaining supplier with a valid Canadian content certification, Accipiter submitted that the appropriate remedy would be for the Tribunal to recommend that it be awarded the contract. For the reasons provided above, the Tribunal determined that in respect of each of the requirements for which Accipiter was non-compliant, PWGSC's assessment of its bid was, on balance, reasonable. On that basis, the Tribunal cannot recommend that Accipiter be awarded the contract.

118. In the alternative of contract award, Accipiter requested that the Tribunal recommend that it be compensated for reasonable bid preparation costs pursuant to subsection 30.15(4) of the *CITT Act*. The Tribunal finds that an award of bid preparation costs would not be appropriate in the circumstances considering that it has found that PWGSC reasonably declared Accipiter's bid non-compliant with the mandatory requirements. Moreover, as the requirement will be retendered, Accipiter will have an opportunity to correct the deficiencies in its previous bid.⁹⁵

119. However, given that PWGSC seriously undermined the integrity and efficiency of the procurement process, the Tribunal finds that the appropriate remedy in the circumstances is to compensate Accipiter in an

95. Similar reasons formed the basis for refusing to award bid preparation costs in *Dynamic Engineering Inc. v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CITT) at para. 55.

amount equal to its reasonable costs incurred in responding to the CAR issued to it on June 18, 2018, including its supplementary response provided to PWGSC on September 8, 2018. This will indemnify Accipiter for the inequitable position it was placed in during Phase II of the evaluation process.

COSTS

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

121. 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.

122. In this case, the procurement, complaint and proceedings were complex. The mandatory requirements that were relevant to the complaint were highly technical resulting in a lengthy RFP, and extensive submissions were necessary to explain the technical requirements, the proposed bid, and the issues arising from the evaluation of Accipiter's bid. Moreover, the procurement process had several components which added to its complexity, including the conditions for the Canadian content certification and phased bid evaluation process. The volume of submissions and the degree to which they were designed as confidential also contributed to the complexity of the complaint as the Tribunal had to proceed very carefully when presenting its public reasons. Moreover, evidence and submissions for various grounds of complaint were very much interrelated. One of the grounds of complaint necessitated the production and review of numerous documents relating to the proposals of the other bidders. The Tribunal also had to address numerous rounds of correspondence with and between the parties during the 135-day inquiry.

123. As such, and given that the complaint is valid in part, the Tribunal awards Accipiter its reasonable costs incurred in preparing and proceeding with this complaint. Given the level of complexity of these proceedings and the complaint, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and the preliminary indication of the amount of the cost award is \$4,700.

DETERMINATION

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

125. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC compensate Accipiter in an amount equal to its reasonable costs incurred in responding to the Compliance Assessment Report issued to it on June 18, 2018, including its supplementary response provided to PWGSC on September 8, 2018.

126. Should the parties be unable to agree on the amount of compensation, Accipiter shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have seven working days after receipt of Accipiter's submission to file a response. Accipiter will then have five working days after the receipt of PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal simultaneously.

127. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Accipiter 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 level of complexity for this complaint is Level 3, and its preliminary indication of the amount of the cost award is \$4,700. 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.

Ann Penner

Ann Penner

Presiding Member

APPENDIX I

Provisions of the CFTA relevant to the complaint:

Article 502: General Principles

1. Each Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.
2. With respect to any measure regarding covered procurement, each Party shall accord to:
 - (a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment the Party accords to its own such goods and services; and
 - (b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment the Party accords to its own suppliers of such goods and services.
3. With respect to the Government of Canada, paragraph 2 means that it shall not discriminate:
 - (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
 - (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

Article 503: General Procurement Rules

...

2. A procuring entity shall not use options, cancel a procurement, or modify an awarded contract in a manner that circumvents the obligations of this Chapter.

...

Article 507: Conditions for Participation

...

3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:
 - (b) base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation.

...

Article 509: Technical Specifications and Tender Documentation

Technical Specifications

1. A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade.

...

Article 515: Treatment of Tenders and Award of Contracts

Treatment of Tenders

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.

...

Evaluation and Award of Contract

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.
5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:
 - (a) the most advantageous tender; or
 - (b) if price is the sole criterion, the lowest price.

...