Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-007

Pennecon Hydraulic Systems

v.

Department of Public Works and Government Services

Determination and reasons issued Wednesday, September 4, 2019

Canada

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IN THE MATTER OF a complaint filed by Pennecon Hydraulic Systems 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

PENNECON HYDRAULIC SYSTEMS **Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES **Government Institution**

DETERMINATION

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

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Pennecon Hydraulic Systems. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is $2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in Article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Cheryl Beckett
Cheryl Beckett
Presiding Member

Tribunal Panel:	Cheryl Beckett, Presiding Member
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Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Roy Chamoun Nick Howard Peter J. Osborne Brendan Morrison Zachary Rosen
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STATEMENT OF REASONS

SUMMARY OF COMPLAINT

1. On April 24, 2019, Pennecon Hydraulic Systems (Pennecon) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning a Request for Proposal (Solicitation No. W8482-156383/B) (the RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND). The solicitation was for the supply of 18 electro-hydraulic marine cranes, with associated detailed engineering design data and technical data package, for the Royal Canadian Navy's Halifax-class ships, with an option to buy an additional 14 cranes of the same design.

2. Pennecon alleged that the successful bidder, a joint venture between Hawboldt Industries (1989) Ltd. (Hawboldt) and Hnos. Toimil Garcia S.L. (Toimil),[2] does not possess the experience required by two mandatory technical evaluation criteria of the RFP. Pennecon further alleged that, after it objected to the award of the contract, PWGSC improperly disqualified its bid, which Pennecon claims was submitted in joint venture with Palfinger Marine GmbH (Palfinger), because of a perceived failure to comply with the requirements for a joint venture bid, while at the same time failing to strictly apply those same requirements to the successful bidder. PWGSC determined that, without the benefit of Palfinger's experience, Pennecon failed to meet certain mandatory technical evaluation criteria of the RFP.

3. As a remedy, Pennecon requested that the Tribunal recommend that PWGSC re-evaluate the bids and, if Pennecon and Palfinger's bid would have been successful, to either award them the contract or, in the alternative, compensate them for their lost profits. In the event that their bid would not have been successful, Pennecon requested that they be awarded their bid preparation costs. Pennecon also requested the reimbursement of its complaint costs.

4. Having determined that the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[3] had been met in respect of the complaint, the Tribunal decided, pursuant to subsection 30.13(1) of the *CITT Act*, to conduct an inquiry into the complaint.

5. The Tribunal conducted the inquiry into the validity of the complaint as required by sections 30.14 and 30.15 of the *CITT Act*. For the reasons provided below, the Tribunal finds that the complaint is not valid.

PROCUREMENT PROCESS

6. On July 19, 2018, PWGSC published the RFP on Buyandsell.gc.ca, the Government of Canada's official procurement information Web site. The RFP followed and superseded an earlier request for proposal (Solicitation No. W8482-156383/A) issued by PWGSC, on behalf of DND, for the supply of 16 electro-

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. In these reasons, reference to Hawboldt and Toimil together means the joint venture of Hawboldt and Toimil.
3. S.O.R./93-602 [*Regulations*].

hydraulic marine cranes. That solicitation, which was cancelled by PWGSC, was the subject of a complaint by Hawboldt and an inquiry by the Tribunal.[4]

7. Of note, the RFP included a Phased Bid Compliance Process (PBCP), which provides bidders with an opportunity, after the bid closing date, to correct deficiencies in their bids to become compliant with certain mandatory requirements of the solicitation. The three phases of the PBCP are described at section 4.1.1 of the RFP.[5] Only bids that are found responsive to the requirements reviewed in a particular phase proceed to the next phase. However, the RFP clearly states that the government has no obligation or responsibility to identify any or all errors or omissions in bids and that bids may be found to be non-responsive at any phase even if they have been found responsive in an earlier phase.[6]

8. During the solicitation period, PWGSC issued six amendments to the RFP. Two of these amendments extended the bid closing date from its original date of August 28, 2018.

9. On September 18, 2018, the RFP closed. Five bids were received, including one from Hawboldt and Toimil and one from Pennecon, allegedly submitted in joint venture with Palfinger.

10. On December 14, 2018, PWGSC published a notice on Buyandsell.gc.ca indicating that a contract in the amount of $15,573,635.80 had been awarded to Hawboldt on December 13, 2018. On the same date, PWGSC sent a letter to Pennecon informing it of the award and that, although Pennecon's bid had been found to be responsive to the mandatory requirements of the solicitation, it had not obtained the highest combined rating of technical merit and price.

11. On December 21, 2018, Pennecon sent a letter to PWGSC wherein it objected to the award of the contract to Hawboldt on the basis that it did not possess the experience required by mandatory technical evaluation criteria $M2^{PB}$ and $M3^{PB}$ found at Annex K of the RFP. Pennecon stated that its own knowledge of the technical requirements for the marine cranes, as well as Hawboldt's published product line and company history, led it to conclude that Hawboldt did not meet these two mandatory criteria. It requested that PWGSC terminate the contract, re-evaluate the compliant bids submitted and award the contract to the successful compliant bidder.

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4. See *Hawboldt Industries v. Department of Public Works and Government Services* (27 April 2018), PR-2017-045 (CITT). At the conclusion of its inquiry, the Tribunal determined that the complaint filed by Hawboldt, which alleged that PWGSC improperly disclosed the contract award value to the other bidders after informing Hawboldt that it had won the competition, but before the contract was actually awarded, was valid. Because of errors in the evaluation process raised by other bidders, PWGSC ultimately cancelled the solicitation before the contract was awarded and decided that it would retender the requirement. As a remedy, the Tribunal recommended that PWGSC compensate Hawboldt by an amount (kept confidential) that it could apply in any retender to offset the fact that its competitors were now free to match or undercut its prior bid price (which could easily be inferred from the contract award value).
5. In the first phase, PWGSC reviews the financial bids to determine if there is any missing information, in which case a notice is sent to the bidder identifying the missing information and specifying a time period within which to provide the information. In the second phase, PWGSC reviews the technical bids to identify instances where bidders have failed to meet the mandatory technical evaluation criteria identified as being subject to the PBCP (i.e. those criteria identified with the superscript "PB") and sends a Compliance Assessment Report to all bidders either identifying the criteria that were not met and specifying a time period within which to provide information to remedy the failure, or stating that the technical bids have met the criteria. In the third phase, PWGSC assesses the bids in accordance with the entire requirement of the solicitation.
6. See section 4.1.1.1(b) of the RFP.

12. On the same date, PWGSC acknowledged receipt of Pennecon's letter of objection and indicated that it would respond in the New Year.

13. Over the following months, Pennecon enquired as to the status of its objection with PWGSC on three separate occasions, each time being told that a response would be provided as soon as possible or within the next few weeks.[7]

14. On April 8, 2019, PWGSC published a notice on Buyandsell.gc.ca indicating that a contract in the amount of $15,573,635.80 had been awarded to the joint venture between Hawboldt and Toimil on April 4, 2019.[8]

15. On the same date, PWGSC sent a letter to Pennecon informing it that, following a re-examination of certain evaluation results, it could confirm that the bid submitted by Hawboldt and Toimil met all mandatory technical evaluation criteria at Annex K of the RFP. PWGSC took the opportunity to inform Pennecon that, due to an administrative oversight, the contract had not originally been awarded to the joint venture between Hawboldt and Toimil, but that this had now been rectified. PWGSC's letter also noted that, upon re-examination of Pennecon's evaluation results, it was found that for a number of mandatory and rated technical evaluation criteria, Pennecon's bid relied on the experience and technical capability of Palfinger. PWGSC added that, since the bid identified the bidder as Pennecon only and had not been submitted by a joint venture between Pennecon and Palfinger, it was necessary to find the bid non-compliant.

COMPLAINT PROCEEDINGS

16. On April 24, 2019, Pennecon filed its complaint with the Tribunal.

17. On April 26, 2019, the Tribunal requested that Pennecon file, by April 29, 2019, additional information related to its complaint as well as confirmation as to whether the complaint was being filed by Pennecon in its individual capacity or as part of the alleged joint venture with Palfinger.

18. On April 29, 2019, Pennecon filed the requested information and confirmed that the complaint was being filed by Pennecon on behalf of the joint venture between itself and Palfinger. In this regard, it filed a letter from Palfinger confirming that Pennecon had been appointed to act as Palfinger's representative for the purposes of the present complaint proceedings.[9]

19. On May 1, 2019, the Tribunal informed the parties that it had accepted the complaint for inquiry.

20. On May 22, 2019, the Tribunal received a letter from counsel for the joint venture of Hawboldt and Toimil seeking leave to intervene in this inquiry. On May 23, 2019, the Tribunal granted intervener status to Hawboldt and Toimil and revised the schedule for submissions by the parties.

21. On May 23, 2019, PWGSC requested a one-week extension to file its Government Institution Report (GIR). Pennecon consented to the requested extension and, at the same time, requested an extension of time to file its comments on the GIR.

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7. Exhibit PR-2019-007-17A (protected), Vol. 2 at 232-236.
8. The contract history published on Buyandsell.gc.ca indicates that the contract originally awarded to Hawboldt on December 13, 2018, was amended on April 4, 2019, by reducing its value to zero.
9. Exhibit PR-2019-007-01A, Vol. 1 at 4.

22. On May 24, 2019, the Tribunal granted the requested extensions and indicated that, as a result, it would now issue its findings and recommendations in respect of the complaint within 135 days after the filing of the complaint pursuant to paragraph 12(c) of the *Regulations*.

23. On June 3, 2019, PWGSC filed its GIR and two supporting affidavits, and on June 10, 2019, Hawboldt and Toimil filed their submissions as well as a supporting affidavit.

24. Following its review of the information provided in the GIR and supporting affidavits, the Tribunal requested, on June 12, 2019, that PWGSC file additional information relating to how it determined that the cranes referenced in Hawboldt and Toimil's bid were compliant with mandatory technical evaluation criterion $M2^{PB}$. PWGSC provided the Tribunal with the requested information on June 19, 2019.

25. On June 14, 2019, Pennecon wrote to the Tribunal objecting to the designation of certain information as confidential in the GIR and supporting affidavits (i.e. information about a project included in Hawboldt and Toimil's bid as meeting mandatory criterion $M2^{PB}$) on the basis that the information in question was available from a public source.

26. On June 17, 2019, PWGSC indicated that it took no position on the issue and that it would comply with the Tribunal's decision in this regard. On June 18, 2019, Hawboldt and Toimil filed submissions in support of maintaining the confidential designation. On June 20, 2019, Pennecon filed additional submissions on the matter.

27. On June 21, 2019, the Tribunal advised the parties that it was satisfied that the designation of the information in question as confidential was warranted. It noted that, although the information was ultimately available through a public source, the fact that it was presented in Hawboldt and Toimil's bid—and the manner in which it was presented (i.e. in response to which criterion)—was not.

28. On June 28, 2019, Pennecon filed its comments on the GIR, the intervener's submissions and the additional information provided by PWGSC. A witness statement was included with Pennecon's comments.

29. On July 16, 2019, PWGSC sought leave to file a supplementary affidavit responding to an issue addressed in Pennecon's comments filed on June 28, 2019. PWGSC included the affidavit with its request. The Tribunal granted the requested leave on July 17, 2019,[10] and Pennecon filed its comments on the supplementary affidavit on July 22, 2019.

30. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

ANALYSIS

31. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must

10. The Tribunal did, however, emphasize that requests for leave to file additional materials, especially when made after comments on the GIR have been received and during a period in which the Tribunal has normally begun its deliberations, must be made at the earliest opportunity. The Tribunal noted that PWGSC's request in this case was made two weeks after it received Pennecon's comments on the GIR and that no explanation was provided to explain this lengthy delay. Despite these failings on the part of PWGSC, the Tribunal decided to grant the requested leave.

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.

32. Section 11 of the *Regulations* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which, in this instance, includes the *Canadian Free Trade Agreement*.[11]

33. The provisions of the *CFTA* that are relevant in the context of the present inquiry provide that a procuring entity shall "base its evaluation on the conditions that the procuring entity has specified in advance in its tender notice or tender documentation"[12] and that, "[t]o be considered for an award, a tender shall . . . at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation . . . ."[13]

34. In assessing whether there has been a breach of the above obligations, the Tribunal typically accords a large measure of deference to evaluators in their evaluations of bids. In general, the Tribunal will only interfere with an evaluation that is *unreasonable*[14] and will substitute its judgment for that of the evaluators *only* when they have not applied themselves in evaluating a bidder's proposal, they have ignored vital information provided in a bid, they have wrongly interpreted the scope of a requirement, they have based their evaluation on undisclosed criteria, or they have otherwise not conducted the evaluation in a procedurally fair way.[15]

35. In addition, the Tribunal has consistently held that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder and that it is therefore incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential respects.[16]

36. It is in light of these obligations and principles that the Tribunal will determine the validity of Pennecon's two grounds of complaint by considering:

1) whether it was reasonable for the evaluators to conclude that Hawboldt and Toimil possessed the experience required by mandatory technical evaluation criteria $M2^{PB}$ and $M3^{PB}$; and

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11. The Notice of Proposed Procurement published on Buyandsell.gc.ca and section 1.2 of the RFP list all of the applicable trade agreements, which include 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) [*CFTA*]. For the purposes of this inquiry, the Tribunal will refer to the provisions of the *CFTA*, given that Pennecon only referred to this agreement in its complaint. The Tribunal notes that the other applicable trade agreements have provisions that are similar in nature to those of the *CFTA*.
12. *CFTA*, article 507(3)(b).
13. *CFTA*, article 515(4).
14. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) [*BMT-NOTRA*] at para. 25, the government institution's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling."
15. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) [*Samson*] at para. 26; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.
16. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *Samson* at para. 28; *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) [*RCGT*] at para. 37.

2) whether it was reasonable for PWGSC to conclude that Pennecon's bid failed to comply with the requirements for a joint venture bid, while at the same time concluding that Hawboldt and Toimil's bid met those same requirements.

Ground 1: Mandatory Technical Evaluation Criteria M2^{PB} and M3^{PB}

37. In its complaint, Pennecon alleged that Hawboldt's bid, whether considered alone or as a joint venture with Toimil, did not meet mandatory technical evaluation criteria M2^{PB} and M3^{PB}. However, following its review of the GIR, Pennecon does not dispute that the crane submitted by Hawboldt and Toimil as meeting mandatory criterion M3^{PB} is compliant and is therefore no longer asking the Tribunal to make a finding with respect to this criterion.[17] Accordingly, the Tribunal will only consider whether it was reasonable for the evaluators to conclude that Hawboldt and Toimil possessed the experience required by mandatory criterion M2^{PB}.

Relevant Provisions of the RFP

38. Section 4.2 of the RFP provides that bids must meet all mandatory criteria in order to be declared responsive. It reads as follows:

> **4.2 Basis of Selection**
>
> To be declared responsive, a bid must:
>
> a) comply with all the requirements of the bid solicitation; and
> b) meet all mandatory criteria;
>
> Bids not meeting (a) and (b) will be declared non-responsive.
>
> . . .

39. Mandatory technical evaluation criterion M2^{PB} found at Annex K of the RFP reads as follows:

> The Bidder must demonstrate that they have experience designing, building, and commissioning at least one (1) Class Society certified, personnel lifting, offshore electro-hydraulic knuckle boom crane of no less than 75% of the Safe Working Load of 7030 kg at a radius of 5 metres or greater in the past ten (10) years.
>
> The bidder must detail when and where the crane was installed, who the customer was, general scope of the project, crane lifting curves, and Safe Working Load, and Class certifications.

40. Section 1.2 of the Statement of Work (SOW) found at Annex A of the RFP reads as follows:

> **1.2 Background**
>
> There is one (1) existing 7.3 m RHIB davit with a 2261 kg lifting capacity and two (2) Knuckle Boom[1] (KB) cranes (one port and one starboard), each with a lifting capacity of 1564 kg fitted on each of the twelve (12) Halifax frigates. . . .
>
> . . .
>
> [1] Please note the term knuckle boom crane will be used as an all-encompassing term for an articulated crane with or without more than one pivot point. Its abbreviated definition will be KB.

41. On August 22, 2018, PWGSC issued Amendment No. 003 to the RFP following a question from a bidder regarding the text of footnote 1 in the SOW. The question and the response read as follows:

17. Exhibit PR-2019-007-39, paras. 3, 30, Vol. 1.

Q1. Could you please confirm that the term knuckle-boom is used in the RFP as an all-encompassing term for cranes with at least one pivot point? Therefore, cranes will be considered valid whether single or double knuckle, extension, knuckle + extension, etc. Per footnote 1 on page 8 of 80 within the SOW: "Please note the term knuckle boom crane will be used as an all-encompassing term for an articulated crane with or without more than one pivot point. Its abbreviated definition will be KB."

R1. DND confirms that the term knuckle-boom (KB) is used as an all-encompassing term for an articulated crane with at least one pivot point. For clarity, a KB crane with one or more pivots points, which may or may not include an extension is acceptable. An 'extension' only crane with no pivot point(s) is not acceptable.

Positions of Parties

42. In its complaint, Pennecon alleged that Hawboldt and Toimil's bid could not have met mandatory criterion $M2^{PB}$ because, to its knowledge, neither Hawboldt nor Toimil had experience designing, building and commissioning cranes that satisfied the required lifting capacity stated therein. However, in its comments on the GIR, Pennecon stated that, although it no longer disputes that the first crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ has the requisite lifting capacity,[18] the information provided by PWGSC in its GIR, and in response to the Tribunal's request of June 12, 2019, indicates that the evaluators departed from the definition of "knuckle boom crane" contained in the RFP when evaluating Hawboldt and Toimil's bid against this criterion.

43. Accordingly, the only remaining issue to be addressed in connection with Pennecon's first ground of complaint is whether it was reasonable for the evaluators to conclude that the first crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ is a "knuckle boom crane" as that term is defined in the RFP.

44. Pennecon submitted that Amendment No. 003 to the RFP confirms that the definition of a knuckle boom crane did not mean *any* crane with at least one pivot point but, rather, any *articulated* crane with at least one pivot point. It therefore submitted that bidders were required to demonstrate that their crane was both an articulated crane *and* that it had at least one pivot point.

45. According to Eddy Knox, Pennecon's General Manager, the terms "knuckle boom crane", "articulated crane" and "articulating crane" all refer to a crane with an articulation or "knuckle" (i.e. a pivot point) in its boom, which is the horizontal arm of a crane that attaches to the base, pedestal, column or superstructure of the crane. Mr. Knox stated that his understanding of the above terms is based on a number of industry standards related to cranes used both on land and in marine environments.[19] He added that his

18. Hawboldt and Toimil's bid provided three cranes in response to mandatory criterion $M2^{PB}$. This criterion required that bidders have experience designing, building and commissioning at least one crane meeting the stated technical requirements. Information on the record indicates that only the first crane submitted by Hawboldt and Toimil was evaluated by PWGSC/DND (see Exhibit PR-2019-007-16A (protected), Tab C, Vol. 2). In these reasons, references to "the crane" are intended to be references to the crane that was evaluated by PWGSC/DND.
19. Mr. Knox specifically referred to Annex "L" of European Standard EN13852-1 published by the European Committee for Standardization, the definitions section of the American Bureau of Shipping's *Guide for Certification of Lifting Appliances*, the *Standard for Offshore and Platform Lifting Appliances* (ref. DNVGL-ST-0378) established by DNV GL (a maritime classification society based in Norway), Chapter 1 of the *Articulating Crane Reference Manual* published by the National Commission for the Certification of Crane Operators (NCCCO), and the definitions sections of the *Safety and Health Regulations for Construction* published by the Occupational Safety and Health Administration of the US Department of Labour.

understanding is also consistent with marketing materials from Toimil, Hawboldt and Palfinger, which all show knuckle boom cranes as having one or more pivot points within the boom itself.

46. Pennecon submitted that it is clear that the evaluators in this case only considered whether the crane submitted by Hawboldt and Toimil had at least one pivot point and not whether the crane was also an "articulated crane" (i.e. whether it had a pivot point in its boom). It submitted that, had the evaluators applied the definition of a "knuckle boom crane" used in the solicitation, they would have determined that Hawboldt and Toimil's bid was not compliant. Pennecon therefore submitted that PWGSC breached its obligation to base its evaluation on the conditions specified in advance in the tender documentation.

47. For its part, PWGSC submitted that the RFP does not define where the pivot point is to be located on the boom of the crane. It submitted that, based on the definition in the RFP, the bid evaluation team determined that the pivot point (or pivot points) could be located anywhere along the boom. According to Mr. Jacob Bragg, a Naval Architect with DND and the bid evaluation team lead for this procurement, the terms "knuckle boom crane" and "articulated crane" are interchangeable, so long as there is a pivot point, either on the boom of the crane or at the base where the boom starts. Mr. Bragg states that it is this pivot point that makes a crane "articulated".

48. PWGSC submitted that the bid evaluation team evaluated each crane consistently and in accordance with the definition of "knuckle boom crane" in the RFP. More specifically, it submitted that the evaluator records completed by the bid evaluation team members all demonstrate that the crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ met the requirement of a "knuckle boom crane" as clarified in Amendment No. 003 to the RFP. In this regard, it submitted that the contents of Hawboldt and Toimil's bid clearly showed that the single pivot point for their crane was located at the end of the boom.

49. Hawboldt and Toimil submitted that, as described in the GIR, their bid met the mandatory requirements of the solicitation. They did not file any submissions regarding the definition of the term "knuckle boom crane".

Tribunal's Analysis

50. As stated above, the Tribunal must determine whether it was reasonable for the evaluators to conclude that the crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ is a "knuckle boom crane" as that term is defined in the RFP.

51. It is clear from the parties' submissions that the point of contention between them is the location of the pivot point on the boom of the crane. Pennecon is of the view that the term "knuckle boom crane", as defined in the RFP, requires a pivot point within the boom itself (i.e. there must be two or more boom sections that pivot or articulate in relation to each other), whereas PWGSC is of the view that the term allows for a single pivot point located at the end of the boom (i.e. a single boom section that pivots or articulates in relation to the base or column of the crane).

52. A review of Hawboldt and Toimil's bid, as well as the positions of the parties, confirms that the crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ does not have a pivot point or articulation within the boom itself but, rather, has a pivot point at the end of the boom where the boom is attached to the base or column. In other words, the crane has a single boom section.

53. On the basis of the industry standards and marketing materials provided by Pennecon, it appears that the term "knuckle boom crane", when considered outside the context of the RFP, has an industry-specific meaning that implies a crane with one or more pivot points within the boom itself. For example, Annex "L" of European Standard EN13852-1 published by the European Committee for Standardization contains a figure showing a "knuckle boom type crane" with a pivot point within the boom.[20] Similarly, Chapter 1 of the *Articulating Crane Reference Manual* published by the National Commission for the Certification of Crane Operators defines an "articulating boom crane" as a "crane with two or more boom sections that pivot (articulate) via hydraulic cylinders" and states that it is also known as a "knuckleboom crane".[21] Even Hawboldt's own Web site depicts knuckle boom cranes as having two boom sections that pivot or articulate in relation to each other.[22]

54. That being said, in the present case, the Tribunal must interpret the term "knuckle boom crane" within the context of the RFP.[23] In other words, it must have regard to specific elements within the solicitation documents that expressly amend or modify the industry-specific meaning discussed above. These elements include footnote 1 to the SOW and the clarification provided at Amendment No. 003. The Tribunal notes here that procuring entities are at liberty to define terms used in solicitation documents in whichever manner they see fit, even if this results in a meaning different than that commonly understood in the industry.

55. Footnote 1 to the SOW states that the term "knuckle boom crane" is used as an "all-encompassing term for an articulated crane with or without more than one pivot point." Likewise, Amendment No. 003 states that the term is used as an "all-encompassing term for an articulated crane with at least one pivot point." The Tribunal is of the view that the use of the words "all-encompassing" clearly suggests a broadening of the definition vis-à-vis its commonly understood meaning. As for the term "articulated crane", it can, within this particular context, reasonably be understood to mean any crane that has at least one pivot point or articulation such as to allow the crane to be articulated. This interpretation finds support in the final part of the sentence, which requires that there be at least *one* pivot point, but without specifying where that pivot point needs to be located. Had PWGSC or DND intended to require that there be more than one pivot point, that there be a pivot point on the boom itself or, clearer yet, that there be two or more boom sections that pivot in relation to each other, it could have said so explicitly.

56. While the Tribunal is of the view that the above is sufficient on its own for it to find that the term "knuckle boom crane", as defined in the RFP, can reasonably be interpreted to include a crane with a single pivot point located at the end of its boom, there is yet further support for this interpretation. The Tribunal has previously stated that the meaning of a term, in the context of its usage in an RFP, would logically be connected to the tasks and deliverables that are set out in the SOW (i.e. the goods and services to be supplied under the resulting contract).[24]

57. Although the SOW, which is found at Annex A of the RFP, makes reference to a "knuckle boom crane", the Tribunal could find no specific technical requirements that would suggest that the cranes to be supplied to DND must have a pivot point on their boom (i.e. have two or more boom sections). The general

20. Exhibit PR-2019-007-39, Vol. 1 at 17.
21. Exhibit PR-2019-007-39, Vol. 1 at 46.
22. Exhibit PR-2019-007-39, Vol. 1 at 68.
23. The Tribunal has previously stated that "[s]olicitation documents are interpreted according to the rules of contract interpretation, which provide that the terms of contracts are interpreted according to their ordinary meaning within the context in which they are used." See *Kileel Development Ltd. v. Department of Public Works and Government Services* (4 April 2019), PR-2018-042 (CITT) at para. 60 and the cases cited therein.
24. *BMT-NOTRA* at para. 28. See also *RCGT* at para. 35.

performance requirements, physical constraints and general design specified for the cranes are completely silent regarding the design of the boom.[25] Simply put, the SOW does not appear to dictate a particular crane design. Therefore, as long as the cranes satisfy the requirements contained in the SOW (e.g. hoist speed, minimum safe working loads, stowed dimensions, etc.), they would presumably be acceptable to DND.

58. Based on the above, the Tribunal finds that it was reasonable for the evaluators to conclude that the crane submitted by Hawboldt and Toimil in response to mandatory criterion $M2^{PB}$ is a "knuckle boom crane" as that term is defined in the RFP and that they therefore possess the experience required by this criterion.

Ground 2: Requirements for a Joint Venture Bid

59. In its complaint, Pennecon alleged that PWGSC improperly determined that its bid failed to comply with the requirements for a joint venture bid and that PWGSC failed to apply those same requirements to Hawboldt and Toimil's bid. Pennecon was of the view that PWGSC first awarding the contract to Hawboldt only and then later re-awarding it to Hawboldt and Toimil supported the inference that they did not clearly identify the bid as being that of a joint venture. In its comments on the GIR, Pennecon submitted that both bids met the requirements for a joint venture bid and that neither should have been disqualified.

60. The Tribunal notes that PWGSC initially evaluated Pennecon's bid as if it had been submitted in joint venture with Palfinger and it was only following a re-examination of Pennecon's evaluation results, most likely prompted by its objection to the award of the contract to Hawboldt, that PWGSC found Pennecon's bid non-compliant. Hence, it is already known that Pennecon's bid, even if given the benefit of Palfinger's experience, did not rank ahead of Hawboldt and Toimil's bid. As the Tribunal has already found that Hawboldt and Toimil possess the experience required by mandatory criterion $M2^{PB}$, should it now find that their bid also met the requirements for a joint venture bid, the question as to whether Pennecon's bid met those requirements would be of little significance.[26]

Relevant Provisions of the RFP

61. The provisions of the RFP that are relevant to this ground of complaint read as follows:

> **PART 2 - BIDDER INSTRUCTIONS**
>
> **2.1 Standard Instructions, Clauses and Conditions**
>
> . . .
>
> The 2003 (2018-05-22) Standard Instructions - Goods or Services - Competitive Requirements, are incorporated by reference into and form part of the bid solicitation.
>
> . . .
>
> **PART 3 - BID PREPARATION INSTRUCTIONS**
>
> **3.1 Bid Preparation Instructions**
>
> . . .
>
> (f) Signature of the Bid:

25. See section 5 of the SOW.
26. The question as to whether Pennecon's bid met the requirements for a joint venture bid would only be of any significance if the Tribunal found that Hawboldt and Toimil should not have been awarded the contract as it would then bear on the remedy that the Tribunal would recommend.

1. Canada requires that each bid, at solicitation closing date and time or upon request from the Contracting Authority, be signed by the Bidder or by an authorized representative of the Bidder. If a bid is submitted by a joint venture, it must be in accordance with section 17 of 2003 (2018-05-22) Standard Instructions;
2. In this solicitation, the "Bidder" means the legal entity submitting the Bid in response to the solicitation and does not include the parent, subsidiaries or other affiliates of that legal entity, or its subcontractors; and
3. Bidders can sign their Bids by copying the front page of this solicitation, signing it, and submitting it as part of their Bids or by including a signature page in a prominent location in their Bids.

. . .

62. The relevant provisions of the Standard Instructions, which are incorporated by reference into the bid solicitation, read as follows:

Standard Instructions - Goods or Services - Competitive Requirements

. . .

04 (2007-11-30) Definition of Bidder

"Bidder" means the person or entity (or, in the case of a joint venture, the persons or entities) submitting a bid to perform a contract for goods, services or both. It does not include the parent, subsidiaries or other affiliates of the Bidder, or its subcontractors.

. . .

17 (2010-01-11) Joint venture

1. A joint venture is an association of two or more parties who combine their money, property, knowledge, expertise or other resources in a single joint business enterprise, sometimes referred as a consortium, to bid together on a requirement. Bidders who bid as a joint venture must indicate clearly that it is a joint venture and provide the following information:
    a. the name of each member of the joint venture;
    b. the Procurement Business Number of each member of the joint venture;
    c. the name of the representative of the joint venture, i.e. the member chosen by the other members to act on their behalf, if applicable;
    d. the name of the joint venture, if applicable.
2. If the information is not clearly provided in the bid, the Bidder must provide the information on request from the Contracting Authority.
3. The bid and any resulting contract must be signed by all the members of the joint venture unless one member has been appointed to act on behalf of all members of the joint venture. The Contracting Authority may, at any time, require each member of the joint venture to confirm that the representative has been appointed with full authority to act as its representative for the purposes of the bid solicitation and any resulting contract. If a contract is awarded to a joint venture, all members of the joint venture will be jointly and severally or solidarily liable for the performance of any resulting contract.

Positions of Parties

63. Pennecon submitted that, contrary to PWGSC's assertion, there was an abundance of information in its bid to give PWGSC a reason, before disqualifying it, to verify whether it was being submitted in joint

venture with Palfinger. It provided a number of examples of the information that was provided as part of its bid which, in its view, indicated that the bid was being submitted in joint venture with Palfinger, despite the fact that it did not use the words "joint venture".[27]

64. Pennecon further submitted that, even if its bid could have more clearly indicated that it was a joint venture, subsections 17(1) and (2) of the Standard Instructions contemplate that some bids may not clearly identify themselves as a joint venture or provide all of the required information, but that this may be clarified on request by PWGSC. It submitted that, if a failure to comply with subsection 17(1) disqualified any potential bidder, subsection 17(2) would serve no purpose.

65. In his witness statement, Mr. Knox explains that, while Palfinger did not sign the bid, Pennecon was appointed by Palfinger, in accordance with subsection 17(3) of the Standard Instructions, to act as its representative for the bid solicitation and any resulting contract. Pennecon provided a letter dated April 18, 2019, from Palfinger attesting to this fact.[28]

66. With respect to Hawboldt and Toimil's bid, Pennecon submitted that, while Hawboldt's cover letter indicated that its bid was submitted through a contractual joint venture agreement with Toimil, it omitted three of the four pieces of information required by subsection 17(1) of the Standard Instructions. It added that Hawboldt also provided information to PWGSC which caused confusion as to its status.[29] It therefore submitted that, while both bids could have more clearly indicated that they were being submitted in joint venture, only Hawboldt and Toimil were given the opportunity to provide additional information and correct the confusion, whereas Pennecon did not receive this opportunity and its bid was instead disqualified.

67. For its part, PWGSC submitted that, due to an administrative oversight, it initially awarded the contract to Hawboldt alone rather than the bidder actually named in the bid, which was a contractual joint venture between Hawboldt and Toimil. It added that the joint venture agreement between Hawboldt and Toimil, which was signed before the bid closing date, was also provided to PWGSC upon request.

68. PWGSC submitted that it did not improperly disqualify Pennecon's bid as it failed to comply with the requirements for a joint venture bid found at section 17 of the Standard Instructions. It submitted that the bid only identified Pennecon as the bidder and that the statement made in the introduction to Pennecon's bid to the effect that Palfinger and itself were willing to work through any discussions after bid submissions was not sufficient to clearly indicate that the bid was being submitted as a joint venture as it could indicate a form of affiliation other than a joint venture (e.g. supplier, subcontractor). It therefore submitted that there was no basis for it to verify or seek additional information pursuant to subsection 17(2) of the Standard Instructions. As for Palfinger's letter of April 18, 2019, PWGSC noted that it is dated months after the bid closing date and does not explicitly state that the bid is a joint venture.

69. Finally, PWGSC submitted that, given the facts, any finding that Pennecon's bid was being submitted as a joint venture with Palfinger would have been unreasonable. Accordingly, it submitted that since Palfinger's experience could not be considered towards demonstrating Pennecon's experience, Pennecon's bid was re-evaluated as non-compliant with certain mandatory criteria.

70. Hawboldt and Toimil submitted that their bid was submitted in joint venture as evidenced by their cover letter which expressly identified the joint venture status of their bid and the name of each member.

27. See examples at Exhibit PR-2019-007-39A (protected), Vol. 2 at para. 25.
28. Exhibit PR-2019-007-01, Vol. 1 at 12.
29. Exhibit PR-2019-007-39A (protected), Vol. 2 at para. 27.

They added that, prior to contract award (i.e. the second contract award), they provided additional information pertaining to the joint venture on request from PWGSC, as contemplated by subsection 17(2) of the Standard Instructions.

Tribunal's Analysis

71. As stated above, the Tribunal must determine whether it was reasonable for PWGSC to conclude that Pennecon's bid failed to comply with the requirements for a joint venture bid, while at the same time concluding that Hawboldt and Toimil met those same requirements. In order for the Tribunal to make this determination, it must first interpret the relevant provisions of the RFP and Standard Instructions to ascertain the extent of a bidder's obligation to clearly identify its bid as being that of a joint venture.

72. Section 3.1(f) of the RFP provides that, if a bid is submitted by a joint venture, it must be in accordance with the Standard Instructions. Subsection 17(1) of the Standard Instructions, in turn, provides that "[b]idders who bid as a joint venture must indicate clearly that it is a joint venture and provide the following information . . . ." The information to be provided includes the name of each member of the joint venture, their Procurement Business Number and the name of the joint venture (the listed information). Subsection 17(2) provides that "[i]f the information is not clearly provided in the bid, the Bidder must provide the information on request from the Contracting Authority."

73. In the Tribunal's opinion, the above provisions create a definite distinction between a bidder's obligation to "indicate clearly that it is a joint venture" and to provide the listed information. In the case of the former, there does not appear to be any flexibility on the part of PWGSC to request that a bidder clarify its status after bid closing—the bidder must clearly indicate its status in its bid. However, in the case of the latter, such flexibility is provided by subsection 17(2) of the Standard Instructions, which allows a bidder to provide, on request from PWGSC, *information* (i.e. the listed information) that was not clearly provided in its bid.

74. Such an interpretation makes inherent sense as PWGSC cannot reasonably be expected to guess as to whether or not a bid was submitted as a joint venture and, consequently, whether it even requires additional information. As noted by PWGSC, there are many other forms of affiliation besides a joint venture. Therefore, the simple inclusion of information pertaining to another company in a bid should not, on its own, lead to the conclusion that the bid is being submitted as a joint venture.

75. As noted above, the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder. Therefore, it is incumbent upon bidders who bid as a joint venture to clearly indicate that it is a joint venture.[30]

76. In the case of Hawboldt, its cover letter indicated that its bid was submitted through a contractual joint venture agreement with Toimil.[31] In the Tribunal's view, this statement satisfied the requirement to indicate clearly that it was a joint venture. Thus, it was reasonable for PWGSC to request, after bid closing, additional information (i.e. the listed information that had not been provided) pursuant to subsection 17(2) of the Standard Instructions.

30. The Tribunal recently came to the same conclusion when it found that there was no reasonable indication that the Parks Canada Agency conducted an unreasonable evaluation when it rejected the experience of a bidder's alleged joint venture partner and concluded that the bid was not compliant with the mandatory criteria of the solicitation. See *MTM-2 Contracting Inc.* (15 March 2019), PR-2018-066 (CITT) at para. 18.
31. Exhibit PR-2019-007-17A (protected), Vol. 2 at 245.

77. As for Pennecon, the introduction to its bid contained the following paragraph:[32]

> Further we (Pennecon Energy Hydraulic Systems) and Palfinger Marine are willing to work through any discussions after bid submissions to optimize the crane requirements to minimize the effect upon the deck layout. We make this comment because the standard production crane (As per solicitation requirements) that will meet the LR LAME requirements is the Palfinger PFM3500.

78. The Tribunal is of the view that this falls well short of a clear indication that it was bidding as a joint venture. In fact, this paragraph can easily imply many types of affiliations other than a joint venture (e.g. subcontractor or supplier). The remainder of the information contained in Pennecon's bid, even when considered together, also failed to provide a clear indication that it was bidding as a joint venture. Moreover, the signature page of the bid referred to Pennecon only and was signed by Mr. Knox, Pennecon's General Manager.[33] Under these circumstances, the Tribunal finds that it was reasonable for PWGSC to conclude that Pennecon's bid failed to comply with the requirements for a joint venture bid.

Conclusion

79. In light of the foregoing, the Tribunal finds that Pennecon's complaint, on both grounds, is not valid.

COSTS

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

81. PWGSC requested its costs incurred in responding to the complaint. As the successful party in this inquiry, it is entitled to its reasonable costs.

82. In determining the amount of the 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.

83. The procurement was of moderate complexity as it involved the supply of marine cranes with associated detailed engineering design data and technical data package. The complaint was also of moderate complexity as there were two grounds of complaint and both pertained to PWGSC's interpretation of ambiguous terms and clauses in the solicitation documents. Finally, the complexity of the proceedings was considered to be above Level 1 as there was an intervener, additional information was requested from PWGSC following the filing of the GIR, an objection to the designation of certain information as confidential in the GIR was filed, and the process required the use of the 135-day time frame.

84. As such, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2 and the preliminary indication of the amount of the cost award is $2,750.

32. Exhibit PR-2019-007-01A, Vol. 1 at 11.
33. Exhibit PR-2019-007-01, Vol. 1 at 160.

DETERMINATION OF THE TRIBUNAL

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

86. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Pennecon. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is $2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Cheryl Beckett

Cheryl Beckett
Presiding Member