



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-020

Heiltsuk Horizon Maritime Services
Ltd. and Horizon Maritime Services
Ltd.

v.

Department of Public Works and
Government Services

*Determination issued
Friday, October 18, 2019*

*Reasons issued
Friday, November 1, 2019*

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IN THE MATTER OF a complaint filed by Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd. 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

**HEILTSUK HORIZON MARITIME SERVICES LTD. AND
HORIZON MARITIME SERVICES LTD.**

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.

As a result of this determination, the Tribunal recommends that all of the bids be re-evaluated by the Department of Public Works and Government Services solely with respect to compliance with mandatory criterion 12 (MR 12), in accordance with the Tribunal's directions set out in the reasons for this determination, including permitting the submission of new information regarding compliance with MR 12.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal does not award any costs.

Peter Burn

Peter Burn
Presiding Member

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STATEMENT OF REASONS

[1] The present matter concerns two complaints filed by Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd. (Heiltsuk Horizon), which are the second and third of four complaints filed by Heiltsuk Horizon in relation to the same procurement (Solicitation No. F7017-160056/C). The procurement was conducted by the Department of Public Works and Government Services (PWGSC) on behalf the Department of Fisheries and Oceans, for the services of two emergency towing vessels on a time charter basis. PWGSC awarded the contract to Atlantic Towing Ltd. (ATL).

[2] On January 2, 2019, the Tribunal determined that Heiltsuk Horizon's first complaint was valid in part, as PWGSC had unreasonably evaluated a mandatory requirement relating to bollard pull ("MR 12").¹ The Tribunal stated that "it was unreasonable for PWGSC to conclude that ATL's bid, on its face, satisfied MR 12" and ordered that the bids be re-evaluated with respect to MR 12.²

[3] Upon re-evaluation, ATL was found to be compliant with MR 12 and remained the successful bidder. The second and third complaints both relate to this re-evaluation of MR 12. The Tribunal accepted the second and third complaints for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*³ and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴

[4] The Tribunal conducted an inquiry into the complaints as required by sections 30.13 to 30.15 of the *CITT Act*. The Tribunal finds that the second and third complaints are both valid in part. As the complaints are based on the same facts and are closely interrelated, the Tribunal issues these single reasons for both of the determinations.

BACKGROUND AND SUMMARY OF COMPLAINTS

PR-2018-023 (the "first complaint")

[5] The solicitation was issued on February 5, 2018. The bid closing date was April 13, 2018, and Heiltsuk Horizon submitted its bid on this date. Nine bids were submitted in total.

[6] After ATL was awarded the contract on August 9, 2018, Heiltsuk Horizon filed its first complaint (PR-2018-023) on August 20, 2018. With respect to the evaluation of MR 12, the complaint stated that ATL's bid failed to take into account engine-driven consumers and was therefore non-compliant.⁵

[7] On January 2, 2019, the Tribunal found the first complaint to be valid in part and recommended a re-evaluation of the MR 12 bollard pull requirement, to be made within six months.⁶

¹ *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 (CITT) [*Heiltsuk Horizon I*].

² *Heiltsuk Horizon I* at paras. 69, 98.

³ R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

⁴ S.O.R./93-602 [*Regulations*].

⁵ Exhibit PR-2018-023-01, Vol. 1 at 28.

⁶ *Heiltsuk Horizon I* at para 98.

[8] On May 27, 2019, PWGSC notified the Tribunal and Heiltsuk Horizon that it had re-evaluated MR 12, that all bidders were found compliant with MR 12, and that ATL remained the successful bidder.

PR-2019-020 (the “second complaint”)

[9] Heiltsuk Horizon filed its second complaint on June 7, 2019, alleging that PWGSC had unreasonably re-evaluated ATL’s compliance with MR 12. Heiltsuk Horizon stated that the re-evaluation did not follow the Tribunal’s determination in PR-2018-023 and was essentially the same evaluation as was found to be unreasonable by the Tribunal in PR-2018-023. It also alleged that PWGSC engaged in impermissible bid repair and displayed a reasonable apprehension of bias. The Tribunal accepted the second complaint for inquiry on June 11, 2019.

[10] On June 21, 2019, ATL requested intervener status in the second complaint. On June 24, 2019, the Tribunal requested parties’ submissions on this intervener request. On June 27, 2019, Heiltsuk Horizon notified the Tribunal that it took issue with certain claims in ATL’s intervener request, but that it took no position on the request itself. The Tribunal granted ATL’s request for intervener status on July 3, 2019.

[11] On July 4, 2019, PWGSC requested an extension of time to file the Government Institution Report (GIR). On the same day, ATL requested an extension of time to serve its submissions. The Tribunal granted both extensions on July 5, 2019.

[12] On July 10, 2019, Heiltsuk Horizon submitted that the extensions of time granted to PWGSC and ATL had created a scheduling conflict for its counsel and requested an extension of time to file its reply. The Tribunal granted this extension on July 12, 2019.

[13] PWGSC filed the GIR on July 16, 2019, and ATL filed its comments on July 23, 2019.

[14] Heiltsuk Horizon filed its response on August 2, 2019, which also contained a request for an oral hearing and further disclosure.

PR-2019-025 (the “third complaint”)

[15] On July 30, 2019, Heiltsuk Horizon filed its third complaint, alleging that new information disclosed in the GIR for the second complaint revealed that PWGSC had unreasonably evaluated *all* bidders’ compliance with MR 12. Heiltsuk Horizon also requested further disclosure in five areas.

[16] The Tribunal accepted the third complaint for inquiry on August 6, 2019. On August 8, 2019, the Tribunal requested that PWGSC include four of Heiltsuk Horizon’s five disclosure requests in the GIR.

[17] On August 8, 2019, the Tribunal advised ATL that it was entitled to request intervener status in the third complaint and asked if ATL objected to the transfer of its information from the first and second complaints to the third complaint. On August 9, 2019, ATL requested intervener status and advised that it had no objection to transferring the previous record to the third complaint.

Convergence of the second and third complaints (PR-2019-020 and PR-2019-025)

[18] On August 13, 2019, PWGSC requested leave to what it argued were new allegations (including what it described as allegations as to “intentional misconduct by those public servants involved in this procurement”) in Heiltsuk Horizon’s response to the GIR in the second complaint. On the same day, Heiltsuk Horizon objected to this request. On August 14, 2019, the Tribunal granted PWGSC permission to respond to Heiltsuk Horizon’s submissions of August 2, 2019, instructing that this response be made in the GIR for the third complaint.

[19] On August 19, 2019, the Tribunal granted ATL’s request for intervener status in the third complaint.

[20] On September 3, 2019, PWGSC filed the GIR for the third complaint, in which it also responded to Heiltsuk Horizon’s submissions of August 2, 2019, in the second complaint.

[21] On September 6, 2019, Heiltsuk Horizon requested an extension of time to file its comments on the GIR and the intervener’s submissions, due to its counsel experiencing weather-related power outages.

[22] ATL submitted its comments on the GIR on September 9, 2019.

[23] On September 10, 2019, the Tribunal granted Heiltsuk Horizon’s request for an extension of time to file its comments.

[24] On September 17, 2019, Heiltsuk Horizon submitted its comments on the GIR and the intervener’s comments.

[25] As set out above, the Tribunal has decided to render one statement of reasons for both the second and third complaints, as they relate to substantially the same facts and issues.

[26] Given that there was sufficient information on the record to determine the validity of both complaints, the Tribunal decided that an oral hearing was not required and disposed of the complaints on the basis of the written information on the record.

PR-2019-034 (the “fourth complaint”)

[27] On September 17, 2019, Heiltsuk Horizon filed the fourth complaint, alleging that new information disclosed in the third GIR confirms that all other bidders are non-compliant, i.e., that Heiltsuk Horizon is the *only* bidder that complies with MR 12.

[28] On September 19, 2019, the Tribunal decided not to conduct an inquiry into the fourth complaint given that it raised substantially the same facts and issues as the third complaint. The Tribunal will address the arguments raised in the fourth complaint in the present statement of reasons on the second and third complaints.

ANALYSIS

Standing

[29] The Tribunal finds that Heiltsuk Horizon had standing to bring both the second and third complaints, contrary to challenges to Heiltsuk Horizon's standing advanced by PWGSC and ATL.

[30] PWGSC argued that Heiltsuk Horizon lacked standing to bring the third complaint because it should have challenged all bids (i.e., bids other than ATL's) in the first or second complaint. PWGSC also argued that the third complaint was redundant, as all grounds were already subsumed within the second complaint. ATL has also challenged Heiltsuk Horizon's standing in arguing that it is not a potential supplier. As Heiltsuk Horizon was the lowest-ranked and most expensive bidder, ATL submits that Heiltsuk Horizon would not be awarded the contract even if ATL's bid is found non-compliant.

[31] In the Tribunal's view, the evolution of Heiltsuk Horizon's arguments is not related to nor does it negate its *standing* in the circumstances. In the Tribunal's view, the potential outcome of the solicitation does not change the fact that Heiltsuk Horizon is a potential supplier. It is undisputed that Heiltsuk Horizon was one of the bidders on a designated contract and as such is a "potential supplier" under section 30.1 of the *CITT Act*.

[32] It should be recalled that the Tribunal is recommending a second re-evaluation, and it is possible that many or all of the bids will be found non-compliant with MR 12. For the reasons below, the Tribunal takes no position at this time on precisely which bids are compliant. However, as in the first complaint, the Tribunal considers it a possibility that Heiltsuk Horizon could become the winning bidder.

[33] In terms of the alleged redundancy of the third complaint, the Tribunal recalls that Heiltsuk Horizon did not have detailed information about the other bids until it received the second GIR. While Heiltsuk Horizon had already submitted that it was *potentially* the only compliant bidder when it filed the second complaint⁷, it could not have definitively argued that the other bidders were non-compliant before seeing the second GIR. Because Heiltsuk Horizon raised the arguments and evidence at its disposal when it could, the Tribunal takes no issue with the timeliness of the third complaint. Nor does the Tribunal consider the third complaint to be redundant: while the grounds of both complaints overlap considerably, the third complaint is based on new evidence that allowed Heiltsuk Horizon to advance a more refined argument.

Reasonable apprehension of bias

[34] In the first complaint, the Tribunal found that the evidence did not support a reasonable apprehension of bias.⁸ In the present complaints, the Tribunal has reached the same conclusion.

⁷ See, e.g., Exhibit PR-2019-020-01, Vol. 1 at 25, where Heiltsuk Horizon submitted that "PWGSC has breached its clear duty to reject non-compliant bids under the trade agreements and/or permitted improper bid repair. The appropriate remedy is contract cancellation, followed by a proper technical re-evaluation of the *other* bids submitted in accordance with the Solicitation, which will once again find Heiltsuk Horizon's bid fully compliant with MR 12, and potentially the only compliant bid."

⁸ *Heiltsuk Horizon I* at paras. 72-79.

[35] Heiltsuk Horizon has argued that the Tribunal ought to revisit the issue of bias in light of the re-evaluation results. According to Heiltsuk Horizon, the fact that ATL was the successful bidder a second time “confirms that the government institution has willfully ignored all the concerns noted to date by both Heiltsuk Horizon and the Tribunal, in order to manufacture and manipulate an outcome that we allege was pre-determined long before it was ordered to conduct its re-evaluation.”⁹

[36] In addition, Heiltsuk Horizon pointed out that the first and second evaluations were both conducted by the same Technical Evaluation Team Leader (Mr. Henri Legros). Heiltsuk Horizon submitted that “much of the material relied on by PWGSC to explain and justify its re-evaluation result appears to have been prepared by Mr. Legros, rather than the five new evaluators assigned to PWGSC’s re-evaluation. In several key instances . . . Mr. Legros’ account and report on the re-evaluation appears to differ from what is actually reflected in the evaluators’ individual evaluation notes.”¹⁰

[37] PWGSC responded that the re-evaluation “was conducted by a team of experienced and independent evaluators, new to this solicitation and who had not participated in the first evaluation” and that Heiltsuk Horizon has raised no new evidence or any new specific allegation of bias since the first complaint.¹¹

[38] In the Tribunal’s view, Heiltsuk Horizon has not established that PWGSC displayed a reasonable apprehension of bias. Without additional evidence, merely coming to the same result on re-evaluation or involving the same Technical Evaluation Team Leader is insufficient to establish a reasonable apprehension of bias.

[39] The Tribunal notes jurisprudence establishing that remanding a matter to the same decision maker is not necessarily inappropriate, unless the original decision maker is unlikely to determine the matter objectively or the decision maker’s discretion is fettered by the original decision.¹² The jurisprudence also establishes that in deciding whether to remand a matter to the same decision maker, it is acceptable to consider efficiency,¹³ the decision maker’s familiarity with the case,¹⁴ and achieving a more expeditious redetermination.¹⁵

[40] The Tribunal finds no evidence that the re-evaluation team was unlikely to determine the matter objectively, nor that their discretion was fettered by the original decision. In the Tribunal’s view, it was permissible for PWGSC to rely on Mr. Legros to lead the re-evaluation given his expertise and familiarity with the procurement. The Tribunal also notes that while Mr. Legros was involved as Technical Evaluation Team Leader in both evaluations, the re-evaluation was done by all new evaluators.

Bid repair

[41] The Tribunal is satisfied that the re-evaluation did not involve bid repair.

⁹ Exhibit PR-2019-020-01, Vol. 1 at 23.

¹⁰ Exhibit PR-2019-020-20, Vol. 1 at 22.

¹¹ Exhibit PR-2019-020-18, Vol. 1 at 6.

¹² *Balazuntharam v. Canada (Citizenship and Immigration)* 2015 FC 607 [*Balazuntharam*] at paras. 18-20; *Edmonton (Police Service) v. Furlong*, 2013 ABCA 177 [*Furlong*] at para. 3.

¹³ *Furlong* at para. 3.

¹⁴ *Balazuntharam* at paras. 20, 23; *Canada (Citizenship and Immigration) v. Harvey*, 2013 FC 717 at para. 75.

¹⁵ *Balazuntharam* at paras. 20-23; *Canada (Citizenship and Immigration) v. Liu*, 2013 FC 639 at para. 1.

[42] The second GIR disclosed that the re-evaluation team sought out the classification societies' standard bollard pull procedures in order to verify whether engine-driven consumers were taken into account. On this basis, Heiltsuk Horizon argued that actively seeking out new, third-party information constituted impermissible bid repair by PWGSC.

[43] PWGSC submitted that the classification societies' bollard pull procedures were incorporated by reference into the bids, allowing evaluators to seek out information about the procedures. Additionally, PWGSC argued that verification and clarification were allowed according to standard instructions incorporated into the RFP, which provide as follows:

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;

...

f. verify any information provided by bidders through independent research, use of any government resources or by contacting third parties;¹⁶

[44] In the Tribunal's view, it was permissible for PWGSC to seek out the classification societies' bollard pull procedures. The evaluators already had bollard pull certificates submitted by the bidders. Therefore, seeking out the standard procedures behind the certificate was merely "verification" as contemplated by the above standard instructions.

[45] The Tribunal finds no indication of bias or prejudice in PWGSC's manner of verifying bollard pull procedure. The verification was conducted in a uniform manner, as the re-evaluation team researched bollard pull procedures for other bids, not only for ATL's bid. Both PWGSC and ATL submitted that no new information was provided by ATL during the re-evaluation process.¹⁷

[46] As PWGSC was authorized to verify information contained in bids, and as other bidders were not prejudiced or treated unfairly in the verification process, the Tribunal finds that PWGSC did not engage in bid repair.

Interpretation of Mandatory Requirement 12

[47] It is well established that the Tribunal will review a procurement process on a reasonableness standard, showing deference to the evaluators' expertise and making recommendations only when a decision is unreasonable. As the Tribunal has repeatedly stated, a procurement evaluation "is unreasonable where the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a

¹⁶ Exhibit PR-2019-020-18, Vol. 1 at 11. "Standard Instructions - Goods or Services - Competitive Requirements - 2017-04-27, subsection 16 (2008-05-12) Conduct of Evaluation" online: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/24#conduct-of-evaluation>.

¹⁷ Exhibit PR-2019-020-18, Vol. 1 at 6; Exhibit PR-2019-020-19 at 9.

requirement, have based their evaluation on undisclosed criteria or have otherwise failed to conduct the evaluation in a procedurally fair manner.”¹⁸

[48] Therefore, the Tribunal does not accept Heiltsuk Horizon’s request to adopt a less deferential standard of correctness. According to Heiltsuk Horizon, because the Supreme Court in *Ledcor Construction* has instructed appellate courts to use the correctness standard when reviewing trial courts’ interpretations of standard form contracts,¹⁹ the Tribunal ought to use the correctness standard when reviewing evaluators’ interpretation of an RFP.

[49] Heiltsuk Horizon’s analogy between appellate-trial review and the Tribunal’s procurement review is not an apt description of the Tribunal’s mandate. The Tribunal is an administrative body which is tasked with a review of complex and often highly technical (as in this case) government procurements within the framework of its statutory mandate. Given this context, the Tribunal sees no reason to depart from its well-established jurisprudence applying the reasonableness standard to procurement evaluations, especially given that the present matter involves considerable technical expertise in the mechanics of maritime emergency towing vessels. The Tribunal will therefore apply the standard of reasonableness to PWGSC’s re-evaluation of MR 12, showing deference to the evaluators’ considerable maritime experience and expertise.

[50] Heiltsuk Horizon has contested the evaluation of a single mandatory requirement, MR 12, which states as follows:

The Bidder’s vessels must exert a minimum continuous bollard pull of no less than 120 tonnes *when all required engine driven consumers (shaft generators, etc.) are taken into account*.²⁰ [emphasis added]

[51] Heiltsuk Horizon argued that PWGSC’s evaluation of MR 12 breached Article 515(4) of the *Canadian Free Trade Agreement*,²¹ which states as follows:

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. [emphasis added]

¹⁸ See, e.g., *BRC Business Enterprises Ltd* (27 September 2010), PR-2010-012 (CITT) at para. 43; *Kileel Developments Ltd.* (4 April 2019), PR-2018-042 (CITT) at para. 56.

¹⁹ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* 2016 SCC 37.

²⁰ Exhibit PR-2019-020-01B, Vol. 1 at 1298.

²¹ Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements and their provisions. Section 1.2 of the RFP lists all of the applicable trade agreements. For the purposes of this inquiry, the Tribunal will refer primarily 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) [*CFTA*], given that the complaints referred only to the *CFTA*. The Tribunal notes that similar provisions are found under the other applicable trade agreements.

[52] Several assessment methodologies were available for bidders to demonstrate compliance with MR 12, which the RFP described as follows:

The Bidder must provide a certificate of compliance (independently verified) or bollard test output data (in accordance with MSC/Circ 884 section 11.1) less than 10 years old that demonstrates a minimum continuous bollard pull of no less than 120 tonnes when all required engine driven consumers (shaft generators, etc.) are taken into account. As per “Noble Denton Marine Services - Certification for Towing Vessel Approvability (DNVGL-SE0122), edition March, 2017”, in instances where a certificate of continuous bollard pull, less than 10 years old cannot be produced, then for tugs less than 10 years old, bollard pull may be estimated as 1 tonne/100 (certified) BHP of the main engines and for tugs over 10 years old, with a bollard pull certificate greater than 10 years old, Bollard Pull may be accepted as the greater of: — the certified value reduced by 1% per year of age since the BP test, or — 1 tonne/100 (certified) BHP of the main engines reduced by 1% per year of age greater than 10.²²

[53] In the first complaint, the Tribunal held that “there was no explicit demonstration of compliance with the terms of the RFP on the face of either [of ATL’s bollard pull certificates].”²³ ATL’s bid contained an independently verified certificate of compliance less than 10 years old, in accordance with what the Tribunal referred to as “assessment methodology (a)”.²⁴ In the first complaint, the Tribunal expressed the following concerns with PWGSC’s assessment of ATL’s bollard pull certificate:

The certificates included with the bid were issued in 2013 and state that both vessels have continuous bollard pulls greater than 120 tonnes: 158.00 tonnes for the Atlantic Eagle and 162.60 tonnes for the Atlantic Raven. Both certificates also state a propulsion engine power of 10,600 kW for the Atlantic Eagle and 10,738 kW for the Atlantic Raven, with a note that “[t]he propulsion engine power is the sum of actual engine power driving propellers” and that “[c]ombustion engines for mechanical propulsion deducted any PTO power, electrical motors on propulsion thruster, electrical motors for PTI, etc.” However, *neither certificate on their face make deductions for engine-driven consumers, as demonstrated by the fact that the values for “engine power” and “propulsion engine power” are the same.*²⁵ [emphasis added]

[54] A crucial component of the Tribunal’s first decision is its finding that the use of the term “required engine driven consumers” in MR 12 means “the power-driven consumers required ‘for normal operations’ of emergency towing vessels.”²⁶ However, during the re-evaluation, the evaluators interpreted “required engine driven consumers” to mean “those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected by the Classification Society Bollard Pull testing procedure.”²⁷

[55] In the present complaints, the Tribunal finds that the re-evaluators’ interpretation of “required engine driven consumers” was unreasonable, as it was inconsistent with the clear language of MR 12

²² Exhibit PR-2019-020-01B, Vol. 1 at 1298-1299.

²³ *Heiltsuk Horizon I* at para. 62.

²⁴ *Heiltsuk Horizon I* at paras. 52, 61.

²⁵ *Heiltsuk Horizon I* at paras. 59-60.

²⁶ *Heiltsuk Horizon I* at para. 64.

²⁷ Exhibit PR-2019-020-18A, Vol. 2 at 55-56.

and the Tribunal's decision in the first complaint. PWGSC deemed all bids to be compliant with MR 12 based on an unreasonable interpretation of a mandatory requirement. As such, by not properly ensuring that the winning bid (or any bid) fulfilled a mandatory requirement, PWGSC breached Article 515(4) of the *CFTA*.

[56] The Tribunal's first decision and the language of MR 12 itself were both clear that bidders must demonstrate a bollard pull above 120 tonnes *when all required engine-driven consumers are taken into account*. The rationale behind this requirement is clear – if engine-driven power consumers are not taken into account in calculating bollard pull, the bollard pull in a real emergency towing operation will be less than the amount certified in the bollard pull test. The standard set by MR 12 ensures that the emergency towing vessels will have adequate power to tow a vessel in distress, in order to ensure marine safety and protect British Columbia's coastline. As Heiltsuk Horizon argued, if an emergency towing vessel does not have adequate bollard pull or propulsion power to aid a vessel in distress, this could put the marine environment and the safety of crews and passengers at risk, defeating the purpose of the procurement.²⁸

[57] The re-evaluation made clear that PWGSC has been evaluating MR 12 on an improper basis from the beginning. The re-evaluators relied on bollard pull test certifications without taking the further step of considering which engine-driven consumers would be required for emergency towing operations and making the according deductions from the certified bollard pull. The Tribunal in the first complaint had already rejected PWGSC's argument that "it was for the certifying body to determine what power-driven consumers were required to ensure that a particular vessel could meet the bollard pull requirement under MR 12."²⁹ Ignoring this direction from the Tribunal, the re-evaluators interpreted "required engine driven consumers" to mean "those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected by the Classification Society Bollard Pull testing procedure."³⁰

[58] In the Tribunal's view, PWGSC genuinely attempted to design a proper re-evaluation and expected bollard pull certificates alone to be sufficient to satisfy the requirements of MR 12. The Tribunal finds no evidence of bias or bad faith on the part of PWGSC. Nonetheless, PWGSC's attempt to re-evaluate was misguided. PWGSC's interpretation of MR 12, which requires one to completely disregard the procuring entity's own requirement that "all required engine driven consumers (shaft generators, etc.)" must be taken into account, was not a reasonable option.

²⁸ See Heiltsuk Horizon's argument at Exhibit PR-2019-020, Vol. 1 at 5. The Tribunal notes that PWGSC described the purpose of the procurement as follows: "As shipping traffic increases globally, the traffic in all Canadian ports, including BC ports such as the Port of Burnaby, the Port of Vancouver and the Port of Prince Rupert, is anticipated to increase. With increased traffic, there is potential increased risk of having a vessel that has lost power or navigational control. This may result in collision or grounding of a vessel leading to spills and causing a significant risk to crew, other vessels, and the marine environment, including the endangered Southern Resident Killer Whale population and other species at risk. In response, the Government of Canada's Ocean Protection Plan (OPP) was designed to address these issues and many others to improve marine safety. The Canadian Coast Guard (CCG) will work with Public Services and Procurement Canada (PSCP) to Time Charter two offshore emergency towing vessels for operations on the West Coast to immediately increase its capacity to mitigate risks of disabled large commercial vessels off Canada's coast." See Solicitation F7017-160056/C, online at: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-MB-003-26699>.

²⁹ *Heiltsuk Horizon I* at para. 64.

³⁰ Exhibit PR-2019-020-18A, Vol. 2 at 55-56.

[59] As a result, the Tribunal finds that PWGSC applied an unreasonable interpretation of MR 12 not only to ATL's bid, but to all bids.

REMEDY

[60] As Heiltsuk Horizon's complaints are valid in part, the Tribunal must determine the appropriate remedy in accordance with subsections 30.15(2) to (4) of the *CITT Act*.

[61] In the second complaint, Heiltsuk Horizon requested contract cancellation followed by re-evaluation of all bids, excluding that of ATL. Alternatively, Heiltsuk Horizon requested lost opportunity compensation, and in the further alternative, bid preparation costs.³¹ In the third complaint, the requested remedy was that the contract be cancelled and awarded to Heiltsuk Horizon along with compensation for lost profit (or, in the alternative, that Heiltsuk Horizon be awarded lost opportunity compensation).³²

[62] According to subsection 30.15(3) of the *CITT Act*, in recommending an appropriate remedy, the Tribunal must consider the circumstances relevant to the procurement in question, including the following:

- (a) the seriousness of the deficiencies found;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

[63] Considering the above factors in subsection 30.15(3) of the *CITT Act*, the Tribunal finds that PWGSC's interpretation of MR 12 was deficient, that losing bidders were potentially prejudiced, and that the efficiency of the procurement system was prejudiced, all of which weigh in favour of recommending a re-evaluation. However, the Tribunal finds insufficient basis for a recommendation that the contract be cancelled or that ATL be excluded from the re-evaluation. The Tribunal also considers it inadvisable to cancel the contract before the re-evaluation is complete, as this may leave the waters off the coast of British Columbia without the protection of emergency towing vessels during the re-evaluation period.

[64] As such, the Tribunal recommends that PWGSC conduct another re-evaluation of MR 12 as soon as practicable and no later than within six months of this determination. However, the Tribunal is not recommending that PWGSC exclude ATL from the re-evaluation or cancel the contract before the re-evaluation is complete. If the re-evaluation finds ATL to be non-compliant with MR 12, the Tribunal recommends that PWGSC terminate ATL's contract and award the contract to the new top-ranked responsive bidder. If the new top-ranked responsive bidder is Heiltsuk Horizon, the Tribunal recommends that PWGSC compensate Heiltsuk Horizon for the profit, if any, that it would have

³¹ Exhibit PR-2019-020-20, Vol. 1 at 37-38.

³² Exhibit PR-2019-025-17, Vol. 1 at 41-44.

earned had it been awarded the contract, for the period from the award of contract to ATL until a new contract is awarded to Heiltsuk Horizon.

[65] Heiltsuk Horizon claimed that its bid complies with MR 12 because power consumers on its vessels are driven by a dedicated diesel electric engine, and thus neither shaft generators nor any other consumers draw power away from the main propulsion engines.³³ Heiltsuk Horizon also claimed that all other bids were non-compliant, because although one other bid provided a graph showing the relationship between bollard pull and use of engine-driven consumers, this bid nonetheless failed to make the required deductions for bollard pull certificates over 10 years old.³⁴ However, given that the Tribunal is reviewing on the deferential standard of reasonableness, and given the nature of the Tribunal's expertise, the Tribunal cannot make a judgement on which bids comply with a reasonable interpretation of MR 12.

[66] Heiltsuk Horizon has argued that "there is more than enough information to conclude that all bids were improperly evaluated."³⁵ The Tribunal notes that Heiltsuk Horizon has provided affidavits from three witnesses with maritime expertise on the alleged deficiencies of ATL's bid,³⁶ as well as a detailed chart outlining the alleged deficiencies of each bid except its own.³⁷ However, the highly technical and factual task of assessing this information to determine the compliance of each bid goes beyond the Tribunal's expertise and proper role and should be left to procuring entity's evaluators. Given the complicated and technical facts at stake, the Tribunal should not (and cannot) substitute its own evaluation of Heiltsuk Horizon's bid or any other bids as it does not have the technical expertise to do so.

[67] Therefore, rather than the Tribunal substituting its own assessment of each bid's compliance for that of the evaluators, it recommends that PWGSC re-evaluate MR 12 in accordance with this statement of reasons. The Tribunal also recommends this approach keeping in mind its broad statutory discretion under subsection 30.15(2) of the *Act* to make recommendations as to "such remedy as it considers appropriate", particularly considering the effectiveness of the remedy on all other interested parties (not just the complainant) and endeavouring to maintain the efficiency of the procurement system.³⁸ The Tribunal is particularly concerned, in the case of the goods and services being procured here, that the most appropriate bidder is selected to safeguard against the environmental and economic impacts of choosing inadequate towing vessels.

[68] In summary, the Tribunal finds that a reasonable evaluation of MR 12 requires evaluators to assess bids as to which consumers are engine-driven, which are required for emergency towing operations, and how much each required consumer deducts from the certified bollard pull.

[69] In the Tribunal's view, it may not be possible to conduct a proper re-evaluation of MR 12 without seeking additional information from bidders. According to standard instructions incorporated into the terms of the RFP, the evaluators are permitted to "seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation" and "verify any information provided by bidders through independent research, use of any government

³³ Exhibit PR-2019-020-01D, Vol. 1 at 41; Exhibit PR-2019-025-17A, Vol. 2 at 46.

³⁴ Exhibit PR-2019-025-17, Vol. 1 at 22.

³⁵ Exhibit PR-2019-020-20 at 30.

³⁶ Exhibit PR-2019-020-01 at 78-103.

³⁷ Exhibit PR-2019-025-17A, Vol. 2 at 44-52.

³⁸ See paragraphs 30.15(3)(b) and (c) of the *Act*.

resources or by contacting third parties”.³⁹ The Tribunal expressly permits evaluators to request clarification and supplementary information from bidders regarding their compliance with MR 12.

[70] For clarity, this new re-evaluation will allow evaluators to rely on bollard pull certificates *as a starting point*, but it will require that evaluators assess deductions for all engine-driven consumers required in emergency towing operations. This means evaluators are required to use their expertise to assess bids as to which consumers are engine-driven, which are required for emergency towing operations, and how much each required consumer would deduct from the certified bollard pull. These factors must be assessed on a vessel-by-vessel basis, taking into account the specific design of the power supply of each vessel and whether the vessel relies on engine-driven consumers at all.⁴⁰ Evaluators must ensure that a vessel would have a *functional* bollard pull of at least 120 tonnes, even during an emergency towing operation when power may be drawn away from the engine to power other consumers.

[71] For further clarity, evaluators are not necessarily required to account for every single consumer that could possibly draw power from the engine at a given time. However, evaluators are required to use their expertise to determine which engine driven consumers of a particular vessel are necessary “‘for normal operations’ of emergency towing vessels”.⁴¹ This means that evaluators must expressly consider the sea conditions that would be present in normal emergency towing operations in the geographical area where the vessels will be patrolling. The Tribunal leaves the specifics of these conditions to the expertise of the evaluators, but notes Heiltsuk Horizon’s suggestion that this may include cross currents, high winds, rough seas or confined or busy navigational corridors, requiring continuous and simultaneous use of winches, thrusters, dynamic positioning systems and/or other auxiliary equipment.⁴²

[72] Finally, evaluators must also ensure that bids have made the proper deductions to certified bollard pull if the vessel or the bollard pull certificate is over 10 years old, in accordance with one of the four assessment methodologies in the RFP.⁴³

COSTS

[73] Pursuant to section 30.16 of the *CITT Act*, the Tribunal may award costs of, and incidental to, any procurement complaint proceedings.⁴⁴

[74] In determining the amount of cost award for these complaints, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of

³⁹ Exhibit PR-2019-020-18, Vol. 1 at 11-12. See “Standard Instructions - Goods or Services - Competitive Requirements - 2017-04-27, subsection 16 (2008-05-12) Conduct of Evaluation” online: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/24#conduct-of-evaluation>.

⁴⁰ For example, Heiltsuk Horizon has submitted that the design of its vessel does not require shaft generators, as it uses three engines for propulsion and has one engine dedicated to non-propulsion power consumers (see Exhibit PR-2019-025-17, Vol. 1 at 13-14). The Tribunal leaves the assessment of the validity of this submission to the new re-evaluators.

⁴¹ *Heiltsuk Horizon I* at para. 64.

⁴² Exhibit PR-2019-020-20, Vol. 1 at 9.

⁴³ See *Heiltsuk Horizon I* at para. 52; Exhibit PR-2019-020-01B, Vol. 1 at 1298-1299.

⁴⁴ Heiltsuk Horizon requested its bid preparation costs, pursuant to subsection 30.15(4) of the *Act*. Bid preparation costs are typically not awarded where a remedy has been recommended, as in the present case. See, for example, *IBM Canada Ltd.* (7 September 2000), PR-99-020 (CITT).

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.

[75] Despite its partial success in the second complaint, the Tribunal does not award costs to Heiltsuk Horizon in PR-2019-020. Heiltsuk Horizon made repeated and unsupported allegations of bias, despite the Tribunal's prior decision that there was no evidence of bias in the first complaint.⁴⁵ The Tribunal considers that this conduct of its case unnecessarily complicated the proceedings (as described above) and was inappropriate given the circumstances.

[76] The Tribunal awards Heiltsuk Horizon its costs in PR-2019-025. Considering the level of complexity of this third complaint, the Tribunal awards costs at Level 1 (\$1,150).

DETERMINATION

[77] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid in part.

[78] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that all of the bids be re-evaluated by PWGSC solely with respect to compliance with MR 12, in accordance with the Tribunal's directions set out in the reasons for this determination including permitting the submission of new information regarding compliance with MR 12.

Peter Burn

Peter Burn
Presiding Member

⁴⁵ *Heiltsuk Horizon I* at paras. 72-79.