



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2017-010

MLS (Overseas) Ltd.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Tuesday, July 25, 2017*

**TABLE OF CONTENTS**

DETERMINATION..... i

STATEMENT OF REASONS ..... 1

    BACKGROUND ..... 1

        RFSO Security Requirements..... 1

        RFSO Evaluation ..... 3

TRADE AGREEMENT..... 5

ANALYSIS..... 5

    MLS’s Position..... 6

    PWGSC’s Position..... 8

    Analysis..... 8

DETERMINATION ..... 11

IN THE MATTER OF a complaint filed by MLS (Overseas) 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**

**MLS (OVERSEAS) 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 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 preparing and proceeding with the complaint, which costs are to be paid by MLS (Overseas) Ltd. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity of the complaint is Level 2 and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the cost decision, it may make submissions to the Canadian International Trade Tribunal, as contemplated by Article 4.2 of the *Procurement Costs Guideline*.

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

Peter Burn  
\_\_\_\_\_  
Peter Burn  
Presiding Member

Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Eric Wildhaber, Counsel Dustin Kenall, Counsel
Complainant:	MLS (Overseas) Ltd.
Counsel for the Complainant:	Darrel Pearson George Reid Jessica Roberts
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Roy Chamoun Ian McLeod Susan Clarke Kathryn Hamill Mani Taheri Marc-André Dionne

Please address all communications to:

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

## STATEMENT OF REASONS

1. On May 10, 2017, MLS (Overseas) Ltd. (MLS) filed a complaint with the Tribunal regarding a Request for a Standing Offer (Solicitation No. W010X-16B042/A) (RFSO) issued on April 28, 2016, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the logistic support services of a marine fuel supplier to buy and deliver marine fuel on an as-and-when-requested basis on behalf of all ships of the Royal Canadian Navy deployed outside of Canada.

2. MLS alleges that PWGSC improperly awarded a Standing Offer to S.C.A Shipping Consultants Associated Ltd. (SCA) when the latter did not possess a valid Facility Security Clearance and Personnel Security Clearance at the time of contract award.

3. As a remedy, MLS requests that the Tribunal recommend that the Standard Offer to SCA be rescinded and instead awarded to MLS (the second highest-ranked bidder) or, alternatively, that MLS be compensated for its lost profits. MLS has also requested its bid preparation costs and the costs of this complaint.

### BACKGROUND

4. On April 28, 2016, PWGSC published the RFSO, with a closing date of June 8, 2016.<sup>1</sup> The closing date was later extended by an amendment (dated May 30) to June 15, 2016, and then by a second amendment (dated June 13) to June 17, 2016.<sup>2</sup>

### RFSO Security Requirements

5. The RFSO was evaluated and scored based on mandatory criteria, point-rated technical criteria, and financial bids. However, it also contained security requirements to be confirmed before issuance of the Standing Offer (but not at the time of bid submission). Specifically, Part 6 of the RFSO contained the requirement that bidders hold a Facility Security Clearance and Personnel Security Clearance at the time of contract award. Section 6.1(1) of Part 6 of the RFSO reads as follows:<sup>3</sup>

#### PART 6 - SECURITY AND FINANCIAL REQUIREMENTS

##### 6.1 Security Requirements

1. *Before issuance of a standing offer, the following conditions must be met:*
  - a) *the Offeror must hold a valid organization security clearance as indicated in Part 7A – Standing Offer;*
  - b) *the Offeror’s proposed individuals requiring access to classified or protected information, assets or sensitive work site(s) must meet the security requirements as indicated in Part 7A – Standing Offer;*
  - c) *the Offeror must provide the name of all individuals who will require access to classified or protected information, assets or sensitive work sites;*
  - d) *the Offeror’s proposed location of work performance and document safeguarding must meet the security requirements as indicated in Part 7A – Standing Offer;*

---

1. Exhibit PR-2017-010-11, exhibit 1, at 26, Vol. 1C.

2. Exhibit PR-2017-010-11, exhibit 2, at 209, Vol. 1C. Exhibit PR-2017-010-11, exhibit 3, at 213, Vol. 1C.

3. Exhibit PR-2017-010-11, exhibit 1, s. 6.1(1), at 38, Vol. 1C.

- e) the Offeror must provide the address(es) of proposed site(s) or premises of work performance and document safeguarding as indicated in Part 3 – Section IV Additional Information.

[Emphasis added]

6. Section 6.1(2) of Part 6 of the RFSO reads as follows:<sup>4</sup>

2. Offerors are reminded to *obtain the required security clearance promptly*. Any delay in the issuance of a standing offer *to allow the successful Offeror to obtain the required clearance* will be at the *entire discretion* of the Standing Offer Authority.

[Emphasis added]

7. Part 3 (Offer Preparation Instructions) of the RFSO advised that the security clearance information was to be included in Section 4 of the offer (Section 1 was the Technical Offer, Section 2 the Financial Offer, and Section 3 the Certifications required under Part 5). Section 4.1.3 of Part 3 reads as follows:<sup>5</sup>

#### **Section IV: Additional Information**

##### **4.1.3 Offeror's Proposed Site(s) or Premises Requiring Safeguarding Measures**

**4.1.3.1** As indicated in Part 6 under Security Requirements, the Offeror must provide the full address(es) of the Offeror's and proposed individual(s) site(s) or premises for which safeguarding measures are required for Work Performance:

##### **Location(s) of Work Performance**

Street Number / Street Name, Unit / Suite / Apartment Number

City, Province, Territory / State

Postal Code / Zip Code

Country

**4.1.3.2** The Company Security Officer (CSO) must ensure through the Industrial Security Program (ISP) that the Offeror and proposed individual(s) hold a valid security clearance at the required level, as indicated in Part 6 – Security, Financial and Other Requirements.

8. The only security requirements at issue in MLS's complaint are those articulated in Sections 7.2.1(1) and 7.2.1(7) of Part 7 of the RFSO relating to, respectively, the Facility Security Clearance and the Personnel Security Clearance as set forth below:<sup>6</sup>

#### **PART 7 - STANDING OFFER AND RESULTING CONTRACT CLAUSES**

##### **A. STANDING OFFER**

##### **7.2 Security Requirements**

**7.2.1** The following security requirements (SRCL and related clauses provided by ISP) apply and form part of the Standing Offer:

The **Contractor** and/or any and all **subcontractors** must be from a country within the North Atlantic Treaty Organization (NATO), the European Union (EU) or from a country with which Canada has an International bilateral industrial security instrument. The Industrial Security Program (ISP) has international bilateral industrial security instruments with countries listed on the following PWGSC website: <http://ssi-iss.tpsgc-pwgsc.gc.ca/gvnmnt/risi-iisr-eng.html>.

4. Exhibit PR-2017-010-11, exhibit 1, s. 6.1(2), at 38, Vol. 1C.

5. Exhibit PR-2017-010-11, exhibit 1, s. 4.1.3, at 35, Vol. 1C.

6. Exhibit PR-2017-010-11, exhibit 1, s. 7.2.1, at 40-41, Vol. 1C.

All **CANADA CLASSIFIED** Level information/assets, furnished to the Foreign recipient **Contractor / Offeror** or produced by the Foreign recipient **Contractor / Offeror**, shall be safeguarded as follows:

1. The Foreign recipient **Contractor / Offeror** shall, at all times *during the performance of the Contract*, hold a *valid Facility Security Clearance*, issued by the National Security Authority (NSA) or *Designated Security Authority (DSA) of their country*, at the *equivalent level of CONFIDENTIAL*, and hold an approved Document Safeguarding Capability Clearance at the level of **CONFIDENTIAL**.
7. **CANADA CLASSIFIED** information/assets shall be released only to Foreign recipient **Contractor / Offeror** personnel, who have a need-to-know for the performance of the **Contract** and who have a *Personnel Security Clearance* at the level of **CONFIDENTIAL**, granted by their respective country.

[Emphasis added, bold in original]

9. Finally, Amendment 2 to the RFSO (dated June 13, 2016) included questions and answers regarding the RFSO. The relationship between the security clearances and award of the Standing Offer was addressed at Question 2, which reads as follows:<sup>7</sup>

2) Could you possibly indicate when you would expect award of the contract as well as the Start Date of any awarded contracts?

a. At this time, we are not able to estimate this date *as the Standing Offer Holder will have to acquire the appropriate Security Clearances before a document is issued*.

[Emphasis added]

## RFSO Evaluation

10. PWGSC received five proposals, three of which were deemed compliant: SCA's, MLS's, and a third-party bidder.<sup>8</sup> The terms of the RFSO provided for award to the compliant bidder with the highest combined technical score (as determined by DND, the Technical Evaluation Authority) and price score (as determined by PWGSC, the Standing Offer Authority). On June 28, 2016, the PWGSC Standing Offer Authority (which was also responsible for determining compliance with the security requirements) wrote to the PWGSC Industrial Security Program (ISS) Office, requesting information regarding the security clearances in ISS's records for all five bidders.<sup>9</sup> As foreign companies, SCA and MLS both needed clearances from their home country, the United Kingdom (U.K.).

11. On or about July 27, 2016, while the security clearance review process was still underway, the highest-ranked bidder was determined to be SCA (MLS ranked second).<sup>10</sup> ISS advised the PWGSC Standing Offer Authority at this time [REDACTED]

[REDACTED]<sup>11</sup>

12. On August 19, 2016, ISS advised the PWGSC Standing Offer Authority that [REDACTED]. The PWGSC Standing Offer Authority

7. Exhibit PR-2017-010-11, exhibit 3, at 214, Vol. 1C.

8. Exhibit PR-2017-010-11, paras. 10 and 15, at 8, Vol. 1C.

9. Exhibit PR-2017-010-11, para. 13, at 8, Vol. 1C. Exhibit PR-2017-010-11, exhibit 4, at 217, Vol. 1C.

10. Exhibit PR-2017-010-11, para. 16, at 8, Vol. 1C.

11. Exhibit PR-2017-010-11A, exhibit 7 (protected), at 31, Vol. 2.

indicated to ISS that [REDACTED]

[REDACTED].<sup>12</sup>

13. On August 26, 2016, ISS advised the PWGSC Standing Offer Authority that [REDACTED]

[REDACTED].<sup>13</sup>

14. On November 18, 2016, SCA emailed the PWGSC Standing Offer Authority representing that it was [REDACTED]

[REDACTED]. SCA stated that [REDACTED]

[REDACTED].<sup>14</sup>

15. On November 22, 2016, the PWGSC Standing Offer Authority referred the question to ISS. ISS advised that [REDACTED] and [REDACTED]

[REDACTED].<sup>15</sup>

16. ISS also referred the PWGSC Standing Offer Authority's questions to the Deputy Director of International Industrial Security Directorate (IISD) of the Designated Security Authority (DSA) Office of Public Services and Procurement Canada, and on December 13, 2016, the latter responded as follows to the PWGSC Standing Offer Authority regarding the sufficiency of a provisional clearance:<sup>16</sup>

Please be advised that following my discussion with the UK DSA I can confirmed [*sic*] that the Provisional List X is common in the UK.

This indicated [*sic*] that the company has been vet like here in Canada for FSC/DSC and their staffs have the required PSC.

Therefore the Provisional LIST X status is to ensure they can safely handle and store CLASSIFIED information and as soon as they are award[ed] a valid contract they will have their full List X status.

and

FYI – [“]Provisional List X” is simply a term that the UK MOD use to identify a contractor that has been the subject of and satisfied the FSC due diligence and physical security process but has not yet been awarded a contract involving UK Secret or International partner/organisation Confidential information.

When a contract at that level is awarded the provisional List X status is converted to List X. It is just the way the UK work[s] in the MOD and they do it simply to s[h]o[w] that contractors that are not already participating in classified contract[s] but have gone through the clearance process can bid on classified contract[s]. If they fail in their bid and are not invited to bid for another contract again within a year the provisional List X status will be withdrawn.

[Underlining in original]

17. On December 14, 2016, the Deputy Director [REDACTED]

[REDACTED].<sup>17</sup>

- 
12. Exhibit PR-2017-010-11A, exhibit 9 (protected), at 36-37, Vol. 2.  
13. Exhibit PR-2017-010-11A, exhibit 9 (protected), at 36, Vol. 2.  
14. Exhibit PR-2017-010-11A, exhibit 13 (protected), at 48-50, Vol. 2.  
15. Exhibit PR-2017-010-11A, exhibit 14 (protected), at 53, Vol. 2.  
16. Exhibit PR-2017-010-11, exhibit 18, at 226-228, Vol. 1C.  
17. Exhibit PR-2017-010-11A, exhibit 19 (protected), at 78, Vol. 2.



18. On the same day, the PWGSC Standing Offer Authority sought and obtained the consent of the three compliant bidders to extend the period of validity of their bids by 35 days until January 18, 2017.<sup>18</sup>

19. On December 22, 2016, SCA informed the PWGSC Standing Offer Authority that [REDACTED].<sup>19</sup> The PWGSC Standing Offer Authority forwarded the SCA email and letter to the Deputy Director and asked him to confirm that SCA had obtained the required clearances. The Deputy Director reported that [REDACTED] [emphasis added, underlining in original]. The Deputy Director attached in his reply email to the PWGSC Standing Offer Authority a copy of a second letter from the U.K. Ministry of Defence confirming the same. He also reiterated that, [REDACTED].<sup>20</sup>

20. PWGSC awarded the Standing Offer under the RFSO to SCA on January 16, 2017. [REDACTED].<sup>21</sup>

## TRADE AGREEMENT

21. Section 1.2. of Part 1 of the RFSO provides that it is governed by, *inter alia*, the *Agreement on Government Procurement*, the only relevant trade agreement in this matter given that MLS (the corporate entity in whose name both the complaint and the RFSO bid were filed) is a company registered under the laws of England and Wales.<sup>22</sup>

22. MLS submits that the award to SCA of the Standing Offer is in breach of paragraph 4 of Article XV of the *AGP*, which provides the following:

4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be from a supplier that satisfies the conditions for participation.

## ANALYSIS

23. The principles governing the Tribunal's review of government institutions' evaluations of proposals in procurements are well settled and simply stated. The Tribunal will only interfere with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when 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 requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>23</sup> In addition, a government institution's

---

18. Exhibit PR-2017-010-11, para. 37, at 12, Vol. 1C.

19. Exhibit PR-2017-010-11A, exhibit 20 (protected) and exhibit 21 (protected), Vol. 2.

20. Exhibit PR-2017-010-11A, exhibit 22 (protected), at 89-91, Vol. 2.

21. Exhibit PR-2017-010-11A, exhibit 10 (protected), at 40, Vol. 2.

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

23. *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.<sup>24</sup>

### MLS's Position

24. MLS argues that PWGSC unreasonably determined that SCA had the required Facility Security Clearance and Personnel Security Clearance from the U.K. at the time PWGSC awarded it the Standing Offer on January 16, 2017.

25. MLS's initial theory of the case was that it believed SCA had (inaccurately) represented to PWGSC that SCA held valid security clearances, on the basis that SCA expected to obtain U.K. security clearances from the U.K. Ministry of Defence in connection with a contemporaneous U.K. procurement in which it had competed and won against MLS but not yet been allowed to perform the contract due to litigation and an extension of MLS's incumbent contract.<sup>25</sup> MLS also argued that SCA did not qualify for the U.K. equivalent of a Facility Security Clearance (or, consequently, a Personnel Security Clearance) under U.K. policy.

26. However, after PWGSC demonstrated in the Government Institution Report (GIR) that the U.K. Ministry of Defence had in fact issued SCA a letter confirming a provisional Facility Security Clearance and an individual clearance for confidential and protected information for Ms. [REDACTED] (one of SCA's directors), MLS then argued that a provisional (rather than a final) List X clearance was insufficient for award of the Standing Offer, and, regardless, that the evidence put forth by PWGSC in the GIR was hearsay, insufficient evidence of compliance with the requirements articulated under U.K. policy.

#### Facility Security Clearance

27. MLS submits that the equivalent of a Facility Security Clearance in the U.K. is a "List X" clearance. It maintains that only companies that are already working on U.K. government contracts that require them to hold classified information at "Confidential" or above can be granted List X clearance. It submits that the requirements for obtaining a List X clearance are stated in the U.K. Cabinet Office document *Security Requirements for List X Contractors*, paragraph 6 of which provides the following:<sup>26</sup>

6. The contractor will need to make the following appointments to satisfy mandatory requirements for the supervision of the appropriate security aspects:

a) **Board Level Contact** - who *must* be a British national and a member of the Board of Directors, who will have overall responsibility for security.

b) **Security Controller** - *must* be a British national who is responsible to the Board Level Contact for the day to day security aspects within the facility - a large contractor, or a contractor with substantial contractual obligations, will have a full time Security Controller, supported by one or more security staff - a contractor with a number of different sites, may need to appoint Local Security Contacts, who report to a [Group] Security Controller.

[Emphasis in original]

---

24. *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CIIT) at paras. 26-27.

25. Exhibit PR-2017-010-01, attachment 2, para. 17, at 26, Vol. 1.

26. Exhibit PR-2017-010-01, attachment 2, exhibit G, at 71, Vol. 1.

28. MLS argues that SCA could not have obtained a List X clearance (or its equivalent Facility Security Clearance required under the RFSO) because its Board of Directors does not include a British national. A corporate annual return for SCA filed on January 22, 2016 (but dated October 6, 2015), shows only Mr. Carlos Alberto Iglesias Murialdo, identified as a Spanish national, as a director.<sup>27</sup> A more recent report on SCA from business research company Endole dated January 25, 2017, identifies Mr. Murialdo again as a director, but also one new director as of June 15, 2016, Ms. Saty Diane Siaba.<sup>28</sup>

29. MLS further submits that a provisional List X clearance is insufficient for award of the Standing Offer. MLS argues that PWGSC has submitted no evidence of final confirmation from the U.K. that a full (as opposed to provisional) List X clearance was ever granted to SCA. MLS also characterizes the evidence included in the GIR consisting of emails between PWGSC and ISS, SCA, and the Deputy Director reflecting the U.K. security clearance process as indirect or hearsay evidence that does not sufficiently establish how SCA met the U.K.'s security clearance requirements as articulated in the *Security Requirements for List X Contractors*.

30. Finally, MLS submits that PWGSC did not independently verify the contents of the U.K. Ministry of Defence's letter. MLS notes the registered address SCA originally provided PWGSC was "144 Castle Street Edgeley, SK3 9JH" and included on the Provisional Facility Security Clearance issued by the U.K. was changed (before the award of the Standing Offer), according to the Endole report dated January 25, 2017, filed in MLS's affidavit, in October 2016 to "Apex Self Storage, Manchester Abattoir, Riverpark R, Manchester M40 2XP". MLS describes this new address as a "virtual office", objecting that "... SCA has no real or effective presence in the UK."<sup>29</sup>

#### Personnel Security Clearance

31. As for the Personnel Security Clearance, MLS argues that absent a Facility Security Clearance the U.K. will not issue a Personnel Security Clearance. In the absence of a Facility Security Clearance, therefore, SCA could not have a Personnel Security Clearance.

32. MLS also relies on a letter dated April 13, 2017, from SCA to the U.K. Ministry of Defence regarding the aforementioned U.K. procurement. MLS submits that this letter (specifically, the use of the infinitive "to be" describing its personnel) is evidence that SCA does not hold valid Personnel Security Clearances in the U.K. In the letter, SCA discusses the recruitment difficulties engendered being the winning bidder but not able to perform the contract:<sup>30</sup>

SCA has the necessity to allocate an appropriate number of skilled managers and operators, including the Contract Manager, in order to comply with the contract requirements and ensure an efficient execution. This allocation includes the recruitment of new personnel *to be also security cleared*. These individuals, all British citizens, experts in the port agency & logistics industry, have been pre-selected during the bidding phase, have been pre-alerted during the standstill period and were to sign some preliminary employment contracts immediately after the award, originally foreseen on February the 13th 2017.

[Emphasis added]

---

27. Exhibit PR-2017-010-01, attachment 2, exhibit D, at 38, Vol. 1.

28. Exhibit PR-2017-010-01, attachment 2, exhibit H, at 115, Vol. 1.

29. Exhibit PR-2017-010-01, para. 34, Vol. 1.

30. Exhibit PR-2017-010-01, attachment 2, exhibit I, at 125, Vol. 1.

33. In response to the GIR, MLS submits that PWGSC has not proven that SCA had appropriate Personnel Security Clearances “for all necessary personnel involved with the Standing Offer contract” as opposed to the single individual (Ms. [REDACTED]) approved by the U.K. Ministry of Defence. It also notes that the U.K. Ministry of Defence letters do not explicitly on their face state that Ms. [REDACTED] has a “Personnel Security Clearance” but only that she “has been cleared to view” “protectively marked” and “classified” material as SCA’s Security Controller officer.

### **PWGSC’s Position**

34. In response to MLS’s submissions, PWGSC laid out in chronological detail the PWGSC Standing Offer Authority’s communications with SCA, ISS and the Deputy Director to illustrate how the certifications were confirmed.

35. It submits that its due diligence and reasonableness is demonstrated by the lengthy email history, and that the letters from the U.K. Ministry of Defence confirming provisional List X Facility Security Clearance and Personnel Security Clearance for Ms. [REDACTED] (stated in all but name in the letters and confirmed by the Deputy Director via direct conversations with the U.K.) are sufficient to prove that at the time of award of the Standing Offer SCA had a valid Facility Security Clearance and Personnel Security Clearance.

### **Analysis**

36. The Tribunal finds that the provisional clearances provided to SCA were sufficient to meet the security clearance requirements of the RFSO. The Tribunal further finds that, regardless, PWGSC reasonably relied on the determination of the U.K. Ministry of Defence that SCA met its own requirements for obtaining a Facility Security Clearance and a Personnel Security Clearance.

#### Provisional U.K. Facility and Personnel Security Clearances Were Valid and Satisfied the Requirements of the RFSO

37. Section 7.2(1) of the RFSO required that the bidder hold at contract award “a valid Facility Security Clearance, issued by the National Security Authority (NSA) or Designated Security Authority (DSA) of their country, at the equivalent level of **CONFIDENTIAL . . .**” Section 7.2(7) required that personnel who (per section 6.1(1)(b)) “requir[e] access to classified or protected information” must “have a Personnel Security Clearance at the level of **CONFIDENTIAL**, granted by their respective NSA/DSA, in accordance with the National Policies of **their respective country**.”

38. The evidence that SCA held, at the time of contract award, a valid Facility Security Clearance and Personnel Security Clearance issued by the U.K. DSA sufficient to permit its facility to store and its designated personnel to handle classified and protected information is robust.

39. PWGSC adduced direct evidence that SCA held a provisional Facility Security Clearance at the time of contract award in the form of two letters from the U.K. Ministry of Defence to SCA. The first (dated December 22, 2016) reads as follows:

I would like to advise you that your firm’s premises at the location detailed below now holds  
**PROVISIONAL Facility Security Clearance:**

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

Individual who has been cleared to view protectively marked material is:

**Security Controller Mrs. [REDACTED].**

40. The second letter (dated December 23, 2016) reads as follows:<sup>31</sup>

I would like to advise you that your firm's premises at the location detailed below now holds  
**PROVISIONAL Facility Security Clearance:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Individual who has been cleared to view classified material is:

**Security Controller Mrs. [REDACTED].**

41. These are official notices of Facility Security Clearances for SCA from the Defence Equipment and Support Principal Security Advisor (DE&S PSyA) of the U.K. Ministry of Defence. The Deputy Director of Canada's DSA at PSPC confirmed that he [REDACTED]

[REDACTED]<sup>32</sup>

42. MLS takes issue with the "provisional" status of the clearances, but it has provided no evidence to rebut the evidence of the Deputy Director that the provisional status reflects only the absence of a current contract with the U.K. government. There is no suggestion on the record that a provisional clearance is less comprehensive or otherwise inadequate for Canadian or U.K. security purposes.

43. Further, MLS has not identified any language in the RFP explicitly requiring that the required security clearances be "final" and not "provisional". In fact, the operative words in the RFSO require the clearances to be "valid", issued by the DSA of their country, and "equivalent" to a Confidential level clearance for purposes of handling classified and protected information: all conditions which are met here. MLS admits that List X status is the valid equivalent Facility Security Clearance issued by the U.K. Ministry of Defence.<sup>33</sup> The notice dated December 22, 2016, from the U.K. Ministry of Defence reads that "[i]n order to gain full List X status this facility must be in receipt of a contract which requires the holding of protectively marked information at **SECRET** or above"; and the notice dated December 23, 2016, reads the same but for the words "classified information" instead of "protectively marked information".<sup>34</sup>

---

31. Based on the above, MLS is incorrect to say that the letters from the U.K. Ministry of Defence contain outdated SCA address information, as the December 23, 2016, letter uses the SCA's current address.

32. Exhibit PR-2017-010-11A, exhibit 22 (protected), at 89, Vol. 2.

33. Exhibit PR-2017-010-01, paras. 11-12, at 15-16, Vol. 1.

34. Exhibit PR-2017-010-11A, exhibit 21 (protected), at 87, Vol. 2. Exhibit PR-2017-010-11A, exhibit 22 (protected), at 91, Vol. 2.

44. The evidence of the Deputy Director in his email exchanges with the PWGSC Standing Offer Authority conveying his understanding of provisional List X status based on his own knowledge and his conversations with his U.K. DSA counterpart support the finding that the provisional Facility Security Clearance and Personnel Security Clearance are functionally equivalent for the purpose of handling Canadian classified information under the Standing Offer and indeed become final upon contract award. The emails and letters on the record consistently represent that the U.K. will not issue a final clearance until after contract award. MLS disparages these as indirect and hearsay, but in fact they are authentic contemporaneous records of the security clearance process written by a senior official at PSPC's DSA office in the course of his interactions with PWGSC and his U.K. DSA counterpart. They are presumed regular, absent evidence to the contrary.

45. Moreover, as a legal matter, PWGSC's interpretation of the RFSO to accept a provisional clearance is reasonable because, in addition to the textual considerations above, it is consistent with the goals of the trade agreements in that it facilitates competition from non-incumbents who do not have a government contract in their home state. Under MLS's interpretation, a non-incumbent from a country that only issues provisional clearances could not meet this requirement if a provisional clearance is inadequate (unless explicitly recognized in the tender documents). The Tribunal does not believe that this was the intention or understanding of PWGSC or bidders at the time the RFSO was issued. Such a result is also inconsistent with the framework of the RFSO security requirements found in Section 7, which acknowledges Canada's security partnerships founded on membership in NATO, the EU, and international bilateral industrial security instruments.

46. PWGSC's interpretation is also to be preferred because it is functional and pragmatic rather than formalistic. It is to be remembered that the security clearance requirements were an operational requirement to be demonstrated before contract award, not at time of bid submission. The purpose was to ensure that classified information could be shared with the contract awardee – that purpose has been served by issuance of a provisional Facility Security Clearance and Personnel Security Clearance from the partner U.K. government.

47. As for the nationality of SCA's board and security controller, the U.K. notices identify Ms. [REDACTED] (an SCA board member) as SCA's Security Controller and as an individual cleared to view protected and classified material. To the extent that the nationality requirements found in Section 6 of the *Security Requirements for List X Contractors* do in fact govern the U.K. Ministry of Defence's awarding of List X clearances, its clearance of her in the notices is implicit evidence of her U.K. nationality. The only other purported evidence of Ms. [REDACTED] nationality is the Endole report in MLS's affidavit. That report does not clearly specify her nationality; it merely puts in parentheses after her name "[REDACTED]". It does not state explicitly that that is her nationality or state whether she has a dual citizenship. Further, the Endole report is a private, unofficial third-party document. It is (unlike the U.K. Ministry of Defence's notices) not an official report from SCA or the U.K. government.

48. On the issue of Personnel Security Clearance, given the demonstrated issuance of a (provisional) Facility Security Clearance, MLS's argument that SCA could not have a Personnel Security Clearance in the absence of the former is rebutted. Further, although MLS is correct that the U.K. letters do not specifically use the words "Personnel Security Clearance", they do explicitly state that Ms. [REDACTED] has authority to view protected and classified material. Additionally, the Deputy Director does represent in his email to PWGSC that the U.K. DSA confirmed to him on December 22, 2016, that the SCA representative (presumably Ms. [REDACTED]) "has now been granted their personnel security clearance."<sup>35</sup> MLS also relies

---

35. Exhibit PR-2017-010-11A, exhibit 22 (protected), at 89-91, Vol. 2.

significantly on SCA's letter dated April 13, 2017, in which SCA alluded to "the recruitment of new personnel to be also security cleared", but this letter regards a different procurement by a different government. It is not evidence that Ms. [REDACTED] was not properly issued a valid Personnel Security Clearance by the U.K. Ministry of Defence with respect to the RFSO.

49. MLS is correct that section 6.1(1) requires that as a precondition of contract award the bidder "must provide the name of all individuals who will require access to classified or protected information" and that the bidder's "proposed individuals requiring access to classified or protected information . . . must meet the security requirements". SCA's proposal has not been filed, and there is no evidence on who it proposed. The only SCA personnel with any security clearance is Ms. [REDACTED]. One person may, as MLS argues, seem low for the number of staff required to access confidential information on the Standing Offer; however, it is notable that MLS proposed only [REDACTED] individuals itself in Section IV of its own proposal.<sup>36</sup>

#### PWGSC's Reliance on U.K. Security Clearance Notices and Communications Was Reasonable

50. The Tribunal also finds that PWGSC properly relied on the written and oral communications with the U.K. Ministry of Defence regarding SCA's security clearances, rather than conducting its own independent assessment of whether SCA met the requirements under U.K. laws for issuance of the clearances. First, Canada has negotiated a bilateral Industrial Security Memorandum of Understanding with the U.K. that covers, *inter alia*, reciprocal personnel and facility security clearances and the extent to which each government will conduct compliance/oversight inspections and audits.<sup>37</sup> Second, for the reasons already provided above, the text and structure of the RFSO contemplate PWGSC accepting a security clearance conducted by home country DSA in lieu of conducting its own security check for the winning bidder. For these reasons, a presumption of reliability regarding the U.K.'s security clearance procedures is warranted.

51. In terms of rebutting that presumption, MLS has provided no evidence or authority that the U.K.'s Facility Security Clearance and Personnel Security Clearance verification processes (either in this instance or generally) are unreliable in terms of ensuring the confidentiality of Canadian military intelligence. Further, MLS has not cited a single case or other legal authority to support its argument that PWGSC was bound to independently and accurately determine whether in its opinion SCA met the U.K.'s legal requirements for security certification, regardless of and even (at least in this case in MLS's submission) in defiance of the U.K. Ministry of Defence's own determination. The Tribunal rejects such a proposition which, if endorsed, would have significant disruptive negative ramifications in terms of comity between Canadian and foreign partner governments and in terms of the burden on PWGSC in duplicating security clearance procedures.

#### **DETERMINATION**

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

---

36. Exhibit PR-2017-010-01A, attachment 4(e) (protected) at 57, Vol. 2.

37. See PWGSC, Industrial Security Manual, Chapter 11 – International Security Issues, s. 1102(3): "Prior to release of PROTECTED/CLASSIFIED information/assets to foreign interests, IISD must request and receive a security assurance from the responsible foreign government (eg. level of Facility Security Clearance held by the recipient organization)" and s. 1103(3) (describing industrial security agreements), online: <http://iss-ssi.pwgsc-tpsgc.gc.ca/msi-ism/ch11-eng.html>. See PWGSC, International contract security requirements, Bilateral industrial security instruments (identifying the U.K. as one of the countries with which "Canada has negotiated bilateral industrial security instruments"), online: <https://www.tpsgc-pwgsc.gc.ca/esc-src/international-eng.html?wbdisable=true>.

53. Both parties requested their costs in relation to this proceeding, although neither specified at what amount or level of complexity.

54. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by MLS. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity of the complaint is Level 2 and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the cost decision, it may make submissions to the Tribunal, as contemplated by Article 4.2 of the *Procurement Costs Guideline*.

55. The Tribunal reserves jurisdiction to establish the final amount of the costs award.

Peter Burn

Peter Burn  
Presiding Member