



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-044

Bluenose Transit Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, March 6, 2020*

*Corrigendum issued
Friday, May 8, 2020*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

BLUENOSE TRANSIT INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that a new solicitation be issued and that the Department of Public Works and Government Services adequately maintain a record of the bid evaluation process.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bluenose Transit Inc. its reasonable bid preparation costs, which costs are to be paid by the Department of Public Works and Government Services.

Should the parties be unable to agree on the amount of bid preparation costs, Bluenose Transit Inc. shall file with the Canadian International Trade Tribunal, within 30 days of the date of this determination, a submission on the issue of costs. The Department of Public Works and Government Services will then have seven working days after receipt of Bluenose Transit Inc.'s submissions to file a response. Bluenose Transit Inc. will then have five working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments. The parties are required to serve each other and file with the Canadian International Trade Tribunal.

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

Peter Burn

Peter Burn
Presiding Member

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

BLUENOSE TRANSIT INC.

Complainant

AND

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

**Government
Institution**

CORRIGENDUM

Paragraph 8 should read as follows:

PWGSC received two bids, one from Coach Atlantic and the other from Bluenose.

By order of the Tribunal

Peter Burn

Peter Burn

Presiding Member

Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Helen Byon, Counsel
Complainant:	Bluenose Transit Inc.
Counsel for the Complainant:	Gerry Stobo Marc McLaren-Caux E. Melisa Celebican
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan Clarke Roy Chamoun Nick Howard Benjamin Hiemstra

Please address all communications to:

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

STATEMENT OF REASONS

[1] This inquiry concerns a complaint filed by Bluenose Transit Inc. (Bluenose) in relation to a Request for Standing Offer (RFSO) (Solicitation No. W0102-20019D/A) conducted by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence. The solicitation was for a Regional Individual Standing Offer (SO) to charter 40 to 48 passenger activity buses (with operator). The buses would be used to transport Regular Force, Cadets, and Militia personnel from 14 Wing Greenwood, Nova Scotia, to various locations within the Atlantic Provinces for DND 14 Wing Transportation Section, Greenwood, Nova Scotia.

[2] Having determined that the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*¹ had been met in respect of the complaint, the Tribunal decided, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, to conduct an inquiry into the complaint.²

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

SUMMARY OF COMPLAINT

[4] In its complaint, Bluenose claimed that PWGSC awarded the SO to *Coach Atlantic Transportation Group Inc.* (Coach Atlantic) despite the fact that Coach Atlantic's bid was non-compliant with the RFSO. There were two main allegations raised in the complaint. First, Bluenose alleged that Coach Atlantic's location exceeded the minimum distance requirement set out in item 16 of the RFSO, Annex "A" – Statement of Work (SOW), which required contractors to be within 40 to 50 kilometres of 14 Wing Greenwood.³ Secondly, it submitted that Coach Atlantic's financial bid was based on rates that were below the mandatory rates prescribed by the Nova Scotia Utility and Review Board (NSURB) under the province's *Motor Carrier Act*.⁴ Bluenose submitted that this was a violation of the laws of Nova Scotia and, therefore, Coach Atlantic's bid should have been found non-compliant.

[5] Following PWGSC's decision to cancel the SO and re-tender, as discussed below, Bluenose requested, as remedy, that the Tribunal recommend that PWGSC issue the SO to it and provide compensation for lost profits for the work already performed by Coach Atlantic. In the alternative, Bluenose requested that the Tribunal recommend compensation for the prejudice it suffered by being denied the SO and the opportunity to perform the work. It also sought compensation that reflected the seriousness of PWGSC's failure to maintain a record of the evaluation process and its conduct during the objection process. Bluenose requested payment in the lump sum of \$10,000. In respect of the re-tendering, Bluenose sought a recommendation that PWGSC require bidders to positively demonstrate compliance with NSURB prescribed rates.

[6] Bluenose also requested its complaint costs. PWGSC submitted that Bluenose was entitled to its costs at Level 1 in accordance with the Tribunal's *Procurement Costs Guideline* (the *Guideline*).

¹ SOR/93-602 [*Regulations*].

² R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

³ Exhibit PR-2019-044-06, Vol. 1 at 23.

⁴ R.S.N.S. 1989, c. 292 [*Motor Carrier Act*].

PROCEDURAL BACKGROUND

The RFSO process

[7] On September 4, 2019, PWGSC published the RFSO. The bidding period closed on September 24, 2019.

[8] Bluenose received two bids, one from Coach Atlantic and the other from Bluenose.

[9] PWGSC advised Bluenose, on October 16, 2019, that the SO was issued to Coach Atlantic, who had the lowest-priced compliant bid.⁵

[10] The next day, on October 17, 2019, Bluenose advised PWGSC that Coach Atlantic did not have a responsive bid to the RFSO. Bluenose indicated that Coach Atlantic was located at a distance greater than the minimum distance requirement in the RFSO. In addition, Bluenose indicated that Coach Atlantic's financial bid was not in compliance with Coach Atlantic's published NSURB rates.⁶

[11] The evidence on the record indicates that PWGSC ceased communicating with Bluenose on October 18, 2019. According to the affidavit of Rea O'Leary of Bluenose, PWGSC stated, during a telephone conversation, that it could no longer discuss the objection raised by Bluenose, as Bluenose's counsel had been copied on the correspondence between the parties.⁷ No written confirmation was provided by PWGSC.

[12] On November 5, 6 and 7, 2019, DND issued six call-ups under the SO, valued at \$7,696.39.⁸

Complaint proceedings

[13] Bluenose filed its complaint on October 30, 2019. The complaint was accepted for inquiry on November 1, 2019.

[14] In the Government Institution Report (GIR) filed with the Tribunal on December 2, 2019, PWGSC stated that it had reviewed the bids on November 8, 2019, and determined that both Coach Atlantic and Bluenose had non-compliant bids. PWGSC indicated that Bluenose's bid was responsive to the distance requirement in item 16 of the SOW, but did not provide information to demonstrate compliance with other criteria.⁹ PWGSC submitted evidence that it notified the bidders on November 20, 2019, of its decision to set aside the SO and re-tender the requirement.¹⁰

[15] Bluenose filed its comments on the GIR on December 9, 2019. Noting the lack of documentation concerning the evaluation of the bids in the GIR, Bluenose requested that the Tribunal direct PWGSC to disclose all records produced by the evaluator that relate to the evaluation of the bids or to expressly confirm that no such records exist.

⁵ Exhibit PR-2019-044-01, Vol. 1 at 72.

⁶ *Ibid.* at 103-107.

⁷ *Ibid.* at 63, 109, 110.

⁸ Exhibit PR-2019-044-08, Vol. 1 at 3 (para. 6); Exhibit PR-2019-044-08A (protected), Vol. 2 at 6-26.

⁹ Exhibit PR-2019-044-08, Vol. 1 at 4 (para. 11).

¹⁰ Exhibit PR-2019-044-08A (protected), Vol. 2 at 31-36; Exhibit PR-2019-044-08, Vol. 1 at 3 (para. 7).

[16] On December 11, 2019, PWGSC requested an opportunity to respond to Bluenose's comments on the GIR, in particular with respect to the submissions concerning Bluenose's bid and content of the solicitation documents in the re-tender.¹¹ Bluenose objected to any further submissions from PWGSC regarding its bid but consented to further submissions regarding any terms of the re-solicitation that could be recommended by the Tribunal.¹²

[17] On December 13, 2019, the Tribunal granted PWGSC's request in part, permitting further submissions on the terms of the re-tendering. The Tribunal also requested submissions from PWGSC on Bluenose's request to the Tribunal for it to direct PWGSC to disclose all of the documents related to the evaluation of the bids or to expressly confirm that no other records exist.

[18] PWGSC filed its submissions on Bluenose's comments on the GIR on December 19, 2019. Bluenose's filed its response on December 30, 2019.

[19] 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 ruled on the complaint based on the written record.

PRELIMINARY MATTERS

Production of documents

[20] With respect to documentation of the evaluation, PWGSC submitted with the GIR, copies of the bids and worksheets produced during the financial evaluation. PWGSC indicated that "[a] PWGSC official reviewed the bids and initially determined that they were both compliant. . . . Worksheets were produced only during the financial evaluation."¹³

[21] In its comments on the GIR, Bluenose raised its concern about the "complete absence of records" maintained by PWGSC concerning the evaluation. Bluenose submitted that PWGSC's record of its evaluation is deficient, stating that "PWGSC has attempted to obscure or diminish the fact that it apparently maintained no records of the evaluation"¹⁴ With respect to the worksheets, Bluenose noted that they appeared to be reproductions of the financial bids of the bidders.

[22] In response to the Tribunal's request on December 13, 2019, for submissions regarding the documents related to the evaluation, PWGSC confirmed on December 19, 2019, that there were no further evaluation documents.¹⁵ No explanation was provided by PWGSC regarding the lack of documentation. On the basis that PWGSC had stated that it had no other documents, the Tribunal was of the view that it was not necessary to issue an order for the production of documents relating to the evaluation of the bids.

[23] The Tribunal was also of the view that it could dispose of the complaint based on the written record of the inquiry proceedings.¹⁶ PWGSC had conceded in the GIR that Coach Atlantic's bid was

¹¹ Exhibit PR-2019-044-11, Vol. 1 at 1.

¹² Exhibit PR-2019-044-12, Vol. 1 at 1, 2.

¹³ Exhibit PR-2019-044-08, Vol. 1 at 2 (para. 3).

¹⁴ Exhibit PR-2019-044-10, Vol. 1 at 4 (para. 6).

¹⁵ Exhibit PR-2019-044-14, Vol. 1 at 2 (para. 3).

¹⁶ While there was sufficient information on the written record to rule on the complaint, proper documentation of the evaluation nonetheless comprises an important component of the record of the solicitation process that must be retained to ensure that unsuccessful bidders may have insight into the evaluation process. See *CGI Information Systems* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) [*CGI*] at para. 95.

non-compliant and the allegation concerning the NSURB rates could be resolved by analyzing the relevant terms of the RFSO.

New allegations with respect to Coach Atlantic's bid

[24] Bluenose raised several new allegations in its comments on the GIR concerning the non-compliance of Coach Atlantic's bid. Essentially, it submitted that PWGSC should have found Coach Atlantic non-compliant as its bid did not sufficiently respond to sections 3.1, 5.1 and 6.1 of the RFSO.¹⁷ Briefly, section 3.1 (Section I: Technical Offer) required bidders to explain how they proposed to meet the technical requirements and carry out the work, section 5.1 required bidders to submit certain completed certifications as part of their bid, and section 6.1 addressed insurance requirements.¹⁸ As a footnote to its submissions, Bluenose stated that since PWGSC had conceded that Coach Atlantic's bid was non-compliant and cancelled the SO, it did not view that it was necessary to file a second complaint in respect of the other additional aspects of Coach Atlantic's bid it viewed to be non-compliant. However, to the extent that the Tribunal found it necessary to do so, Bluenose requested that its submissions be treated as a new complaint filed within the prescribed timeline set out in the *Regulations*.¹⁹

[25] With respect to the manner in which Bluenose has raised these new allegations concerning Coach Atlantic's bid, the Tribunal notes that, pursuant to subsection 30.11(1) of the *CITT Act*, the potential supplier has the sole discretion to file a complaint and request the Tribunal to conduct an inquiry into the complaint. The Tribunal has no discretion itself to determine *whether it is necessary*, in the context of an ongoing inquiry, to treat submissions as a new ground of complaint filed under subsection 30.11(1), particularly in the case where the complainant expressed its view that it was not necessary to file a second complaint. In this regard, the Tribunal has previously stated that complainants must fully and completely articulate the grounds of complaint at the time that the complaint is filed. This requirement is essential for the Tribunal to frame the subject matter of its inquiry, as the consideration of a new ground of complaint would constitute a substantive amendment to the complaint, in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint. In addition, the government institution is entitled to know the precise allegations against which it must defend at the time at which a complaint is filed.²⁰

[26] Having said the above, considering that PWGSC has already conceded that Coach Atlantic's bid was non-compliant and that it should not have issued the SO to Coach Atlantic, the additional allegations raised by Bluenose are moot. As such, the Tribunal need not inquire further into whether Bluenose has filed a new complaint under subsection 30.11(1) of the *CITT Act*.

Bluenose's non-compliant bid

[27] As noted above, after this complaint was accepted for inquiry, PWGSC submitted that it re-evaluated the bids and determined that both bids were non-compliant. PWGSC indicated that Bluenose's bid was responsive to the distance requirement in item 16 of the SOW, but that it did not

¹⁷ Exhibit PR-2019-044-10, Vol. 1 at 6-8 (paras. 13, 14); Exhibit PR-2019-044-10A (protected), Vol. 2 at 6-8 (paras. 13, 14).

¹⁸ Exhibit PR-2019-044-06, Vol. 1 at 11, 13, 15.

¹⁹ Exhibit PR-2019-044-10, Vol. 1 at 6 (footnote 5).

²⁰ *Lanthier Bakery Ltd.* (6 May 2015), PR-2014-047 (CITT) at para. 36.

provide information to demonstrate compliance with other criteria.²¹ Bluenose addressed PWGSC's re-evaluation in its comments on the GIR, arguing essentially that the Tribunal should not accept PWGSC's position that Bluenose's bid is non-compliant. Bluenose submitted that there was no evidence to support PWGSC's conclusion: its technical offer sufficiently addressed section 12 of the SOW, and section 3.1 of the RFP (which requires bidders to explain and demonstrate how they propose to meet the requirement) should not be read to apply to all items listed in the SOW.

[28] In response to these submissions, PWGSC requested an opportunity to respond to the allegation that Bluenose's bid was compliant. However, Bluenose objected to PWGSC being permitted to file any such submissions. In its letter to the Tribunal, Bluenose stated that it had not raised "new arguments" in its comments on the GIR or any "new allegation that the Bluenose bid was compliant". It also referred to the GIR, which confirmed that the evaluator had previously found Bluenose's bid to be compliant.²²

[29] In the Tribunal's view, these allegations constitute a new ground of complaint as they deal with subject matter that was not raised in the original complaint, which had dealt exclusively with aspects of Coach Atlantic's bid that were argued to be non-compliant. As discussed above, consideration of a new ground of complaint would constitute a substantive amendment to the complaint in circumvention of section 7 of the *Regulations*. Since 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, the Tribunal will not inquire into the issues raised concerning the responsiveness of Bluenose's bid.

[30] Moreover, the Tribunal notes that the complaint would not have met the deadline for filing prescribed in the *Regulations*.²³ Bluenose would have become aware of the basis of the complaint on November 20, 2019, when it was notified of the results of PWGSC's bid re-evaluation and cancellation of the SO.²⁴ Pursuant to subsection 6(1) of the *Regulations*, the deadline for filing a complaint is 10 working days after the basis of complaint became known or reasonably should have become known. Accordingly, Bluenose was required to file its complaint on or before December 4, 2019, which is three working days before it filed its comments on the GIR, where Bluenose first raised this issue. There is also no evidence that an objection was made to PWGSC within the timeline prescribed in the *Regulations*.

TRIBUNAL'S 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 a complaint. At the conclusion of the inquiry, the Tribunal must determine whether a complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

²¹ Exhibit PR-2019-044-08, Vol. 1 at 4 (para. 11).

²² Exhibit PR-2019-044-12, Vol. 1 at 1, 2.

²³ See *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 42; *Falconry Concepts* (29 December 2010), PR-2010-46 (CITT) at paras. 76-78.

²⁴ Exhibit PR-2019-044-08A (protected), Vol. 2 at 36.

[32] In its complaint, Bluenose submitted that PWGSC breached Article 515(5) of the CFTA, which provides that a procuring entity shall award the contract “based solely on the evaluation criteria specified in the tender notices and tender documentation”.²⁵ Bluenose claimed that the SO was improperly issued to Coach Atlantic, as its bid was non-compliant with the RFSO.

Item 16 of the Statement of Work

[33] Bluenose claimed that Coach Atlantic did not meet the mandatory technical requirement set out in item 16 of the SOW, which required contractors to be “located within 40-50 km of 14 Wing Greenwood”.²⁶ In its complaint, Bluenose referred to Coach Atlantic’s addresses as they appeared on the Tender Award Notice issued by PWGSC, website and license issued by the NSURB.²⁷

[34] PWGSC conceded this ground of complaint, indicating that Coach Atlantic should not have been issued the SO as it was non-compliant in respect of item 16 of the SOW.²⁸ Accordingly, the Tribunal finds this ground of complaint to be valid.

NSURB rates

[35] Bluenose also alleged that Coach Atlantic should have been found non-compliant on the basis that the rates submitted in its financial bid were lower than the mandatory minimum rates prescribed by the NSURB under the *Motor Carrier Act*. Bluenose submitted that Coach Atlantic’s financial offer was contrary to section 2.5 of the RFSO, which stipulates the applicable laws. The provision reads as follows:

The Standing Offer and any contract resulting from the Standing Offer must be interpreted and governed, and the relations between the parties determined, by the laws in force in Nova Scotia.²⁹

[36] Additionally, Bluenose referred to paragraph 4.1(a) of the RFSO, which states that “[o]ffers will be assessed in accordance with the entire requirement of the Request for Standing Offers including the technical and financial evaluation criteria”.³⁰ Bluenose alleged that PWGSC knew, or reasonably ought to have known, that Nova Scotia law imposed rate restrictions on motor carriers in Nova Scotia, and, therefore, that compliance with mandatory rates was an essential term of the RFSO.³¹

[37] Bluenose provided the Tribunal with a copy of the NSURB’s Order M08498, dated February 20, 2018, concerning Coach Atlantic’s application to amend its Motor Carrier License

²⁵ *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]. Section 1.2 of the RFSO provides that the requirement is subject to the terms of the CFTA. Exhibit PR-2019-044-06, Vol. 1 at 6.

²⁶ *Ibid.* at 23.

²⁷ The address appearing on Coach Atlantic’s license was with respect to its “equipment point”. Exhibit PR-2019-044-01, Vol. 1 at 52, 77, 86.

²⁸ Exhibit PR-2019-044-08, Vol. 1 at 4 (para. 10).

²⁹ Exhibit PR-2019-044-06, Vol. 1 at 10.

³⁰ *Ibid.* at 12.

³¹ Exhibit PR-2019-044-01, Vol. 1 at 18 (para. 38).

(No. P02806) and Extra-Provincial Operating License No. XP02472 (Order).³² The Order includes a schedule of rates set by the NSURB applicable to Coach Atlantic (for example, “live mileage”, “deadhead mileage”, hourly and layover rates).³³ Bluenose submitted that, based on the published rates for Coach Atlantic and taking into account the maximum allowable 20 percent discount,³⁴ Coach Atlantic’s bid for the total evaluated price was substantially lower than would have been required, i.e. by “several hundred thousand dollars”.³⁵

[38] For its part, PWGSC claimed that the issue raised by Bluenose was moot given its intention to re-tender.

[39] As discussed above, the Tribunal has previously stated that the cancellation of a procurement process does not remove the Tribunal’s jurisdiction to review the procurement process and to determine whether it was conducted in accordance with the trade agreements.³⁶ In the Tribunal’s view, the issue of the application of the laws of Nova Scotia as it pertains to the rates submitted in Coach Atlantic’s bid remains relevant. Should the Tribunal find this ground of complaint to be valid, it may consider the appropriateness of a remedy that affects the re-solicitation.³⁷

[40] PWGSC submitted that section 2.5 of the RFSO, which refers to the application of the laws of Nova Scotia, applies only in respect of any resulting contract between the parties; therefore, it is not intended to apply to the interpretation of the terms of the solicitation.³⁸ The Tribunal concurs that this provision relates to issues arising during contract administration.³⁹ This is clear from the wording of section 2.5 noted above, which refers expressly to the “standing offer” and “any contract” resulting therefrom. There is no reference in section 2.5 to the requirements of the RFSO, or the technical and financial offers to be submitted from the bidder, in relation to the laws of Nova Scotia. The question of whether prices in the financial bid should be governed by the laws of Nova Scotia, therefore, cannot be answered by reference to section 2.5.

[41] The Tribunal also does not find that paragraph 4.1(a) of the RFSO supports Bluenose’s position. As noted above, this provision refers generally to the requirements of the RFSO. It does not impose any other conditions that would be relevant to this ground of complaint, in particular given the Tribunal’s finding above with respect to the interpretation of the provision in section 2.5 regarding applicable laws.

³² *Ibid.* at 82, 83.

³³ See rates in Schedule D of the Order: Exhibit PR-2019-044-01, Vol. 1 at 84.

³⁴ See section 3 of Schedule D of the Order: Exhibit PR-2019-044-01, Vol. 1 at 85.

³⁵ *Ibid.* at 16-18 (paras. 33-36).

³⁶ *Telecore* (10 October 2017), PR-2017-021 (CITT) [*Telecore*] at paras. 9-11; *Access to Information Agency Inc.* (26 October 2016), PR-2016-001 (CITT) [*AIA*] at paras. 32-36.

³⁷ The Tribunal notes subsection 30.13(5) of the *CITT Act*, which provides that the Tribunal may cease conducting an inquiry at any time “. . . if it is of the opinion that the complaint is trivial . . .”. In past cases, the Tribunal has taken this provision to mean that it could continue an inquiry provided the grounds of complaint are relevant, i.e. the inquiry may have a practical impact, as opposed to a theoretical one, on the complainant. For example, the Tribunal has continued an inquiry even when a solicitation was cancelled in order to duly consider whether the complainant was entitled to the essence of the remedy that it would have been awarded if its complaint had been found to be valid. *Lincoln Landscaping Inc.* (16 September 2016) PR-2016-018 (CITT) at paras. 11, 12. *Telecore* at para. 15.

³⁸ A similar paragraph is found in section 7.13 of the RFSO: Exhibit-PR-2019-044-06, Vol. 1 at 19.

³⁹ A similar approach was taken by the Tribunal in *Sepha Catering Ltd.* (14 November 2014), PR-2014-38 (CITT) at paras. 24-25. See also *Flag Connection Inc.* (7 May 2013), PR-2013-003 (CITT) at para. 23.

[42] As the RFSO did not incorporate any requirements in respect of the rates set by the NSURB, there is no basis for finding this ground of complaint valid.

[43] That said, the Tribunal's finding with respect to the NSURB rates and Coach Atlantic's financial bid does not mean that PWGSC should unburden itself of any consideration of the rates of the NSURB in the next solicitation. The Tribunal remains concerned that, absent any such consideration, bidders may be incentivized to bid prices based on rates below the minimum rates they may be legally required to adhere to.

[44] PWGSC submitted that it cannot administer or enforce the provisions of the *Motor Carrier Act* and that there is a regulatory scheme within that Act to address motor carrier rates; the NSURB is the appropriate forum. The Tribunal does not dispute these claims. However, it remains uncontroverted that motor carriers in Nova Scotia must be licensed by the NSURB under the *Motor Carrier Act*.⁴⁰ Moreover, item 9 of the SOW requires the contractor to provide, on request, proof of its operating license.⁴¹ A contract formed between the parties based on unauthorized rates could, at the outset of the contract, jeopardize the validity of the bidder's license to operate a motor carrier in that province. An invalid license would mean that the contractor could no longer fulfill the terms of the contract. During the contract administration phase, this would invariably destabilize the supply of services needed by DND.

[45] It seems it would be prudent, therefore, for PWGSC to take measures in the next solicitation that would facilitate its assessment of whether a bidder's license is valid or at risk of becoming subject to proceedings before the NSURB as a result of the rates included in its financial bid. In this regard, the Tribunal notes the NSURB's discretion to suspend or cancel licenses under the *Motor Carrier Act*.⁴² While the Tribunal does not intend to describe what measures might be appropriate in the circumstances, it notes Article 515(6) of the CFTA, which provides that, if a procuring entity receives a bid with a price that is abnormally lower than the other bid prices, "it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract".

CONCLUSION

[46] On the basis of the above, the Tribunal finds the complaint valid in part. PWGSC improperly awarded the SO to Coach Atlantic.

REMEDY

[47] In response to Bluenose's requests with respect to remedy described above, PWGSC submitted that, as the SO has been set aside and it intends to re-tender, the appropriate remedy has been given. Further, PWGSC argued that Bluenose provided no support for its claims of prejudice and that any prejudice in the circumstances is limited to bid preparation costs. Compensation for loss

⁴⁰ Exhibit PR-2019-044-01, Vol. 1 at 15 (para. 29); Exhibit PR-2019-044-08, Vol. 1 at 6 (paras. 16, 19).

⁴¹ Exhibit PR-2019-044-06, Vol. 1 at 23.

⁴² See section 19 of the *Motor Carrier Act*: Exhibit PR-2019-044-01, Vol. 1 at 121, which reads as follows:

19 (1) The Board may, at any time or from time to time, amend or suspend any license or may, for cause, and after a hearing upon such notice as the Board may direct, cancel any licence.

(2) When deciding whether to amend, suspend or cancel a license pursuant to subsection (1), the Board shall take into consideration the factors enumerated in Section 13.

of profits would not be warranted as Bluenose's bid was determined by PWGSC to be non-compliant and could not have been awarded the contract.

[48] In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the *CITT Act*. This includes taking into account the seriousness of any deficiency in the procurement process, the degree to which the complainant was prejudiced, the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, and whether the parties acted in good faith.

[49] Having regard to the factors set out in subsection 30.15(3) of the *CITT Act*, the Tribunal finds that the appropriate remedy in the circumstances is the issuance of a new solicitation. This remedy reflects the seriousness of the violation in question, namely that the contract was improperly awarded to a bidder who did not comply with mandatory criteria of the RFSO. It is also consistent with previous statements by the Tribunal that, upon the discovery of errors in the evaluation process, a contracting authority must take appropriate steps to correct such errors. This preserves the integrity of the procurement system.⁴³ In this regard, PWGSC has stated that it intends to modify and clarify the structure of the mandatory technical criteria. Bidders will have an opportunity in the re-tender to ask questions and seek clarification as required.⁴⁴

[50] Furthermore, there is no evidence that the parties did not act in good faith. The Tribunal assumes the good faith of the parties and considers accusations of bad faith to go well beyond procedural irregularities or failures.⁴⁵ Accordingly, the Tribunal does not find that PWGSC's conduct in addressing Bluenose's objection prior to the filing of the complaint, i.e. ceasing communication with Bluenose, is indicative of bad faith.

[51] Bluenose seeks compensation to cover the prejudice it has suffered as a result of being denied the SO and the opportunity to perform the work, PWGSC's failure to maintain a record of the evaluation, lost profits, and PWGSC's conduct during the objection process.⁴⁶ In the Tribunal's view, the prejudice against Bluenose has been lessened by the fact that its own bid was determined non-compliant. Moreover, the issuance of a new solicitation responds to the prejudice Bluenose has been subjected to, by providing it with another opportunity to participate in the procurement process. For these reasons, the Tribunal does not view that the circumstances warrant compensation for lost profits or lost opportunity.

[52] The Tribunal also recommends that for the next solicitation, PWGSC adequately maintain a record of the bid evaluation process, in particular with respect to the mandatory technical criteria. PWGSC's failure to properly document the evaluation of the bids seriously undermined the integrity and transparency of the procurement process. This is underscored by the fact that PWGSC's evaluation error was made with respect to a relatively simple requirement, i.e. item 16 of the SOW. Without a record of the evaluation, the Tribunal's ability to understand how the error was made and how the solicitation could be improved has been hindered.⁴⁷ That said, the Tribunal has not been

⁴³ *Telecore* (10 October 2017), PR-2017-021 (CITT) at para. 14.

⁴⁴ Exhibit PR-2019-044-08, Vol. 1 at 4 (para. 12).

⁴⁵ See *Valcom Consulting Group Inc.* (14 June 2017), PR-2016-056 (CITT) at para. 103.

⁴⁶ Exhibit PR-2019-044-10, Vol. 1 at 13, 14 (paras. 36 and 37).

⁴⁷ *Oshkosh Defense Canada Inc.* (20 May 2016), PR-2015-051 and PR-2015-067 (CITT) at paras. 216-221; *CGI* at para. 95; *Almon* (1 March 2011), PR-2008-048R (CITT) at para. 29. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at para. 48.

persuaded that PWGSC's failure in this regard is indicative of it having approached the procurement process in bad faith.

[53] As there has been no deficiency found in respect of PWGSC's consideration of the published rates issued by the NSURB applicable to Coach Atlantic, the Tribunal does not consider it appropriate to recommend requirements for compliance with NSURB rates in the next solicitation.

Bid preparation costs

[54] Bluenose did not request bid preparation costs. However, Bluenose submitted that the Tribunal's sanction was warranted, as PWGSC's failure to maintain records of the evaluation process seriously undermined the integrity and transparency of the procurement process. The Tribunal agrees. It is clear that Bluenose effectively participated in a solicitation process that was conducted with little regard for ensuring transparency and accountability during the procurement process—principles that have been repeatedly emphasized by the Tribunal. As such, the Tribunal finds it appropriate to award Bluenose its reasonable bid preparation costs pursuant to subsection 30.15(4) of the *CITT Act*.

Costs

[55] The Tribunal also awards Bluenose its reasonable costs incurred in preparing and proceeding with this complaint pursuant to section 30.16 of the *CITT Act*. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity in this case is Level 2. While the procurement was for a single service, the proceedings were extended to 135 days to permit PWGSC to further respond to Bluenose's comments on the GIR as well as additional submissions required to determine the scope of documents in PWGSC's possession with respect to the evaluation of bids. Accordingly, the Tribunal's preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION

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

[57] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that a new solicitation be issued and that PWGSC adequately maintain a record of the bid evaluation process.

[58] Pursuant to subsection 30.15(4) of the *CITT Act*, the Tribunal awards Bluenose its reasonable bid preparation costs, which costs are to be paid by PWGSC.

[59] Should the parties be unable to agree on the amount of bid preparation costs, Bluenose shall file with the Tribunal, within 30 days of the date of this determination, a submission on the issue of costs. PWGSC will then have seven working days after receipt of Bluenose's submissions to file a response. Bluenose will then have five working days after the receipt of PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal.

[60] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Bluenose its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In

accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Peter Burn

Peter Burn
Presiding Member