



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2019-060

Valley Associates Global Security  
Corporation

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, June 29, 2020*

*Reasons issued  
Thursday, July 23, 2020*

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IN THE MATTER OF a complaint filed by Valley Associates Global Security Corporation 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**

**VALLEY ASSOCIATES GLOBAL SECURITY CORPORATION** **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 (CITT Act)*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Nevertheless, pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Valley Associates Global Security Corporation its reasonable costs incurred in preparing the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline (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.

Susan D. Beaubien  
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Susan D. Beaubien  
Presiding Member

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

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Complainant:	Valley Associates Global Security Corporation
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Government Institution:	Department of Public Works and Government Services
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## STATEMENT OF REASONS

### OVERVIEW

[1] Valley Associates Global Security Corporation (Valley) has filed a complaint<sup>1</sup> with the Tribunal concerning the process and outcome of a procurement for “High Risk Search Equipment”.

[2] The procurement process was administered by Public Works and Government Services Canada (PWGSC) on behalf of the Department of National Defense (DND). A request for proposal (RFP W8476-195904/A) was issued on April 15, 2019, with a closing date of July 30, 2019 (RFP).<sup>2</sup>

[3] Med-Eng Holdings (Med-Eng) was the successful bidder and was awarded a contract by PWGSC on or about December 9, 2019. The value of the contract was estimated by Valley to be \$23,342,842.23,<sup>3</sup> but PWGSC subsequently confirmed to the Tribunal that the value of the contract awarded to Med-Eng is \$6,793,514.95.<sup>4</sup>

[4] Valley complains that Med-Eng is a non-compliant bidder. It also contends that the procurement process was unfair, giving rise to apprehension of bias and partiality. More particularly, Valley alleges that Med-Eng interfered with the procurement process by using “undisclosed back channels” to secure changes to key specifications in the RFP at a late stage in the procurement process. As a result, Valley claims that the procurement process was flawed and unfair and that Valley was prejudiced in its ability to react to the changes in the tender specifications. Valley also alleges that it was prejudiced by a flawed bid evaluation process.<sup>5</sup>

[5] Valley unsuccessfully sought redress from PWGSC.<sup>6</sup> On February 13, 2020, Valley filed this complaint.<sup>7</sup>

[6] The Tribunal conducted a review of Valley’s complaint for the purposes of subsection 30.11(2) of the *CITT Act*. On February 20, 2020, the Tribunal decided to initiate an inquiry with respect to Valley’s complaint. Notice of this decision was published in the Canada Gazette on February 29, 2020.

### PROCEDURAL BACKGROUND

[7] In support of its complaint, Valley submitted an affidavit from its president, Michael Martin.<sup>8</sup>

[8] PWGSC filed a Government Institution Report (GIR),<sup>9</sup> together with an affidavit of Neil Schubert,<sup>10</sup> a project management engineer with DND. Mr. Schubert is the Technical Authority and

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<sup>1</sup> Complaint, Exhibit PR-2019-060-01, p. 1-8

<sup>2</sup> Complaint, Exhibit PR-2019-060-01, p. 3-4

<sup>3</sup> Schubert Affidavit, Ex. 12, Exhibit PR-2019-060-12, p. 1239-1240.

<sup>4</sup> Exhibit PR-2019-060-06, p. 1. The difference between the estimated contract value communicated to Valley is likely explained by the value of a future 10-year service support contract, yet to be concluded.

<sup>5</sup> Complaint, Exhibit PR-2019-060-01, p. 1-22.

<sup>6</sup> Exhibit PR-2019-060-01, p. 105-110, 23-27.

<sup>7</sup> Complaint, Exhibit PR-2019-060-01, p. 1-8.

<sup>8</sup> Exhibit PR-2019-060-01, p. 28.

<sup>9</sup> Exhibit PR-2019-060-12, p. 3 *et seq.*

<sup>10</sup> Exhibit PR-2019-060-12, p. 50.

deputy Project Manager for the solicitation at issue and has been involved in all phases of the solicitation, including as a member of the team responsible for bid evaluation.<sup>11</sup>

[9] Valley submitted a reply to the GIR.<sup>12</sup> PWGSC objected that Valley's reply raised new issues not defined by the original complaint, essentially contending that Valley was splitting its case.<sup>13</sup> With leave of the Tribunal,<sup>14</sup> PWGSC filed a brief sur-reply confined to the allegedly new issues.<sup>15</sup>

[10] Both Valley<sup>16</sup> and PWGSC<sup>17</sup> filed written submissions on the merits.

[11] As a result of procedural extensions requested by the parties, and the state of emergency limitations imposed by the COVID-19 pandemic, the Tribunal extended the deadline for completion of this inquiry to 135 days, pursuant to section 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

## FACTUAL BACKGROUND

[12] At issue in these proceedings is the conduct of a procurement process for acquisition of equipment defined as "High Risk Search Equipment and Multi-Threat Detection Tools" (HRS Equipment) for use by DND, together with product service support.

[13] The procurement arose as part of an ongoing assessment of equipment needs for the Canadian Army pertaining to High Risk Search Capability, which was commenced in 2012 by the Army's Director of Land Requirements (DLR). There are several types of operational equipment needed for High Risk Search Capability, one of which is HRS Equipment.<sup>18</sup>

[14] The HRS Equipment is described as a set of highly specialized search tools designed to allow Canadian Forces personnel to search for suspected explosive threats in high risk situations,<sup>19</sup> such as improvised explosive devices which may be hidden or cached.<sup>20</sup> Intended for use in high-risk situations, the HRS Equipment are designed to allow the user to be highly mobile while ensuring safety and minimizing operational encumbrances.<sup>21</sup>

[15] During 2014-2015, Mr. Schubert worked with DLR to define requirements for HRS Equipment, having regard to the Army's needs, commercially available products and budgetary constraints.<sup>22</sup> The process of defining requirements for HRS Equipment included detailed assessments, product demonstrations, trials and evaluations by prospective users.<sup>23</sup>

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<sup>11</sup> Schubert Affidavit, para. 2, Exhibit PR-2019-060-12, p. 50.

<sup>12</sup> Exhibit PR-2019-060-17.

<sup>13</sup> Exhibit PR-2019-060-19.

<sup>14</sup> Exhibit PR-2019-060-21.

<sup>15</sup> Exhibit PR-2019-060-22.

<sup>16</sup> Exhibit PR-2019-060-01, p. 9.

<sup>17</sup> Exhibit PR-2019-060-12, p. 3.

<sup>18</sup> Schubert Affidavit, para. 4, Exhibit PR-2019-060-12, p. 51. Others were identified by Mr. Schubert as being High Risk Remotely Operated Vehicles, High Angle Search Equipment & Confined Space Communications, Colourimetric Explosives Detection Kit, but are not relevant to this complaint.

<sup>19</sup> Martin Affidavit, para. 4, Exhibit PR-2019-060-01, p. 28.

<sup>20</sup> Exhibit PR-2019-060-01, p. 23.

<sup>21</sup> Martin Affidavit, para. 4, Exhibit A - Exhibit PR-2019-060-01, p. 28, 35 *et seq.*

<sup>22</sup> Schubert Affidavit, para. 4, Exhibit PR-2019-060-12, p. 51-52.

<sup>23</sup> Martin Affidavit, para. 5, Exhibit PR-2019-060-01, p. 28.

[16] As a result of these endeavours, a draft Statement of Work was prepared in September 2015 to underpin prospective procurement of the HRS Equipment.<sup>24</sup> The draft Statement of Work included Mandatory Requirements for at least some of the individual components of the HRS Equipment.<sup>25</sup>

[17] The draft Statement of Work was posted on the website buyandsell.gc.ca with prospective suppliers being invited to provide comments on the requirements for the HRS Equipment. This Request for Information (RFI) was open from November 3, 2016, to January 30, 2017.<sup>26</sup>

[18] Med-Eng and a third party, The Deltic Group Inc. (Deltic), responded to the RFI. Valley did not make submissions.<sup>27</sup>

[19] The responses to the RFI led to further revisions of the Statement of Work. Mr. Schubert asserts that these changes were made in consultation with DLR and included amendments to the specifications for an assault ladder and hydraulic door opener. These changes are alleged to have been made to ensure that the specifications could be met using “off the shelf” components that are commercially available.<sup>28</sup>

[20] The project moved into the implementation phase in September 2017. A team<sup>29</sup> including Mr. Schubert (as technical authority at DND) and a contracting authority at PWGSC proceeded to prepare a Request for Proposal (RFP). Mr. Schubert asserts that the RFP was premised on the requirements for HRS Equipment as defined through consultation with DLR and the responses received to the RFI.<sup>30</sup>

[21] The RFP prescribed that prospective bidders could establish technical compliance with Mandatory Requirements by submitting results of field testing of the equipment or by way of the bidder stating that the equipment is compliant.<sup>31</sup> Notwithstanding the technical complexity of the Mandatory Requirements and the intended conditions for use of the equipment (military use in high-risk situations), most of the technical criteria could be met using only a compliance statement, without further testing or verification by DND or PWGSC.<sup>32</sup>

[22] The RFP was posted on April 15, 2019, with a closing date of June 17, 2019.<sup>33</sup> The RFP totaled 293 pages. Approximately 250 pages of the RFP pertained to a detailed description of the technical requirements and specifications for the various types of individual items and systems that comprise the components of the HRS Equipment.<sup>34</sup>

[23] Several requests for extension of the closing date were submitted by prospective bidders, including Valley. Ultimately, the closing date was extended to July 30, 2019.<sup>35</sup>

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<sup>24</sup> Schubert Affidavit, para. 6, Exhibit PR-2019-060-12, p. 51-52.

<sup>25</sup> Martin Affidavit, para. 5, Exhibit PR-2019-060-01, p. 28.

<sup>26</sup> Schubert Affidavit, para. 7, Exhibit PR-2019-060-12, p. 52.

<sup>27</sup> Schubert Affidavit, para. 8, Exhibit PR-2019-060-12, p. 52.

<sup>28</sup> Schubert Affidavit, para. 8, Exhibit PR-2019-060-12, p. 52.

<sup>29</sup> The team also included a DND Procurement Manager and an Integrated Logistics Support Manager: Schubert Affidavit, para. 9, Exhibit PR-2019-060-12, p. 52.

<sup>30</sup> Schubert Affidavit, paras. 8-9, Exhibit PR-2019-060-12, p. 52.

<sup>31</sup> Martin Affidavit, paras. 6-7, Exhibit PR-2019-060-01, p. 28-29.

<sup>32</sup> Martin Affidavit, paras. 6-7, Exhibit PR-2019-060-01, p. 28-29.

<sup>33</sup> Schubert Affidavit, para. 10, Ex. 2, Exhibit PR-2019-060-12, p. 52, 177 *et seq.*

<sup>34</sup> Martin Affidavit, para. 8, Exhibit PR-2019-060-01, p. 29.

<sup>35</sup> Schubert Affidavit, paras. 11, 24 -25, Exhibit PR-2019-060-12, p. 53, 57.

[24] From April 15 to July 15, 2019, PWGSC received 62 requests for clarification from prospective bidders. PWGSC issued 13 formal contract amendments.<sup>36</sup>

[25] On June 19, 2019, Med-Eng filed an objection with PWGSC with respect to the specifications for one particular component of the HRS Equipment, namely, the Hydraulic Door Opener System (HDOS). Med-Eng claimed that the specifications for HDOS could only be met by one specific commercial system (Libervit Door Raider System).<sup>37</sup>

[26] According to Med-Eng, the mandatory use of the Libervit Door Raider System would effectively deem the solicitation to be a sole-source contract,<sup>38</sup> for all practical purposes. It appears that Med-Eng would be unable to source a Libervit system. Accordingly, Med-Eng asked that procurement of the HDOS be carried out separately, or that the specifications for the HDOS be relaxed so that prospective bidders could compete for the contract using hydraulic door openers from other Original Equipment Manufacturers (OEMs) besides Libervit.<sup>39</sup>

[27] Prior to receiving this communication from Med-Eng, Mr. Schubert believed that Libervit products were broadly available.<sup>40</sup>

[28] Med-Eng also asked for other changes in the HDOS specifications including a reduction in the spreading force of the HDOS from 60 kN to 20 kN.<sup>41</sup>

[29] According to Mr. Schubert, the information provided by Med-Eng caused the DND/PWGSC project team to become concerned about whether the procurement was both open and competitive. The project team undertook a review of the HDOS specifications with the Army.<sup>42</sup>

[30] Shortly thereafter, another prospective bidder (Deltic) raised concerns about HDOS that essentially coincided with those of Med-Eng. Deltic advised that certain requirements, notably the spreading force and weight dimensions, could only be met by the Libervit Door Raider System, which Deltic was unable to source. Deltic asked that the specification for the HDOS be relaxed so that other competitive systems could be considered or substituted, or that supply of the HDOS be conducted in a separate competition.<sup>43</sup>

[31] The communication from Deltic reinforced the internal concerns that had been generated as a result of Med-Eng's submissions concerning the stringency of the HDOS specifications.<sup>44</sup> Following internal deliberation, the Army confirmed that some changes to the HDOS specifications could be made to increase the competitiveness of the tender process while still meeting the Army's operational requirements.<sup>45</sup>

[32] As a result, Mandatory Requirement M42 in the RFP was changed to reduce the specification for spreading force from 60 kN to 50 kN (which was less than the reduction to 20 kN that Med-Eng

<sup>36</sup> Martin Affidavit, paras. 8-9, Exhibit PR-2019-060-01, p. 29; GIR, Exhibit PR-2019-060-12, p. 177-949.

<sup>37</sup> Schubert Affidavit, para. 12, Exhibit PR-2019-060-12, p. 53.

<sup>38</sup> Schubert Affidavit, para. 12, Confidential Exhibit 5, Exhibit PR-2019-060-12, p. 53, 972-979.

<sup>39</sup> Schubert Affidavit, Confidential Exhibit 5, Exhibit PR-2019-060-12, p. 973-974.

<sup>40</sup> Schubert Affidavit, para. 13, Exhibit PR-2019-060-12, p. 54.

<sup>41</sup> Schubert Affidavit, para. 12, Exhibit PR-2019-060-12, p. 53.

<sup>42</sup> Schubert Affidavit, para. 14, Exhibit PR-2019-060-12, p. 54.

<sup>43</sup> Schubert Affidavit, para. 15, Confidential Exhibit 6, Exhibit PR-2019-060-12, p. 54.

<sup>44</sup> Schubert Affidavit, para. 16, Exhibit PR-2019-060-12, p. 54.

<sup>45</sup> I.e. reduction on minimum spreading force. See Schubert Affidavit, para. 17, Exhibit PR-2019-060-12, p. 55.



had asked for). The required length of a remote cable was reduced from 150 m to 130 m.<sup>46</sup> Other changes to the technical specifications included a change to the maximum battery charging time, and permitting the use of a pneumatic-hydraulic drive in addition to hydraulic power unit for the HDOS unit.<sup>47</sup>

[33] All of these changes to the specifications for the HDOS unit are said to have been acceptable to the Army, having regard to its operational requirements.<sup>48</sup>

[34] Mr. Schubert notified PWGSC that the Army had decided to amend the HDOS specifications in order to facilitate greater competition.<sup>49</sup> This caused PWGSC to issue Amendment 11 to the RFP on July 3, 2019, and extend the bid closing date to July 16, 2019.<sup>50</sup>

[35] Valley contends that Amendment 11 comprised the first material change effected to the tender requirements, notwithstanding that 62 clarification requests had been previously submitted by bidders between April 15, 2019, and July 15, 2019.<sup>51</sup> It further asserts that Amendment 11 amounted to a 155-page reissue of the Statement of Work issued days before the bid closing date, with no background or other information to explain the rationale for the change.

[36] From its review of Amendment 11, Valley concluded that the revised HDOS specifications reflected a system manufactured by Holmatro.<sup>52</sup> According to Valley, the Holmatro system is designed for use by police tactical squads and requires additional, extensive support equipment, which was omitted from the revised RFP specifications.

[37] In contrast, Valley describes the Libervit system as a “full mil” system that is used by NATO Forces and exclusively by Canada’s CANSOFCOM. The Libervit system is said to include all components needed to execute the type of missions described by the RFP.<sup>53</sup>

[38] Valley contends that the Holmatro system is inherently incapable of meeting the overriding RFP specifications. For example, the Holmatro system will only open two or three doors (depending on frame type),<sup>54</sup> unlike the Libervit system which can open six to eight doors on a single air cylinder, as prescribed by the RFP. In order to compensate, Valley claims that DND personnel will be required to carry additional equipment (not prescribed by Amendment 11) that will exceed mandatory work restrictions prescribed in the Statement of Work.<sup>55</sup>

[39] Accordingly, the issuance of Amendment 11 caused Valley to pose certain questions and clarification requests.<sup>56</sup> These submissions were received by PWGSC and forwarded to Mr. Schubert, although the identity of the bidder making these submissions was apparently not disclosed to Mr. Schubert at the time.<sup>57</sup>

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<sup>46</sup> Schubert Affidavit, para. 17, Exhibit PR-2019-060-12, p. 55.

<sup>47</sup> Schubert Affidavit, para. 18, Exhibit PR-2019-060-12, p. 55.

<sup>48</sup> Schubert Affidavit, paras. 17-18, 22, Exhibit PR-2019-060-12, p. 55-56.

<sup>49</sup> Schubert Affidavit, para. 23, Exhibit PR-2019-060-12, p. 56-57.

<sup>50</sup> Schubert Affidavit, para. 24, Exhibit PR-2019-060-12, p. 57.

<sup>51</sup> Martin Affidavit, para. 9, Exhibit PR-2019-060-01, p. 29.

<sup>52</sup> Martin Affidavit, para. 10, Exhibit PR-2019-060-01, p. 29.

<sup>53</sup> Martin Affidavit, para. 17, Exhibit PR-2019-060-01, p. 30.

<sup>54</sup> Martin Affidavit, para. 18, Exhibit PR-2019-060-01, p. 30.

<sup>55</sup> Martin Affidavit, paras. 18-19, Exhibit PR-2019-060-01, p. 30-31.

<sup>56</sup> Martin Affidavit, para. 19, Exhibit PR-2019-060-01, p. 30-31; Schubert Affidavit, para. 25-27, Exhibit PR-2019-060-12, p. 57-58.

<sup>57</sup> Schubert Affidavit, para. 25, Exhibit PR-2019-060-12, p. 57.

[40] Valley's clarification requests expressed concerns that the amended specifications defined equipment that was inadequate for field use and would compromise the operational safety of armed forces personnel. It also sought confirmation that field testing of the equipment proposed to be supplied would be included as a part of the bid evaluation process, in lieu of a compliance statement. Valley also sought a further extension of the bid closing date.<sup>58</sup>

[41] Mr. Schubert stated that the risks and benefits of relying upon compliance statements had previously been assessed. As DND was seeking "off the shelf" equipment, compliance statements were deemed to be acceptable, especially since Phase 2 Evaluation Trials were planned downstream in the bid evaluation process, for certain equipment considered to be at potentially higher risk for possible failure.<sup>59</sup>

[42] However, in response to Valley's request, the bid closing date was further extended to July 30, 2019, by way of Amendment 12 to the RFP.<sup>60</sup>

[43] After the release of Amendment 12, Mr. Martin contacted Holmatro and was advised that Med-Eng had been working with DND to have the HDOS specifications amended so that the Holmatro system could be supplied as part of the HRS Equipment.<sup>61</sup>

[44] Mr. Schubert testified that he had no direct contact with either Med-Eng or Deltic during the tender process, other than to receive their written objections and requests for clarification<sup>62</sup> addressed to PWGSC,<sup>63</sup> which gave rise to Amendment 11.

[45] By the bid closing date, PWGSC had received bids from Valley, Med-Eng and Deltic.<sup>64</sup>

[46] The bids were evaluated according to a two-phase evaluation process by a team of evaluators. During the first phase, the bids were assessed for compliance with the mandatory requirements as prescribed by the RFP. For some requirements, bidders had to submit a Compliance Statement (CS) describing how their equipment met the specified requirement. For other requirements, the RFP prescribed that bidders had to provide a Test Report, namely, test documentation demonstrating that the proposed equipment complied with specifications.

[47] Following completion of phase one of the evaluation, all three bids were found to be compliant with the terms of the RFP.<sup>65</sup>

[48] The second phase of the evaluation comprised DND's testing of some sample equipment provided by bidders.<sup>66</sup> Only a small subset of the HRS Equipment described in the RFP was designated for testing.<sup>67</sup> This testing was completed in November 2019 and all three bidders passed.<sup>68</sup>

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<sup>58</sup> Schubert Affidavit, para. 25, Exhibit PR-2019-060-12, p. 57.

<sup>59</sup> Schubert Affidavit, para. 26, Exhibit PR-2019-060-12, p. 58.

<sup>60</sup> Schubert Affidavit, para. 25, Exhibit PR-2019-060-12, p. 57.

<sup>61</sup> Martin Affidavit, paras. 12-13, Exhibit PR-2019-060-01, p. 29.

<sup>62</sup> Schubert Affidavit, para. 19, Exhibit PR-2019-060-12, p. 55.

<sup>63</sup> Referred to as the "Contracting Authority" in the Schubert Affidavit.

<sup>64</sup> Schubert Affidavit, para. 29, Exhibit PR-2019-060-12, p. 58.

<sup>65</sup> Schubert Affidavit, paras. 30-31, Ex. 10, Exhibit PR-2019-060-12, p. 59, 1178.

<sup>66</sup> Schubert Affidavit, para. 34, Exhibit PR-2019-060-12, p. 59-60.

<sup>67</sup> Martin Affidavit, para. 6, Exhibit PR-2019-060-01, p. 28.

<sup>68</sup> Schubert Affidavit, para. 34, Exhibit PR-2019-060-12, p. 59-60.

[49] As all three bidders were found to be compliant with the RFP, but Med-Eng's bid was lowest in price, the contract was awarded to Med-Eng on December 4, 2019. Valley was notified by letter on December 9, 2019, that its bid was compliant, but that the contract had been awarded to a lower-cost bid.<sup>69</sup>

[50] At Valley's request, a debriefing meeting was held on December 16, 2019. During that meeting, Valley aired its concerns with the procurement process with PWGSC. On December 19, 2019, Valley wrote to PWGSC providing a summary of what was discussed at the meeting, derived from notes taken by Valley's representative(s) at the meeting.<sup>70</sup>

[51] On January 31, 2020, PWGSC replied to Valley, taking issue with Valley's description of what transpired at the debriefing.<sup>71</sup>

[52] Valley then filed its complaint with the Tribunal<sup>72</sup> and concurrently filed access-to-information requests, seeking production of documents pertaining to the procurement process.<sup>73</sup>

## POSITIONS OF THE PARTIES

[53] Valley's complaint rests on three grounds:

- (a) the contract for the HRS Equipment was awarded to a substantially non-compliant bidder (Med-Eng) whose bid not comply with mandatory technical specifications;
- (b) the tender process was unfair and gives rise to an apprehension of bias and partiality, as a result of *ex parte* communications between DND, PWGSC and other bidders;
- (c) the tender process was unfair as it denied Valley a reasonable opportunity to react to modifications in the tender specifications (Amendment 11),<sup>74</sup> thus favouring another bidder.

[54] Valley alleges that the flaws in Amendment 11 are three-fold. Firstly, the reasons for the change in HDOS specifications were not provided or were otherwise opaque. Secondly, insufficient time was provided for Valley to deal with the material changes implemented by Amendment 11. Thirdly, Valley asserts that the revised specifications omitted the costs of equipment that would be needed to offset or remedy the deficiencies of the Holmatro system to the benefit of Med-Eng.

[55] PWGSC argues that Valley's complaint is not valid because:

- (a) Med-Eng's bid was reasonably evaluated as being compliant;
- (b) Valley's complaint concerning alleged bias and insufficient opportunity to respond to Amendment 11 is out of time;
- (c) Canada was not biased for or against any bidder. The HDOS specifications were amended to facilitate greater competition and achieve better value for money;

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<sup>69</sup> Schubert Affidavit, para. 37, Ex. 12, Exhibit PR-2019-060-12, p. 60, 1239.

<sup>70</sup> Exhibit PR-2019-060-01, p. 105.

<sup>71</sup> Exhibit PR-2019-060-01, p. 23.

<sup>72</sup> Exhibit PR-2019-060-01, p. 1.

<sup>73</sup> Exhibit PR-2019-060-01, p. 459-468.

<sup>74</sup> Exhibit PR-2019-060-01, p. 12, 10-22.

(d) Valley was not prejudiced by Amendment 11, which relaxed the bidding requirements. Moreover, Valley received the exact extension of time that it had asked for.<sup>75</sup>

## ANALYSIS

[56] The following statutory parameters define the scope of the Tribunal's inquiry:

Matters inquired into

**30.14** (1) In conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint.

Matter to be decided

(2) At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed.

[57] Section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* prescribe as follows:

If the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Government Procurement, the CCFTA, the CPFTA, the CCOFTA, the CPAFTA, the CHFTA, the CKFTA, CETA, the CFTA, CUFTA or the TPP applies.

[58] In support of its complaint, Valley cites and relies upon the following trade agreement provisions: CFTA Articles 502.1, 507.3b, 509.2b, 509.7b, 515.4 and 515.5b; NAFTA Articles 1007, 1008, 1009, 1015.4 and 107; and CETA Articles 19.4, 19.73(b), 19.9, 19.14 and 19.16.<sup>76</sup>

[59] Valley's complaint is premised on three grounds:

- (a) the contract was awarded to a substantially non-compliant bidder;
- (b) the tender process was unfair because it was tainted by bias or the apprehension of bias;
- (c) Valley was prejudiced by being denied a reasonable opportunity to react to changes in the tender specifications.

### **Ground 1: Contract awarded to a substantially non-compliant bidder**

[60] The first ground of Valley's complaint is that the contract for supply of HRS Equipment was awarded to a "non-compliant" bidder (i.e. Med-Eng).

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<sup>75</sup> Exhibit PR-2019-060-12, p. 5-46.

<sup>76</sup> Exhibit PR-2019-060-01, p. 6.

[61] Valley contends that Med-Eng is a “non-compliant” bidder because some components of the HRS Equipment to be supplied by Med-Eng are mismatched to, or otherwise deficient or unsuitable for, the intended operational use.

[62] Valley describes its concerns with respect to the functionality and suitability of some aspects of the proposed HRS Equipment. At least in part, some of these concerns derive from Valley’s telephone inquiries posed to manufacturers of the components at issue.<sup>77</sup> As such, they are hearsay and must be weighed cautiously.

[63] The Tribunal finds that Valley’s complaint, in essence, is directed to an alleged lack of due diligence by DND in selecting and defining (1) criteria for the equipment specified in the RFP and (2) evaluation metrics and criteria for assessing performance of the equipment proposed to be supplied, when measured against the RFP specifications.

[64] This amounts to a complaint that the specifications and terms of the tender should have been framed more precisely and rigorously and that the prescribed evaluation criteria were too lax from the outset. On Valley’s argument, these deficiencies have caused an outcome where DND is acquiring equipment that represents either poor value for public money spent, and/or is non-functional to the point where the safety of Army personnel may be placed at risk.

[65] Valley also contends that the limitations of the Holmatro system will require additional equipment to operationally compensate for the lower performance provided by the Holmatro system. The revised specifications do not take the additional costs of this equipment into account. Essentially, Valley argues that the revised specifications are incomplete or otherwise deficient in defining equipment that will be operationally equivalent to what was described in the original Statement of Work.

[66] A procuring entity has the discretion to define tender specifications as it sees fit in order to satisfy its legitimate operational requirements.<sup>78</sup> However, that discretion must be reasonably exercised. The tender requirements cannot be discriminatory, impossible to meet or otherwise unreasonable.<sup>79</sup>

[67] Although Valley is clearly of the view that the prescribed equipment as revised by Amendment 11 is deficient, DND disagrees. Valley’s unfavourable opinion of the technical merits of the prescribed equipment does not mean that DND acted unreasonably in selecting that equipment for procurement. The tender was structured to prescribe “off the shelf” components believed to be commercially available. Such a specification is not inherently discriminatory or impossible to fulfill.

[68] In such circumstances, it is not the role of the Tribunal to adjudicate, or second-guess, the substantive merits of DND’s decision to specify that equipment in the tender.

[69] Accordingly, the Tribunal must defer to DND’s expertise and judgment in defining operational requirements and the equipment needed to meet those requirements, for the purposes of procurement. Such an exercise will presumably comprise the assessment and weighing of many

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<sup>77</sup> Martin Affidavit, paras. 18, 22-25, Exhibit PR-2019-060-01, p. 30-32.

<sup>78</sup> *723186 Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at paras. 19-21; *Daigen Communications* (23 August 2011), PR-2011-021 (CITT) at paras. 16-17.

<sup>79</sup> *Almon Equipment Limited v. Canada (Public Works and Government Services)*, 2012 CanLII 27603 [*Almon*], at paras. 52-55.

factors including operational needs, the anticipated frequency of equipment use, and cost, among others. This extends to a decision to exclude or defer the purchase of additional or remedial equipment that may be needed to complement the equipment being procured. It is not the role of the Tribunal to step into DND's shoes and undertake a rebalancing of those variables. Such an exercise would be incompatible with a reasonableness review.

[70] The discretion to prescribe specifications for goods being procured extends to amending those specifications during the tender process, upon notice to all prospective bidders. In this case, all requests for clarifications and any changes, including Amendment 11, were duly published and distributed to all bidders.

[71] Valley further contends that actual testing of the proposed equipment would reveal its inherent deficiencies, by way of failure to meet operational performance standards. As DND chose to accept compliance statements for most components, in lieu of test reports, for the purpose of assessing bids, the unsuitability of the proposed equipment will not come to light until after the HRS Equipment is purchased and delivered.

[72] If Valley's assessment is correct, DND may (or may not) have made an unwise procurement decision. If so, the merits of that decision will be revealed when the equipment is delivered and used. If the equipment performance is unsatisfactory or otherwise does not meet operational requirements, DND will be left to consider and invoke whatever remedial measures may be available to it.

[73] In essence, Valley is now asserting that this speculative outcome should be prevented by having the Tribunal go behind the compliance statements provided by the bidders.

[74] In defining the evaluation criteria for the equipment to be supplied, DND may have set a low threshold by requiring compliance statements instead of test reports. The rationale for this, as explained by Mr. Schubert, is that the equipment at issue comprises "off the shelf" components which do not require testing.<sup>80</sup>

[75] The Tribunal can review the evaluation process to ensure that the evaluation was carried out reasonably and fairly. However, in doing so, it cannot redraft the Statement of Work or the evaluation criteria in order to substitute a requirement for test data in lieu of the compliance statements that were prescribed by the tender.

[76] In reviewing the evaluation of bids in a procurement, a reasonableness standard applies.<sup>81</sup> As noted by the Tribunal in *Samson & Associates*:

The Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. Therefore, the Tribunal has repeatedly stated that it will interfere only 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. [footnote omitted] In addition, the

<sup>80</sup> Schubert Affidavit, para. 26, Exhibit PR-2019-060-12, p. 58.

<sup>81</sup> *Dynamic Engineering v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CIIT) at para. 27; *Star Group International Trading Corporation v. Defence Construction (1951) Limited* (7 April 2014), PR-2013-032 (CIIT) at para. 26.

Tribunal has previously indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling. [footnote omitted]<sup>82</sup>

[77] The Tribunal finds no basis to conclude that the evaluation criteria were not reasonably considered and applied by the evaluation team.<sup>83</sup> Where compliance statements were required, they were provided and duly noted on the evaluation form.

[78] Valley clearly views the use of compliance statements to be an inadequate metric for assessing the operational functionality of at least some of the proposed equipment to be supplied. Even assuming this to be the case (and the Tribunal makes no such finding), the evaluation itself does not become unreasonable because it entails the application of an evaluation standard that has been set as a low bar by the tender itself.

[79] Accordingly, it was neither unreasonable nor procedurally unfair for the evaluators to have accepted the compliance statements. That was the prescribed standard. As the tender was not drafted to require anything more than that, the Tribunal cannot second-guess the technical accuracy of the representations made in the compliance statements.

[80] If the content or representations in the compliance statements are later found to be factually inaccurate because the equipment does not perform as expected, that failure may be attributable, at least in part, to the standard chosen as evaluation criteria when the tender was originally prepared, and not to an unreasonable application of that standard at the evaluation stage.

[81] The Tribunal cannot retroactively change the standard by finding that the evaluation team should have evaluated the bids using a different and higher standard for equipment performance or functionality. Indeed, to do so would serve to introduce different or undisclosed criteria to the evaluation process, with consequent procedural unfairness.

[82] In its reply to the GIR, Valley amplified its argument to contend that other specifications and evaluation, notably for the HVA system, were similarly deficient.<sup>84</sup> PWGSC objected to these arguments, saying that Valley was splitting its case.<sup>85</sup>

[83] The Tribunal finds that the reasons given above likewise apply to other aspects of Valley's complaint about tender specifications, such as the HVA system, and are dispositive. In view of this, the Tribunal need not decide whether Valley's submissions of April 27, 2020, constitute proper reply.

## **Ground 2: Unfair tender process due to apprehension of bias and partiality**

[84] This ground of Valley's complaint is directed to the circumstances which gave rise to Amendment 11.

[85] From the start of the bidding process on April 15, 2019, PWGSC received numerous clarification requests from prospective bidders. It appears that these would have been sent by PWGSC to Mr. Schubert, as DND project manager for this particular procurement for review and

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<sup>82</sup> *Samson & Associates*, 2015 CanLII 153852, at para. 35.

<sup>83</sup> Schubert Affidavit, para. 36, Ex. 10, Confidential Exhibit 11, Exhibit PR-2019-060-12, p. 60, 1178, 1181-1237.

<sup>84</sup> Exhibit PR-2019-060-17, p. 3-7.

<sup>85</sup> Exhibit PR-2019-060-19.

comment. It can be inferred from Mr. Schubert's affidavit that the identity of the bidder posing a clarification request would not necessarily be revealed to him.<sup>86</sup>

[86] However, this procedure does not appear to have been followed with respect to the objection filed by Med-Eng on June 15, 2019.

[87] Med-Eng asserted that the HDOS specifications rendered the procurement to be effectively sole-source and thus unlawful:

The manner in which A13 of the SOW is currently written breaches the applicable trade agreements, and in so doing, undermines the integrity of the Canadian procurement system.<sup>87</sup>

[88] In support of this argument, Med-Eng included a copy of correspondence sent to Valley, inquiring whether Valley would supply Med-Eng with the Libervit system, for the purposes of the procurement at issue. Valley declined, saying that it intended to submit its own bid. Med-Eng then contacted the European manufacturer of the Libervit system, to inquire about direct sourcing. The manufacturer declined to supply Med-Eng, having regard to its contractual arrangement with Valley, which granted Valley exclusive distributorship rights to the Libervit system in Canada.

[89] Shortly thereafter, Mr. Schubert became aware that a third prospective bidder (Deltic) was also contending that the procurement was effectively sole-source, because only the Libervit system could meet the HDOS specifications. It is unknown whether there were any other prospective bidders at that stage who may have conveyed an interest in this procurement process (i.e. by way of previous, unrelated clarification requests).

[90] In any event, PWGSC and DND (via Mr. Schubert) were in receipt of correspondence from two of three known prospective bidders. That correspondence did not merely request, or make a case for, a change in specifications on the premise that alternative equipment could be substituted on the merits. It went much farther by notifying DND that the third prospective bidder (Valley) was declining to supply the prescribed equipment to prospective competitors and that an "unfair and improper advantage" was being conferred on the Libervit system by the existing HDOS specifications.<sup>88</sup>

[91] While PWGSC and DND were not under a duty to notify Valley of the correspondence that had been received from Med-Eng and Deltic, the failure to do so, in the context of this particular case, was unwise. In making this observation, the Tribunal should not be taken as saying that a procuring entity should be consulting all prospective bidders before reaching a decision on the merits of a clarification request.

[92] In the present situation, two of three prospective bidders alleged, *ex parte*, that the procurement has been rendered sole-source and thus "unfair" because a third prospective bidder (Valley) was declining to supply its competitors with one component of the goods being procured. Such allegations may be viewed as a complaint against the third bidder or could even be interpreted (at least arguably) as impugning the conduct of another bidder (Valley). On these particular facts, it would have been prudent and good practice for PWGSC to notify Valley of these allegations.

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<sup>86</sup> Schubert Affidavit, paras. 25-26, Exhibit PR-2019-060-12, p. 57-58.

<sup>87</sup> Schubert Affidavit, Ex. 5, Exhibit PR-2019-060-12, p. 973.

<sup>88</sup> Schubert Affidavit, Ex. 5, Exhibit PR-2019-060-12, p. 973.



[93] The Tribunal agrees with Valley's cogent submission that an agreement to supply competitors for the purposes of a procurement in which Valley itself would be a bidder, could give rise to a perception of collusion amongst bidders.<sup>89</sup> The Tribunal further observes that the record does not conclusively demonstrate that Med-Eng would have been completely unable to source the Libervit system through other channels, such as purchasing from a broker or acquiring the equipment through a subsidiary or related entity. Med-Eng simply advised of its inability to obtain the Libervit system through the most direct and convenient channels of trade. It did not demonstrate that any other possible options were either impossible or overly burdensome.<sup>90</sup>

[94] As such, the procurement at issue could have been better and more transparently managed, even if the overall outcome of the procurement decision was not consequentially affected.

[95] A clear and explicit reply to Med-Eng, refuting its allegations that sole sourcing was categorically precluded by the trade agreements, would have dispelled any suggestion that DND might have considered changes to the HDOS specifications for any reasons other than a genuine consideration of operational needs measured against cost and a desire for enhanced competition.

[96] Notwithstanding, the Tribunal also finds that the evidence does not show that there was actual bias or the appearance of bias against Valley during the procurement process.

[97] In *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, the Federal Court of Appeal confirmed that fairness in public procurement matters encompasses the duty to be impartial.<sup>91</sup> That duty is not limited to avoidance of actual bias but also to reasonable apprehension of bias.<sup>92</sup>

[98] The test for reasonable apprehension of bias has been framed as:

. . . what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would he think that it is more likely than not that [the individual] whether consciously or unconsciously, would decide fairly.<sup>93</sup>

[99] The assessment of reasonable apprehension of bias is context-dependent.<sup>94</sup> The good faith and honesty of the public servants overseeing the procurement process is presumed.<sup>95</sup> There must be some evidential foundation to support an allegation of bias or partiality.<sup>96</sup> That evidence is not present here.

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<sup>89</sup> Exhibit PR-2019-060-17, p. 10-11.

<sup>90</sup> See *Almon* at paras. 39-55.

<sup>91</sup> 2000 CanLII 16572 (FCA) [*Cougar Aviation*].

<sup>92</sup> *Cougar Aviation* at paras. 27-30.

<sup>93</sup> *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at p. 394, cited in *CAE Inc. v. Department of Public Works and Government Services* (7 September 2004), PR-2004-007 (CITT) at para. 29.

<sup>94</sup> *Cougar Aviation* at para. 31.

<sup>95</sup> *MasterBedroom Inc.* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at paras. 15-16.

<sup>96</sup> *Renaissance Aeronautics Associates Inc. (d.b.a. Advanced Composites Training) v. Department of Public Works and Government Services* (28 May 2018), PR-2017-063 (CITT) at para. 38; *Tyr Tactical Canada ULC* (13 May 2016), PR-2016-006 (CITT) at para. 26.

[100] The Tribunal has previously held that there is no inherent unfairness or bias in a tender procedure simply because the prospective bidders may not all be on equal footing, or that some bidders, due to their circumstances, possess an advantage relative to the others.<sup>97</sup>

[101] It is also settled that the procuring entity may refine the tender specifications for the purpose of increasing competition during the tender process. An open and competitive procurement process is desirable and is the presumptive norm. The trade agreements do not preclude or guard against greater or increased competition. As such, a relaxing of tender specifications to increase competition may change the previous equilibrium that existed between the bidders. However, such amendments do not create bias or unfairness unless there is evidence that the changes are implemented with the targeted objective of favouring one bidder over the other(s).<sup>98</sup>

[102] There is no persuasive evidence to suggest that the decision to redefine the HDOS specifications was made specifically to target or disadvantage Valley or to explicitly favour Med-Eng.

[103] The change in specifications did not eliminate Valley from the tender competition. Valley had the option of quoting either the Holmatro system or the Libervit system. There is no evidence to indicate that Valley was unable to obtain or supply the Holmatro system.

[104] In devising a bid strategy, Valley could have assessed whether it still had room to make an overall profitable bid by quoting the Libervit system at a discount and offsetting that discount on other components. If not, it still retained the option of quoting the Holmatro system. It is possible that the Statement of Work and evaluation criteria as drafted provides little incentive for bidders to provide “value added” content. If a compliance statement is provided and satisfies the minimum criteria, no additional credit is received for equipment which exceeds the prescribed threshold. However, this goes to the procurement strategy adopted by the procuring entity and the manner in which it chooses to draft the tender specifications and evaluation criteria.

[105] Moreover, Valley’s bid was judged to be compliant at both stages of a two-step evaluation process. Overall, it placed second of three bidders overall and was not awarded the contract due to the cost factor – Valley’s quoted price to supply HRS Equipment was higher than the price quoted by Med-Eng.

[106] Accordingly, the relaxing of the requirements with respect to the HDOS system may have reduced a competitive advantage held by Valley relative to other bidders at the outset of the tender process. But Valley has no right or entitlement to a particular advantage or to maintain it throughout the process. As noted by the Tribunal in *Almon*, bidders will not necessarily stand on an equal footing for any number of legitimate commercial reasons and “[g]overnment is under no obligation to compromise its legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers’ needs.”<sup>99</sup>

[107] Just as there is no breach of trade agreements where tender requirements may be stringent to the disadvantage of a bidder (as was the case in *Almon*), the trade agreements are likewise not contravened where the procuring entity decides that operational requirements can still be met by less sophisticated equipment, thereby trading off some equipment features for potential cost savings arising from a more competitive tender process.

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<sup>97</sup> *Almon* at paras. 40-42.

<sup>98</sup> *Western Star Trucks* (11 September 2000), PR-2000-011 (CITT) [*Western Star*] at p. 6-7.

<sup>99</sup> *Almon* at paras. 40-41.

[108] Viewed in that context, the Tribunal finds that the test for bias and reasonable apprehension of bias is not met – a reasonable person would not find that a decision to trade-off some equipment features for potential costs savings is biased. It may or may not turn out later to have been “penny wise and pound foolish”, but that does not make the decision a discriminatory one which contravenes the trade agreements.

[109] Of greater concern to the Tribunal is Med-Eng’s forceful *ex parte* demand that failure to amend the HDOS specifications would result in a sole-source procurement which would constitute a breach of trade agreements *per se*.

[110] It is not uncommon for a bidder to alert a contracting authority that a procurement comprises sole sourcing and to inquire about possible substitution. However, alleging that the procurement will be unlawful unless the specifications are amended to suit the requesting bidder can be viewed as coercive.

[111] Sole sourcing *per se* does not necessarily contravene trade agreements. If so, the Crown would always be precluded from procuring goods that may be subject to intellectual property monopoly rights or which are otherwise proprietary. In particular, such protection may attach to innovative or cutting-edge technology. The public interest would not be served if such goods were automatically placed out of reach from government procurement because of a blanket prohibition against sole sourcing.

[112] As such, the conditions of a tender are circumstance-dependent, having regard to the needs of the procuring entity, which is free to define the parameters of the procurement accordingly. In doing so, the provisions of the trade agreements should be observed.

[113] Notwithstanding, the content of Med-Eng’s objection could well be interpreted as necessitating action to remedy a status quo that was flatly asserted, by a prospective bidder, as being unlawful. Mr. Schubert provides only a very brief description of DND’s reaction to Med-Eng’s objection:

Based on the information provided by Med-Eng, the project team was concerned about the openness and competitiveness of the procurement, and began to review the requirement for the HDOS with the Army.<sup>100</sup>

[114] Both DND and PWGSC engage in frequent procurement processes. As such, they must be considered to be relatively sophisticated entities with access to legal advice, as needed. However, the evidence does not indicate whether such advice was sought here. Consequently, Med-Eng’s assertion of trade agreement breach might have been accepted at face value by the project team and been a factor underpinning their review of the HDOS specifications. Alternatively, Med-Eng’s assertion of trade agreement breach could have been recognized as unfounded and dismissed out of hand.

[115] As such, it is unclear as to whether the review of the HDOS requirements was conducted by the Army under the misapprehension that remedial action was mandatory because the status quo was untenable. If so, the Army would have been operating under legal mistake with respect to the false choice defined by the allegation that sole sourcing would breach trade agreements *per se*. In such circumstances, the review of specifications giving rise to Amendment 11 might well have been focused on identifying equipment specifications that the Army could live with, as opposed to what it wanted or needed.

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<sup>100</sup> Schubert Affidavit, para. 14, Exhibit PR-2019-060-12, p. 54.

[116] On the other hand, the Army could have reasonably and rationally reached the conclusion that the cost savings to be derived from a more competitive procurement process outweighed the added features and advantages of the Libervit system. The information that the Libervit system could not be competitively sourced may have been regarded as an opportunity to reduce overall procurement cost, by amending the specifications. As noted above, the Army is best placed to assess relevant factors, (including type of operational use and anticipated frequency of use) in order to define its procurement needs. Within the overall framework of a procurement directed to a multiplicity of components, the Army might well place an HDOS system with Libervit features at a lower point on its hierarchy of needs, particularly when costs or other factors are considered. That is a legitimate choice to make, having regard to the principles set out in both *Almon* and *Western Star*.

[117] The GIR does not include the correspondence wherein Mr. Schubert reports Med-Eng's objection to DND, or any subsequent documentation generated internally as DND considered possible consequential amendment to the HDOS specifications. Valley has filed access-to-information requests seeking disclosure of documents underpinning the procurement at issue. The access-to-information requests were filed on the same day that Valley filed this complaint with the Tribunal.<sup>101</sup> The documents have not yet been released to Valley.<sup>102</sup>

[118] The documents sought by Valley may (or may not) reveal that DND amended the HDOS under the mistaken belief that such amendment was legally required to correct a RFP that would otherwise "breach" trade agreements. Without that documentation, there is a gap in the evidential record. It would be speculative for the Tribunal to bridge that gap by concluding that Amendment 11 arose from a review that was not independent, or otherwise conducted under conditions of legal mistake.

[119] However, there is evidence to support a finding that the HDOS specifications were freely and independently revised by DND.

[120] Med-Eng's complaint insisted that the HDOS specifications be relaxed to enable systems from other OEMs to be considered, or that procurement of the HDOS system be carved out and made subject of a separate competition. As such, there appeared to be an alternative to revision of the specifications that would have still addressed Med-Eng's complaint. That alternative was not adopted by DND.

[121] Further, DND did not adopt all of the changes to the specifications sought by Med-Eng. For example, Med-Eng requested that the spreading force of the HDOS be lowered from 60 kN to 20 kN. Amendment 11 revised the spreading force specification to 50 kN.

[122] The Tribunal also notes that DND had previously received a clarification request seeking revision of specifications to an aspect of the tender unrelated to this complaint, on the basis that sole sourcing would be required. The request was denied, by way of Clarification Request 3 in Amendment 1:

### **3 - Clarification Request**

The Solicitation calls specifically for the NICE Frame and related accessories. This creates a sole source situation for the manufacturer. Would you consider a fully compliant back pack system from a different manufacturer?

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<sup>101</sup> Exhibit PR-2019-060-01, p. 459-465.

<sup>102</sup> Exhibit PR-2019-060-17, p. 3.

### 3 – Response

No, Canada requires specified in-service Load Carriage System as described in the SOW.<sup>103</sup>

[123] Maintaining the specification for the NICE Frame despite sole sourcing, suggests that DND was aware that it had the *bona fide* option to reject Med-Eng's demands concerning the HDOS specifications, notwithstanding that sole sourcing would be the result.

[124] Mr. Schubert states that he believed the Libervit system to be widely available, before receiving Med-Eng's complaint. The Tribunal thus infers that the original HDOS specifications might have been more broadly drafted from the outset, had DND been aware of possible limitations for the sourcing of the Libervit system by multiple bidders.

[125] Accordingly, the Tribunal concludes, based on the evidence before it, that although the procurement process followed in this case could have been better and more transparently handled, there is insufficient evidence to demonstrate that those deficiencies served to create a process that was biased against Valley, created a reasonable apprehension of bias or was otherwise unfair.

#### **Ground 3: No reasonable opportunity to react to changes in tender specifications**

[126] Although specifications for the HRS Equipment were developed in a consultative process spanning approximately five years, substantial changes to the specifications for one aspect (HDOS System) were made at a very late stage in the process.

[127] With approximately 12 days remaining before the closing date, PWGSC introduced significant amendments to the specifications for one component of the equipment being procured (HDOS System). The effect of this change was to broaden the specifications to enable either the Holmatro system or the Libervit system to be supplied by a prospective bidder.

[128] Valley contends that this change operated, for practical purposes, to lower the minimum technical performance threshold to the point where the equipment is ill-suited, if not dysfunctional, for its intended operational use. For the reasons given above, the Tribunal is in no position to make this assessment on the merits or to second-guess DND's reasons for making that change.

[129] Clearly, Valley views the Libervit system as being the optimal (if not only) system capable of achieving the operational field objectives described in the RFP. Although Valley has exclusive rights to distribute the Libervit system in Canada, there is no evidence that the terms of distributorship limit or restrict Valley's ability to source or obtain similar products, such as the Holmatro system. Indeed, according to Valley, the Holmatro and Libervit system are not direct competitors, as one is intended for police tactical squads and the other for military use. As such, all prospective bidders would have been placed on a level playing field of being able to quote the Holmatro system for supply to DND. Valley would have had the additional option of quoting the Libervit system in its bid, which it did.

[130] If Valley regarded Amendment 11 as prejudicial, it had the option of filing a complaint with the Tribunal at that time. Instead, Valley elected to request an extension of time, which was granted. PWGSC granted the extension for the duration of time specified in Valley's request.

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<sup>103</sup> GIR, Ex. 12, Exhibit PR-2019-060-12, p. 472.

[131] Although Valley stresses that PWGSC advised that no further extensions would be granted, this simply underscores the imperative of filing a complaint at that time, if Valley perceived that the time afforded to respond to Amendment 11 was overly limited.

[132] Notwithstanding, Valley was able to submit its bid on time and that bid was found to be compliant, at both stages of the evaluation process. In the end, the contract was awarded to Med-Eng, based on price. It is quite possible that price differential between the Holmatro system quoted by Med-Eng and the Libervit system was a contributing factor to the price differential between the bids tendered by Med-Eng and Valley. It may have even been a dominant factor. However, that price differential arises from Valley's own decision to quote the Libervit system at a particular cost or price point, instead of the Holmatro system.

[133] The Tribunal finds that Valley wanted to supply the Libervit system because it regarded the Libervit system to be superior equipment that was best suited to DND's operational needs. That view was not affected or changed by Amendment 11. Indeed, Valley maintained that position throughout, up to and including the filing of this complaint – the alleged differences in performance characteristics between the Holmatro and Libervit systems underpin Valley's complaints that the procurement process was flawed.

[134] In view of the foregoing, the Tribunal finds that Valley was able to react and respond to Amendment 11 and was not prejudiced by the timing of the amendment.

[135] In the alternative, even if such prejudice could be demonstrated, Valley is out of time to make that complaint.

[136] Time is of the essence in procurement matters. A bidder who becomes aware of a serious flaw in the procedural process must react at that time. If it awaits the outcome of the process, it may find itself out of time.<sup>104</sup> Having sought and accepted the extension of time and proceeded with the filing of its bid, Valley essentially waived its right to later complain about a timing disadvantage when it was not awarded the contract.

## Summary

[137] The Tribunal faces statutory deadlines for disposition of procurement disputes.<sup>105</sup> The timeline for disposition of this procurement has been extended to the maximum permissible period of 135 days. The Tribunal has no authority or discretion to further extend that timeline, notwithstanding the state of emergency arising from the COVID-19 pandemic.

[138] As such, the Tribunal must render its decision, based on the evidence provided within the statutory timeline. For the reasons given above, the evidential record is not as fulsome as it could have been. The GIR does not fully account for the internal perception, handling and consideration of Med Eng's *ex parte* complaint referencing Valley's refusal to supply the Libervit system and Med-Eng's assertion that the original tender specifications were consequentially contrary to trade agreements and thus unlawful.

[139] Having considered the trade agreement provisions cited by Valley in its complaint, the Tribunal finds that none of these provisions have been contravened by the actions and events that are complained of.

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<sup>104</sup> *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284, at paras. 18-20.

<sup>105</sup> Section 12, *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

[140] Although the assertions made by Med-Eng can arguably be characterized as “advice” conveyed by an interested party to the contracting authority, the available evidence of record does not persuasively demonstrate that either DND or PWGSC were misled or coerced into making changes to the Statement of Work because of a mistaken belief that the existing specifications created an unlawful tender, having regard to the provisions of the trade agreements and that there was no discretion to retain the original HDOS specifications, even if sole sourcing was the result.

[141] As discussed above, there is evidence to support a finding that DND’s rationale for revising the HDOS specifications was made independently, and underpinned by the opportunity to lower the overall cost of procuring HRS Equipment by way of a more competitive process. In doing so, DND may well have decided to make certain trade-offs, but that decision is DND’s to make. Amendment 11 operated to increase competition by enabling an operational alternative to the Libervit system (whether fully equivalent or not) to be quoted by other bidders.

[142] For the reasons given above, there is insufficient evidence for the Tribunal to conclude that Valley’s grounds for complaint are well-founded. The relaxing of tender specifications to facilitate increased competition creates neither bias nor a reasonable apprehension of bias. A successful bidder is not non-compliant because it proposes equipment conforming to amended specifications which would have otherwise not satisfied the original specifications. The evaluation of the bids is not unfair because more stringent, but non-prescribed evaluation criteria might have led to a different outcome had it been specified and used.

## COSTS

[143] The Tribunal is conferred with a broad statutory discretion concerning allocation of costs in a procurement dispute.<sup>106</sup>

[144] The Tribunal is mindful of the general principles that costs usually follow the event<sup>107</sup> and are not intended to serve as alternative redress for an unsuccessful party.

[145] However, a decision to award costs (or not) must be made on a principled basis, having regard to the circumstances of the case at issue.<sup>108</sup>

[146] The Tribunal has concluded that there were procedural deficiencies in the procurement process but that the available evidence falls short of demonstrating that these deficiencies amount to either a breach of relevant trade agreements or a failure to adhere to the rules of the tender process, as prescribed by the RFP.

[147] The Tribunal has frequently stressed the importance that the GIR must provide complete and transparent disclosure, and not be calibrated or otherwise strategic.<sup>109</sup> Given the short timelines for conducting a procurement inquiry, and the summary nature of the proceeding, it is imperative that full disclosure of all relevant materials be provided to the Tribunal. The GIR is an important factor in maintaining overall public confidence in the government procurement process.

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<sup>106</sup> Section 30.16, *Canadian International Trade Tribunal Act; Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199, at para. 26.

<sup>107</sup> *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199, at para. 28; *Canada (Attorney General) v. Educom TS Inc.*, 2004 FCA 130, at para. 11.

<sup>108</sup> *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199, at paras. 26-27, 30.

<sup>109</sup> *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 42.

[148] On the facts of this case, PWGSC was placed on early notice<sup>110</sup> that Valley's concerns about the procurement process arose, at least in part, from its information that other bidders and manufacturers were communicating, *ex parte*, with DND and/or PWGSC about the specifications for the HDOS equipment. The full scope of those communications was (and remains) unknown to Valley. Those are allegations which, if taken at face value and not cogently rebutted or fully explained, can raise issues concerning the operational integrity of the procurement system (at least in this case) and require further scrutiny.

[149] Valley sought disclosure of relevant documents by way of access-to-information requests. As those documents were within the possession or control of DND and/or PWGSC, the Tribunal considers that those documents could have been provided in the GIR. In the alternative, the GIR could have otherwise explicitly addressed the information being sought by Valley, but did not.

[150] The Tribunal is aware of the challenges and limitations that have been caused by the COVID-19 pandemic. Both parties sought, and were granted, extensions of time to file materials with the Tribunal having regard to the pandemic conditions. PWGSC ultimately filed an extensive GIR which, as noted, did not extend to addressing Valley's documentary requests. The GIR does not indicate or explain why this additional material sought by Valley could not have been included within the GIR.

[151] If the documents sought by Valley had been provided earlier, the evidential record before the Tribunal might (or might not) have been significantly different. This is not a minor procedural irregularity which was immaterial to the substance or merits of the complaint<sup>111</sup>. The documents sought bear directly on the arguments made by Valley with respect to the second ground for its complaint. With more fulsome disclosure, the Tribunal's deliberations and the potential outcome might (or might not) have been consequentially affected.

[152] In the unusual circumstances of this particular case and to underscore the importance of full and timely disclosure of relevant documents in the GIR, the Tribunal considers that Valley should be awarded its costs of the inquiry. Having regard to the complexity of issues and volume of material submitted, the Tribunal's preliminary determination is that costs of this inquiry fall within Level 2.

[153] The Tribunal encourages the parties to discuss and reach an agreement on the payment of costs, having regard to these reasons. If no agreement can be reached, the parties may make submissions on costs within 15 days of the date of this Statement of Reasons.

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Susan D. Beaubien  
Susan D. Beaubien  
Presiding Member

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<sup>110</sup> For example, by the content of Mr. Martin's Affidavit, together with the access-to-information requests attached as Exhibits J and K to the Martin Affidavit.

<sup>111</sup> The Tribunal considers the circumstances of this case to be distinguishable from those in e.g. *Canada (Attorney General) v. Educom TS Inc.*, 2004 FCA 130; *Canada (Attorney General) v. Polaris Inflatable Boats Ltd.*, 2004 FCA 144.