



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2019-067

NISIT International Ltd.

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, July 20, 2020*

*Reasons issued  
Tuesday, August 4, 2020*

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

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

**BETWEEN**

**NISIT INTERNATIONAL LTD.**

**Complainant**

**AND**

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

**Government  
Institution**

**DETERMINATION**

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

Pursuant to section 30.16 of the *Act*, the Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by NISIT International Ltd. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Procurement Costs Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Susan D. Beaubien  
\_\_\_\_\_  
Susan D. Beaubien  
Presiding Member

Tribunal Panel:	Susan D. Beaubien, Presiding Member
Support Staff:	Peter Jarosz, Counsel
Complainant:	NISIT International Ltd.
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Roy Chamoun Benjamin Hiemstra Nicholas Howard
Intervener:	BRS Innovations Holdings

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## STATEMENT OF REASONS

### OVERVIEW

[1] NISIT International Ltd. (NISIT) has complained to the Tribunal concerning the outcome of a solicitation (W8476-196077/A) comprising a Request for Proposal (RFP) to supply Colourimetric Explosives Detection Kits (CEDK) to the Department of National Defence (DND).<sup>1</sup>

[2] The procurement process was administered by the Department of Public Works and Government Services (PWGSC) on behalf of DND.<sup>2</sup>

[3] NISIT submitted a bid in response to the RFP but was unsuccessful. BRS Innovations Holdings (BRS) was the successful bidder and was awarded a contract by PWGSC. The value of the contract was estimated by NISIT to be \$236,986.90.<sup>3</sup>

[4] NISIT complains that BRS is a non-compliant bidder. More particularly, NISIT contends that the product DND believes to have chosen by the tender process does not conform to the tender requirements and would be hazardous to DND personnel, if used.

[5] The Tribunal conducted a review of NISIT's complaint for the purposes of subsection 30.11(2) of the *CITT Act*. On March 13, 2020, the Tribunal decided to initiate an inquiry with respect to NISIT's complaint.<sup>4</sup> Notice of this decision was published in the Canada Gazette on March 28, 2020.

### PROCEDURAL BACKGROUND

[6] NISIT filed its complaint by way of email, describing, in some detail, its safety and efficacy concerns with respect to the non-compliant product that it believed BRS would be supplying to DND.<sup>5</sup>

[7] PWGSC filed a Government Institution Report (GIR),<sup>6</sup> comprising the RFP and its addenda,<sup>7</sup> the bid evaluations and testing results for the products that were evaluated during the procurement process (designated as confidential information),<sup>8</sup> advisory correspondence concerning the tender outcome,<sup>9</sup> the BRS bid (designated confidential),<sup>10</sup> and post-tender correspondence between PWGSC and NISIT.<sup>11</sup>

[8] PWGSC also made written representations.<sup>12</sup>

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<sup>1</sup> Complaint, Exhibit PR-2019-067-01.

<sup>2</sup> Exhibit PR-2019-067-06, p. 1.

<sup>3</sup> Exhibit PR-2019-067-06, p. 1.

<sup>4</sup> Exhibit PR-2019-067-03.

<sup>5</sup> Complaint, Exhibit PR-2019-067-01.

<sup>6</sup> GIR, Exhibit PR-2019-067-16.

<sup>7</sup> GIR, Exhibit PR-2019-067-16, p. 20-223.

<sup>8</sup> GIR, Exhibit PR-2019-067-16, p. 224-318, 323-366.

<sup>9</sup> GIR, Exhibit PR-2019-067-16, p. 368-370.

<sup>10</sup> GIR, Exhibit PR-2019-067-16, p. 396-416.

<sup>11</sup> GIR, Exhibit PR-2019-067-16, p. 372-381.

<sup>12</sup> GIR, Exhibit PR-2019-067-16, p. 3-18.

[9] NISIT submitted written comments in reply to the GIR.<sup>13</sup>

[10] The Tribunal extended the deadline for completion of this inquiry to 135 days, pursuant to paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

### INTERLOCUTORY ISSUES

[11] BRS requested leave to intervene in this inquiry, by way of request filed with the Tribunal on March 27, 2020.<sup>14</sup>

[12] The decision to permit intervention is discretionary and is governed by section 30.17 of the *Canadian International Trade Tribunal Act* (Act):

**30.17** An interested party may, with leave of the Tribunal, intervene in any proceedings before the Tribunal in relation to a complaint.

[13] As section 30.17 is framed using permissive, not mandatory language, the statute does not provide an interested party with an automatic right to participate as either a party or as an intervener. Intervention is permissible only when the Tribunal grants leave.

[14] Section 30.1 of the Act provides the following definition of “interested party”:

*interested party* means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint;

[15] “Potential supplier” is defined as follows:

*potential supplier* means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

[16] BRS is a “potential supplier” because it was the successful bidder for the contract whose procurement process is now contested by NISIT, thus giving rise to this inquiry. As such, BRS is an “interested party” within the meaning of section 30.17.

[17] The Tribunal must accordingly exercise its discretion to determine whether BRS should be granted leave to intervene.

[18] In deciding BRS’s request for leave to intervene, the Tribunal found the test set forth in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 [*Pictou Landing*] to be helpful in guiding the exercise of its discretion.

[19] For the purposes of section 30.17, the factors identified by *Pictou Landing* may be summarized and restated as follows:

- (1) Has the proposed intervener complied with procedural requirements for seeking leave to intervene? Has it provided grounds or evidence that are sufficiently detailed to enable the Tribunal to properly exercise the discretion conferred by section 30.17?

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<sup>13</sup> Exhibit PR-2019-067-19.

<sup>14</sup> Exhibit PR-2019-067-08.

- (2) Is the proposed intervener an “interested party”?
- (3) Will the proposed intervener advance different and useful perspectives that will assist the Tribunal with disposition of the inquiry?
- (4) Is it in the interests of justice that intervention be permitted?
- (5) Would the proposed intervention be consistent with the objective of securing the fairest, least expensive and most expeditious determination of the proceeding?<sup>15</sup>

[20] Section 30.17 prescribes no specific procedural requirements for a motion seeking leave to intervene.

[21] BRS is self-represented and sent a letter to the Tribunal asking to participate in the proceeding.<sup>16</sup> Although BRS’s letter did not describe grounds for intervention, the Tribunal considered that there was sufficient information on file to enable the Tribunal to assess whether leave to intervene should be granted.

[22] BRS fulfills the statutory definition of being an interested party. Moreover, the grounds for complaint, as advanced by NISIT, include allegations that the product to be supplied by BRS was not only non-compliant with tender requirements, but also hazardous for use. The Tribunal considered that BRS would be in a position to marshal evidence and/or argument that would address these allegations.

[23] As such, the Tribunal concluded that BRS could well bring a perspective differing from those of NISIT and PWGSC and which could usefully assist the Tribunal in its disposition of this proceeding.

[24] With respect to the fourth factor, BRS would be directly and materially affected if NISIT succeeded with its complaint. The Tribunal has the statutory jurisdiction to recommend the cancellation of a contract awarded pursuant to a flawed procurement process, among other remedies.<sup>17</sup> As such, the interests of justice would be served by granting BRS leave to intervene.

[25] Finally, BRS’s participation as an intervener was unopposed and would not be disruptive of the timeline for the conduct of this inquiry and its fair, cost-effective and timely disposition.

[26] Having regard to all of the foregoing, the Tribunal decided to grant BRS standing as an intervener.

[27] Notwithstanding, BRS did not participate by either filing evidence or written submissions.

## **FACTUAL BACKGROUND**

[28] The procurement at issue is directed to equipment (CEDK) that is intended to be used by field engineers of the Canadian Armed Forces acting as intermediate and advanced search teams. These search teams will provide support to Battle Groups in both overseas and domestic missions. In

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<sup>15</sup> I.e. consistent with Rule 3 of the *Canadian International Trade Tribunal Rules*.

<sup>16</sup> Exhibit PR-2019-067-08.

<sup>17</sup> *CITT Act*, s. 30.15(2).

that capacity, the search teams require a field detection kit to enable the detection and presumptive identification of explosive substances using colourimetric technique.<sup>18</sup>

[29] Colourimetric analysis entails the application of chemical reagents to the material being tested. When in contact with a potential explosive substance, the reagent will cause an observable colour change to occur. The type of colour change is substance-specific. As such, the colour change serves as a marker to identify a particular type of explosive substance or a precursor.<sup>19</sup>

[30] The field detection kit (CEDK) must be simple, reliable and non-encumbering for use in the field. The objective is to enable the search teams to quickly test for potential explosive substances in different weather and light conditions including daylight, low light (dawn/dusk) or black-out conditions.<sup>20</sup>

[31] The RFP was dated August 8, 2019, with a closing date of October 11, 2019.<sup>21</sup>

[32] The Statement of Work (SOW) in the RFP prescribed technical requirements for the CEDK. Among other requirements, the CEDK was prescribed to be premised on “proven, fielded equipment” used in service by a military or police agency of the United States, Canada, Britain, Australia or otherwise by a NATO military partner.<sup>22</sup>

[33] Two types of CEDK were described by the SOW. One is a “multi-sample” kit which comprises reagents for detection of 13 explosive and explosive substances, in sufficient quantities for 10 tests. Also required was provision of a “single sample” kit comprising reagents for detection of eight manufactured explosives and nitrates, in sufficient quantity for no less than 10 tests.<sup>23</sup>

[34] Reagents had to be supplied as either sealed crushable ampoules (as an integrated test unit) or in drop/spray dispensers.<sup>24</sup> Other kit components included items such as sample collectors<sup>25</sup>, gloves, evidence bags, markers, and a carry pouch. Technical specifications are prescribed for each component of the kit.<sup>26</sup>

[35] Among other specifications, the SOW also prescribed a list of explosive and explosive substances that the CEDK must detect and in what quantity (i.e. bulk or trace amounts). The specifications also described requisite testing time, error rate (false positives) and environmental/climactic conditions for operation.<sup>27</sup>

[36] For reasons of operational expediency and simplicity during combat operations, the Single Sample Kit must require only one sample to detect all of the prescribed substances.<sup>28</sup>

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<sup>18</sup> GIR, Exhibit PR-2019-067-16, p. 163.

<sup>19</sup> GIR, Exhibit PR-2019-067-16, p. 163.

<sup>20</sup> GIR, Exhibit PR-2019-067-16, p. 163.

<sup>21</sup> GIR, Exhibit PR-2019-067-16, p. 21.

<sup>22</sup> GIR, Exhibit PR-2019-067-16, p. 179.

<sup>23</sup> GIR, Exhibit PR-2019-067-16, p. 179-180.

<sup>24</sup> GIR, Exhibit PR-2019-067-16, p. 180.

<sup>25</sup> I.e. a swab pen-style collector.

<sup>26</sup> GIR, Exhibit PR-2019-067-16, p. 180-183.

<sup>27</sup> GIR, Exhibit PR-2019-067-16, p. 183-185.

<sup>28</sup> Namely, eight listed manufactured explosives, Nitrates (Homemade Explosives & Precursors) as prescribed to Annex A Table 1 of the SOW; see Exhibit PR-2019-067-16, p. 183-184.



[37] Five addenda were issued to the RFP,<sup>29</sup> but their content is not relevant to this proceeding.

[38] By the bid closing date, PWGSC had received bids from NISIT, BRS and a third party.<sup>30</sup>

[39] The bids were evaluated according to a two-phase evaluation process<sup>31</sup> by a team of evaluators. During the first phase, the bids were assessed for compliance with certain mandatory technical requirements as prescribed by the RFP.<sup>32</sup> Bidders had to submit a Compliance Statement (CS) describing how their proposed product met each of the technical requirements prescribed by the SOW.<sup>33</sup>

[40] In the second phase of the evaluation, product samples supplied by the bidders were tested by DND. The product trials were conducted pursuant to criteria defined by the RFP.<sup>34</sup>

[41] Following completion of the phase one evaluation, all three bids were found to be compliant with the terms of the RFP.<sup>35</sup>

[42] However, only the BRS product passed the testing criteria evaluated during the product trials in the second phase of the evaluation.<sup>36</sup> Accordingly, the contract was awarded to BRS.

[43] PWGSC notified NISIT by email on February 21, 2010, that the contract has been awarded to BRS.<sup>37</sup>

[44] By email dated February 28, 2010, NISIT indicated that it disagreed with the outcome of the procurement process.<sup>38</sup> It further complained to the Tribunal on March 3, 2020.<sup>39</sup>

## POSITIONS OF THE PARTIES

### NISIT

[45] NISIT is a corporation having offices or places of business in Northampton, United Kingdom, and in Northern Ireland.<sup>40</sup> The term “NISIT” appears to be an acronym for Northern Ireland Security Intelligence Training.<sup>41</sup>

[46] NISIT asserts long-standing expertise with the use of forensic testing for the detection of explosives.<sup>42</sup> In response to the RFP, NISIT proposed to supply DND with its SeekerE system.<sup>43</sup>

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<sup>29</sup> GIR, Exhibit PR-2019-067-16, p. 150-223.

<sup>30</sup> GIR, Exhibit PR-2019-067-016, p. 8.

<sup>31</sup> GIR, Exhibit PR-2019-067-016, p. 127-129, 7-9.

<sup>32</sup> I.e. Annex D, Section 3.3; see GIR, Exhibit PR-2019-067-016, p. 130-133.

<sup>33</sup> Annex D, Section 2.1; see GIR, Exhibit PR-2019-067-016, p. 127.

<sup>34</sup> GIR, Exhibit PR-2019-067-016, p. 127, 129, 134-136, 7-9.

<sup>35</sup> GIR, Exhibit PR-2019-067-016, p. 7-9; Confidential Exhibits 3, 4, Exhibits 5, 6.

<sup>36</sup> GIR, Exhibit PR-2019-067-016, p. 7-9; Confidential Exhibits 7, 8.

<sup>37</sup> GIR, Exhibit 9a, Exhibit PR-2019-067-016, p. 235-236.

<sup>38</sup> GIR, Exhibit 10, Exhibit PR-2019-067-016, p. 239-239.

<sup>39</sup> Complaint, Exhibit PR-2019-067-01.

<sup>40</sup> GIR, Exhibit 9a, Exhibit PR-2019-067-016, p. 235; Exhibit PR-2019-067-019, p. 1-2.

<sup>41</sup> Complaint, Exhibit PR-2019-067-01.

<sup>42</sup> Exhibit PR-2019-067-019, p. 1.

<sup>43</sup> Complaint, Exhibit PR-2019-067-01; Exhibit PR-2019-067-019.

[47] According to NISIT, the SeekerE system is the preferred explosive detection system in many countries of the world. To detect a possible explosive, a swab is used to collect a sample of the material being tested. The swab is inserted into a handheld device. Software within the device performs the colourimetric analysis and detects and identifies any explosive material within the sample. The test results are visually displayed on the screen of the handheld device. The software can retain the results of up to 10,000 tests in memory.<sup>44</sup>

[48] Upon receiving notification that the contract had been awarded to BRS, NISIT seems to have concluded that the tender was awarded for supply of a product known as Expray.<sup>45</sup> According to NISIT, use of Expray requires chemical reagents to be sprayed on a test sample in order for colourimetric identification of possible explosives to occur.<sup>46</sup>

[49] NISIT contends that the chemicals used by the Expray product are classified as hazardous substances by health, safety and regulatory authorities in many countries, notably the United States, United Kingdom and Canada. As such, the aerosol dispersion of such chemicals in a spray creates potential health hazards for the user.<sup>47</sup> These concerns are amplified under confined or night-time conditions where steady hands are required to correctly handle the chemicals and apply a correct amount of reagent to the sample being tested.<sup>48</sup>

[50] In view of this, NISIT submits that the Expray product fails to comply with several specifications prescribed by the tender. More particularly, NISIT alleges that use of the chosen product:

- (a) will require use of a multiplicity of samples for testing;
- (b) entails the spraying of hazardous chemicals, thus placing the user at risk from aerosol inhalation of toxic substances;
- (c) is complicated and will lead to unreliable test results;
- (d) is problematic from the standpoint of compliance with health, safety and environmental requirements;
- (e) is problematic with respect to compliance with regulatory standards for the packaging and labelling of hazardous substances;
- (f) is operationally obsolete, as the Expray product is being phased out in other countries, notably the United States.<sup>49</sup>

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<sup>44</sup> Complaint, Exhibit PR-2019-067-01, p. 1.

<sup>45</sup> The Complaint discusses the use of both sprays and drops as being disadvantageous, for similar reasons, notably risk to the user from exposure to toxic chemicals and the practical limitations of ensuring uniform and consistent delivery of the requisite amounts of reagent. Notwithstanding, most of the criticisms in the Complaint are directed at Expray, up to and including the final paragraphs which bear the heading "In Summary". See Complaint, Exhibit PR-2019-067-01, p. 9.

<sup>46</sup> Complaint, Exhibit PR-2019-067-01, p. 7.

<sup>47</sup> Complaint, Exhibit PR-2019-067-01, p. 6.

<sup>48</sup> Complaint, Exhibit PR-2019-067-01, p. 3, 7-8.

<sup>49</sup> Complaint, Exhibit PR-2019-067-01.

[51] NISIT contends that all of these drawbacks are avoided by the features of the SeekerE product, which has a number of claimed advantages, namely:

- (a) it is safer and faster to use;
- (b) yields quicker and more dependable results due to the use of software;
- (c) retains a record of previous tests;
- (d) safer for use in combat zones at night;
- (e) it is easier to operate as limited hand manoeuvring is required to insert the sample swab into the handheld device;
- (f) requires the use of only one testing swab per sample.<sup>50</sup>

[52] Upon delivery of the GIR, it became clear that the tender was not awarded for the Expray product. Rather, the product to be supplied by BRS is a different product, namely, Drop-Ex.<sup>51</sup>

[53] The Drop-Ex product does not use a spray or aerosol transmission of reagent. Instead, a sample of the substance to be tested is deposited on a sample collection paper. Liquid chemical reagents are dropped sequentially on the sample using sequentially ordered droppers. Any colour changes to the sample are visually observed and compared to a reference chart that is provided with the kit.<sup>52</sup>

[54] In reply to the GIR, NISIT maintained the position that the SeekerE handheld device was superior technology to a system that requires the calibrated application of liquid drops, especially under field conditions. The following passage from NISIT's reply aptly summarizes the basis of NISIT's complaint with respect to technical requirements of the tender and the outcome of the procurement process:

Many Operational Units, currently use the SeekerE system and with considerable success. Including the,

- Police,
- Military,
- Border and Customs Control.

Not only in the USA, but South America, Europe, Middle-East and further afield.

We fail to see how such a liquid drop test is suitable in a combat or Rural Operational situation.

For over 40 years we in Northern Ireland have used Forensics to detect Terrorists and their Explosives and the only time where this open liquid form of testing is only used in Laboratories, under controlled condition.

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<sup>50</sup> Complaint, Exhibit PR-2019-067-01, p. 2.

<sup>51</sup> GIR, Exhibit PR-2019-067-016, p. 14.

<sup>52</sup> GIR, Exhibit PR-2019-067-016, p. 15.

Failure to do this results in Court Cases Lost. And Terrorists were going free. In an Operational scene, you do not have time to stop, take a sample and then add one, two or even three drop onto it, in an unprotected environment. It is impossible to guarantee the correct amount is directly added to the suspect material, particularly if it is only a trace amount.

Our, and my experience in Explosive search has taken me to many countries and For example in Libya, where they were very clever in the manner in which they made their bombs, this test would not work because you are only getting the equivalent of 3 grains of salt to test.

I would defy anyone to collect it, clean and then drop 2 or 3 types of chemical onto it and get an accurate test. This is totally useless in an actual environment.<sup>53</sup>

[55] NISIT does not challenge DND's finding that the SeekerE product was found non-compliant during the second product testing phase of bid evaluation.<sup>54</sup> Instead, it states that it has developed an improved swab that will remedy the problem encountered during the product trials.<sup>55</sup>

## PWGSC

[56] PWGSC argues that NISIT's complaints are not valid because they are premised on the mistaken assumption that Expray, as opposed to Drop-Ex, has been chosen as the product to be supplied to DND.

[57] According to PWGSC, NISIT has misinterpreted the tender requirements. The specifications require that the CEDK use a single *sample*, as opposed to a single *test*, in order to detect the eight substances listed in Annex A of the RFP.<sup>56</sup> The specification distinguishes between "tests" and "sample". The evaluation of the products under consideration does not turn on the number of *tests* required to detect the prescribed explosive substances, but upon use of a single *sample*.

[58] Nothing in the RFP precludes a CEDK from using liquid drops. Indeed, the specification explicitly contemplate that such a product could be used for colourimetric analysis<sup>57</sup> and NISIT's complaint discusses the use of liquid drops.<sup>58</sup>

[59] PWGSC stresses that bid evaluation is reviewed on a reasonableness standard. Testing of the Drop-Ex product demonstrated that all eight prescribed substances were detected by application of drops to a single sample on a sample collection paper. Accordingly, the DND evaluators reasonably concluded that BRS's product was compliant with the RFP, having regard to the evaluation criteria and methodology defined by the RFP.

[60] As to NISIT's objections with respect to the alleged toxicity of the chemicals in the BRS product referable to health, safety and environmental concerns, PWGSC says that these requirements are contractual in nature. They pertain to prescribed requirements (such as product labelling) that

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<sup>53</sup> Exhibit PR-2019-067-019.

<sup>54</sup> GIR, Exhibit PR-2019-067-016, p. 369-370.

<sup>55</sup> GIR, Exhibit PR-2019-067-016, p. 241.

<sup>56</sup> At section A1.4, Table 1 – see e.g. GIR, Exhibit PR-2019-067-016, p. 80-81.

<sup>57</sup> GIR, Exhibit PR-2019-067-016, p. 180.

<sup>58</sup> Complaint, Exhibit PR-2019-067-01, e.g. at p. 3, 7.

must be adhered to when the chosen product is actually used. As such, they do not pertain to bid evaluation, but rather to contract administration and are consequentially irrelevant.

[61] Finally, as NISIT does not dispute DND's determination that its bid was non-compliant, its comments concerning the capacities and advantages of the SeekerE product are irrelevant.

## ANALYSIS

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

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

(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.

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

**11** 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.

[64] NISIT was self-represented. Although its complaint did not refer to a specific trade agreement, the Tribunal considers CETA to be a relevant trade agreement, given NISIT's corporate domicile in the United Kingdom and Northern Ireland.

[65] In making its complaint, NISIT has alleged that CEDKs using sprays or drops are inherently unsuitable for field use.<sup>59</sup> Under field conditions, NISIT claims that hand manipulation of chemical reagents may be difficult or imprecise. The user may be exposed to inhalation of, or contamination with, toxic chemicals. Those disadvantages are avoided by use of a handheld device, such as SEEKER-E which constitutes (at least arguably) improved and more sophisticated technology as compared to a system requiring manual manipulation of liquid or aerosol chemical reagents, using a spray canister or droppers.

[66] However, the tender specifications at issue were framed broadly to enable bidders to propose CEDKs that use sprays, drops or other means for performing colourimetric analysis to detect and identify a defined set of explosive substances or their precursors.<sup>60</sup>

[67] When reviewing the merits of procurement complaints, the Tribunal examines the bid evaluation process relative to the RFP as actually issued, and not as against criteria of an RFP that might have been issued, but was not. Put another way, the Tribunal must take the RFP "as is" and

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<sup>59</sup> Particularly when compared to the technology used by its Seeker-E system.

<sup>60</sup> See Annex A, Section A1.2 – System Components, which states that reagents may be provided as an integrated test unit or in drop/spray dispensers; GIR, Exhibit PR-2019-067-016, p. 180.

cannot, for practical purposes, “rewrite” the RFP after the fact, even on the premise that a “better” product might be procured.

[68] A procuring entity has the discretion to define tender specifications as it sees fit in order to satisfy its legitimate operational requirements.<sup>61</sup> Notwithstanding, DND’s discretion must be reasonably exercised. The tender requirements cannot be discriminatory, impossible to meet or otherwise unreasonable.<sup>62</sup>

[69] DND has the discretion to weigh a range of factors and variables when deciding upon the scope of the tender specifications, including cost and ease of operational use. The tender specifications are then written accordingly. The Tribunal must thus defer to DND’s expertise and judgment in defining operational requirements and the equipment needed to meet those requirements, for the purposes of procurement, unless that discretion has been unreasonably exercised.

[70] A decision to include less sophisticated technology within the scope of the tender specifications is not inherently unreasonable.

[71] NISIT has an unfavourable opinion of the technical merits of a CEDK requiring manual use and application of chemical reagents to a sample. Even if NISIT’s characterizations of the disadvantages of the Expray and Drop-Ex products and methodology are well-grounded (and the Tribunal makes no such finding), this does not preclude DND from holding a different opinion concerning the technical merits or cost-effectiveness of such commercially available CEDKs.

[72] In reviewing the procurement process, the Tribunal cannot substitute its own judgment for that of DND, merely on the basis of a difference of opinion between the parties. Such an exercise would be incompatible with a review which is legally required to be conducted on a standard of reasonableness. A decision is not unreasonable because another decision maker may have weighed the same underlying variables differently and written different tender specifications.

[73] Neither party submitted independent expert or other evidence to the Tribunal. Accordingly, there is no basis for the Tribunal to conclude, based on the record before it, that the tender specifications were unreasonably drafted. As such, the Tribunal cannot, for practical purposes, retroactively amend the tender to exclude spray or drop products, because of operational deficiencies alleged by an unsuccessful bidder.

[74] If NISIT’s assessment is correct, DND may (or may not) have made an unwise procurement decision resulting in poor value for public money spent. If so, the merits of that decision will be revealed when the CEDK equipment is delivered and used. If the CEDK performance is unsatisfactory, impractical to use or otherwise does not meet operational requirements, DND will be left to consider and invoke whatever remedial measures may be available to it.

[75] The Tribunal can review the evaluation process to ensure that the bid evaluation was carried out reasonably and fairly.<sup>63</sup> As noted by the Tribunal in *Samson Associates*:

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<sup>61</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>62</sup> *Almon Equipment Limited v. Canada (Public Works and Government Services)*, 2012 CanLII 27603, at paras. 52-55.

<sup>63</sup> *Dynamic Engineering v. Department of Public Works and Government Services* (16 May 2018), PR-2017-060 (CITT) at para. 27; *Star Group International Trading Corporation v. Defence Construction (1951) Limited* (7 April 2014), PR-2013-032 (CITT) at para. 26.

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. In addition, the 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.<sup>64</sup>

[76] In reviewing the evaluation of BRS's bid, the Tribunal agrees with PWGSC that the evaluation criteria specified by the tender requires use of a single sample. The fact that a series of drops may need to be sequentially applied to that sample (i.e. "tests") in order to detect and identify the target compounds<sup>65</sup> does not contravene the tender specifications.

[77] The results from the product trials demonstrate that the Drop-Ex product was able to detect and identify the target compounds in accordance with the prescribed margin of error. There is no dispute that the SeekerE product, upon testing, did not meet these criteria and was found non-compliant.

[78] The Tribunal thus finds that PWGSC's evaluation of BRS's bid was reasonably conducted and was reasonably found to be compliant.

[79] The fact that the Drop-Ex may be arguably less convenient to use is not a relevant consideration, given how the tender specifications have been drafted. As noted above, the Tribunal's review is limited to ensuring that the specifications as drafted were reasonably applied to the bids received as of the closing date. In doing so, the Tribunal cannot consider other factors, such as a comparative evaluation of the advantages and disadvantages of product use under field conditions, as submitted by NISIT. If it did, this would amount to a retroactive amendment to the prescribed bid evaluation criteria, thus introducing different or undisclosed criteria to the bid evaluation process, with consequent procedural unfairness.

[80] If the CEDK 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 fact that users of the CEDK may have to handle toxic chemicals is not indicative of unreasonableness. Chemicals and laboratory reagents are handled, on a daily basis, in many occupational and institutional settings. Safety and environmental concerns are managed by way of product instructions, and the use of protocols which are imposed for the safe handling and use of substances that would otherwise be dangerous. The Tribunal notes that these issues are specifically addressed in the RFP.<sup>66</sup>

[82] It is speculative to conclude that the successful bidder will not correctly label the supplied product, or otherwise fail to provide other deliverables needed for safe use of the product, including

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<sup>64</sup> *Samson & Associates*, 2015 CanLII 153852, at para. 35.

<sup>65</sup> As is the case for the Drop-Ex product.

<sup>66</sup> GIR, Exhibit PR-2019-067-016, e.g. p. 171,173-174, 176-177.

instructional materials and training. The Tribunal agrees with PWGSC that such issues, if they arise, go to contract administration and not to bid evaluation.

[83] In summary, BRS's bid defined a product (Drop-Ex) that falls within the scope of the tender as drafted. It was found, in field testing, to comply with the technical specifications of the RFP. Accordingly, BRS's bid to supply the Drop-Ex product should not be disqualified because the product is (arguably) less technologically sophisticated than a competing product (SeekerE) using different technology or methodology to achieve the same operational objective.

[84] Moreover, a decision to select the Drop-Ex product over the SeekerE product cannot be viewed as unreasonable in circumstances where the SeekerE product itself was found to be non-compliant.

[85] NISIT has developed improvements to the SeekerE product. These appear to post-date the relevant evaluation dates for this tender and are thus irrelevant to this proceeding.<sup>67</sup>

[86] NISIT is free to advocate that future DND tenders for CEDK should be drafted more narrowly or include more stringent evaluation criteria directed to different or more technologically sophisticated products, such as its improved swab for the SeekerE product. However, those considerations do not assist NISIT with respect to this complaint.

[87] For the above reasons, the Tribunal concludes that NISIT's complaint must be dismissed.

### Costs

[88] The Tribunal is conferred with a broad statutory discretion concerning allocation of costs in a procurement dispute.<sup>68</sup>

[89] As a general principle, costs usually follow the event.<sup>69</sup> As PWGSC has been successful, the Tribunal awards PWGSC its reasonable costs of the proceeding.

[90] This proceeding was not particularly complex. The issues were relatively straightforward and the materials submitted by the parties was not particularly voluminous. As such, the Tribunal's preliminary determination is that costs of this inquiry fall within Level 1.

[91] The Tribunal notes that there appears to have been some miscommunication or misunderstanding in advising NISIT, as an unsuccessful bidder, of the actual product that had won the tender.

[92] Moreover, commercial motivations aside, NISIT appeared to be expressing its genuinely held and *bona fide* concerns<sup>70</sup> about the safety limitations of the CEDKs at issue.

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<sup>67</sup> GIR, Exhibit PR-2019-067-016, p. 372-373.

<sup>68</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>69</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>70</sup> GIR, Exhibit PR-2019-067-016, p. 375, 384, 386-395.



[93] In view of the foregoing, the Tribunal encourages the parties to discuss and reach an agreement on the payment of costs, having regard to these reasons.

[94] If no agreement can be reached, the parties may make submissions on costs within 15 days of the date of this Statement of Reasons.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member