



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2020-034

Falcon Environmental Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, January 11, 2021*

*Reasons issued  
Monday, January 18, 2021*

## TABLE OF CONTENTS

DETERMINATION.....	i
STATEMENT OF REASONS .....	1
SUMMARY OF THE COMPLAINT .....	1
PROCUREMENT PROCESS.....	2
COMPLAINT PROCEEDINGS.....	3
POSITIONS OF THE PARTIES .....	4
Falcon .....	4
PWGSC.....	5
PNWR .....	5
ANALYSIS.....	5
The matter is not moot.....	6
The complaint was filed within the time limit set out in subsection 6(1) of the <i>Regulations</i> .....	7
Did PWGSC err in evaluating PNWR’s claim against mandatory criterion M5? .....	8
Application to the evaluation of PNWR’s proposal in this case .....	10
COSTS.....	15
DETERMINATION .....	16
ANNEX 1 .....	18
EXCERPTS OF PART 4 OF THE RFP .....	18
PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION.....	18
4.1 Evaluation Procedures.....	18
4.1.1 Phased Bid Compliance Process.....	18
4.1.1.1 General .....	18
4.1.1.3 Phase II: Technical Bid.....	19
4.1.1.4 Phase III: Final Evaluation of the Bid .....	21
4.2 Basis of Selection.....	21
4.2.1 Basis of Selection – Highest Combined Rating of Technical Merit and Price .....	21

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

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

**BETWEEN**

**FALCON ENVIRONMENTAL INC.**

**Complainant**

**AND**

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

**Government  
Institution**

**DETERMINATION**

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services re-evaluate the bid submitted by Pacific Northwest Raptors Ltd. to determine whether it is responsive to mandatory criterion M5 set out in the solicitation documents, subject to the following conditions:

- This re-evaluation is to take place only if the Tribunal's determination or remedy recommendation in *Falcon Environment Service Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 and PR-2020-022 (CITT) is set aside by the Federal Court of Appeal, or that this matter is referred back to the Tribunal for reconsideration in accordance with the Court's instructions, at the conclusion of judicial review proceedings in Federal Court of Appeal File No. A-285-20 (Judicial Review Application).
- In that event, within 10 days of being notified by the Tribunal of the outcome of the Judicial Review Application, the Department of Public Works and Government Services will send to Pacific Northwest Raptors Ltd. a Compliance Assessment Report (CAR) indicating that its original bid failed to meet mandatory criterion M5 and requesting additional or different information to remedy this deficiency.
- In accordance with the terms of the solicitation documents, Pacific Northwest Raptors Ltd. will then be offered a reasonable opportunity to provide the requested additional information to remedy its failure to meet mandatory criterion M5, as would have taken place had the bid been properly evaluated at Phase II of the Phased Bid Compliance Process.

- Should Pacific Northwest Raptors Ltd. choose to provide additional or different information or clarification in response to the CAR within the time period specified by the Department of Public Works and Government Services, the Department will then proceed to the re-evaluation of Pacific Northwest Raptors Ltd.'s bid to determine whether, taking into account the relevant additional or different information submitted, it is responsive to mandatory criterion M5.
- The recommended re-evaluation is limited to a review of Pacific Northwest Raptors Ltd.'s bid compliance with mandatory criterion M5 and is to be conducted in accordance with the applicable provisions of the solicitation documents governing Phase II of the Phased Bid Compliance Process.
- For greater certainty, in the event that the Judicial Review Application is dismissed by the Federal Court of Appeal, the Tribunal does not recommend any remedy.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal awards Falcon Environmental Inc. its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. 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 *Procurement Costs Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Georges Bujold  
\_\_\_\_\_  
Georges Bujold  
Presiding Member

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

Tribunal Panel:	Georges Bujold, Presiding Member
Support Staff:	Zackery Shaver, Counsel
Complainant:	Falcon Environmental Inc.
Counsel for the Complainant:	Gerry Stobo Marc McLaren-Caux Andrew Paterson
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Roy Chamoun Benjamin Hiemstra Peter Osborne Margaret Robbins
Intervener:	Pacific Northwest Raptors Ltd.
Counsel for the Intervener:	Gillian Radcliffe

Please address all communications to:

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

## STATEMENT OF REASONS

### SUMMARY OF THE COMPLAINT

[1] The present complaint concerns a Request for Proposal (Solicitation No. W0125-29WR08) for the provision of aerodrome wildlife control services at Canadian Forces Base Trenton and Canadian Forces Detachment Mountain View. This is the third complaint filed by Falcon Environmental Inc. (Falcon) relating to this procurement process.

[2] As in its two prior complaints, Falcon alleges that the Department of Public Works and Government Services (PWGSC), acting on behalf of the Department of National Defence, failed to evaluate the winning bid, tendered by Pacific Northwest Raptors Ltd. (PNWR), in conformance with Canada's trade agreements. The Tribunal already conducted an inquiry into Falcon's first two complaints and determined that they were valid. The Tribunal also recommended that PWGSC terminate the designated contract with PNWR and award it to Falcon as the new highest-ranked responsive bidder in relation to Solicitation No. W0125-20WR08/A.<sup>1</sup> Nonetheless, for reasons discussed below, the Tribunal decided that it was necessary to determine the validity of Falcon's third complaint.

[3] In this case, Falcon's allegation is that PWGSC did not evaluate the proposal of the winning bidder, PNWR, in accordance with a different requirement of the RFP than the evaluation criteria that were in issue in Files No. PR-2020-009 and PR-2020-022. Specifically, Falcon claims that PNWR's bid should have been declared non-responsive as it did not meet mandatory criterion M5, which required bidders to demonstrate experience incorporating the use of birds of prey and applying a procedure manual issued by Transport Canada, namely, Transport Canada Wildlife Control Procedures (TP 11500).

[4] As a remedy, Falcon requested that the Tribunal recommend that the contract with PNWR be terminated and that a new contract be awarded to Falcon instead. Falcon has also requested that it be awarded its complaint costs.

[5] While its inquiry into Falcon's prior complaints was well underway, on August 31, 2020, having determined that the complaint met the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> the Tribunal decided, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*,<sup>3</sup> to conduct an inquiry into the third complaint.<sup>4</sup>

[6] The Tribunal conducted its inquiry into the validity of the complaint as required by sections 30.14 and 30.15 of the *CITT Act*. Due to the interrelated nature of Falcon's three complaints, the Tribunal's inquiry into the present complaint included, at the request of the parties, consideration

---

<sup>1</sup> *Falcon Environmental Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 and PR-2020-022 (CITT) [Files No. PR-2020-009 and PR-2020-022].

<sup>2</sup> SOR/93-602 [*Regulations*].

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

<sup>4</sup> It was not practicable to combine the proceedings in this inquiry with other ongoing proceedings concerning the procurement process at issue. Indeed, given the Tribunal's inability to extend the statutory deadline for the issuance of its determination in Files No. PR-2020-009 and PR-2020-022, combining all proceedings into a single inquiry would have left insufficient time to adequately examine the allegation and evidence filed in this case.

of the evidence tendered by the parties in Files No. PR-2020-009 and PR-2020-022. The Tribunal also took into account the additional evidence filed by the parties and its previous determination and remedy recommendation.

[7] In particular, the Tribunal notes its recommendation in Files No. PR-2020-009 and PR-2020-022 that Falcon be awarded the designated contract as a result of its earlier determination. The present inquiry is therefore unusual in that the Tribunal has already determined that PWGSC erroneously evaluated PNWR's bid against another requirement of the RFP, resulting in PNWR no longer being the bidder with the highest-ranked responsive bid. Moreover, the Tribunal has already recommended the remedy that Falcon is seeking in this case. Finally, the Tribunal cannot ignore that PWGSC indicated that it intended to implement the Tribunal's recommendation to the greatest extent possible.

[8] Notwithstanding the above-noted developments, for the reasons provided below, the Tribunal finds that the complaint is valid.

## PROCUREMENT PROCESS

[9] On September 5, 2019, PWGSC issued a Request for Proposal (RFP) on Buyandsell.gc.ca. Amendment 01, containing the bid solicitation documents, was published on September 6, 2019.

[10] On November 13, 2019, at 2:00 p.m. Eastern Standard Time, the RFP closed.<sup>5</sup> Two bids were received; one bid from Falcon and another from PNWR.

[11] On November 28, 2019, PNWR received a Compliance Assessment Report (CAR) from PWGSC indicating that its bid did not comply with certain mandatory criteria, other than criterion M5, which is the relevant criterion in this case.<sup>6</sup> In accordance with the evaluation procedures set out in the RFP, PWGSC requested that PNWR respond to the CAR with additional or different information by December 5, 2019, in order to remedy its failure to meet the specified mandatory criteria.<sup>7</sup>

[12] On December 4, 2019, PNWR provided PWGSC with its reply to the CAR.<sup>8</sup>

[13] On February 18, 2020, Falcon was informed by email that it was not the successful bidder in the solicitation. The email stated that PNWR had tendered the winning bid and that the contract would start May 1, 2020. According to PWGSC, the date of the commencement of the performance of the contract was subsequently postponed to November 2020. The contract award value was \$312,900 for the first year of the contract, with four additional one-year options.

[14] Falcon filed objections to the award of the contract with PWGSC on March 2 and 3, 2020, and requested that PWGSC provide several documents related to the procurement.

---

<sup>5</sup> Exhibit PR-2020-034-07 at 32.

<sup>6</sup> Exhibit PR-2020-034-07A (protected) at 78. According to the RFP, upon completion of an assessment in Phases I or II of the evaluation process, the PWGSC procurement officer was to issue a CAR to bidders. This report informs them either that PWGSC is considering their bid as is or identifies any eligible mandatory requirement for which the bid does not as yet demonstrate compliance and for which the bidder will be entitled to provide a response.

<sup>7</sup> Exhibit PR-2020-034-07 at 40-44.

<sup>8</sup> Exhibit PR-2020-034-07A (protected) at 81.

[15] Included in Falcon's objection was a request for a re-evaluation of PNWR's bid against mandatory criterion M5, stemming from Falcon's belief that PNWR could not have satisfied criterion M5, which relate to having wildlife control officers with certain education and experience, on the basis that PNWR had advertised an open position.

[16] Following several delays related to office closures due to the COVID-19 pandemic, on May 26, 2020, PWGSC provided a reply to Falcon's objections denying the relief requested and refusing to disclose the documents requested. In its letter, PWGSC informed Falcon that PNWR's bid was compliant with criterion M5 and that PNWR's job posting was not relevant to the bid and could not be considered in the evaluation.

[17] This letter also included a response to other grievances against PWGSC's evaluation of PNWR's bid raised by Falcon. This response led to the filing of Falcon's first complaint on June 9, 2020 (File No. PR-2020-009). On August 5, 2020, after having reviewed information filed by PWGSC as part of its Government Institution Report (GIR) in response to the first complaint, Falcon filed its second complaint (File No. PR-2020-022) with the Tribunal. The subject matter of these complaints was alleged errors in the evaluation of PNWR's bid against requirements other than mandatory criterion M5.

[18] On August 7, 2020, the Tribunal ordered that PWGSC produce certain documents that it considered relevant to the disposition of Falcon's first complaint. The documents ordered to be produced included PNWR's complete bid. PWGSC duly complied with the Tribunal's order and filed the bid as a confidential exhibit on August 14, 2020.

[19] On October 22, 2020, the Tribunal rendered its determination in Files No. PR-2020-009 and PR-2020-022, finding that Falcon's complaints were valid. Due to an unredeemable error in the evaluation of PNWR's bid against point-rated criterion R1, the Tribunal also found that the contract was improperly awarded to PNWR.

## **COMPLAINT PROCEEDINGS**

[20] On August 27, 2020, Falcon filed its third complaint with the Tribunal. This complaint was a result of the review by its counsel of PNWR's complete bid disclosed on August 14, 2020.

[21] On August 31, 2020, the Tribunal accepted Falcon's complaint for inquiry.

[22] On September 10, 2020, PNWR filed a request to intervene.

[23] On September 11, 2020, Falcon confirmed that it did not oppose PNWR's request to intervene. On the same day, the Tribunal granted PNWR's request to intervene.

[24] On September 21, 2020, PNWR filed its comments on the complaint.

[25] On September 28, 2020, PWGSC filed its GIR.

[26] On October 5, 2020, PNWR filed its comments on the GIR.

[27] On October 16, 2020, Falcon filed its comments on the GIR and PNWR's comments.



[28] On October 30, 2020, the Tribunal requested Falcon to inform it of its intentions with respect to this complaint given the determination made in Files No. PR-2020-009 and PR-2020-022. The Tribunal also requested the parties' views on whether the subject matter of this complaint was moot as a result of the Tribunal's previous determination.

[29] On November 3, 2020, in a letter to the Tribunal, Falcon indicated that it had been advised by PWGSC that the department would not seek judicial review of the determination and that, therefore, it may appear the issues in dispute and the rights of the parties have been resolved, insofar as the Tribunal has already recommended the same remedy which Falcon seeks in this case. However, Falcon noted that it remained to be seen whether PNWR would seek judicial review of the determination, in which case the determination might be set aside. For this reason, Falcon submitted that this inquiry, which concerns an independent complaint based on different grounds, might ultimately determine Falcon's rights.

[30] In a letter dated November 5, 2020, PNWR indicated that it was reviewing its legal options with respect to seeking judicial review of the Tribunal's decision.

[31] On November 6, 2020, the Tribunal issued a direction to the parties indicating that it would refrain from rendering a decision on whether the matter was moot until the expiry of the period for judicial review of the determination.

[32] On November 20, 2020, PNWR sought judicial review of the decision in Files No. PR-2020-009 and PR-2020-022.

[33] On January 5, 2021, in response to a request from Falcon, the Tribunal informed the parties that it had proceeded with its inquiry and would issue a determination on the merits of the complaint.

## **POSITIONS OF THE PARTIES**

### **Falcon**

[34] Falcon argues in this third complaint that PNWR's bid failed to meet the requirements of mandatory criterion M5, as it did not include sufficient information on how its proposed wildlife control officers (WCOs) had applied TP 11500 in the course of their work as WCOs. As a factor specifically enumerated in mandatory criterion M5, it is Falcon's contention that any bidder should reasonably be expected to demonstrate, in their bid, the application of their candidates' skills with respect to the wildlife management techniques outlined in TP 11500.<sup>9</sup>

[35] As Falcon could not locate any mention of TP 11500 in PNWR's bid, Falcon contends that the evaluators must have either made use of undisclosed evaluation criteria or had erred in concluding that PNWR had met this criterion.<sup>10</sup> Falcon has also argued that reviewing the questions and answers in Amendment 007 and the "Statement of Work" in Annex A of the solicitation documents underlines the importance of the proposed WCO's familiarity with this document.<sup>11</sup>

[36] With respect to PWGSC's allegation that its complaint was late, Falcon submits that the basis of this complaint is Pacific's full and unabridged bid and that the full bid was only disclosed to

---

<sup>9</sup> Exhibit PR-2020-034-01 at para. 50.

<sup>10</sup> *Ibid.* at paras. 26-29.

<sup>11</sup> *Ibid.* at paras. 36-38.

Falcon's counsel on August 14, 2020. Accordingly, Falcon maintains that it would not have been in a position to file its complaint prior to its counsel having reviewed PNWR's bid documents.<sup>12</sup>

## PWGSC

[37] PWGSC's primary argument is that Falcon's complaint is late and that, in any event, the evaluators conducted their evaluations in a reasonable manner, with due regard to mandatory criterion M5, making their assessment of this mandatory criterion based on PNWR's bid as a whole. PWGSC submits that there is no basis for the Tribunal to substitute its judgment for that of PWGSC's in the circumstances.<sup>13</sup>

[38] PWGSC also submits that Falcon made an argument similar to this complaint when it communicated its objection on March 2, 2020, and that following receipt of PWGSC's response to its objection denying its claim that the evaluation of PNWR's bid against mandatory criterion M5 was improper, Falcon proceeded to file the first complaint in which it abandoned its complaint regarding PNWR's compliance with M5.<sup>14</sup> Accordingly, PWGSC argues that Falcon's complaint concerning alleged evaluation errors with respect to this mandatory criterion is late.

[39] PWGSC further submits that, in any event, its evaluation was reasonable and took into consideration the entirety of PNWR's experience. PWGSC states that TP 11500 is a procedural manual that illustrates best practices and that many of these best practices were highlighted in PNWR's bid. PWGSC states that "[t]he description of relevant experience that is consistent with the guidelines set out in TP 11500 is more useful demonstration the criteria has been met than a mere assertion that the resources have experience applying the TP 11500."<sup>15</sup>

## PNWR

[40] PNWR's comments on the complaint concern primarily what it views as an inaccurate portrayal of its bid by Falcon. Contrary to Falcon's assertions, PNWR contends that it had described, in detail, the techniques discussed in TP 11500 and that PNWR's staff used these techniques at the airports where it was contracted to provide wildlife management services. PNWR suggests that a point-by-point enumeration of the work completed by its proposed WCOs is unnecessary and would have created a significant amount of additional work in furnishing a complete bid.<sup>16</sup> PNWR states that PWGSC's evaluation of mandatory criterion M5 was reasonable and should not be disturbed.<sup>17</sup>

## ANALYSIS

[41] Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

---

<sup>12</sup> Exhibit PR-2020-034-19 at para. 4.

<sup>13</sup> Exhibit PR-2020-034-16 at paras. 34-35.

<sup>14</sup> *Ibid.* at paras. 41-42.

<sup>15</sup> *Ibid.* at para. 51.

<sup>16</sup> Exhibit PR-2020-034-15 at para. 14.

<sup>17</sup> *Ibid.* at para. 28.

[42] Section 11 of the *Regulations* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements. In the present case, the RFP states that the procurement is subject to *inter alia* the provisions of the Canadian Free Trade Agreement,<sup>18</sup> the North American Free Trade Agreement,<sup>19</sup> and the WTO Agreement on Government Procurement.<sup>20</sup>

[43] Falcon's only allegation is that the evaluators' conclusion that the winning bidder, PNWR, demonstrated compliance with an element of mandatory criterion M5 is unreasonable. In short, because, in its view, PNWR's bid failed to describe how Falcon's proposed WCOs had the required experience applying TP 11500, Falcon claims that the evaluation of PNWR's bid was inconsistent with the terms of the RFP and of the relevant provisions of the applicable trade agreements.

### **The matter is not moot**

[44] As noted above, the Tribunal requested submissions from the parties on the issue of whether this inquiry had become moot as a result of its determination and remedy recommendation in Files No. PR-2020-009 and PR-2020-022. This question arose because at the conclusion of its prior inquiry regarding the procurement process at issue, the Tribunal determined that PWGSC breached the applicable trade agreements in evaluating PNWR's bid and recommended that the designated contract at issue be awarded to Falcon. This is the same remedy requested by Falcon in the complaint that caused the present inquiry to be initiated.

[45] Shortly after the issuance of its prior determination and anticipating that PWGSC could decide to promptly implement its related recommendation, the Tribunal felt it necessary to query the parties as to whether, as a result of the outcome of its earlier inquiry, this matter had become moot. As publically available information now indicates that the contract that was originally awarded to PNWR was cancelled on November 10, 2020,<sup>21</sup> and awarded to Falcon on November 30, 2020,<sup>22</sup> it was indeed appropriate to verify whether a determination in this inquiry would still have the effect of resolving a controversy which affects or may affect the rights of the parties.

[46] It appears that it could, as the Tribunal must have regard to the fact that PNWR, also an intervener in Files No. PR-2020-009 and PR-2020-022, filed an application for judicial review of the Tribunal's previous determination before the Federal Court of Appeal.

---

<sup>18</sup> Canadian Free Trade Agreement, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/07/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [CFTA].

<sup>19</sup> North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA].

<sup>20</sup> Revised Agreement on Government Procurement, online: World Trade Organization <[https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)> (entered into force 6 April 2014) [AGP]. The RFP and the Notice of Proposed Procurement published on Buyandsell.gc.ca list other applicable trade agreements. The Tribunal notes that the other applicable trade agreements have provisions that are similar to those of the CFTA, the NAFTA and the AGP.

<sup>21</sup> Tender Award W0125-20WR08/002/KIN, Buyandsell.gc.ca, Public Works and Government Services, 1 December 2020.

<sup>22</sup> Tender Award W0125-20WR08/001/KIN, Buyandsell.gc.ca, Public Works and Government Services, 10 November 2020.

[47] Ultimately, and as a result of the foregoing developments, the Tribunal finds that while the proceedings before the Federal Court of Appeal are pending, it cannot be said that the Tribunal's determination and remedy recommendation in its previous inquiry concerning the procurement process at issue definitively settled the rights of the parties.<sup>23</sup>

[48] As correctly noted by Falcon in its correspondence with the Tribunal on this issue, judicial review proceedings could result in the Tribunal's determination being set aside entirely or set aside and referred back to the Tribunal with instructions on remand, whereupon it could make a different determination or recommendation, including dismissing the previous complaints. In that event, it is possible that the issues raised in this inquiry may ultimately determine the complainant's rights.

[49] For these reasons, the Tribunal finds that, in the current state of affairs, the matter at issue in this case is not merely hypothetical or abstract. Until the outcome of the proceedings at the Federal Court of Appeal is known, the Tribunal cannot conclude that this matter concerns a dispute that has become moot as a result of its prior determination concerning the solicitation at issue and the measures subsequently taken by PWGSC. Therefore, the Tribunal finds that it cannot cease its inquiry on the grounds of mootness and deems it necessary to issue a determination on the merits of Falcon's third complaint.

**The complaint was filed within the time limit set out in subsection 6(1) of the *Regulations***

[50] PWGSC submitted that the disclosure of PNWR's bid was used by Falcon's counsel as a fishing expedition for discovering new grounds of complaint. According to PWGSC, Falcon is attempting, through its third complaint, to use newly acquired evidence, to which only its counsel could have access, to manufacture a new basis for a complaint that is now untimely. In this regard, it argued that Falcon had voiced concerns with the evaluation of PNWR's bid against mandatory criterion M5 in its original objection to PWGSC back in March 2020.

[51] Noting that Falcon decided not to pursue a challenge to the evaluation of PNWR's bid against criterion M5 before the Tribunal when PWGSC denied the relief that Falcon then requested, PWGSC's position is that Falcon is now time-barred from doing so. In short, PWGSC's position is that having abandoned its allegation regarding PNWR's compliance with mandatory criterion M5, Falcon cannot attempt to resurrect a complaint it may have had regarding criterion M5 based solely on confidential disclosure of PNWR's bid to counsel in the context of a separate complaint regarding different evaluation criteria.

[52] Falcon disagrees. It submitted that PWGSC confuses the notion of the *basis* of a complaint with the subject of a complaint. In response to PWGSC's argument that it made allegations concerning PNWR's purported non-compliance with mandatory criterion M5 in its objection and, therefore, that the basis of its third complaint was known to it as of the date of its objection, Falcon argues that what PWGSC describes as the basis of its third complaint is the broadly defined subject of this complaint and not its basis within the meaning of this term in subsection 6(1) of the *Regulations*.

[53] According to Falcon, prior to PWGSC's disclosure of PNWR's bid, it did not have a reasonable basis to complain about whether PNWR's bid demonstrated that its proposed resources

---

<sup>23</sup> In the Tribunal's opinion, its previous determination will, however, have this effect in the event that the Federal Court of Appeal dismisses PNWR's application.

had the required hours of experience applying Transport Canada Wildlife Control Procedures TP 11500 to wildlife control services within the past five years. In essence, it submitted that it was through the disclosure of additional information by PWGSC, after the first two complaints were filed, that the facts underlying its third complaint were, for the first time, revealed.

[54] Tribunal jurisprudence indicates that in situations where, as part of an ongoing complaint process, the complainant becomes aware of new grounds of complaint, it may file a new complaint in accordance with subsection 30.11(2) of the *CITT Act* and the conditions set out in the *Regulations*.<sup>24</sup> Thus, if the basis of a different breach is revealed during a complaint process, a new complaint must be filed in order to have that alleged breach adjudicated by the Tribunal.

[55] The issue therefore becomes whether the basis of Falcon's third complaint became known or reasonably should have become known to Falcon before PNWR's full bid was disclosed to its counsel as a result of the Tribunal's order that it be produced for the purposes of the inquiry in Files No. PR-2020-009 and PR-2020-022. In this regard, the Tribunal is of the view that it is only when its counsel got access to the actual contents of the bid that Falcon could raise the specific allegation it made in its third complaint to dispute PWGSC's evaluation of PNWR's bid against mandatory criterion M5.

[56] While it is true that Falcon questioned this evaluation in its initial objection to PWGSC, the Tribunal notes Falcon's original claim regarding criterion M5 to which PWGSC responded in its denial of relief letter was different. It stemmed from its perception that PNWR could not satisfy the experience requirements set out in M5 because it had recently posted a job opening for a wildlife control services professional. The factual basis for its complaint in this case is not the same and rests on information that could not have become known to Falcon, as represented by its legal counsel, prior to the latter's review of PNWR's bid. As such, the information that led Falcon to file its third complaint was not evidence in support of a prior claim that it chose not to pursue. Rather, it forms the basis of a new ground of complaint.

[57] Since this information only became known to counsel retained by Falcon to act on its behalf before the Tribunal on August 14, 2020, and the complaint was filed within 10 working days after that date, the Tribunal finds that it was filed within the time limit set out in subsection 6(1) of the *Regulations*.

### **Did PWGSC err in evaluating PNWR's claim against mandatory criterion M5?**

[58] The question before the Tribunal is whether the evaluation team erred in its evaluation of PNWR's proposal and, if so, if any such error is sufficient for the Tribunal to interfere with the evaluation and substitute its judgment for that of the evaluators.

#### Relevant provisions of trade agreements and standard of review

[59] In terms of a potential breach of the relevant trade agreements, the CFTA provides that a procuring entity shall "base its evaluation on the conditions that the procuring entity has specified in advance in its tender notice or tender documentation"<sup>25</sup> and that, "[t]o be considered for an award, a

<sup>24</sup> *Storeimage v. Canadian Museum of History* (18 January 2013), PR-2012-015 (CITT); *Halkin Tool Limited v. Department of Public Works and Government Services* (3 May 2010), PR-2009-066 (CITT).

<sup>25</sup> Article 507(3)(b) of the CFTA.

tender shall . . . at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation . . . .”<sup>26</sup>

[60] Moreover, Article 515(5) of the CFTA provides the following:

Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

[61] Articles 1015(4)(a), (c) and (d) of NAFTA and Articles VIII(3)(b) and XV(4) and (5) of the AGP contain similar provisions.

[62] When considering whether bids are evaluated in keeping with these provisions, the Tribunal applies the standard of reasonableness. It will generally accord a large measure of deference to evaluators in their evaluation of proposals.<sup>27</sup> The Tribunal has indicated as follows:

[I]t 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>28</sup>

[Footnotes omitted]

[63] However, it is also well established that procuring entities must evaluate a bid’s conformance with mandatory requirements thoroughly and strictly.<sup>29</sup> The requirement for a bid to demonstrate compliance with all mandatory criteria cannot be abridged or left to inference.<sup>30</sup>

[64] The Tribunal has also been clear that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation. In other words, bidders bear the responsibility of “connecting the dots”—they must take care to ensure that any and all supporting documentation in their bids clearly demonstrates compliance.<sup>31</sup> As such, while the Tribunal has encouraged evaluators

---

<sup>26</sup> Article 515(4) of the CFTA.

<sup>27</sup> See, for example, *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) [*Saskatchewan Institute*] at para. 58.

<sup>28</sup> *Saskatchewan Institute* at para. 58.

<sup>29</sup> *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

<sup>30</sup> *Madsen Power Systems Inc. v. Department of Public Works and Government Services* (29 April 2016), PR-2015-047 (CITT) at para. 41.

<sup>31</sup> *Valcom Consulting Group Inc.* (14 June 2017), PR-2016-056 (CITT) at para. 54.

to resist making assumptions about a bid,<sup>32</sup> ultimately, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood by the evaluators.<sup>33</sup>

[65] Finally, in *Southern California Safety Institute, Inc.*, the Tribunal noted as follows: “While, in limited circumstances, evaluators are permitted to seek the clarification or verification of information contained in proposals, they are generally required to make decisions on the basis of what is contained in the proposals before them.”<sup>34</sup> In the same vein, the Tribunal stated, in *Unisource Technology Inc.*, that “[e]valuators simply cannot depend upon extraneous knowledge or information when it is a mandatory requirement of the RFP that such information be submitted.”<sup>35</sup>

[66] In short, the Tribunal may intervene and substitute its judgment for that of the evaluators where, unlike them, it is of view that the information contained in a bid does not clearly demonstrate compliance with a mandatory criterion. In this scenario, there is a basis to conclude that the evaluation was unreasonable because, in presuming compliance in the absence of sufficient information contained in the bid, it can be said that the evaluators failed to apply themselves in evaluating the bidder’s proposal or improperly relied on information extraneous to the bid itself to fill in the gaps.

#### **Application to the evaluation of PNWR’s proposal in this case**

[67] Applying the principles above to the facts of this case, the Tribunal finds that PWGSC erred in determining that PNWR’s bid demonstrated compliance with the terms of the mandatory criterion M5 of the RFP, which required a detailed demonstration of the relevant work experience. A thorough and strict assessment of the contents of PNWR’s bid reveals that it did not *clearly* demonstrate experience in accordance with this criterion.

[68] Mandatory criterion M5 read as follows:

#	Mandatory Technical Criteria	Page Number(s) in Bid
M5	Regarding the proposed resources: As a minimum the Bidder must propose one Senior Wildlife Control Officer (SWCO) and one Wildlife Control Officer (WCO). The Bidder must demonstrate that their two proposed resources possess the skills and certifications required below. The information should be provided in the form of a résumé or CV, at the very least demonstrate this experience by providing references for contracts where they have accumulated these hours.	

<sup>32</sup> *Tritech Group Ltd. v. Department of Public Works and Government Services* (31 March 2014), PR-2013-035 (CITT) at para. 38.

<sup>33</sup> See, for example, *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 28; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

<sup>34</sup> *Southern California Safety Institute, Inc.* (22 December 2003), PR-2003-047 (CITT) at 7.

<sup>35</sup> *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para. 16.

	<p>(a) The proposed SWCO must possess a minimum of 5,850 hours of wildlife control experience at an airport(s) in the past five (5) years incorporating the use of birds of prey and applying Transport Canada Wildlife Control Procedures (TP 11500) to wildlife control services.</p> <p>(b) The proposed Wildlife Control Officer (WCO) must possess a minimum of 1,950 hours of wildlife control experience at an airport(s) in the past five (5) years incorporating the use of birds of prey and applying Transport Canada Wildlife Control Procedures (TP 11500) to wildlife control services.</p>	<p>(a) # of hours, and reference page number in bid: _____</p> <p>(b) # of hours, and reference page number in bid: _____</p>
--	---	---

[69] According to the term of the RFP, it was thus incumbent on bidders to provide information indicating that its proposed resources possessed not only a minimum number of hours of wildlife control work experience at an airport in the past five years. They were required to demonstrate a precise and defined type of experience at airports, namely, experience incorporating the use of birds of prey and applying Transport Canada Wildlife Control Procedures (TP 11500) to wildlife control services.

[70] The RFP also emphasized the requirement for bidders to address the evaluation criteria clearly and in sufficient detail:

The technical bid should address *clearly and in sufficient depth* the points that are subject to the evaluation criteria against which the bid will be evaluated. Simply repeating the statement contained in the bid solicitation is insufficient.<sup>36</sup>

[Emphasis added]

[71] The Tribunal notes that PNWR's bid and the CVs of its proposed SWCO and WCO attached thereto do not state that they have experience applying Transport Canada Wildlife Control Procedures (TP 11500) to wildlife control services. Similarly, in the parts of its bid identified by PNWR as the relevant sections and attachments that demonstrated that its proposed resources met mandatory criterion M5,<sup>37</sup> there is no mention of Transport Canada's procedure manual TP 11500, nor any explanation of, or explicit details provided on, the experience of the proposed SWCOs and WCOs applying the procedures set out in this document.

[72] As such, none of the documents provided by PNWR with its bid specifically state how and to what extent the proposed WCOs and SWCOs applied manual TP 11500 to wildlife control services in their recent work experience. The Tribunal considers that PNWR's bid was imprecise and lacked the requisite particulars in this regard.

[73] In its comments on the complaint, PNWR submitted that, nonetheless, there was enough information provided throughout its bid for evaluators to be able to judge its familiarity and competence with the various tools and wildlife control techniques available, as described in manual TP 11500. It notably referred to Table 2 of its bid which set out PNWR's overall experience

<sup>36</sup> Exhibit PR-2020-034-06 at 82. Other relevant provisions of the evaluation procedures set out in the RFP are reproduced in Annex 1.

<sup>37</sup> Exhibit PR-2020-034-08 (protected) at 26, 30-35 and Appendices A at 46-50, E at 61-63 and F at 64-79.



providing wildlife control services at airports using a variety of techniques. It also noted that, as the various wildlife control officers proposed for the project have accumulated their hours at the sites specified, it is clear they have significant experience applying a wide range of techniques at airports, as well as experience with additional techniques at additional sites. Essentially, PNWR's position is that its broad description of relevant experience that is consistent with the procedures set out in manual TP 11500, even if its proposed resources' résumés do not expressly refer to the application of the procedures set out in this document, was appropriately deemed sufficient by PWGSC to demonstrate compliance with criterion M5.

[74] In its GIR, PWGSC made similar submissions. It emphasized that PNWR included information concerning seven wildlife control techniques that it uses, which are all listed in manual TP 11500. According to PWGSC, in this way, PNWR's bid addressed the contents of manual TP 11500 and, as a result, there is no basis to interfere with the conclusion of the evaluators.

[75] The Tribunal is unable to accept these arguments because criterion M5 did not require a demonstration of the wildlife control techniques employed by PNWR, as a firm, at airports. It specifically required bidders to demonstrate that the proposed SWCOs and WCOs had significant hours within the past five years applying the procedures of manual TP 11500. In this regard, the Tribunal finds that there was insufficient information included in PNWR's bid that could reasonably have allowed the evaluators to conclude that it was the proposed SWCOs and WCOs that had accumulated the required number of hours of experience, within the past five years, applying manual TP 11500 to wildlife control services.

[76] Even accepting that PNWR's bid demonstrated that it had experience applying certain of the techniques described in manual TP 11500, on the Tribunal's review, criterion M5 was not addressed clearly and in sufficient depth by PNWR. It appears that PNWR left it up to the evaluators to "connect the dots" regarding its proposed resources' experience applying TP 11500. For example, there is no clear indication in the bid connecting or linking the information regarding PNWR's overall experience and that of its proposed SWCOs and WCOs to demonstrate that it was the latter individuals who possessed the minimum number of hours of experience applying the techniques set out in the manual, within the specified time frame.

[77] Yet, there is no doubt that, reasonably interpreted, criterion M5 required this level of detail. In light of the generic nature of the description of the actual experience of its proposed SWCOs and WCOs in PNWR's bid, and considering that it is well established that evaluators must base their evaluations on the content of the proposals before them, without recourse to information or knowledge extraneous thereto, the Tribunal finds that the evaluators' conclusion regarding PNWR's compliance with criterion M5 was unreasonable.

[78] As stated at the outset of this analysis, bids must be evaluated thoroughly and strictly for compliance. It is not enough that a bid may have been compliant or was more likely than not compliant. A bid is either compliant or it is not. In the Tribunal's opinion, it was not reasonable for evaluators to ostensibly infer that PNWR's proposed resources had the experience unambiguously required by criterion M5 on the basis of the general information provided with its bid. The onus to show compliance rests on the bidder; it is not permissible for government institutions to give bidders the benefit of the doubt where compliance cannot be clearly established from the information in a bid.

[79] On this issue, it is worth noting that the evaluators' score sheets do not reveal a rigorous consideration of the issue of the experience of each resource proposed by PNWR applying manual TP 11500 to wildlife control services. While the evaluation report form indicated that evaluators may provide an explanation for their decision, there is no indication on the completed evaluation reports that the evaluators turned their mind to the requirement regarding specific experience applying manual TP 11500. In fact, the short annotations on the evaluation reports suggest that compliance was merely assessed through a verification of the number of hours of experience at airports, which is only one component of criterion M5.<sup>38</sup>

[80] Finally, the Tribunal notes that both PWGSC and PNWR referred to Appendix H to PNWR's bid, consisting of excerpts from a bid submitted by PNWR in 2015 and which expressly mentioned manual TP 11500,<sup>39</sup> as evidence that PNWR's bid in response to the RFP at issue demonstrated that its SWCOs and WCOs had the required experience applying manual TP 11500. Even assuming that this document indicated that PNWR's employees would have some familiarity with the tools and techniques contemplated in this manual, the fact remains that, in itself and without further explanation, it fails to establish that each individual SWCO and WCO proposed by PNWR in its bid had the experience contemplated by criterion M5. Again, it is not PNWR's capacity to carry out the work that is to be examined in the context of the evaluation of its bid against M5. Rather, evaluators had to assess whether the information provided regarding the particular experience of each proposed resource satisfied this criterion.

[81] In any event, this criterion requires *recent* experience applying manual TP 11500 (i.e. within the past five years, namely, between 2015-2019). Therefore, experience acquired by an unspecified PNWR employee in the years preceding 2015, to which Appendix H pertains, could not validly be taken into account by PWGSC when assessing compliance of its 2019 bid against mandatory criterion M5.<sup>40</sup>

[82] In summary, the evidence before the Tribunal indicates that PWGSC's conclusion that PNWR's bid demonstrated compliance with mandatory criterion M5 of the RFP is not supported by a tenable explanation. This criterion required detailed demonstration of the relevant work experience and the Tribunal is not persuaded by PWGSC's and PNWR's arguments that the content of PNWR's bid was adequate in this respect. Accordingly, it finds that the complaint is valid.

## REMEDY

[83] Falcon submitted that PNWR's bid should have been disqualified as a result of the evaluation error committed by PWGSC and that the most appropriate remedy would be a recommendation that Falcon be awarded the contract as the only remaining compliant bidder. PWGSC did not dispute this request, relying on its submissions in Files No. PR-2020-009 and PR-2020-022 on the issue of remedy. PNWR made no representations with respect to remedy other than supporting PWGSC's position in the GIR.<sup>41</sup>

---

<sup>38</sup> Exhibit PR-2020-034-16A (protected) at 25-32.

<sup>39</sup> Exhibit PR-2020-034-08 (protected) at 104-169.

<sup>40</sup> Even accepting that the SWCOs and WCOs proposed by PNWR in 2019 were employed by it at the time of the 2015 bid reproduced, in part, in Appendix H, the Tribunal fails to see how experience acquired by these individuals at unnamed airports only in 2015 could be deemed sufficient to satisfy the fairly large hour requirements of criterion M5.

<sup>41</sup> Exhibit PR-2020-034-18.

[84] The Tribunal disagrees with Falcon's conclusion that, but for the error in the evaluation of PNWR's bid against criterion M5, Falcon would necessarily have been the winning bidder. The reason being that had PNWR's bid been properly evaluated, its original bid would have been deemed inconsistent with criterion M5 at Phase II of the Phased Bid Compliance Process set out in the RFP. At that stage, the evaluation procedures provided that PWGSC would send a written notice to the bidder by way of a CAR, identifying any mandatory criteria that the bid had failed to meet. The notified bidder would then have the period specified in the CAR to remedy the failure to meet any eligible mandatory criterion identified in the CAR by providing to Canada in writing additional or different information or clarification in its response to the CAR.<sup>42</sup>

[85] Pursuant to the terms of the RFP, whereas PNWR's bid should have been deemed non-compliant with M5 at Phase II of the evaluation process, it would follow that a CAR would have been issued to PNWR to allow it to provide additional information to demonstrate its compliance with this requirement. PWGSC would then have determined whether PNWR's bid was responsive to the requirements reviewed at Phase II, including M5, considering such additional or different information or clarification as may have been provided by the bidder in accordance with the provisions of the RFP.

[86] In other words, the Tribunal is not convinced that it would be appropriate to disqualify PNWR from the procurement process as a result of an error in the evaluation that appears curable given the terms of the RFP. Further, the Tribunal finds that an important objective of a remedy recommendation is, where possible, to place the parties in the position in which they would have been absent the government's breach or breaches. In this case, the Tribunal is of the view that it would be inappropriate to deprive PWGSC of its faculty to apply the CAR process set out in the RFP, or to prevent PNWR of the possibility of availing itself of this process.

[87] The Tribunal also understands that the rationale underlying a Phased Bid Compliance Process (PBCP) is to support the Government of Canada's procurement objectives of competition and best value to Canada by increasing the number of bids or offers that demonstrate compliance with the eligible mandatory requirements of a given RFP. In light of this goal and the terms of the RFP in this case, it is suitable to provide PNWR with an opportunity to correct a finding of non-compliance with respect to mandatory criterion M5. The Tribunal finds that this consideration, which does not arise for the evaluation of the bids against rated requirements at Phase III of the evaluation process,<sup>43</sup> is relevant to its remedy recommendation in this case. As previously noted, the only deficiency in the procurement process found by the Tribunal occurred at Phase II of the PBCP when compliance with mandatory requirements was assessed by PWGSC.

[88] Accordingly, having regard to the factors stipulated in subsection 30.15(3) of the *CITT Act*, the Tribunal recommends that PNWR be offered an opportunity to submit additional or different information in order to be re-evaluated as compliant with respect to mandatory criterion M5. However, given that the contract has already been canceled and awarded to Falcon as a result of the Tribunal's determination in Files No. PR-2020-009 and PR-2020-022, the Tribunal is of the view that this remedy recommendation would serve no useful purpose if the Federal Court of Appeal dismisses the judicial review application brought against its earlier determination and

---

<sup>42</sup> See Annex 1, section 4.1.1.3 of the RFP.

<sup>43</sup> In this regard, in Files No. PR-2020-09 and PR-2020-022, the deficiency in the procurement process found by the Tribunal and the consequent prejudice to Falcon and to the integrity and efficiency of the competitive procurement system were more serious.

recommendation. Therefore, the Tribunal's recommended re-evaluation of PNWR's bid against criterion M5 is subject to the following conditions:

- This re-evaluation is to take place only if the Tribunal's determination or remedy recommendation in *Falcon Environment Service Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 and PR-2020-022 (CITT) is set aside by the Federal Court of Appeal, or that this matter is referred back to the Tribunal for reconsideration in accordance with the Court's instructions, at the conclusion of judicial review proceedings in Federal Court of Appeal File No. A-285-20 (Judicial Review Application).
- In that event, within 10 days of being notified by the Tribunal of the outcome of the Judicial Review Application, PWGSC will send to PNWR a CAR indicating that its original bid failed to meet mandatory criterion M5 and requesting additional or different information to remedy this deficiency.
- In accordance with the terms of the solicitation documents, PNWR will then be offered a reasonable opportunity to provide the requested additional information to remedy its failure to meet mandatory criterion M5, as would have taken place had the bid been properly evaluated at Phase II of the PBCP.
- Should PNWR choose to provide additional or different information or clarification in response to the CAR within the time period specified by PWGSC, PWGSC will then proceed to the re-evaluation of PNWR's bid to determine whether, taking into account the relevant additional or different information submitted, it is responsive to mandatory criterion M5.
- The recommended re-evaluation is limited to a review of PNWR's bid compliance with mandatory criterion M5 and is to be conducted in accordance with the applicable provisions of the solicitation documents governing Phase II of the PBCP.
- For greater certainty, in the event that the Judicial Review Application is dismissed by the Federal Court of Appeal, the Tribunal does not recommend any remedy.

## COSTS

[89] Each party, including PNWR, has requested costs to be awarded in its favour, but none has made submissions on the amount.

[90] The Tribunal has broad discretion to award costs under section 30.16 of the *CITT Act*. The Tribunal follows the judicial model under which, generally, the winning party is entitled to its costs.<sup>44</sup> As such, as the successful party in this inquiry, Falcon is entitled to its reasonable costs.

[91] An award of costs is not intended to be a source of profit for the successful party, nor is it imposed as punishment on the party who pays it.<sup>45</sup> Costs are generally determined in accordance with

---

<sup>44</sup> See *Canadian North v. Department of Indian Affairs and Northern Development* (15 May 2007), PR-2006-026R (CITT) at para. 7; *Procurement Costs Guideline* at section 2.1.

<sup>45</sup> See *SoftSim Technologies Inc. v. National Research Council of Canada* (5 November 2018), PR-2018-015 (CITT) at para. 6.

the Tribunal's *Procurement Costs Guideline* (the *Guideline*), which sets out a flat-rate system based on the level of complexity of the procurement, the complaint, and the complaint proceedings.

[92] Based on the factors listed in the *Guideline*, the Tribunal's preliminary assessment is that the level of complexity in this matter is Level 1, which has an associated all-inclusive flat rate of \$1,150. While the Tribunal has discretion to increase this amount in certain circumstances and noted Falcon's request that it award costs "on a heightened scale" in this inquiry, it has decided against deviating from the *Guideline*.

[93] Falcon submitted that because disclosure of PNWR's full bid was delayed until after the filing of its second complaint concerning this procurement, and only after the Tribunal had to issue an order requiring PWGSC to disclose the full bid, it was unable to include the allegation at issue in this inquiry in the second complaint that it filed. Thus, it claims that it was PWGSC's lack of transparency that caused the filing of a third complaint.

[94] However, the Tribunal is unable to conclude that PWGSC's decision to provide only the excerpts of PNWR's bid that it considered relevant in response to the Tribunal's direction at the time of the acceptance of the first complaint for inquiry suggested a malevolent intent to withhold information. At that time, the Tribunal finds that PWGSC legitimately believed that the disclosure of the complete bid was not required for the Tribunal to dispose of the first complaint. The Tribunal also notes that PWGSC promptly complied with its order for the production of the complete bid, which made clear that, despite PWGSC's argument to the contrary, the Tribunal considered that the document in its entirety had to be produced. In these circumstances, the Tribunal finds that PWGSC's actions do not justify an increase in the amount of costs to be paid to Falcon.

[95] All things considered, although the complexity of the procurement was at a medium level, as it involved the procurement of a multi-faceted service project, wildlife control services, i.e. the provision of a wide array of services on an as-required basis, the complaint itself was of a low complexity, as the issue involved an analysis of a single allegation. Moreover, most of the materials and evidence had already been filed with the Tribunal in the course of its prior inquiries concerning this procurement. They were simply placed on the record of this inquiry. In view of these considerations, the proceedings were also narrowly circumscribed and of low complexity.

[96] Therefore, in accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication of the amount of the cost award is \$1,150.

## DETERMINATION

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

[98] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC re-evaluate the bid submitted by PNWR to determine whether it is responsive to mandatory criterion M5 set out in the solicitation documents, subject to the following conditions:

- This re-evaluation is to take place only if the Tribunal's determination or remedy recommendation in *Falcon Environment Service Inc. v. Department of Public Works and Government Services* (22 October 2020), PR-2020-009 and PR-2020-022 (CITT) is set aside

by the Federal Court of Appeal, or that this matter is referred back to the Tribunal for reconsideration in accordance with the Court's instructions, at the conclusion of judicial review proceedings in Federal Court of Appeal File No. A-285-20 (Judicial Review Application).

- In that event, within 10 days of being notified by the Tribunal of the outcome of the Judicial Review Application, PWGSC will send to PNWR a CAR indicating that its original bid failed to meet mandatory criterion M5 and requesting additional or different information to remedy this deficiency.
- In accordance with the terms of the solicitation documents, PNWR will then be offered a reasonable opportunity to provide the requested additional information to remedy its failure to meet mandatory criterion M5, as would have taken place had the bid been properly evaluated at Phase II of the PBCP.
- Should PNWR choose to provide additional or different information or clarification in response to the CAR within the time period specified by PWGSC, PWGSC will then proceed to the re-evaluation of PNWR's bid to determine whether, taking into account the relevant additional or different information submitted, it is responsive to mandatory criterion M5.
- The recommended re-evaluation is limited to a review of PNWR's bid compliance with mandatory criterion M5 and is to be conducted in accordance with the applicable provisions of the solicitation documents governing Phase II of the PBCP.
- For greater certainty, in the event that the Judicial Review Application is dismissed by the Federal Court of Appeal, the Tribunal does not recommend any remedy.

[99] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Falcon its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. 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.

---

Georges Bujold  
Georges Bujold  
Presiding Member

**ANNEX 1****EXCERPTS OF PART 4 OF THE RFP****PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION****4.1 Evaluation Procedures**

- (a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical evaluation criteria.
- (b) An evaluation team composed of representatives of Canada will evaluate the bids.
- (c) Canada will use the Phased Bid Compliance Process described below.

**4.1.1 Phased Bid Compliance Process****4.1.1.1 General**

- (a) Canada is conducting the PBCP described below for this requirement.
- (b) Notwithstanding any review by Canada at Phase I or II of the PBCP, Bidders are and will remain solely responsible for the accuracy, consistency and completeness of their Bids and Canada does not undertake, by reason of this review, any obligations or responsibility for identifying any or all errors or omissions in Bids or in responses by a Bidder to any communication from Canada.

THE BIDDER ACKNOWLEDGES THAT THE REVIEWS IN PHASE I AND II OF THIS PBCP ARE PRELIMINARY AND DO NOT PRECLUDE A FINDING IN PHASE III THAT THE BID IS NON-RESPONSIVE, EVEN FOR MANDATORY

REQUIREMENTS WHICH WERE SUBJECT TO REVIEW IN PHASE I OR II AND NOTWITHSTANDING THAT THE BID HAD BEEN FOUND RESPONSIVE IN SUCH EARLIER PHASE. CANADA MAY DEEM A BID TO BE NON-RESPONSIVE TO A MANDATORY REQUIREMENT AT ANY PHASE.

THE BIDDER ALSO ACKNOWLEDGES THAT ITS RESPONSE TO A NOTICE OR A COMPLIANCE ASSESSMENT REPORT (CAR) (EACH DEFINED BELOW) IN PHASE I OR II MAY NOT BE SUCCESSFUL IN RENDERING ITS BID RESPONSIVE TO THE MANDATORY REQUIREMENTS THAT ARE THE SUBJECT OF THE NOTICE OR CAR, AND MAY RENDER ITS BID NON-RESPONSIVE TO OTHER MANDATORY REQUIREMENTS.

- (c) Canada may, in its discretion, request and accept at any time from a Bidder and consider as part of the Bid, any information to correct errors or deficiencies in the Bid that are clerical or administrative, such as, without limitation, failure to sign the Bid or any part or to checkmark a box in a form, or other failure of format or form or failure to acknowledge; failure to provide a procurement business number or contact information such as names, addresses and telephone numbers; inadvertent errors in numbers or calculations that do not change the amount the Bidder has specified as the price or of any component thereof that is subject to

evaluation. This shall not limit Canada's right to request or accept any information after the bid solicitation closing in circumstances where the bid solicitation expressly provides for this right. The Bidder will have the time period specified in writing by Canada to provide the necessary documentation. Failure to meet this deadline will result in the Bid being declared non-responsive.

- (d) The PBCP does not limit Canada's rights under Standard Acquisition Clauses and Conditions (SACC) 2003 (2019-03-04) Standard Instructions – Goods or Services – Competitive Requirements nor Canada's right to request or accept any information during the solicitation period or after bid solicitation closing in circumstances where the bid solicitation expressly provides for this right, or in the circumstances described in subsection (c).
- (e) Canada will send any Notice or CAR by any method Canada chooses, in its absolute discretion. The Bidder must submit its response by the method stipulated in the Notice or CAR. Responses are deemed to be received by Canada at the date and time they are delivered to Canada by the method and at the address specified in the Notice or CAR. An email response permitted by the Notice or CAR is deemed received by Canada on the date and time it is received in Canada's email inbox at Canada's email address specified in the Notice or CAR. A Notice or CAR sent by Canada to the Bidder at any address provided by the Bidder in or pursuant to the Bid is deemed received by the Bidder on the date it is sent by Canada. Canada is not responsible for late receipt by Canada of a response, however caused.

...

#### **4.1.1.3 Phase II: Technical Bid**

- (a) Canada's review at Phase II will be limited to a review of the Technical Bid to identify any instances where Bidder has failed to meet any Eligible Mandatory Criterion. This review will not assess whether the Technical Bid meets any standard or is responsive to all solicitation requirements. Eligible Mandatory Criteria are all mandatory technical criteria that are identified in this solicitation as being subject to the PBCP. Mandatory technical criteria that are not identified in the solicitation as being subject to the PBCP, will not be evaluated until Phase III.
- (b) Canada will send a written notice to the Bidder (Compliance Assessment Report or "CAR") identifying any Eligible Mandatory Criteria that the Bid has failed to meet. A Bidder whose Bid has been found responsive to the requirements that are reviewed at Phase II will receive a CAR that states that its Bid has been found responsive to the requirements reviewed at Phase II. Such Bidder shall not be entitled to submit any response to the CAR.
- (c) A Bidder shall have the period specified in the CAR (the "Remedy Period") to remedy the failure to meet any Eligible Mandatory Criterion identified in the CAR by providing to Canada in writing additional or different information or clarification in response to the CAR. Responses received after the end of the Remedy Period will not be considered by Canada, except in circumstances and on terms expressly provided for in the CAR.
- (d) The Bidder's response must address only the Eligible Mandatory Criteria listed in the CAR as not having been achieved, and must include only such information as is necessary to achieve such compliance. Any additional information provided by the Bidder which is not



necessary to achieve such compliance will not be considered by Canada, except that, in those instances where such a response to the Eligible Mandatory Criteria specified in the CAR will necessarily result in a consequential change to other parts of the Bid, the Bidder shall identify such additional changes, provided that its response must not include any change to the Financial Bid.

- (e) The Bidder's response to the CAR should identify in each case the Eligible Mandatory Criterion in the CAR to which it is responding, including identifying in the corresponding section of the original Bid, the wording of the proposed change to that section, and the wording and location in the Bid of any other consequential changes that necessarily result from such change. In respect of any such consequential change, the Bidder must include a rationale explaining why such consequential change is a necessary result of the change proposed to meet the Eligible Mandatory Criterion. It is not up to Canada to revise the Bidder's Bid, and failure of the Bidder to do so in accordance with this subparagraph is at the Bidder's own risk. All submitted information must comply with the requirements of this solicitation.
- (f) Any changes to the Bid submitted by the Bidder other than as permitted in this solicitation, will be considered to be new information and will be disregarded. Information submitted in accordance with the requirements of this solicitation in response to the CAR will replace, in full, only that part of the original Bid as is permitted in this Section.
- (g) Additional or different information submitted during Phase II permitted by this section will be considered as included in the Bid, but will be considered by Canada in the evaluation of the Bid at Phase II only for the purpose of determining whether the Bid meets the Eligible Mandatory Criteria. It will not be used at any Phase of the evaluation to increase any score that the original Bid would achieve without the benefit of such additional or different information. For instance, an Eligible Mandatory Criterion that requires a mandatory minimum number of points to achieve compliance will be assessed at Phase II to determine whether such mandatory minimum score would be achieved with such additional or different information submitted by the Bidder in response to the CAR. If so, the Bid will be considered responsive in respect of such Eligible Mandatory Criterion, and the additional or different information submitted by the Bidder shall bind the Bidder as part of its Bid, but the Bidder's original score, which was less than the mandatory minimum for such Eligible Mandatory Criterion, will not change, and it will be that original score that is used to calculate any score for the Bid
- (h) Canada will determine whether the Bid is responsive for the requirements reviewed at Phase II, considering such additional or different information or clarification as may have been provided by the Bidder in accordance with this Section. If the Bid is not found responsive for the requirements reviewed at Phase II to the satisfaction of Canada, then the Bid shall be considered non-responsive and will receive no further consideration.
- (i) Only Bids found responsive to the requirements reviewed in Phase II to the satisfaction of Canada, will receive a Phase III evaluation.

#### **4.1.1.4 Phase III: Final Evaluation of the Bid**

- (a) In Phase III, Canada will complete the evaluation of all Bids found responsive to the requirements reviewed at Phase II. Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.
- (b) A Bid is non-responsive and will receive no further consideration if it does not meet all mandatory evaluation criteria of the solicitation.

...

### **4.2 Basis of Selection**

#### **4.2.1 Basis of Selection – Highest Combined Rating of Technical Merit and Price**

- (1) To be declared responsive, a bid must:
  - (a) comply with all the requirements of the bid solicitation; and
  - (b) meet all mandatory criteria; and
  - (c) obtain the required minimum of 70 points overall for the technical evaluation criteria which are subject to point rating.

The rating is performed on a scale of 100 points.

- (2) Bids not meeting (a) or (b) or (c) will be declared non-responsive.
- (3) The selection will be based on the highest responsive combined rating of technical merit and price. The ratio will be 60% for the technical merit and 40% for the price.
- (4) To establish the technical merit score, the overall technical score for each responsive bid will be determined as follows: total number of points obtained / maximum number of points available multiplied by the ratio of 60%.
- (5) To establish the pricing score, each responsive bid will be prorated against the lowest evaluated price and the ratio of 40%.
- (6) For each responsive bid, the technical merit score and the pricing score will be added to determine its combined rating.
- (7) Neither the responsive bid obtaining the highest technical score nor the one with the lowest evaluated price will necessarily be accepted. The responsive bid with the highest combined rating of technical merit and price will be recommended for award of a contract.

The table below illustrates an example where all three bids are responsive and the selection of the contractor is determined by a 60/40 ratio of technical merit and price, respectively. The total available points equals 135 and the lowest evaluated price is \$45,000 (45).

**Basis of Selection – Highest Combined Rating Technical Merit (60%) and Price (40%)**

		<b>Bidder 1</b>	<b>Bidder 2</b>	<b>Bidder 3</b>
<b>Overall Technical Score</b>		115/135	89/135	92/135
<b>Bid Evaluated Price</b>		\$55,000.00	\$50,000.00	\$45,000.00
<b>Calculations</b>	<b>Technical Merit Score</b>	$115/135 \times 60 = 51.11$	$89/135 \times 60 = 39.56$	$92/135 \times 60 = 40.89$
	<b>Pricing Score</b>	$45/55 \times 40 = 32.73$	$45/50 \times 40 = 36.00$	$45/45 \times 40 = 40.00$
<b>Combined Rating</b>		83.84	75.56	80.89
<b>Overall Rating</b>		1st	3rd	2nd