



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-064

2484726 Ontario Inc. d.b.a. Brion
Raffoul

v.

Department of Public Works and
Government Services

*Determination issued
Thursday, March 4, 2021*

*Reasons issued
Friday, March 19, 2021*

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IN THE MATTER OF a complaint filed by 2484726 Ontario Inc. d.b.a. Brion Raffoul 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

2484726 ONTARIO INC. D.B.A. BRION RAFFOUL

Complainant

AND

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

**Government
Institution**

DETERMINATION

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

Pursuant to section 30.16 of the *CITT 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 2484726 Ontario Inc. d.b.a. Brion Raffoul. In accordance with the *Procurement Costs Guideline (Guideline)*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's 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.

Serge Fréchette

Serge Fréchette

Presiding Member

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

Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Heidi Lee, Counsel
Complainant:	2484726 Ontario Inc. (d.b.a. Brion Raffoul)
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STATEMENT OF REASONS

OVERVIEW

[1] This complaint was filed by 2484726 Ontario Inc. d.b.a. Brion Raffoul (Brion Raffoul) with the Canadian International Trade Tribunal, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ It concerns a Request for Standing Offer (Solicitation No. 01R11-20S009/C) issued by the Department of Public Works and Government Services (PWGSC) on behalf of Agriculture and Agri-Food Canada (AAFC) for patent agent services (the RFSO).

[2] The RFSO was divided into four separate categories: 1) Biotechnologies, 2) Plant Variety Protection, 3) Products and Equipment, and 4) New Trends. Category 4, i.e. “New Trends” are related to artificial intelligence, information processing and clean technology.

[3] Brion Raffoul alleged that certain mandatory criteria for Category 4 were unreasonable. Brion Raffoul also raised allegations of bias on the part of PWGSC. As remedy, Brion Raffoul requested the award of the contract for Category 4 or, alternatively, that the RFSO be cancelled and re-tendered with revised criteria.

[4] The Tribunal accepted the complaint for inquiry in accordance with subsection 30.13(1) of the *Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

[5] Following an inquiry into the complaint, the Tribunal finds that the complaint is not valid.

PROCEDURAL BACKGROUND

[6] The RFSO was published on November 23, 2020. It followed an earlier version, Solicitation No. 01R11-20S009/A (RFSO A), which was cancelled after no compliant bids were received.³

[7] On December 1, 2020, PWGSC and Brion Raffoul held a debriefing session, which Brion Raffoul had requested as a bidder under RFSO A.

[8] On December 1, 2020, following the debriefing, Brion Raffoul emailed PWGSC to raise its concerns about the education and research experience requirements for senior patent agents in the RFSO. In doing so, Brion Raffoul stated that “[i]n the hope that this can be resolved prior to the closing date for the revised solicitation, please advise us on the process for formally lodging a complaint.”⁴ That same day, PWGSC responded and directed Brion Raffoul to the recourse mechanisms available to bidders.

[9] On December 2, 2020, PWGSC held a bidder’s conference for the RFSO. Brion Raffoul attended the conference and reiterated its concerns regarding the education and research experience

¹ R.S.C., 1985, c. 47 (4th Supp.) [*Act*].

² S.O.R./93-602 [*Regulations*].

³ Exhibit PR-2020-064-18 at para. 11.

⁴ Exhibit PR-2020-064-01B at 4.

requirements for senior patent agents. According to PWGSC, it undertook to provide written answers to questions raised during the conference.⁵

[10] On December 2, 2020, PWGSC also published Amendment 001 to the RFSO, which was intended to respond to written inquiries from bidders.⁶ The amendment also corrected an error in the description for criterion M4 for Category 4.

[11] Brion Raffoul filed the present complaint on December 4, 2020, which was accepted by the Tribunal for inquiry on December 10, 2020.⁷

[12] On December 15, 2020, PWGSC published Amendment 002, which extended the closing date to January 28, 2021.

[13] On January 6, 2021, PWGSC published Amendment 003, which answered questions that had been raised at the bidders' conference.⁸

[14] On January 22, 2021, PWGSC published Amendment 004 to respond to questions not answered in Amendment 003. Amendment 004 also further amended criterion M4 for Category 4 and extended the closing date to February 11, 2021.

[15] Within these proceedings before the Tribunal, PWGSC filed the Government Institution Report (GIR) on January 18, 2021, which included a sworn affidavit by M. Benoit Rancourt, the principal contact at AAFC for the RFSO. Brion Raffoul filed its comments on the GIR on January 27, 2021.⁹

[16] The RFSO closed on February 11, 2021, as scheduled.

Preliminary issue: Order postponing contract award

[17] On December 14, 2020, the Tribunal issued an order pursuant to subsection 30.13(3) of the *Act* requiring PWGSC to postpone the award of any contract in connection with the RFSO (the Order).¹⁰

[18] On December 23, 2020, PWGSC certified, pursuant to subsection 30.13(4) of the *Act*, that the procurement of services pursuant to the RFSO was urgent and that a delay in the awarding of contracts would be contrary to the public interest. PWGSC requested, in the alternative, that the Order be rescinded with respect to Categories 1, 2 and 3 of the RFSO only, while remaining in effect for Category 4.

⁵ Exhibit PR-2020-064-18 at para. 15.

⁶ Exhibit PR-2020-064-18 at para. 26 and p. 87.

⁷ The Tribunal is satisfied that the complaint was filed in accordance with section 6 of the *Regulations*.

⁸ Exhibit PR-2020-064-18 at para. 18 and p. 94.

⁹ The Tribunal is satisfied that there were no procedural fairness concerns regarding the timing of the publication of Amendment 004, as PWGSC provided the relevant text of Amendment 004 in the GIR. Amendment 004 was also ultimately issued prior to the filing of Brion Raffoul's comments to the GIR.

¹⁰ Exhibit PR-2020-064-07.

[19] Subsection 30.13(4) of the *Act* provides that:

The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

[20] On December 24, 2020, in view of PWGSC's request in the alternative, the Tribunal rescinded the Order with respect to categories 1, 2 or 3 of the RFSO only (the Rescission Order).¹¹

[21] On January 6, 2021, PWGSC issued Amendment 003, as noted above.

[22] On January 8, 2021, Brion Raffoul submitted that PWGSC had contravened the Tribunal's Order by issuing Amendment 003, which included amendments and questions relating to Category 4 and therefore, in Brion Raffoul's view, was a continuation of the procurement process for Category 4. Brion Raffoul also argued that PWGSC was required to keep the bidding period open until the Tribunal concluded its inquiry. Brion Raffoul requested that the Tribunal provide clarification of the Order to this effect. In response, PWGSC submitted that it had not awarded any contracts under Category 4 and that it would not do so long as the Order remained in force.

[23] The Order, as modified by the Rescission Order, was issued pursuant to subsection 30.13(3) of the *Act*, which provides as follows:

Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, *the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint.*

[Emphasis added]

[24] This subsection grants the Tribunal the narrow and specific authority to order the government institution to postpone the awarding of the contract only, until the validity of the complaint has been determined. The Tribunal was therefore satisfied that the concerns raised by Brion Raffoul fell outside the scope of the Order. For this reason, the Tribunal declined to clarify the scope of the Order, noting that orders issued by the Tribunal are intended to speak for themselves, and directed the parties to subsection 30.13(3).¹²

[25] Following the Tribunal's correspondence, Brion Raffoul again requested that the Tribunal clarify the Order.¹³ Specifically, Brion Raffoul requested that the Tribunal clarify, in accordance with its discretionary authority under subsection 30.15(2) of the *Act*, that the Order required PWGSC to postpone the closing date of the solicitation. In the alternative, Brion Raffoul requested that the Tribunal issue another order postponing the closing date until the conclusion of the Tribunal's inquiry. In support, Brion Raffoul argued that an order that does not postpone the closing date provides no remedy. In response, PWGSC submitted that the Tribunal does not have authority to

¹¹ In doing so, the Tribunal stated in the Rescission Order that it would consider further requests by PWGSC, pursuant to subsection 30.13(4) of the *Act*, concerning contracts in relation to the RFSO that were not subject to that order, should such requests arise in the future. See Exhibit PR-2020-064-12.

¹² Exhibit PR-2020-064-16.

¹³ Exhibit PR-2020-064-17.

grant the interlocutory orders requested by Brion Raffoul under subsection 30.15(2) of the *Act*, and that Brion Raffoul would not be prejudiced by the continuation of the procurement process.

[26] Subsection 30.15(2) provides as follows:

Subject to the regulations, *where the Tribunal determines that a complaint is valid*, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

[Emphasis added]

[27] As argued by PWGSC, this provision only applies where the Tribunal has determined that a complaint is valid and was therefore not applicable at that stage of the proceeding. The Tribunal also agreed that the continuation of the procurement process would not preclude the Tribunal from recommending any of the remedies set out in the provision, including the remedies sought by Brion Raffoul.

[28] For these reasons, the Tribunal declined to grant Brion Raffoul's requests.

RELEVANT PROVISIONS OF THE RFSO

[29] The following are relevant provisions regarding Category 4:

SCOPE OF WORK:

...

4. New Trends:

- a. **Artificial Intelligence**
This category includes inventions related to the manipulation of digitized information and data by computer and other digital equipment during the acquisition, recording, organization, display and dissemination of this information and data for various applications;

or

b. Information processing

This category includes inventions related to the manipulation of digitized information and data by computer and other digital equipment during the acquisition, recording, organization, display and dissemination of this information and data for applications in areas such as food protection, agriculture and environment;

or

c. Clean technology

This category includes inventions related to technologies, products or methods or processes that reduces negative environmental impacts through significant energy efficiency improvements, the sustainable use of resources, or environmental protection activities.¹⁴

[30] The relevant specifications are mandatory criteria M1 and M4 for Category 4.

[31] The description for criterion M1 provides as follows:

The Offeror must provide evidence it has successfully prosecuted one (1) patent family¹ in which patents have been issued in:

- Canada
- United States and
- at least two (2) countries outside of North America²,

where each patent was issued in the past ten (10) years from date of posting of this solicitation (shown on the front page of the tender documents) which falls in Category #4 – New Trends.

...

For clarity, the patent families provided do not need to have been prosecuted by the Senior Patent Agent identified in M2-M4.

(Notes:

¹ A ‘patent family’ is defined as a set of patents that are linked by a common priority document and priority date.

² European Union and National patents from a European country cannot be submitted as separate patents in a given patent family.)¹⁵

¹⁴ Exhibit PR-2020-064-08A at 18-19.

¹⁵ Exhibit PR-2020-064-08A at 48-49.

[32] The description for criterion M4 was amended by Amendment 001 to correct an administrative error and further amended by Amendment 004, as follows:

Description of criterion M4, as amended by Amendment 001 on December 2, 2020, at the time of the filing of the complaint	Final description of criterion M4, as amended by Amendment 004 on January 6, 2021
<p>The Senior Patent Agent must meet one (1) of the two (2) criteria listed below:</p> <ul style="list-style-type: none"> • Education – Ph.D. of Science Degree in Computer Science, Information Technologies, Environmental Chemistry, or other field that is related to Category #4 – New Trends <p>OR</p> <ul style="list-style-type: none"> • Education – Bachelor of Science Degree* in one (1) of the above areas AND a minimum of two (2) years (24 months) cumulative research work experience – postdoctoral or other research experience related to the fields of Category #4 – New Trends. <p>* Bidder must provide a copy of the diploma.¹⁶</p>	<p>The Senior Patent Agent must meet one (1) of the two (2) criteria listed below:</p> <p>Education – Post Graduate Science Degree in Computer Science, Computer Engineering, Information Technologies, Environmental Chemistry, or other field that is related to Category #4 – New Trends.</p> <p>OR</p> <p>Education – Bachelor of Science Degree* in one (1) of the above areas AND a minimum of two (2) years (24 months) cumulative research work experience related to the fields of Category #4 – New Trends.¹⁷</p>

ANALYSIS

[33] Subsection 30.14(1) of the *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.

[34] 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, which in the present case is the *Canadian Free Trade Agreement*.¹⁸

[35] In view of this framework, the Tribunal will consider the grounds of complaint raised by Brion Raffoul, namely:

- 1) whether mandatory criterion M1 of Category 4 was unreasonable;
- 2) whether mandatory criterion M4 of Category 4 was unreasonable; and
- 3) whether there was bias or reasonable apprehension of bias on the part of PWGSC.

¹⁶ Exhibit PR-2020-064-08A at 61-62.

¹⁷ Exhibit PR-2020-064-18 at 193-194.

¹⁸ Online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> (entered into force 1 July 2017) [CFTA].

Grounds 1 and 2: Criteria M1 and M4 of Category 4

The law

[36] The first two grounds of complaint relate to PWGSC's obligations under Article 509(1) of the CFTA, which requires that "a procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade."

[37] In assessing whether there has been a breach of this obligation, the Tribunal has held that specifications of a solicitation must reflect a legitimate operational requirement of the government institution, without which they would constitute an impermissible obstacle to trade.¹⁹ In this regard, the Tribunal has held that:

. . . not all requirements can be qualified as "legitimate operational requirements". Instead, the Tribunal is of the view that, when it is claimed that a function, a feature or any other requirement constitutes a "legitimate operational requirement", the procuring entity must be able to demonstrate why such a function or feature is legitimately required to fulfil its needs and to achieve the targeted end result.²⁰

[Footnote omitted]

[38] Similarly, the Tribunal has also held that a government institution is entitled to require that its procured services be of the highest possible standards, provided that the conditions are justified by legitimate operational requirements.²¹

[39] More broadly, the Tribunal has long held that a procuring entity is entitled to define its own procurement needs, provided it does so reasonably and in accordance with rules of the applicable trade agreements.²² Tender requirements cannot be discriminatory, impossible to meet or otherwise unreasonable.²³

[40] In addition, the fact that a certain requirement is onerous and could be more burdensome for certain potential suppliers than others is not sufficient to conclude that the tendering procedures are discriminatory.²⁴ Bidders will not necessarily stand on equal footing for any number of legitimate commercial reasons, and the government institution is under no obligation to compromise its

¹⁹ *Entreprise Marissa Inc. v. Department of Public Works and Government Services* (13 June 2011), PR-2010-086 (CITT) [*Entreprise Marissa*] at paras. 65-66. The Tribunal notes that this case considered the predecessor to Article 509 of the CFTA, i.e. Article 403 of the *Agreement on Internal Trade* (AIT). The Tribunal has recognized that Article 509 of the CFTA is worded similarly to Article 403 of the AIT. In this regard, see *Accipiter Radar Technologies Inc. v. Department of Public Works and Government Services* (26 April 2019) PR-2018-049 (CITT) [*Accipiter*] at para. 75.

²⁰ *Entreprise Marissa* at para. 67; *Re Complaint Filed by Foundry Networks Inc.* (12 March 2002), PR-2001-048 (CITT) at 10.

²¹ *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) [*Almon*] at para. 62.

²² *Accipiter* at para. 75.

²³ See *NSIT International Ltd. v. Department of Public Works and Government Services* (20 July 2020), PR-2019-067 (CITT) at para. 68.

²⁴ *Almon* at para. 28.

legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs.²⁵

[41] With these principles in mind, the Tribunal now turns to Brion Raffoul's allegations.

Ground 1: Criterion M1

[42] Criterion M1 required the bidder to have successfully prosecuted one patent family, in which the patents were issued in Canada, the United States and at least two other countries outside of North America, and where each patent was issued in the past 10 years.

[43] Brion Raffoul alleged that the 10-year time limit and the geographical restrictions were unreasonable.²⁶ In support, Brion Raffoul argued that the time limit did not recognize the reality of prosecuting a patent family, the timing of which is largely outside the control of the patent agent. According to Brion Raffoul, it takes on average 6.5 years for a Canadian patent to be granted and nearly 10 years to obtain patents in the United States and the European Union. Brion Raffoul argued that clients rarely engage in all three prosecutions at the same time and often choose to apply for patents in just one other jurisdiction outside of Canada and the United States due to the high cost of the proceedings.

[44] Altogether, Brion Raffoul submitted that the requirements of criterion M1 did not reflect the skills or abilities of the patent agent and were therefore arbitrary and unrelated to AAFC's operational needs. Brion Raffoul also argued that the criterion unfairly advantaged large firms with clients that can afford parallel or expedited prosecutions across multiple jurisdictions.

[45] With respect to the 10-year requirement, PWGSC submitted that bidders were required to have recent patent prosecution experience to ensure that the patent agents retained by AAFC were up to date in their knowledge, skills and experience, as patentability requirements for inventions in Canada and in other countries are often amended. In this regard, PWGSC relied on the evidence of M. Rancourt of AAFC.²⁷ M. Rancourt also explained that AAFC initially set the limit at 5 years in RFSO A, but bidders had difficulty demonstrating this experience.²⁸ Based on information received from bidders, AAFC revised this limitation to 10 years to ensure that bidders would be able to demonstrate recent experience in the relevant jurisdictions and meet this requirement.²⁹

[46] PWGSC also submitted that the geographical limitations reflected AAFC's legitimate operational needs. According to M. Rancourt, AAFC did not anticipate filing any patents in Mexico or in any other jurisdiction within North America other than Canada or the United States, but that AAFC expected to, on occasion, file patents in jurisdictions outside of North America.

²⁵ *Almon* at paras. 60-61. See also *Valley Associates Global Security Corporation v. Department of Public Works and Government Services* (29 June 2020), PR-2019-060 (CITT) at para. 106.

²⁶ Brion Raffoul also alleged that the exclusion of Mexico violated the Canada-United States-Mexico Agreement, 13 March 2020, SC 2020, c 1, online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 July 2020) [CUSMA]. As Canada is not a party to the CUSMA chapter on government procurement, the Tribunal did not consider this allegation any further.

²⁷ Exhibit PR-2020-064-18 at 187.

²⁸ *Ibid*; Exhibit PR-2020-064-18 at para. 48.

²⁹ Exhibit PR-2020-064-18 at 187.

[47] Based on M. Rancourt's evidence, the Tribunal accepts that AAFC required patent agents with recent experience in the relevant jurisdictions and finds that this is a legitimate operational requirement. The Tribunal also finds that the 10-year limitation and the geographical scope of criterion M4 were reasonable. The Tribunal also acknowledges that these requirements may advantage certain suppliers, as argued by Brion Raffoul. However, as discussed above, the trade agreements do not require the government institution to compromise its legitimate operational needs to ensure all suppliers are on equal footing. Requirements are not discriminatory or unreasonable for the sole reason that they may be more onerous or burdensome for certain suppliers.

[48] The Tribunal notes Brion Raffoul's argument, made in reply, that because criterion M1 is a requirement for the *bidder*, it cannot be rationally linked to AAFC's purported need for *agents* with up-to-date experience and knowledge regarding patentability requirements.

[49] Brion Raffoul's argument suggests that AAFC's need for patent agents with up-to-date knowledge, skills and information is entirely unrelated to the prior experience of the bidder (e.g. the firm). The Tribunal does not agree with this view. The Tribunal could not reasonably conclude that a firm's prior experience with successful patent prosecution was unconnected to the level of patent agent services offered by that firm, as the bidder, to AAFC. Mandatory criteria regarding the prior experience of bidders are common requirements in solicitations, which ensure that the bidder can demonstrate its ability to provide the goods or services being procured. The Tribunal therefore remains of the view that the requirements of criterion M1 are sufficiently connected to AAFC's stated need for patent agents with up-to-date knowledge, skills and experience.

[50] Altogether, the Tribunal is satisfied that criterion M1 is rationally connected to a legitimate operational objective of AAFC.

[51] For the foregoing reasons, the Tribunal finds that this ground of complaint is not valid.

Ground 2: Criterion M4

[52] At the time the complaint was filed, criterion M4 required senior patent agents to have either 1) a PhD or 2) a BSc and a minimum of 24 months of cumulative research work experience, which was described as either postdoctoral or other research experience.

[53] Brion Raffoul submitted that these requirements effectively and arbitrarily excluded senior patent agents with master's degrees, who were unlikely to have 24 months of cumulative research experience. Brion Raffoul argued that even a two-year master's degree would only translate to 20 months of research work, as the academic calendar runs from September to April. Brion Raffoul also argued that the requirement for 24 months of postdoctoral research essentially amounted to a PhD.

[54] As noted above, PWGSC subsequently issued Amendment 004, which amended criterion M4 by replacing the requirement for a PhD with a requirement for a postgraduate degree. It also removed the requirement for postdoctoral research experience for bachelor's degree holders. This requirement was standardized across all four categories of the RFSO, removing any requirement for a PhD and postgraduate research.³⁰ As a result, the final version of criterion M4 required senior patents have

³⁰ Exhibit PR-2020-064 at 190.

either 1) a postgraduate degree, or 2) a Bachelor of Science degree and a minimum of 24 months of cumulative research work experience.

[55] The above amendments addressed several elements of Brion Raffoul's complaint in relation to criterion M4, namely by accepting master's degrees without additional research requirements and removing the references to postdoctoral research. To the extent that Brion Raffoul's complaint challenged the requirements for a PhD and for postdoctoral research, the Tribunal considers these issues to now be moot to declines to consider them.

[56] The Tribunal will turn to the remainder of this ground of complaint.

[57] Brion Raffoul maintained that criterion M4 was not rationally connected to AAFC's operational needs for Category 4, i.e. patent agent services in the areas of artificial intelligence, information processing and clean technology. Brion Raffoul also argued that criterion M4, when considered with criteria M2 and M3 (which together required the senior patent agent to have at least five years of experience as a registered patent professional in Canada and the United States), amounts to a specification that is nearly impossible to meet.

[58] In support, Brion Raffoul presented two hypothetical career trajectory timelines of patent agents that would meet criteria M2, M3 and M4 – one "best-case scenario" that aimed to capture the fastest possible qualification timeline, and one that was, in Brion Raffoul's view, representative of a more common career pathway.

[59] Brion Raffoul submitted that in order to have the required five years of professional experience, the senior patent agent in the "best-case scenario" would have had to pass all four patent agent exams no later than 2015. In 2015, according to Brion Raffoul, only two candidates passed all four exams on their first try, meaning only two Canadian patent agents could meet this "best-case scenario." In this scenario, Brion Raffoul also submitted that the agent would have last gained research experience in the areas of "New Trends" in 2013. Brion Raffoul argued that this experience and knowledge would be obsolete by 2021, considering the gains in technology since then. Brion Raffoul argued that this gap would be even greater for patent agents that followed the more common career pathway.

[60] Altogether, Brion Raffoul argued that there was no rational connection between the requirement for 24 months of cumulative research work experience and actual patent applications in the "New Trends" fields.

[61] For its part, PWGSC submitted that the requirements of criterion M4 were rationally linked to AAFC's needs, as the responsibilities of the senior patent agent would require someone with significant research experience. In this regard, M. Rancourt stated that the senior patent agent must be able to discuss the research work of AAFC researchers and scientists, who are PhD holders with significant research experience in their fields.³¹ M. Rancourt also stated that the patent agent would be responsible for undertaking patentability assessments, drafting patent applications for innovations developed in research environments, providing opinions and recommendations for protection of new intellectual property, and presenting to the AAFC scientific community on new areas of research.³²

³¹ Exhibit PR-2020-064-18 at 186.

³² Exhibit PR-2020-064-18 at 185.

[62] AAFC determined that these activities require a high level of understanding of the research environment, the methods used by the scientific community, and the challenges in the transfer of technologies in the form of research prototypes.³³ M. Rancourt also stated that AAFC considered shortening the requirement for 24 months of research, but ultimately determined that the two full years combined with a Bachelor of Science degree was the minimum level of experience that would meet AAFC's needs for the senior patent agent role.³⁴

[63] In the Tribunal's view, M. Rancourt's evidence established that AAFC required a senior patent agent with a demonstrated understanding of the scientific research environment, which was required in view of the anticipated responsibilities of the senior patent agent. AAFC did not require a patent agent with up-to-date knowledge or research experience relating to the current technologies in the areas of "New Trends." The Tribunal is therefore not persuaded by Brion Raffoul's argument regarding the length of time that would have elapsed since the senior patent agent's research experience.

[64] The Tribunal is also not persuaded that criterion M4 is impossible to meet. Brion Raffoul's arguments demonstrated that criterion M4 may be stringent and difficult to meet, but there was no indication that it would be impossible to do so. In view of M. Rancourt's evidence on the services required by AAFC from the senior patent agent, the Tribunal finds that the stringent requirements of criterion M4 are justified.

[65] For the foregoing reasons, the Tribunal finds that the requirements of criterion M4 are rationally linked to AAFC's operational needs. Accordingly, this ground of complaint is not valid.

Ground 3: Allegations of bias

[66] In the context of criterion M4, Brion Raffoul also alleged that PWGSC displayed a clear preference for PhD holders. PWGSC denied this allegation.

[67] It is well established that the federal government's procurement evaluation process is subject to a duty of fairness and impartiality. As a result, government institutions must avoid both actual bias and that which can give rise to a reasonable apprehension of such bias.³⁵

[68] Actual bias is more difficult to establish than a reasonable apprehension of bias, as the relative burden of proof is higher.³⁶ In the Tribunal's view, Brion Raffoul's evidence does not approach the standard needed to establish actual bias, and therefore its allegations are best dealt with under the test for a reasonable apprehension of bias, which provides as follows:

³³ *Ibid.*

³⁴ Exhibit PR-2020-064-18 at 186-187.

³⁵ *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (11 June 2020), PR-2019-053 (CITT) [*SoftSim*] at para. 71.

³⁶ *SoftSim* at para. 75, relying on *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 64. The Tribunal has stated that, when alleging that a solicitation was structured to favour a particular bidder, "a complainant bears the onus to present positive evidence that the government institution structured the terms of the RFP, such as technical requirements or specifications, with the purpose or effect of favouring (or excluding) a particular supplier". See *SoftSim* at para. 74.

. . . what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the person], whether consciously or unconsciously, would not decide fairly.³⁷

[69] In raising allegations of bias, the complainant bears the burden of supporting its claim. When a complainant alleges even a reasonable apprehension of bias, “it is not sufficient to simply state that there is a belief that there is bias—[the complainant] must offer sufficient evidence in that regard.”³⁸ Moreover, the Tribunal generally “presumes the good faith and honesty both of the bidders and of the public servants . . .”, meaning that the complainant must provide sufficient evidence to overcome this presumption.³⁹

[70] As evidence, Brion Raffoul relied on comments by AAFC representatives at the bidders’ conference. According to Brion Raffoul, M. Rancourt stated at the conference that AAFC was “looking for PhDs” and that there were references to postdoctoral research throughout the conference. In contrast, M. Rancourt stated in his witness statement that he informed bidders at the bidders’ conference that the PhD requirement was an error. He also stated that he confirmed at the conference that a post-graduate degree in the relevant field would meet the educational requirement and that an amendment would be issued to this effect.⁴⁰ Brion Raffoul also argued that PWGSC’s numerous references in the GIR to the fact that the senior patent agent would be required to work with AAFC’s researchers, who are PhD holders, implied that only individuals with equivalent experience would be qualified to do so.

[71] On balance, the Tribunal finds that Brion Raffoul’s evidence does not give rise to a reasonable apprehension of bias. In the Tribunal’s view, this finding is supported by the actual terms of criterion M4. As discussed above, criterion M4 requires senior patent agents to have either a postgraduate degree or a Bachelor of Science degree with two years of research experience. This requirement is assessed on a straightforward meet or not-meet basis. A proposed agent would be compliant with criterion M4 by meeting *either* of these requirements. In other words, even if Brion Raffoul’s allegations were true, there would be no mechanism in the evaluation method of criterion M4 for PWGSC to favour PhD holders over agents with master’s or bachelor’s degrees.

[72] Altogether, the Tribunal finds that Brion Raffoul’s evidence does not support a finding of reasonable apprehension of bias on the part of PWGSC. The totality of the evidence did not convince the Tribunal that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that PWGSC was biased in favour of agents with PhDs.

³⁷ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, citing *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at 394, per de Grandpré J. (dissenting). See also *Horizon* at para. 73 and *SoftSim* at para. 76.

³⁸ *SoftSim* at para. 77; *Sunny Jaura d.b.a. Jaura Enterprises v. Department of Foreign Affairs, Trade and Development* (30 January 2019), PR-2018-058 (CITT) at paras. 13, 15. See also *Renaissance Aeronautics Associates Inc. (D.B.A. Advanced Composites Training) v. Department of Public Works and Government Services* (28 May 2017), PR-2017-063 (CITT) at para. 38; *Tyr Tactical Canada, ULC v. Royal Canadian Mounted Police* (16 May 2016), PR-2016-006 (CITT) at para. 26.

³⁹ *SoftSim* at para. 77; *MasterBedroom Inc. v. Department of Public Works and Government Services* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at para. 16.

⁴⁰ Exhibit PR-2020-064-18 at 186.

Conclusion

[73] For the reasons set out above, the Tribunal finds that this complaint is not valid.

COSTS

[74] The Tribunal has broad discretion to award costs under section 30.16 of the *Act*. The Tribunal follows the “judicial model” under which, generally, the winning party is entitled to its costs. As such, the Tribunal will award costs to PWGSC.

[75] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[76] In this case, the solicitation was not particularly complex, the issues raised by the complainant were limited and straightforward, and the proceedings were not overly complicated. Accordingly, the Tribunal’s preliminary indication of the level of complexity for this complaint case is Level 1, which has an associated flat-rate amount of \$1,150.

DECISION

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

[78] Pursuant to section 30.16 of the *Act*, the Tribunal awards PWGSC its costs in the amount of \$1,150 for responding to the complaint, which costs are to be paid by Brion Raffoul. The Tribunal directs Brion Raffoul to take appropriate action to ensure prompt payment.

Serge Fréchette

Serge Fréchette

Presiding Member