



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2020-065

Joe Parsons Construction Ltd.

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, April 23, 2021*

*Reasons issued  
Monday, May 10, 2021*

*Corrigendum issued  
Friday, May 28, 2021*

**TABLE OF CONTENTS**

DETERMINATION..... i

STATEMENT OF REASONS ..... 1

    OVERVIEW ..... 1

    SUMMARY OF THE COMPLAINT ..... 1

    PROCEDURAL BACKGROUND ..... 1

        The solicitation process ..... 1

        Complaint proceedings..... 3

    ANALYSIS..... 4

        Solicitations A and B ..... 5

        Disclosure of JPCL’s pricing..... 7

    REMEDY ..... 11

    DETERMINATION ..... 16

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

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

**BETWEEN**

**JOE PARSONS CONSTRUCTION LTD.**

**Complainant**

**AND**

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

**Government Institution**

**DETERMINATION**

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

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that the Department of Public Works and Government Services (PWGSC) re-evaluate all financial offers submitted in response to Solicitation No. EP899-210725/A, in accordance with the Tribunal's directions set out in the reasons for this determination. The Tribunal also recommends that no further call-ups or any other forms of expenditure under the standing offers issued pursuant to Solicitation No. EP899-210725/B be undertaken by PWGSC pending the re-evaluation.

The Tribunal further recommends that, following the re-evaluation, PWGSC cancel the standing offers issued pursuant to Solicitation No. EP899-210725/B and issue the standing offers in accordance with the results of the recommended re-evaluation, and compensate Joe Parsons Construction Ltd. for the lost profit that it would have earned from call-ups issued against a standing offer based on its ranking in the re-evaluation, from the date the standing offers were awarded pursuant to Solicitation No. EP899-210725/B, up until the moment a standing offer is issued to Joe Parsons Construction Ltd. The compensation for lost profit is to be calculated based on the unit prices indicated in the Standing Offer Agreement for Joe Parsons Construction Ltd. dated October 14, 2020.

In the alternative, should PWGSC determine that it is not in the public interest to cancel the standing offers issued pursuant to Solicitation No. EP899-210725/B, after the re-evaluation mentioned above is completed, the Tribunal recommends that PWGSC compensate Joe Parsons Construction Ltd. for an amount equal to the lost profit that it would have earned from call-ups issued against the standing offer based on its ranking in the re-evaluation. This compensation should be calculated starting from the date the standing offers were awarded pursuant to Solicitation No. EP899-210725/B and for the duration that such standing offers remain in effect. The compensation for lost profit is to be calculated using a reasonable rate of profit and based on the unit prices indicated in the Standing Offer Agreement for Joe Parsons Construction Ltd. dated October 14, 2020. The compensation should be negotiated between PWGSC and Joe Parsons Construction Ltd.

Should the parties be unable to agree on the amount of compensation for lost profit, Joe Parsons Construction Ltd. shall file with the Tribunal, within 40 days of the date on which it receives notice of the results of the re-evaluation, a submission on the issue of compensation. PWGSC will then have seven working days after the receipt of Joe Parsons Construction Ltd.'s submission to file a response. Joe Parsons Construction Ltd. will then have five working days after the receipt of the reply submission from PWGSC to file any additional comments. The parties are required to serve each other and file with the Tribunal.

Each party will bear its own costs.

Randolph W. Heggart

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Randolph W. Heggart  
Presiding Member

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

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

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

**BETWEEN**

**JOE PARSONS CONSTRUCTION LTD.**

**Complainant**

**AND**

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

**Government  
Institution**

**CORRIGENDUM**

Footnote 34 of the Statement of Reasons should read as follows:

34 *Ibid.* at 190; Exhibit PR-2020-065-12A (protected) at 190; Exhibit PR-2020-065-01A at 18, 201; Exhibit PR-2020-065-012 at 308, 377.

Randolph W. Heggart

Randolph W. Heggart  
Presiding Member

Tribunal Panel:	Randolph W. Heggart, Presiding Member
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Complainant:	Joe Parsons Construction Ltd.
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## STATEMENT OF REASONS

### OVERVIEW

[1] This complaint was filed by Joe Parsons Construction Ltd. (JPCL), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> concerning a Request for Standing Offers (Solicitation No. EP899-210725/B) (Solicitation B) issued by the Department of Public Works and Government Services (PWGSC) for the provision of labour, equipment and materials to perform miscellaneous minor earthworks and hydraulic seeding, and provision of aggregate materials for the regional office of Cape Breton Operations in Sydney, Nova Scotia.

[2] The Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Act* and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> and conducted an inquiry into the validity of the complaint as directed by sections 30.13 to 30.15 of the *Act*.

[3] For the reasons that follow, the Tribunal finds that the complaint is valid.

### SUMMARY OF THE COMPLAINT

[4] JPCL alleged that it was prejudiced in the procurement process for Solicitation B, as pricing information, including its own, from the original solicitation (Solicitation No. EP899-210725/A) (Solicitation A) was disclosed by PWGSC and the terms of Solicitation B remained unchanged from Solicitation A. As a result, JPCL alleged that PWGSC engaged in bid shopping.

[5] JPCL also alleged that PWGSC's conduct amounted to a breach of contract. However, during these proceedings, JPCL withdrew this ground of complaint.<sup>3</sup> Accordingly, the Tribunal's inquiry proceeded only in respect of JPCL's other allegations.

[6] As remedy, JPCL requested that a new solicitation be issued for the requirement.

### PROCEDURAL BACKGROUND

#### The solicitation process

[7] On September 8, 2020, PWGSC issued Solicitation A, which had a bid closing date of October 6, 2020. An amendment was made to Solicitation A on September 30, 2020.

[8] PWGSC received five bids in response to Solicitation A. All five bids were found to be compliant. On October 7, 2020, PWGSC completed the financial evaluations.

[9] On October 14, 2020, PWGSC issued three standing offers to the bidders with the three lowest evaluated prices, including one to JPCL. On October 15, 2020, PWGSC notified JPCL

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

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

<sup>3</sup> Exhibit PR-2020-065-14 at 2.

that it had been awarded a standing offer and published contract award notices on the Government of Canada's procurement website, Buyandsell.gc.ca.<sup>4</sup>

[10] Also, on October 15, 2020, PWGSC issued regret letters to the other two bidders who were not issued standing offers. The regret letters contained the names of the three winning bidders and showed the distribution of the awarded standing offers.<sup>5</sup>

[11] On October 18, 2020, one of the unsuccessful bidders requested the pricing of the winning bids from PWGSC. The following day, PWGSC provided the bidder with the total evaluated prices for the companies that were issued the standing offers, but declined to provide any unit-pricing details.<sup>6</sup> After the bidder objected to PWGSC's evaluation of its financial offer, PWGSC re-evaluated all of the financial offers on October 20, 2020.

[12] As a result of the re-evaluation, PWGSC determined that the terms of Annex B, Basis of Payment, did not clearly state that PWGSC *would correct* errors between unit pricing and extended pricing. PWGSC decided to set aside the three standing offers and reissue the solicitation.<sup>7</sup>

[13] On October 26, 2020, PWGSC issued a notice of termination to JPCL. The notice stated that a latent ambiguity was discovered after the standing offers were awarded, which resulted in inconsistencies in the evaluation of bids. The notice also indicated that the requirement would be re-tendered soon on Buyandsell.gc.ca for a period of 15 days.<sup>8</sup>

[14] On October 28, 2020, another bidder requested the pricing of the winning bids, which PWGSC provided that same day.<sup>9</sup>

[15] On November 4, 2020, Solicitation B was issued with a bid closing date of November 19, 2020. The solicitation was amended on November 5, 2020.

[16] On November 4, 2020, PWGSC provided JPCL, the evaluated financial offers of the three winning bids for Solicitation A.<sup>10</sup>

[17] On November 9, 2020, PWGSC notified JPCL of the re-tender.<sup>11</sup>

[18] After submitting its bid in response to Solicitation B, on November 27, 2020, JPCL received a letter of regret from PWGSC indicating that its bid did not rank in the top three offers under the evaluation methodology described in the solicitation.<sup>12</sup>

[19] In response to a request from JPCL, on November 30, 2020, PWGSC provided JPCL with the top three evaluated prices in response to Solicitation B.<sup>13</sup>

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<sup>4</sup> Exhibit PR-2020-065-01A at 209-213.

<sup>5</sup> Exhibit PR-2020-065-12 at 300-304.

<sup>6</sup> *Ibid.* at 308, 309.

<sup>7</sup> *Ibid.* at para. 26.

<sup>8</sup> Exhibit PR-2020-065-01A at 202-204.

<sup>9</sup> Exhibit PR-2020-065-12 at 377.

<sup>10</sup> Exhibit PR-2020-065-01A at 201.

<sup>11</sup> *Ibid.* at 208.

<sup>12</sup> *Ibid.* at 326-328.



[20] On November 30, 2020, JPCL sent PWGSC an objection letter containing its “Statement of Complaint”.<sup>14</sup> In the letter, JPCL indicated that the bid prices of the three companies that were issued the standing offers were made public and that no changes were made between Solicitation A and Solicitation B with respect to the scope of work, units and measure, class of labour and materials, and estimated quantities. JPCL also stated that “[d]oing this second tender without making any changes to the tender quantities **compromised** pricing for this second tender (**BID SHOPPING**). Known bids from the first tender that were made public can be easily figured out . . . .”<sup>15</sup> In the letter, JPCL requested that the tender be cancelled and re-issued with different estimated quantities.

[21] On December 2, 2020, PWGSC responded to JPCL’s objection, confirming that the standing offers (issued from Solicitation B) would “not be cancelled and the solicitation re-tendered as the evaluations were conducted properly and bidders were notified by email on October 26<sup>th</sup>, 2020 that there would be a Solicitation re-tender, and it was also stipulated on Buyandsell.gc.ca in Solicitation B on November 3<sup>rd</sup> 2020.”<sup>16</sup>

### Complaint proceedings

[22] On December 9 and 10, 2020, JPCL filed its complaint with the Tribunal, which was accepted for inquiry on December 14, 2020.<sup>17</sup>

[23] On December 18, 2020, PWGSC requested an extension to file the Government Institution Report (GIR) until January 29, 2021. On December 21, 2020, the Tribunal granted PWGSC’s request.

[24] PWGSC filed the GIR on January 29, 2021. JPCL filed comments on the GIR on February 4, 2021. In its comments on the GIR, JPCL clarified that the allegation of breach of contract was not relevant to its complaint.

[25] On February 5, 2021, PWGSC requested permission from the Tribunal to respond to JPCL’s comments on the GIR, indicating it had noticed an error in one of JPCL’s citations. The Tribunal granted the request and PWGSC filed its response on February 15, 2021.

[26] Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and ruled on the complaint based on the written record.

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<sup>13</sup> Exhibit PR-2020-065-12 at 492.

<sup>14</sup> Exhibit PR-2020-065-01 at 8-10.

<sup>15</sup> *Ibid.* at 10.

<sup>16</sup> *Ibid.* at 8, 9. Although the complaint form submitted by JPCL to the Tribunal noted that it had not yet received a response to its written objection, the Tribunal notes that the form was signed and dated on November 30, 2020. Accordingly, the Tribunal accepted that the complaint form itself did not reflect the fact that PWGSC had responded to its objection on December 2, 2020. However, the documentation of the objection and denial of relief by PWGSC was submitted with the complaint. Exhibit PR-2020-065-01 at 1, 4.

<sup>17</sup> Attached to the complaint form filed with the Tribunal on December 9, 2020, was the letter dated November 30, 2020, containing JPCL’s “Statement of Complaint” and a separate letter to the Minister of Public Services and Procurement Canada dated December 8, 2020 (Exhibit PR-2020-065-01). In accepting the complaint for inquiry, the Tribunal found that the grounds of complaint listed in the complaint form (Exhibit PR-2020-065-01 at 5) were sufficiently detailed in the aforementioned letters.

## ANALYSIS

[27] 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. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

[28] JPLC's allegations concerning the disclosure of pricing information and the re-tendering process may be analyzed with consideration of the obligation set out in Article 517(1) of the Canadian Free Trade Agreement,<sup>18</sup> which states as follows: "Notwithstanding any other provision of this Chapter, *a procuring entity shall not provide to any particular supplier information that might prejudice fair competition between suppliers*" [emphasis added].

[29] JPCL alleged that the prices submitted in response to Solicitation B were compromised due to the fact that the terms in the pricing tables in Annex B were not changed by PWGSC despite that prices from Solicitation A had been disclosed. According to JPCL, the disclosure allowed other companies to undercut the disclosed prices in the second solicitation process. In JPCL's letter dated November 30, 2020, submitted with the complaint, and the comments on the GIR, using the example of the evaluated price (which represented the aggregate value of pricing for five separate years) of Yates Trucking & Excavation Ltd. (Yates Trucking), the top ranked bidder, JPCL explained that as the terms of the tender had not changed, a potential bidder could determine the per annum price of the lowest priced bid. A potential bidder could win the standing offer by ensuring that its per annum pricing was lower than that of the lowest priced bid. The per annum pricing could be lowered by adjusting the unit prices.<sup>19</sup>

[30] For its part, PWGSC submitted that it was *required* to publish standing offer award values and was permitted to disclose the total evaluated prices offered by the bidders in Solicitation A, including the unit prices. Moreover, by submitting its bid, JPCL consented to the disclosure and publication of its pricing as part of the terms of Solicitation A. PWGSC noted that JPCL itself had requested the pricing of bids in both solicitations. PWGSC also argued that JPCL was not prejudiced in Solicitation B as it did not receive a standing offer due to discrepancies between the unit pricing and the extended pricing in JPCL's offer. After PWGSC's correction of the extended pricing in JPCL's bid, in accordance with the terms of Solicitation B, JPCL ranked fourth amongst the bidders.

[31] Finally, PWGSC submitted that its decision to correct errors that were made during Solicitation A was consistent with the principle of preserving the integrity of the procurement process.

[32] For the reasons below, the Tribunal is of the view that PWGSC breached its obligation under Article 517(1) of the CFTA. The Tribunal finds that PWGSC's disclosure of pricing information

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<sup>18</sup> Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [CFTA].

<sup>19</sup> For instance, as noted by JPCL, Yates Trucking ranked first in Solicitation A with an offer of \$1,705,000. The annual price over the five-year period would be \$341,000. Exhibit PR-2020-065-01 at 10; Exhibit PR-2020-065-14 at 1.

from Solicitation A, in the manner it did, without any changes with respect to pricing tables in Annex B, in Solicitation B, seriously prejudiced the complainant in its effort to compete fairly in the re-solicitation. Therefore, the Tribunal finds the complaint to be valid.

## Solicitations A and B

### Solicitation A

[33] According to the basis of selection outlined in section 4.2.1 of Solicitation A, three standing offers were to be awarded on a proportional basis. The lowest-priced offer would receive 50 percent of the work, the second lowest-priced offer would receive 30 percent of the work and the third lowest-priced offer would receive 20 percent of the work. Solicitation A indicated that “[t]he three (3) responsive offers with the lowest evaluated prices on an aggregate basis” would be recommended for issuance of a standing offer.<sup>20</sup> Financial offers were to be submitted in accordance with Annex B.<sup>21</sup>

[34] In Annex B, there were two tables, i.e. Tables A and B, for three separate years, as well as for two option years (for a total of five years). For each of the years, bidders were required to complete both Tables A and B. Table A consisted of columns A through G. For each of the 18 items listed in column A, bidders were required to provide the “Price per Unit” (column F) and the “Extended Price” (column G). The extended price was to be calculated based on multiplying the estimated quantity indicated in column E for the specific item, with the price per unit in column F (extended price = column E x column F). Table B consisted of six columns for two items described in the “Class of Labour” column. Bidders were required to indicate the percentage markup for each item in the “OH&P Factor (%)” column and the extended price. The extended price was to be calculated by adding the mark-up to the total estimated expenditure indicated in the table for each item. The total price offered, consisting of the aggregate value for all five years (i.e. three years and two option years), was to be included in a table at the end of Annex B.<sup>22</sup>

[35] Additionally, Annex B instructed that “[t]he Unit rate price will govern in establishing the extended price.”<sup>23</sup> In the GIR, PWGSC submitted that Annex B did not specify that the extended price would be corrected by PWGSC where it discovered an error made by the bidder in calculating the extended price.

[36] Based on the three lowest evaluated prices, the three standing offers were awarded to Yates Trucking (ranking first), JPCL (ranking second), and Paul McDonald Trucking & Backhoe Ltd. (ranking third).<sup>24</sup>

### Solicitation B

[37] As noted above, Solicitation B was issued by PWGSC after it decided that Annex B, in Solicitation A, lacked clarity regarding PWGSC’s intent to correct errors in the calculation of prices. PWGSC also was of the view that the re-tender would address evaluation errors it had discovered during the re-evaluation of the financial bids on October 20, 2020. These evaluation errors were

<sup>20</sup> Exhibit PR-2020-065-12 at 47.

<sup>21</sup> Section 3.1 of Solicitation A, Exhibit PR-2020-065-12 at 46.

<sup>22</sup> Exhibit PR-2020-065-12 at 57-68.

<sup>23</sup> *Ibid.* at 57.

<sup>24</sup> *Ibid.* at para. 18.

described in the protected version of the GIR.<sup>25</sup> According to PWGSC, in order to preserve the integrity of the procurement process, it set aside the standing offers and re-tendered the requirement by issuing Solicitation B on November 4, 2020.

[38] PWGSC made submissions with respect to its decision to set aside the standing offers, stating that the decision upheld the integrity of the procurement process. However, as the complaint did not raise allegations concerning PWGSC's decision to set aside the standing offers and re-tender, but rather addressed the manner in which it conducted the re-tendering process, the Tribunal need not examine these submissions for the purposes of determining the validity of the complaint. However, upon determining that the complaint is valid, they may be considered in the Tribunal's consideration of the appropriate remedy, as discussed below.

[39] According to PWGSC, the key difference between Solicitations A and B was that Annex B was modified to provide clarification on how extended prices submitted in offers would be corrected if a discrepancy between the unit price and extended pricing was discovered during evaluation. The remainder of Annex B, including Tables A and B, remained unchanged. The revised instructions in Annex B are reproduced below:

...

**It is the bidder's responsibility to provide clear unit prices (using decimals) as the unit prices will prevail.**

**PLEASE NOTE:**

**Supply Manual Article 5.30:**

**Canada has the discretion to correct any discrepancies it discovers between the unit prices and extended prices during evaluations, and Canada WILL correct the extended price based on the unit pricing submitted by offerors.**

An Excel Spreadsheet has been created to allow offerors to supply their pricing information electronically. Offerors that would prefer to use the prepared spreadsheet instead of the pricing tables contained in the tables below are to contact the contracting authority and request that it be emailed to them.<sup>26</sup>

...

[40] In addition, Question and Answer 3 in Amendment 001 provided further clarification regarding how PWGSC would approach corrections of the bidders' pricing information.

**Question 3:**

Annex B: Basis of Payment – The instructions say . . .

What happens if I forget to include a decimal point or I insert an incorrect number in my unit price, but my extended price is still recorded as I intended it to be?

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<sup>25</sup> Exhibit PR 2020-065-12A (protected) at paras. 22-25.

<sup>26</sup> Exhibit PR-2020-065-12 at 400.

**Answer 3:**

During the financial evaluation, the evaluator will multiply the unit price (**as it is recorded**) by the estimated usage in order to determine the evaluated extended price. Bidders must be careful to record all unit prices accurately within their offer, as clarifications will not be sought and the **UNIT PRICES WILL PREVAIL**.<sup>27</sup>

[41] Based on the three lowest evaluated prices, the three standing offers were awarded to Santana Contracting Ltd. (Santana Contracting) (ranking first), Yates Trucking (ranking second), and Greg MacIntyre Trucking & Backhoe Ltd. (MacIntyre Trucking) (ranking third).<sup>28</sup>

**Disclosure of JPCL's pricing**What price was disclosed and to whom?

[42] The evidence on the record indicates that the prices that were posted on Buyandsell.gc.ca were limited to *contract values*.<sup>29</sup> In other words, on the contract award notices published on Buyandsell.gc.ca, the total bid price of JPCL or the other successful bidders were not published, only the resulting contract value.<sup>30</sup>

[43] However, the total evaluated prices of JPCL's bid, along with the total evaluated prices of the other successful bidders were provided to two of the bidders as well as to JPCL. In response to requests for the winning prices in the process for Solicitation A, these prices were communicated to MacIntyre Trucking on October 19, 2020,<sup>31</sup> and Yates Trucking, on October 28, 2020.<sup>32</sup> JPCL received the pricing information on November 4, 2020.<sup>33</sup>

[44] In the case of JPCL, the total evaluated price was not equal to JPCL's actual total bid price but reflected a higher value that included corrections that were made to its extended pricing by PWGSC.<sup>34</sup>

PWGSC's right to disclose JPCL's pricing information

[45] Solicitation A incorporated by reference 2005 (2017-06-21) General Conditions – Standing Offers – Goods or Services (General Conditions) as set out in PWGSC's *SACC Manual*.<sup>35</sup> PWGSC submitted that pursuant to Article 09 (2012-07-16) - Disclosure of Information of the General Conditions, it was entitled to disclose JPCL's pricing information. The relevant clause reads as follows:

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<sup>27</sup> *Ibid.* at 488.

<sup>28</sup> *Ibid.* at para. 38.

<sup>29</sup> *Ibid.* at 659.

<sup>30</sup> Exhibit PR-2020-065-01A at 340-342.

<sup>31</sup> Exhibit PR-2020-065-12 at 308.

<sup>32</sup> *Ibid.* at 377.

<sup>33</sup> *Ibid.* at 379.

<sup>34</sup> *Ibid.* at 190; Exhibit PR-2020-065-12A (protected) at 190.

<sup>35</sup> *Standard Acquisition Clauses and Conditions Manual*: online at <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual>> [*SACC Manual*]. See section 7.3.1 of Solicitation A, Exhibit PR-2020-065-12 at 49.

The **Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada**, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, in relation to such disclosure.<sup>36</sup>

[46] In addition, PWGSC also argued that its actions in relation to the disclosure were consistent with sections 7.35 and 7.45 of PWGSC's *Supply Manual*. Section 7.35 addresses notification to unsuccessful bidders/offerors/suppliers. Section 7.45 refers to the disclosure of the total evaluated price of the successful bidder after the issuance of a standing offer, as follows:

7.45. Disclosure of Information

- a. The following information can be released by contracting officers on a routine basis, **after award of a contract or issuance of a standing offer** (SO) or supply arrangement (SA):
  - i. for all solicitations for goods and services, the name of the successful and unsuccessful bidders/offerors/suppliers, responsive and nonresponsive, together with the total evaluated price of the successful bidder/offeror/supplier and total score, if applicable . . . .<sup>37</sup>

[47] Another authority for publishing the value of successful tenders cited by PWGSC was Article 516 of the CFTA. PWGSC submitted that according to this provision it *must* publish the value of successful tenders. The provision reads as follows:

*Information Provided to Suppliers*

1. A procuring entity shall promptly inform participating suppliers of its contract award decisions . . . .

*Publication of Award Information*

No later than 72 days after the award of each contract covered by this Chapter, **a procuring entity shall publish** a notice on one of the tendering websites or systems designated by its Party. The information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following:

. . .

- (d) the value of the successful tender.<sup>38</sup>

[48] Essentially, PWGSC's position was that the disclosure or publication of prices in respect of the successful bidders in the Solicitation A process was in accordance with established practice of the public tendering and award system. As such, according to PWGSC "none of the three successful bidders could plausibly or reasonably expect that their respective total evaluated bids would not be

<sup>36</sup> Exhibit PR-2020-065-12 at para. 29.

<sup>37</sup> *Ibid.* at para. 30.

<sup>38</sup> *Ibid.* at para. 61.

disclosed.”<sup>39</sup> Moreover, JPCL could not have any expectation that its total evaluated price would be kept confidential.

[49] In the Tribunal’s view, the requirements of Article 516 of the CFTA must be read with consideration of Article 517. It bears repeating that Article 517(1) provides that “notwithstanding any other provision of this Chapter, a procuring entity shall not provide to any particular supplier information that might prejudice fair competition between suppliers.” Article 517(2) further restricts the disclosure of information in certain circumstances, including where it could cause prejudice to a bidder participating in a procurement process. Article 517(2) reads as follows:

2. Nothing in this Chapter shall be construed to require the disclosure of information if disclosure:

...

(b) might prejudice fair competition between suppliers;

...

[50] In other words, although there is a requirement to publish the value of the successful tender under Article 516, in the Tribunal’s view, this obligation should be read with consideration of whether such action prejudiced fair competition between bidders in the re-tendering process. In this regard, the Tribunal recently stated as follows in *MRC and CME*:

While the Tribunal has previously acknowledged, as noted by PWGSC, that the disclosure of the price on contract award is a “feature of the long-established public tendering and award system”, *it must nevertheless consider the impact of such practice in the context where the government institution proposes to retender the same requirement and obligations for fair competition must be considered.*<sup>40</sup>

[Footnotes omitted, emphasis added]

[51] In that case, PWGSC had disclosed pricing and the technical scores of the successful bidder before deciding that it would re-tender the requirement. In considering whether the disclosure breached Article 517(1) of the CFTA, the Tribunal took into account the fact that there was no indication that PWGSC would revise the terms of the re-tender such that the risks to the bidder’s ability to fairly compete would be mitigated. Accordingly, consistent with past decisions, the Tribunal found that the disclosure of the bidder’s pricing information would prevent the bidder from fairly competing in the re-tender.<sup>41</sup> The Tribunal also found that the disclosure of one bidder’s

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<sup>39</sup> *Ibid.* at para. 65.

<sup>40</sup> See *Marine Recycling Corporation and Canadian Maritime Engineering Ltd* (22 February 2021), PR-2020-038, PR-2020-044, PR-2020-056 (CITT) [*MRC and CME*] at para. 63.

<sup>41</sup> *Conair Aviation, A division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CITT) at 16; *Lincoln Landscaping Inc.* (16 November 2016), PR-2016-018 (CITT) at para. 50; *Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT) at para. 41; *Lengkeek Vessel Engineering* (7 March 2007), PR-2006-022 (CITT) at para. 17; *Hawboldt Industries* (27 April 2018), PR-2017-045 (CITT) at paras. 44-48.

pricing adversely impacted the ability of another bidder to compete fairly in the re-tender, despite that its own pricing information had not been disclosed.<sup>42</sup>

[52] The Tribunal finds that the principles described above apply to the present case. After disclosing the pricing information of the three successful bids in Solicitation A, PWGSC re-tendered the requirement without taking any steps to mitigate the risks to fair competition, including making any changes to the pricing tables in Annex B. As noted by JPCL, no changes were made with respect to Table A: Class of Labour of Materials (column C), Unit of Measure (column D), and Estimated Quantity (column E). The estimated expenditures for both items in Table B were also unchanged. These were the factors that formed the basis for prices offered by bidders and they were identical in Solicitation B and Solicitation A. With knowledge of the winning prices in the original solicitation bids and the pricing tables in Annex B of Solicitation B being the same, bidders participating in Solicitation B had an advantage. As further discussed below, the second bidding process was compromised.

#### Prejudice to JPCL in the Solicitation B process

[53] As a result of the disclosure of pricing information from the Solicitation A process, bidders participating in Solicitation B were made aware of the range of pricing that would likely make their bids more competitive. As argued by JPCL, since the terms of the pricing tables were not changed in Solicitation B, from the total evaluated price that was disclosed, the per annum bid price could be easily calculated and a bidder would only have to make sure its per annum bid prices were less than those of the previous solicitation.

[54] PWGSC submitted that JPCL was not prejudiced, as it disclosed JPCL's total evaluated price (which included adjustments to the extended pricing) and not its actual bid price. The Tribunal is not persuaded by this argument. It was the knowledge of the total evaluated price, which reflected the offered price after any errors in calculation were corrected, that provided other bidders with an advantage in the process for Solicitation B. The total evaluated prices indicated the prices at which bids in the re-tender would be competitive. The disclosure of total evaluated prices for each of the successful bids in Solicitation A, including JPCL's, impacted the fairness of Solicitation B, as none of the pricing tables were changed from the original tender.

[55] The Tribunal agrees with JPCL, as noted in its comments on the GIR, that overall, the resulting prices from the Solicitation B process were lower than prices in the Solicitation A process. For instance, all of the prices of the winning bids in the Solicitation B process were lower than JPCL's total evaluated price in Solicitation A. Moreover, the total evaluated price offered by the first ranking bidder in the Solicitation B process, Santana Contracting, was even lower than Yates Trucking's total evaluated price in Solicitation A.<sup>43</sup> Finally, it was possible for bidders that participated in Solicitation A to submit lower prices in Solicitation B.<sup>44</sup> Considering the foregoing, the Tribunal finds that on balance, JPCL was prejudiced by the disclosure of its evaluated price as well as the evaluated prices of the other winning bidders in the original solicitation.

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<sup>42</sup> *MRC and CME* at para. 62.

<sup>43</sup> Exhibit PR-2020-065-13 at 31; Exhibit PR-2020-065-12 at paras. 18, 38.

<sup>44</sup> Exhibit PR-2020-065-12A (protected) at [REDACTED], [REDACTED].



[56] Furthermore, the fact that JPCL's bid contained certain deficiencies with respect to its extended pricing, which led to an increase in its total evaluated price from its actual bid price (due to the corrections to JPCL's extended pricing by PWGSC), does not vitiate the prejudice JPCL faced in Solicitation B. As submitted by JPCL in its comments on the GIR, its bid was ultimately higher as a result of the compromised bids in the Solicitation B process. In assessing prejudice, for the Tribunal to limit its consideration to the resulting evaluation prices and rankings of the bidders based on those prices, would require an assumption that none of the prices offered by the winning bidders in the first place were influenced by the disclosed prices from Solicitation A. While the Tribunal cannot detail the extent to which bidders factored in the previous disclosed pricing into their offers, this is not necessary for it conclude that PWGSC's disclosure of the pricing information along with the absence of any changes to Solicitation B to mitigate the risk of prejudice to fair competition, breached Article 517(1) of the CFTA.

[57] Finally, PWGSC also submitted that the disclosure of the total evaluated prices from Solicitation A was limited to only certain bidders and that it did not provide the first-ranked bidder, Santana Contracting, with the information. The Tribunal does not find that the potential for harm was mitigated by PWGSC's limited disclosure. In the Tribunal's view, once the information was disclosed, the potential for such information to be used to undermine the integrity of the procurement process by any bidder existed. Furthermore, absent evidence on the record, the Tribunal cannot presume that only certain companies had access to the information once it was disclosed by PWGSC.

[58] For the reasons above, the Tribunal finds that the complaint is valid.

## REMEDY

[59] As the complaint is valid, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) to (4) of the *CITT Act*. To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including the following:

- (1) the seriousness of the deficiencies found;
- (2) the degree to which the complainant and all other interested parties were prejudiced;
- (3) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (4) whether the parties acted in good faith; and
- (5) the extent to which the contract was performed.

[60] The Tribunal finds that the deficiency it found in the procurement process was significant. JPCL was denied an opportunity to fairly compete for one of the standing offers that could have resulted in up to five years of work, for a portion of the total revenues that would likely have been in the range of \$1.5 million.<sup>45</sup> The fact that JPCL's price was known to other bidders and none of the relevant terms in re-tender were changed, the integrity of the particular process was seriously compromised. As a result of these circumstances, it was possible for bidders to correct errors in their

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<sup>45</sup> Exhibit PR-2020-065-01A at 326.

original bids and undercut the total evaluated prices of winning bids in Solicitation A. One bidder, who was not part of the original solicitation, submitted an offer that underbid all of the other bidders. Although the Tribunal does not find that PWGSC acted in bad faith and did not intend to prejudice JPCL, this does not vary the degree to which JPCL was prejudiced in the procurement process.

[61] That said, the Tribunal is of the view that as it must consider all the circumstances relevant to the procurement, in considering the appropriate remedy, it must also turn its mind to the fact that the prejudice suffered by JPCL was compounded by PWGSC's decision to re-tender.

[62] It bears repeating that PWGSC's decision to re-tender was to rectify an ambiguity with respect to its evaluation methodology, i.e. to clarify that it would correct errors made in the calculation of the extended pricing. The Tribunal has no reason to believe that PWGSC was not acting in good faith when it decided to re-solicit the requirement based on its belief that there was an ambiguity in Solicitation A. However, PWGSC's actions in this regard were unwarranted.

[63] Firstly, Annex B clearly stated that the "Unit rate price will govern in establishing the extended price."<sup>46</sup> Secondly, the standard instructions included plain wording to the effect that PWGSC could make the corrections. According to section 2.1 of Solicitation A, the 2006 (2020-05-28) Standard Instructions - Request for Standing Offers - Goods or Services - Competitive Requirements (Standard Instructions) of PWGSC's *SACC Manual* was incorporated by reference into the RFSO<sup>47</sup>. Article 16 of those instructions reads, in part, as follows:

1. In conducting its evaluation of the offers, Canada may, but will have no obligation to, do the following:

...

*e. correct any error in the extended pricing of offers by using unit pricing and any error in quantities in offers to reflect the quantities stated in the RFSO; in the case of error in the extension of prices, the unit price will govern.*<sup>48</sup>

[Emphasis added]

[64] In the Tribunal's view, the RFSO was clear that PWGSC could correct errors made by the bidders when calculating the extended pricing using the unit prices stated in the financial bid. As such, there was no need to cancel the first RFSO because the wording in Annex B, combined with the incorporated Standard Instructions, was sufficiently clear and unambiguous to allow the evaluation of the bids as received and to make the corrections to the extended pricing based on the unit price.<sup>49</sup>

[65] As Solicitation B should not have been issued, as there was no ambiguity in the RFSO to rectify, in considering the appropriate remedy, the Tribunal will consider the evaluation of the bids

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<sup>46</sup> Exhibit PR-2020-065-12 at 57.

<sup>47</sup> *Ibid.* at 42.

<sup>48</sup> Article 16 of the Standard Instructions, *SACC Manual*.

<sup>49</sup> See *MRC and CME* at para. 54 in which the Tribunal similarly concluded that the ambiguity in the solicitation documents alleged by PWGSC were found not to warrant cancellation of the solicitation and re-tendering.

that were submitted in response to Solicitation A. This is necessary to properly ascertain JPCL's ranking.

[66] Following an objection raised by an unsuccessful bidder, PWGSC re-evaluated the bids on October 20, 2020. This resulted in PWGSC's discovery of what, in its view, were errors in its evaluation conducted previously on October 7, 2020 (original evaluation).<sup>50</sup>

[67] The Tribunal has reviewed the evaluation errors claimed to have been made by PWGSC during the original evaluation and is of the view that PWGSC should re-evaluate all of the bids submitted in response to Solicitation A so as to determine JPCL's proper ranking.

[68] With respect to errors, the Tribunal has repeatedly held that the onus is on bidders to ensure their bids are correct. In *Trans-Sol*, the Tribunal stated as follows:

. . . the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation and that it accurately reflects the bidder's intention ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal and to make sure that it is compliant with all essential elements. The present situation could have been avoided if Trans-Sol had exercised due diligence in the preparation of its proposal.<sup>51</sup>

[69] However, Solicitation A indicated that certain corrections of errors in the financial bid by PWGSC were permissible. As noted above, according to the terms of Solicitation A, i.e. Article 16 of the Standard Instructions, PWGSC could correct errors made in respect of the *extended pricing* based on the *unit price* that was submitted. In the Tribunal's view, although the RFSO only explicitly mentions the correction of the extended pricing, it would not have been unreasonable for PWGSC to have made certain assumptions about the unit prices that were *at issue during the re-evaluation*.<sup>52</sup>

[70] In this regard, the jurisprudence has established parameters for the correction of errors submitted in a bid. In *Francis H.V.A.C.*,<sup>53</sup> the Federal Court of Appeal found that the government institution was entitled to correct any "easily discoverable" mathematical errors. In this case, PWGSC corrected the mathematical errors on its own initiative and without any new information from the bidder. The bid contained correct unit prices, but there were errors in adding the subtotals for some of the tables in the financial bid. The Court stated as follows:

[23] In the case at bar, MNO did not submit any new information after the bid closing date . . . Rather, it was PWGSC that corrected MNO's mathematical errors on its own initiative. . . .

[24] It is clear from a review of MNO's bid that it contained the correct prices on all of the individual HVAC units. However, there were errors in adding the subtotals for three of the

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<sup>50</sup> Exhibit PR-2020-065-12 at paras. 22, 57; Exhibit PR-2020-065-12A (protected) at paras. 22-25.

<sup>51</sup> *Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT) [*Trans-Sol*] at para. 11. See also *Softsim Technologies Inc.* (11 June 2020), PR-2019-053 (CITT) at para. 48.

<sup>52</sup> Exhibit PR-2020-065-12A (protected) at paras. 22-24.

<sup>53</sup> *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 (CanLII) [*Francis H.V.A.C.*].

23 tables which were *easily discoverable* by calculating the individual prices by year and comparing them to the subtotals. . . .

[25] It is clear from the foregoing that it was PWGSC that discovered the errors and corrected them, not MNO. *PWGSC did not use any information that was not already included in the bid*. Indeed, PWGSC was entitled to correct any mathematical error on its own and enter into a contract based on MNO's unit prices. . . .<sup>54</sup>

[Emphasis added]

[71] However, as the Tribunal described in *Gallason Industrial*, there are limits to the type of errors contained in the bid that may be corrected by the government institution. In this case, the Tribunal found that there was no "easily discoverable" error in the financial bid, which had contained significant errors, as its unit prices did not correspond to the extended prices as required by the RFP.<sup>55</sup> In discussing whether PWGSC could replace the unit prices submitted in the bid with the new numbers that were provided by the complainant in that case in response to a clarification request from PWGSC, the Tribunal stated as follows:

PWGSC could not do to Gallason's bid what it did with Francis'. As such, there was no "easily discoverable["]mathematical error because Gallason's financial bid was *unclear as to whether the error was with the unit prices or the extended prices* (or both). Likewise, this was not a situation where PWGSC could have used other information provided elsewhere in the bid to identify and/or correct the source of the pricing discrepancy at the time of bid closing.<sup>56</sup>

[Emphasis added]

[72] With consideration of the principles in *Gallason Industrial* and *Francis H.V.A.C.*, in the present case, when re-evaluating the bids, the evaluators may infer that there is a decimal point in the unit price where it can be *clearly* inferred that the decimal point in the price was either obscured or omitted when it was transcribed by hand. As an example, if the unit price for item Y, with a hypothetical estimated quantity of 100 units, appears as "\$100" (with no apparent decimal point), with the extended price written as "\$100.00", and the unit price for item Y in all of the other years appeared as "\$1.00" (where the decimal point is present), with the extended price in each instance also being "\$100.00", in the Tribunal's view, it would be reasonable for PWGSC to infer that a decimal point was intended by the bidder in the unit price and was simply either obscured or omitted when it was transcribed by hand, i.e. "\$100" was intended to be "\$1.00". In interpreting the unit price in this manner, no digits or existing decimal points in the original unit price are changed.

[73] In reissuing the RFSO, PWGSC emphasized in Amendment 001 of Solicitation B that the unit price would be accepted "as it is recorded". In other words, decimal points must be evident in the unit price, if they are necessary. PWGSC also provided bidders the option of submitting prices using an excel spreadsheet; this was possibly to mitigate any doubt of an omitted or obscured decimal point as there may be in a handwritten pricing submission. As the bids must be evaluated in

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<sup>54</sup> *Ibid.* at paras. 23-25.

<sup>55</sup> *Gallason Industrial Cleaning Services Inc.* (15 August 2018), PR-2018-002 (CITT) [*Gallason Industrial*] at para. 33.

<sup>56</sup> *Ibid.* at para. 37. See also *Maritime Fence Ltd.* (23 November 2009), PR-2009-027 (CITT) at paras. 27, 28.

accordance with the terms of Solicitation A, which did not include the additional terms outlined in Amendment 001 of Solicitation B, in the Tribunal's view, the unit price could be interpreted in the manner described above.

[74] The Tribunal also notes that in *Gallason Industrial*, it held that “the price discrepancy clause does not refer to allowing corrections to *unit prices* where they do not correspond to the extended price totals. Rather it indicates that in the case of a discrepancy between unit and extended prices, the unit prices will prevail.”<sup>57</sup> In the Tribunal's view, the interpretation of the unit price described above does not offend the rules of the tender. In this instance, the error does not concern the extended pricing, the correction of which is governed by Article 16 of the Standard Instructions and the terms of Annex B. Moreover, the unit price would not be corrected to make it correspond to the extended pricing. It would instead be interpreted to be the same as the other four instances of the unit price, ensuring that the correct unit price is used in evaluating the financial bid.

[75] To further illustrate, PWGSC could not, for example, correct a unit price that was clearly written. For instance, if a unit price was clearly written in the form “\$100.00” it should not revise the unit price to “\$1.00”. This would, in the Tribunal's view, constitute a material change to the unit price requiring the movement of the decimal place and deletion of the two ending zeros. In this instance, the unit price would not have been ambiguous. Although the bidder may have intended to enter \$1.00 and simply made the mistake of entering \$100.00, this was an error that should not be corrected by PWGSC. As such, as per the terms of Solicitation A, the extended price for the item must be calculated using the unit price submitted by the bidder, i.e. \$100.00.

[76] The re-evaluation of the financial bids is necessary to properly determine JPCL's ranking and determine the proportion of work it was entitled to. In doing so, PWGSC may apply the Tribunal's views on how unit prices may be interpreted. Should no other errors in the bids exist, this would re-instate the bidders' standing after the evaluation on October 7, 2020.

[77] Insofar as the recommended re-evaluation results in JPCL not ranking in the top three, ultimately, JPCL will not have been prejudiced by PWGSC's conduct. In this case, it would not have been entitled to a standing offer or any compensation for profits that it may have lost by not being issued the standing offer. However, if JPCL ought to have been issued a standing offer, an appropriate remedy would be that the standing offers issued as a result of Solicitation B be cancelled and standing offers should be issued in accordance with the results of the re-evaluation (i.e. the confirmed ranking of the top three bidders). To the extent that work has been issued under the standing offers pursuant to Solicitation B, JPCL should also be compensated for any lost profits that it would have otherwise earned. As there were no issues on the record with respect to PWGSC's acceptance of the unit prices that were included in JPCL's financial offer, the compensation for lost profit should be calculated based on the unit prices indicated in the Standing Offer Agreement (SOA) for JPCL dated October 14, 2020.

[78] However, if the re-evaluation results in JPCL being entitled to a standing offer, the present circumstances raise the question of whether it would be in the public interest to cancel the existing standing offers and reissue them according to the results of the re-evaluation, or instead to compensate JPCL for the profits it would have earned had it been issued a standing offer. In this regard, the Tribunal is mindful of ensuring that in recommending the appropriate remedy in this case,

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<sup>57</sup> *Gallason Industrial* at para. 41.

the expense to taxpayers or impact on PWGSC's operational requirements are minimized. Presently, the Tribunal is unable to make this assessment as there is no information on the record that indicates the extent of the work that has been issued and the circumstances that could arise from the cancellation of the issued standing offers.

[79] Accordingly, the Tribunal is of the view that if, following the re-evaluation, PWGSC considers that it is not in the public interest to cancel the standing offers issued pursuant to Solicitation B, it should compensate JPCL for the profit it would have earned had it been issued the standing offer, starting from the date the standing offers were awarded pursuant to Solicitation B and for the duration that they remain in effect.

[80] Finally, with respect to complaint costs, JPCL did not request that it be awarded any. Accordingly, the Tribunal will not award costs.<sup>58</sup>

## DETERMINATION

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

[82] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC re-evaluate all financial offers submitted in response to Solicitation A, in accordance with the Tribunal's directions set out in the reasons for this determination. The Tribunal also recommends that no further call-ups or any other forms of expenditure under the standing offers issued pursuant to Solicitation B be undertaken by PWGSC pending the re-evaluation.

[83] The Tribunal further recommends that, following the re-evaluation, PWGSC cancel the standing offers issued pursuant to Solicitation B and issue the standing offers in accordance with the results of the recommended re-evaluation, and compensate JPCL for the lost profit that it would have earned from call-ups issued against a standing offer based on its ranking in the re-evaluation, from the date the standing offers were awarded pursuant to Solicitation B, up until the moment a standing offer is issued to JPCL. The compensation for lost profit is to be calculated based on the unit prices indicated in the SOA for JPCL dated October 14, 2020.

[84] In the alternative, should PWGSC determine that it is not in the public interest to cancel the standing offers issued pursuant to Solicitation B, after the re-evaluation mentioned above is completed, the Tribunal recommends that PWGSC compensate JPCL for an amount equal to the lost profit that it would have earned from call-ups issued against the standing offer based on its ranking in the re-evaluation. This compensation should be calculated starting from the date the standing offers were awarded pursuant to Solicitation B and for the duration that such standing offers remain in effect. The compensation for lost profit is to be calculated using a reasonable rate of profit and based on the unit prices indicated in the SOA for JPCL dated October 14, 2020. The compensation should be negotiated between PWGSC and JPCL.

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<sup>58</sup> *Autopos Marine Inc. d.b.a. AutoNav* (5 June 2019), PR-2018-057 (CITT) at para. 60; *eVision Inc., SoftSim Technologies Inc., in Joint Venture* (22 August 2019), PR-2019-011 (CITT) at para. 46. See *Exeter v. Attorney General of Canada*, 2013 FCA 134 (CanLII), in which the Federal Court of Appeal held that parties must request their costs in order to be awarded any.

[85] Should the parties be unable to agree on the amount of compensation for lost profit, JPCL shall file with the Tribunal, within 40 days of the date on which it receives notice of the results of the re-evaluation, a submission on the issue of compensation. PWGSC will then have seven working days after the receipt of JPCL's submission to file a response. JPCL will then have five working days after the receipt of the reply submission from PWGSC to file any additional comments. The parties are required to serve each other and file with the Tribunal.

[86] Each party will bear its own costs.

Randolph W. Heggart

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Randolph W. Heggart

Presiding Member