



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2020-088

Cache Computer Consulting Corp

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, June 25, 2021*

*Reasons issued  
Friday, July 16, 2021*

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IN THE MATTER OF a complaint filed by Cache Computer Consulting Corp 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**

**CACHE COMPUTER CONSULTING CORP**

**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, in part.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services (PWGSC) re-evaluate the bids submitted in response to Solicitation No. 24062-200609/A that were considered for evaluation during Phase III of the phased bid compliance process, in accordance with the evaluation matrix described in the request for proposal (RFP), taking into account the Tribunal's reasons for this decision. At the reasonably exercised discretion of PWGSC, the bid re-evaluation may extend to the re-evaluation of the mandatory criteria prescribed by the RFP that are not scored based on points.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Cache Computer Consulting Corp its reasonable costs incurred in preparing and proceeding with its complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. Any party that disagrees **with the preliminary level of complexity or the preliminary indication of the cost award** is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal's Statement of Reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

The interveners, Systematix IT Solutions Inc. and PricewaterhouseCoopers LLP, shall each bear their own costs.

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Susan D. Beaubien  
Susan D. Beaubien  
Presiding Member

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

Tribunal Panel:	Susan D. Beaubien, Presiding Member
Tribunal Counsel:	Helen Byon, Counsel Sarah Shinder, Counsel
Complainant:	Cache Computer Consulting Corp (O/A Cache Consulting)
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Ms. Adrienne Moir Mr. David Covert Mr. Justin Roy
Intervener:	Systematix IT Solutions Inc.
Counsel for the Intervener:	Ms. Stephanie Pierce Mr. Phuong T.V. Ngo Mr. Daniel Chomski
Intervener:	Pricewaterhouse Coopers LLP
Counsel for the Intervener:	Mr. Martin G. Masse Ms. Erin Brown

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## STATEMENT OF REASONS

[1] Cache Computer Consulting Corp. (Cache) has filed a complaint<sup>1</sup> concerning a Request for Proposal (RFP) (Solicitation No. 24062-200609/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Treasury Board Secretariat for the procurement of Task-based Informatics Professional Services (TBIPS).<sup>2</sup>

[2] The RFP arose from an existing TBIPS Supply Arrangement and was intended to result in the award of one contract for two years plus a single irrevocable option for one year that would enable the contract to be extended.<sup>3</sup>

[3] The tender process began with the publication of the RFP on August 27, 2020.<sup>4</sup> The closing date for the receipt of bids was initially fixed as September 18, 2020,<sup>5</sup> but this date was subsequently extended through amendments to October 30, 2020.<sup>6</sup>

[4] The RFP described the specific nature of the TBIPS services to be provided<sup>7</sup> and also prescribed certain criteria with respect to the education, professional certifications, work experience and security clearance requirements of the persons who would provide those services.<sup>8</sup>

[5] Bidders were instructed by the RFP to describe the resources that the bidder proposed to supply. Within the context of the RFP, a “resource” is understood to mean the expertise and services of specific, named individuals whose labour the bidder is in a position to supply to provide the services. The RFP also required each bidder to provide, among other things, a certification asserting that the described resources would be available to perform the work should the bidder win the tender and be awarded the contract and that it had the permission from those individuals to propose their services in relation to the work and to submit his/her resume to PWGSC.<sup>9</sup>

[6] Bids were to be assessed for both technical merit and price, using a scoring matrix prescribed by the RFP. The bidder achieving the highest score would win the tender and be awarded the contract. A portion of the bid evaluation process included the assessment of the resources proposed by each bidder and the scoring for each one. The skills and experience of each resource, as reflected in a *curriculum vitae*, was to be evaluated and scored against criteria defined in the RFP.<sup>10</sup>

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<sup>1</sup> Exhibit PR-2020-088-01.

<sup>2</sup> *Ibid.* at 10, 14.

<sup>3</sup> *Ibid.*

<sup>4</sup> The date of August 27, 2020, appears on the face of the RFP; see Exhibit PR-2020-088-01 at 10. However, in the GIR, PWGSC states that the RFP was published on August 28, 2020. Nothing turns on this apparent one-day discrepancy.

<sup>5</sup> Exhibit PR-2020-088-01 at 10.

<sup>6</sup> Specifically, the bid closing date was extended on various occasions, as follows. On September 2, 2020, Amendment 001 first extended the bid closing date to October 2, 2020. On September 23, 2020, Amendment 004 further extended the bid closing date to October 16, 2020. Finally, Amendment 006 extended the bid closing date to 30 October 2020. See Exhibit PR-2020-088-01 at 213, 271, 332.

<sup>7</sup> Exhibit PR-2020-088-01 at 59.

<sup>8</sup> *Ibid.* at 59-75.

<sup>9</sup> *Ibid.* at 38-39.

<sup>10</sup> *Ibid.* at 31-37.

[7] Cache was the incumbent supplier of TBIPS services to the Treasury Board Secretariat under a previous contract<sup>11</sup> whose expiry caused the RFP to be published. In response to the RFP, Cache submitted a bid, as did at least two other bidders, including PricewaterhouseCoopers LLC (PwC) and Systematix IT Solutions Inc. (Systematix).

[8] Cache's bid was unsuccessful. PWGSC awarded contracts to Systematix and PwC on February 1, 2021.<sup>12</sup>

[9] After learning of the tender outcome, Cache appears to have made inquiries which led it to conclude that at least one other bidder (and possibly more) may have certified the availability of resources which were not actually available to them. Cache advised PWGSC of its concerns and asked that PWGSC verify the accuracy of the certifications provided by other bidders in the competition. Cache indicated that it had lost a previous unrelated contract because of an alleged practice of bidders certifying resources without actually having secured the consent of the resources described in the winning bid. Cache provided PWGSC with a list of consultants who had allegedly advised Cache that they had not granted permission to any other bidder to be included as a resource in a bid responsive to this RFP. PWGSC declined to take any action.<sup>13</sup>

[10] Cache repeated its concerns and identified a specific individual ("A")<sup>14</sup> whose services were allegedly promised and certified by at least one other bidder, all without the permission of "A". Cache supplied PWGSC with a written statement to this effect, signed by "A".<sup>15</sup>

[11] A series of emails passed between Cache and PWGSC during the period February 1, 2021, to February 12, 2021.<sup>16</sup> Cache filed a complaint with the Tribunal on February 10, 2021. On February 12, 2021, PWGSC notified Cache that it would investigate Cache's allegations.<sup>17</sup>

[12] The Tribunal accepted Cache's complaint for inquiry on February 18, 2021.<sup>18</sup>

## INTERLOCUTORY MATTERS

[13] Systematix and PwC both sought leave to participate in the inquiry as interveners. The Tribunal's decision to grant leave to intervene is discretionary. After giving due consideration to relevant factors<sup>19</sup> and in the absence of any objections, the Tribunal concluded that Systematix and PwC should each be permitted to appear as interveners.<sup>20</sup>

[14] Prior to filing the Government Institution Report (GIR), PWGSC brought a motion asking that the Tribunal cease its inquiry on three grounds, namely the following:

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<sup>11</sup> Exhibit PR-2020-088-37A (protected) at 10.

<sup>12</sup> Exhibit PR-2020-088-01A (protected) at 437.

<sup>13</sup> Exhibit PR-2020-088-01A (protected) at 443-445; Exhibit PR-2020-088-41A at 9-11.

<sup>14</sup> At the request of Cache, the individual is not identified by name in these reasons in order to protect his/her privacy, although that name does appear in the public materials submitted by all parties to this proceeding.

<sup>15</sup> Exhibit PR-2020-088-01A at 449.

<sup>16</sup> Exhibit PR-2020-088-37A (protected) at 3-11; Exhibit PR-2020-088-41A at 5-14.

<sup>17</sup> Exhibit PR-2020-088-37 at 29.

<sup>18</sup> Exhibit PR-2020-088-03.

<sup>19</sup> See *NISIT International Ltd.* (20 July 2020), PR-2019-067 (CITT) at paras. 12-26.

<sup>20</sup> Exhibit PR-2020-088-012; Exhibit PR-2020-088-028.

- There is no valid basis for the complaint as it was not made in good faith and, in any event, was filed prematurely by Cache;
- The complaint pertains to an issue of contract administration and thus falls outside the scope of the Tribunal's jurisdiction; and
- The complaint does not provide PWGSC with sufficient information to understand the case that it must meet.

[15] The Tribunal set a schedule to enable all parties to provide submissions on PWGSC's motion. The filing of the GIR was suspended, pending the disposition of the motion.

[16] All parties filed written arguments addressing the issues raised by PWGSC's motion. Systematix and PwC filed submissions in support of the arguments advanced by PWGSC.

**First ground: There is no valid basis for the complaint**

[17] As Cache filed its complaint with the Tribunal on February 10, 2021, PWGSC asserts that this timing left no time for PWGSC to respond to Cache's objection which had been sent to PWGSC earlier on that same day.

[18] In filing its complaint with the Tribunal, Cache characterized PWGSC as being non-responsive to its written concerns. PWGSC says that this amounts to the filing of a premature complaint and that Cache did not allow PWGSC sufficient opportunity to address the matter.

[19] The filing of Cache's complaint was the culmination of a series of emails exchanged between Cache and PWGSC between February 1 and 3, 2021. As detailed further below, the record shows that PWGSC was quick to respond to Cache's initial queries, with a reply being sent within a few hours.

[20] On February 3, 2021, Cache asked PWGSC if it intended to respond or take action in relation to an email sent the previous day wherein Cache repeated its call for PWGSC to investigate what Cache viewed as the certification by other bidders of resources that were not actually available to them.<sup>21</sup>

[21] Several days elapsed, with no reply from PWGSC. Ultimately, Cache signalled on February 10, 2021, that it would be filing a complaint with the Tribunal. The complaint was filed on that same day. PWGSC then provided a brief response indicating that it would investigate Cache's allegations.

[22] It appears as if the filing of Cache's complaint and the sending of PWGSC's reply may have crossed, in terms of timing, during the course of the day on February 10, 2021. In any event, PWGSC contends that the timing of Cache's complaint gave PWGSC no opportunity to investigate Cache's allegations, rendering the complaint premature. Moreover, PWGSC contends that the filing of a complaint in the face of PWGSC's agreement to investigate is indicative that Cache was not acting in good faith.

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<sup>21</sup> Exhibit PR-2020-088-41A at 5-6.

[23] The *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>22</sup> impose stringent deadlines with respect to the filing of procurement complaints. According to subsections 6(1) and (2) of the *Regulations*, a complaint must be filed within 10 working days after the date on which the complainant knew or should have reasonably known about the basis of a complaint, as set forth below:

**6 (1)** Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

**(2)** A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

[24] It is well established that a prospective complainant cannot adopt a “wait and see” position in which time is of the essence.<sup>23</sup> An unsuccessful bidder who delays in submitting a complaint to the Tribunal may find itself out of time within which to do so.

[25] This being said, the ten-day time limit noted above stops running where the bidder complains or seeks redress from the procuring entity. In this case, Cache’s objection was required to be made within 10 days of receiving the regret letter dated February 1, 2021. The ten-day time limit to file a complaint with the Tribunal started to run again after the day on which Cache had actual or constructive knowledge of denial of relief from PWGSC.

[26] As noted above, the record shows that on February 2, 2021, Cache provided PWGSC with a list of consultants. According to Cache, those consultants had informed Cache that they had not consented to being included in the bid of any other bidder. Cache requested PWGSC to verify that none of the consultants on Cache’s list were actually included in the bids of the other bidders.<sup>24</sup> “A” was one of the consultants on the list.

[27] On February 2, 2021, PWGSC responded with its confirmation that “none of the resources proposed by [Cache] were proposed by other bidders. . . .”<sup>25</sup> In the Tribunal’s view, this amounted to a denial of relief, especially since “A” was, in fact, included as a resource in another bidder’s proposal.

[28] The next day, on February 3, 2021, Cache again requested PWGSC to confirm that they would conduct the verification requested by Cache.<sup>26</sup> No response was given by PWGSC until later

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<sup>22</sup> SOR/93-602 [*Regulations*].

<sup>23</sup> *Pacific Northwest Raptors Ltd.* (16 October 2019), PR-2019-017 (CITT) at para. 29; *Temprano and Young Architects Inc. v. National Capital Commission* (26 February 2019), PR-2018-036 (CITT) at paras. 21, 22; *Hewlett-Packard (Canada) Co.* (20 March 2017), PR-2016-043 (CITT) at para. 86.

<sup>24</sup> Exhibit PR-2020-088-41A at 10.

<sup>25</sup> *Ibid.* at 7-9.

<sup>26</sup> *Ibid.* at 6.



on February 12, 2021, after Cache had provided, on February 10, 2021, a statement signed by “A” confirming that he had not granted permission to be included in the bid.<sup>27</sup>

[29] The pattern of communication between Cache and PWGSC from February 1 to 3, 2021, showed that PWGSC responded quickly to Cache’s emails, typically within a matter of hours. As noted above, in PWGSC’s initial response, on February 2, 2021, it declined to make inquiries concerning the possible bidding irregularities that Cache alleged had transpired. Cache made several attempts to persuade PWGSC to verify the bidder certifications and PWGSC declined to act.

[30] After Cache followed up, on February 3, 2021, there was silence from PWGSC for seven days. In these circumstances, the Tribunal finds that it was reasonable for Cache to conclude that PWGSC had declined to provide relief, whether explicitly or constructively.

[31] The *Regulations* permit a complainant to seek redress from the government institution before filing a complaint, but this is not mandatory. A complainant must be alert and mindful of the short time limit (10 days) provided by the *Regulations*. Prior to the filing of the complaint, the correspondence of record does not suggest that PWGSC was prepared to either act on Cache’s complaint or to reconsider its position.

[32] The fact that PWGSC later relented and *subsequently* agreed to conduct a further investigation after Cache submitted additional evidence was not sufficient, in these particular circumstances, for the Tribunal to conclude that Cache’s complaint was either premature or made in bad faith.

[33] The Tribunal further finds that the filing of the complaint would not (and did not) prevent or prejudice PWGSC from carrying out the investigation mentioned in its email dated February 10, 2021. Depending on the outcome of that investigation, PWGSC retained the authority to take action that would render moot Cache’s complaint or precipitate its withdrawal.

[34] For the above reasons, the Tribunal dismissed the first ground of PWGSC’s motion.

**Second ground: The complaint is premised on a matter of contract administration and the Tribunal lacks jurisdiction**

[35] PWGSC contends that Cache’s complaint pertains to an issue of contract administration and thus falls outside the Tribunal’s jurisdiction. As contracts have been awarded to Systematix and PwC, Cache’s complaint about the availability of bidder’s resources postdates the competitive tender process. According to PWGSC, if a bidder is unable to deliver the resources as described in its bid, the government may invoke its remedies under contract law, but that issue is outside the Tribunal’s jurisdiction, as there is no breach of the trade agreements. As such, PWGSC argues that Cache’s complaint must consequently fail.

[36] It is well established that the Tribunal’s jurisdiction does not extend to matters of contract administration. For example, if a contract is awarded and a bidder fails to deliver the product or service that has been procured, or if the deliverables are unsatisfactory, Canada may terminate the contract or otherwise seek relief that may arise from the contract provisions.

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<sup>27</sup> *Ibid.* at 5-6; Exhibit PR-2020-088-01A (protected) at 449.

[37] However, as discussed later in these reasons, there is no bright line between the end of the procurement process and the start of the contract administration process. The issue is dependent on circumstances and every case turns on its own facts.

[38] The trade agreements require that tenders be conducted fairly and transparently. The Tribunal's jurisdiction encompasses the reviewing of the tender process to ensure that the competition has been conducted fairly and transparently, in accordance with the provisions and conditions of the published tender.

[39] In the present case, the RFP required bidders to *certify* that the resources described in their bid had consented to their inclusion in the bid and that they would be available to perform the work.

[40] Moreover, the resources were not to be generically described by bidders. Rather, the bid instructions required bidders to identify the resources as *individuals* and to provide what amounted to a *curriculum vitae* for each resource, including details concerning their education, qualifications, career and professional experience. According to the RFP, this information was to be used to evaluate and score each resource as against mandatory criteria prescribed by the RFP. This scoring was integral to the competition and underpinned the determination of a winning bidder.

[41] If a bidder proposes resources that it is not entitled to provide at first instance, the level playing field that is essential to a fair and transparent tender process becomes uneven. That bidder's submission is essentially being evaluated and scored on a phantom premise—namely the experience and qualifications of a resource that is not actually available to that bidder.

[42] Such a practice could enable a bidder to submit a highly qualified person as a straw candidate for the sole purpose of scoring highly in the competition. Even if the unavailable resource was later permissibly replaced according to the terms of the contract, it could not be assumed that the replacement would have necessarily received the same competitive score as the person being replaced. In other words, had the replacement been proposed as a resource at first instance and been assessed against candidates proposed by other bidders, the outcome of the competition might have been different.

[43] This is all the more so where the bids are otherwise competitive and closely matched. Small differences in the scoring of mandatory criteria could well affect the outcome of the competition. This is underscored where the relevant scoring matrix for the evaluation of proposed resources comprises a major portion of the overall points that are being awarded, as is the case with the RFP at issue.

[44] Accordingly, a tender where one or more bidders compete for points on the basis of resources that are not theirs to provide is inherently unfair to other bidders and tends to undermine the integrity of the procurement process. It also contributes to overall uncertainty in securing value for public dollars spent, as the procuring entity would be left in doubt as to whether it would actually receive the services of the individuals described as resources in the winning bids.

[45] Such a scenario is rooted in the fairness and conduct of the competitive tender process. As such, it is distinguishable from issues of contract administration which may, for example, permit the bidder to provide a substitute for a resource that *later becomes unavailable* or for the contract to be terminated in a situation where the promised resource is not provided or does not perform as

expected. Those circumstances, should they arise, pertain to changes in circumstances post-competition, as opposed to facts which subsist at the outset of, and during, the competition itself.

[46] Cache's complaint included the allegation that at least one bidder (Systematix) certified the availability of resource "A", notwithstanding a written statement from "A", later obtained by Cache, asserting that "A" had not given permission for his/her name to be included as a prospective resource.

[47] At the time of PWGSC's motion, the GIR had not yet been filed. The Tribunal's record included only a brief email from PWGSC stating that its inquiries of Systematix had yielded information that Systematix was satisfied that it had obtained "A"'s consent to put him/her forward as a resource.<sup>28</sup>

[48] The Tribunal was therefore faced with two conflicting allegations, both categorical. Cache submitted a signed statement from "A", whereas PWGSC advised that it had received documentation from the bidder corroborating "A"'s consent, but did not provide the Tribunal with any supporting evidence.

[49] For the purposes of a motion to summarily dismiss the complaint, the issue is whether Cache's allegations define an arguable case that the procurement process may have been conducted unfairly. If Cache's allegations that "A" did not consent to being proposed as a resource are assumed to be true, and noting PWGSC's denial, this is sufficient to define an arguable case, for the reasons given above.

[50] This is all the more so where the evidence underpinning PWGSC's refutation was not on the record. The Tribunal was only provided with a hearsay statement that the bidder had provided documentation indicative of "A"'s consent. Without the additional disclosure that would be provided by a GIR, the Tribunal was thus unable to conclude that it was plain and obvious that Cache's complaint was either futile or beyond the scope of the Tribunal's jurisdiction. Such a conclusion would be premature in the absence of a GIR. Accordingly, the second ground of PWGSC's motion was dismissed.

**Third ground: The complaint does not provide PWGSC with sufficient information to understand the case that it must meet**

[51] Finally, PWGSC asserts that Cache's complaint does not sufficiently inform PWGSC of the case that it must meet.

[52] The Tribunal is not persuaded by PWGSC's arguments. Having made extensive and sophisticated submissions that Cache's complaint falls outside the Tribunal's jurisdiction, indicating that it clearly understood the nature of Cache's allegation, PWGSC cannot have it both ways by now asserting that the nature of Cache's complaint is opaque. The record shows that Cache, from the outset, contended that at least one other bidder had certified the availability of bid resources that were not, in fact, available to them. In support of that allegation, Cache submitted a written statement signed by "A" which placed the reliability of any bidder certification concerning "A" squarely in issue.

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<sup>28</sup> Exhibit PR-2020-088-13 at 11.

[53] A complaint should be given a purposive and fair reading. The Tribunal finds that the crux of Cache's complaint is directed to the allegation that one or more bidders were providing bid certifications with respect to the consent and availability of bidders that were unreliable. This ground of complaint was communicated by the content under the headings "Content or nature of objection" and "Relief requested from contracting authority" as found in Cache's complaint as filed on February 10, 2021,<sup>29</sup> and was sufficient to inform PWGSC of the case to be met.

## Conclusion

[54] Accordingly, the Tribunal concluded that it would be premature to dismiss Cache's complaint before viewing the evidence and content of the GIR.

[55] The Tribunal considered arguments made by PwC that Cache's complaint should be dismissed to the extent that it touched on the award of a contract to PwC. Cache's complaint did not specifically allege that PwC had made unreliable certifications with respect to the availability of the resources proposed in its bids.

[56] However, as discussed above, the allegations in Cache's complaint define a challenge to the overall fairness of the bid evaluation process, namely that the bid evaluators were unknowingly allocating points to bid resources who had not actually agreed to be available to perform the work. If the bid evaluation process had indeed been compromised as alleged, the Tribunal was not in a position to determine, on the basis of an incomplete record at an interlocutory stage, the extent to which the scoring of PwC's bid and its subsequent ranking vis-à-vis other bidders, might or might not have been affected by a potentially unreliable or tainted evaluation process.

[57] Having regard to the foregoing, PWGSC's motion was therefore dismissed in its entirety. A schedule was set for next steps within the proceeding. The Tribunal also extended the deadline for the determination of Cache's complaint to 135 days, pursuant to paragraph 12(c) of the *Regulations*.<sup>30</sup>

## FILING OF THE GIR

[58] The GIR was filed on May 14, 2021, and was subsequently revised on May 21 and May 25, 2021.<sup>31</sup> PWGSC disputes the designation of confidentiality as applied to at some of the material filed by Cache. These documents were subsequently filed by Cache on the public record as requested by the Tribunal.<sup>32</sup>

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<sup>29</sup> The Tribunal notes that some text may not have been apparent on the original complaint form. However, the Tribunal was able to see all the text on the complaint form at the time it rendered its decision to accept the complaint for inquiry. The Tribunal notes that Appendix A of PWGSC's motion (Exhibit PR-2020-088-13 at 9) includes the text that was properly under the heading "Detailed Statement of Facts and Arguments" as it was contained in the original complaint. Cache subsequently filed a copy of the plain text from its complaint form on March 4, 2021. Exhibit PR-2020-088-01 at 6; Exhibit PR-2020-088-11A at 4.

<sup>30</sup> Exhibit PR-2020-088-31.

<sup>31</sup> The Tribunal permitted PWGSC to file a revised GIR on May 18, 2021, after it was discovered that documents that were requested to be removed from the record by Cache remained on the record at the time PWGSC filed its original GIR on May 14, 2021. The original GIR was subsequently removed from the record as requested by PWGSC. Exhibit PR-2020-088-035; Exhibit PR-2020-088-034; Exhibit PR-2020-088-19.

<sup>32</sup> Exhibit PR-2020-088-01A (protected) at 440-448; Exhibit PR-2020-088-41A at 5-14.

[59] In addition to PWGSC's written submissions, the GIR included the following:

- (a) copies of email correspondence as between PWGSC and Cache from February 1 to 17, 2021;<sup>33</sup>
- (b) copies of email correspondence as between PWGSC and Systematix from February 12 to 16, 2021;<sup>34</sup>
- (c) copies of correspondence sent by Systematix to "A" on February 14, 2021, seeking clarification and confirmation that "A" had previously consented to be a bid resource for Systematix;<sup>35</sup>
- (d) an email sent by "A" directly to PWGSC on February 15, 2021;<sup>36</sup>
- (e) an affidavit of Silvana Bittar Mansour, Supply Team Leader with the Professional Services Procurement Directorate of PWGSC;<sup>37</sup> and
- (f) a copy of Systematix's technical bid and certifications, submitted to PWGSC in response to the RFP.<sup>38</sup>

[60] Cache, Systematix and PwC filed replies to the GIR. Systematix provided affidavits from two individuals, Carolyn Mitchell<sup>39</sup> and Rhonda Evraire,<sup>40</sup> who were involved in dealing with PWGSC and with "A" in the context of the RFP.

[61] In her affidavit, Ms. Mansour states that she had telephoned "A" on February 11, 2021, to inquire about the attestation that "A" had provided to Cache on February 9, 2021. According to Ms. Mansour, "A" advised that the draft attestation had been prepared by Cache who had asked him/her to sign it. "A" also informed Ms. Mansour that he/she was currently doing work for Cache on behalf of the Treasury Board Secretariat.<sup>41</sup>

[62] The GIR reveals that Ms. Mansour then contacted Systematix on February 12, 2021, to advise that PWGSC had learned that Systematix did not have the written permission of "A" to propose him/her and to provide his/her resume with respect to submitting a bid in response to the RFP. PWGSC referenced relevant portions of the RFP and asked Systematix to provide "a copy of the signed permission from [A]".<sup>42</sup>

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<sup>33</sup> Exhibit PR-2020-088-37 at 27-38; Exhibit PR-2020-088-37B (protected) at 4-14.

<sup>34</sup> Exhibit PR-2020-088-37 at 40-48.

<sup>35</sup> *Ibid.* at 49-51.

<sup>36</sup> *Ibid.* at 52-56.

<sup>37</sup> *Ibid.* at 58-62.

<sup>38</sup> Exhibit PR-2020-088-37B (protected) at 39-369.

<sup>39</sup> Exhibit PR-2020-088-40 at 8-18; Exhibit PR-2020-088-40A (protected) at 8-18.

<sup>40</sup> Exhibit PR-2020-088-40 at 19-20; Exhibit PR-2020-088-04A (protected) at 8-18.

<sup>41</sup> Exhibit PR-2020-088-37 at 60.

<sup>42</sup> Part 5 of the RFP – Certifications; Article 12-Contract Terms and Conditions, see Exhibit PR-2020-088-37 at 47-48.

[63] Systematix replied the same day<sup>43</sup> by confirming that they were in possession of correspondence showing that they had “A”’s permission to submit him/her as a bid resource and that Systematix had “reached out” to “A” in order to obtain the information requested by PWGSC.

[64] Shortly thereafter,<sup>44</sup> Systematix advised Ms. Mansour of a “long discussion” by telephone that had just been held between Systematix and “A”.<sup>45</sup> Included within that email were copies of screenshots reflecting a brief exchange of text messages on August 28, 2020, as between Systematix and “A”. This exchange culminated in the text message “ok” that was sent by “A” which Systematix asserts constituted “A”’s permission to propose him/her as a bid resource with respect to the RFP. Systematix also requested a same day opportunity to speak with Ms. Mansour by telephone and further advised that “A” could be available to discuss further with PWGSC.<sup>46</sup>

[65] It appears that representatives of Systematix and Ms. Mansour spoke by telephone during the afternoon of February 12, 2021. According to Ms. Mansour, Systematix reported to her that “A” had admitted to providing consent by way of a text message on August 28, 2020, felt embarrassed by the memory lapse and had no ill intent.<sup>47</sup>

[66] On February 13 and 14, 2021,<sup>48</sup> Systematix sent an email to “A” referencing his/her purported agreement to be proposed by Systematix as a bid resource. It was suggested that “A” may have forgotten this commitment due to the passage of time. Screenshots of the text messages exchanged between “A” and Systematix were enclosed, presumably to refresh “A”’s recollection. Systematix asked “A” to provide the written confirmation that had been requested by Ms. Mansour two days previously. PWGSC was copied on this email.<sup>49</sup>

[67] It appears that “A” did not respond to the email sent by Systematix. Instead, on the following day, i.e. February 15, 2021, “A” wrote directly to Ms. Mansour and categorically contradicted Systematix’s version of events, stating the following:

. . . my OK by text was NOT an ok to be bid on the RFP without my full legal agreement. This OK should have led to an agreement on the rate, review of my resume, the grid that would be submitted and signed contract [*sic*] to give my authorisation to be bid on the RFP at the rate that I usually ask. None of this was done and never in my consultant career have I worked this way. In fact, I did not even know that Systematix bided [*sic*] on the PI/PO position.<sup>50</sup>

[68] “A” further asserted that his/her services had been bid on the RFP at lower than his/her usual hourly rate and that he/she would not have agreed to work at that rate, if Systematix had actually proposed it to him/her. To obtain his/her going rate, “A” claims that he/she was told by Systematix, in vague terms, that he/she could possibly fill another position within the scope of the contract.

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<sup>43</sup> See Exhibit PR-2020-088-37 at 47.

<sup>44</sup> Also on February 12, 2021.

<sup>45</sup> Exhibit PR-2020-088-37 at 43.

<sup>46</sup> *Ibid.*

<sup>47</sup> Exhibit PR-2020-088-37 at 61

<sup>48</sup> Exhibit PR-2020-088-40 at 10.

<sup>49</sup> Exhibit PR-2020-088-37 at 50-51. See also Exhibit PR-2020-088-40 at 10.

<sup>50</sup> Exhibit PR-2020-088-37 at 53.

However, “A” viewed this possibility as being highly uncertain, at least in part, because the option was apparently contingent on securing approval from PWGSC.<sup>51</sup>

[69] In “A”’s view, there is a practice of qualified consultants being bid at lowball rates in order to maximize the ability of a bidder to submit a low bid. If the bidder wins the contract, “A” contends that the consultant is then told that the bidder cannot pay the consultant’s going rate, which means that the consultant ends up either working at a discounted rate or declining the job. In the latter scenario, “A” asserts that other resources are substituted and PWGSC does not obtain the services of the experienced consultants that were originally bid and whose qualifications and expertise were evaluated as against the prescribed criteria of the RFP.<sup>52</sup>

[70] Furthermore, “A” claimed PwC had secured permission to bid him/her on the RFP but was now declining to pay “A” at the agreed-upon hourly rate.<sup>53</sup>

[71] “A”’s email to PWGSC concluded on the following note:

I hope this email will change the way the bidding firms plays with consultants (*sic*), this has to change. Feel free to call me if you want more detail.<sup>54</sup>

[72] It does not appear as if PWGSC initiated any further follow-up discussion with “A”.

[73] In her affidavit, Ms. Mitchell states that she had a further telephone conversation with “A” on February 15, 2021. She states that “A” informed her that he/she had received legal advice from a family friend that his text message of “ok” did not constitute consent to bid.<sup>55</sup>

[74] There was further email communication between PWGSC and Systematix on February 16, 2021, which referenced a telephone conversation that was scheduled for that afternoon. In its email to Ms. Mansour in advance of this teleconference, Systematix expressed concern that “A” was saying that his/her text message of “ok” was not a consent to be proposed as a resource in relation to the RFP. It now claimed that it had a “history” of working with “A” using limited and casual communication via text message.<sup>56</sup>

[75] In support of this allegation, Systematix provided copies of additional screenshots which were said to reflect “A”’s agreement to be included as a resource for a bid submitted by Systematix for a tender issued on behalf of the Department of Foreign Affairs, Trade and Development during July 2020, approximately one month before the RFP was published. Systematix also claimed that the use of text messages “to gain commitments from consultants on bids is a common practice of professional service firms to gain quick agreement.”<sup>57</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Exhibit PR-2020-088-40 at 10.

<sup>56</sup> Exhibit PR-2020-088-37 at 40-42.

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

[76] The protestations of “A” to the contrary, PWGSC nonetheless concluded that “A”’s text of “ok” on August 28, 2020, was a “reasonable basis” for Systematic to infer that it had obtained “A”’s consent.<sup>58</sup> PWGSC then sent Cache a brief email on February 17, 2021, stating the following:

The Bidder provided written documentation indicating that it had the right to propose the resource.<sup>59</sup>

[77] In reply to a follow-up email sent by Ms. Mitchell on February 25, 2021, Ms. Mansour advised that PWGSC took no issue with the certifications provided by Systematix and was “satisfied” that the certification had been provided with the good faith belief that “A” had provided consent to be proposed as a resource.<sup>60</sup>

[78] Other than describe the chronological sequence of events summarized above, Ms. Mansour’s affidavit can be summarized as follows:

(a) PWGSC does not verify each certification provided by a bidder, as a matter of course. Such an exercise, if undertaken, would be unduly burdensome and would likely overwhelm PWGSC’s resources. Instead, it is PWGSC’s expectation that bidders will provide “accurate and honest” certifications.

(b) PWGSC reserves the right, in its discretion, to verify bidder certifications at any time. Typically, PWGSC will only take this step where there is reasonable cause to suspect an issue with a particular certification or in unusual circumstances. Otherwise, the usual practice is for PWGSC to rely upon the certifications submitted by bidders.

(c) PWGSC had no grounds to suspect the accuracy of the certifications before the tender and the evaluation of bids had been completed.

(d) PWGSC had not, as of the date of Ms. Mansour’s affidavit, issued any task authorizations pursuant to the contracts awarded to either Systematix or PwC.<sup>61</sup>

[79] The affidavits of Ms. Mitchell and Ms. Evraire discuss the above sequence of events from the standpoint of Systematix.

## **POSITIONS OF THE PARTIES**

[80] The main point emphasized by Cache is that the terms of the RFP permit PWGSC to verify whether consultants have provided permission to be proposed as a resource and that such confirmation must be provided by bidders. In view of what it believed to be irregularities with the bidding of resources without consent, notably in relation to “A”, Cache argued that PWGSC had awarded contracts to bidders who had failed to comply with the RFP’s provisions concerning bidder certification.

[81] For its part, PWGSC argued that it had conducted a reasonable evaluation of the bids and that it was entitled to rely upon the certifications as provided by the bidders. Moreover, PWGSC

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<sup>58</sup> Exhibit PR-2020-088-37 at 61.

<sup>59</sup> Exhibit PR-2020-088-37 at 28.

<sup>60</sup> Exhibit PR-2020-088-40 at 17.

<sup>61</sup> Exhibit PR-2020-088-37 at 57-62.



contended that the essence of Cache's complaint pertains to contract administration and is thus beyond the jurisdiction of the Tribunal to adjudicate.

[82] PWGSC also took issue with additional grounds of complaint raised late by Cache, together with what PWGSC submitted were retroactive and inappropriate confidentiality designations made by Cache.

[83] Both Systematix and PwC agreed with, and supported, PWGSC's arguments, particularly with respect to reliance on the certifications as supplied by bidders and the issue of jurisdiction.

## ANALYSIS

[84] In *Canada (Attorney General) v. Almon Equipment Limited*,<sup>62</sup> the Federal Court of Appeal summarized the framework of public procurement, and the regulatory oversight provided by the Tribunal, as follows:

[22] The purposes of this regulatory regime can be deduced from the substantive content of the provisions set out above. Under this regime, in a federal government procurement, the government must announce its requirements, criteria and evaluation methods in its request for proposals and associated documents (subject to possible appropriate amendment later) and must adhere to those requirements, criteria and evaluation methods when it receives and evaluates proposals submitted to it. Overseeing this is the Tribunal, with its statutory jurisdiction: if the Tribunal conducts an inquiry, it must examine the government's adherence to the requirements, criteria and evaluation methods the government announced and the overall "integrity and efficiency of the competitive procurement system." As section 11 of the Regulations, above, makes clear, this all takes place under the umbrella of the Agreement on Internal Trade which, in article 100, aims at "establish[ing] an open, efficient and stable domestic market."

[23] The purposes of this regulatory regime, deduced from the above provisions, are as follows:

(1) *Fairness to competitors in the procurement system.* A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.

(2) *Ensuring competition among bidders.* When bidders are placed on a level playing field and compete, it is more likely that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. Competition also gives taxpayers value for the taxes they pay.

(3) *Efficiency.* This speaks directly to the government getting good quality goods and services at minimum expense. This also speaks to the need for a procurement system to run in a timely, practical manner without causing unnecessary expense.

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<sup>62</sup> *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 [*Almon*] at para. 23.

(4) *Integrity*. A procurement process with integrity increases participants' confidence in the procurement system and enhance their participation in it. This increases the probability that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. A procurement process with integrity also gives taxpayers value for the taxes they pay.

These four purposes, and the overarching concept of value for taxpayers, are essential aspects of good governance. Important as they are, they must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies.

[85] These principles align with the requirements of the trade agreements mandating that a procurement process be fair, transparent and impartial.<sup>63</sup>

[86] The provisions of the RFP that are relevant to this dispute are reproduced as follows:

## **PART 5 – CERTIFICATIONS AND ADDITIONAL INFORMATION**

Bidders must provide the required certifications and additional information to be awarded a contract.

The certifications provided by Bidders to Canada are subject to verification by Canada at all times. Unless specified otherwise, Canada will declare a bid non-responsive, or will declare a contractor in default if any certification made by the Bidder is found to be untrue, whether made knowingly or unknowingly, during the bid evaluation period or during the contract period.

The Contracting Authority will have the right to ask for additional information to verify Bidder's certifications. Failure to comply and to cooperate with any request or requirement imposed by the Contracting Authority will render the bid non-responsive or constitute a default under the Contract.

...

### **(b) Professional Services Resources**

...

(iii) If a Bidder has proposed any individual who is not an employee of *the Bidder*, by *submitting a bid*, the Bidder certifies that it has the permission from that individual to propose his/her services in relation to the Work to be performed and to submit his/her résumé to Canada. The Bidder must, upon request from the Contracting Authority, provide a written confirmation, signed by the individual, of the permission given to the Bidder and of his/her availability. Failure to comply with the request may result in the bid being declared non-responsive.

[Emphasis added]

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<sup>63</sup> See for example Canadian Free Trade Agreement, Articles 500, 502, 503.

[87] The Tribunal has previously held that a procuring entity has the discretion to rely upon certifications provided by bidders.<sup>64</sup> Such reliance is *prima facie* and necessarily rests on the presumption that the content of the certification is true. Indeed, Ms. Mansour states that PWGSC proceeds on the basis that bidders will provide certifications that are “accurate and honest.”<sup>65</sup>

[88] Reliance on the certification underpins the evaluation aspect of the tender process, which cannot be a sham competition if the objectives defined in *Almon* are to be met. The bidders disclose the resources that they will supply, if awarded the contract. The bids are then neutrally evaluated and scored in accordance with the mandatory technical criteria prescribed by the RFP. However, the presumption of accuracy which attaches to a certification is rebuttable. If the certification is shown to be inaccurate or untrue from the outset, then the presumption is rebutted. In that scenario, bidders might not have competed on a level playing field as one bidder was not competing on the basis of the resources that are actually being offered or proposed by them, but rather on the basis of resources that are speculative or fictitious.

[89] An affirmation/certification begins speaking as of the date it is made. If a bidder truthfully certifies the availability of a particular resource when submitting a bid and that resource then declines to show up for work, post-contract award, the certification does not become retroactively untrue. There has been a change in circumstances, post-competition. This is distinguishable from a situation where the certification is untrue or unsound from the outset, whether innocently or not. In that scenario, the fairness of the competition is placed in doubt. The bidder who has made the faulty certification and wins the competition may well benefit from what amounts to a high-scoring straw candidate obtaining scores that might not have been available to an alternative candidate. This is inherently unfair to other bidders.

[90] For practical purposes, this would also be conducive to the potential inefficient and wasteful use of public funds. It forces Canada to elect between either accepting a substitute resource (who may be a “downgrade” in terms of education/skills/experience relative to the candidate who was scored during the competition) or cancel the contract and reboot the tender process.

[91] PWGSC argues that the bid evaluation was conducted fairly and that there is no basis for the Tribunal to intervene.

[92] The GIR did not provide the bid evaluation sheets or copies of the bids that were received in response to the RFP. Notwithstanding, that is not the issue here. It is well established that the Tribunal will defer to the evaluations carried so long as the evaluators have reasonably applied themselves to the task at hand and their evaluation is supported by a tenable explanation, even if the Tribunal does not find that explanation to be cogent or particularly compelling.<sup>66</sup>

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<sup>64</sup> See for instance, *Access Corporate Technologies Inc.* (14 November 2013), PR-2013-012 (CITT) at para. 39; *Central Automotive Inspections Records & Standards Services (CAIRSS) Corp.* (31 October 2012), PR-2012-025 (CITT) at paras. 24-25. See also *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT) at paras. 22-23; *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at para. 11; *J.A. Larue Inc.* (7 August 2020), PR-2020-004 at para. 46; *Atlantic Catch Data Ltd.* (29 March 2018), PR-2017-040 [*Atlantic Catch*] at para. 44.

<sup>65</sup> Exhibit PR-2020-088-37 at 58.

<sup>66</sup> For example, see *Joint Venture of BMT Fleet Technology Limited and Notra Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25. See also *C3 Polymeric Limited v. National Gallery of Canada* (14 February 2013), PR-2012-020 (CITT) at para. 38.

[93] In this case, it is not a question of whether the evaluators applied relevant evaluation criteria to the bid content, but rather whether the bid content *per se* was indeed relevant to the evaluation, unbeknownst to the evaluators. If the evaluators are basing their evaluation on bid resources that a bidder cannot supply, the playing field becomes uneven as between that bidder and another bidder whose bid is evaluated having regard to its actual resources, especially where the qualifications and experience of the unavailable resource proposed by the first bidder will attract a higher competitive score.

[94] The following was observed in the email sent by “A” on February 15, 2021, to Ms. Mansour:

The [Government of Canada is] not getting the consultants that were [bid] and reviewed (because of the rate issue), they are given whom ever the firm can find at the price [bid] and they modify their resumes to get them in. I have been on a lot of [Government of Canada] projects and this happens all the time, projects get affected by getting people that are not suitable for the role because the original [bid] consultant is not the one taking the role. In that situation, the firm claims its because they are not available but the reality is they are no longer on the same page with the rates after the firm wins the [RFP].<sup>67</sup>

[95] The Tribunal finds that PWGSC acted reasonably in relying upon the certifications provided by the bidders, but only up until the point where the accuracy of one or more certifications was challenged and placed in doubt. At that juncture, it became incumbent upon PWGSC to conduct a thorough and neutral evaluation to assess the scope of any inaccuracies in certification and the extent to which the inaccurate certifications may have compromised the overall fairness of the competition and PWGSC’s consequent ability to fairly evaluate the bids that it had received. The record does not demonstrate that PWGSC turned its mind to that particular issue.

[96] Instead, PWGSC concluded that Systematix had a reasonable basis, from the text messages exchanged on August 28, 2020, to *infer* that it had obtained “A”’s permission to bid him/her as a resource and to submit his/her resume as part of a bid in response to the RFP.

[97] However, the Tribunal finds that the terms of the RFP mandated a more stringent standard than the mere drawing of inferences, even if done mistakenly or in good faith. Bidders were not merely required to state or represent the availability of a proposed resource, but to provide a *certification* that the resource had granted permission for his/her labour, skills and resume to be proposed and that he/she would be available to perform the work if the bidder were to be awarded a contract.

[98] Inherent in the ordinary, dictionary meaning of the word “certify” is some degree of care and due diligence to ascertain the truth and accuracy of the facts being attested to.

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<sup>67</sup> Exhibit PR-2020-088-37 at 53.

[99] Courts and tribunals may take judicial notice of the common dictionary meaning of words.<sup>68</sup> The Merriam-Webster Dictionary defines “certify”, *inter alia*, as follows:

l : to attest authoritatively: such as

a : confirm

b : to present in formal communication

c : to attest as being true or as represented or as meeting a standard . . .<sup>69</sup>

[100] The Cambridge Dictionary defines “certify” as follows:

to say in a formal or official way, usually in writing, that something is true or correct.<sup>70</sup>

[101] The MacMillan Dictionary provides a similar definition of “certify” as follows:

to state officially that something is true, accurate, or of a satisfactory standard;

to give someone an official document stating that they have passed an examination or have achieved the qualifications necessary to work in a particular profession<sup>71</sup>

[102] These meanings are also consistent with numerous provisions in the *Canada Evidence Act*<sup>72</sup> where certifications and certificates are deemed to have official nature and to constitute legal proof of the facts stated therein.

[103] In the circumstances of this case, the Tribunal finds that the text messages, relied upon by Systematix and PWGSC as confirming that “A” had indeed provided permission to be proposed as a resource, fall well short of what is required to support a certification, having regard to meaning of that terminology.

[104] The RFP does not require a bidder to certify *their own belief* concerning the permission and availability of the resource being bid. Rather, it requires the bidder to certify that the requisite permissions have *actually been granted* by the resource and that he/she will *actually be available* to perform the work.

[105] The Tribunal finds the text messages to be vague and somewhat cryptic. Suffice to say that the “ok” message could be interpreted as having several meanings in addition to the one advanced by

<sup>68</sup> See *R. v. Krymowski*, [2005] 1 S.C.R. 101 at para. 22: “A court may accept without the requirement of proof facts that are either “(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”: *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32, at para. 48. The dictionary meaning of words may fall within the latter category: see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at § 9.13 and § 19.22.” Also see *Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 at para. 53; *Rona Inc. v. President of the Canada Border Services Agency* (24 June 2020), AP-2018-010 (CITT) at paras. 164-166.

<sup>69</sup> Online: <<https://www.merriam-webster.com/dictionary/certify>>.

<sup>70</sup> Online: <<https://dictionary.cambridge.org/dictionary/english/certify>>.

<sup>71</sup> Online: <<https://www.macmillandictionary.com/dictionary/british/certify>>.

<sup>72</sup> R.S.C., 1985, c. C-5.

Systematix and PWGSC, ranging from (but not limited to): a means of concluding the conversation; an agreement to consider the proposal; or a willingness to discuss further.

[106] Certainly, the text messages provide no information concerning the scope of work, timing or remuneration involved, all of which would be presumably relevant for a consultant to know before agreeing to an assignment, even tentatively or by way of contingency. While the Tribunal recognizes that text messaging may be a convenient method of quick communication, the issue is whether Systematix had secured “A”’s agreement to be proposed and available for a particular job, and not whether that agreement was presumed.

[107] There must be a meeting of the minds before two parties can be said to have arrived at an agreement. On the evidence in this case, that meeting of the minds has not been established. There is no persuasive evidence that “A” was provided with sufficient information concerning the RFP to be informed as to what he/she was being asked to consent to or that the consent being requested was coextensive with the requirements of section 5.1(b) of the RFP.

[108] Even if the relevant details of the proposed job assignment could not be conveniently explored by way of a text message, it would be consistent with a minimum standard of care inherent with a certification to follow up with a clear confirmation by way of email, if only briefly, to either confirm the understanding or to inform “A” once the bid had been submitted. This was not done and there is simply no persuasive evidence here that reasonably supports the certification that Systematix provided to PWGSC. To the contrary, “A” has explicitly denied twice, in writing, that he agreed to be proposed as a resource on the RFP.

[109] Systematix seeks to explain the ambiguities by asserting that “A” has a preference for very brief communication via text message. As such, it argues that the Tribunal should infer “A”’s consent with respect to *this* RFP based on “A”’s supposed agreement to be bid on an unrelated RFP which was secured by way of text messages exchanged during July 2020.

[110] This amounts to an attempt to corroborate Systematix’s grounds for belief that “A” had provided consent to be bid on a different RFP, based on what transpired in relation to a previous, unrelated RFP. First, the Tribunal has no evidence from “A” concerning this characterization of the text messages exchanged in July 2020. Second, even if “A” had so agreed to be proposed as a resource by Systematix on an unrelated tender, that consent is not perpetual or irrevocable and is not automatically transferable to an unrelated matter, i.e. a completely different and separate RFP. It also cannot overcome “A”’s clear and categorical denial that he/she had not provided permission for Systematix to bid him/her as a resource for this particular RFP. Moreover, “A”’s email to PWGSC explicitly stated a preference for clear, unambiguous communications.<sup>73</sup>

[111] To the extent that there is contradiction in the version of the events as described, the Tribunal prefers the evidence of “A”, tendered by way of written statement, and assigns it a higher degree of weight and credibility.

[112] Systematix points out that “A”’s initial statement was prepared by Cache for signature by “A”, which implies that the Tribunal should afford it less weight because of an ongoing business relationship as between Cache and “A”. The Tribunal dismisses this argument. The evidence shows

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<sup>73</sup> Exhibit PR-2020-088-37 at 53.

that “A” has business relationships with each of Cache<sup>74</sup>, Systematix<sup>75</sup> and PwC.<sup>76</sup> The Tribunal finds no basis to conclude that “A” is unusually dependent on Cache and that he/she could not have declined Cache’s request that the statement be signed, just as “A” declined to provide a written statement to PWGSC, as requested by Systematix.

[113] The Tribunal now turns to the argument that Cache’s complaint is premised solely on a matter of contract administration and is thus beyond the scope of the Tribunal’s jurisdiction.

[114] The Tribunal has previously found that PWGSC may rely, at the time of bid evaluation, upon certifications provided by bidders. The most relevant case to consider is *Softsim Technologies Inc. v. Department of National Defence*.<sup>77</sup> In *Softsim*, the Tribunal stated the following:

[36] It is also well established that, where a solicitation requires bidders to certify certain information in their proposal for accuracy and completeness, the procuring entity is entitled to rely on those certifications at the time of bid evaluation.<sup>78</sup>

[115] However, the complaint in *Softsim* was underpinned by *unsubstantiated* allegations concerning the supposed recruiting practices of the winning bidder (Maverin) who had advised the government institution (DND) following the competition that it could no longer provide the resources identified in its bid.

[116] Unlike the present case, there was no evidence before the Tribunal in *Softsim* that the resources certified by Maverin in its bid had not, in fact, granted permission to be bid or they had *not* agreed to make themselves available for work.

[117] The Tribunal indicated its concern about the timing of Maverin’s advice that its resources (as bid) were no longer available. However, *in the absence of any evidence* that the certification was untrue at the time of bidding, the Tribunal found that the procuring entity was within its rights to rely upon the certifications as follows:

[39] *There is no evidence that DND knew, prior to contract award, that the resources named by Maverin were unavailable or otherwise did not give their permission to submit their candidacy.* It is clear from the evidence adduced by the parties that the contract was awarded on August 15, 2018, and that Maverin only advised DND that it could no longer provide the named resources on August 17, 2018. SoftSim’s purported discussions with Maverin, as well as Maverin’s online job postings, were also all subsequent to the date of contract award.

[40] *Although the close proximity between the date of contract award and the date on which Maverin advised DND of the unavailability of its resources raises questions, there is no reason to believe, in the absence of evidence to the contrary, that DND colluded with*

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<sup>74</sup> *Ibid.* at 60.

<sup>75</sup> *Ibid.* at 40; Exhibit PR-2020-088-40 at 8.

<sup>76</sup> Exhibit PR-2020-088-37 at 53.

<sup>77</sup> *Softsim Technologies Inc. v. Department of National Defence* (19 December 2018), PR-2018-032 (CITT) [*Softsim*].

<sup>78</sup> *Softsim* at para. 36.

Maverin. DND was well within its rights to rely on Maverin's certification at the time of bid closing and to award the contract accordingly.<sup>79</sup>

[Emphasis added, footnotes omitted]

[118] Consequently, the Tribunal, in *Softsim*, was left to conclude that the unavailability of Maverin's bid resources arose subsequently and was thus an issue of contract administration falling outside the Tribunal's jurisdiction.

[119] The present case is thus distinguishable on its facts. In *Softsim*, the challenge to the certification was essentially speculative. Unlike that scenario, there is evidence here, in the form of two written statements directly from a bid resource ("A"), which categorically deny having granted consent to be included as a bid resource. The evidence to the contrary is largely premised on hearsay.<sup>80</sup> It appears as if PWGSC did not take the step of speaking with "A" directly, although he/she was apparently willing to have that confirmation.

[120] In such circumstances, it is not dispositive that the problems with Systematix's certifications were raised *after* the competition had been concluded and contracts had been awarded.

[121] Implicit in "contract administration" is the taking of steps taken to actually perform work in accordance with the terms of the contract. Ms. Mansour's affidavit confirms that no task authorizations have yet been issued with respect to the contracts awarded.<sup>81</sup>

[122] In *Softsim*, the Tribunal also quoted the following from its decision in *Atlantic Catch*:<sup>82</sup>

... the Tribunal is satisfied that it was not unreasonable for PWGSC to accept AECOM's bid as meeting the certification requirement regarding the availability of resources, as per section 5.2.3.1 of the RFP, at the time of bid closing. Although changes were subsequently made to AECOM's working team personnel, the Tribunal finds that those changes occurred after the award of contract to AECOM. As such, there is no indication that PWGSC acted unreasonably in accepting AECOM's bid certification with respect to the availability of its proposed resources at bid closing.

[123] If the successful bidder then delivers services of resources that were not proposed in its bid, PWGSC has the option of seeking a remedy in contract, as a matter of contract administration.

[124] However, there is a distinction between a change of circumstances that arises after the competition is over (as occurred in *Atlantic Catch*) and a factor that has been present, albeit unknown, throughout the tender process, as is the case here.

[125] An inaccurate certification is essentially a latent defect unknown to PWGSC which may, depending on the circumstances, operate to taint the fairness of the entire tender process. While the tender is ongoing, the existence of bids, their content and the identity of the bidders is secret and is

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<sup>79</sup> *Softsim* at paras. 39-40.

<sup>80</sup> Which are statements by Systematix witnesses concerning what "A" is alleged to have said to them over the phone.

<sup>81</sup> Exhibit PR-2020-088-37 at 61.

<sup>82</sup> *Softsim* at para. 37 citing *Atlantic Catch* at para. 44.



known only to PWGSC. The Tribunal recognizes that, for practical purposes, PWGSC accepts the certifications at face value during the competition.

[126] Accordingly, if an unsuccessful bidder wishes to challenge the fairness of the tender process arising from an inaccurate certification provided by another bidder, it can only do so after the competition is over, as occurred in this case. Otherwise, inaccurate certifications could, for practical purposes, never be challenged or be subjected to scrutiny and would provide no opportunity for recourse for bidders who may have been prejudiced by a tainted competition. This would be problematic in terms of the government's obligations under the trade agreements.<sup>83</sup>

[127] As such, the contract administration cases relied upon by PWGSC are distinguishable. Post-tender circumstances which lead to supply of goods and services that do not meet expectations or contract requirements does not necessarily lead to the retroactive finding that the procurement process was somehow flawed or unfair. However, an inaccurate certification that is a latent defect and present during the competition may compromise its fairness vis-à-vis other bidders. Its nature and relevance to the procurement process does not change simply because it can only come to light after the competition has concluded.

## **OTHER ISSUES**

[128] Cache sought to raise some additional allegations after the filing of its initial complaint and subsequently withdrew them.

[129] PWGSC made objections to Cache's designation of certain aspects of the record as being confidential. The Tribunal largely agrees with PWGSC's written submissions on this point but has acceded to Cache's request to refer to "A" in these reasons using only that pseudonym.

[130] In view of the foregoing, the Tribunal finds that Cache's complaint, is valid, in part.

## **REMEDY**

[131] The Tribunal finds that the fair evaluation of bids in the competition was compromised by the inaccurate certification provided by Systematix, which would have been unknown to PWGSC's evaluators. However, there is insufficient evidence to enable the Tribunal to assess the extent of the prejudice with respect to other bidders in the competition and whether the final ranking of bids would have been affected, and if so, to what extent.

[132] Accordingly, the Tribunal is unable to conclude that Cache would have necessarily succeeded in the competition and thus declines to award financial compensation or bid preparation costs to Cache.

[133] In these circumstances, the Tribunal recommends that the bids be reassessed.

[134] PwC urges the Tribunal to find that the award of a contract in its favour should not be disturbed and that Cache's complaint should be dismissed, to the extent that it touches on PwC's bid.

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<sup>83</sup> For example, Article 503(2) of the Canadian Free Trade Agreement (CFTA) indicates that post-tender actions, such as contract modification or cancellation of the procurement may not be used to circumvent the government's obligations under Chapter 5 of the CFTA. On the same reasoning, an unfair tender process should not escape scrutiny or remedy on an arbitrary rationale.

[135] Cache's complaint was framed in general terms and raised the issue of resources being bid by other bidders without explicit consent from the individual being proposed as a resource. As framed, that would include PwC. The issues were subsequently narrowed to focus on "A" as being a specific example of a resource who had been bid by Systematix without permission having been secured. Cache made no specific allegations as against PwC.

[136] This being said, "A" has alleged that the practice of speculative bidding of resources is widespread. In addition, "A" asserts an issue with PwC and the payment of his hourly rate.<sup>84</sup> This is indicative of a potential issue with the scope of certification provided by PwC in relation to "A"'s availability, especially if any permission given by "A" to PwC was contingent on payment of a particular hourly rate. As such, the Tribunal is unable to conclude that the reassessment of the bids and the curing of procedural unfairness that occurred during the initial tender is unrelated or necessarily irrelevant to PwC's bid. The facts in this case are therefore distinguishable from the *Envoy* case relied upon by PwC<sup>85</sup>.

[137] Accordingly, the Tribunal concludes that PWGSC is best placed to assess the parameters and scope of re-evaluation of bids. In doing so, the Tribunal urges PWGSC to take these reasons into account with a view to ensuring a bid evaluation process that is fair.

[138] The Tribunal notes that the RFP included a Phased Bid Compliance Process provision. As the issues discussed in these reasons pertain only to those bids subjected to evaluation of mandatory technical criteria where the bid resource certifications provided by bidders would have been relied upon in the course of assessment, bids that did not advance to this stage of the evaluation need not be reassessed, at the discretion of PWGSC.

## COSTS

[139] The Tribunal is conferred with a broad statutory discretion concerning the allocation of costs in a procurement dispute.<sup>86</sup>

[140] As a general principle, costs usually follow the event.<sup>87</sup> As Cache has been successful, at least in part, the Tribunal provisionally awards Cache its reasonable costs of this proceeding.

[141] This inquiry raised at least one novel issue, but the legal and factual issues were not especially complex. The complexity of the proceedings was enhanced by the bringing of a preliminary motion to dismiss the inquiry. These factors tend to mitigate in favour of an award of costs fixed at Level 3.

[142] However, the Tribunal must also consider the issues raised, and steps taken, by Cache during the proceeding. They added some complexity and additional work, and were ultimately not conducive to advancing the proceedings. These steps included submission of additional grounds of complaint and excessive designations of confidentiality that were contested by PWGSC and the interveners.

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<sup>84</sup> Exhibit PR-2020-088-37 at 53, 54.

<sup>85</sup> *Canada (Attorney General) v. Envoy Relocation Services*, 2006 CAF 13, 2006 FCA 13 [*Envoy*] at para. 2.

<sup>86</sup> Section 30.16, *CITT Act*; *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 [*Georgian College*] at para. 26.

<sup>87</sup> *Georgian College* at para. 28; *Canada (Attorney General) v. Educom TS Inc.*, 2004 FCA 130 at para. 11.

[143] Taking all of these factors into account, the Tribunal's preliminary determination is that costs of this inquiry fall within Level 2 of the *Procurement Costs Guideline*. As Cache's complaint was directed at the actions of PWGSC, the Tribunal finds that those costs should be payable to Cache by PWGSC.

[144] The interveners, PwC and Systematix, supported arguments of PWGSC that were mostly unsuccessful. As such, the interveners should bear their own costs.

[145] The Tribunal emphasizes that these findings with respect to costs both preliminary and provisional. The parties may make submissions on costs within 15 days of the date of this Statement of Reasons. Upon receipt and consideration of submissions from the parties, the Tribunal will render a final Order with respect to costs.

## DETERMINATION

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

[147] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC re-evaluate the bids submitted in response to Solicitation No. 24062-200609/A that were considered for evaluation during Phase III of the phased bid compliance process, in accordance with the evaluation matrix described in RFP, taking into account the Tribunal's reasons for this decision. At the reasonably exercised discretion of PWGSC, the bid re-evaluation may extend to the re-evaluation of the mandatory criteria prescribed by the RFP that are not scored based on points.

[148] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Cache its reasonable costs incurred in preparing and proceeding with its complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the cost award is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal's Statement of Reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

[149] The interveners, Systematix and PwC, shall each bear their own costs.

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Susan D. Beaubien  
Susan D. Beaubien  
Presiding Member