



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-096

Visiontec (2008) Ltd.

v.

Department of Public Works and
Government Services

*Determination issued
Friday, July 30, 2021*

*Reasons issued
Wednesday, August 18, 2021*

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IN THE MATTER OF a complaint filed by Visiontec (2008) 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

VISIONTEC (2008) LTD.

Complainant

AND

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

**Government
Institution**

DETERMINATION

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

Each party will bear its own costs.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

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

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STATEMENT OF REASONS

OVERVIEW

[1] This complaint was filed by Visiontec (2008) Ltd. (Visiontec), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ concerning a Request for Proposal (Solicitation No. 21120-203664/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of Correctional Service Canada (CSC) for the acquisition of two full body X-ray scanners (the RFP). The X-ray scanners are intended to be used for scanning inmates for contraband, including narcotics and weapons.

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

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

SUMMARY OF THE COMPLAINT

[4] In its complaint, Visiontec made allegations arising from PWGSC's and CSC's conduct towards Visiontec concerning its alleged apparent conflict of interest or unfair advantage with respect to the RFP procurement process. Specifically, Visiontec has alleged that:

- (a) the procurement process was not conducted in a fair, open and transparent manner;
- (b) PWGSC took contradictory positions concerning whether Visiontec could submit a bid in response to the RFP;
- (c) PWGSC denied Visiontec's requests for a meeting and further information concerning PWGSC's claim that Visiontec had an apparent conflict of interest; and
- (d) PWGSC's claim is not legally supported; the alleged conflict of interest was caused by the failure of PWGSC and CSC to take measures to eliminate or mitigate the conflict of interest.

[5] As a remedy, Visiontec requested that a new solicitation be issued or, alternatively, that it receive compensation for damages and losses.

PROCEDURAL BACKGROUND

[6] On December 9, 2020, PWGSC emailed Visiontec notifying it that due to the fact that Visiontec's consultant, "DE", had also worked as a consultant for CSC on the RFP, Canada would

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

² SOR/93-602 [*Regulations*].

not be in a position to accept its bid once the RFP was issued because of the “potential conflict of interest”.³

[7] Visiontec replied on December 17, 2020, expressing its view that there was no conflict of interest or potential conflict of interest. Visiontec requested that PWGSC state “in writing” the basis for its position and also proposed a conference call to discuss the issue.⁴ On January 21, 2021, PWGSC indicated to Visiontec that a meeting would be “premature” as the RFP had not yet been issued. In this letter, PWGSC stated that Visiontec would be in a situation of “conflict of interest or unfair advantage” and that it intended to rely on clause 18 (2012-03-02 – Conflict of interest – unfair advantage) of the 2003 (2020-05-28) Standard Instructions – Goods or Services – Competitive Requirements (Standard Instructions) of PWGSC’s Standard Acquisitions Clauses and Conditions Manual. Pursuant to paragraph 3 of clause 18, Visiontec would have an opportunity to make representations before PWGSC issued a final decision.⁵

[8] On January 29, 2021, Visiontec sent another letter to PWGSC expressing its disagreement with PWGSC’s position. Shortly after, on February 5, 2021, Visiontec sent PWGSC a letter containing over two dozen questions regarding PWGSC’s claim that Visiontec had a conflict of interest.⁶

[9] On February 24, 2021, PWGSC issued the RFP, with a closing date of April 6, 2021. Following several amendments to the RFP, the closing date was extended to May 26, 2021.⁷

[10] Following the issuance of the RFP, on February 26, 2021, Visiontec sent a letter to PWGSC requesting a response to its February 5 letter. PWGSC responded to this letter on March 1, 2021, advising Visiontec that it had already responded to Visiontec’s inquiries in December 2020 and that “[t]he authority for these matters is the [Tribunal]. The [Tribunal] is responsible for safeguarding the integrity of the Government of Canada’s procurement processes.” PWGSC affirmed that it would not be in a position to accept Visiontec’s bid.⁸

[11] On March 5, 2021, Visiontec wrote to PWGSC setting out the grounds of its objections, including that PWGSC’s conclusions are without factual foundation or legal support.⁹ On March 10, 2021, PWGSC wrote to Visiontec reiterating that it “maintains that there would be an appearance of conflict of interest if Visiontec were permitted to submit a bid.”¹⁰

Complaint proceedings

[12] On March 17, 2021, Visiontec filed its complaint with the Tribunal. The complaint was accepted for inquiry on March 24, 2021.

³ Exhibit PR-2020-096-01B at 45.

⁴ *Ibid.* at 47.

⁵ *Ibid.* at 50.

⁶ *Ibid.* at 51-55.

⁷ Exhibit PR-2020-096-08A at 1, 76, 77, 89; Exhibit PR-2020-096-11A at 38-39.

⁸ Exhibit PR-2020-096-01B at 58-60.

⁹ *Ibid.* at 62-64.

¹⁰ *Ibid.* at 66.

[13] In its complaint, Visiontec requested that the Tribunal issue an order requiring PWGSC to postpone the closing date of the RFP and the award of the designated contract until the Tribunal determined the validity of the complaint. On March 25, 2021, the Tribunal issued an order, pursuant to subsection 30.13(3) of the *CITT Act*, to postpone the awarding of any contract in connection with Solicitation No. 21120-203664/A.¹¹ With respect to Visiontec's request for a Tribunal order to postpone the closing date of the RFP, the Tribunal determined that it had no authority to issue such an order under subsection 30.13(3) of the *CITT Act*.

[14] On April 1, 2021, the Tribunal received correspondence from Visiontec requesting that the Tribunal direct PWGSC to clarify certain issues related to the ongoing procurement process, including, among other things, whether PWGSC intended to postpone the awarding of the contract and the closing date of the RFP, and other such questions related to how PWGSC would treat Visiontec's bid during the procurement process.¹² That same day, the Tribunal informed Visiontec that it would not direct PWGSC to clarify the issues stated in its letter. The Tribunal was of the view that such a direction was not necessary given that PWGSC was required to file a Government Institution Report (GIR) pursuant to subrule 103(1) of the *Canadian International Trade Tribunal Rules*¹³ and that Visiontec would have an opportunity to comment on the GIR.

[15] PWGSC filed the GIR on April 21, 2021, and comments on the GIR were filed by Visiontec on April 30, 2021.

[16] On May 7, 2021, PWGSC filed a reply to Visiontec's comments on the GIR. Although PWGSC filed these submissions without seeking leave, the Tribunal accepted the filing and permitted Visiontec to file a sur-reply, which was received on May 14, 2021.

[17] After becoming aware that PWGSC had issued a new solicitation (Solicitation No. 21120-203664/B) (Solicitation B) that replaced the RFP that is the subject of this complaint, on July 20, 2021,¹⁴ the Tribunal sought comments from the parties as to its relevance to the present inquiry. Both parties filed submissions with respect to the new solicitation on July 22, 2021, with replies filed on July 26, 2021.

[18] 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.

Preliminary matters

Cancellation of the RFP and issuance of a new solicitation

[19] Shortly before the issuance of the determination, the Tribunal became aware that PWGSC cancelled the RFP that was the subject of the complaint and replaced it with Solicitation B, which,

¹¹ Exhibit PR-2020-096-07.

¹² Exhibit PR-2020-096-09 at 1, 2.

¹³ SOR/91-499 [*Rules*].

¹⁴ Exhibit PR-2020-096-18.

according to buyandsell.gc.ca, was published on June 11, 2021.¹⁵ Neither of the parties informed the Tribunal of this development. On July 20, 2021, the Tribunal requested submissions from the parties regarding Solicitation B.

[20] Visiontec submitted that it had obtained the relief it was seeking and that the issuance of Solicitation B resolved any concerns regarding conflict of interest or unfair advantage.¹⁶ Visiontec concluded from PWGSC's submission in the GIR that issues of conflict of interest pertaining to Visiontec would not arise in future procurement processes. The relevant submissions from PWGSC were reproduced in Visiontec's submissions, as follows:

Canada's concerns regarding the current circumstances and their potential impact on the integrity of the procurement process are not a reflection on the integrity of the Complainant or its experience or capabilities as a supplier. They reflect Canada's concern that the integrity of the procurement process would be compromised as a result of the specific circumstances that have unfolded, regardless of how they came about. *Therefore, any decision by Canada regarding a conflict of interest/unfair advantage with respect to the circumstances at issue in this Complaint will not affect future procurement processes and is not intended to be critical of the Complainant.* Indeed, it is disappointing for Canada that the participation of one of the potential suppliers for this procurement process has potentially been compromised by circumstances not intentionally caused by anyone involved.¹⁷

[Emphasis added]

[21] Consequently, relying on PWGSC's submissions, Visiontec assumed that by issuing Solicitation B, PWGSC had taken steps to facilitate Visiontec's participation in the new solicitation process. Furthermore, Visiontec noted that PWGSC had not rejected the bid submitted by Visiontec on July 19, 2021, in response to Solicitation B or provided advance notice to Visiontec that its bid would be treated any differently than bids submitted by other bidders.

[22] Visiontec argued, however, that if PWGSC issued Solicitation B without ensuring that Visiontec could participate in the solicitation process, then PWGSC deliberately intended to create a situation of unfairness.

[23] For its part, PWGSC submitted that the replacement of the RFP with Solicitation B had no relevance to the substantive issues of this complaint or its defence against the allegations made by Visiontec.

[24] PWGSC's explanation regarding the issuance of Solicitation B is reproduced below:

Following the initial posting of Solicitation A on Buyandsell.gc.ca in February 2021, [PWGSC] received a number of questions regarding the technical requirements and evaluation criteria from prospective bidders. On June 8, 2021, PWGSC posted [Amendment 010] to Solicitation A (attached as *Annex A*). In Response 34 of Amendment 010, PWGSC

¹⁵ *Ibid.*

¹⁶ Exhibit PR-2020-096-21 at 3.

¹⁷ *Ibid.* at 4. Exhibit PR-2020-096-11A at 29, 30.

indicated “*Canada will amend its requirements from using a human fixture to [a] mannequin (test fixture). Given this significant change to the RFP Canada, Solicitation 21120-203664/A will be deleted in its entirety and replaced with Solicitation 21120-203664/B.*” The replacement of Solicitation A by Solicitation B also addressed other technically specific questions raised (see Responses 37, 38 and 40 of Amendment 010). As a result, PWGSC noted at the end of Amendment 010 “*All previous questions, answers and modifications to Solicitation 21120-203664/A will be hereby deleted in its entirety. Bidders will be expected to refer to Solicitation 21120-203664/B to participate.*”

The change from using a human fixture to a mannequin (test fixture) was made to address concerns raised by a bidder that the use of a human to evaluate the scanners may potentially violate standards set by the American National Standards Institute and Ontario’s X-Ray Safety Regulation, RRO 1990, Reg. 861.

[25] PWGSC submitted that the issuance of Solicitation B had no impact on its position concerning Visiontec’s “apparent conflict of interest/unfair advantage”. The evaluation criteria and the technical requirement was developed by the working group of which DE (Visiontec’s consultant) was an “integral part”; Solicitation B did not change the substance of the evaluation criteria or the technical requirement.¹⁸ PWGSC also submitted that Solicitation B was not a separate procurement process.

[26] Contrary to PWGSC’s position, the cancellation of the original RFP and issuance of a new solicitation did not have the effect of replacing the designated contract (as defined in section 30.1 of the *CITT Act*) that related to the complaint. The allegations made in the complaint were in respect of PWGSC’s conduct vis-à-vis the original RFP, and the Tribunal’s jurisdiction for its inquiry pursuant to subsection 30.14(1) of the *CITT Act* is limited to the subject matter of the complaint.¹⁹

[27] PWGSC’s decision to issue a new solicitation (instead of issuing an amendment to the RFP) due to changes to certain technical requirements understandably created some confusion regarding the relief Visiontec sought in these proceedings. However, this did not expand the scope of the Tribunal’s jurisdiction to address issues created by the issuance of Solicitation B, such as whether PWGSC properly notified Visiontec of its intention to reject Visiontec’s bid for Solicitation B and whether Visiontec has been unfairly restricted from participating in that process.

[28] Consequently, matters relating to the new solicitation are outside the scope of this inquiry. In this regard, the Tribunal has previously stated that complainants must fully and completely articulate the grounds of complaint *at the time that the complaint is filed* and that it has no discretion itself to determine *whether it is necessary*, in the context of an ongoing inquiry, to treat submissions as a new ground of complaint filed under subsection 30.11(1) of the *CITT Act*. This is essential for the Tribunal to frame the subject matter of its inquiry, as the consideration of a new ground of complaint

¹⁸ Exhibit PR-2020-096-20.

¹⁹ This is consistent with previous decisions. The Tribunal notes that the order postponing the award of contract issued on March 25, 2021, which applied to Solicitation No. 21120-203664/A, would not apply to the procurement process for Solicitation No. 21120-203664/B. See *Accipiter Technologies Inc.* (26 April 2019), PR-2018-049 (CITT) at paras. 53-54.

would constitute a substantive amendment to the complaint, in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint. In addition, the government institution is entitled to know the precise allegations against which it must defend at the time at which a complaint is filed.²⁰

[29] The Tribunal's determination was therefore in respect of the grounds of complaint that were accepted for inquiry.

Production of documents

[30] In its comments on the GIR, Visiontec alleged that PWGSC failed to produce certain documents, including a report from its internal assessment of the conflict of interest concerns arising from DE's work on the RFP and relationship with Visiontec conducted after DE's email to CSC on October 13, 2020. Visiontec also submitted that PWGSC failed to provide a complete statement of findings, actions and recommendations that responds fully to the allegations contained in the complaint, as required by paragraph 103(1)(b) of the *Rules*. Visiontec requested that the Tribunal direct PWGSC to produce a copy of the aforementioned investigation report and other documents that the Tribunal considered appropriate, including confirmation from PWGSC and CSC that all relevant documents concerning this inquiry had been produced.

[31] PWGSC replied to Visiontec's request for further documents and provided a copy of its correspondence with Visiontec dated April 12 and 13, 2021. PWGSC also explained that the internal assessment conducted by PWGSC did not result in a "report". PWGSC was instead referring to legal advice from counsel that was subject to solicitor-client privilege and therefore would not be produced in these proceedings.²¹

[32] In its sur-reply, with respect to PWGSC's internal assessment, Visiontec further requested that PWGSC provide to the Tribunal the "factual findings" of the internal assessment, which, in its view, were not subject to privilege.

[33] Having considered the parties' submissions as well as the evidence on the record, the Tribunal advised the parties on May 19, 2021, of its decision not to grant Visiontec's request for a production order. The Tribunal found that PWGSC sufficiently satisfied the requirements under subrule 103(1) of the *Rules*. The record included relevant evidence concerning DE's retention by CSC and exchanges between PWGSC and Visiontec both before and subsequent to the issuance of the RFP. In addition, the Tribunal was unconvinced that further factual information from PWGSC's internal assessment was necessary given that it was subject to solicitor-client privilege²² and that the conclusions of the assessment were consistent with PWGSC's position as communicated to Visiontec and in these proceedings.

²⁰ *Lanthier Bakery Ltd.* (6 May 2015), PR-2014-047 (CITT) at para. 36; *Bluenose Transit Inc.* (6 March 2020), PR-2019-044 (CITT) at para. 25.

²¹ Exhibit PR-2020-096-14 at 1.

²² See the Supreme Court of Canada's discussion of the scope of solicitor-client privilege in *R v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII) at paras. 35 to 37.

New allegations

[34] In its comments on the GIR, Visiontec made submissions regarding flaws in the evaluation criteria of the RFP. For instance, Visiontec alleged that PWGSC had not sufficiently addressed questions concerning the number of units that would be purchased and that the Tribunal should seek clarification from PWGSC on this issue. Visiontec also referred the Tribunal to DE's second affidavit, wherein he alleged that there were "significant shortcomings in the evaluation process [that] will prevent a fair and objective evaluation from being completed."²³

[35] PWGSC submitted that this was a new ground of complaint and therefore cannot be considered in this inquiry.

[36] In sur-reply, Visiontec stated that it was not asking the Tribunal to adjudicate on the issue of the evaluation criteria. Rather, potential flaws in the evaluation process were important considerations for the Tribunal in deciding whether to grant Visiontec's requested relief, i.e. cancelling and reissuing the RFP.

[37] The grounds of complaint accepted for inquiry were limited to issues arising from PWGSC's concerns of conflict of interest and unfair advantage. There were indeed no allegations concerning the fairness of the evaluation process outlined in the RFP. Moreover, the issues concerning the evaluation criteria do not, in the Tribunal's view, impact Visiontec's ability to submit a proposal nor are they relevant to issues concerning conflict of interest or unfair advantage as they have been raised in the complaint. For these reasons, the Tribunal did not consider, in this inquiry, matters related to possible flaws in the evaluation criteria of the RFP.

ANALYSIS

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

[39] As noted above, Visiontec made several allegations against PWGSC and CSC. In the Tribunal's view, these allegations can be further summarized as follows. The central issue of this complaint is whether PWGSC improperly considered Visiontec as having a real or apparent conflict of interest or unfair advantage based on the fact that at the time DE was a consultant for Visiontec, he also worked on the RFP for CSC. Related to this, the Tribunal must consider whether PWGSC or CSC failed to avoid, eliminate or mitigate the real or apparent conflict of interest or unfair advantage and whether its treatment of Visiontec during the procurement process was conducted in a fair, open and transparent manner. This latter issue requires the Tribunal to consider if Visiontec was unfairly barred from submitting a bid, was properly notified under clause 18 of the Standard Instructions and was provided an opportunity to make representations.

²³ Exhibit PR-2020-096-13 at 40.

[40] Visiontec raised numerous provisions of the trade agreements (specifically under the CFTA, CETA and CPTPP)²⁴ that PWGSC allegedly violated. In sum, these provisions relate to PWGSC's obligation to ensure open, transparent and non-discriminatory access to the procurement, avoid conduct that would create a conflict of interest or prevent a supplier from submitting a bid, include all necessary information in the tender documents and act in accordance with such documents, and provide notice as well as, if requested, reasons for a decision to reject a supplier's request to participate in a procurement.

[41] For its part, PWGSC submitted that based on all of the information available to it, Visiontec had, at the very least, an appearance of conflict of interest or unfair advantage.²⁵ Accordingly, it has acted consistently with the Conflict of Interest provisions of the RFP and its obligations under the trade agreements. CSC was not aware of DE's working relationship with Visiontec at the time it sought and retained his services and has acted diligently to prevent a conflict of interest by including the obligation to disclose conflicts of interest in DE's employment contract. PWGSC argued that it cannot simply rely on the declarations of the bidder as an assurance that its participation would not undermine the integrity of the procurement process.

Conflict of interest and unfair advantage

Standard Instructions

[42] The RFP incorporates by reference the Standard Instructions. These Standard Instructions include clause 18 (2012-03-02) – Conflict of interest – unfair advantage, which state the following:²⁶

18 (2012-03-02) Conflict of interest—unfair advantage

1. In order to protect the integrity of the procurement process, bidders are advised that Canada *may reject* a bid in the following circumstances:

- a. if the Bidder, *any of its subcontractors*, any of their respective employees or former employees was *involved in any manner in the preparation of the bid solicitation* or in any situation of conflict of interest or appearance of conflict of interest;

²⁴ Canadian Free Trade Agreement, 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]; *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017) [CETA]; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>> (entered into force on 8 March 2018) [CPTPP]. The full list of trade agreement provisions is set out in Appendix 1 of these reasons. The Notice of Proposed Procurement published on Buyandsell.gc.ca listed other applicable trade agreements. Exhibit PR-2020-096-01 at 72.

²⁵ Exhibit PR-2020-096-11A at paras. 4(a), 69, 76.

²⁶ Exhibit PR-2020-096-01 at 82; Exhibit PR-2020-096-08A at 6, 94-95.

b. if the Bidder, *any of its subcontractors*, any of their respective employees or former employees *had access to information related to the bid solicitation that was not available to other bidders* and that would, *in Canada's opinion*, give or appear to give the Bidder an unfair advantage.

2. The experience acquired by a bidder who is providing or has provided the goods and services described in the bid solicitation (or similar goods or services) will not, in itself, be considered by Canada as conferring an unfair advantage or creating a conflict of interest. This bidder remains however subject to the criteria established above.

3. *Where Canada intends to reject a bid under this section, the Contracting Authority will inform the Bidder and provide the Bidder an opportunity to make representations before making a final decision.* Bidders who are in doubt about a particular situation should contact the Contracting Authority before bid closing. By submitting a bid, the Bidder represents that it does not consider itself to be in conflict of interest nor to have an unfair advantage. The Bidder acknowledges that it is within Canada's sole discretion to determine whether a conflict of interest, unfair advantage or an appearance of conflict of interest or unfair advantage exists.²⁷

[Emphasis added]

[43] At the outset, some discussion of the terms used in clause 18, i.e. conflict of interest, appearance of conflict of interest, unfair advantage and appearance of unfair advantage, is warranted. In this regard, Visiontec submitted that PWGSC has not provided a coherent position as to the applicable issue. While the Tribunal finds that PWGSC has not been consistent in its correspondence, it did refer Visiontec to both issues of a conflict of interest or unfair advantage prior to the filing of the complaint.²⁸ In the GIR, PWGSC stated that based on the facts, there is "at least the appearance of a conflict of interest/unfair advantage."²⁹

[44] In the Tribunal's view, the terms "conflict of interest" and "unfair advantage" are to be understood in the context in which they are used in clause 18 of the Standard Instructions.

[45] Conflict of interest is discussed in paragraph 1(a) of clause 18. The first part of this paragraph refers to any *subcontractor of the bidder* that was *involved in any manner in the preparation of the bid solicitation*. The second part then refers to ". . . or in any situation of conflict of interest or appearance of conflict of interest . . ." Reading this contextually, a conflict of interest, as contemplated in clause 18, *includes* a situation where a bidder has contracted a person who was involved in preparing the solicitation documents. The reference to ". . . or in any situation of conflict of interest . . ." in clause 18 contemplates that Canada may also reject bids in *other* situations of conflict of interest. These possible situations are not defined in the remainder of clause 18. However,

²⁷ Exhibit PR-2020-096-11A at 33.

²⁸ In PWGSC's initial email to Visiontec on December 9, 2020, PWGSC only referred to a "potential conflict of interest". However, in PWGSC's email dated January 21, 2021, PWGSC referred to a conflict of interest or unfair advantage. Although it is less clear, the email of March 10, 2021, of PWGSC does refer to both an appearance of conflict of interest and "perceived" unfair advantage. Exhibit PR-2020-096-01B at 45, 50, 66.

²⁹ Exhibit PR-2020-096-11A at para. 76.

the key point is that there is more than one type of situation that could constitute a conflict of interest for Canada to exercise its discretion to reject a bid under clause 18.³⁰

[46] Unfair advantage is discussed in paragraph 1(b) of clause 18. The first part of this paragraph refers to any *subcontractor of the bidder*. In the second part, the text refers to two conditions which must be satisfied for there to be an unfair advantage. Firstly, the subcontractor of the bidder must have *had* access to information related to the bid solicitation that was not available to other bidders. *Secondly, Canada must be of the opinion that this would give or appear to give the Bidder an unfair advantage.*

[47] Having set out the meaning of conflict of interest and unfair advantage, the issue then is whether present circumstances warrant the exercise of PWGSC's discretion to reject Visiontec's bid on the basis of an apparent conflict of interest or unfair advantage reasonably considering the facts at hand (as opposed to an *actual* conflict of interest or unfair advantage).

[48] In the GIR, PWGSC submitted that DE was directly involved in the preparation of the bid solicitation at issue at the same time as he was providing services as a consultant to Visiontec. The fact that Visiontec would be seen to have an interest in advance drafts of the RFP, which its consultant DE would have had full access to, created the *apparent* conflict of interest or unfair advantage compared to those potential suppliers who did not have an employee or subcontractor who worked on the solicitation documents.

[49] As submitted by PWGSC, the trade agreements require it to conduct a fair procurement process—not affected by conflict of interest or unfair advantage—and this obligation must be considered in respect of all bidders. In this regard, PWGSC has referred to relevant provisions of the trade agreements including, for instance, Articles 500, 502, 512.3 and 515 of the CFTA.³¹ If PWGSC fails to adequately address a real or apparent conflict of interest or unfair advantage pursuant to its obligations under the trade agreements, it could expose itself to reasonable complaints from other bidders.

[50] Having considered the relevant facts, as they are further described below, the Tribunal is of the view that PWGSC acted consistently with its obligations under the trade agreements in finding that Visiontec had an apparent conflict of interest or unfair advantage, as these terms are used in clause 18 of the Standard Instructions.

[51] This is consistent with the Tribunal's conclusion in *Bluedrop*. In this case, the winning bidder employed a person that previously oversaw the branch of the Department of National Defence

³⁰ The Tribunal notes that another situation that could create a conflict of interest is the one referenced by Visiontec, i.e. from the *British Columbia Law Commission Report in its Report on Conflicts of Interest: Directors and Societies*, where “[a] person is also in a conflict of interest when the person is under a duty to promote the interests of A, and a separate duty to promote the interests of B, and the interests of A and B come into conflict.” Exhibit PR-2020-096-01B at 9.

³¹ See Appendix II to these reasons for the text of these provisions under the CFTA. PWGSC also noted that the preamble to and Article IV.4 of the WTO Agreement on Government Procurement and Article 19.4 of CETA contain similar obligations to ensure fair and open access to government procurement opportunities and to avoid situations of conflict of interest or unfair advantage. Exhibit PR-2020-096-11A at para. 66.

(DND) that was responsible for the preparation of a prior version of the solicitation.³² The Tribunal found the solicitation that was the subject of the complaint to be substantially similar to the previous solicitation.³³ PWGSC had argued that DND's former employee ". . . kept an arm's length from document preparation and was not involved in drafting the solicitation documents . . ." The Tribunal ultimately determined that the circumstances surrounding the winning bidder's proposal "did in fact give rise to a conflict of interest and a well-founded apprehension of unfair advantage." By not rejecting the proposal of the winning bidder, the Tribunal found that PWGSC had breached the requirements of the solicitation (i.e. the Conflict of interest – unfair advantage provisions of the RFP) and the applicable trade agreements.³⁴ As noted by PWGSC, the fact that the employee worked for DND and the bidder at *different* times did not eliminate the conflict of interest and unfair advantage.

[52] The Tribunal also considered its prior decision in *J. Molson & Associates*. Although, in this case, the issue of a conflict of interest concerned a member of the evaluation team that was a contractor of the winning bidder, it is nevertheless relevant insofar as a conflict of interest was found to exist despite that 1) the contractor was under a contractual obligation not to be involved in preparing the bidder's proposal; and 2) the bidder submitted that it was not privy to any information relating to the solicitation through its consultant.³⁵

[53] Visiontec also submitted that the RFP's conflict of interest provision enabled PWGSC to reject Visiontec's bid, subject to providing Visiontec with an opportunity to make submissions, which Visiontec argued it was denied. In support, Visiontec referred to the Tribunal's decision in *Dollco Printing*, where the Tribunal found that the complainant in that case could not be disqualified from the procurement process based on a possible conflict of interest, as the tender documents did not expressly contemplate such an outcome.³⁶

[54] The Tribunal does not accept these arguments on the basis that in *Serco Facilities Management Inc.* the Federal Court of Appeal has established the principle that a bid may be rejected for concerns relating to a conflict of interest even if not expressly indicated in the RFP. In this regard, the Court stated that "[t]he absence of a conflict of interest or the right to reject a bid for that reason are not a requirement of the procurement, an evaluation criterion, or an evaluation methodology, which, as contemplated in Article 506(6) of the *AIT*, must be clearly identified in the tender documents."³⁷

³² The complaint was in respect of matters relating to the subsequent solicitation.

³³ The Tribunal found that the solicitation that was the subject of the complaint was essentially a retendering of the previous solicitation that had expired.

³⁴ *Bluedrop Performance Learning Inc. v. Department of Public Works and Government Services* (25 September 2008), PR-2008-017 (CITT) [*Bluedrop*] at para. 16.

³⁵ *J. Molson & Associates v. Department of Public Works and Government Services* (24 August 2004), PR-2004-014 (CITT) [*J. Molson*].

³⁶ *Dollco Printing (Dollco Corporation)* (5 August 2003), PR-2003-016 (CITT).

³⁷ *Defence Construction (1951) Limited v. Serco Facilities Management Inc.*, 2008 FCA 208 (CanLII) at para. 6. The Federal Court of Appeal overturned the Tribunal's decision that the complaint was valid in *Serco Facilities Management Inc. v. Defence Construction Canada* (18 December 2007), PR-2007-053 and PR-2007-054 (CITT), in which the Tribunal had determined that the rejection of a bid based on a conflict of interest had to be expressly stated in the tender documents. See also *Bluedrop* and *J. Molson*.

[55] Furthermore, while the Tribunal is of the view that denying a bidder the right to make representations in a manner afforded by the terms of the RFP would be a breach, it does not agree that such a denial would require PWGSC to accept a bid from a bidder who has a real or apparent conflict of interest or unfair advantage. With respect to PWGSC's discretion to reject a bid under clause 18(1) of the Standard Instructions, the Tribunal stated in *Bluedrop* that even though the Standard Instructions state that Canada "may" reject a bid if an apparent conflict of interest exists, Canada has a positive obligation to consider whether a conflict of interest or unfair advantage exists and *must* reject bids where a conflict of interest exists.³⁸ Accordingly, whether Visiontec was able to fully make representations did not render PWGSC unable to reject its bid, where the circumstances amount to an apparent conflict of interest/unfair advantage.

[56] That said, the Tribunal does agree that Visiontec was denied an opportunity to make representations, as discussed further below.

Visiontec's contract with DE

[57] DE became known to Visiontec when he was employed with the Government of Ontario's Ministry of Community Safety and Correctional Services (MCSCS) and served as the Technical Authority on the MCSCS body scanner project until his retirement in 2018.³⁹ Visiontec had been awarded a contract from MCSCS for supplying X-ray scanners in April 2016.⁴⁰

[58] DE entered into a contract with Visiontec in May 2020.⁴¹ Visiontec retained DE to work on an E-learning project for a particular model of the X-ray scanner (the SOTER 240 model), which Visiontec had supplied to the Ontario government.⁴² This project was near completion in or around October 2020.⁴³

CSC's retention of DE

[59] A key issue that arises in examining the manner in which CSC retained DE is whether CSC was aware, when it sought and hired DE, that he was working for Visiontec, a relationship which, as noted above, began in May 2020.

[60] The evidence on the record indicates that shortly after Visiontec was awarded the contract for supplying X-ray scanners to MCSCS (July 2016), CSC began seeking information concerning the x-ray scanners from Visiontec.⁴⁴ Eventually, in January 2020, CSC sought a consultant to assist with its requirement for body scanners. During discussions between CSC and Visiontec, DE was identified as a potential candidate. In her affidavit, Ms. Colleen Rodi of Visiontec stated that "it was

³⁸ *Bluedrop* at para. 15.

³⁹ Exhibit PR-2020-096-01B at 30.

⁴⁰ *Ibid.* at 29.

⁴¹ Ms. Rodi indicates that Visiontec contracted DE for E-learning on May 19, 2020. See Exhibit PR-2020-096-01B at 37; DE indicates that his contract was dated May 13, 2020. See Exhibit PR-2020-096-01 at 60.

⁴² DE's contract with Visiontec required DE to work less than seven hours on average per week. See Exhibit PR-2020-096-01 at 57, 59; Exhibit PR-2020-096-01B at 37.

⁴³ Exhibit PR-2020-096-01B at 37 (para. 95).

⁴⁴ *Ibid.* at 31-34.

noted that [DE] could be a candidate as he retired from MCSCS over a year before.”⁴⁵ CSC requested from Visiontec DE’s contact information, which Visiontec obtained through a contact at MCSCS.⁴⁶

[61] Shortly after receiving DE’s contact information, Mr. Sylvio Bisson of CSC contacted DE on April 22, 2020. At this time, CSC discussed with DE of the possibility of working for CSC to assist with developing the technical requirements for the RFP, including working on the statement of work and evaluation criteria.⁴⁷ Mr. Bisson requested from DE, among other things, a copy of his resume.⁴⁸ An email from DE to CSC on April 23, 2020, confirms that a resume was provided. Based on the description of what the resume contained in DE’s email, the Tribunal is of the view that it did not refer to any future work with Visiontec.⁴⁹

[62] DE entered into an employment contract with CSC on September 3, 2020, for the period of September 8, 2020, to April 30, 2021. The employment contract described the duties to be performed as “[a]ssist with the procurement process of the full body scanner.”⁵⁰ At the time that DE started his contract with CSC, he had already begun working under a contract with Visiontec (starting in May 2020).

[63] Contrary to Visiontec’s claim in these proceedings, PWGSC submitted that CSC was not aware that DE was working with Visiontec until after DE had already begun working on the RFP. More precisely, PWGSC submitted that DE advised CSC in October 2020 of his work with Visiontec (first by telephone on October 12, 2020, and then the next day in an email).

[64] The Tribunal notes that the evidence on the record indicates that Visiontec did not advise CSC at any time that it too was planning to retain DE’s services.⁵¹

[65] The Tribunal finds the evidence by way of affidavit on the issue of whether DE may have informed CSC prior to entering his contract with CSC to be contradictory. Mr. Bisson and Mr. Stéphane Jolicoeur of CSC both stated that DE did not mention his work with Visiontec during their discussions with him regarding his employment offer with CSC.⁵² However, DE stated in his affidavit that “. . . even before I took on the consultant position with CSC, I made it known to CSC that I had worked as a consultant for Visiontec in relation to the E-Learning Modules.”⁵³ DE also stated that the October 13, 2020, email to CSC was to make sure that there was full transparency and that even though he was assured not to be concerned about his prior project for Visiontec, he wanted

⁴⁵ *Ibid.* at 35 (para. 80).

⁴⁶ *Ibid.* at 35 (para. 81); Exhibit PR-2020-096-01A at 187.

⁴⁷ Exhibit PR-2020-096-11A at 42 (para. 10).

⁴⁸ *Ibid.* at 50.

⁴⁹ Exhibit PR-2020-096-11B (protected) at 52.

⁵⁰ *Ibid.* at 57-60; Exhibit PR-2020-096-11A at 57-60.

⁵¹ Exhibit PR-2020-096-11A at 42 (paras. 8, 9).

⁵² *Ibid.* at 42, 46.

⁵³ Exhibit PR-2020-096-01 at 63. The Tribunal notes that DE also stated in his affidavit that he was at one point asked to complete a form documenting his involvement in the project for Visiontec but was later told that as the nature of the work was very different, there was no need to complete the form. Without a timeframe for when this exchange occurred, the Tribunal could not consider it to be indicative of PWGSC’s previous knowledge of the consultancy contract with Visiontec.

to ensure that CSC had the information to make a decision before he became too involved with the RFP and that it could consider mitigation measures.⁵⁴

[66] In DE's subsequent affidavit, DE does not state that he directly made CSC aware of his contract with Visiontec at the time he was hired. The relevant part is reproduced below:

At paragraph 17 [of the GIR], the statement made asserts that I did not comply with the *Values and Ethics Code for the Public Sector* and the Treasury Board *Directive on Conflict of Interest* as I did not disclose on my start date on September 8, 2020 "any real, apparent or potential conflict of interest." Again, this statement is not true. CSC obtained my name from Ms. Colleen Rodi of Visiontec and was well aware that I was involved in the procurement with the Ontario Government that resulted in Visiontec being selected. . . . I was employed as an "Electric Systems Research advisor" and not in any procurement role. . . . I made my report within 60 days . . . (by sending my superiors within CSC my email of October 13, 2020). By this time, I had worked a sufficient amount of time and had understood what I was being asked to do such that I could make a proper disclosure. . . .⁵⁵

[67] Based on the evidence on the record, the Tribunal is not persuaded that CSC had knowledge that DE was under contract with Visiontec at the time he was retained. In addition to the evidence described above, the Tribunal also considered DE's written email that was sent to CSC officials on October 13, 2020. In the Tribunal's view, the discussion of DE's work with Visiontec is worded in a manner that would suggest that the recipients, i.e. Mr. Bisson and Mr. Jolicoeur, were not previously aware of the information.⁵⁶ Furthermore, the Tribunal finds the subsequent actions of Mr. Jolicoeur and Mr. Bisson to be indicative of learning the information for the first time. For instance, Mr. Jolicoeur stated the following in his response to DE: "Thank you [for] bringing this to our attention. We will need to do an internal assessment and bring this up to [PWGSC]." Mr. Jolicoeur also indicated that he would need to verify with Human Resources whether a revised security form and security re-evaluation would be needed. Mr. Bisson subsequently requested an opinion on the potential conflict.⁵⁷

[68] As noted by PWGSC, by the time DE disclosed his work with Visiontec, he had been involved in preparing the RFP for a period of approximately one month.

[69] After informing CSC, DE continued to be involved with the development of the RFP and was sent numerous emails and meeting invitations for discussions concerning the procurement process, including the statement of requirement, the evaluation criteria, the acceptance test document and criteria, and the site planning workbook. PWGSC submitted as evidence emails reflecting the aforementioned work dated between October 21, 2020, and November 12, 2020.⁵⁸ On November 25

⁵⁴ Exhibit PR-2020-096-01 at 64.

⁵⁵ Exhibit PR-2020-096-13 at 33, 34.

⁵⁶ Exhibit PR-2020-096-11B (protected) at 109.

⁵⁷ Exhibit PR-2020-096-11A at 108.

⁵⁸ *Ibid.* at 112-121; Exhibit PR-2020-096-11B (protected) at 112-121.

and December 4, 2020, DE sent emails to CSC regarding his concerns related to Visiontec and his work with CSC.⁵⁹ DE submitted his resignation on December 7, 2020.⁶⁰

The nature of DE's work for CSC

[70] The evidence on the record indicates that DE was hired to work on the RFP and that he carried out this work for a period of time prior to the issuance of the RFP. This is evident from Mr. Bisson's email to DE on April 22, 2020 (before he was hired), which described the work as, among other things, helping to complete the statement of work and evaluation criteria for the RFP, scope definition for site preparation work and addressing the legal and health questions relating to the project.⁶¹ The "Body X-Ray Scanner Procurement and Implement Project – Scope of Work Discussion Paper" prepared by DE and sent to CSC on April 23, 2020, also reflected that the nature of the work would be to develop the RFP.⁶²

[71] The employment contract with CSC specified the duties to be performed as follows: "Assist with the procurement process of the full body scanner."⁶³ According to CSC, due to the nature of his work, DE had access to information related to the solicitation documents that was not available to bidders. As evidence of his work, PWGSC provided examples of correspondence between DE and officials at CSC relating specifically to the RFP between September 11 to October 9, 2020. The evidence on the record supports that DE was a key contributor in providing comments on the draft statement of work and technical requirements, and technical evaluation criteria. He was also consulted on a privacy impact assessment, site planning workbook and the "acceptance test document".⁶⁴

Visiontec's position with respect to its alleged conflict of interest

[72] Visiontec argued that PWGSC's position is unfounded. Visiontec raised several considerations, as follows:⁶⁵

- i. Visiontec itself did not put itself in a position of conflicting obligations.
- ii. The nature of the work DE performed for Visiontec and CSC was unrelated. DE's work involved developing E-learning modules for the Ontario government on the use of the Soter RS 240 equipment,⁶⁶ whereas for CSC, DE provided input into CSC's procurement of X-ray scanners.
- iii. DE was subject to confidentiality obligations while working for CSC, and there is no evidence that DE provided Visiontec with confidential information related to the RFP.

⁵⁹ Exhibit PR-2020-096-11B (protected) at 123-126.

⁶⁰ Exhibit PR-2020-096-01 at 66-67; Exhibit PR-2020-096-01B at 34.

⁶¹ Exhibit PR-2020-096-11A at 50.

⁶² *Ibid.* at 54-55.

⁶³ *Ibid.* at 57.

⁶⁴ *Ibid.* at 9, 10, 23, 42, 112-121; Exhibit PR-2020-096-11B (protected) at 42, 112-121.

⁶⁵ Visiontec also noted there was no conflict of interest on the basis that PWGSC retained DE knowing that he had an ongoing project for Visiontec. As the Tribunal has discussed above, the evidence does not support this allegation.

⁶⁶ Exhibit PR-2020-096-01B at 37.

- iv. DE had no other fiduciary obligation to either CSC or Visiontec; he was not an employee of Visiontec or a dependent contractor.⁶⁷
- v. There was no evidence that DE's involvement in the RFP resulted in the inclusion of technical requirements or evaluation criteria that benefitted Visiontec.
- vi. DE would not profit from Visiontec's success in the procurement process.
- vii. CSC could have avoided the creation of the conflict of interest.

[73] The Tribunal is of the view that the factors described above do not invalidate PWGSC's invocation of clause 18 of the Standard Instructions when it became aware of the potential risk. On balance, the Tribunal finds that there is sufficient evidence on the record to indicate that Visiontec's consultant was involved in the preparation of the bid solicitation and therefore that, at the very least, an appearance of conflict of interest reasonably exists. Similarly, Visiontec's consultant had access to information concerning the RFP that was not available to other bidders. The Tribunal finds that PWGSC's opinion that there existed an appearance of conflict of interest or unfair advantage to be reasonable.

[74] An actual conflict of interest or unfair advantage is not required. The appearance of a conflict of interest or unfair advantage is sufficient given that it is impossible to know with certainty that during the time that DE was simultaneously working for CSC and Visiontec, information concerning the RFP was either advertently or inadvertently disclosed in advance of the RFP being issued. Further, the Tribunal is of the view that the risk of unfair advantage is not limited to information concerning the requirements that were published in the RFP, but also includes information from general discussions regarding the requirements, even those that may not have been included in the final published version of the RFP. The elimination of such risk is of paramount importance to preserving the integrity of the procurement process.

[75] Therefore, Visiontec has not persuaded the Tribunal that there is any basis to distinguish the present case from previous case law interpreting the conflict of interest and unfair advantage provisions contained in the Standard Instructions. As discussed above, CSC retained the services of a consultant—whom it understood to be retired—to further develop the RFP, and unbeknownst to it, this consultant was at the same time under contract with Visiontec.

[76] Indeed, the Tribunal takes note that for requirements for equipment using sophisticated technology, government procuring entities may need to consult industry experts who, given the particularity of the technology, are in short supply. The Tribunal agrees with Visiontec that there is an imperative that these experts are available to the government when they are called upon to assist in fulfilling requirements for these assets. These experts may also be retained by industry.

[77] However, in the present circumstances, after disclosing to CSC the name of a candidate for a consultancy position relating to the development of a tender to fulfill a requirement for X-ray

⁶⁷ In this regard, the Tribunal notes that DE has provided several reasons that would lessen his proximity to Visiontec. For instance, DE stated that, as an independent consultant, his contract made clear that he had no right or authority to assume or create any obligation or responsibility on behalf of Visiontec; the work was on an "as needed" basis for approximately five months (6.5 hours a week), with no promise of additional work, including if Visiontec was successful in the procurement process. Exhibit PR-2020-096-01 at 61.

scanners, Visiontec chose to hire the same person it had referred to CSC to work on a project that relates to X-ray scanners (albeit not in a procurement context). While the Tribunal recognizes that Visiontec's actions may have been unintentional, it nevertheless placed itself in a position that posed a risk to its ability to participate in the procurement process. On these facts, the Tribunal does not agree that PWGSC must act to enable Visiontec to participate in the solicitation process, thereby exposing it to liability vis-à-vis other bidders for breach of its obligations to ensure a fair and impartial procurement process. The importance of preserving the integrity of the process underlies the manner in which the trade agreements have been interpreted, i.e. even the "appearance" of a conflict of interest may be prohibited.

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

Mitigating the conflict of interest or unfair advantage

[79] Visiontec argued that PWGSC and CSC breached their obligations under the trade agreements to proactively avoid giving rise to circumstances that could result in the creation of a conflict of interest.⁶⁸ In this regard, Visiontec referred to Articles 19.4(4) and 19.9(5) of CETA. Pursuant to Article 19.4(4) of CETA, procuring entities are obligated to conduct a procurement in a transparent and impartial manner, including by avoiding conflicts of interest. Under Article 19.9(5), a procuring entity is obligated not to seek or accept advice for its solicitation from a person that may have a commercial interest in the procurement (having the effect of precluding competition).

[80] Visiontec submitted that it was within CSC's control to avoid the creation of a conflict of interest by hiring DE. Moreover, Visiontec argued that CSC should have stopped working with DE after his disclosure in October 2020 or implemented the recommendations noted by DE. These included, for instance, not including DE as an evaluator, having another engineer review the RFP to ensure there was no bias or having an independent audit performed.⁶⁹

[81] As discussed above, the Tribunal finds that, on balance, the evidence indicates that CSC had no prior knowledge of DE's ongoing contractual relationship with Visiontec.⁷⁰ The Tribunal also notes that the employment contract included an obligation to "recognize, prevent, report and resolve any real, apparent, or potential conflicts of interest between official responsibilities and one's private affairs".⁷¹ Moreover, there is insufficient evidence that the measures suggested by DE would have adequately addressed the concerns with respect to a bidder obtaining in advance information concerning the RFP, as discussed above.⁷²

[82] DE had already worked on the RFP for over a month and had access to information related to the RFP that would not have been available to other bidders. Therefore, suspending DE's work on

⁶⁸ See Appendix I for the text of these provisions.

⁶⁹ Exhibit PR-2020-096-01 at 65-66.

⁷⁰ The Tribunal notes that in PWGSC's email to DE on April 22, 2020, PWGSC asked DE for a copy of his resume. However, no evidence of this resume was provided to the Tribunal by either party. Exhibit PR-2020-096-11A at 50.

⁷¹ Exhibit PR-2020-096-11A at 59.

⁷² Exhibit PR-2020-096-01 at 65-66.

the RFP after his disclosure in October 2020, would not, in the Tribunal's view, have sufficiently mitigated risks to the procurement process.

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

PWGSC's treatment of Visiontec

[84] Visiontec submitted at the outset of this proceeding that PWGSC effectively barred Visiontec from submitting a bid without an opportunity to make representations. Visiontec also argued that PWGSC failed to adequately explain its position regarding the conflict of interest. This, it argued, was contrary to PWGSC's obligations to conduct a fair, open and transparent procurement process.

PWGSC's explanation

[85] From the record of exchanges between PWGSC and Visiontec, including the letters issued by PWGSC, the Tribunal finds that PWGSC was clear with respect to the basis of its concerns regarding the submission of a bid from Visiontec. On several different occasions, PWGSC explained that its position arose from the fact that it had become aware that while DE was working on the RFP for CSC, he was also working for Visiontec as a consultant.⁷³ As discussed above, this fact was a sufficient basis for PWGSC to have determined that Visiontec had an apparent conflict of interest and unfair advantage.

[86] Although PWGSC did not respond in substance to the numerous questions raised by Visiontec seeking from PWGSC further information concerning its position, this did not amount to a breach of the trade agreements. The questions listed in Visiontec's letter dated February 5, 2021, pertained to matters not directly relevant to the basis for PWGSC's position, which, as noted above, had been communicated. For example, the questions addressed the following: when PWGSC determined that a conflict of interest potentially existed; what was PWGSC's knowledge of DE's previous experience; the duration of time DE was retained as a consultant; an explanation as to why the meeting requested by Visiontec was delayed; what mitigation steps were taken by PWGSC; how many other consultants were retained by PWGSC; and whether DE was to be involved in the evaluation of the bid.⁷⁴

[87] In explaining its lack of response to these questions, PWGSC submitted that it did not reply because it would have required disclosing DE's personal information or because the question was not relevant to whether Visiontec had a conflict of interest or unfair advantage. The Tribunal agrees with PWGSC's explanation.

[88] Moreover, the Tribunal has stated in a different context that the obligation under the trade agreements to provide transparency as to the reasons for not selecting a bid (see, for instance, Article 516(1) of the CFTA), is to enable the unsuccessful bidder to determine its rights in view of the requirements set out in the trade agreement.⁷⁵ The Tribunal is of the view that this principle is

⁷³ Exhibit PR-2020-096-01B at 50, 60, 66.

⁷⁴ *Ibid.* at 52-55.

⁷⁵ *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) [CGI] at para. 48.

applicable to the level of disclosure required by PWGSC in the present case. Visiontec was in possession of the basis for PWGSC's position regarding its participation in the procurement process—DE was a consultant for Visiontec at the same time that he was working on the RFP. The Tribunal finds that Visiontec's understanding of the basis for PWGSC's position is reflected in Ms. Rodi's affidavit, wherein she reiterates that the "factual basis for the allegations rest on the following 'facts' which [PWGSC] states as: i. A consultant worked for [CSC and PWGSC] *on preparing the requirements and evaluation criteria* for [the RFP]. ii. *During that time*, the consultant also worked for Visiontec" She then proceeds to refute PWGSC's factual findings.⁷⁶

Visiontec's ability to submit a bid

[89] Having reviewed PWGSC's correspondence to Visiontec up to the date that the complaint was filed, the Tribunal is of the view that PWGSC did not state that Visiontec would be barred from submitting a bid. Rather, PWGSC advised Visiontec of the manner in which the bid would be treated if submitted. For instance, in its email of March 1, 2021, PWGSC informed Visiontec that "Canada is obligated to refuse any bids."⁷⁷ Nevertheless, during these proceedings, PWGSC provided further clarification in this regard. In the GIR, PWGSC noted that it had sent an email to Visiontec on April 12, 2021, indicating that it wanted to "ensure that Visiontec understands that it may submit a bid if it wishes to do so" and that "should Visiontec choose to submit a bid, [PWGSC] will call upon Visiontec to make submissions pursuant to Section 18 of [the Standard Instructions] and may ultimately reject Visiontec's bid."⁷⁸

[90] The fact that Visiontec was permitted to submit a bid was acknowledged by Visiontec in its comments on the GIR. Moreover, Visiontec also indicated that it had sufficient time to submit its bid given PWGSC's extension of the bid closing date.

[91] Consequently, the Tribunal finds that the issue of whether Visiontec was barred from submitting a bid is moot.

Opportunity to make representations

[92] Upon advising Visiontec of its intention to reject its proposal, according to clause 18 of the Standing Instructions, PWGSC was required to provide Visiontec an opportunity to make representations before making a final decision. PWGSC submitted that it was "at all times" open to Visiontec submitting more information or representations that would have demonstrated that Visiontec did not have a real or apparent conflict of interest or unfair advantage. The Tribunal does not agree. The evidence on the record indicates that prior to Visiontec filing its complaint with the Tribunal, PWGSC denied Visiontec an opportunity to provide reasons. The Tribunal finds that this was contrary to the standard required for a fair and transparent procurement process.

[93] Before the RFP was issued, PWGSC notified Visiontec on December 9, 2020, that "Canada will not be in a position to accept a proposal from VisionTec . . . once the RFP is published because

⁷⁶ Exhibit PR-2020-096-01B at 39.

⁷⁷ *Ibid.* at 60.

⁷⁸ Exhibit PR-2020-096-11A at 35.

of [the] potential conflict of interest.”⁷⁹ Shortly thereafter, Visiontec requested a meeting to discuss PWGSC’s position. This was initially agreed upon until after PWGSC indicated to Visiontec, on January 21, 2021, that such a meeting would be premature, as the RFP had not yet been issued. However, in this email, PWGSC clarified that if Visiontec submitted a bid in response to the RFP, PWGSC would rely on clause 18 of the Standard Instructions—under which Visiontec could make representations to PWGSC before a final decision was made.⁸⁰

[94] After the RFP was issued, Visiontec corresponded with PWGSC indicating that it had not yet had an opportunity to meet with PWGSC.⁸¹ On March 1, 2021, PWGSC responded to Visiontec stating that it had provided its response and that “the authority for these matters is the CITT”. By referring Visiontec to the Tribunal, it was clear that PWGSC had refused Visiontec an opportunity to make representations. The Tribunal finds that this was inconsistent with the procedure set out in the Standard Instructions, which required PWGSC to provide an opportunity to make representations.

[95] However, as mentioned above, during these proceedings, PWGSC sent a letter to Visiontec on April 12, 2021, in which it clarified that it could submit a bid and that, after doing so, it would be given an opportunity to make representations. In the Tribunal’s view, the letter is in substance similar to its previous letters with the additional qualification that its view regarding Visiontec was “preliminary” and that should Visiontec choose to submit a bid, PWGSC would “call upon” Visiontec to make submissions.⁸² PWGSC appears to have attempted to correct its initial position that Visiontec must seek relief from the Tribunal.

[96] The Tribunal is not persuaded that PWGSC’s most recent correspondence to Visiontec sufficiently addressed PWGSC’s improper procedure. While it may not always be the case that PWGSC will be reasonably aware of its intention to reject a bid due to a conflict of interest or unfair advantage before bid closing, in the present case, the Tribunal is of the view that PWGSC had already formed this intention and previously notified Visiontec of this intention.⁸³ PWGSC has attempted to characterize its previous emails to Visiontec as a measure taken “as a courtesy” so that Visiontec would not waste time and resources submitting a bid and that *only after submitting its bid* PWGSC would provide notice under paragraph 18(3) of clause 18.⁸⁴ The Tribunal fails to see a distinction between PWGSC’s emails previously sent to Visiontec and a notice under paragraph 18(3) that would then trigger the obligation to provide an opportunity to make representations.

⁷⁹ Exhibit PR-2020-096-01B at 45.

⁸⁰ *Ibid.* at 50.

⁸¹ Visiontec also indicated in this email that PWGSC had not responded to the questions it raised with PWGSC in its previous letter dated February 5, 2021.

⁸² Exhibit PR-2020-096-11A at 35.

⁸³ On December 9, 2020, PWGSC stated in its email that “. . . Canada will not be in a position to accept a proposal from VisionTec . . . once the RFP is published . . .” On January 21, 2021, PWGSC stated in its email that “[i]f and when PWGSC decides to issue and RFP . . . , we intend to rely on [clause 18].” On March 1, 2021, PWGSC stated in its email that “. . . Canada will not be in a position to accept a proposal from VisionTec.” On March 10, 2021, PWGSC stated in its email that “[y]ou have objected to [PWGSC’s] finding that Visiontec would be in a conflict of interest if it were to submit a bid [PWGSC] maintains that there would be an appearance of conflict of interest if Visiontec were permitted to submit a bid.” See Exhibit PR-2020-096-01B at 45, 50, 60, 66.

⁸⁴ Exhibit PR-2020-096-11A at 23, 30.

[97] As Visiontec received notice under paragraph 18(3), it was consequently entitled to an opportunity to make representations under the RFP, and there was no reason to delay such an opportunity until after bid submission. Delaying representations in this manner could, in the Tribunal's view, result in Visiontec unnecessarily expending resources on its proposal should PWGSC ultimately reject its bid.⁸⁵ More importantly, the Tribunal questions the meaningfulness of such an opportunity considering that Visiontec has provided extensive submissions during the course of this inquiry responding to PWGSC's view concerning Visiontec's participation in the solicitation process.

[98] The Tribunal therefore finds this ground of complaint to be valid.

CONCLUSION

[99] For the reasons above, the Tribunal finds that the complaint is valid, in part.

REMEDY

[100] Having found the complaint to be valid, in part, the Tribunal must now address the issue of remedy. In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the *CITT Act*. This includes taking into account the seriousness of any deficiency in the procurement process, the degree to which the complainant was prejudiced, the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, and whether the parties acted in good faith.

[101] The failure to properly implement paragraph 18(3) of the Standard Instructions, by denying Visiontec an opportunity to make representations, was a deficiency in the procurement process. However, the Tribunal has found no evidence that either PWGSC was acting in bad faith or that Visiontec was seriously prejudiced. In this regard, the Tribunal notes that Visiontec did not object to PWGSC's letter dated April 12, 2021, which indicated that Visiontec would be called upon to make submissions pursuant to clause 18 of the Standard Instructions *should Visiontec choose to submit a bid*.⁸⁶ Moreover, for the reasons above, the Tribunal has determined, after considering all of the submissions and evidence on the record, that PWGSC's position that Visiontec has an apparent conflict of interest or unfair advantage was consistent with its obligations under the trade agreements.

[102] Considering the above, the Tribunal finds that there is no basis to recommend a remedy under subsection 30.15(2) of the *CITT Act*.

COSTS

[103] Both parties have sought to be awarded costs for these proceedings. Given the divided success in this case, the Tribunal will not award costs to any party.

⁸⁵ However, the Tribunal recognizes that, in other situations, even if a bidder was provided an opportunity to make representations prior to bid closing, PWGSC may not issue its final decision regarding a bidder's conflict of interest or unfair advantage until after bid closing.

⁸⁶ Exhibit PR-2020-096-13 at 26.

DECISION

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

[105] Each party will bear its own costs.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

APPENDIX I⁸⁷

CFTA, Article 502(1)

Each Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.

CFTA, Article 503(5)(b)

Except as otherwise provided in this Chapter, including Article 513, the following is an illustrative list of practices that are considered to be inconsistent with Articles 502.1, 502.2, or 502.3:

...

scheduled events in the tendering process in order to prevent suppliers from submitting tenders;

CETA, Article 19.4(4)

A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

...

b. avoids conflicts of interest;

CETA, Article 19.7(1)

A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.

CPTPP, Article 15.8(1)

A procuring entity shall limit any conditions for participation in a covered procurement to those conditions that ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that procurement.

CPTPP, Article 15.8(4)

If there is supporting material, a Party, including its procuring entities, may exclude a supplier on grounds such as:

⁸⁷ Listed in the order they appear in the complaint.

- (a) bankruptcy or insolvency;
- (b) false declarations;
- (c) significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts; or
- (d) failure to pay taxes.

CPTPP, Article 15.9(4)

The procuring entity shall:

...

- (c) allow all qualified suppliers to submit a tender, unless the procuring entity stated in the notice of intended procurement a limitation on the number of suppliers that will be permitted to tender and the criteria or justification for selecting the limited number of suppliers.

CETA, Article 19.7(3)(b)

In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

...

- b. shall base its evaluation on the conditions that the procuring entity has specified in advance in notices or tender documentation.

CETA, Article 19.8(15)

If a procuring entity rejects a supplier's request for participation in a procurement or application for inclusion on a multi-use list, ceases to recognise a supplier as qualified, or removes a supplier from a multi-use list, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

CETA, Article 19.9(5)

A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

CETA, Article 19.9(7)(b)

A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

. . .

b. any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection with the conditions for participation;

CPTPP, Article 15.13(3)

A procuring entity shall promptly reply to any reasonable request for relevant information by an interested or participating supplier, provided that the information does not give that supplier an advantage over other suppliers.

APPENDIX II

CFTA

Article 500

The purpose of this Chapter is to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers.

Article 502(1)

Each Party shall provide open, transparent, and *non-discriminatory access* to covered procurement by its procuring entities.

[Emphasis added]

Article 512(3)

In the course of negotiations, a procurement entity *shall not give an unfair advantage to*, or discriminate against, a supplier.

[Emphasis added]

Article 515(1)

A procuring entity shall receive, open, and treat all tenders under procedures that *guarantee the fairness and impartiality of the procurement process*, and the confidentiality of tenders. . . .

[Emphasis added]