



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-098

Aqua Valley Water

v.

Department of Public Works and
Government Services

*Determination issued
Friday, August 6, 2021*

*Reasons issued
Thursday, August 26, 2021*

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IN THE MATTER OF a complaint filed by Aqua Valley Water 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

AQUA VALLEY WATER

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Aqua Valley Water be compensated by the lump sum amount of \$2,000, which amount is to be paid by the Department of Public Works and Government Services (PWGSC).

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Aqua Valley Water 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 (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, in accordance with Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

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:	Sarah Shinder, Counsel
Complainant:	Aqua Valley Water
Counsel for the Complainant:	Dennis Vial
Government Institution:	Department of Public Works and Government Services
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STATEMENT OF REASONS

[1] This complaint arises from a Notice of Proposed Procurement (solicitation No. W0102-22001D/A) for the supply of bottled water to a military base (14 Wing Greenwood) located in Greenwood, Nova Scotia (RFSO). The RFSO was issued on February 16, 2021, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND).¹

[2] The RFSO was a new solicitation for the continuation of bottled water supply² that was being provided under a contract previously awarded to Aqua Valley Water (Aqua Valley) of Coldwater, Nova Scotia, pursuant to a prior solicitation (No. W0102-170124/A – the “Prior Contract”).³

[3] Aqua Valley brings this complaint to the Tribunal on the basis of a series of events related to the COVID-19 pandemic and the subsequent state of public emergency.

[4] The Prior Contract to Aqua Valley was set to expire on July 31, 2020. The COVID-19 pandemic began in mid-March 2020 in Canada. The province of Nova Scotia invoked the *Emergency Management Act* on March 22, 2020, declaring a state of public emergency.⁴

[5] On April 14, 2020, PWGSC contacted Aqua Valley asking for an extension of the Prior Contract, as follows:

As you are probably aware, the above-noted standing offer agreement is due to expire on 2020-07-31.

Due to the current Covid 19, we would like to extend for an additional six months (2021-01-31). All other terms and conditions, including basis of payment, would remain the same.

Please advise if you are in agreement with this extension. Thank you.⁵

[6] Aqua Valley agreed to this request. Documentation implementing the contract extension until January 31, 2021, was issued.⁶

¹ Exhibit PR-2020-098-009 at 6.

² Which includes related goods and services, namely rental of water coolers and cleaning/maintenance of government and/or rental machines on an “as and when requested” basis. See Exhibit PR-2020-098-009 at 46.

³ *Ibid.* at 9, 15.

⁴ Online: <<https://novascotia.ca/coronavirus/docs/Declaration-of-Provincial-State-of-Emergency-by-Minister-Porter-Signed-March-22-2020.pdf>>. The Tribunal takes judicial notice of this fact. A court or tribunal 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.” See *R. v. Krymowski*, [2005] 1 S.C.R. 101 at para. 22; *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32, at para. 48. In any event, during the hearing, PWGSC did not contest that the existence of the pandemic was such a notorious fact that judicial notice could be taken of it. See *Transcript of Public Hearing* at 12.

⁵ Exhibit PR-2020-098-09 at 32.

⁶ *Ibid.* at 34.

[7] At least up until this point, Aqua Valley alleges that it had been monitoring buyandsell.gc.ca⁷ and stood ready to bid on a new solicitation for the supply of bottled water to 14 Wing Greenwood, given that its incumbent contract was approaching its expiry.

[8] The COVID-19 pandemic did not abate and continued during the remaining months of 2020, leading to successive extensions of the state of emergency, together with urgent and stringent public health measures, enacted both in Nova Scotia and across Canada. Throughout this period, Aqua Valley continued to supply bottled water to 14 Wing Greenwood.

[9] As the extended Prior Contract expiry date of January 31, 2021, grew closer, Aqua Valley contacted PWGSC. The public health emergency due to COVID-19 remained in effect. By email dated January 6, 2021, Aqua Valley offered to further extend the Prior Contract, if such an extension was needed by PWGSC, as follows:

Just a quick follow up regarding water for 14 Wing Greenwood.

The terms expire end of this month, if need be, we have no problem extending the terms till we have some kind of normalcy.⁸

[10] Unbeknownst to Aqua Valley, PWGSC was, at that time, in the process of completing internal work needed to issue the RFSO.⁹

[11] On January 11, 2021, PWGSC asked Aqua Valley for an additional four-month extension of the Prior Contract until May 31, 2021:

Greenwood would like to extend the current RISO until 2021-05-31 under the same terms and conditions, including pricing, as the original RISO (W0102-170124/001/HAL). Please confirm that you are in agreement and I will issue the amendment accordingly. Thank you.¹⁰

[12] Aqua Valley agreed to this request, executing the requisite documentation on January 20, 2021.¹¹ At this time, the province of Nova Scotia was in a state of lockdown due to the ongoing public health emergency posed by COVID-19.

[13] Shortly thereafter, on February 16, 2021, PWGSC issued the RFSO. It was posted on buyandsell.gc.ca the following day, with a closing date of March 4, 2021.¹²

[14] Aqua Valley was unaware that the RFSO had been issued. It believed that the issuance of a solicitation remained in abeyance due to the pandemic and its accompanying restrictions. It did not submit a bid.

[15] On March 9, 2021, following close of the tender, PWGSC awarded the Standing Offer to Canadian Springs as the successful bidder.¹³

⁷ *Transcript of Public Hearing* at 9.

⁸ Exhibit PR-2020-098-09 at 37.

⁹ Exhibit PR-2020-098-20 at 15.

¹⁰ Exhibit PR-2020-098-09 at 37.

¹¹ *Ibid.* at 39.

¹² *Ibid.* at 6, 43.

¹³ *Ibid.* at 3.

[16] On March 18, 2021, PWGSC contacted Aqua Valley, inquiring about the number of water coolers supplied to 14 Wing Greenwood during the course of the Prior Contract. PWGSC also asked Aqua Valley why it had not submitted a bid in response to the RFSO. Aqua Valley reacted with surprise, as it was now just learning that the RFSO had been issued.¹⁴

[17] It appears as if Aqua Valley then sought recourse from PWGSC but was advised on March 22, 2021, that it could file a complaint with the Tribunal.¹⁵

[18] Aqua Valley filed a complaint with the Tribunal on March 24, 2021, stating the primary ground for its complaint as follows:

We were misled after they requested multiple extensions.¹⁶

Our intentions were to bid on the contract once it was up for renewal. Our contract expired July 31st 2020. Due to COVID-19, we were asked to extend our original contract on April 14th 2020. We reached out on January 6th 2021 and it was decided on January 11th 2021 to extend the contract again until May 31st 2021. There was no communication that this was the final extension or that they would be putting the contract up for bid on February 16th 2021 during this extension. It wasn't until the new Standing Offer had expired on March 4th 2021, that they reached out to us on March 18th 2021 via telephone, asking why we didn't offer a bid and how many water coolers they have. Based on our previous communication, we were not aware that they were going to put the contract up for bid because the COVID-19 situation is still ongoing. We were expecting another extension because the COVID-19 situation is the same today as it was when they originally requested an extension because of COVID-19.¹⁷

[19] The complaint also contained certain comments concerning the quantity and costing of water coolers to be supplied under the contract arising from the RFSO. However, this ground of complaint was not pursued.

[20] As a remedy, Aqua Valley asked that a new solicitation be issued for the supply of bottled water to 14 Wing Greenwood.¹⁸

[21] The Tribunal accepted Aqua Valley's complaint for inquiry on March 30, 2021.¹⁹

[22] PWGSC filed a Government Institution Report (GIR) on April 23, 2021.²⁰

¹⁴ Exhibit PR-2020-098-20 at 18.

¹⁵ Exhibit PR-2020-098-01 at 6.

¹⁶ *Ibid.* at 7.

¹⁷ *Ibid.* at 10.

¹⁸ *Ibid.*

¹⁹ Exhibit PR-2020-098-03.

²⁰ Exhibit PR-2020-098-09.

[23] On June 9, 2021, the Tribunal invited the parties to make representations concerning the potential relevance and application of the Supreme Court of Canada's decision in *C.M. Callow Inc. v. Zollinger*,²¹ having regard to the grounds of complaint advanced by Aqua Valley.²²

[24] PWGSC filed written representations, together with an affidavit of Kathie Taylor,²³ a supply specialist with PWGSC who was the contract authority with respect to the Prior Contract and the prior solicitation (No. W0102-170124/A) that gave rise to it.

[25] Aqua Valley also filed brief written submissions.

[26] An oral hearing was held on June 24, 2021, by way of videoconference. Aqua Valley was represented by its president, Dennis Vial, who had dealt directly with PWGSC during the events relevant to this complaint. PWGSC was represented by counsel.

POSITION OF THE PARTIES

Aqua Valley

[27] Aqua Valley submits that it was misled by the actions and communications of PWGSC that a new solicitation for the supply of bottled water to 14 Wing Greenwood was suspended until the pandemic was over. It emphasized that PWGSC represented throughout that the extensions were required *due to COVID-19* and that PWGSC never advised that the extensions were required because additional time was required to prepare the requisite documentation for the RFSO.²⁴

[28] During the oral argument, Mr. Vial stated that Aqua Valley was "led to believe that we were doing something to service our country during a crisis by promising to uphold an agreement to extend our Standing Offer,"²⁵ that they were "doing our honest best to keep things running smoothly, with as little interruption at Greenwood as possible during this time."²⁶

[29] Mr. Vial also claimed that the pandemic conditions created hardship for Aqua Valley's business. He stated that "running our small business was extra difficult during the pandemic, as it was for everyone,"²⁷ but that Aqua Valley was "willing to [continue to supply 14 Wing Greenwood] based on the promised agreement of a second extension of the Contract term until May 31st, 2021." Further, Aqua Valley alleged that it had "endured extra cost to deliver to the base"²⁸ during the pandemic.

[30] Aqua Valley pointed out pandemic conditions and the fact that the state of emergency had worsened in Nova Scotia by early 2021, as compared with the situation at the outset of the pandemic in spring 2020. This contributed to Aqua Valley's belief that issuance of a new solicitation remained

²¹ 2020 SCC 45 [*Callow*].

²² Exhibit PR-2020-098-017.

²³ Exhibit PR-2020-098-20 at 13.

²⁴ Exhibit PR-2020-098-22 at 1; *Transcript of Public Hearing* at 9.

²⁵ *Transcript of Public Hearing* at 7.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

on hold when the second extension was requested. As COVID-19 remained an issue, nothing was communicated by PWGSC to indicate that the new extension dynamic was over.²⁹

[31] At the hearing, Mr. Vial denied the allegations in Ms. Taylor’s affidavit that he had admitted to having “dropped the ball”³⁰ with respect to a notification published on Buyandsell³¹ with respect to the RFSO.

[32] As for *Callow*, Aqua Valley takes the position that this decision is relevant because Aqua Valley was presented with a misleading picture, which in turn caused it to miss the opportunity to submit a proposal in response to the RFSO.

PWGSC

[33] In its GIR, PWGSC argues that Aqua Valley lacks standing to bring this complaint. As Aqua Valley did not submit a bid in response to the RFSO and that procurement has now closed, PWGSC argues that Aqua Valley is therefore not a “potential supplier” within the meaning of the *Canadian International Trade Tribunal Act*.³²

[34] PWGSC addresses Aqua Valley’s complaint as being directed to an expectation that the Prior Contract would continue to be extended indefinitely, until the end of the pandemic. Extensions of the Prior Contract were solely a matter for PWGSC’s discretion and conferred no guarantee or rights upon Aqua Valley with respect to additional extensions.

[35] From PWGSC’s standpoint, Aqua Valley was not entitled to receive any invitation to bid on the RFSO. Indeed, had such an invitation been extended, PWGSC contends that this could have amounted to preferential treatment, thus creating unfairness to other bidders, to the point of a potential breach of the trade agreements.³³ Issuing an invitation to Aqua Valley would have required

²⁹ Exhibit PR-2020-098-22 at 1; *Transcript of Public Hearing* at 8, 10.

³⁰ Exhibit PR-2020-098-22.

³¹ *Transcript of Public Hearing* at 9.

³² R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

³³ Exhibit PR-2020-098-009 at 11. Reference is made to *Geophysical Service Incorporated v. Canada (Public Works and Government Services)* (19 May 2009), PR-2009-008 (CITT) at para. 9. On the issue of PWGSC practices, it submitted as follows (see *Transcript of Public Hearing* at 27, 28):

... it’s simply that PWGSC doesn’t have a practice—and for good reason—of advising potential suppliers of the fact that they are going out to tender. And the reason for that is particularly because complaints do arise about a lack of fairness in a procurement context. And while I appreciate the absence of a statement of when or how they might go out to tender neutralizes it a bit, I think there would even be arguably, you know, the basis for a claim of unfairness if one particular supplier, and particularly if that supplier is the incumbent, is given advance notice that a tender is upcoming. So one might imagine that if, particularly given the circumstances of the COVID-19 pandemic, a solicitation was going to be put together on rather short notice, Mr. Vial or the Complainant receiving notice a few weeks before that it’s going to happen gives them a distinct advantage. It gives them time to put together their—you know, the materials that they expect to be part of a bid submission. Gives them time perhaps to adjust whatever might need adjusting in terms of the services that they’re going to deliver. I think, you know, PWGSC has to be extremely cautious in terms of how it manages communications with potential suppliers in light of that fact. And that I think is the primary consideration.

that invitations be extended to other prospective bidders, and the terms of the RFSO did not provide for an invitation process.³⁴

[36] PWGSC also argues that Aqua Valley stands on equal footing with any other party seeking to bid on a public procurement process.³⁵ All prospective government suppliers have access to the website (buyandsell.gc.ca) where new solicitations are published, together with the notification system that is provided there. As such, Aqua Valley could have learned of the RFSO when it was posted on buyandsell.gc.ca on February 16, 2021. In PWGSC's view, Aqua Valley had the responsibility to ensure that it monitored that website, and receive any relevant notifications, with respect to any developments relevant to a new procurement pertaining to the subject matter of the Prior Contract, especially since no further extensions had been explicitly discussed or agreed to by PWGSC.

[37] With respect to the applicability of *Callow*, PWGSC takes the position that the duty of honest performance, as set out in by the Supreme Court in that case, is a purely contractual duty and can only exist where there is a contractual relationship between the parties.

[38] In the procurement context, PWGSC argues that there are two unique contractual considerations that must inform the Tribunal's consideration of the *Callow* decision in this case. The first is the unique Contract A/Contract B framework,³⁶ and the second, that the duty of good faith by a procuring party towards a specific supplier can only arise where that supplier has delivered a bid in response to the solicitation.

[39] Applying these principles to the present case, PWGSC argues that since Aqua Valley did not submit a bid in response to the solicitation, the only contractual relationship between PWGSC and Aqua Valley was the Prior Contract. Any complaint concerning those dealings pertain to issues of contract administration and thus fall outside of the Tribunal's jurisdiction.³⁷

[40] Moreover, PWGSC contends that *Callow* arose in a situation of dishonest conduct. PWGSC argues that it did not engage in the type of dishonest conduct described in the *Callow* decision or indeed any dishonest conduct whatsoever. PWGSC submits that it did not mislead or withhold information from Aqua Valley.³⁸

[41] While PWGSC conceded that, in hindsight, it may have been possible to "see now" that Aqua Valley was operating under a misconception, PWGSC takes the view that there was no basis for it to have realized, based on the email correspondence, that Aqua Valley believed that the Prior Contract would be extended for as long as the pandemic was in effect.³⁹

[42] In summary, PWGSC says that it had no obligation to further extend the Prior Contract, nor did it have any obligation to notify Aqua Valley that a new procurement process had been commenced. It seeks dismissal of the complaint, with costs.

³⁴ Exhibit PR-2020-098-20 at 4.

³⁵ *Ibid.* at 10; *Transcript of Public Hearing* at 34.

³⁶ As discussed in *Martel Building Ltd. v Canada*, 2000 SCC 60 at paras. 80-83, and in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3.

³⁷ Exhibit PR-2020-098-20 at 3.

³⁸ *Ibid.* at 4.

³⁹ *Transcript of Public Hearing* at 24.

ISSUES

[43] The arguments raised by the parties define the following issues:

- (1) Does Aqua Valley have standing to bring this complaint?
- (2) What is the scope of Aqua Valley's complaint?
- (3) Has there been a breach of the trade agreements?

ANALYSIS

Standing

[44] Subsection 30.11 (1) of the *CITT Act* provides that a "potential supplier" may file a complaint with the Tribunal concerning any aspect of the procurement process.

[45] The term "potential supplier" is defined in section 30.1 of the *CITT Act*, as follows:

"potential supplier" means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

[46] In *COGNOS Incorporated*, the Tribunal concluded that a potential supplier is an entity that "would have or could have been a bidder, were it not for the alleged restrictive nature of the procurement process."⁴⁰

[47] The terms "bidder" and "prospective bidder" must also be read in context as being referable to a particular "designated contract".⁴¹ There is no dispute here that the RFSO pertains to a "designated contract" or that Aqua Valley was not a "bidder". The issue is whether Aqua Valley was a "prospective bidder".

[48] In *Flag Connection*,⁴² the Tribunal formulated a two-part test for determining whether an entity is a "prospective bidder", as follows:

The Tribunal is of the view that, in order to be considered a prospective bidder in relation to a particular designated contract, two requirements must necessarily be met. First, the complainant must have the technical and financial capability of fulfilling the requirement that is the subject of the procurement. Second, it must have the capacity to submit a proposal in response to the solicitation.

[49] Aqua Valley satisfies the first of these requirements. As the incumbent supplier of bottled water to 14 Wing Greenwood, the Tribunal finds that Aqua Valley has the technical and financial capability to have met the requirements of the RFSO. Indeed, PWGSC was apparently of the same view, as shown by its inquiry concerning why Aqua Valley had not submitted a bid.

⁴⁰ *COGNOS Incorporated* (23 August 2002), PR-2002-004 (CITT).

⁴¹ *Flag Connection Inc. v. Department of Public Works and Government Services* (3 September 2009), PR-2009-026 (CITT) [*Flag*] at para. 17.

⁴² *Flag* at para 20.

[50] The second requirement turns on whether Aqua Valley had the “capacity” to submit a proposal in response to the RFSO.

[51] The Tribunal has previously held that a complainant may lose its “capacity” to bid once the tender has closed, because the procuring entity can no longer receive or assess the bid at that point. However, this does not apply in situations where the complainant is precluded from submitting a bid as a result of a breach of the trade agreements during the course of the procurement process.⁴³

[52] If the Tribunal concludes that the complainant was not precluded from placing a bid as a result of a breach of the trade agreements, then the complainant is not a “prospective bidder” and thus not a “potential supplier” having standing to bring a complaint.⁴⁴

[53] In this case, the complaint is premised on the grounds that Aqua Valley was misled by the actions or silence of PWGSC concerning the imminent publication of the RFSO and consequently did not submit a bid.

[54] For the reasons set out below, the Tribunal finds that there is a causal relationship between a breach of the trade agreements and the fact that Aqua Valley did not submit a bid. Aqua Valley was effectively deprived of its capacity to submit a bid. Accordingly, the Tribunal concludes that Aqua Valley was a “prospective bidder” and thus a “potential supplier” having standing to bring this complaint.

What is the scope of Aqua Valley’s complaint?

[55] PWGSC has characterized Aqua Valley’s complaint as being rooted in a frustrated expectation that the Prior Contract would continue to be extended. On that premise, the complaint would, in essence, become a dispute dealing with contract administration falling outside the jurisdiction of the Tribunal.

[56] The Tribunal’s jurisdiction is restricted to the procurement process. As noted in *9324-3566 Quebec Inc.*:

Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed.

The Tribunal has been clear that matters of contract administration are beyond the scope of its jurisdiction.⁴⁵

[57] PWGSC argues that Aqua Valley’s complaint is rooted in events that transpired during the contract administration phase of the Prior Contract for which Aqua Valley was the incumbent supplier. The decisions to extend the term of the Prior Contract are discretionary and distinct from the procurement process associated with the RFSO.

[58] This argument is somewhat overstated. While the steps to extend the Prior Contract due to the COVID-19 pandemic did form part of the administration of the Prior Contract, the Tribunal finds that Aqua Valley does not complain about PWGSC’s extension requests or the terms and conditions

⁴³ *Flag* at para. 20, footnote 12; See also *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207; *Canada (Attorney General) v. Siemens Enterprise Communications Inc.*, 2011 FCA 251.

⁴⁴ *Ibid.*

⁴⁵ *9324-3566 Quebec Inc.* (19 May 2021), PR-2021-005 (CITT) at para. 16.

attached to those extensions. Rather, the complaint is that PWGSC's actions during the administration of the Prior Contract spilled over into the concurrent procurement process for the RFSO, and consequently created unfairness, to the prejudice of Aqua Valley.

[59] The Tribunal has held that the procurement process commences "once a government institution has decided to obtain certain goods or services, by such methods as lease, rent or purchase, and continues through the contract award for such goods or services."⁴⁶

[60] The evidence is clear that PWGSC had made a decision to obtain goods or services, namely to continue to acquire an ongoing supply of bottled water for 14 Wing Greenwood. That decision had been made as early as April 2020, as stated by Ms. Taylor's affidavit:

In April of 2020, in light of shutdowns at 14 Wing Greenwood as a result of the COVID-19 pandemic, DND recognized that it would not be able to prepare and deliver the appropriate documentation to request that PSPC conduct a new solicitation process to issue a new standing offer for the Services prior to the expiry of the Prior Standing Offer on July 31, 2020, and that it was therefore desirable to extend the term of the Prior Standing Offer to accommodate this delay.⁴⁷

[61] The Tribunal finds that the procurement process for the RFSO as a new solicitation was proceeding concurrently and in parallel with ongoing performance and management of the Prior Contract.⁴⁸ Although these processes are procedurally distinct, this does not mean that the facts and events in the context of one process were incapable of affecting the other. Indeed, that occurred in this case, albeit due to an unusual and exceptional set of circumstances.

[62] As such, the Tribunal concludes that Aqua Valley's complaint before the Tribunal is limited to the procurement pertaining to the RFSO, and not to administration of the Prior Contract. To the extent that Aqua Valley has, or may have, any complaint or recourse concerning the management or administration of the Prior Contract, such a matter is not for the Tribunal to assess or decide.

Has there been a breach of the trade agreements?

[63] In considering the regulatory regime for procurement complaints defined by section 30.11 of the *CITT Act*, the Federal Court of Appeal made the following observations:

[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

⁴⁶ *Novell Canada Ltd. v. Canada (Public Works and Government Services)* (17 August 2000), PR-98-047R (CITT).

⁴⁷ Exhibit PR-2020-098-20 at 9.

⁴⁸ The phases of procurement and contract administration are not necessarily demarcated by a bright line—see, for example, *AdVenture Marketing Solutions Inc. v. Department of Public Works and Government Services* (31 March 2011), PR-2010-074 (CITT); *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT) at para. 25; *Eclipsys Solutions Inc.* (21 March 2016), PR-2015-038 (CITT).

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.

(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.⁴⁹

[64] The RFSO is subject to the provisions of the Canadian Free Trade Agreement.⁵⁰ Articles 500 and 502 of the CFTA state as follows:

Article 500: Purpose

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: General Principles

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

[65] Having regard to the principles outlined in *Almon*, the Tribunal finds that a purposive and liberal approach should be taken when interpreting and applying the CFTA requirements of openness, transparency, and fairness of the procurement process.

[66] At the heart of this matter is whether the objectives of openness, transparency, and fairness required PWGSC to alert Aqua Valley that a new procurement process was forthcoming for the provision of bottled water to 14 Wing Greenwood.

⁴⁹ *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, at para. 23.

⁵⁰ Canadian Free Trade Agreement, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf> (entered into force 1 July 2017) [CFTA].

[67] The scope of PWGSC's duty to be open, transparent and fair with prospective bidders is fact- and circumstance-dependent. In this regard, the principles set out by the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger*⁵¹ require consideration.

[68] *Callow* builds on the decision in *Bhasin v. Hrynew*,⁵² where the Supreme Court held that there is an organizing principle of good faith at common law that requires contractual obligations to be performed honestly, reasonably and not capriciously or arbitrarily. As a component of this general organizing principle, the common law imposes a duty of honest performance, which requires the parties to be honest with each other and not mislead one another in relation to the performance of their contractual obligations.⁵³

[69] In *Callow*, the Supreme Court expanded the scope of the duty of honest performance established in *Bhasin* by holding that the requirements of honesty in contractual performance can go further than prohibiting outright lies, and can include half-truths, omissions, and even silence, whether through action (such as by saying something directly to a counterparty) or through inaction (such as by failing to correct a misapprehension caused by one's own misleading conduct).⁵⁴

[70] PWGSC has stressed that the doctrines set forth in *Callow* and *Bhasin* are restricted to situations where the parties are in a contractual relationship. It advances what amounts to a zero-sum argument, namely that *Callow* may apply to the administration of the Prior Contract but if so, then the Tribunal lacks jurisdiction. On the other hand, *Callow* cannot assist Aqua Valley because it did not submit a bid and was accordingly not in a contractual relationship with PWGSC. The latter argument is premised on the "Contract A/Contract B" framework for procurement formulated by the Supreme Court of Canada in *The Queen in Right of Ontario v. Ron Engineering Construction (Eastern) Ltd.*,⁵⁵ and discussed in *Double N Earthmovers Ltd. v. Edmonton (City)*⁵⁶ and in *Martel Building Ltd. V. Canada*.⁵⁷

[71] The Contract A/Contract B framework of *Ron Engineering* arose in the context of a procurement governed by the common law, as opposed to the requirements of trade agreements. For the purposes of deciding this case, the Tribunal must consider whether there has been a breach of the trade agreements. As such, a further examination of the principles in *Ron Engineering* is unnecessary.

[72] As noted above, the procurement process was underway at all material times, having commenced in the spring of 2020. As such, once PWGSC had made a decision concerning DND's requirements for the ongoing supply of bottled water to 14 Wing Greenwood by way of a new tender, PWGSC was required to comply with the obligations imposed by the trade agreements.

[73] Those obligations may or may not be fully equivalent to those in the "Contract A" framework of *Ron Engineering*. The Tribunal need not decide this point and makes no finding in this regard. However, the Tribunal is called upon to consider whether what has transpired meets the criteria of openness, fairness and transparency, as required by the CFTA. In that context, the Tribunal considers

⁵¹ 2020 SCC 4 [*Callow*].

⁵² *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*].

⁵³ *Ibid.* at paras. 63, 73.

⁵⁴ *Ibid.* at paras. 90-91.

⁵⁵ [1981] 1 S.C.R. [*Ron Engineering*].

⁵⁶ 2007 SCC 3.

⁵⁷ 2000 SCC 60 at paras 79-84.

that the duty of honest performance described in *Callow* is analogous, in underlying concept, to the requirements mandated by the trade agreements. As such, the Tribunal considers that *Callow* provides a useful guide to inform the Tribunal's assessment of whether the procurement at issue has been conducted fairly, openly and transparently.

[74] Moreover, there are certain factual parallels that can be drawn between the facts of this case and those in *Callow*. In both cases, an inference was drawn by a complainant or plaintiff in the context of communications relating to a contract renewal, but the alleged wrong occurred during the exercise of another right or obligation.

[75] It is well established that an incumbent supplier should not be provided with a special *advantage* concerning an upcoming tender, as might be conveyed, for example, by advance notice that serves to place that supplier in a preferential position vis-à-vis other prospective bidders. This would be problematic having regard to Article 503(5)(g) of the CFTA, which provides as follows:

(5) 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:

...

(g) providing information to one supplier in order to give that supplier an advantage over other suppliers;

[76] However, just as an incumbent supplier should not be given an advantage, the incumbent should likewise not be placed at a *disadvantage*.

[77] The Tribunal concurs that PWGSC had no duty to specifically invite Aqua Valley to bid on the RFSO. However, by the same token, it should have taken care to ensure that its statements and actions did not mislead Aqua Valley.

[78] The CFTA requirements of openness, transparency and fairness must be assessed in light of the relevant circumstances. The Tribunal considers the timeline here to be highly relevant.

[79] Aqua Valley's email of January 6 stated that Aqua Valley was prepared to extend the contract until "some kind of normalcy" was restored. Given that the RFSO was published on February 16, 2021, the Tribunal finds that the preparation of the tender documents was at an advanced stage, if not by January 6, 2021, then certainly by the time⁵⁸ that Aqua Valley executed the documents to extend the term of the Prior Contract. Preparation of the RFSO was not handled by Ms. Taylor, but by one of her PWGSC colleagues. Ms. Taylor indicated that she was unaware of the publication of the RFSO.⁵⁹ However, there is no evidence stating that she was unaware of the status of the RFSO preparation during her communications with Aqua Valley, given that it was published shortly after the Prior Contract extension was implemented. The Tribunal concludes that the status of the RFSO would have been a prerequisite to the decision that a further extension was needed, which was in turn implemented by means of communication to Aqua Valley.

⁵⁸ January 20, 2021.

⁵⁹ Exhibit PR-2020-098-20 at 16.

[80] As such, PWGSC was well aware that contract extension until “some kind of normalcy” was restored was not required. However, it chose to remain silent and not advise Aqua Valley of that fact.

[81] These events must be viewed in their overall context. The first extension was represented to Aqua Valley as being required “due to COVID-19”, as opposed to delays in preparing tender documentation. By early January 2021, the state of emergency that began in Nova Scotia in the spring of 2020 had accelerated to lockdown conditions throughout the province. The Tribunal finds that this was known to both Aqua Valley and to PWGSC.

[82] In view of those circumstances, the Tribunal finds that the correspondence between PWGSC and Aqua Valley can be reasonably taken as communicating that a new procurement for the supply of bottled water to 14 Wing Greenwood was being deferred indefinitely.

[83] Based on the evidence, the Tribunal finds that PWGSC was aware that issuance of the RFSO was well in the works, if not imminent, at least as early as mid-January 2021. Notwithstanding, it did not correct or rebut the premise in Aqua Valley’s email of contract extensions being required until “some kind of normalcy” had returned.

[84] By staying silent, PWGSC placed Aqua Valley at a competitive disadvantage within the framework of the tender. Other prospective suppliers were not privy to the communications between PWGSC and Aqua Valley. As such, unlike Aqua Valley, they had no reason to stop monitoring buyandsell.gc.ca.

[85] Given the lockdown conditions then in effect and the state of the pandemic, the return of “some kind of normalcy” would, at that time, have been understood by a reasonable person as referring to a point in time that was longer than a few weeks. The Tribunal finds that Aqua Valley’s continued willingness to extend the Prior Contract should have served as a reasonable indicator to PWGSC that Aqua Valley had an interest as a prospective bidder on the RFSO. As such, there was an obligation for a tender process that provided neither an advantage or a disadvantage to Aqua Valley or any other prospective bidder.

[86] A correction of Aqua Valley’s obvious misunderstanding of PWGSC’s intentions did not have to rise to the level of extending Aqua Valley an invitation to bid on the upcoming RFSO. Simply advising Aqua Valley that no further extensions would be required and then leaving Aqua Valley to its own devices concerning next steps would have been sufficient. Such an alert would not have conferred an unfair advantage upon Aqua Valley but would have levelled the playing field between prospective bidders.

[87] Aqua Valley might have exercised an abundance of caution by continuing to monitor buyandsell.gc.ca. However, that contingency cannot operate to excuse a procedural deficiency that renders the procurement non-compliant with the trade agreement requirements.

[88] In these circumstances, the Tribunal finds that there was a lack of openness and transparency in the procurement process, which caused consequent unfairness to Aqua Valley. As a result, Aqua Valley was deprived of its capacity to submit a bid in response to the RFSO.

[89] The Tribunal does not conclude that PWGSC was acting in bad faith or with any intent to deliberately prejudice Aqua Valley. Most likely, PWGSC had concluded that anything other than silence could be construed as a communication that might contravene Article 503(5)(g) of the CFTA.

[90] In so doing, however, PWGSC failed to take a fully objective view of the entire sequence of events and did not consider how its actions, words, and inactions, might have given the wrong impression, or alternatively the clear impression that a re-tender would not occur while the pandemic was ongoing. Nor did PWGSC recognize the potential prejudice to Aqua Valley that would flow from not alerting it to the fact that the procurement was not being suspended indefinitely.

[91] The Tribunal's findings rest heavily on the fact that these events took place during special circumstances. States of public emergency are, by their very nature, rare and exceptional events.

[92] For the foregoing reasons, the Tribunal finds that Aqua Valley's complaint is valid.

REMEDY

[93] Once the Tribunal has determined that a complaint is valid, subsection 30.15(2) of the *CITT Act* lists the remedies that the Tribunal may award to the complainant:

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

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

[94] When recommending a remedy the Tribunal is required to consider the factors specified by subsection 30.15(3) of the *CITT Act*:

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

The seriousness of any deficiency in the procurement process

[95] The deficiency in this case had the effect of rendering the procurement process less competitive because it operated, for practical purposes, to preclude a prospective bidder from competing for the tender. As noted above, the Tribunal is persuaded by the record that Aqua Valley, as the incumbent supplier, would have submitted a bid in response to the RFSO had it not been misled into believing that publication of a new tender remained suspended, due to the ongoing COVID-19 pandemic.

[96] The public interest is served by procurement processes that maximizes competitive bidding.⁶⁰

[97] Although the predominant and proximate cause of the process deficiency was PWGSC's conduct vis-à-vis Aqua Valley, the Tribunal also finds that Aqua Valley bears some responsibility. It could have exercised an abundance of caution by continuing to monitor buyandsell.gc.ca. This is a mitigating factor, as is the fact that two bids were received. Accordingly, the tender process remained competitive, but it was less competitive than it could or should have been, but for the deficiency.

The degree to which the complainant and all other interested parties were prejudiced

[98] Aqua Valley was prejudiced because it lost the opportunity to submit a bid in response to the RFSO. However, this is not a situation where, but for deficiencies in the procurement process, a complainant was denied the award of a Standing Offer that it otherwise would have won. There is no basis for the Tribunal to conclude that any bid by Aqua Valley would have necessarily been assessed as the lowest-priced compliant bid. Such a conclusion is entirely speculative.

[99] As there is no evidence that the bids otherwise received were not fairly assessed, the Tribunal concludes that no other parties were prejudiced.

The degree to which the integrity and efficiency of the competitive procurement system was prejudiced

[100] There is a public interest in ensuring that the procurement of goods and services using public funds is carried out fairly and transparently. In order to achieve this objective, procurement processes must be characterized by both integrity and efficiency. In this case, the integrity of the system was undermined because one prospective bidder was placed at a competitive disadvantage, for the reasons outlined above. This may have been unintentional, but it does not alter the fact that the playing field was rendered uneven. Although a procuring entity cannot favour or provide an advantage to one bidder over another, the corollary is that a bidder should likewise not be placed at a disadvantage, as is the case here.

[101] The facts of this case are unusual. The Tribunal finds no evidence that the cause of the deficiency is due to some endemic or major flaw within the procurement framework of this RFSO. As noted above, the Tribunal is persuaded that the exceptional circumstances and state of emergency caused by the COVID-19 pandemic is a significant contributory factor.

[102] For these reasons, the Tribunal concludes that the integrity and efficiency of the procurement system has only been prejudiced to a relatively modest degree.

⁶⁰ *Almon, supra.*

Whether the parties acted in good faith

[103] The good faith and honesty of the public servants overseeing the procurement process is presumed.⁶¹ There is no evidence here to rebut that presumption. Although errors were made, the Tribunal is satisfied that the parties were acting in good faith and that PWGSC did not deliberately or intentionally seek to disadvantage Aqua Valley.

The extent to which the contract was performed

[104] The Standing Offer was awarded to Canadian Springs on March 9, 2021, for a three-year term, with the potential for two one-year options.⁶² Unlike a contract for the performance of ongoing, incremental project work, this Standing Offer is for call-ups for the supply of a commodity product. There is no evidence before the Tribunal relating to whether any call-ups were issued against the Standing Offer. Further, only a relatively small portion of the overall contract term has elapsed.

[105] Having considered the foregoing, the Tribunal is not persuaded that it would be appropriate to recommend that the existing contract be terminated and that a new solicitation for the designated contract be issued. The Tribunal concludes that such an outcome would be a disproportionate remedy in the circumstances.

[106] As Aqua Valley did not submit a bid, there are no grounds for the Tribunal to direct a re-evaluation of the bids. Nor is there any evidence that the bids that were received were improperly evaluated.

[107] For the same reason, the Tribunal concludes that it would be inappropriate to recommend that the contract be awarded to Aqua Valley. No bid was received from Aqua Valley that could be assessed for compliance with the RFSO requirements. Under those circumstances, the procurement would, for practical purposes, become a sole-source tender.

[108] Accordingly, the Tribunal is left to consider a remedy of monetary compensation pursuant to paragraph 30.15(2)(e) of the *CITT Act*, which confers the Tribunal with a broad remedial discretion.⁶³

[109] As Aqua Valley did not prepare a bid, it has incurred no bid preparation costs that should be compensated. Nor can lost profits be compensated, as this presumes, as a matter of course, that Aqua Valley would have been awarded the contract had it submitted a bid. There is no basis upon which the Tribunal can make such a finding.

[110] In considering a remedy pursuant to subsection 30.15(2) of the *CITT Act*, the Tribunal must be mindful of the importance of potential bidders having confidence in the integrity of the procurement system. This principle was explained by the Federal Court of Appeal in *Canada (Attorney General) v. Envoy Relocation Services*, as follows:

⁶¹ *MasterBedroom Inc.* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at paras. 15-16.

⁶² Exhibit PR-2020-098-09 at 46.

⁶³ E.g. see *Systèmes Equinox Inc. v. Canada (Public Works and Government Services)*, 2012 FCA 51.

[22] Although performing essentially adjudicative functions when it inquires into complaints by disappointed bidders on government contracts that they were unfairly treated, the CITT must exercise its powers with a view to, among other things, maintaining potential bidders' confidence in the integrity of the procurement system. An erosion of confidence would have a detrimental impact on the competitiveness of bidding. Hence, it should not be assumed that the CITT's power to recommend compensation is exercisable exclusively on the basis of common-law principles.⁶⁴

[111] Consequently, an award of monetary compensation pursuant to subsection 30.15(2) of the *CITT Act* is not limited by common law principles governing an award of damages.⁶⁵ Moreover, in recommending the appropriate remedy, the Tribunal must have regard not only to the complainant's prejudice, but also to systemic concerns.⁶⁶

[112] Having weighed the relevant factors as discussed above, the Tribunal finds that recommending a lump sum monetary award payable to Aqua Valley would signal the importance of ensuring scrupulous fairness to prospective bidders throughout the procurement process, consistent with the objectives in *Envoy*.

[113] However, the Tribunal is also mindful that the events occurred during the exceptional circumstances of a global pandemic. That factor, taken together with those discussed above, mitigates in favour of a modest award of monetary compensation. For that reason, the Tribunal recommends that Aqua Valley be compensated by PWGSC in the amount of \$2,000.

COSTS

[114] As a general principle, costs usually follow the event.⁶⁷ As Aqua Valley has been successful, the Tribunal provisionally awards Aqua Valley its reasonable costs for this proceeding.

[115] Although the underlying facts of this complaint were straightforward, there was some degree of complexity to the legal issues that were raised by the complainant. A novel question of law, namely the possible relevance of *Callow* in a procurement context, was canvassed and an oral hearing was held. Taking all of these factors into account, the Tribunal's preliminary determination is that costs of this inquiry fall within Level 2 of the Tribunal's *Procurement Costs Guideline*.

[116] The Tribunal emphasizes that these findings with respect to costs are 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.

⁶⁴ 2007 FCA 176 at para. 22.

⁶⁵ *Envoy* at paras. 23-26.

⁶⁶ *Envoy* at para. 26.

⁶⁷ *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 at paras. 26-28.

DETERMINATION

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

Susan D. Beaubien

Susan D. Beaubien
Presiding Member