Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-102

CTS Defence Inc.

v.

Department of Public Works and Government Services

Determination issued
Wednesday, August 11, 2021

Reasons issued
Friday, August 27, 2021

Corrigendum issued
Wednesday, January 26, 2022

Canadä

TABLE OF CONTENTS

DETERMINATION i
CORRIGENDUM ii
STATEMENT OF REASONS 1
INTRODUCTION 1
BACKGROUND 1
POSITION OF THE PARTIES 3
CTS Defence 3
PWGSC 4
ANALYSIS 4
1) Was the addition of M57 unfair or arbitrary? 5
2) Was PWGSC's evaluation of CTS Defence's bid reasonable? 7
3) Was the addition of M57 unfair because it did not provide sufficient time for suppliers to respond? 13
DETERMINATION 14
COSTS 14

IN THE MATTER OF a complaint filed by CTS Defence Inc. 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

CTS DEFENCE INC. **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 not valid. No costs shall be awarded to either party.

Cheryl Beckett

Cheryl Beckett
Presiding Member

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

IN THE MATTER OF a complaint filed by CTS Defence Inc. 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

CTS DEFENCE INC. **Complainant**

AND

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

CORRIGENDUM

The last sentence of paragraph 57 of the Statement of Reasons should read as follows:

For example, Section 7.1.2 of the Statement of Work provides as follows:

The last sentence of footnote 32 to paragraph 57 of the Statement of Reasons should read as follows:

See also Section 7.1.10 of the Statement of Work, Exhibit PR-2020-102-12A at 47.

The first sentence of paragraph 67 of the Statement of Reasons should read as follows:

This criterion makes reference to Section 7.1.2 of the Statement of Work, which is set out above.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Tribunal Panel:	Cheryl Beckett, Presiding Member
Tribunal Counsel:	Kalyn Eadie, Counsel Sarah Shinder, Counsel
Complainant:	CTS Defence Inc.
Government Institution:	The Department of Public Works and Government Services
Counsel for the Government Institution:	Manou Ranaivoson Peter J. Osborne Zachary Rosen
Intervener:	Air Tindi Ltd.

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

[1] This complaint relates to a Request for Proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the lease of aircraft (Solicitation No. W8485-20SC07/A).

[2] CTS Defence Inc. (CTS Defence) takes issue with the addition of a mandatory technical criterion requiring that certain certifications be with the same company that is bidding. CTS Defence also challenges PWGSC's conclusion that its bid did not meet such mandatory technical criterion.

[3] As a remedy, CTS Defence requests, *inter alia*, that the bids be re-evaluated and that the designated contract be awarded to the lowest bidder further to such re-evaluation.

[4] For the reasons provided below, the Tribunal finds that the complaint is not valid.

BACKGROUND

[5] The RFP was issued on December 23, 2020, with a bid closing date of February 2, 2021. It was subject to five amendments.

[6] On December 30, 2020, Canada Training Solutions (CTS) advised PWGSC that it would be forming a joint venture named "CTS Defence" to submit a bid in response to the RFP.[1]

[7] On January 7, 2021, PWGSC published Amendment 003, which introduced Mandatory Technical Criterion 57 (M57) as part of Attachment 1 to Part 3. M57 reads as follows:[2]

> M57 Bidder must demonstrate that related Air Operator's Certificate (AOC) and Approved Maintenance Organisation (AMO) certification(s) (Transport Canada accreditations) are with this same company that is bidding.[3]

[8] On January 13, 2021, PWGSC issued Amendment 005, which resulted from questions from potential bidders relating to the application of M57.[4]

[9] These potential bidders pointed out an apparent contradiction between M57 and Section 7.1.1 of the Statement of Work. Section 7.1.1 originally provided that "the Contractor (and air operator, if a separate organizations) must comply with" the provisions of various legislation. The prospective

---

1 Exhibit PR-2020-102-12A at 108.

2 The date of January 7, 2021, appears on the face of the Amendment; see Exhibit PR-2020-102-06A at 97. In its comments on the GIR, PWGSC also states that Amendment 003 was published on January 7, 2021; see Exhibit PR-2020-102-012 at 4. However, the tender notice published on buyandsell.gc.ca, which does not form part of the Tribunal's record in the present proceedings, suggests that this amendment was published on January 11, 2021. Nothing turns on this apparent four-day discrepancy.

3 Exhibit PR-2020-102-06A at 101.

4 Exhibit PR-2020-102-01 at 107, 108.

bidders noted that this language "indicates that there can be two separate companies involved with this."[5]

[10] Through Amendment 005, PWGSC revised Section 7.1.1 of the RFP to remove the reference to a separate "air operator" organization and to provide that "[t]he Contractor must comply with" that same legislation. In response to the questions from potential bidders, PWGSC further stated that "section M57 remains unchanged. M57 does not contradict the modified article 7.1.1."[6]

[11] On February 2, 2021, CTS Defence submitted a bid in response to the RFP.[7] Ultimately, CTS Defence did not submit a bid as a joint venture. In its bid, CTS Defence explained as follows:

> M1.0 CTS Defence was originally conceived as a Joint Venture (JV) between Take Flight Group (owning Air Partners and AircraftWorks), Hopkinson Aircraft Sales (owning Business Aircraft Solutions) and Canada Training Solutions (owning CTS and CTS Tek). JV arrangements are supported within this RFP as outlined in Section 5.1.1.2 (Bid Certification), and email correspondence with the Contracting Authority on December 30, 2020 further supported the JV construct. However, when Amendment 5 to this solicitation was published on January 13, 2021, we became concerned that the JV construct may no longer be the preference of Canada. For this reason, after consultation with our legal team and experts from the Treasury Board Secretariate [sic], we have transitioned CTS Defence from being a JV into a single corporate entity with which all groups now directly hold ownership stakes. **(M57)**
>
> M1.1 The requirement for the AOC and AMO to be held 'with' the contractor is considered to be satisfied, as the relationship between CTS Defence and these certifications is ownership based, and not subcontracted. This is the same mechanism through which Air Canada and WestJet hold their AOC and AMO certifications, and we have received expert counsel that this is the surest way for us to meet this Mandatory Requirement.[8]

[12] The AOC certification submitted with the bid was in the name of Air Partners Corp., and the AMO was in the name of Aircraftworks Ltd.[9]

[13] On February 26, 2021, PWGSC informed CTS Defence that its bid had been declared non-responsive, as it had not demonstrated that it, as the bidder, held the AOC and AMO certifications, as required by M57.[10]

[14] On March 1, 2021, CTS Defence wrote to PWGSC to raise its concerns about the procurement process. In particular, CTS Defence highlighted the reasons for which it believed its bid was compliant with the mandatory criterion at issue, namely that since the AOC and AMO certifications were owned by companies that also own CTS Defence or are affiliates of CTS Defence, they should have been considered as being "with the same company that is bidding". CTS Defence further objected to the timing of the amendments to the RFP and noted that M57 was contradictory to

---

5 *Ibid.* at 108.
6 *Ibid.*
7 *Ibid.* at 129-259.
8 *Ibid.* at 179.
9 *Ibid.* at 234-257.
10 *Ibid.* at 109-110.

other provisions in the RFP regarding joint ventures and subcontracting arrangements, which had caused confusion among bidders. CTS Defence accordingly requested that PWGSC either reverse its decision that CTS Defence was not compliant with M57 and award the contract to the lowest-priced bid, or provide CTS Defence with an explanation of why the decision to award the contract to a higher-priced bid was justified.[11]

[15] On March 2, 2021, PWGSC acknowledged receipt of CTS Defence's correspondence and informed CTS Defence of its intention to provide a response to its letter once it had an opportunity to review the file in detail.[12]

[16] CTS Defence filed its initial complaint, File No. PR-2020-094, on March 11, 2021. On March 15, 2021, the Tribunal decided not to conduct an inquiry into the complaint because CTS Defence had not yet received a denial of relief from PWGSC, and the complaint was therefore premature.[13]

[17] On March 24, 2021, PWGSC responded to CTS Defence by way of letter, whereby it indicated that it was maintaining its original determination. This letter contained certain reasons in support of its decision and information relating to recourse mechanisms available to suppliers.[14]

[18] On March 29, 2021, CTS Defence filed the present complaint.[15]

[19] On April 6, 2021, the Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*,[16] having found that PWGSC's letter dated March 24, 2021, constituted a denial of relief.

[20] On May 5, 2021, Air Tindi Ltd. (Air Tindi), the successful bidder, was granted leave to intervene after the Tribunal gave due consideration to the relevant factors.[17] However, Air Tindi filed no submissions in the context of the present complaint.

POSITION OF THE PARTIES

CTS Defence

[21] CTS Defence takes issue with the inclusion of M57 in the RFP. CTS Defence argues that M57, as interpreted by PWGSC, is unfair and arbitrary. CTS Defence submits that PWGSC's interpretation of M57 ignores common industry standards in Canada. CTS Defence also contends that the manner in which M57 has been interpreted by PWGSC does not align with the way similar requirements have recently been interpreted.

[22] In light of the above, CTS Defence takes issue with the evaluation of its bid. Specifically, CTS Defence challenges PWGSC's finding that its bid is non-compliant. CTS Defence argues that

---

11 *Ibid.* at 111-114.
12 *Ibid.* at 115.
13 *CTS Defence Inc.* (19 March 2021), PR-2020-094 (CITT).
14 Exhibit PR-2020-102-01 at 278.
15 Exhibit PR-2020-102-01.
16 R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
17 Exhibit PR-2020-102-11.

their AOC and AMO certifications should be considered as being "with" CTS Defence, "as they are, insofar as is common industry standard in Canada."

[23] Lastly, CTS Defence alleges that the amendment to the RFP in order to incorporate M57 was unfair, as potential bidders were not given sufficient time to respond.

PWGSC

[24] PWGSC argues that the inclusion of M57 in the RFP was justified and not arbitrary. It is PWGSC's contention that M57 was included in the procurement in order to ensure that the bidder could actually provide all required services without relying on certifications held by a third party. PWGSC takes the position that the language of M57 is clear and unambiguous.

[25] PWGSC further submits that CTS Defence's grounds of complaint relating to the addition of M57 as a mandatory requirement are untimely. In PWGSC's view, CTS Defence should have lodged a complaint within 10 days of the publication of Amendment 003.

[26] PWGSC also contends that CTS Defence did not comply with M57. Lastly, PWGSC submits that CTS Defence had ample opportunity to amend or revise its bid in order to ensure that it was compliant with the terms of M57.

ANALYSIS

[27] 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.

[28] Section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[18] specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements.

[29] In view of this framework, the Tribunal will examine the grounds of complaint raised by CTS Defence, namely the following:

1) whether the addition of M57 was unfair or arbitrary;

2) whether the evaluation of CTS Defence's bid was reasonable; and

3) whether the addition of M57 was unfair because it did not provide sufficient time for suppliers to respond.

[30] In addition, as indicated above, PWGSC also contends that CTS Defence's ground of complaint relating to whether M57 is unfair or arbitrary is untimely. The Tribunal will therefore also examine this issue.

---

18 SOR/93-602 [*Regulations*].

1) Was the addition of M57 unfair or arbitrary?

[31] It is well established that a government institution is entitled to require that its procured services be of the highest possible standards, provided, however, that the conditions are justified by legitimate operational requirements.[19] Similarly, Article 509 of the Canadian Free Trade Agreement provides that government institutions must not prepare, adopt, or apply any technical specification with the purpose or effect of creating unnecessary obstacles to trade.

[32] As noted above, CTS Defence argues that the addition of M57 was unfair and arbitrary in that it apparently prevented companies who did not hold their own AOC and AMO from bidding, contrary to common industry practice.

[33] PWGSC argues that M57 was introduced in order to ensure that the bidder had all of the necessary certifications to perform the services envisaged by the procurement. PWGSC's position is based on the following matter of principle: "government institutions cannot rely on a bidder's undertaking to provide certain services if the bidder's ability to do so depends entirely on a third party who is not a party to the contractual relationship with the government institution." Of note, PWGSC takes the position that had CTS Defence bid as a joint venture, it would have been compliant with M57.

[34] In response to PWGSC's submissions, CTS Defence argues that it is compliant with M57 as it is an incorporated partnership. In particular, CTS Defence submits the following:

> An incorporated partnership has significantly greater liability and exposure to the partners than within a JV (joint venture) construct. This is the precise reason why the government would have greater recourse for non-compliance matters when dealing with an incorporated partnership than with a JV.[20]

[35] PWGSC also argues that CTS Defence's ground of complaint relating to the addition of M57 as a mandatory requirement is untimely, as it should have been raised within 10 working days of the publication of Amendment 003.

---

[19] *2484726 Ontario Inc. d.b.a. Brion Raffoul* (4 March 2021), PR-2020-064 (CITT) at para 38; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at para. 62. The Tribunal has also held that legitimate operational requirements must be reasonable, i.e. not impossible to meet. See, for example, *Horizon Maritime Services Ltd. / Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 at para. 77; *Springcrest Inc.* (21 November 2016), PR-2016-021 (CITT) at para 53.

[20] Exhibit PR-2021-102-015 at 5. The Tribunal notes that CTS Defence is a company incorporated under the *Canada Business Corporations Act* on January 5, 2021. See <https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=12621207&V_TOKEN=null&crpNm=cts%20defence&crpNmbr=&bsNmbr=>. A court may accept without the requirement of proof facts that are either "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy." 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. The Tribunal considers that this information falls within the latter category.

Did CTS Defence raise this ground of complaint in a timely manner?

[36] Pursuant to subsection 6(1) of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.

[37] When a ground of complaint concerns the terms of a solicitation, the Tribunal has previously held that, without evidence to the contrary, bidders are generally considered to have obtained a copy of the solicitation on the date of publication.[21]

[38] Similarly, the Tribunal considers that where the complaint concerns an amendment to the terms of a solicitation, bidders are generally considered to have obtained a copy of the amendment on the date of its publication.[22]

[39] Amendment 003, which introduced M57, was issued on January 7, 2021. The Tribunal therefore considers that the basis of the complaint became known or reasonably should have become known to CTS Defence on January 7, 2021.

[40] Amendment 005 was issued on January 13, 2021, further to questions from potential bidders relating to the application of M57.[23]

[41] Therefore, in order to meet the prescribed time limits, CTS Defence would have been required to file this ground of complaint with the Tribunal or object to the government institution within 10 working days of January 7, 2021, i.e. by January 21, 2021. Accordingly, to the extent that CTS Defence's ground of complaint relates to the addition of M57 as a mandatory technical criterion, the Tribunal finds that it is time-barred.

[42] Even if the Tribunal were to take the most generous approach and consider that CTS Defence became aware of the basis of the grounds of complaint when Amendment 005 was issued, it still did not file its complaint within the time limits of section 6 of the *Regulations.* Indeed, the timeline to file a complaint under that timeline would have been 10 working days after January 13, 2021 (i.e. January 27, 2021).

[43] In its comments to the GIR, CTS Defence notes that there was a consistent negative tone and lack of clarity in PWGSC's communications, as well as a refusal to be transparent, and apparent confusion within PWGSC concerning the requirements of this solicitation. CTS Defence therefore states that it was "impossible to feel certain" about how PWGSC would interpret its own requirement. As a result, CTS Defence made certain statements in its bid to encourage post-bid discussions if required.

[44] Even assuming that it were established that PWGSC in fact engaged in this conduct, this fact alone would be insufficient to discharge CTS Defence from its obligation to remain vigilant

---

21 *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) at para. 16. See also *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at para. 23; *Temprano and Young Architects Inc.* (26 February 2019), PR-2018-036 (CITT) at para. 23.

22 *1075773 Ontario Inc. (ctc TrainCanada) (Re)* (23 July 2007), PR-2007-026 (CITT).

23 Exhibit PR-2020-102-01 at 107, 108.

throughout the procurement process and to react as soon as it becomes aware, or should have become aware, of any aspect of the procurement process that it may consider flawed. A supplier cannot adopt a wait-and-see approach and challenge procurement requirements only once the procurement process is complete and it finds itself dissatisfied with the results.[24]

[45] Having found that this ground of complaint is time-barred, the Tribunal will not address the parties' arguments regarding whether M57 was unfair or arbitrary. However, the Tribunal is of the view that it was not unreasonable for PWGSC to require that either the bidder hold the AOC and the AMO or that there be some sort of contractual relationship between the bidder and the holder of the AMO, to ensure a direct contractual liability between itself and the bidder relating to these mandatory certifications.

2) Was PWGSC's evaluation of CTS Defence's bid reasonable?

[46] Tribunal jurisprudence has established that when considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness.[25] Specifically, the Tribunal will only substitute its judgment for that of the evaluators when they have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair manner.[26] The Tribunal has also held that an evaluation will be considered to be reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.[27]

[47] It is also settled in law that procuring entities must evaluate a bid's conformity with mandatory requirements thoroughly and strictly.[28]

<u>Was PWGSC's interpretation of M57 reasonable?</u>

[48] CTS Defence argues that the interpretation adopted by PWGSC, which is that M57 required both the AMO and the AOC to be in the name of the bidder, is inconsistent with industry norms and with other RFPs with similar requirements. CTS Defence further argues that PWGSC's interpretation is inconsistent with wording of M57, because M57 employs the word "company" whereas a joint venture is not a company.[29]

---

24 *Temprano and Young Architects Inc. v. National Capital Commission* (26 February 2019), PR-2018-036 (CITT) at paras. 21, 22; *IBM Canada v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 at paras. 20 and 28.

25 *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (2 January 2019), PR-2018-023 (CITT) at para. 45. This principle is affirmed in *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26 at para 70.

26 See, for example, *Samson & Associates v. Department of Public Works and Government Services* (13 April 2015), PR-2014-050 (CITT) at para. 35; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33.

27 *Ibid*.

28 *Falcon Environmental Inc.* (11 January 2021) PR-2020-034 (CITT) [*Falcon Environmental*] at para. 63; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

29 Exhibit PR-2020-102-15 at 7.

[49] PWGSC contends that the language of M57 was clear and unambiguous. PWGSC takes the position that M57, in particular the language "be with this same company", required that the AOC and AMO certifications relied upon by a bidder must be actually held by the bidder; in other words, in the name of the bidding entity. PWGSC further notes that the RFP explicitly allowed joint ventures to bid, and that this did not create an inconsistency with M57.

[50] In its reply to the GIR, CTS Defence argued that it did not complain about M57 at the time of publication because it felt that the wording of M57 was clear, and based on its understanding of it, it felt that it was compliant. However, in light of PWGSC's evaluation of its bid, CTS Defence claims that the wording of M57 is ambiguous.

[51] The Tribunal notes that it is not entirely clear whether this ground of CTS Defence's complaint relates to a lack of clarity in the wording of M57 itself, or to the evaluators' interpretation of M57.

[52] To the extent that CTS Defence's complaint relates to a lack of clarity in M57 itself, the Tribunal has held that where the ambiguity is apparent on the face of the tender documents, bidders have the obligation to seek clarification of what is being required or otherwise file an objection or a complaint in a timely manner.[30]

[53] In the Tribunal's view, M57 was ambiguous, and this should have been readily apparent when read in conjunction with the rest of the RFP. A review of the terms of the RFP reveals several clauses and provisions impacted by Amendment 003 that apparently contradicted the terms of M57.

[54] On January 13, 2021, PWGSC introduced Amendment 005 to respond to questions from prospective bidders, who had pointed out an apparent contradiction between M57 and Section 7.1.1 of the Statement of Work.[31]

[55] Therefore, it was apparent to bidders prior to January 13, 2021 (which is only six days after Amendment 003 was published) that M57 potentially contradicted the other terms of the RFP.

[56] The Tribunal further notes that, despite this amendment, certain sections of the RFP still use language that apparently contradicts the terms of M57.

[57] Specifically, certain resulting contract clauses still refer to the possibility that the contractor and aircraft operator could be separate organizations and that the aircraft operator could hold the AOC and AMO. For example, Section 7.1.2 of the resulting contract clauses provides as follows:

> Activities cannot commence until the *Contractor and aircraft operator* are in possession of a valid TAO issued by the DND/CAF Technical Airworthiness Authority (TAA) and Operational Airworthiness Authority (OAA). […] In making that assessment, the DND/CAF will give credit if the Contractor and/or *aircraft operator* meets at least one of the following conditions:
>
> a. Be a Canadian company and hold a valid Air Operator Certificate (AOC) issued by TCCA Civil Aviation (TCCA) under CARs Part VII.

---

30 *Ibid.*

31 Exhibit PR-2020-102-01 at 108.

b. Be a Canadian company and be a TCCA Approved Maintenance Organization (AMO), *or have arrangements with an appropriate AMO for the maintenance of the aircraft being provided*.[32]

[Emphasis added]

[58] Lastly, the Tribunal notes that M57 did not use common defined terms readily available to PWGSC. For instance, the Tribunal notes that other mandatory technical criteria refer to the bidding entity as the "Contractor",[33] whereas M57 uses the terms "Bidder" and "this same company that is bidding." Regardless of this inconsistent drafting, the Tribunal interprets both of these terms to mean "Bidder" or "Contractor".

[59] The Tribunal therefore finds that M57 was ambiguous and that the ambiguity was apparent on the face of the RFP. To the extent that CTS's Defence's complaint relates to the lack of clarity in the wording of M57 itself, the Tribunal finds that CTS Defence should therefore have sought clarification, objected or filed a complaint with the Tribunal within 10 working days of the publication of Amendment 003 on January 7, 2021.

[60] However, the Tribunal will also examine whether the evaluators adopted a reasonable interpretation of M57 in evaluating CTS Defence's bid, as any ground of complaint regarding the evaluation would only have become apparent to CTS Defence after it received its regret letter.

[61] Tribunal jurisprudence establishes that solicitation documents are interpreted according to the rules of contract interpretation.[34] As such, the terms of solicitation documents are interpreted according to their ordinary meaning within the context in which they are used.[35] Further, as the Supreme Court confirmed in *Tercon Contractor*, "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."[36]

[62] Therefore, in the present case, the Tribunal must interpret the expression "be with this same company" within the context of the RFP.

---

32 Exhibit PR-2020-102- 12A at 45. See also Section 7.1.10 of the resulting contract clauses, Exhibit PR-2020-102-12A at 47.

33 See M53 to M55, which form part of the Section titled "Mandatory Contractor" and use the term "Contractor". For example, M53 reads, in relevant part, as follows: "*Contractor* must have minimum 2-years of experience" [Emphasis added]. See Exhibit PR-2020-102-06A at 13.

34 *Kileel Developments Ltd. v. Department of Public Works and Government Services* (4 April 2019), PR-2018-042 (CITT) at para. 60, aff'd *Kileel Developments Ltd. v. Canada (Attorney General)*, 2020 FCA 163. See also *StenoTran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (15 April 2016), PR-2015-043 (CITT) at para. 39; *Microsoft Canada Co., Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation v. Department of Public Works and Government Services* (12 March 2010), PR-2009-056 (CITT) at para. 50; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA); *Ready John Inc. v. Canada (Public Works and Government Services)*, 2004 FCA 222 (CanLII) at para. 35; *Bergevin v. Canada (International Development Agency)*, 2009 FCA 18 (CanLII) at paras. 17-22.

35 *Ibid.*

36 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII) at paras. 64-65.

[63] Firstly, in the Tribunal's opinion, the terms of the RFP expressly permitted bidders to bid as joint ventures. Notably, Section 5.1.1.2 of Attachment 3 to Part 3 (Bid Certification) requires that the bidder identify whether it is bidding as a joint venture.[37] In addition, the provisions of the 2003 (2020-05-28), Standard Instructions - Goods or Services - Competitive Requirements (Standard Instructions) were incorporated by reference into the RFP. The Standard Instructions specifically define "bidder" as the "person or entity (or, in the case of a *joint venture*, the persons or entities) submitting a bid to perform a contract for goods, services or both" [emphasis added].[38]

[64] Section 5.1.1.2. of Attachment 3 to Part 3 was not amended further to the introduction of M57. As indicated above, the words of one provision must not be read in isolation but should be considered in harmony with the rest of the RFP. Should M57 be interpreted to mean that joint ventures are not permitted, as is advanced by CTS Defence, Section 5.1.1.2 of Attachment 3 to Part 3 would be rendered meaningless. A harmonious reading of the RFP therefore supports PWGSC's interpretation that the "company" referred to in M57 can include a joint venture.

[65] Further, it is unclear to the Tribunal whether CTS believed that joint ventures were permitted during the procurement process. In its bid, CTS Defence notes that it "became concerned that the JV construct may no longer be the preference of Canada" and that it received expert advice pursuant to which its current structure was the "surest way" to meet M57.[39] Again, to the extent that it was unclear to CTS Defence whether or not M57 precluded it from bidding as joint venture, it was incumbent upon it to seek clarification with the procuring entity during the procurement process.

[66] The same interpretative approach must be adopted in assessing whether it was reasonable for PWGSC to interpret M57 as requiring that the AOC and AMO certifications be in the name of the bidder. A review of the terms of the solicitation reveals that Mandatory Criterion 54 (M54) also requires that the AMO must be held by the bidding entity (or contractor). M54 reads as follows:

> M54 Contractor is an accredited TC AMO per Subpart 73 of CAR; 7.1.2 A,B[40]

[67] This criterion makes reference to Section 7.1.2 of the resulting contract clauses, which is set out above. An ordinary reading of M54 read in conjunction with Section 7.1.2 makes clear that a bidder can satisfy the AMO requirement if it has *arrangements* with an appropriate AMO.

[68] The Tribunal notes that the interpretation of M57 advanced by PWGSC would render subparagraph (b) of Section 7.1.2 meaningless. Such an interpretation would therefore be inconsistent with a harmonious reading of the RFP and the ordinary meaning of the words that are used in the RFP.

[69] The Tribunal also notes that the checklists included in the RFP contain language that suggests that the AMO and AOC can be held by separate organizations. For example, the "TAA Audit Checklist for TAO Organization" checklist, at ID 1, reads as follows: "Is the company an acceptable organization (Air Operator *and/or* Maintenance)"[41] [emphasis added].

---

[37] Exhibit PR-2020-102-06A at 18.
[38] Exhibit PR-2020-102-12A at 123.
[39] Exhibit PR-2020-102-01 at 179.
[40] Exhibit PR-2020-102-06A at 13.
[41] Exhibit PR-2020-102-06A at 71. In addition, the "AIA Checklist for Initial Verification and Audit" contains various references to the "Air Operator"; see PR-2020-102-06A at 57.

[70] As such, in the Tribunal's opinion, a harmonious reading of the terms of the RFP reveals that an AMO can "be with" the bidder for the purposes of M57 provided that the bidder can demonstrate that it has arrangements with an appropriate AMO. The Tribunal considers that the term "arrangement" refers to contractual arrangements. As such, PWGSC's interpretation of M57 in respect to the requirement for an AMO was not reasonable.

[71] However, in respect of the AOC, the Tribunal notes that subparagraph (a) of Section 7.1.2 does not contain any reference to an arrangement. Rather, Section 7.1.2 provides that the company must *hold* an AOC.

[72] Further, in the Tribunal's opinion, Amendment 003 read together with Amendment 005 makes clear that the RFP will no longer permit the AOC to be held by a third party (i.e. a party that is not the bidder).

[73] The Tribunal therefore finds that PWGSC's interpretation of M57 in respect of the AOC is reasonable.

[74] The Tribunal understands that CTS Defence takes the position that because it is common industry practice for companies to hold the relevant certifications in a similar corporate structure than that of CTS Defence, "with this same company" should be interpreted more broadly to mean that the certifications can be held by affiliates of the bidder. In other words, CTS Defence argues that M57 should be interpreted in light of industry norms.

[75] The Tribunal notes that CTS Defence has not adduced any evidence in support of its assertions. The Tribunal nonetheless notes that, even if CTS Defence had adduced evidence in support of its assertions, this argument cannot succeed. Such an interpretation is not supported by the terms of the RFP, taking into consideration the principles of contract interpretation set out above.

[76] In sum, the Tribunal finds that M57 cannot be reasonably interpreted to mean that both the AMO and AOC must be held in the name of the bidder. More specifically, the Tribunal finds that PWGSC unreasonably interpreted M57 to exclude the possibility that the AMO be satisfied if the bidder demonstrates that a valid contractual arrangement exists between the bidder and the holder of the AMO. The Tribunal, however, finds that PWGSC's interpretation of M57 in respect of the AOC is reasonable having regard to the criteria of the RFP, read harmoniously in their entirety.

Was PWGSC's application of M57 reasonable?

[77] M57 required a *demonstration* that the related AOC and AMO certification(s) "are with this same company that is bidding."

[78] It is uncontested that CTS Defence itself is the bidder.[42] The Tribunal must therefore consider whether PWGSC's evaluation of CTS Defence's bid was reasonable in light of what the Tribunal has found to be a reasonable interpretation of M57 as set out above.

[79] PWGSC argues that CTS Defence's bid contained no information that could have permitted the evaluators to conclude that the AMO or AOC were "with this same company that is bidding" for

---

42 Exhibit PR-2020-102-15 at 8.

the purposes of M57. The Tribunal understands that the crux of PWGSC's arguments is that the AMO and AOC were not in the name of the bidder. According to PWGSC, this fact alone was sufficient to ascertain that CTS Defence's bid was non-compliant.

[80] The Tribunal finds that this is not a reasonable application of M57. The Tribunal has found that M57 cannot be reasonably interpreted to mean that the AMO requirement can only be satisfied if the AMO is in the name of the bidder.

[81] Therefore, contrary to PWGSC's allegations, the Tribunal finds that a demonstration of the contractual relationships between the bidder and the holder of the AMO would have been relevant in assessing whether CTS Defence complied with M57.

[82] CTS Defence alleges that it explained, very plainly, how the AOC and AMO certifications were held within its company in its bid.

[83] A review of CTS Defence's bid reveals that it did indicate that CTS Defence is jointly owned by three corporations: Canada Training Solutions Inc., Business Aviation Services and Take Flight Group. The bid also indicated that Take Flight Group owns both Air Partners Corp., which holds the AOC CTS Defence intended to use, and Aircraftworks Ltd., which holds the AMO that it intended to use.[43]

[84] CTS Defence's bid also included AOC and AMO certifications appended to the bid, which indicated that those certifications were held by Air Partners Corp. and Aircraftworks Ltd., respectively.[44]

[85] The Tribunal finds that CTS Defence's bid contained no demonstration as to how the AOC certification was held by the bidder, CTS Defence. A third party holding the AOC certification (even if it is an affiliated party) is not equivalent to the requirement that the bidder must hold the certification.

[86] The Tribunal also finds that CTS Defence's bid contained no demonstration or otherwise any assertion relating to the contractual relationship between CTS Defence and Aircraftworks Ltd., the holder of the AMO. The Tribunal is of the opinion that evidence of a contractual relationship was necessary to comply with the requirements of M54 and M57 as it related to the AMO. A third party holding the AMO certification (even if it is an affiliated party) is not equivalent to the requirement that the bidder must hold or have an "arrangement" with the holder of the certification.

[87] The Tribunal therefore finds that CTS Defence did not discharge its onus to demonstrate how its bid met M57.

[88] CTS Defence also questions why no post-submission clarifications were sought by PWGSC. CTS Defence notes that clarifications and minor amendments are routinely sought from bidders in the post-submission/evaluation period.

[89] Tribunal jurisprudence establishes that "[w]hile, in limited circumstances, evaluators are permitted to seek the clarification or verification of information contained in proposals, they are

---

43 Exhibit PR-2020-102-01 at 137.

44 Exhibit PR-2020-102-001 at 234-257.

generally required to make decisions on the basis of what is contained in the proposals before them."[45] In this vein, it is settled law that bidders must take care to ensure that any and all supporting documentation in their bids clearly demonstrates compliance.[46]

[90] It was thus incumbent on CTS Defence to provide sufficient information in its bid to *demonstrate* that the AOC and AMO were with CTS Defence. PWGSC cannot be faulted for not having engaged with CTS Defence during the evaluation process to seek clarification of the information contained in CTS Defence's bid.

[91] In sum, the Tribunal finds that CTS Defence's bid was reasonably evaluated as non-compliant.

3) Was the addition of M57 unfair because it did not provide sufficient time for suppliers to respond?

[92] Article 511 of the CFTA requires that procuring entities provide a reasonable period of time for suppliers to prepare and submit responsive tenders.[47] Article 510 of the CFTA similarly provides that if a procuring entity modifies the evaluation criteria or the requirements set out in the tender documentation, the procuring entity shall extend, if appropriate, the final date for the submissions of tenders to allow adequate time for suppliers to modify and resubmit amended tenders.[48]

[93] In its complaint, CTS Defence argues that the addition of M57 provided insufficient time for companies to submit responsive tenders. CTS Defence argues that potential bidders were given approximately two weeks to respond to M57, with no rationale given for the change and with no details concerning how this item would be interpreted.

[94] In its comments on the GIR, CTS Defence notes that it did not anticipate that PWGSC would have accepted a joint venture structure. CTS Defence recognizes that reorganizing as a joint venture could have been done in less than 24 hours and with "nil and negligible" expense.[49]

---

45 *Falcon Environmental* at para. 65, citing *Re Complaint Filed by Southern California Safety Institute, Inc.* (22 December 2003), PR-2003-047 (CITT) at 7.

46 *Falcon Environmental* at para. 64; *Valcom Consulting Group Inc.* (14 June 2017), PR-2016-056 (CITT) at para. 54.

47 Article 510.2 of the CFTA reads as follows:

> Prior to the final date for the submission of tenders, if a procuring entity modifies the evaluation criteria or the requirements set out in the tender documentation, or amends or reissues a tender notice or the tender documentation, the procuring entity shall:
> (a) publish the modifications or amended or re-issued tender notice or tender documentation on the tendering website or system used by the procuring entity; and
> (b) extend, if appropriate, the final date for the submission of tenders to allow adequate time for suppliers to modify and resubmit amended tenders.

48 Article 511 of the CFTA provides as follows:

> A procuring entity shall, consistent with its own reasonable needs, provide a reasonable period of time for suppliers to prepare and submit responsive tenders, taking into account factors such as:
> (a) the nature and complexity of the procurement;
> (b) the extent of subcontracting anticipated; and
> (c) the time necessary for transmitting tender documentation by non-electronic means.

49 Exhibit PR-2020-102-15 at 2.

[95] As stated above, the Tribunal has found that the wording of M57 did not prelude companies from bidding as joint ventures.

[96] Having so found, the Tribunal is of the view that M57 provided sufficient time for bidders to respond. Accordingly, the Tribunal finds that PWGSC did not breach Articles 510 or 511 of the CFTA.

DETERMINATION

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

COSTS

[98] Each party requested that the Tribunal award it costs.

[99] The Tribunal generally awards costs to the successful party, in keeping with the *Procurement Costs Guideline*. The Tribunal nonetheless has broad discretion to award costs under section 30.16 of the *CITT Act*.

[100] In determining whether costs should be awarded to the successful party in this case, the Tribunal considers that, although it concluded that the complaint was not valid for the reasons given above, the Tribunal disagrees with PWGSC's argument that M57 was unambiguous. The Tribunal encourages PWGSC to engage in greater care when drafting and amending the provisions of solicitation documents. This includes providing rationales for amendments and, where necessary, details concerning how amendments are to be interpreted.

[101] As a practical matter, the Tribunal understands that the defects in the drafting of the solicitation documents contributed to CTS Defence's decision to file its complaint. As such, had M57 been clearly drafted, CTS Defence may not have decided to file a complaint.

[102] Further, had the grounds of complaint regarding the addition of M57 been timely, the Tribunal would have examined this allegation and found that while M57 was not unfair or arbitrary as alleged by CTS Defence, it was at the very least unclear and caused confusion among bidders. Therefore, irrespective of the outcome of this complaint, the Tribunal finds that the defects in the drafting of the RFP were material.

[103] The Tribunal therefore exercises its discretion as a court of record to decide that each party will bear its own costs in these proceedings.

Cheryl Beckett
Cheryl Beckett
Presiding Member