



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-023

Marine International Dragage
(M.I.D.) Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, December 23, 2020*

*Reasons issued
Thursday, January 7, 2021*

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IN THE MATTER OF a complaint filed by Marine International Dragage (M.I.D.) 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

MARINE INTERNATIONAL DRAGAGE (M.I.D.) 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 (CITT Act)*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and 30.15(3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Marine International Dragage (M.I.D.) Inc. (hereinafter M.I.D.) be compensated by the Department of Public Works and Government Services (PWGSC) for its lost profits as a result of not being awarded the contract.

Calculation of the amount of profits shall be based on the price indicated in M.I.D.'s proposal. The Tribunal recommends that M.I.D. and PWGSC negotiate the amount of compensation for lost profits and report back to the Tribunal on the results of the negotiations within 45 days of the date of this determination. Should the parties be unable to agree on the amount of compensation for lost profits, M.I.D. shall file with the Tribunal, within 60 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of M.I.D.'s submission to file a response. M.I.D. will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal simultaneously.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards M.I.D. its reasonable costs incurred in preparing and submitting 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 1 and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Georges Bujold

Georges Bujold
Presiding Member

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

Tribunal Panel:	Georges Bujold, Presiding Member
Support Staff:	Martin Goyette, Counsel
Complainant:	Marine International Dragage (M.I.D.) Inc.
Government Institution:	Department of Public Works and Government Services
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STATEMENT OF REASONS

SUMMARY OF COMPLAINT

[1] This complaint was filed by Marine International Dragage Inc. (M.I.D.) on August 8, 2020, and was completed on August 10, 2020, following a request by the Tribunal for M.I.D. to provide further information and documentation in order for the complaint to be considered as having been filed.

[2] The complaint concerns an invitation to tender (ITT) (Solicitation No. EE517-210222/A) issued by the Department of Public Works and Government Services (PWGSC) for the removal of concrete structures (primarily blocks) located at the bottom of the Richelieu River in Lacolle, Quebec.

[3] M.I.D. claims that the contract award process was marred by a conflict of interest, as the contract was awarded to the company that had prepared the plans and specifications for the work to be carried out. M.I.D. therefore maintains that this company was privy to privileged information concerning the work. M.I.D. further points out that the winning bidder's business registration number was no longer valid which, in its view, constitutes another deficiency that calls into question the integrity of the tendering process and the awarding of the contract.

[4] As a primary remedy, M.I.D. is requesting that the contract be awarded to it. In addition, M.I.D. is seeking financial compensation equivalent to its loss of opportunity and lost profits. M.I.D. is also seeking reasonable compensation for costs incurred in preparing its complaint.

[5] The Tribunal agreed to inquire into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*¹ and pursuant to the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

[6] The Tribunal conducted its inquiry into the merits of the complaint in accordance with sections 30.14 and 30.15 of the *CITT Act*. For the reasons that follow, the Tribunal finds that the complaint is valid.

[7] This is the second complaint filed by M.I.D. with regard to this procurement. M.I.D. had previously filed a complaint on July 28, 2020, concerning the procurement in question which raised essentially the same allegations. At the time of the filing of the first complaint with the Tribunal, PWGSC had yet to reply to the objection submitted by M.I.D. PWGSC had not yet denied relief to the complainant. For this reason, on July 30, 2020, the Tribunal had decided not to conduct an inquiry into the complaint based on the ground that it was premature.³

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

² SOR/93-602 [*Regulations*].

³ The Tribunal's decision was issued on August 4, 2020; *Marine International Dragage (M.I.D.) Inc.* (4 August 2020), PR-2020-020 (CITT).

PROCUREMENT PROCESS

[8] The ITT was issued on June 15, 2020, with a closing date of July 2, 2020. The information sheet for the ITT that appears on Buyandsell.gc.ca indicates that this procurement is subject to the provisions of the Canadian Free Trade Agreement.⁴

[9] The ITT included technical specifications describing the work to be carried out. Appendix A of these technical specifications contains a technical underwater-inspection report prepared by MVC Océan Inc. (hereinafter MVC). The report essentially lists the concrete structures to be removed, giving their dimensions and describing their condition as well as the nature and quality of the surrounding riverbed. Some of the information contained therein is redacted and was therefore omitted from the ITT documentation.

[10] On June 17 and 18, 2020, two amendments to the ITT were issued. These contain PWGSC's responses to three questions asked by the bidders. Questions 1 and 2 inquired whether the firm having performed the inspection was allowed to submit a bid for the removal of the concrete structures.

[11] PWGSC replied to the first question as follows:

Since all inspection results were made public, Canada was not considering prohibiting the firm that conducted the inspection from bidding. Note that Canada may revise this position under the terms of clause GI17 (2012-07-16) Conflict of Interest – Unfair Advantage of the solicitation.⁵

[12] The second question, posed by M.I.D. on July 17, 2020, asked PWGSC whether the firm having performed the inspections would be allowed to bid on the project, which could represent a conflict of interest for the other contractors. PWGSC responded to this question by referring to its response to the first question, without confirming whether MVC would be allowed to submit a bid.⁶

[13] M.I.D. submitted its bid in response to the ITT on July 1, 2020.

[14] On July 7, 2020, PWGSC provided M.I.D. with the “unofficial results” [translation] of the ITT, namely a list of the bids received, along with the amount of each bid. The list indicated that MVC's bid was the second lowest bid and that M.I.D.'s bid was third lowest.

[15] On July 17, 2020, M.I.D. sent an email to PWGSC inquiring as to whether the procurement had been awarded. PWGSC responded on the morning of July 20, 2020, that the contract had not been awarded yet. According to the public notice posted on the Buyandsell.gc.ca website that same day, the contract had been awarded to 9031-3560 Québec Inc., whose corporate name is MVC Océan.⁷ The evidence entered into the record by PWGSC shows that the contract was awarded to MVC after PWGSC had authorized the supplier having submitted the lowest bid to withdraw it, due to the fact that it was deemed to be vitiated by a material error.⁸ As a result, MVC became the lowest compliant bidder.

⁴ 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].

⁵ Amendment 001 to the ITT, Exhibit PR-2020-023-01 at 31.

⁶ Amendment 002 to the ITT, Exhibit PR-2020-023-01 at 33.

⁷ Exhibit PR-2020-023-01 at 290.

⁸ Exhibit PR-2020-023-11 at 46-53.

[16] The complainant asserts that it learned of the awarding of the contract when it consulted Buyandsell.gc.ca.⁹ Later, on August 27, 2020, it sent two emails to PWGSC. In the first of these emails, the complainant noted that the business registration number 9031-3560 Québec Inc. “had been removed” [translation] from the business register of Québec. It further alleged that MVC was in conflict of interest as it had prepared the ITT. M.I.D. further noted that technical specifications accompanying the ITT contained redacted sections and that when it requested access to this information, it was told that it was the costs estimated by MVC Océan. In its email, the complainant also noted that the impropriety of allowing MVC Océan to participate as a bidder was stressed in the questions directed to PWGSC during the procurement process. The complainant added that the use of a name that had been removed from the register demonstrated a significant degree of collusion between PWGSC and MVC. The complainant concluded by indicating that it was challenging the validity of the contract award and that it would be filing a complaint with the appropriate organizations.

[17] In a second email sent to PWGSC that same day, M.I.D. requested that the contract awarded to 9031-3560 Québec Inc./MVC be cancelled and awarded to M.I.D. instead, given that, based on the information that had previously been provided to PWGSC, M.I.D. was of the view that its bid had now become the lowest compliant bid.

[18] On July 28, 2020, PWGSC responded to M.I.D. by email that, as had been indicated in the question/answer 1 published in the amendments to the ITT, given that all inspection results were made public, PWGSC had not prohibited the firm that conducted the inspection from bidding. PWGSC added that with respect to the name appearing in the award notice, a verification was underway to establish whether an update to the information associated with the business number was required. PWGSC also notified M.I.D. of the recourse mechanisms that were available to it.

PROCEDURAL HISTORY

[19] As noted above, M.I.D. filed a first complaint with the Tribunal on July 28, 2020, a complaint that the Tribunal dismissed as premature. The Tribunal’s decision did not prevent M.I.D. from filing a subsequent complaint within 10 working days after the day on which it received a denial of relief from PWGSC, should such a denial be provided.

[20] On August 6, 2020, M.I.D. filed the present complaint with the Tribunal. However, the complaint failed to meet the requirements of subsection 30.11(2) of the *CITT Act*, and additional information and documentation were required before it could be considered filed. On August 7, 2020, in accordance with subsection 30.12(2), the Tribunal asked the complainant to provide the necessary information and documentation for the complaint to comply with the requirements of subsection 30.11(2). The complainant filed the documents and provided the additional information requested on August 10, 2020.¹⁰

⁹ In its complaint, M.I.D. states that it became aware of the contract award on July 27, 2020, through Buyandsell.gc.ca. However, in its GIR, M.I.D. states that it became aware of the contract award on July 21, 2020. Exhibit PR-2020-023-01 at 11; Exhibit PR-2020-023-15 at 9.

¹⁰ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499) provides that in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint is considered filed “. . . on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.”

[21] On September 4, 2020, PWGSC requested a four-day extension, until September 18, 2020, to file its Government Institution Report (GIR). On September 9, 2020, the Tribunal granted the requested extension and indicated that, accordingly, it would be rendering its findings and recommendations within 135 days of the filing of the complaint, in accordance with paragraph 12(c) of the *Regulations*.

[22] PWGSC filed its GIR on September 18, 2020. M.I.D. submitted its comments on the GIR on October 2, 2020, after having requested, and obtained, a short extension to do so.

[23] On October 9, 2020, PWGSC sent the Tribunal a reply to the complainant's comments on the GIR and requested the Tribunal's permission to enter its reply into the record. That same day, M.I.D. sought clarifications with respect to PWGSC's right of reply. The Tribunal indicated that it had agreed to enter the reply into the record and would assess the admissibility of the various issues raised in the reply in its analysis of the complaint.

[24] On October 13, 2020, M.I.D. requested leave to submit its comments in response to the reply filed by PWGSC and sent those comments to the Tribunal. On October 16, 2020, the Tribunal wrote to M.I.D., informing it that the Tribunal agreed to enter its response into the record and that it would determine the admissibility of the documents filed by the parties after the comments on the GIR as part of its analysis of the matter.

[25] Ultimately, the Tribunal determined that its review of the documents in question would cause no prejudice to the parties and that it was in the interests of justice that the additional submissions filed by the parties on October 9 and 13, 2020, be taken into consideration in its analysis of the complaint.

PARTIES' POSITIONS

[26] In its complaint, M.I.D. essentially criticizes PWGSC for having allowed the winning bidder, MVC, to submit a bid when it had inspected the concrete structures to be removed and prepared a report under a previous contract. In M.I.D.'s view, MVC was in a conflict of interest and, for that reason, PWGSC should have rejected MVC's bid. In that regard, M.I.D. alleges that, having been involved in the preparation of the bid, MVC had been privy to privileged information, which included detailed knowledge of the features of the riverbed, and had probably even developed a budget when designing the plans and specifications. Based on these facts, M.I.D. was of the view that the process had not been fair and equitable.

[27] Moreover, M.I.D. alleges that the business number to which the contract was awarded (9031-3560 Québec Inc.) has not been valid since 2001.

[28] In its GIR, PWGSC asks the Tribunal to dismiss M.I.D.'s allegations as being without merit. PWGSC argues that there is no conflict of interest in this case. PWGSC notes that the ITT includes a clause (clause GI17) providing that Canada may reject a potential supplier's bid in cases where there is a conflict of interest, where the potential supplier has been involved in the preparation of the bid solicitation, or where it has an unfair advantage. In the circumstances, PWGSC concluded that MVC was not in a conflict of interest and that it did not benefit from an unfair advantage based on its fulfillment of the earlier contract. Moreover, PWGSC alleges that MVC was not involved in the preparation of the bid solicitation. Thus, it would have been unjust to deprive MVC of the right to bid. PWGSC further argues that M.I.D.'s complaint is time-barred.

[29] As for the ground of complaint regarding MVC's business number, PWGSC asserts that the fact that PWGSC's procurement system is in need of updating with respect to a supplier's numerical designation has nothing to do with collusion, as alleged by M.I.D. Moreover, MVC's valid corporate name was indicated in the award notice and PWGSC never concealed the name of the firm that was awarded the contract.

[30] M.I.D. responded to PWGSC's arguments by challenging PWGSC's assertion that the complaint was time-barred. Furthermore, M.I.D. reiterated its position that MVC was in a conflict of interest when it submitted its bid and that it had an unfair advantage in knowing, during the inspection it conducted in the fall of 2019, that another invitation to tender to carry out the work would be issued. M.I.D. alleged that MVC had benefitted from an unfair advantage over the other bidders given the non-disclosure of certain information, including the video recordings of the underwater inspection and the recommendations contained in its inspection report regarding the costs and method of removal, to which the other suppliers did not have access, because PWGSC had redacted certain parts of MVC's report included in the ITT and had chosen not to provide the video recordings produced by MVC to the other bidders. According to M.I.D., the Tribunal should determine that clause GI17 ought to have been applied and PWGSC ought to have prohibited MVC from bidding on the ITT.

[31] M.I.D. adds that PWGSC is responsible for verifying and ensuring bid compliance as well as the validity of the bidders' corporate names in order to avoid any confusion that may create a violation of integrity and nullification of declarations submitted during the filing of bids. The corporate name 9031-3560 Québec Inc. has not been valid since November 15, 2001. MVC could therefore not bid under that corporate name.

ANALYSIS

Ground of complaint with respect to MVC's involvement in tendering process

[32] The Tribunal will begin by considering the primary ground of the complaint raised by M.I.D., arising from the fact that PWGSC allowed MVC to submit a bid in response to the ITT.

Was the complaint filed within the time limit?

[33] Subsection 6(1) of the *Regulations* provides that a potential supplier who files a complaint must do so "not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Subsection 6(2) provides that a potential supplier may also choose to make an objection to the relevant government institution within 10 working days after the day on which the basis of its objection became known or reasonably should have become known. In such cases, the potential supplier may then file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief by that government institution.

[34] PWGSC contends that M.I.D.'s complaint is time-barred. PWGSC asserts that the complainant and the other potential suppliers were notified on June 17, 2020, of PWGSC's decision not to reject MVC's bid on the basis of the earlier contract it had obtained, as is clear in the responses provided in amendments 001 and 002 to the ITT.

[35] PWGSC's argument refers to amendments 001 and 002, wherein PWGSC replied to the questions of potential suppliers as to the possibility of MVC submitting a bid. Question 1 contained in amendment 001 and the reply of the government institution read as follows:

Q1. Is the firm that conducted the inspection allowed to bid for the removal?

R1. Given that all inspection results were made public, Canada was not considering prohibiting the firm that conducted the inspection from bidding. Note that Canada may revise this position under the terms of clause GI17 (2012-07-16) Conflict of Interest – Unfair Advantage of the solicitation.

[36] PWGSC refers to that same question in its reply to question 2, which had been asked by M.I.D. PWGSC's reply is found in amendment 002 to the ITT:

Q2. Can the firm that carried out the inspections bid on the project? This could represent a conflict of interest for the other contractors.

R2. Please see question #1 (Q1) of amendment 001.

[37] PWGSC's reply – in which the imperfect tense is used and there is an indication that PWGSC could reconsider its position – cannot be taken to be its final position vis-à-vis the complainant. The Tribunal does not read PWGSC's reply as a definitive answer allowing MVC to submit a bid. On the contrary, this reply suggests that PWGSC's position on the matter could change. At the time, it was therefore reasonable for M.I.D. to believe that the firm that conducted the inspection might not be allowed to bid or that a potential bid on its part could be rejected at a later date in application of clause GI17. Put another way, there remained some doubt as to the involvement of MVC in the tendering process in issue, such that the Tribunal cannot conclude that M.I.D. should have reasonably known the basis of its complaint as early as June 17, 2020.

[38] PWGSC further argues that even if one were to consider the closing date of the bids as being the time M.I.D. found out that no changes would be made to the bid solicitation and that MVC would continue to be allowed to submit a bid, M.I.D.'s complaint would still be time-barred given that the time limit for making an objection or filing a complaint with the Tribunal would have therefore been on July 16, 2020, namely 10 working days after July 2, 2020, whereas M.I.D. made its objection to PWGSC on July 27, 2020.

[39] The Tribunal finds that M.I.D. could not have inferred solely from the closing date of the bids that PWGSC had not and would not revise its position as to the possibility of MVC of submitting a bid. Indeed, at that particular time, M.I.D. could certainly not have known whether MVC was going to submit a bid or not. Furthermore, even if one were to hypothesize that in the absence of an additional amendment to the ITT, M.I.D. should have presumed, based on the closing date of the bids, that MVC had not been excluded from the tendering process, the fact remains that it could still not have known at the time whether a bid from MVC would have been accepted by PWGSC. In fact, clause GI17 provides that PWGSC "may" reject a bid where there exists a conflict of interest or an unfair advantage and that Canada has sole authority to determine whether such a situation exists. In the eyes of a potential supplier such as M.I.D., it was therefore rational to think that it was still possible that a potential bid by MVC would be rejected, despite the closing of the bids.

[40] Given the terms of this clause, the Tribunal is of the view that M.I.D. was still unable to conclude, on July 2, 2020, from the mere fact that no amendment to the ITT had been made, that

PWGSC had allowed the firm that conducted the inspection to bid or that its bid would be found to be admissible. Accordingly, it would be inappropriate to consider that the closing date of the bids constituted the date on which M.I.D. became aware of or should have reasonably become aware of the basis of its complaint in the circumstances.

[41] Moreover, the evidence shows that M.I.D. was notified, on July 7, 2020, of the “unofficial results” of the tendering process. Those “results” indicated that MVC had submitted a bid, and that it was the second lowest. PWGSC’s email communicating those unofficial “results” indicated that “[t]he official results will be available on buyandsell.gc.ca after the evaluation of the bids.” The Tribunal does not find that M.I.D. ought to have concluded from this list of bids received – which PWGSC had itself described the results as “unofficial” [translation] – that PWGSC had definitively decided to accept MVC’s bid. This is especially true given that the list presented MVC’s bid as being the second lowest, which rendered it improbable, from M.I.D.’s perspective and based on the information it possessed at the time, that the contract would be awarded to MVC. Viewed from this angle, M.I.D. could logically infer that, despite its concerns about MVC’s involvement in the process, a potential decision not to reject MVC’s proposal would not cause it prejudice. In any event, it would have been premature to file a complaint based on results that were clearly not definitive or official.¹¹

[42] M.I.D. acted diligently in contacting PWGSC on July 17, 2020, to inquire as to whether the contract had already been awarded. M.I.D. received a negative answer from PWGSC on the very day on which the contract was awarded to MVC. M.I.D. maintains that it learned of the awarding of the contract following the publication of a notice on buyandsell.gc.ca. M.I.D. made an objection, requesting that the contract awarded to MVC be cancelled and that it be awarded to M.I.D. on July 27, 2020.

[43] In short, given the non-definitive response provided by PWGSC to the suppliers’ questions as to whether PWGSC would allow MVC to bid on the ITT and given the fact that the results communicated on July 7, 2020, were preliminary and, in fact, consisted of a list of bids submitted, the Tribunal finds that M.I.D. became aware of the basis of its objection and complaint, that is to say of PWGSC’s definitive decision not to reject MVC’s bid, at the time it learned about the awarding of the contract to MVC, therefore, at the earliest, on July 21, 2020, the date of publication of the notice.¹² M.I.D.’s objection was therefore made within the time limits set out in subsection 6(2) of the *Regulations*, and M.I.D. filed its second complaint with the Tribunal within 10 days of the PWGSC’s denial of relief in response to its objection. Accordingly, contrary to PWGSC’s allegations, M.I.D.’s complaint was not time-barred.

Did the tendering process favour MVC?

[44] Articles 502(1) and 503(5)(g) of the CFTA provide that all procurement must be open and non-discriminatory – which implies that potential suppliers would bid on an equal basis – and

¹¹ In *TPG Technology Consulting Ltd. v. Canada (Public Works and Government Services)*, 2007 FCA 291 at paras. 40, 41, the Federal Court of Appeal stressed how important it is for the Government Institution to issue an official communication to indicate the starting point of the limitation period.

¹² As indicated above, M.I.D. states in its complaint that it became aware of the contract award on July 27, 2020, through Buyandsell.gc.ca. However, in its GIR, M.I.D. states that it became aware of the contract award on July 21, 2020. These discrepancies have no impact on the M.I.D.’s timeliness. Exhibit PR-2020-023-01 at 11; Exhibit PR-2020-023-15 at 9.

prohibit the provision of information to one supplier so as to give that supplier an advantage over other suppliers:

Article 502: General Principles

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

...

Article 503: General Procurement Rules

...

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; and

[45] The Tribunal recognized that a procurement process is not necessarily discriminatory where a supplier, including an incumbent, has a certain business advantage that gives it a competitive edge with respect to a procurement.¹³ However, the Tribunal has also recognized that a breach of the trade agreements will occur when procuring entities use solicitation documents to create or compound an unfair advantage to an incumbent. For example, where, as a result of the terms of solicitation documents, an incumbent had access to information directly relevant to the procurement process that was not available to other bidders.¹⁴

[46] Moreover, as PWGSC pointed out, the general conditions contained in clause GI17 (2012-07-16) Conflict of interest / Unfair advantage, which were incorporated by reference into the ITT, provide that:

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

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

¹³ See, in particular, *CAE Inc. v. Department of Public Works and Government Services* (7 September 2004), PR-2004-008 (CITT) at para. 43; *723186 Alberta Ltd.* (12 September 2011), PR-2011-028) at para. 21.

¹⁴ See, for example, *Alcohol Countermeasure Systems Corp. v. Royal Canadian Mounted Police* (24 April 2014), PR-2013-041 (CITT) at paras. 44-49.

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

[47] The Tribunal has in the past pointed out, in relation to a similar clause, that while the usage of the word “may” appears to confer a discretion upon PWGSC as to whether or not to reject bids in respect of which a conflict of interest or unfair advantage has been found to exist, there is an obligation at common law, on the part of a procuring entity, to consider whether such a conflict or unfair advantage exists and to act accordingly.¹⁵ Thus, the Tribunal found that such a clause serves to reaffirm PWGSC’s right to consider fundamental principles of fairness in rejecting a bid in such cases, and that PWGSC has a responsibility to preserve the integrity of the procurement system by rejecting the proposal of any bidder who is in a conflict of interest or who has an unfair advantage.

[48] In short, the provisions of the CFTA and clause GI17 raise questions as to whether MVC participated in the preparation of the ITT, and whether PWGSC acted in a discriminatory manner towards certain suppliers or conferred an unfair advantage upon MVC, in particular by providing it with information that was not communicated to other suppliers.

[49] In this case, the answers to these questions are closely intertwined. On the basis of the evidence, the Tribunal finds that various aspects of the procurement system resulted in MVC gaining an unfair competitive advantage, that is to say, an advantage beyond any natural competitive advantage it may have already had, in addition to providing it with access to information to which the other suppliers did not have. These findings are sufficient to conclude that the competitive procurement process failed to comply with the provisions of the CFTA.

[50] PWGSC explains that in March 2019, it concluded a procurement arrangement with five firms, including MVC, aimed at providing inspection services of various marine structures.¹⁶ As part of that arrangement, PWGSC retained the services of MVC in October 2019 under a contract for the underwater inspection of concrete structures located at the bottom of the Richelieu River in the Lacolle area. On January 9, 2020, MVC submitted its final technical report to PWGSC following its underwater inspection. A redacted version of this report was later added to the technical specification in the ITT.

[51] PWGSC maintains that MVC was not involved in the preparation of the bid solicitation within the meaning of clause GI17. PWGSC indicated that the tendering documents were entirely designed and prepared by PWGSC based on relevant sections of a sample specification. PWGSC adds that MVC’s report was only one element among the technical information provided to bidders, which also included technical specifications, a location plan, a table showing the details of the structures, as well as the typical details of the blocks, all provided by PWGSC, as well as a bathymetric survey prepared by the Canadian Hydrographic Service. PWGSC argues that the mere fact that the inspection report resulting from a previous contract with MVC was attached to the bid

¹⁵ *Bluedrop Performance Learning Inc. v. Department of Public Works and Government Services* (25 September 2008), PR-2008-017 (CITT) at para. 15, citing *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1995] 2 F.C. 132. See also *Cougar Aviation Ltd. v. Canada (Department of Public Works and Government Services)*, 2000 CanLII 16572 (FCA).

¹⁶ Exhibit PR-2020-023-11 at 19.

solicitation does not make it a participant in the “preparation of the bid solicitation” within the meaning of clause GI17.

[52] PWGSC further alleges that it was not aware at the time the underwater inspection was carried out by MVC whether Transport Canada, for whom the inspection of the concrete structures was performed, would potentially issue an invitation to tender to proceed with the removal of the concrete structures. PWGSC adds that there was no communication between PWGSC and MVC regarding a potential invitation to tender for the removal of the structures during the time when MVC was in the process of completing its inspection report or when MVC’s final report was submitted.

[53] The Tribunal finds that, while it did not go so far as to prepare the technical specifications for the bid solicitation, MVC’s involvement allowed PWGSC to precisely identify the scope of its need, describe the work to be carried out by the contractor and potentially helped PWGSC establish its budget for the work to be completed.

[54] Moreover, the procurement arrangement concluded with MVC provided that:

If appropriate, the Department may need to define the most effective and cost-efficient means of acting to correct problems detected by the inspections. The supplier that conducts the inspection must provide all the information needed to enable the Department to clearly define the problems and the means to correct them. *Often, inspection results will serve as a basis to prepare plans and specifications*, impose load or usage restrictions, or assess bearing capacity and residual life. The accuracy and level of detail of information provided must allow this to be properly done.¹⁷

[Emphasis added]

[55] As for the specific contract for the inspection of the concrete structures located at the bottom of the Richelieu River,¹⁸ it called for MVC to, among other things, conduct a visual examination and detailed survey of the blocks, and to draft a “detailed technical report” [translation]. MVC was to include in that report all of the results of the observations made during the inspection accompanied by explanatory notes. The report was also to include “recommendations on the best method for the removal of the structures and all necessary information” [translation]. The contract provided that the report would be “annotated by the Departmental Representative and any corrections or additional explanations will have to be taken into consideration in the production of the final report” [translation].¹⁹

[56] These elements paint the picture of a situation in which the procuring entity, PWGSC, solicited the support of a private firm in order to design technical specifications which would be used in the issuing of the bid solicitation. Furthermore, the report prepared by MVC constituted a key and important – even essential – part of the ITT. The technical specifications attached to the ITT contained, aside from the report prepared by MVC, brief descriptions of the work to be carried out as well as generic instructions on health and safety, protection of the environment, payment, etc. Nevertheless, it was the report prepared by MVC that unequivocally established the details of the work to be carried out.

¹⁷ Exhibit PR-2020-023-11 at 28.

¹⁸ *Ibid.* at 38.

¹⁹ *Ibid.* at 40-41.

[57] However, the Tribunal does not find it necessary for it to rule on the issue of whether MVC was involved in the preparation of the bid solicitation within the meaning of paragraph 1(a) of clause GI17, in such a way that the fact that PWGSC allowed MVC to submit a bid breached this component of clause in the circumstances of the case.²⁰ This is because the Tribunal is of the view that, whatever the answer to this question, the access to the procurement failed to comply with the principle of non-discrimination, and MVC benefitted from an unfair advantage as a result of the underwater inspection it conducted coupled with the fact that PWGSC made use of some of the information that had been gathered by MVC and included in its inspection report.

[58] In the Tribunal's view, these procedural defects are sufficient to conclude that PWGSC breached the relevant provisions of the CFTA in this case. Indeed, it is clear from the evidence that MVC had access to highly relevant information that directly concerned the procurement process to which the other bidders, including M.I.D., did not have access. Moreover, the Tribunal is of the view that PWGSC's decision not to disclose all of MVC's findings and recommendations following the inspection unfairly compounded the inherent competitive advantage that it enjoyed as a result of its prior involvement as a consultant.

[59] In this regard, the Tribunal notes that MVC's report indicates that it had produced video recordings during its inspections of the concrete structures in the Richelieu River and that the video recordings of all of the structures inspected were available and were electronically appended to its report.²¹ PWGSC indicated that it had decided not to make the video recordings available to the bidders due to the purported poor visibility in those videos which was attributable to the large quantity of sediments that were stirred up in the water. PWGSC adds that if M.I.D. or another bidder had felt the need to obtain a copy of the video recordings, PWGSC would have gladly provided it to them.

[60] The Tribunal cannot make a determination as to the quality of the video recordings but it notes that the report points out that "[t]he videos are very useful for visualizing the condition of the structures, the riverbed, and especially to confirm the irregular shapes of the structures" [translation].²² This statement is in line with M.I.D.'s submissions, namely, that the potential suppliers had the necessary expertise and competencies to adequately assimilate the information in the video recordings produced MVC. It also contradicts PWGSC's conclusion, set out in its GIR that the videos would be of no use to the potential suppliers. Furthermore, the Tribunal does not find, as PWGSC does, that M.I.D. can be faulted for not having requested access to the video recordings for the purposes of the preparing its bid. It was PWGSC's responsibility, in order to respect the core principles of non-discrimination and transparency in the procurement process, to disclose those video recordings with the tendering documents or to make them available and clearly notify all of the potential suppliers of that availability.

²⁰ In keeping with the principle of judicial economy, the Tribunal will therefore not make a determination on the issue of whether the fact that TPSGC allowed MVC to submit a bid may, in itself, be viewed as a breach of paragraph 1(a) of general clause GI17, and therefore as a contravention of the terms of the ITT, and as such, a violation of section 515(5) of the CFTA.

²¹ Exhibit PR-2020-023-01 at 116, 121.

²² *Ibid.* at 121.

[61] Furthermore, as noted above, the version of MVC's report, included as an attachment to the ITT, contained information that was redacted, namely the description of the staff that participated in the underwater inspection and MVC's recommendations. Those recommendations included a proposal for a work method for the removal of the concrete structures, a timeline for the work, as well as an assessment of the removal costs.²³

[62] PWGSC states that it had asked MVC to draw up recommendations in its technical inspection report so that Transport Canada, the ultimate beneficiary of the report, would have the most complete information on the condition of the structures as well as the logistics and estimate of the costs associated with their removal. As in its recommendations, MVC proposed a method of work, a timeline, as well as an assessment of anticipated costs. PWGSC maintains that it redacted this portion of the report to avoid proposing a non-approved method to the bidders and to leave them free reign in proposing the method of removal that they felt was most suitable.

[63] The Tribunal finds that the information that was redacted from the report helped contribute to the creation of an inappropriate distinction between MVC and the other potential suppliers by conferring an advantage upon MVC. The information contained in MVC's report as to the method of removal, timeline, and removal costs, was relevant to potential suppliers as it would have likely allowed them (as it did MVC) to estimate more easily their costs for carrying out the required work. Furthermore, this information would have enabled the other bidders to gain knowledge of the work plans already proposed by MVC when it was acting in its capacity as a consultant. Given that MVC had this information based on the contract it had previously been awarded, and that the information was redacted from the version of its report appended to the ITT, MVC found itself with an advantage over the other potential suppliers. Added to these advantages is the fact that it was the only potential supplier that was able to visit the site.²⁴

[64] MVC therefore found itself in a privileged position to prepare a bid in response to the ITT, having access to information that the other suppliers did not have access to. In such circumstances, PWGSC had an obligation to either exclude MVC from the tendering process or to make sure it took measures that would place all of the potential suppliers on an equal footing, which it did not do.

[65] Having decided to allow MVC to participate in the tendering process, it was up to PWGSC not to continue – or worse, compound – the lack of equal opportunity given to potential suppliers. Rather, PWGSC had to ensure that every potential supplier had a fair shot at the procurement. At a minimum, the Tribunal would have expected PWGSC to have made available the entire report prepared by MVC to all of the potential suppliers, even if this perhaps entailed the addition of a note indicating that the supplier was free to propose a method for removing the concrete blocks different from the one proposed by MVC. The Tribunal would also have expected PWGSC to have provided access to the video recordings produced by MVC. These measures could have allowed the various suppliers to engage in a fair competition to bid on the ITT.

[66] Rather than conducting itself this way, PWGSC left MVC in an unfairly privileged position when it failed to disclose all of the information gathered by MVC in the course of its performance of the underwater inspection contract, including the video recordings and the recommendations

²³ Exhibit PR-2020-023-11 at 9.

²⁴ Yet, the invitation specified that there would be no on-site visits. MVC did in fact get this opportunity, unlike the other bidders, which gave it an advantage that PWGSC did not mitigate when it neglected to disclose the video recordings of the seabed produced by MVC.

provided by MVC as to the method of removal, estimation of costs and the likely timeline for the completion of the work. That information would have made it easier for the other bidders to estimate the costs of the project, determine the best method for removing the blocks and thus submit a more competitive bid. All things considered, the fact that MVC had access to all of that information provided it with an unfair advantage over the other suppliers.

[67] For the foregoing reasons, the Tribunal finds that PWGSC completed a procurement process in a manner that resulted in discrimination between potential suppliers, contrary to section 502.1 of the CFTA. Furthermore, the facts in this case are analogous to a situation wherein PWGSC would provide information to a potential supplier in such a manner as to confer on that supplier an advantage over other suppliers, which is contrary to section 503.5(g) of the CFTA.

[68] Moreover, the fact that PWGSC allowed MVC to submit a bid when it had access to information related to the bid solicitation which was not available to the other suppliers constitutes a breach of paragraph 1(b) of clause GI17, and therefore a contravention of the terms of the ITT, and as such, a violation of section 515(5) of the CFTA. This provision reads as follows:

Article 515: Treatment of Tenders and Award of Contracts

...

Evaluation and Award of Contract

...

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

[69] In short, section 515(5) imposes an obligation on procuring entities to award contracts in accordance with the conditions set out in the tender documentation. In this case, in light of the jurisprudence of the Tribunal, paragraph 1(b) of clause GI17 imposed on PWGSC the obligation to preserve the integrity of the procurement system by rejecting MVC's proposal given that it had access to information related to the ITT that was not available to other bidders and that this situation gave or, at the very least, appeared to give the bidder an unfair advantage.

[70] The Tribunal therefore finds that the complaint is valid.

Ground of complaint regarding corporate name of successful bidder

[71] The Tribunal has already found that the manner in which PWGSC acted during the procurement process in issue – and the subsequent awarding of contract to MVC – was tainted by procedural defects such that it resulted in a breach of the provisions of the CFTA. As such, there is no need for it to make a determination on the merits of the second ground raised by M.I.D., which concerned the name of the successful bidder. The Tribunal nonetheless notes that in support of that

ground of complaint, the complainant highlighted an excerpt from the Quebec business register which appears to show that MVC was previously known by the corporate name 9031-3560 Québec Inc. but that this corporate name was withdrawn in 2001.²⁵ M.I.D. did not explain which provisions of the trade agreements may have been breached by the reference to a business number which was no longer valid. There does not appear to the Tribunal to be any clear breach of any trade agreement based on that sole anomaly, especially given the fact that the award notice of the contract indicated both that the contract was awarded to 9031-3560 Québec Inc., and that its business name was MVC Océan. In the Tribunal's view, equating this error or confusion with an alleged collusion is in no way supported by the evidence submitted by M.I.D. and, as a consequence, this allegation is entirely without merit.

REMEDY

[72] Having found that the complaint is valid, the Tribunal must now consider the matter of a remedy. M.I.D. is asking that the contract awarded to MVC be cancelled and awarded to it instead. Alternatively, M.I.D. is seeking compensation for loss of opportunity and profits, in addition to costs incurred in preparing and submitting of its complaint.

[73] Subsection 30.15(3) of the *CITT Act* provides that, when determining the appropriate remedy, the Tribunal must take into account all of the factors relevant to the procurement. Particular consideration must be given to the seriousness of any deficiency found on the procurement process, the degree to which the complainant or other interested parties were prejudiced; the degree to which the integrity and efficiency of the procurement system was prejudiced; whether the parties acted in good faith; and the extent to which the contract was performed.

[74] In this case, the deficiencies found were relatively serious and prejudiced the integrity of the procurement system, given that they relate to fundamental principles on which the procurement system rests upon, namely, the principles of non-discrimination and transparency. Breaches of these principles resulted in one bidder being favoured over the complainant and all of the other potential suppliers. That said, there is no evidence in the record to suggest that PWGSC acted in bad faith.

[75] Finally, given that the contract awarded to MVC was completed, the Tribunal cannot order its cancellation and it obviously cannot recommend that it be awarded to M.I.D. as requested.

[76] In light of the circumstances of this inquiry, the payment of compensation is the most appropriate remedy. As for the amount of compensation, given the circumstances of this matter, the Tribunal considers it appropriate that PWGSC compensate M.I.D. for its lost profits as a result of not being awarded the contract. In this regard, it is apparent from the evidence that M.I.D. would have submitted the lowest compliant bid had PWGSC rejected MVC's bid. Furthermore, it is not ruled out that it would have been able to submit a lower-priced bid if it had been given access to all of the information that was available to MVC and that was not disclosed by PWGSC.

[77] Consequently, after having taken into account the conditions set out in subsection 30.15(3) of the *CITT Act*, the Tribunal recommends that M.I.D. be compensated by PWGSC in recognition of its lost profits as a result of not being awarded the contract.

²⁵ Exhibit PR-2020-023-15 at 72.

COSTS

[78] Pursuant to section 30.16 of the *CITT Act*, the Tribunal also awards M.I.D. its reasonable costs incurred in preparing and submitting its complaint, which costs are to be paid by PWGSC.

[79] In accordance with the *Procurement Costs Guideline (Guideline)*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1. The complaint was directed at a single service, and the inquiry was extended to 135 days following a request for a time-limit extension to file the GIR but it was not otherwise too complicated, no public hearing was held, and there were no interveners. Moreover, the issues were relatively confined to the question of conflict of interest and any unfair advantage that may have been conferred upon MVC. Accordingly, the Tribunal's preliminary indication of the amount of the cost award is \$1,150.

[80] Should either of the parties disagree with the preliminary determination of the level of complexity or with the amount of compensation, they are entitled to file submissions with the Tribunal, in accordance with section 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the compensation.

DETERMINATION

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

[82] Pursuant to subsections 30.15(2) and 30.15(3) of the *CITT Act*, the Tribunal recommends, as a remedy, that M.I.D. be compensated by PWGSC for its lost profits as a result of not being awarded the contract.

[83] Calculation of the amount of profits shall be based on the price indicated in M.I.D.'s proposal. The Tribunal recommends that M.I.D. and PWGSC negotiate the amount of compensation for lost profits and report back to the Tribunal on the results of the negotiations within 45 days of the date of this determination. Should the parties be unable to agree on the amount of compensation for lost profits, M.I.D. shall file with the Tribunal, within 60 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of M.I.D.'s submission to file a response. M.I.D. will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal simultaneously.

[84] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards M.I.D. its reasonable costs incurred in preparing and submitting its complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1 and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Georges Bujold
Georges Bujold
Presiding Member