



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2021-023 and
PR-2021-028

Rampart International Corporation

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, November 10, 2021*

*Reasons issued
Tuesday, November 30, 2021*

TABLE OF CONTENTS

DETERMINATION.....	i
STATEMENT OF REASONS	1
SUMMARY OF COMPLAINTS	1
PROCEDURAL BACKGROUND	1
POSITIONS OF THE PARTIES	4
Rampart.....	4
PWGSC.....	5
Interveners.....	6
PRELIMINARY MATTERS	7
Rampart’s request for the production of documents	7
Rampart’s proposed expert witnesses and request for an oral hearing.....	13
PWGSC’s claims regarding Rampart’s status as a potential supplier	14
PWGSC’s request that the Tribunal disregard a portion of Rampart’s comments on the GIR	15
ANALYSIS.....	16
Legitimate operational requirements.....	16
Use of design or descriptive characteristics in the technical specifications	23
Ambiguity in the RFP	25
Division of the procurement to avoid trade agreement obligations	26
Improper communications with SIG Sauer’s distributor	26
REMEDY.....	27
COSTS.....	28
DETERMINATION	29
APPENDIX 1: EXERPTS FROM THE CFTA.....	30
APPENDIX 2 : PROVISIONS OF THE RFP AT ISSUE	34

IN THE MATTER OF two complaints filed by Rampart International Corporation 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 each of those complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a decision to combine both complaints and conduct a single inquiry.

BETWEEN

RAMPART INTERNATIONAL CORPORATION

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 complaints are valid in part.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services (PWGSC) cancel Solicitation No. W8476-216392/B and issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should PWGSC choose to require or refer to a particular design or type, it shall include words such as “or equivalent” in the tender documentation, as required by the applicable trade agreements.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Rampart International Corporation its reasonable costs incurred in preparing and proceeding with its complaints, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline*, the Tribunal’s preliminary indication of the level of complexity for these complaints is Level 3, and its preliminary indication of the amount of the cost award is \$4,700. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the cost award is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal’s statement of reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

The interveners, MD Charlton Company Ltd. and Stoeger Canada (1990) Ltd., shall each bear their own costs.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

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

Tribunal Panel: Randolph W. Heggart, Presiding Member

Tribunal Secretariat Staff: Kalyn Eadie, Counsel
Emilie Audy, Counsel
Jessye Kilburn, Counsel
Stephanie Blondeau, Senior Registrar Officer
Morgan Oda, Registrar Officer

Complainant: Rampart International Corporation

Counsel for the Complainant: Gerry Stobo
Marc McLaren-Caux
Andrew Paterson
Alexander Hobbs
Jan M. Nitoslawski

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Peter J. Osborne
Zachary Rosen
Veronica Tsou

Intervener: MD Charlton Company Ltd.

Counsel for the Intervener: R. Benjamin Mills
Greg Landry

Intervener: Stoeger Canada (1990) Ltd.

Counsel for the Intervener: Nicholas C. Tibollo
Frances Tibollo

Please address all communications to:

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

STATEMENT OF REASONS

SUMMARY OF COMPLAINTS

[1] Rampart International Corp. (Rampart) filed two complaints (File Nos. PR-2021-023 and PR-2021-028), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ concerning a Request for Proposal (RFP) (Solicitation No. W8476-216392/B) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for a replacement pistol and holster system for the Canadian Armed Forces (CAF).

[2] Rampart alleged that some of the RFP's technical specifications and requirements breach the provisions of the *Canadian Free Trade Agreement*,² as they do not serve any legitimate operational requirement, but rather favour a specific pistol design produced by SIG Sauer and Beretta.

[3] As a remedy, Rampart requested that the Tribunal direct PWGSC to amend the impugned technical specifications of the RFP.

[4] On July 6, 2021 (File No. PR-2021-023), and August 6, 2021 (File No. PR-2021-028), having determined that the complaints met the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,³ the Tribunal decided, pursuant to subsection 30.13(1) of the *CITT Act*, to conduct an inquiry into the complaints.

[5] On August 17, 2021, the Tribunal decided, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,⁴ to combine the proceedings into a single inquiry.

[6] For the reasons that follow, the Tribunal finds that the complaints are valid in part.

PROCEDURAL BACKGROUND

[7] On May 3, 2021, PWGSC issued the RFP for a replacement pistol and holster system for the CAF on Buyandsell.gc.ca.⁵ PWGSC published six amendments to the RFP.

[8] The initial closing date was August 3, 2021. PWSGC subsequently extended the RFP closing date from August 3, to October 1, 2021, via Amendment 004 to the RFP,⁶ and from October 1, to November 16, 2021, via Amendment 006 to the RFP.⁷

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

² Online: Internal Trade Secretariat: <https://www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> (entered into force 1 July 2017) [CFTA].

³ SOR/93 602 [Regulations].

⁴ SOR/91-499 [Rules].

⁵ Online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-BM-039-28208>>.

⁶ Exhibit PR-2021-023-28 at 317-318.

⁷ *Ibid.* at 329-330.

[9] On May 17, 2021, Rampart made an objection to PWGSC concerning the specifications outlined in the RFP.⁸ On May 31, 2021, Rampart followed up with PWGSC with respect to its objection.⁹

[10] On June 14, 2021, PWGSC informed Rampart that it had completed its review of the objection but requested that Rampart provide a non-confidential version of its objection so that the questions and responses could be shared on Buyandsell.gc.ca.¹⁰ The same day, PWGSC published Amendment 001 to the RFP, which provided responses to questions posed by other potential bidders regarding the terms of the RFP. While this document was not a direct response to Rampart's objection, it did address some of the same issues.¹¹

[11] On June 28, 2021, Rampart filed its first complaint (File No. PR-2021-023) with the Tribunal.

[12] On July 6, 2021, the Tribunal advised Rampart and PWGSC that the first complaint (File No. PR-2021-023) had been accepted for inquiry.

[13] On July 7, 2021, the Tribunal issued a Postponement of Award of Contract Order.¹²

[14] On July 21, 2021, PWGSC responded to Rampart's objection.

[15] On July 27, 2021, MD Charlton Company Ltd. (MDC) submitted a request to participate in the proceedings.¹³ The next day, the Tribunal granted MDC intervener status.¹⁴

[16] On July 28, 2021, Rampart filed its second complaint (File No. PR-2021-028) with the Tribunal and requested that the second complaint be joined with the first complaint.¹⁵

[17] On August 6, 2021, the Tribunal advised Rampart and PWGSC that the second complaint (File No. PR-2021-028) had been accepted for inquiry.¹⁶

[18] On August 10, 2021, Stoeger Canada (1990) Ltd. (Stoeger) submitted a request to participate in the proceedings.¹⁷ The Tribunal granted Stoeger intervener status on August 13, 2021.¹⁸

⁸ Exhibit PR-2021-023-01A (protected) at 371–386.

⁹ Exhibit PR-2021-023-01 at 400.

¹⁰ *Ibid.* at 8.

¹¹ *Ibid.* at 13. The Tribunal accepted Rampart's argument that Amendment 001, while not a direct response to its objections, constituted a denial of relief with respect to the grounds raised in the first complaint, and that Rampart's first complaint was accordingly filed in a timely manner. Alternatively, the Tribunal notes that Amendment 001 could be construed as providing Rampart with knowledge of its grounds of complaint, in which case the first complaint was also filed in a timely manner.

¹² Exhibit PR-2021-023-06.

¹³ Exhibit PR-2021-023-13.

¹⁴ Exhibit PR-2021-023-15.

¹⁵ Exhibit PR-2021-028-01 at 55.

¹⁶ Exhibit PR-2021-028-05.

¹⁷ Exhibit PR-2021-023-16.

¹⁸ Exhibit PR-2021-023-19.

[19] PWGSC twice requested an extension to the deadline to file its Government Institution Report (GIR), from August 3 to August 17, 2021,¹⁹ and from August 17 to September 7, 2021.²⁰ With the consent of the parties, the Tribunal consolidated the two complaints and extended the deadline to file the GIR.²¹ Rampart also requested, and the Tribunal granted, an extension to the deadline to file its comments on the GIR, from September 21 to September 27, 2021.²² As a result of these extensions, the deadline for the issuance of the Tribunal's determination in respect of the complaints became "within 135 days after the filing of the first complaint", in accordance with paragraph 12(c) of the Regulations.

[20] On September 7, 2021, PWGSC filed public and confidential versions of the GIR with the Tribunal.²³ On September 9, 2021, Rampart alleged that public information in the GIR had improperly been designated as confidential and requested that the Tribunal order that the GIR be revised.²⁴

[21] On September 10, 2021, PWGSC responded to Rampart's letter and subsequently filed a revised GIR on September 13.²⁵ The same day, Rampart sent a letter agreeing with PWGSC's revised confidentiality designations.²⁶

[22] Also on September 10, 2021, Rampart requested that the Tribunal issue a production order to PWGSC.²⁷ On September 15, 2021, PWGSC responded to Rampart's request for the production of documents. On September 16, 2021, Rampart replied to PWGSC's response. On September 21, 2021, after reviewing the parties' arguments, the Tribunal denied Rampart's request on the grounds that the documents were not relevant and indicated that full reasons would be provided with the Tribunal's reasons for the determination.²⁸

[23] On September 14, 2021, MDC filed its comments on the GIR.²⁹ On September 16, 2021, Stoeger indicated that it would not be filing submissions.³⁰

[24] On September 27, 2021, Rampart filed its comments on the GIR and on the intervener's submissions.³¹

[25] On October 1, 2021, PWGSC submitted an objection to Rampart's comments on the GIR³² and requested the Tribunal to disregard the 56 pages of new affidavit evidence as well as 70 pages of arguments. PWGSC further submitted a correction to paragraph 52 of the affidavit of Mr. Luke Foster,

¹⁹ Exhibit PR-2021-023-10.

²⁰ Exhibit PR-2021-023-18.

²¹ Exhibit PR-2021-023-21.

²² Exhibit PR-2021-023-46.

²³ Exhibit PR-2021-023-28; Exhibit PR-2021-023-28A (protected).

²⁴ Exhibit PR-2021-023-32; Exhibit PR-2021-023-32A (protected).

²⁵ Exhibit PR-2021-023-35.

²⁶ Exhibit PR-2021-023-37.

²⁷ Exhibit PR-2021-023-34.

²⁸ Exhibit PR-2021-023-46.

²⁹ Exhibit PR-2021-023-39.

³⁰ Exhibit PR-2021-023-44.

³¹ Exhibit PR-2021-023-47.

³² Exhibit PR-2021-023-48.

sworn on September 7, 2021, in which Mr. Foster misspoke as to when the RFP requirements were communicated to Rampart.³³

[26] On October 4, 2021, Rampart submitted a reply to PWGSC's letter objecting to its comments.³⁴

[27] On October 6, 2021, the Tribunal advised the parties that it had all the documentation necessary to make a decision on the issue, and therefore did not require any further submissions.³⁵

POSITIONS OF THE PARTIES

Rampart

[28] Rampart alleged that the procurement at issue was structured around a particular pistol design type produced by only two manufacturers, namely SIG Sauer and Beretta, rather than being developed to meet any of the CAF's legitimate operational needs. According to Rampart, the RFP's mandatory criteria therefore unreasonably excluded pistols produced by other manufacturers, including the Glock pistols that Rampart intends to bid.

[29] In its first complaint (File No. PR-2021-023), Rampart took issue with the following requirements:

- Removable serialized trigger group (serialization, Trigger Group Criteria, Design) – requirements 3.5.2, 3.5.3, 3.5.4, 3.7.1 and 9.1.1; and
- Loaded chamber indicator (LCI) – requirement 3.9.1.

[30] In its second complaint (File No. PR-2021-028), Rampart added objections to the following requirements:

- Forward Trigger Return – requirement 3.7.7;
- Striker deactivation button or other mechanism – requirement 3.9.2;
- Manually applied safety mechanism – requirement 3.9.4.

[31] The full text of these requirements is provided at Appendix 2.

[32] Rampart also alleged that PWGSC divided the CAF's requirements into separate procurements to avoid the obligations of the trade agreements – first, to acquire pistols with a removable serialized trigger group; second, to acquire some unspecified number of conversion kits to meet other unspecified pistol sizes; and third, to acquire some unspecified number of conversion kits to change the pistols to other unspecified calibres.

³³ *Ibid.* at 7.

³⁴ Exhibit PR-2021-023-49.

³⁵ Exhibit PR-2021-023-50.

[33] Rampart further alleged that, according to the Registry of Lobbyists, there were improper communications between the government institutions and MDC, who is SIG Sauer's distributor in Canada.

PWGSC

[34] PWGSC submitted that the objective in this procurement is to obtain a safe and effective personal weapon and holster system that prioritizes maintenance, customizability, and future growth potential, as the acquired pistol and holster system must remain in circulation for the next 10 years but is realistically expected to be in circulation for much longer.

[35] PWGSC submitted that the criteria with respect to the removable trigger group / modular pistol are reasonable and relate to legitimate operational requirements, particularly the maintenance of pistols and future growth of the pistol fleet. As for the LCI and the striker deactivation button or mechanism, these criteria relate to legitimate operational requirements of safety.

[36] In support of its claim that the requirements of the RFP reflect the legitimate operational requirements of the CAF, PWGSC provided detailed information regarding the development process of those requirements. According to the affidavits of Major Carl Gendron, the Project Director, and Mr. Keith Grosser, the Contracting Authority, the following steps were followed:

- In 2015-2017, individuals at DND conducted internal testing, market surveys and researched recent developments in pistol technology to ascertain what was available on the market. This included collecting data on the reliability of the existing fleet of Browning pistols; soliciting feedback from competition-level shooters regarding different pistol types; purchasing different pistols to strip and assemble; visiting trade shows and conducting site visits with manufacturers; and monitoring the U.S. Army's acquisition of a new pistol.³⁶
- Based on this research, Major Gendron's team drafted the Statement of Requirements (SOR). The first draft was completed in May 2018.³⁷
- DND requested that the Independent Review Panel for Defence Acquisition (IRPDA) conduct an abbreviated review of the SOR and draft RFP. The IRPDA does not generally review procurements that will not exceed \$100 million in expenditures; however, DND requested the review specifically due to concerns raised by industry with regard to modularity and fairness. DND officials met with the IRPDA on March 10, 2021, and the results of the review were communicated to the project team on March 18, 2021. The SOR was amended in response to the IRPDA's comments and finalized on March 25, 2021.³⁸
- In May 2019, an options analysis was completed. This analysis determined that a competitive process would be the most effective.³⁹

³⁶ Exhibit PR-2021-023-28B at 106-107.

³⁷ *Ibid.* at 107-108.

³⁸ *Ibid.* at 108-109, 123-173.

³⁹ Exhibit PR-2021-023-28 at 247, 556-562.

- To support the conclusion that there were sufficient examples of pistols in the market to support a competitive process, PWGSC required a gap analysis to be conducted on each mandatory requirement. The gap analysis was completed in December 2020.⁴⁰
- On February 26, 2021, a draft RFP was posted with a Notice of Proposed Procurement for the purpose of soliciting feedback from potential bidders.⁴¹

[37] PWGSC also provided the affidavit of Mr. Foster, who assisted Major Gendron in researching the operational requirements of the CAF in preparing the RFP. Mr. Foster is a Senior Engineering Technologist at DND who is responsible for: providing technical support to the Small Arms Capital Program; the design and implementation of technical training to the CAF weapons technicians for newly procured small arms; and all aspects of equipment management.⁴²

[38] PWGSC further submitted that there is no divided procurement. DND has made the decision to first proceed with the procurement of the modular pistols, with the potential for a future procurement down the road once its operational needs have crystallized. As for the alleged inappropriate communications between lobbyist for MDC and DND officials, PWGSC argued that Rampart's argument is a fishing expedition, as Rampart has no information as to the contents of the communications between DND and ministerial levels and lobbyists.

[39] Finally, with respect to the criteria related to the forward trigger return (requirement 3.7.7) and the manually applied safety mechanism (requirement 3.9.4), these are in the process of being amended to address Rampart's complaints.

Interveners

[40] While both MDC and Stoeger were granted intervener status, only MDC submitted comments on the GIR.

[41] MDC submitted that Rampart is trying to redefine the good that PWGSC and DND are seeking to acquire for members of the CAF, but it is not for a potential supplier to redefine the CAF's "end goal" so as to accommodate the limited functionality of that potential supplier's goods.

[42] MDC further submitted that representatives of Rampart were advised in 2016, and again in 2018, that DND wanted to procure modular pistols with a top-mounted LCI. Therefore, Rampart had ample opportunity to seek out the distribution rights so that it would be in a position to offer a modular pistol or otherwise to encourage Glock to manufacture a pistol that met such requirements. The CAF should not be prevented from leveraging the advantages that the PWGSC, DND and the CAF see in having a modular pistol to accommodate a foreign manufacturer of firearms, and the CFTA should not be used to that end.

⁴⁰ *Ibid.* at 247–248, 563–577.

⁴¹ *Ibid.* at 248.

⁴² *Ibid.* at 154.

PRELIMINARY MATTERS

Rampart's request for the production of documents

[43] On September 10, 2021, Rampart requested that the Tribunal issue a production order to PWGSC.⁴³ Rampart claimed that PWGSC had omitted relevant documents and information from the GIR and had therefore failed to comply with subsections 103(2)(c) and (e) of the Rules. In general, Rampart's production request concerned documents referred to in Major Gendron's affidavit, which details the development process for the requirements of the RFP.

[44] On September 15, 2021, PWGSC responded to Rampart's request for the production of documents. On September 16, 2021, Rampart replied to PWGSC's response. On September 21, 2021, after reviewing the parties' arguments, the Tribunal denied Rampart's request on the grounds that the documents were not relevant and indicated that full reasons would be provided with the Tribunal's reasons for the determination.⁴⁴

[45] In order for a party to obtain a production order at the Tribunal, it must demonstrate that the requested information and documents are relevant to an issue in dispute and that the request does not impose a disproportionate burden on the other parties or the Tribunal in terms of time and expense.⁴⁵ Additionally, as parties do not have a general right to discovery at the Tribunal, the request must not be a mere "fishing expedition".⁴⁶ The Tribunal will review each document or group of documents requested in turn to explain its reasons for denying the request for the production of documents.

Documents and information underpinning the SOR

[46] Rampart submitted that Major Gendron's affidavit refers to studies and other sources of information that he relied on to determine the operational requirements of this procurement, but that none of this information was disclosed, despite the fact that it is relied on by Major Gendron and PWGSC in support of the contention that the requirements of the RFP reflect the CAF's legitimate operational requirements. Rampart accordingly requested production of all the documents referred to in paragraph 14 of Major Gendron's affidavit, which are listed below.

The study on reliability referred to in paragraph 14(a) of Major Gendron's affidavit

[47] PWGSC submitted that the study is not relevant to the current proceedings as it was done to assess the reliability of the existing fleet of Browning Hi-Power pistols. Major Gendron stated in his

⁴³ Exhibit PR-2021-023-34.

⁴⁴ Exhibit PR-2021-023-46.

⁴⁵ In prior decisions, the Tribunal has stated that it is "incumbent on parties to produce any and all relevant documents necessary for the Tribunal to properly dispose of the complaint": *Stenotran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (24 July 2014), PR-2013-046 (CIIT) at para. 78; *The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency* (26 April 2018), PR-2016-041 (CIIT) [*Masha Krupp*] at para. 19. This "necessary and relevant" standard addresses the proactive disclosure obligation of parties at the commencement of an inquiry; it does not purport to limit the type of documents that parties may request be produced at a later point: *Masha Krupp* at footnote 4.

⁴⁶ *Masha Krupp* at para. 19.

affidavit that “this study supported the need to replace the fleet”.⁴⁷ PWGSC argued that the need to replace the fleet is not at issue in these proceedings.

[48] Given that this study is claimed only to support the need of replacing the existing fleet and no other claim is made regarding the study, the Tribunal is of the view the study is not relevant to the current proceedings.

The separate CAF competition shooter study referenced in paragraph 14(b) of Major Gendron’s affidavit

[49] PWGSC submitted that this study supported the requirement for striker-fired pistols and that the requirement that the pistol be striker-fired is not at issue in these proceedings. Accordingly, the underlying study has no relevance to these complaints

[50] Rampart noted that this study was said to have led to “discussions unanimously in support of a top-mounted LCI”.⁴⁸ PWGSC replied that these discussions were oral discussions had during the study, not written or documented exchanges. PWGSC confirmed that full disclosure has been made.

[51] In reply, Rampart argued that the study is relevant given that PWGSC relied on the result of this study to justify the top-mounted LCI in the GIR and the affidavit.

[52] The Tribunal notes that the requirement for striker-fired pistols is not at issue this complaint. With respect to the discussions regarding the top-mounted LCI, the Tribunal has no reason to doubt the statement of PWGSC that full disclosure has been made regarding these conversations. The Tribunal notes that Major Gendron’s affidavit states that the study “resulted in discussions” in support of the top-mounted LCI.⁴⁹ There is nothing on the record that indicates that there is any discussion of this issue in the results of the study itself.

Details and supporting documentation concerning the incident of damage described in paragraph 14(c) of Major Gendron’s affidavit

[53] Rampart noted that Major Gendron stated that this incident “contributed to DND’s desire for modular pistols” and requested details regarding the identification of the pistol model involved, the circumstances of the damage, efforts made to repair the pistol, and the analysis that supports Major Gendron’s conclusion that the damage “would have been easily repaired had it been a modular pistol.”⁵⁰

[54] PWGSC submitted that a lengthy discussion of the impact of modularity on maintenance is available at paragraphs 21 to 27 of Major Gendron’s affidavit. PWGSC stated that the same analysis applies to the pistol with a damaged grip mentioned at paragraph 14(c) of the affidavit and is independent of the brand or model of pistol. Regardless of the brand or model, if a grip is damaged, it is a serialized component on a non-modular pistol, thus the whole pistol is taken out of commission or must be disposed of. If the grip is damaged on a modular pistol, the serialized component can be taken out of the pistol and the non-serialized part (the grip) replaced.

⁴⁷ Exhibit PR-2021-023-28B at 106.

⁴⁸ *Ibid.* at 107.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

[55] The Tribunal is satisfied that the Mr. Gendron's affidavit deals with the benefits of a modular pistol in an adequate fashion. This is an anecdotal story and not part of an extensive study, therefore, no other documentation is needed.

Details of the information as well as the documentation gathered from the industry during trade shows and site visits with manufacturers and an explanation of when such documentation and information was obtained

[56] PWGSC submitted that these documents no longer exist and full disclosure has been made.

[57] While the Tribunal would encourage government institutions to ensure that all documentation that is used in establishing a procurement strategy be maintained for the duration of that exercise, the Tribunal has no reason to doubt PWGSC's response that full disclosure has been made.

Details of the information as well as the documentation gathered in respect of the U.S. Army procurement

[58] Rampart noted that Major Gendron stated that the U.S. Army's acquisition of new pistols during the 2015-2017 timeframe was "closely monitored".⁵¹

[59] PWGSC submitted that discussions surrounding the U.S. solicitation documents were held orally and that full disclosure had been made through the affidavits.

[60] The Tribunal has no reason to doubt PWGSC's response that full disclosure has been made.

The documents, information and analyses gathered and prepared by Major Gendron and his colleagues concerning the "CAF needs" as well as the May 2018 draft of the SOR

[61] Rampart noted that Major Gendron also states at paragraph 16 of his affidavit that he was heavily involved in the drafting of the SOR, "understanding CAF needs", and defining the requirements, and that this led to the drafting of a first version of the SOR in May 2018. However, Rampart submitted that there is no documentation in the GIR showing the actual operational input and feedback given by the CAF. Accordingly, Rampart argued that PWGSC should be required to produce the documents, information and analyses gathered and prepared by Major Gendron and his colleagues concerning the "CAF needs" which are described at paragraph 16 of Major Gendron's affidavit, as well as the May 2018 draft of the SOR which represented, in his words, the culmination of his research.

[62] PWGSC submitted that Rampart is not entitled to every item of correspondence, document, and comment that went into the drafting process, nor is it entitled to every iteration of the SOR. PWGSC argued that these documents are irrelevant as these intermediate steps did not inform the RFP. PWGSC claimed that what is relevant is the final SOR that was arrived at by DND, as these final requirements informed the RFP. PWGSC noted that the final SOR has already been produced.

[63] The Tribunal agrees that what is important is the final version of the SOR. While some documentation leading up to that final version could be important to determine how the final

⁵¹ *Ibid.*

statement of requirements was arrived at, the important element is being able to determine how PWGSC and DND applied themselves in arriving at that final version. The Tribunal is of the opinion that the affidavits and the attachments thereto provided by PWGSC are sufficient in that respect for the Tribunal to make a ruling on the compliance of the procurement with the applicable trade agreements.

The documentation or correspondence that was provided by the CAF that supports and quantifies the existence and extent of the need for alternative ammunition

[64] Rampart noted that PWGSC claims that modularity is essential as it allows for the flexibility to use specialized rounds of ammunition for niche employment in areas such as suppression, wildlife control, personal defence and armour piercing. Rampart argued that PWGSC should be required to disclose any documentation that supports the need for these types of specialized ammunition.

[65] PWGSC submitted that these discussions were oral discussions. PWGSC and DND confirmed that full disclosure has been made.

[66] The Tribunal has no reason to doubt PWGSC and DND's response that full disclosure has been made.

All documentation and analyses conducted on the lifecycle, maintenance and operational costs of the different pistols analyzed by DND or PWGSC, or confirmation that no such documentation exists and that no such analyses were in fact conducted

[67] Rampart submitted that PWGSC claims in the GIR and supporting affidavits that modular pistols will result in the lowest cost of total ownership and that modular pistols are cheaper to operate due to reduced maintenance supportability costs. However, no documents or analyses of any kind have been provided in the GIR to support these claims.

[68] PWGSC submitted that these analyses were conducted orally, and that full disclosure has been made. Specifically, the analyses that drove the conclusion that modular pistols result in cost savings are outlined at paragraphs 27, 32 and 35 of Major Gendron's affidavit, which read as follows:

27. Modular functionality also provides Canada with the lowest cost of total ownership. Firstly, it is much easier for Canada to stock parts to support a fleet rather than acquire new pistols (which would require project funding). Secondly, if a pistol that does not have a removeable trigger group requires repairs to the frame or slide, as in the preceding examples, the entire pistol would have to be removed from service. This is because both these components of the pistol reflect the serial number and if any of these parts require replacement the pistol must be scrapped. The fleet of pistols would decrease quickly over time with wear.

32. A third aspect of future-proofing includes being able to adapt to changes in technology, or even changes in standards. For example, the standard sniper rifle is a 7.62 calibre rifle. However, there is a trend towards ammunition like the 6.5 Creedmoor, which has a very strong possibility of changing the current standard due to the many advantages of this ammunition. A modular pistol with a removeable trigger group will allow DND to adapt to

analogous changes more quickly, and at a lower cost than acquiring a new set of pistols at a different calibre.

35. Additionally, there are cost advantages of being able to adapt to changes via a conversion kit as opposed to acquiring a new pistol. Conversion kits are seen by the CAF as spare parts, therefore can be obtained via Operations and Maintenance funding, which is made available annually to sustain a fleet of equipment or adapt to mission conditions and may be used by the life cycle manager. Using Operations and Maintenance funding is easier to access as opposed to capital funding (which is required for new pistols and far more difficult to obtain).

[69] While it does seem highly irregular that an analysis conducted on the lifecycle, maintenance and operational costs would be conducted orally with no written record, the Tribunal has no reason to doubt PWGSC and DND's response that full disclosure has been made.

The IRPDA file

[70] At paragraph 42 of the GIR, PWGSC stated that an abbreviated review of the modularity requirement was conducted by the IRPDA. This review is cited in support of PWGSC's argument that the requirement for modular pistols is a legitimate operational requirement of the CAF. Some correspondence relating to the IRPDA's review, including an email requesting changes to the SOR based on the IRPDA's review, and minutes from a meeting between DND and the IRPDA were provided as attachments to the GIR, but the IRPDA's final report or "observations" document is not on the record. Rampart accordingly requested the production of IRPDA's complete file for this procurement, including all correspondence with DND and its final report or "observations" document.

[71] PWGSC confirmed that all available correspondence between DND and the IRPDA has been produced. PWGSC further stated that it is unable to produce the IRPDA's final observations because they are classified "Secret", as DND considers them as advice to the Minister of National Defence and accordingly subject to Cabinet confidence privilege. In addition, as a result of this classification, no members of the RFP drafting team ever saw the final observations and the only information communicated to them was the information contained in the above-referenced email. PWGSC submitted that since that was the only information used that was considered in finalizing the SOR and, subsequently, the RFP, the final observations report is not relevant.

[72] The Tribunal is satisfied with the explanation put forward by PWGSC that the result communicated by email was the only feedback used in creating the final SOR, and that no other information is therefore relevant.

Communications between DND or PWGSC officials and SIG Sauer and Beretta

[73] Rampart submitted that there appears to have been significant interaction between government officials and Beretta and SIG Sauer prior to the release of the draft RFP or the finalization of the SOR, which it argued is relevant to the grounds of complaint, as it has argued that the requirements of this procurement were structured around the specific characteristics of pistols produced by those two manufacturers. Rampart accordingly requested production of the documents identified in the columns titled "Sig Sauer Comments" and "Beretta Comments" in the Gap Analysis report, which was provided as Exhibit C in Mr. Grosser's affidavit, and the timing of the provision of

these documents, as well as all correspondence between DND or PWGSC and SIG Sauer and Beretta leading up to the preparation of the Gap Analysis report.

[74] PWGSC and DND submitted that Rampart has misunderstood the contents of the Gap Analysis report, and that the columns it identified do not contain comments from SIG Sauer and Beretta about their product. They are internal comments by DND about the SIG Sauer and Beretta products. The comments in these columns are the technical authority's assessment of whether, based on publicly available information, the offerings meet the requirements of the RFP. Accordingly, there was no correspondence between DND and the manufacturers leading up to the preparation of the Gap Analysis report. PWGSC and DND confirmed that full disclosure has been made.

[75] In reply, Rampart referred to specific areas in the Gap Analysis that it states confirm that SIG Sauer and Beretta communicated with DND officials regarding their products.

[76] While the construction of this document does appear to reference communications between DND officials and various manufacturers, the Tribunal has no reason to doubt PWGSC and DND's explanation that the comments are based on the authors' assessment of publicly available information and that full disclosure has been made.

Documents and analyses related to the requirement for top-mounted LCIs

[77] Rampart requested production of all documentation and details concerning the "[s]everal in-person trials [which] were done with various pistols with LCIs located at different places" that are referred to at paragraph 67(iv) of the GIR, and which are claimed to support the top-mounted LCI requirement in the RFP, as well as any studies or information that were relied on to support the statement in Major Gendron's affidavit that a top-mounted LCI "offers greater safety for our soldiers". In addition, Rampart requested production of all documentation and analyses which support PWGSC's assertion that a top-mounted LCI in particular (as opposed to, e.g., an extractor-mounted LCI) "directly addresses" the problem of negligent discharges, as it alleged that the Annual Report of the Judge Advocate General for 2013-2014 (JAG Annual Report) concerning the frequency of negligent discharges that was attached to Mr. Foster's affidavit does not support this statement.

[78] PWGSC submitted that all discussions concerning the requirement for a top-mounted LCI were had orally and were not written or documented exchanges. PWGSC and DND confirmed that full disclosure has been made.

[79] With respect to the JAG Annual Report that was attached to Mr. Foster's affidavit, PWGSC claimed that it is cited for the proposition that negligent discharges occur in the hundreds and are a live issue for DND, therefore DND is presenting the solution of the top-mounted LCI in an effort to combat the issue. The JAG Annual Report is not cited for any information about the benefit of a top-mounted LCI.

[80] The Tribunal has no reason to doubt PWGSC and DND's response that full disclosure has been made.

All Gender-based Analysis Plus (GBA+) policy documents and analyses that were prepared for this procurement which show that the location of the LCI gives rise to differential gender-based impacts

[81] Rampart requested production of all GBA+ documents and analyses that were prepared for this procurement which show that the location of the LCI gives rise to differential gender-based impacts.

[82] PWGSC and DND submitted that how the top-mounted LCI relates to GBA+ inclusion is discussed at paragraph 22 of Mr. Foster's affidavit. It is already explained that the top-mounted LCI caters to both left and right-handed shooters. PWGSC and DND confirmed that full disclosure has been made.

[83] The Tribunal has no reason to doubt PWGSC and DND's response that full disclosure has been made.

Rampart's proposed expert witnesses and request for an oral hearing

[84] Rampart filed expert witness reports for the same two witnesses, i.e. Mr. Randy Turner and Mr. Emanuel Kapelsohn, in each complaint. Mr. Turner was a member of the CAF from 1999-2019, mainly attached to the Joint Task Force 2 (JTF 2) special operations unit in various capacities, and currently owns and operates a firearms training business.⁵² Mr. Kapelsohn is a U.S.-based defensive firearms instructor with extensive experience in training law enforcement and military personnel.⁵³ Rampart stated that the purpose of putting forward Mr. Turner's and Mr. Kapelsohn's evidence in the form of expert reports is to allow them to assist the Tribunal in understanding the technical requirements of the RFP that are at issue in this complaint and how these requirements relate (or do not relate) to the performance and functional characteristics of pistols.

[85] Rampart also indicated that Messrs. Turner and Kapelsohn were willing and able to testify in person or by videoconference, as required, in order to assist the Tribunal in gaining a better understanding of the technical issues in this case.

[86] In its GIR filed on September 7, 2021, PWGSC submitted that neither Mr. Turner nor Mr. Kapelsohn have relevant experience to speak to the requirements of the CAF and DND. In particular, PWGSC noted that though Mr. Turner served in the CAF, his experience is mainly with special operations units and not with the general forces. Mr. Kapelsohn has not served in the Canadian military.

[87] PWGSC further submitted that there was no compelling basis to justify an oral hearing, as the allegations made in the complaint do not raise any issues of credibility or complex factual issues which would necessitate an oral hearing and can ably be determined on a written record.

[88] In its reply to the GIR filed on September 27, 2021, Rampart submitted that Mr. Turner has over twenty years of experience in the CAF, sixteen of which were with the Canada's elite JTF-2, as a Special Forces Assaulter, while the other five years were as an infantry soldier in a regular force

⁵² Exhibit PR-2021-023-28 at 421-426.

⁵³ *Ibid.* at 550-554.

battalion.⁵⁴ As for Mr. Kapelsohn, the latter has forty-two years of experience providing training on small-arm tactics and weapons handling to over 17,000 individuals in various military organizations on three continents.⁵⁵ Rampart further submitted that, collectively, Mr. Turner and Mr. Kapelsohn have over sixty years of experience that is directly relevant to the issues under consideration before the Tribunal.

[89] The test for the admissibility of expert evidence was set out by the Supreme Court of Canada in *R. v. Mohan*,⁵⁶ in which the court enunciated the following four criteria to consider when assessing the admissibility of expert evidence: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any other exclusionary rule of evidence; and (4) a properly qualified expert.⁵⁷ Rampart claimed that Mr. Kapelsohn and Mr. Turner are properly qualified due to their experience with pistols detailed above and that their evidence is relevant and necessary as it touches directly on the design and descriptive characteristics of the requirements of the RFP, and it is information that is likely outside of the experience and knowledge of the Tribunal.

[90] In the present case, PWGSC does not appear to dispute that the two proposed experts are knowledgeable with respect to pistol performance and functional characteristics; its position appears to be that the two are not experts on whether the technical specifications represent the legitimate operational requirements of the CAF and DND, and therefore should not be permitted to offer their opinions regarding this issue.

[91] The Tribunal is of the view that, while Mr. Turner and Mr. Kapelsohn are undoubtedly very knowledgeable about the weapons in issue in this complaint, they are not nor have they been proposed as experts in procurement matters, including what constitutes a legitimate operational requirement. The Tribunal therefore accepts them as expert witnesses with respect to pistol performance and functional characteristics. However, any opinions offered with respect to whether the requirements of the RFP represent the CAF's legitimate operational requirements will be given little weight, especially in light of the fact that the Tribunal has the affidavit evidence of DND personnel directly responsible for identifying the CAF's legitimate operational requirements for the purposes of developing the SOR and RFP.

[92] In addition, the Tribunal determined that it was not necessary to hold an oral hearing for the purpose of questioning the experts regarding the technical aspects of the procurement.

PWGSC's claims regarding Rampart's status as a potential supplier

[93] In the GIR, PWGSC submitted that, since Rampart, by its own admission, cannot supply a pistol that meets the requirements of the RFP as they stand, Rampart should only be considered a potential supplier if all the grounds of complaint it has raised about the technical specifications are well-founded. Therefore, if the Tribunal finds that one of the technical requirements is a legitimate operational requirement, the complaints must be dismissed for lack of jurisdiction since Rampart would no longer be able to submit a responsive bid. PWGSC relied on the Federal Court of Appeal decision in *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, which it submits stands for the proposition that "if the . . . Tribunal finds after reviewing the evidence that the

⁵⁴ Exhibit PR-2021-023-47 at 65–66.

⁵⁵ *Ibid.*

⁵⁶ [1994] 2 SCR 9 [*Mohan*].

⁵⁷ *Mohan* at para. 17.

complainant was not in fact precluded from bidding by any objectionable aspect of the procurement process, the Tribunal must dismiss the complaint for want of jurisdiction.”⁵⁸

[94] Rampart submitted that PWGSC has misconstrued the caselaw on this point. It submitted that in the complaints at issue in *Enterasys*, the complainant was not a potential supplier because it failed to submit a bid, and there was no evidence that it was denied a chance to bid because of the “objectionable” requirements of the RFP. Rampart submitted that, even if it does not succeed on every ground of complaint, it can and still intends to submit a bid.

[95] Subsection 7(1) of the Regulations prescribes that the complainant must be a potential supplier for the Tribunal to conduct an inquiry. The Tribunal finds that this case is distinguishable from *Enterasys*, wherein the complainant was not a potential supplier because it failed to submit a bid. In the case at hand, the closing date for the submission of bids has not passed and conceivably Rampart could have been preparing contingent bids based on a number of possible outcomes, including a finding that one or more of the grounds of complaint surrounding technical specifications are not valid.

PWGSC’s request that the Tribunal disregard a portion of Rampart’s comments on the GIR

[96] In a letter dated October 1, 2021, PWGSC objected to paragraphs 21 to 147 of Rampart’s comments on the GIR as well as the reply affidavits of Mike Klein, Randy Turner, and Emanuel Kapelsohn, and requested that the Tribunal disregard them as they were irrelevant and improper. Essentially, PWGSC submitted that Rampart is asking the Tribunal to ignore the usual deference granted to procuring entities in determining their legitimate operational requirements and conduct an “audit” of DND’s decision-making process. PWGSC also claimed that Rampart misrepresented the evidence with respect to the IRPDA review.

[97] On October 4, 2021, Rampart responded that PWGSC’s submissions are not an “objection” to Rampart’s reply but rather an improper attempt to re-argue matters already raised in the GIR.

[98] From a procedural perspective, the Tribunal notes that this was an unsolicited sur-reply on the part of PWGSC, which in turn led to an unsolicited response from Rampart. The Tribunal expects parties to seek approval to make submissions that fall outside of the normal procedures and generally, will only permit the government institution to reply to the comments on the GIR where the complainant raises new arguments or evidence that goes beyond replying to what was in the GIR, or presents new grounds of complaint.

[99] In this case, Rampart did not raise new arguments or evidence and the Tribunal notes that PWGSC did not allege that Rampart has gone beyond the scope of proper reply evidence and argument. PWGSC’s submissions are largely reemphasizing its argument that the Tribunal should defer to DND’s judgment in determining what constitute its legitimate operational requirements and as such have been given very little weight. Therefore, the Tribunal sees no reason to disregard a portion of Rampart’s comments on the GIR.

⁵⁸ 2011 FCA 207 at para. 12 [*Enterasys*].

ANALYSIS

[100] 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.

[101] Section 11 of the Regulations specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements. In the present case, the procurement is subject to the CFTA.

[102] The provisions of the CFTA which Rampart alleges have been breached are Articles 502(1), 503(1), 506(6), 509(1), 509(2), 509(3), 509(7) and 513. The text of each of these provisions can be found in Appendix 1.

[103] Using these provisions as the framework for its analysis, the Tribunal will determine the validity of the grounds of complaints by considering whether the technical specifications and requirements of the procurement breach those provisions of the CFTA. In addition, the Tribunal will rule on whether there were improper communications between SIG Sauer's distributors and government officials involved in the procurement.

[104] PWGSC indicated in its GIR that requirements 3.7.7 and 3.9.4 are in the process of being amended to address Rampart's complaint.⁵⁹ Given that PWGSC has committed to granting the remedy requested, Rampart's allegations regarding requirements 3.7.7 and 3.9.4 are moot and will not be addressed in the analysis below.

Legitimate operational requirements

[105] Article 509(1) of the CFTA provides as follows:

A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade.

[106] In assessing whether there has been a breach of this obligation, the Tribunal has held that specifications of a solicitation must reflect a legitimate operational requirement of the government institution, without which they would constitute an impermissible obstacle to trade.⁶⁰ Where a complainant alleges an RFP's criteria are not legitimate operational requirements, the Tribunal must decide whether the complainant has demonstrated that the requirements are discriminatory, impossible to meet or unreasonable.⁶¹ As long as a reasonable method is used in their establishment,

⁵⁹ Exhibit PR-2021-023-28 at 4.

⁶⁰ *Entreprise Marissa Inc. v. Department of Public Works and Government Services* (13 June 2011), PR-2010-086 (CITT) [*Entreprise Marissa*] at paras. 65-66. The Tribunal notes that this case considered the predecessor to Article 509 of the CFTA, i.e. Article 403 of the Agreement on Internal Trade (AIT). The Tribunal has recognized that Article 509 of the CFTA is worded similarly to Article 403 of the AIT. In this regard, see *Accipiter Radar Technologies Inc. v. Department of Public Works and Government Services* (26 April 2019) PR-2018-049 (CITT) at para. 75.

⁶¹ *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 paras. 77-78.

the Tribunal will grant considerable deference to the procuring entity in establishing its needs and operational requirements. However, the procuring agency will be required to demonstrate how a specified function or feature, particularly ones not performance-based, is legitimately required to fulfil those needs and to achieve the targeted end result.⁶²

[107] The Tribunal has also held that a government institution, in satisfying its legitimate operational requirements, need not structure a procurement to accommodate any particular supplier. As long as a procurement is not deliberately constructed to preclude certain suppliers from bidding or to direct the procurement to a favoured supplier, a government institution may choose to procure using a combination of specifications, even though this might have the effect of excluding some suppliers.⁶³

[108] Rampart claimed that the various technical specifications requiring a modular pistol with a removable trigger group assembly, as well as the requirements for a top-mounted LCI and for the striker deactivation mechanism, were reverse engineered to direct the procurement towards pistols produced by SIG Sauer and Beretta and to arbitrarily exclude the type of pistols produced by Glock. Further, Rampart alleged that the technical specifications do not represent legitimate operational requirements and are accordingly unnecessary obstacles to trade. As noted above, Rampart has filed expert evidence in support of these claims. A more detailed discussion of this evidence is included below but Rampart's witnesses claim that the requirement for a modular design, particularly the requirement that the pistol be able to be converted to different sizes or calibres of pistols, is unnecessary, as 9mm ammunition is the North Atlantic Treaty Organization's standard and there is limited need for compact or subcompact pistols among the general CAF personnel. The witnesses also claimed that having the serial number on the trigger would present issues for equipment management within the CAF. With respect to the top-mounted LCI requirement and the striker deactivation mechanism, the witnesses claimed that neither of these mechanisms actually enhance safety.

[109] PWGSC claimed that the modular pistol is necessary in order to achieve DND's goal of purchasing "a safe and effective personal weapon and holster system that prioritizes maintenance, customizability, and future growth potential."⁶⁴ PWGSC stated that the replacement pistol should have various options for maintenance and repair, incorporate recent advances in pistol technology so as to not be quickly lapsed by modernization, and should be able to adapt to different needs over this time. The requirements for modular functionality (a removeable trigger group), the top-mounted LCI and a striker deactivation button or other mechanism were identified as parameters that would allow it to fulfill this objective.

[110] In reply, Rampart submitted that the evidence put forward by PWGSC supports the view that the technical specifications were designed around the characteristics of the SIG Sauer and Beretta modular pistols, rather than constructed by identifying the CAF's actual operational needs and allowing the industry to propose solutions. Specifically, Rampart pointed to the apparent admission

⁶² 2484726 *Ontario Inc. d.b.a. Brion Raffoul* (4 March 2021), PR-2020-064 (CITT) at para. 37 (citing *Entreprise Marissa* at para. 67; *Re Complaint Filed by Foundry Networks Inc.* (12 March 2002), PR-2001-048 (CITT) [*Foundry Networks*] at 10; *NISIT International Ltd. v. Department of Public Works and Government Services* (20 July 2020), PR-2019-067 (CITT) [*NISIT*] at para. 69.

⁶³ 723186 *Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at 19-21.

⁶⁴ Exhibit PR-2021-023-28B at 2.

that the requirements were structured around what was available on the market contained in the response to the IRPDA's questions.⁶⁵

[111] A summary of the competing evidence offered by the witnesses regarding each specific technical requirement is provided below.

Trigger group serialization

[112] Requirement 3.5.2 in Annex C of the RFP requires that the trigger group assembly be stamped with a unique serialization number whereas requirements 3.5.3 and 3.5.4 require that the serial number remain visible while the pistol is assembled and that only the trigger group itself be stamped.

[113] Mr. Turner claimed that requiring that the serial number appear on the trigger group assembly would be an administrative and logistical challenge as it would require the tracking of both the trigger group assembly and all the unserialized component parts, including (potentially) three different sized grip frames and the conversion kits for the different sizes (compact/subcompact) and calibres. Mr. Turner claimed that the CAF has previously had issues with members not returning unserialized components and selling them on the black market. In addition, the modular pistol design could allow CAF members to substitute barrels and slides obtained on their own onto their service weapon, which could result in safety and security issues.⁶⁶

[114] PWGSC's witness, Mr. Foster, noted in his affidavit that serialization is always included on the components that control the firing of the gun. If a gun is not modular, serialization is done on the frame because the trigger group (which controls the firing of the gun) cannot be removed from the rest of the gun. In the case of a modular pistol, serialization occurs on the trigger group, because once removed from the frame, the frame alone does not allow the gun to be fired.⁶⁷

[115] With respect to the logistical and safety concerns raised by Rampart's witnesses, Mr. Foster noted that the serial number is not the only way to track the component parts and that the CAF has systems in place to ensure that non-serialized components are appropriately tracked.⁶⁸

[116] In reply, Mr. Turner noted that Mr. Foster's explanation does not negate his point that separately tracking the serialized trigger group assembly and the non-serialized other components represents an additional administrative burden as opposed to tracking a serialized frame and slide.⁶⁹

Removable trigger group assembly

[117] Requirement 3.7.1 in Annex C of the RFP requires that the serialized trigger group must be removable as a complete assembly while requirement 3.7.2 of Annex C requires that the trigger group must fit in any grip frame housing regardless of slide size or calibre.

[118] As noted above, Mr. Turner and Mr. Kapelsohn stated that there is limited need in the CAF for pistols of different sizes and different calibres and that the acquisition of modular pistols and

⁶⁵ *Ibid.* at 140.

⁶⁶ Exhibit PR-2021-023-01 at 429-435.

⁶⁷ Exhibit PR-2021-023-28 at 164.

⁶⁸ *Ibid.* at 164-167.

⁶⁹ Exhibit PR-2021-023-47 at 102-104.

conversion kits is not a logical way to ensure that these needs are met. Mr. Kapelsohn also stated that this is not a cost-effective solution as the trigger group represents a minor proportion of the cost of the pistol; therefore, removing the trigger group would be a waste of the other, more expensive components.⁷⁰

[119] PWGSC stated that the requirement for a removable trigger group contributes to simplified maintenance and keeps pistols available for use by allowing the user to perform repairs and maintenance in the field. Major Gendron stated that trigger systems rarely experience failure but wear to the frame and slide is common. Modularity would allow for the pistol user to be able to switch components and conduct repairs on their own pistol instead of sending the pistol back to a main base for maintenance. Having a removable trigger group would similarly allow users to customize the pistol on their own in the field rather than sending the pistol to a weapons technician for modification.⁷¹

[120] PWGSC also argued that having a modular pistol will allow the CAF to adapt to technological improvements without having to replace the pistol fleet. For example, if the standard ammunition calibre changes in the future, the modular pistol design will allow DND to adapt to this change more quickly. Modularity also allows adaptation to existing specialized types of ammunition.⁷²

[121] In the reply affidavits, Mr. Turner and Mr. Kapelsohn stated that CAF members would not carry replacement parts or conversion kits as this is impractical and goes against the usual way in which weapons are issued to CAF members. Mr. Turner further claimed that, in his experience, the frame and slide are much less likely to fail than the small, moving sub-components within the trigger group. Mr. Kapelsohn similarly stated that, in his experience, modern polymer framed pistols do not often suffer damage to the frame or slide but that trigger groups and firing mechanisms do often need to be repaired.⁷³

LCI – requirement 3.9.1

[122] The LCI is a safety feature that is used to confirm whether there is a round in the chamber of the pistol. The RFP requires that the LCI is located on the top of the slide. Rampart submitted that this is a design preference and is not a legitimate operational requirement as there is no safety or other benefit to having the LCI on top of the slide rather than on the side as it is on the Glock.

[123] Mr. Turner stated that the LCI should not be the primary means for the user to determine whether there is a round in the chamber, and that CAF protocol is for soldiers to conduct a “press check” to determine by visual and manual inspection if there is a round in the chamber, not to rely on the LCI. He therefore stated that the LCI is a design feature with limited usefulness and not a safety feature, as claimed by PWGSC in its response to potential supplier questions in Amendment 001 to the RFP.⁷⁴

⁷⁰ Exhibit PR-2021-023-01 at 436–439, 566–569.

⁷¹ Exhibit PR-2021-023-28B at 111.

⁷² *Ibid.* at 112–113.

⁷³ Exhibit PR-2021-023-47 at 96–98, 121–127.

⁷⁴ Exhibit PR-2021-023-01 at 441–443.

[124] Mr. Kapelsohn went into greater detail about the potential dangers of relying on the LCI to determine whether there is a round in the chamber and expressed a similar opinion to Mr. Turner, i.e. the LCI should not be the main way a user determines whether there is a live round in the chamber. Mr. Kapelsohn also noted that the top-mounted LCI has several disadvantages, notably the need to move the hands out of the shooting grip to tactilely check the LCI. With a side-mounted LCI, a right-handed user would not have to change the position of his or her hands to check the LCI. Accordingly, Mr. Kapelsohn also stated that this is a design requirement that does not improve the performance of the pistol and could in fact be hazardous.⁷⁵

[125] PWGSC's witness Mr. Foster stated that the requirement for a top-mounted LCI was chosen with training safety as well as field safety considerations in mind, but that Messrs. Turner and Kapelsohn's evidence only considers field operations. Further, since Mr. Turner's experience is as a special operations and infantry soldier, his opinion does not take into account the operational requirements of all CAF members.⁷⁶

[126] In particular, Mr. Foster stated that DND determined that the top-mounted LCI maximises operational and training safety for the following reasons:

- (a) The top-mounted LCI is more visible to people around the shooter – for example, the Range Safety Officer in a shooting range environment - and will not be covered up by the user's hand when holding the pistol.
- (b) In testing, the users indicated that the top-mounted LCI was preferred, as it was most accessible visually and tactilely for both left- and right-handed users. Mr. Foster stated that Mr. Kapelsohn's statement that the user would have to break the shooting grip to tactilely check the top-mounted LCI is incorrect, as this can be done with the non-dominant hand while maintaining the proper grip.
- (c) The top-mounted LCI aligns with other requirements for ambidextrous controls.
- (d) The top-mounted LCI is more visible when the pistol is holstered (especially if the pistol is used by a left-handed shooter, an LCI on the right-hand side would be pointed towards the user's body and not visible).
- (e) Studies have shown that the top-mounted LCI is a safety device that can save lives and can be used to prevent negligent discharges.
- (f) Top-mounted LCIs are widely available.⁷⁷

[127] According to Mr. Foster, top-mounted LCIs are also compliant with the Government of Canada's GBA+ policy as they are accessible to both left- and right-handed shooters as well as users with different hand sizes.⁷⁸

[128] With respect to Mr. Kapelsohn's concerns regarding the potential safety issues with a top-mounted LCI, Mr. Foster noted that all mechanisms are subject to failure, and that the pistols will

⁷⁵ *Ibid.* at 558–564.

⁷⁶ Exhibit PR-2021-023-28 at 158.

⁷⁷ *Ibid.* at 159–161.

⁷⁸ *Ibid.* at 162.

be regularly inspected and maintained, which will mitigate the safety issues. The LCI is not intended to replace other safety training but to enhance safety by providing another way to check if there is a round in the chamber.⁷⁹

[129] In reply, Mr. Turner and Mr. Kapelsohn both stated that the claim that the LCI is useful to any individual other than the shooter is not based in reality, as the LCI will not be visible to people in the shooter's general vicinity due to its small size. In their experience, this is not how LCI's are used in practice. They also disputed the claim that a top-mounted LCI is more visible when the pistol is holstered. Further, they disagreed with the claim that shooters would be able to check a top-mounted LCI with their thumb without breaking the proper shooting grip.⁸⁰

Striker deactivation button or other mechanism - requirement 3.9.2

[130] Requirement 3.9.2 in Annex C of the RFP states: "The C22 FF pistol must have a striker deactivation button or other mechanism that will allow the shooter to disassemble the pistol without having to pull the trigger." Avoiding the trigger pull during disassembly is a safety feature that is intended to prevent negligent discharges.

[131] Mr. Turner's evidence is that this mechanism is unnecessary and will not lead to fewer accidental discharges. The standard protocol for disassembling a weapon is to ensure that the pistol is unloaded and confirmed to be clear of ammunition by visual and physical inspection before disassembling it. The striker deactivation button will not protect against negligent discharges if a round is left in the chamber, as there is still the possibility that the user will pull the trigger by accident, out of habit (as the current Browning service pistol requires a trigger pull during disassembly) or because some pistols with the mechanism, such as the Beretta, also still allow for a trigger pull as an alternative to the striker deactivation mechanism in their disassembly protocols.⁸¹ Mr. Kapelsohn similarly stated that ultimately, safety depends on training and not on mechanisms. He also stated that his own survey of law enforcement agencies using Glock pistols indicates that there are very few instances of negligent discharges.⁸²

[132] Mr. Foster's evidence is that the striker deactivation mechanism does not replace the need to properly unload the pistol before disassembly but serves as a backup in the event the chamber is not properly unloaded. It will never be relied on as the only safety feature used to prevent negligent discharges and is not a substitute for proper training on the disassembly of a weapon. However, Mr. Foster stated that DND is requiring the striker deactivation mechanism precisely for situations where the shooter is tired or under stress and does not follow the proper procedures.⁸³

[133] Further, Mr. Foster noted that CAF training protocols will be updated to ensure that members are cautioned not to pull the trigger during disassembly of the pistol. With respect to Mr. Kapelsohn's evidence regarding the frequency of negligent discharges in police forces, Mr. Foster noted that, unlike police officers, the majority of CAF soldiers will not use their pistol

⁷⁹ *Ibid.* at 163–164.

⁸⁰ Exhibit PR-2021-023-47 at 105–114, 132–137.

⁸¹ Exhibit PR-2021-028-01 at 420–428.

⁸² *Ibid.* at 914–915.

⁸³ Exhibit PR-2021-023-28 at 168.

daily, as it is considered a last line of defence. He also stated that hundreds of negligent discharges occur every year in the CAF alone and comprise over 10 percent of JAG summary trials.⁸⁴

[134] In reply, Mr. Turner noted that the statistic referred to above includes all types of weapons (including the main service weapon, which is a rifle) and not just pistols and that the data are outdated.⁸⁵ Mr. Kapelsohn disputes the claim that police officers are expert pistol users who are inherently less likely to forget their safety training when disassembling their weapon.⁸⁶

Conclusion on legitimate operational requirements

[135] As noted above, the Tribunal has repeatedly stated that tender requirements cannot be discriminatory, impossible to meet or otherwise unreasonable. However, this statement cannot be construed to mean that all suppliers have to have the ability to supply to a certain specification. Specifications by their very nature are discriminatory. In *NISIT*, the Tribunal stated the following:

DND has the discretion to weigh a range of factors and variables when deciding upon the scope of the tender specifications, including cost and ease of operational use. The tender specifications are then written accordingly. *The Tribunal must thus defer to DND's expertise and judgment in defining operational requirements* and the equipment needed to meet those requirements, for the purposes of procurement, *unless that discretion has been unreasonably exercised.*⁸⁷

[Emphasis added]

[136] While the complainant characterizes the establishment of the specifications as arbitrary and states that the specifications serve no legitimate performance or operational objectives, in the Tribunal's opinion, PWGSC and DND have stated definitively and explained how each of the disputed specifications would serve to further particular objectives within the CAF. The Tribunal has no reason to doubt the authenticity of these claims.

[137] However, the Tribunal would like to highlight a particular exchange in the discussion of the establishment of the specifications:

Observation: The team is prescribing the detailed solution to the problem rather than identifying the operational need and allowing industry to propose the solution.

Rebuttal: Aligned with the minor capital procurements, to maximize the outcome of the project given short timelines and limited resources *the simplest solution is to analyze what exists on the market today and structure the requirements to match*. This strategy will make the most flexible fleet into the future. Likely that this fleet will stay in service many years past its expected lifespan.⁸⁸

[Emphasis added]

⁸⁴ *Ibid.* at 169–170.

⁸⁵ Exhibit PR-2021-023-47 at 114–115.

⁸⁶ *Ibid.* at 129–130.

⁸⁷ *NISIT* at para. 69.

⁸⁸ Exhibit PR-2021-023-28B at 140.

[138] While the Tribunal has not found that the specifications do not reflect the legitimate operational requirements of DND, the method described above to establish those specifications is contrary to the stated purpose of the CFTA procurement chapter in Article 500, which is “to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers.” Staying current with what exists on the market is a good practice. However, conducting a significant portion of purchase decisions in an opaque manner without allowing all suppliers a fair chance to compete is contrary to both the spirit and, as will be shown below, specific provisions of the CFTA. Formulating in one’s mind what design features of a product best meet the legitimate operational requirements of a procuring entity could, at the very least, create a confirmation bias so that possible alternatives would not be fairly considered or evaluated.

Use of design or descriptive characteristics in the technical specifications

[139] Article 509(2) of the CFTA provides, in part, that:

2. In prescribing technical specifications for the goods or services being procured, a procuring entity shall, if appropriate:
 - (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics

[140] Article 509(3) of the CFTA provides that:

3. A procuring entity should avoid the use of technical specifications that require or refer to a particular trademark or trade name, patent, copyright, *design, type*, specific origin, producer, or supplier. If the technical specifications are used in that manner, a procuring entity shall indicate that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirement of the procurement by including words such as “or equivalent” in the tender documentation.

[Emphasis added]

[141] Rampart argued that all the impugned technical requirements are improperly specified in terms of design or descriptive characteristics rather than performance or functional characteristics. In the comments on the GIR, Rampart claimed that the evidence shows that the criteria are based on the design of the modular pistols manufactured by SIG Sauer and Beretta.

[142] PWGSC asserted that the technical specifications describe performance and functional requirements, rather than prescribe a design type or descriptive characteristics. Specifically, with respect to the requirements for a removable trigger group assembly, PWGSC argued that the criteria do not specify how a manufacturer is to design their trigger group to ensure it is removeable as a complete assembly, nor do the criteria specify how a manufacturer can design the trigger group to function in any grip frame housing. PWGSC submitted that the design itself is up to the discretion of the manufacturer, the criteria merely dictate the performance of the pistol.

[143] The Tribunal finds that all the criteria in question are specifications that refer to a design or type of feature rather than ones based on performance or functional requirements. For example, even if manufacturers have some flexibility in the design of their trigger group to ensure it is removeable as a complete assembly, requiring a trigger group to be removeable as a complete assembly is a

design-based specification. Further, PWGSC's argument that the requirements are not design-based is contradicted numerous times by its own evidence; for example, section 5.2.1.3 of the SOR reads, in part, as follows: "The AP must have an adaptable *design* with a serialized trigger group allowing users to change grips, frames and slides" [emphasis added].⁸⁹

[144] However, Article 509(2)(a) is not an absolute prohibition on the use of design or descriptive characteristics in technical requirements. Although the provision uses the mandatory "shall", it is qualified by "if appropriate".⁹⁰ Clearly the term "if appropriate" must have meaning, and the Tribunal's position is that it provides discretion to the procuring entity to decide if the use of performance-based or design-based criteria is appropriate in the circumstances.

[145] Similarly, Article 509(3) uses the wording "should" rather than "shall" and only mandates that the procuring entity shall consider tenders of equivalents where it crafts the technical specifications around these types of requirements and that it must include words such as "or equivalent" in the tender documents.

[146] Accordingly, the Tribunal notes that the use of tender specifications based on design or type is not in and of itself improper. It is again within the discretion of the procuring entity to establish their own requirements.⁹¹

[147] However, the trade agreements do require that, if a government institution chooses technical requirements that refer to a particular design or type, it must allow for bidders to propose equivalents. In the present case, with the exception of the striker deactivation button requirement, which included the equivalency provision "or other mechanism that will allow the shooter to disassemble the pistol without having to pull the trigger", it is evident that PWGSC failed to indicate that it will consider tenders of equivalent goods that demonstrably fulfil the requirement of the procurement and failed to include words such as "or equivalent" in the tender documentation.

[148] In summary, while the Tribunal has found above that these criteria reflect a link to the legitimate operational requirements of the CAF, the Tribunal finds that PWGSC has breached Article 509(3) of the CFTA in not allowing bidders to propose equivalents to specifications that require a particular design or type, specifically, by not including the words "or equivalent" in the tender documentation. Even if the solicitation is not explicitly limited to SIG Sauer and/or Beretta and there are accordingly at least two suppliers who could compete, the requirements as drafted do

⁸⁹ Exhibit PR-2021-023-28 at 145. Further, the Tribunal notes that this requirement originally stated: "The AP must have a *modular design* . . ." [emphasis added]. Exhibit PR-2021-023-28B at 128.

⁹⁰ The Tribunal notes that some of its previous jurisprudence suggests that the use of design or descriptive characteristics is prohibited. For example, in *Foundry Networks* at 9, the Tribunal stated regarding Article 1007(2)(a) of the North American Free-Trade Agreement (NAFTA) (which is very similarly worded to Article 509(2) of the CFTA) that technical specifications *must* be "specified in terms of performance criteria rather than descriptive characteristics". However, this statement is contradicted in the very next paragraph by the statement that procuring entities should express "those requirements preferably using performance specifications over design specifications".

⁹¹ The wording of Article 509(3) of the CFTA is considerably less severe than the wording of NAFTA which applied in the *Foundry Networks* decision that these forms of specifications should not be used "unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements". *Foundry Networks* at 8. However, this is consistent with the Tribunal's decision in *Halkin Tool Limited v. Department of Public Works and Government Services* (3 May 2010), PR-2009-066 (CITT) at paras. 31-34.

restrict competition as they do not allow bidders to propose alternative solutions that could meet the CAF's legitimate operational requirements in another manner.

[149] The Tribunal would encourage DND and PWGSC to consider using performance or functional requirements as these criteria are more easily relatable to legitimate operational requirements.

Ambiguity in the RFP

[150] Article 509(7) of the CFTA requires that the tender documentation include all information necessary to permit suppliers to prepare and submit responsive tenders. The Tribunal has previously recognized that this provision includes a requirement that tender documents not be ambiguous.⁹²

[151] Rampart claimed that the "concept of modularity" has been ambiguously incorporated into the RFP. Rampart submitted that the definition of "modular pistol" in Annex C, paragraph 1.2.2.5, is ambiguous because it requires that the trigger group be capable of being dropped into a different frame size or frame of a different calibre, but no information has been given in the RFP with respect to what other sizes or calibres will be required. While Rampart acknowledged that this definition is not itself a mandatory technical criterion, it argued that PWGSC has made it "abundantly clear" in its responses to bidder questions and objections in Amendment 001 that it intends to evaluate proposals as if this definition were a mandatory technical criterion of the RFP.

[152] In addition, Rampart claimed that requirements 3.7.1 and 3.7.2 of Appendix 1 to Annex E are ambiguous. Requirement 3.7.1 provides that "the trigger group must be removable as a complete assembly," and requirement 3.7.2 provides that "the trigger group must fit/function in any grip frame housing regardless of slide size or calibre". With respect to requirement 3.7.2, similarly to its argument with respect to the definition of modular pistol, Rampart claimed that this is ambiguous because it is not clear what slide size or calibre is being referred to. Rampart noted that other provisions of the RFP clearly state that it is only seeking a pistol with a full frame size and that is chambered for 9mm ammunition. Rampart also claimed that these specifications are ambiguous as it is not clear what parts constitute the "trigger group". In his affidavit, Mr. Turner claimed that requirements 3.5.2, 3.5.3 and 3.5.4 are also ambiguous for the same reason.

[153] PWGSC submitted that the term "modular pistol" is clearly defined and that the technical specifications are not ambiguous. Regarding Rampart's claims that the RFP is ambiguous because it does not specify what sizes or calibres will be required, PWGSC argued that the future procurement of conversion kits, if any, does not need to be defined in this RFP. The definitions for future procurements do not prohibit the bidder from understanding and meeting the requirements of this RFP.

[154] The Tribunal finds that the specifications, while complicated, are not ambiguous. The Tribunal agrees with PWGSC's last statement above, i.e. that what Rampart is complaining about is lack of clarity with respect to future procurements of conversion kits and that that does not prevent bidders from understanding the requirements of this RFP. Therefore, the Tribunal finds that this ground of complaint is not valid.

⁹² *Marine Recycling Corporation and Canadian Maritime Engineering Ltd.* (22 January 2021), PR-2020-038, PR-2020-044 and PR-2020-056 (CITT) at para. 47.

Division of the procurement to avoid trade agreement obligations

[155] Article 503(1) of the CFTA prohibits the division of procurement requirements in order to avoid the obligations of the agreement. Rampart's arguments regarding this obligation mainly concern the definition of "modular pistol", which is a modular pistol that can be converted to different sizes and/or different calibres, and PWGSC's responses to questions posed by bidders concerning this definition (contained in Amendment 001). Specifically, PWGSC indicated in Amendment 001 that DND was considering the purchase of conversion kits for unspecified sizes and calibres in the future.

[156] Rampart claimed that this constitutes contract splitting and that PWGSC has divided the procurement in this way to avoid being required to state either the nature or the number of alternative pistol formats which are required, which according to Rampart is required by Article 506(6)(c) of the CFTA. Rampart further argued that dividing the procurement in this way has prevented bidders from proposing and pricing solutions which are responsive to the CAF's needs – whether this be a single pistol capable of converting into various other configurations or by way of two or more pistols with some degree of configurability. Relatedly, Rampart submitted that a fair financial evaluation would include the price for the conversion kits. Finally, Rampart argued that the trigger groups will be proprietary, and this will accordingly limit competition when the conversion kits are procured, resulting in a limited tender that would contravene Article 513.

[157] PWGSC argued that there is no split procurement where there is only one procurement process ongoing, even if there are additional strategies, projects or plans that may require additional procurements in the future, in accordance with the Tribunal's decision in *Novell Canada, Ltd. v. Department of Public Works and Government Services*.⁹³

[158] Even if the Tribunal were to decide that this is a divided procurement, PWGSC submitted that there is no resulting obstacle to trade or breach of the CFTA. It submitted that it was perfectly legitimate for PWGSC to wait until its operational needs had crystallized before specifying the number of conversion kits that it would purchase.

[159] In addition, PWGSC argued that Rampart's proposed solution, which would be to provide multiple types of pistols in order to fulfill the requirement for pistols of different sizes and calibres, does not meet the CAF's identified operational needs. Further, it submitted that limited tendering as defined in the trade agreements involves a pre-selection of suppliers by the procuring body and that there is accordingly no limited tender currently before the Tribunal.

[160] The Tribunal finds that the procurement was not divided to avoid the trade agreement obligations. The current procurement clearly is covered by the CFTA and the Tribunal cannot pre-judge future procurements that currently are not in progress. Therefore, the Tribunal finds that this ground of complaint is not valid.

Improper communications with SIG Sauer's distributor

[161] Rampart submitted that the lobbyist for MDC repeatedly communicated with DND officials following the issuance of the RFP and Rampart's objection, as shown in the Registry of Lobbyists. Rampart alleged that these communications concerned the procurement at issue in this complaint,

⁹³ (17 August 2000), PR-98-047R (CITT) at paras. 33, 37–39.

and that this could have resulted in the provision of information to MDC that would give them an advantage over other suppliers or the provision of advice from MDC to DND in the preparation or adoption of certain technical specifications. Rampart also noted the requirement in the RFP that communications regarding the RFP be submitted to the Contracting Authority and that questions and answers regarding the RFP be publicly posted.

[162] PWGSC argued that Rampart has no knowledge of the content of these communications and in particular whether they relate to this procurement, and that this line of argumentation is a fishing expedition.

[163] PWGSC further submitted that there had been no communications between PWGSC officials or DND officials and MDC relating to this procurement. Mr. Grosser stated in his affidavit that he is not aware of any communications between lobbyists for MDC and PWGSC personnel involved in drafting the RFP.⁹⁴ Mr. Foster similarly stated that he is not aware of any communications between lobbyists for MDC and DND personnel involved in the drafting of the RFP or who would be involved in the evaluation of bids.⁹⁵ Finally, PWGSC obtained copies of the correspondence between MDC and DND identified in the registry of lobbying activities and confirmed that none of this correspondence related to issues raised in Rampart's complaints.⁹⁶

[164] The Tribunal finds that there is no evidence of the existence of any improper communications relating to the procurement that is the subject of this complaint. Therefore, the Tribunal finds that this ground of complaint is not valid.

REMEDY

[165] PWGSC has granted the remedy requested by Rampart for requirements 3.7.7 and 3.9.4. Additionally, having found the remainder of the complaint to be valid in part, the Tribunal must now recommend an appropriate remedy.

[166] In this regard, subsections 30.15(2) and (3) of the *CITT Act* provide as follows:

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

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

⁹⁴ Exhibit PR-2021-023-28 at 248–249.

⁹⁵ Exhibit PR-2021-023-29 at 172–173.

⁹⁶ Exhibit PR-2021-023-28B at 59–60; Exhibit PR-2021-023-28A (protected) at 62–114.

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

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

[167] As a remedy, Rampart requested that PWGSC be directed to amend the technical specifications of the RFP to bring them into compliance with the requirements of the CFTA. PWGSC did not make any submissions on the appropriate remedy.

[168] The Tribunal considers that not framing requirements in accordance with the applicable trade agreements represents a serious deficiency in the procurement process. The Tribunal also believes that such a serious deficiency prejudices the integrity and efficiency of the competitive procurement system. However, there is no indication that the parties have acted in bad faith.

[169] As no contract has yet been awarded – indeed the bid submission deadline had not passed as of the issuance of the Tribunal’s determination in this case – the Tribunal considers it appropriate to recommend the cancellation and re-issuance of the solicitation rather than consider compensation.

[170] Therefore, pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC cancel Solicitation No. W8476-216392/B and issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should PWGSC choose to require or refer to a particular design or type, it shall include words such as “or equivalent” in the tender documentation, as required by the applicable trade agreements.

COSTS

[171] Both PWGSC and Rampart requested their complaint costs should they be successful.

[172] The Tribunal has broad discretion to award costs under section 30.16 of the *CITT Act*. The Tribunal follows the “judicial model” under which, generally, the winning party is entitled to its costs. As such, the Tribunal will award costs to Rampart.

[173] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline (the Guideline)*, which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[174] In this instance, due to the level of complexity of the complaint, which involved multiple grounds of complaint concerning complex technical specifications, the complexity of the

procurement itself, which involved detailed technical specifications, and the level of complexity of the proceedings, which raised multiple procedural issues as outlined above, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, which has an associated flat-rate amount of \$4,700.

DETERMINATION

[175] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid in part.

[176] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC cancel Solicitation No. W8476-216392/B and issue a new solicitation in accordance with the provisions of the applicable trade agreements. In the new solicitation, should PWGSC choose to require or refer to a particular design or type, it shall include words such as "or equivalent" in the tender documentation, as required by the applicable trade agreements.

[177] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Rampart its reasonable costs incurred in preparing and proceeding with its complaints, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for these complaints is Level 3, and its preliminary indication of the amount of the cost award is \$4,700. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the cost award is invited to make submissions to the Tribunal within 15 days of the issuance of the Tribunal's statement of reasons. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

[178] The interveners, MDC and Stoeger, shall each bear their own costs.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

APPENDIX 1: EXERPTS FROM THE CFTA**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

1. A procuring entity shall not prepare, design, or otherwise structure a procurement, select a valuation method, or divide procurement requirements in order to avoid the obligations of this Agreement. This includes actions such as dividing required quantities of the goods or services to be procured, or diverting funds to entities not covered by this Chapter or to buying groups in a manner designed to avoid the obligations of this Chapter.

...

Article 506: Tender Notices

6. Each tender notice shall include:

...

- (c) the nature and the quantity, or estimated quantity, of the goods or services to be procured unless those requirements are included in tender documentation;

...

Article 509: Technical Specifications and Tender Documentation*Technical Specifications*

1. A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade.

2. In prescribing technical specifications for the goods or services being procured, a procuring entity shall, if appropriate:

- (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
- (b) base the technical specification on standards, if they exist

3. A procuring entity should avoid the use of technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier. If the technical specifications are used in that manner, a procuring entity shall indicate that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirement of the procurement by including words such as “or equivalent” in the tender documentation.

...

Tender Documentation

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Tender documentation shall include all pertinent details concerning:

- (a) the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighting and evaluation, unless price is the sole criterion; and
- (b) the requirements to be fulfilled by the supplier, and the terms or conditions applicable to the tender, including, if applicable:
 - (i) technical specifications;
 - (ii) requirements for servicing or warranty;
 - (iii) transition costs;
 - (iv) applicable conformity assessment certification, plans, drawings, or instructional materials; and
 - (v) requirements related to the submission of the tender

...

Article 513: Limited Tendering

1. Subject to paragraphs 2 and 3, and provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects its own suppliers, a procuring entity may use limited tendering in the following circumstances:

- (a) if:
 - (i) no tenders were submitted or no suppliers requested participation;
 - (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
 - (iii) no suppliers satisfied the conditions for participation; or
 - (iv) the submitted tenders were collusive, provided that the requirements of the tender documentation are not substantially modified;
- (b) if the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
 - (i) the requirement is for a work of art;

- (ii) the protection of patents, copyrights, or other exclusive rights;
 - (iii) due to an absence of competition for technical reasons;
 - (iv) the supply of goods or services is controlled by a supplier that is a statutory monopoly;
 - (v) to ensure compatibility with existing goods, or to maintain specialized goods that must be maintained by the manufacturer of those goods or its representative;
 - (vi) work is to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
 - (vii) work is to be performed on a leased building or related property, or portions thereof, that may be performed only by the lessor; or
 - (viii) the procurement is for subscriptions to newspapers, magazines, or other periodicals;
- (c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement, if a change of supplier for such additional goods or services:
- (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
- (d) if strictly necessary, and for reasons of urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering;
- (e) for goods purchased on a commodity market;
- (f) if a procuring entity procures a prototype or a first good or service that is developed in the course of, and for, a particular contract for research, experiment, study, or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;
- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers;
- (h) if a contract is awarded to a winner of a design contest provided that:
- (i) the contest has been organized in a manner that is consistent with the principles of this Chapter, in particular relating to the publication of a tender notice; and

- (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner; or
- (i) if goods or consulting services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, result in the waiver of privilege, cause economic disruption, or otherwise be contrary to the public interest.

2. A procuring entity may, in its use of limited tendering under paragraphs 1(a) through 1(i), choose not to apply Articles 504.5 through 504.10, Article 506, Article 507, Article 508.5, Article 508.6, Article 509.7, Article 509.8, Articles 510 through 512, Article 514 and Article 515.

3. A procuring entity may, in its use of limited tendering under paragraph 1(i), also choose not to apply Article 516.

APPENDIX 2 : PROVISIONS OF THE RFP AT ISSUE**ANNEX B
C22 MODULAR PISTOL PROJECT
STATEMENT OF WORK**

...

- 9.1 Standard Design
- 9.1.1 The Contractor has been manufacturing and selling a modular pistol of this caliber for at least one (1) year prior to the date of the release of this solicitation.

**ANNEX C
C22 MODULAR PISTOL PROJECT
PISTOL TECHNICAL AND PERFORMANCE
SPECIFICATION**

...

- 1. SCOPE
- ...
- 1.2.2. Definitions
- ...
- 1.2.2.5 “Modular Pistol” is defined as a pistol where the entire trigger group can be removed and dropped into another pistol frame size. The pistol frame could be a different size for the same calibre or a pistol frame for a different calibre pistol. This will allow the army the flexibility to convert between calibre and frame sizes with the purchase of a conversion kit.
- ...
- 3. TECHNICAL AND PERFORMANCE SPECIFICATION REQUIREMENTS
- 3.1 Calibre
- 3.1.1 The C22 FF pistol must be chambered for all 9 x 19 mm Parabellum cartridges dimension IAW Annex A to STANAG 4090.
- ...
- 3.5 C22 FF Pistol Markings
- ...

- 3.5.2 The C22 FF pistol trigger group must be permanently stamped or engraved with a unique serial number using YYKANNNNN format unless an alternative format is approved by the TA. Where YY designates the last two digits of the year of manufacture. KA designates the C22 FF pistol. NNNNN is the unique serial number which starts at 00001 and increments by 1 for each C22 FF pistol delivered to Canada (21KA00001 would be the first pistol manufactured in 2021).
- 3.5.3 The C22 FF pistol trigger group serial number must be visible when the C22 FF pistol is fully assembled.
- 3.5.4 The C22 FF pistol trigger group must be the only component marked with the serial number.
- ...
- 3.7 Trigger group
- 3.7.1 The trigger group must be removable as a complete assembly.
- 3.7.2 The trigger group must fit/function in any grip frame housing regardless of slide size or calibre.
- ...
- 3.7.7 The trigger must automatically return to its normal forward most position upon release after partial or complete trigger pull.
- ...
- 3.9 Safety Mechanism
- 3.9.1 The C22 FF pistol must have a visible and tactile loaded chamber indicator on the top of the slide.
- 3.9.2 The C22 FF pistol must have a striker deactivation button or other mechanical mechanism that will allow the shooter to disassemble the pistol without having to pull the trigger.
- ...
- 3.9.4 The C22 FF pistol must not have a manually applied safety mechanism.