



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File PR-2021-040

Cadex Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, January 7, 2022*

*Reasons issued  
Tuesday, February 8, 2022*

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IN THE MATTER OF a complaint filed by Cadex Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**CADEX INC.**

**Complainant**

**AND**

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

**Government  
Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint filed by Cadex Inc. is not valid. Each party will bear its own costs.

Randolph W. Heggart

Randolph W. Heggart  
Presiding Member

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

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## STATEMENT OF REASONS

### SUMMARY OF THE COMPLAINT

[1] The complaint concerns a procurement (solicitation W8476-196090/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND). The solicitation was for the purchase of 229 multi-calibre sniper weapon (MCSW) systems.

[2] Cadex Inc. (Cadex), the complainant, claims that PWGSC breached the Canadian Free Trade Agreement (CFTA)<sup>1</sup> by failing to follow the evaluation procedures as set out in the Request for Proposal (RFP), ignoring vital information in Cadex's bid materials, and conducting the procurement in a procedurally unfair way.

[3] As a remedy, Cadex asks for the designated contract to be cancelled and awarded to Cadex. In the alternative, Cadex seeks compensation for lost profits. In the further alternative, Cadex seeks compensation for lost opportunity. Cadex also seeks reimbursement of its bid preparation costs and its costs in bringing the complaint.

### PROCUREMENT PROCESS

[4] PWGSC issued the RFP in question on August 31, 2020.<sup>2</sup> The RFP was amended 15 times.<sup>3</sup>

[5] Bids were evaluated through a three-phase bid compliance process.<sup>4</sup> Phase I involved the preliminary evaluation of financial bids, Phase II involved the preliminary evaluation of technical bids, and Phase III involved the final evaluation of bids.<sup>5</sup> Three responsive bids, including those of Cadex and Stoeger Canada (1990) Ltd. (Stoeger), advanced from Phase I to Phase II.<sup>6</sup> Wolverine Supplies Ltd. (Wolverine) responded to the RFP<sup>7</sup> but did not advance past Phase I.

[6] On January 15, 2021, Cadex was awarded a contract to provide three pre-production sample (PPS) MCSWs for evaluation trials.<sup>8</sup> The PPS MCSWs were delivered to DND on April 14, 2021.<sup>9</sup>

[7] On June 15, 2021, PWGSC invited Cadex to witness the PPS testing.<sup>10</sup> On June 16, 2021, Cadex indicated its desire to witness some of the testing.<sup>11</sup> Cadex asked for the testing schedule so it could decide at what stage it would attend the testing, noting that it could not have someone at the Eastern Ontario Shooting Club for the complete duration of the test.<sup>12</sup> On June 17, 2021, PWGSC

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

<sup>2</sup> Exhibit PR-2021-040-01 at 56; Exhibit PR-2021-040-18 at paras. 1, 2.

<sup>3</sup> Exhibit PR-2021-040-01 at 85–159.

<sup>4</sup> Exhibit PR-2021-040-18 at 7, 33.

<sup>5</sup> *Ibid.* at 7, 34–36.

<sup>6</sup> *Ibid.* at 4; Exhibit PR-2021-040-01 at 65.

<sup>7</sup> Exhibit PR-2021-040-18 at 17.

<sup>8</sup> *Ibid.* at 8; Exhibit PR-2021-040-01A (protected) at 925.

<sup>9</sup> Exhibit PR-2021-040-01 at 374.

<sup>10</sup> *Ibid.* at 387.

<sup>11</sup> *Ibid.* at 385.

<sup>12</sup> *Ibid.*

advised that the evaluation was “currently at TEST 13” and offered June 28, 2021, as a date for Cadex to observe.<sup>13</sup>

[8] On June 17, 2021, as part of its response regarding possible dates for the site visit, Cadex asked PWGSC if tests 1 to 12 were complete.<sup>14</sup> That same day, PWGSC confirmed that “[t]ests 1 through 12 have been completed.”<sup>15</sup> Cadex responded that it was “[g]lad to hear test [sic] 1 to 12 were completed” and confirmed its availability to witness the testing on June 23, 2021.<sup>16</sup> Cadex made a site visit on that date<sup>17</sup> as well as on June 28 and 30, 2021.<sup>18</sup>

[9] On July 15, 2021, Cadex asked PWGSC if the endurance test was complete.<sup>19</sup> On July 16, 2021, PWGSC advised that all testing was complete and all that remained for DND to do was to write and deliver the evaluation report.<sup>20</sup>

[10] On August 12, 2021, PWGSC emailed Cadex a regret letter dated August 11, 2021, advising that the contract had been awarded to Stoeger.<sup>21</sup> The regret letter also explained that Cadex did not meet one of the solicitation’s mandatory requirements.<sup>22</sup> Specifically, Test 8 (Low Temperature Operation) was assessed as non-compliant because the PPS failed to fire the loaded cartridges.<sup>23</sup>

[11] Cadex contacted PWGSC by telephone on August 12, 2021, to ask PWGSC to reconsider its decision because, in Cadex’s view, the test procedures for Test 8 were not followed.<sup>24</sup> According to Cadex, during the telephone conversation, PWGSC indicated that, while Cadex could request a debriefing, in PWGSC’s view the test procedures were followed, the contract award decision was final, and Cadex could challenge the decision at the Tribunal.<sup>25</sup> PWGSC’s view on that exchange is slightly different; it states that Cadex declined a formal debrief and filed its complaint instead.<sup>26</sup>

[12] On August 19, 2021, Cadex emailed PWGSC asking to inspect the PPS and to be permitted to undertake cleaning and maintenance measures to ensure that storage was done in a manner to preserve the possibility of a fair re-testing of the PPS.<sup>27</sup> Cadex also asked PWGSC to ensure that no actions be taken that could prejudice the possibility of fair re-testing, such as the modification or destruction of the PPS MCSWs.<sup>28</sup> PWGSC acknowledged receipt of Cadex’s email that same day.<sup>29</sup>

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<sup>13</sup> *Ibid.* at 384.

<sup>14</sup> *Ibid.* at 383.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* at 381.

<sup>17</sup> Exhibit PR-2021-040-18 at 20; Exhibit PR-2021-040-01 at 459.

<sup>18</sup> Exhibit PR-2021-040-27 at para. 12; Exhibit PR-2021-040-01 at 445.

<sup>19</sup> Exhibit PR-2021-040-01 at 391.

<sup>20</sup> *Ibid.* at 390.

<sup>21</sup> *Ibid.* at 394, 403.

<sup>22</sup> *Ibid.* at 403.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 9; Exhibit PR-2021-040-01A (protected) at 1177.

<sup>25</sup> Exhibit PR-2021-040-01 at 9; Exhibit PR-2021-040-01A (protected) at 1178.

<sup>26</sup> Exhibit PR-2021-040-18 at 155.

<sup>27</sup> Exhibit PR-2021-040-01 at 398.

<sup>28</sup> *Ibid.* at 398.

<sup>29</sup> *Ibid.* at 396.

## PROCEDURAL HISTORY

[13] Cadex filed its complaint with the Tribunal on August 25, 2021.<sup>30</sup> Cadex also sought suspension of the designated contract award pending resolution of the complaint<sup>31</sup> and asked the Tribunal for an expeditious determination.<sup>32</sup> Specifically, Cadex requested the express option procedure,<sup>33</sup> pursuant to rule 107 of the *Canadian International Trade Tribunal Rules* (Rules).<sup>34</sup> Cadex also asked the Tribunal, in the alternative, to abridge the time for PWGSC to file the Government Institution Report (GIR).<sup>35</sup>

[14] On August 30, 2021, the Tribunal decided to conduct an inquiry into the complaint.<sup>36</sup> On August 31, 2021, the Tribunal asked PWGSC for its views on Cadex's request for an expedited process.<sup>37</sup> On September 2, 2021, PWGSC asked the Tribunal to deny Cadex's request. As a sign of good faith, DND and PWGSC issued a stop work order regarding the designated contract awarded to Stoeger.<sup>38</sup>

[15] On September 3, 2021, Cadex withdrew its request for the express option and did not affirm its request for an abridged timeframe for the issuance of the GIR.<sup>39</sup> Cadex also asked the Tribunal to require PWGSC to respond to earlier correspondence dated August 19, 2021, and to report on the status of the PPS MCSWs.<sup>40</sup>

[16] By letter dated September 7, 2021, the Tribunal confirmed to the parties that the inquiry would not proceed using the express option.<sup>41</sup> The Tribunal also encouraged PWGSC to immediately answer Cadex's questions posed in its correspondence of August 19, 2021. The Tribunal did not shorten the timeframe for PWGSC to issue the GIR.

[17] PWGSC responded to Cadex's August 19, 2021, correspondence on September 8, 2021.<sup>42</sup> PWGSC submitted that Cadex's request was premature and, if fulfilled, would risk causing delay and perceived unfairness.<sup>43</sup> On September 16, 2021, Cadex acknowledged PWGSC's assurances of proper storage practises and concerns regarding fairness, and provided steps for a particular storage procedure.<sup>44</sup>

[18] PWGSC filed the GIR on September 27, 2021.<sup>45</sup> On September 29, 2021, Cadex asked the Tribunal to issue a production order to PWGSC with regard to evaluation and test reports and records

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<sup>30</sup> Exhibit PR-2021-040-02 at 1.

<sup>31</sup> Exhibit PR-2021-040-01 at 49.

<sup>32</sup> *Ibid.* at 39, 482.

<sup>33</sup> *Ibid.*

<sup>34</sup> SOR/91-499.

<sup>35</sup> Exhibit PR-2021-040-01 at 42.

<sup>36</sup> Exhibit PR-2021-040-04 at 1.

<sup>37</sup> Exhibit PR-2021-040-05 at 1.

<sup>38</sup> Exhibit PR-2021-040-06 at 1.

<sup>39</sup> Exhibit PR-2021-040-07 at 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> Exhibit PR-2021-040-09 at 1.

<sup>42</sup> Exhibit PR-2021-040-10.

<sup>43</sup> *Ibid.*

<sup>44</sup> Exhibit PR-2021-040-14.

<sup>45</sup> Exhibit PR-2021-040-18.

of the procurement.<sup>46</sup> Cadex also requested an extension of time to file its reply to the GIR and to respond to intervener comments (see requests to intervene in paragraph 22).<sup>47</sup> On October 1, 2021, the Tribunal asked parties to comment on Cadex's request and suspended the filing deadline for comments on the GIR pending the Tribunal's decision on Cadex's request.<sup>48</sup>

[19] On October 6, 2021, PWGSC submitted that the requested documents were not relevant to resolving the complaint.<sup>49</sup> PWGSC noted that a final evaluation report had not yet been completed, and preparation of the report was halted pending the complaint proceedings.<sup>50</sup> However, PWGSC submitted an interim report to the Tribunal.<sup>51</sup> On October 7, 2021, the Tribunal received an unsolicited letter from Cadex submitting that it was not up to PWGSC to decide whether to withhold contemporaneous evaluation notes and records or to assess their relevance.<sup>52</sup>

[20] On October 13, 2021, the Tribunal denied Cadex's production order request, set filing dates for comments on the GIR, and asked PWGSC to resubmit the interim report with fewer redactions.<sup>53</sup> PWGSC resubmitted the interim report on October 15, 2021.<sup>54</sup>

[21] On November 1, 2021, further to the Tribunal's suspension of filing deadlines in response to Cadex's production order request and consequential extension of the deadline to comment on the GIR, and pursuant to paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations),<sup>55</sup> the Tribunal notified the parties that the deadline for issuing its findings and recommendations was 135 days from the date Cadex filed the complaint.<sup>56</sup>

[22] The contract awardee, Stoeger, and an unsuccessful bidder, Wolverine, sought leave from the Tribunal to intervene in the complaint proceedings,<sup>57</sup> which was granted to both.<sup>58</sup> Cadex raised concerns about Wolverine's intervention.<sup>59</sup> Ultimately, following the Tribunal's grant of leave to intervene, only Stoeger submitted comments on the GIR and the complaint.<sup>60</sup>

## PRELIMINARY MATTERS

[23] There are two preliminary matters: PWGSC's claim that Cadex's allegations were not timely because the basis for those allegations was known to Cadex more than 10 business days before the

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<sup>46</sup> Exhibit PR-2021-040-20.

<sup>47</sup> *Ibid.* at 4.

<sup>48</sup> Exhibit PR-2021-040-21.

<sup>49</sup> Exhibit PR-2021-040-22.

<sup>50</sup> *Ibid.*; Exhibit PR-2021-040-22A (protected).

<sup>51</sup> Exhibit PR-2021-040-22; Exhibit PR-2021-040-22A (protected).

<sup>52</sup> Exhibit PR-2021-040-23 at 2.

<sup>53</sup> Exhibit PR-2021-040-24.

<sup>54</sup> Exhibit PR-2021-040-25A (protected).

<sup>55</sup> SOR/93-602.

<sup>56</sup> Exhibit PR-2021-040-28.

<sup>57</sup> Exhibit PR-2021-040-12; Exhibit PR-2021-040-15. Stoeger sought leave by letter dated September 13, 2021, and Wolverine sought leave by letter dated September 16, 2021.

<sup>58</sup> Exhibit PR-2021-040-13; Exhibit PR-2021-040-16. The Tribunal granted leave to Stoeger on September 15, 2021, and to Wolverine on September 17, 2021.

<sup>59</sup> Exhibit PR-2021-040-17.

<sup>60</sup> Exhibit PR-2021-040-26.



complaint was filed<sup>61</sup> and the Tribunal's decision to deny Cadex's request for PWGSC to produce certain documents.<sup>62</sup> Each is addressed below.

### **PWGSC's claim that Cadex's allegations were not timely**

#### Position of the parties

[24] PWGSC made two claims in its submission that Cadex's allegations were not timely. PWGSC first alleges that, as of the site visit, on June 23, 2021, Cadex knew the basis for its allegation that the Phase II testing did not follow the numbering sequence of the tests.<sup>63</sup> PWGSC then alleges that Cadex knew the basis for its allegation that Bore Tech Blast Degreaser was not used in testing based on its observations from that same visit.<sup>64</sup> PWGSC submits that, to the extent that these are the facts on which Cadex alleges a trade agreement breach, they were known to Cadex more than 10 working days before it filed the complaint. Therefore, according to PWGSC, the allegations are not timely.

[25] Regarding PWGSC's first allegation, Cadex denies being informed during site visits, on June 23, 28, and 30, 2021, that tests 8, 9, and 12 had not been conducted.<sup>65</sup> Cadex submits that no one at Cadex recalls receiving such information on those dates.<sup>66</sup> According to Cadex, it first learned that Test 8 was completed on July 14, 2021, in the regret letter it received on August 12, 2021.<sup>67</sup> Cadex further submits that, in any event, with the test sequencing issue becoming a non-live issue, the relevant date for determining timeliness is August 12, 2021, when Cadex was informed that the PPS failed Test 8.<sup>68</sup>

[26] Regarding PWGSC's second allegation, Cadex submits that there is no evidence that a Cadex representative knew, based on observations during a site visit, that Bore Tech Blast Degreaser was not used in testing.<sup>69</sup> Cadex submits that its representative only observed that Cadex's bore guide maintenance tool was not used in the maintenance and cleaning of the PPS during his site visits on June 23 and 30, 2021.<sup>70</sup> Cadex argues that the origin of its allegation regarding the failure to use Bore Tech Blast Degreaser is the regret letter it received from PWGSC on August 12, 2021, which informed Cadex that acetone was the degreaser used during Test 8.<sup>71</sup>

[27] The parties do not dispute that Cadex only learned that its PPS failed Test 8 from the regret letter it received on August 12, 2021.

[28] Stoeger did not make a submission on this preliminary issue.

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<sup>61</sup> Exhibit PR-2021-040-18 at 20.

<sup>62</sup> Exhibit PR-2021-040-20; Exhibit PR-2021-040-24.

<sup>63</sup> Exhibit PR-2021-040-18 at 20.

<sup>64</sup> *Ibid.*

<sup>65</sup> Exhibit PR-2021-040-27 at para. 12.

<sup>66</sup> *Ibid.* at paras. 12–15.

<sup>67</sup> *Ibid.* at para. 15.

<sup>68</sup> *Ibid.* at para. 16.

<sup>69</sup> *Ibid.* at para. 18.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at para. 20.

### Analysis

[29] For the reasons that follow, the Tribunal finds that Cadex's complaint was timely. Subsection 6(1) of the Regulations requires a complaint to be filed with the Tribunal "no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Therefore, the question for the Tribunal is when Cadex knew or reasonably should have known the basis of its complaint, i.e. in June 2021, at the time of the visits, or on August 12, 2021, when it received the regret letter.

[30] The Tribunal extends the benefit of the doubt to Cadex regarding when it knew of the grounds of complaint. Mr. Jeff Mosher's affidavit, submitted by PWGSC, makes it clear that in June 2021, there was confusion regarding the timeline of tests.<sup>72</sup> He admitted to inadvertently misstating in his June 17, 2021, correspondence with Cadex the timing of tests 8, 9 and 12.<sup>73</sup> Perhaps brought on by the unusual conditions of the pandemic, Mr. Mosher was uncertain himself as to when the tests were conducted at that time. Now, much later, he asserts that he corrected his misstated timelines in a verbal conversation with a Cadex representative during a site visit on June 30, 2021.<sup>74</sup> The Tribunal notes the absence of any documentary evidence supporting Mr. Mosher's claim. This is remarkable despite the record showing that there would have been witnesses to the conversation, including one from DND who provided an affidavit in this proceeding that makes no reference to this important alleged conversation. Given the confusion regarding the testing timelines and the absence of information corroborating Mr. Mosher's recollection of the alleged June 30, 2021, conversation, the Tribunal accepts that Cadex did not learn about the testing sequence until it received the regret letter on August 12, 2021.

[31] PWGSC's claim that Cadex knew that Bore Tech Blast Degreaser was not used in tests seems to be based on PWGSC's assumption that Cadex would have been able to observe this fact during the site visit on June 30, 2021. However, there is no evidence establishing that Cadex was in a position to make such an observation. Therefore, the Tribunal finds that there is no basis for it to doubt Cadex's assertion that its representatives did not know, at that time or at any other time, prior to it receiving the regret letter, that its recommended consumable was not being used.

[32] The Tribunal finds that the basis for Cadex's complaint arose when it received the regret letter on August 12, 2021. Cadex filed its complaint with the Tribunal on August 25, 2021, which is within the prescribed 10-working-day period. Therefore, PWGSC's claim that Cadex's allegations were not timely is not valid.

### **The Tribunal's decision not to order PWGSC to produce documents**

#### Positions of the parties

[33] After receiving the GIR, Cadex asked the Tribunal to order PWGSC to produce.<sup>75</sup>

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<sup>72</sup> Mr. Mosher is the PWGSC supply team leader who acted as contracting authority on behalf of DND for the purchase of the MCSWs. Exhibit PR-2021-040-18 at 142.

<sup>73</sup> Exhibit PR-2021-040-18 at 149.

<sup>74</sup> *Ibid.* at 149.

<sup>75</sup> Exhibit PR-2021-040-20 at 2.

1. “All test reports, evaluation notes, analyses, memoranda, communications and contemporaneous records including test data (such as digital video and photographic data), which together form the full test record for each of the following tests:
  - i. Test 8 – Low Temperature Operation; and
  - ii. Test 12 – Safety Drop.
2. The final evaluation report.

[Footnote omitted]

[34] Cadex argues that PWGSC’s failure to produce its complete evaluation and test records and final evaluation report constitutes a failure to comply with its disclosure obligations under rule 103(2)(c) and (e) of the Rules.<sup>76</sup> Cadex submits that the Rules impose a significant duty of transparency and cooperation on government institutions, particularly where there is an alleged defect in the evaluation of a bid.<sup>77</sup> Cadex asserts that contemporaneous records of the testing process, including all notes, videos/photographs, and reports, are relevant and necessary to the Tribunal’s inquiry to ensure fairness and transparency for all parties concerned.<sup>78</sup> Cadex submits that such disclosure is “routinely” provided by PWGSC in proceedings of this kind.<sup>79</sup>

[35] Specifically, Cadex argues that the requested documents were needed to verify the sequence of testing and to address the allegation that PWGSC’s testing of the PPS MCSW was not conducted properly.<sup>80</sup> According to Cadex, the requested documents should have been filed as a matter of course with the GIR because, as contemporaneous records from the evaluation process, they are the core of the evidentiary foundation on which evaluators base their decision and by which the Tribunal can determine the validity of a complaint.<sup>81</sup>

[36] PWGSC submits that none of Cadex’s allegations are resolved by the requested documents.<sup>82</sup> Rather, they are resolved by a determination of the dates on which the evaluation tests were completed and an interpretation of the RFP and the Cadex Operator Manual.<sup>83</sup> PWGSC submits that the conduct of Test 12 is not probative of any issue because it was conducted after Test 8.<sup>84</sup> PWGSC argues that there is no dispute that Bore Tech Blast Degreaser was not used in Test 8; rather, the

<sup>76</sup> *Ibid.* at 2, 3. The Tribunal notes that the cited provisions appear to be from a previous version of the Rules.

<sup>77</sup> *Ibid.* at 2, citing *Pomerleau Inc. v. Department of Public Works and Government Services* (21 May 2015), PR-2014-048 (CITT) [*Pomerleau*] at para. 27; *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (20 May 2016), PR 2015-051 and PR-2015-067 (CITT) [*Oshkosh*] at para. 70; and *Canada (Attorney General) v. Almon Equipment Limited* (20 July 2010), 2010 FCA 193 [*Almon*] at para. 48.

<sup>78</sup> Exhibit PR-2021-040-20 at 3, citing *Horizon Maritime Services Ltd. / Heiltsuk Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (2 January 2019), PR-2018-023 (CITT) [*Heiltsuk CITT 2019*] at para. 40.

<sup>79</sup> Exhibit PR-2021-040-20 at 3, citing *Heiltsuk CITT 2019* at para. 40; *Falcon Environmental Services Inc. v. Department of Public Works and Government Services* (18 April 2019), PR-2019-003 (CITT) [*Falcon*].

<sup>80</sup> PR-2021-040-20 at 3.

<sup>81</sup> PR-2021-040-23 at 1, citing *Oshkosh* at para. 219.

<sup>82</sup> Exhibit PR-2021-040-22 at 2.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

issue is whether the RFP required its use, an issue resolved by reference to documents already before the Tribunal, including the RFP and Cadex's Operator Manual.<sup>85</sup>

[37] Stoeger did not make a submission on this preliminary issue.

### Analysis

[38] For the reasons that follow, the Tribunal denied Cadex's production order request because the matters at issue could be resolved using the existing information and evidence on the Tribunal's record, and no additional information was needed. Orders for the production of documents are issued in cases where the Tribunal needs additional information to adequately and fairly resolve a complaint. Production orders are not a mechanism for a complainant to obtain documents in order to bolster or supplement its pleadings. In *Heiltsuk FCA*, the Federal Court of Appeal (Court) recognized that allegations related to procedural fairness and bias may require additional disclosure but not for the purpose of seeking to discover documents to establish a claim.<sup>86</sup>

[39] Cadex is correct that the Tribunal has previously observed that government institution evaluations of bids must be transparent and grounded in fact. However, the Tribunal has also asserted its discretion to decide whether a disclosure of documents request is warranted in the specific circumstances of a particular inquiry.<sup>87</sup> The Tribunal's approach is supported by the decision in *Heiltsuk FCA*, wherein the Court states that disclosure orders are "akin to decisions made by administrative decision makers in determining their own procedure, 'including aspects that fall within the scope of procedural fairness' such as information disclosure. Absent statutory provisions to the contrary, administrative decision makers 'enjoy considerable discretion' in making such decisions."<sup>88</sup> The Court said that "[t]he question of what documents a government institution must produce in the context of a procurement inquiry is, in my view, a procedural matter that falls within the Tribunal's discretion."<sup>89</sup> In the current complaint, whether disclosure may or may not be provided "routinely" by PWGSC in procurement inquiry proceedings was not determinative in deciding whether to require PWGSC to provide the requested documents. It was within the Tribunal's discretion to consider whether a disclosure order was warranted in the specific circumstances of this particular inquiry.

[40] Subsection 30.14(1) of the CITT Act requires the Tribunal to "limit its considerations to the subject matter of the complaint."<sup>90</sup> Paragraphs 103(1)(b) and (d) of the Rules require PWGSC to provide all documents that are relevant to the complaint and any additional evidence or information that may be necessary to resolve the complaint. Therefore, in accordance with the Rules and the

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<sup>85</sup> *Ibid.* at 2.

<sup>86</sup> *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Ltd.* (10 February 2021), 2021 FCA 26 [*Heiltsuk FCA*] at para. 111.

<sup>87</sup> *Vireo Network Inc. v. Department of Public Works and Government Services* (23 April 2014), PR-2013-037 (CITT) at para. 58.

<sup>88</sup> *Heiltsuk FCA* at para. 108.

<sup>89</sup> *Heiltsuk FCA* at para. 65.

<sup>90</sup> Cadex submitted the following three grounds of complaint: Test 12 (safety drop) was improperly conducted prior to Test 8 (Low Temperature Operation); PWGSC failed to use Cadex's recommended degreaser and thereby failed to follow the requirements of the RFP and ignored vital information in Cadex's materials; and PWGSC failed to conduct Test 8 according to the evaluation procedures outlined in the RFP and thus deprived Cadex of the opportunity to witness the conduct of Test 8 and potentially correct the evaluators' procedures, which constituted a denial of procedural fairness.

Tribunal's past determinations, the question for the Tribunal in this inquiry was whether the requested documents: were "relevant documents *necessary* for the Tribunal to properly dispose of the complaint" [emphasis added].<sup>91</sup>

[41] In the cases cited by Cadex,<sup>92</sup> the key elements considered by the Tribunal related to matters about the evaluation of the bids that were unclear and unresolved after the GIR was filed. For example, in *Oshkosh*, there was no explanation as to why evaluators reversed their initial decision and appeared to ignore information in the bid.<sup>93</sup> That is not the case here.

[42] Regarding the first ground of complaint, Cadex alleges that Test 12 (Safety Drop) was conducted prior to Test 8, which could have resulted in the PPS being damaged prior to the test.<sup>94</sup> While there was a question as to whether the order of testing was somehow prescribed in the tender documents,<sup>95</sup> the GIR contained affidavit evidence by the individual who conducted those tests that the drop test was conducted after the low temperature operation test.<sup>96</sup> Therefore, the documents requested by Cadex were not necessary for the Tribunal to consider and decide this issue.

[43] Regarding the second ground of complaint, Cadex alleges that the degreaser (acetone) used on the PPS prior to Test 8 was incompatible with the tender documents and the manufacturer's instructions.<sup>97</sup> However, the parties do not dispute which degreaser was used in Test 8. DND admits that it used acetone. For this matter, the question for the Tribunal is whether the RFP and Cadex's instructions required the evaluators to use Bore Tech Blast Degreaser as Cadex alleges was required. The Tribunal determined that the question could be resolved by looking at the documentation already on the Tribunal's record, namely the RFP, Cadex's bid, the Operator Manual and the Maintenance Manual. Therefore, the documents requested by Cadex, such as evaluators' notes and contemporaneous evaluation evidence, were not necessary for the Tribunal to consider and decide this issue.

[44] Regarding the third ground of complaint, Cadex alleges that it was denied an opportunity to witness some of the testing, which meant that it did not see that evaluators were using acetone as a degreaser and was thereby denied an opportunity to intervene and correct the evaluators' procedures.<sup>98</sup> Thus, according to Cadex, the testing was conducted in a procedurally unfair manner.<sup>99</sup> PWGSC admits that in June 2021, Cadex was mistakenly informed that tests 1 to 12 were complete when in fact certain tests were outstanding.<sup>100</sup> The issues for the Tribunal are whether the RFP required the evaluators to conduct the tests in a particular order and whether evaluators were required to permit Cadex to attend the tests. The Tribunal determined that these issues could be resolved by looking at documentation already on the Tribunal's record—namely the RFP and Cadex's bid.

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<sup>91</sup> *Rampart International Corporation v. Department of Public Works and Government Services* (10 November 2021), PR-2021-023 and PR-2021-028 (CITT) at para. 45; *Stenotran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (24 July 2014), PR-2013-046 (CITT) at para. 78.

<sup>92</sup> Cadex cited the following cases: *Pomerleau, Oshkosh, Almon, Heiltsuk CITT 2019*, and *Falcon*.

<sup>93</sup> At para. 70.

<sup>94</sup> Exhibit PR-2021-040-01 at 32.

<sup>95</sup> The tests listed in the RFP are set out in Appendix I.

<sup>96</sup> Exhibit PR-2021-040-18 at 149.

<sup>97</sup> Exhibit PR-2021-040-01 at 35.

<sup>98</sup> *Ibid.* at 42.

<sup>99</sup> *Ibid.*

<sup>100</sup> Exhibit PR-2021-040-18 at 149.

Therefore, the documents requested by Cadex were not necessary for the Tribunal to consider and decide this issue.

[45] As Cadex's grounds of complaint could all be resolved by the Tribunal considering documents already on the record, it was not necessary to issue an order for PWGSC to disclose additional documents.

## ANALYSIS

[46] To determine the validity of a complaint, the Tribunal must determine whether PWGSC followed the procedures and requirements prescribed in respect of the designated contract.<sup>101</sup> In assessing whether evaluators followed solicitation requirements and procedures, the Tribunal shows deference to evaluators' expertise, interfering only when an evaluation or award is unreasonable.<sup>102</sup> The Tribunal's role is to decide if an evaluation is supported by a reasonable explanation; it is "not to step into the shoes of the evaluators and reassess the unsuccessful proposal".<sup>103</sup>

[47] The Tribunal has held that a procuring entity's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling."<sup>104</sup> The Tribunal has also held that an evaluation or award is unreasonable where evaluators have not applied themselves in evaluating a bid, have interpreted the scope of a solicitation requirement incorrectly, have ignored vital information provided in a bid, have based their evaluation on undisclosed criteria, or have otherwise not conducted the evaluation in a procedurally fair way.<sup>105</sup>

[48] The Tribunal must also determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements.<sup>106</sup> The RFP identifies the CFTA as the applicable trade agreement.<sup>107</sup> The Tribunal has held that the CFTA requires procuring entities to evaluate bids in accordance with the essential criteria set out in the tender documentation.<sup>108</sup> Therefore, the Tribunal must decide whether DND conducted the evaluation of the PPS MCSWs in accordance with the RFP criteria at issue and in a manner consistent with the CFTA.

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<sup>101</sup> Subsection 30.14(2) of the CITT Act states as follows: "At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed."

<sup>102</sup> *AJL Consulting v. Department of Agriculture and Agri-food* (12 February 2020), PR-2019-045 (CITT) [*AJL Consulting*] at para. 8; *Heiltsuk Horizon Maritime Services Ltd./Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (3 May 2021), PR-2020-068 (CITT) at para. 44.

<sup>103</sup> *Heiltsuk FCA* at para. 70. See also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83.

<sup>104</sup> *AJL Consulting* at para. 8; citing *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25.

<sup>105</sup> *Menya Solutions Inc. v. Department of Public Works and Government Services* (28 May 2020), PR-2020-003 (CITT) at para. 38.

<sup>106</sup> Section 11 of the Regulations.

<sup>107</sup> Exhibit PR-2021-040-01 at 59.

<sup>108</sup> *AJL Consulting* at para. 7.

[49] Cadex alleges that: Test 12 was improperly conducted prior to Test 8, contrary to the terms of the RFP;<sup>109</sup> the evaluators failed to use the degreaser recommended in Cadex's bid, which was contrary to the terms of the RFP and ignored vital information in Cadex's bid;<sup>110</sup> and PWGSC's miscommunication of the test sequence deprived Cadex of an opportunity to witness Test 8, which means that the procurement was procedurally unfair and the process was not sufficiently transparent.<sup>111</sup> These allegations are addressed, in turn, below.

### **Test 12 (Safety Drop) was conducted after Test 8 (Low Temperature Operation)**

#### Positions of the parties

[50] Cadex submits that Test 12, which could have damaged the PPS causing mechanical issues that could impair the normal functioning of a rifle, was conducted prior to Test 8.<sup>112</sup> Cadex asserts that the RFP's testing procedures set out in Annex D, Appendix 3, clearly contemplated that PPS MCSWs would be tested in a certain order,<sup>113</sup> which means that the RFP's evaluation procedures were not followed.<sup>114</sup> Cadex further asserts that not following the alleged prescribed testing order could have had a directly prejudicial effect on the firing of the PPS in Test 8.<sup>115</sup>

[51] In the GIR, citing section 4.1(c) of the RFP, PWGSC submitted that there was no stipulation that tests had to be conducted in a specific order.<sup>116</sup> PWGSC further submitted that, in any event, different PPS MCSWs were used for different tests, and the PPS used for tests 8, 9 and 12 (PPS "C") were subjected to those tests in that listed order.<sup>117</sup>

[52] In its comments on the GIR, Cadex submitted that it is impossible to pursue this ground of complaint because there is no information on the record confirming that Test 12 was undertaken prior to Test 8.<sup>118</sup> Cadex submitted that the issue of the order of testing is no longer a live issue.<sup>119</sup>

[53] Stoeger did not make a submission on this matter.

#### Analysis

[54] The Tribunal finds that, irrespective of whether the RFP required tests to be conducted in a specific order, Test 8 was conducted prior to Test 12. The interim report,<sup>120</sup> together with the affidavit of evaluation team member Master Warrant Officer Gagnon stating that Test 8 was conducted on July 14, 2021, and Test 12 was completed on July 15, 2021,<sup>121</sup> indicates that Test 8 was

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<sup>109</sup> Exhibit PR-2021-040-01 at 34.

<sup>110</sup> *Ibid.* at 35.

<sup>111</sup> *Ibid.* at 42.

<sup>112</sup> *Ibid.* at 27, paras. 57–60.

<sup>113</sup> *Ibid.* at 32.

<sup>114</sup> *Ibid.* at 34.

<sup>115</sup> *Ibid.*

<sup>116</sup> Exhibit PR-2021-040-18 at 9.

<sup>117</sup> *Ibid.* at 10.

<sup>118</sup> Exhibit PR-2021-040-27 at 10.

<sup>119</sup> *Ibid.* at 7.

<sup>120</sup> Exhibit PR-2021-040-22A (protected) at 10.

<sup>121</sup> Exhibit PR-2021-040-18 at 170.

conducted prior to Test 12. PWGSC's representative, Mr. Mosher, has confirmed that he mistakenly informed Cadex that Test 8 (and indeed Test 12) were completed on or before June 17, 2021.<sup>122</sup>

[55] Nothing before the Tribunal establishes that Test 12 was conducted prior to Test 8, and Cadex has not established that the sequence of conducting Test 8 and Test 12 was contrary to any RFP criteria. Therefore, on balance, the Tribunal determines that this ground of complaint is not valid.

### **PWGSC's use of acetone was not contrary to the solicitation or Cadex's manufacturer's instructions**

#### Positions of the parties

[56] Cadex submits that PWGSC's failure to use Cadex's recommended degreaser for Test 8 was contrary to the terms of the RFP and that PWGSC ignored vital information in Cadex's bid. Cadex asserts that the RFP test procedures required Test 8 to be conducted using a manufacturer's recommended preparation procedure for low temperature operation.<sup>123</sup> Citing *Oshkosh*, Cadex submitted that "[t]he Tribunal has previously commented on the importance of adhering to a bidder's recommendations regarding the testing of a particular good."<sup>124</sup>

[57] Specifically, Cadex argues that the RFP (Annex D, Appendix 3, Evaluation Procedures, section 3.8.2.b) states that a manufacturer's recommended preparation procedures for low temperature operation would be followed for Test 8.<sup>125</sup> According to Cadex, the section 3.8.2.b evaluation procedure "requires a wholistic reading of the [Cadex] Operator Manual, which includes the use of the Recommended Consumables listed at section 9 of page 74."<sup>126</sup>

[58] Cadex points to the highlighted warning on page 53 of its Operator Manual (under the "Cold Weather Conditions" section) that "[u]sing oil or grease in cold weather environment will cause the rifle to be hard to cycle and may prevent proper firing of the cartridge".<sup>127</sup> Cadex notes the instructions after the warning, as follows:<sup>128</sup>

3. Use a good quality solvent/degreaser and a clean rag to wipe down the firing pin assembly. Ensure that all fouling and lubricant residue are removed.
4. Apply a good amount of degreaser to the shroud assembly to dissolve any grease and oils that are not directly accessible. Dry thoroughly.
5. Clean the bolt body with the same solvent/degreaser to remove any lubricant from both the exterior and interior of the bolt. Dry thoroughly.

[Underlining in original]

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<sup>122</sup> *Ibid.* at 149.

<sup>123</sup> Exhibit PR-2021-040-01 at 35; Exhibit PR-2021-040-27 at 12.

<sup>124</sup> Exhibit PR-2021-040-01 at 40.

<sup>125</sup> *Ibid.* at para. 64; Exhibit PR-2021-040-27 at 12.

<sup>126</sup> Exhibit PR-2021-040-27 at 13.

<sup>127</sup> Exhibit PR-2021-040-01 at 36, para. 65.

<sup>128</sup> *Ibid.* at 36.



Cadex argues that the highlighted warning on page 53 “only served to emphasize the fact that the recommended degreaser should absolutely have been used.”<sup>129</sup>

[59] Cadex notes that the chapter titled “Recommended Consumables” in the Operator Manual identified Bore Tech Blast Degreaser as the sole recommended degreaser and “warned that while ‘Other product may be found suitable,’ ‘it’s your responsibility to validate if the cleaning product is compatible with your rifle.’”<sup>130</sup> Cadex argues that it relied on Annex E of the RFP, stating that recommended consumables would be used “to support Phase 2 and Phase 3 of bid evaluation”;<sup>131</sup> therefore, its recommended consumable would be used to successfully test its rifles.<sup>132</sup> Cadex points out that, in January 2021, it asked PWGSC if it should ship chemicals such as oil, grease and solvent, and PWGSC replied “no”.<sup>133</sup> Cadex asserts that “[a]t no time did Cadex indicate that anything other than Bore Tech Blast Degreaser should be used to conduct any tests, including Test 8.”<sup>134</sup>

[60] Cadex asserts that “[i]n all reasonable likelihood, had PWGSC used the recommended degreaser . . . Cadex’s rifle would have successfully fired during Test 8.”<sup>135</sup> Cadex does not consider acetone a “good quality” degreaser and explains that, in its own experiments with acetone, in August 2021, Cadex was “able to reliably reproduce the failures observed in Test 8.”<sup>136</sup>

[61] PWGSC submits that acetone is a good quality degreaser commonly used by the Canadian Armed Forces (CAF), and the decision to use it was reasonable.<sup>137</sup> PWGSC states that, as explained by Master Warrant Officer Gagnon in his affidavit, in accordance with section 3.8.2(b) of the RFP,<sup>138</sup> he reviewed the Operator Manual to prepare the PPS for Test 8.<sup>139</sup> PWGSC asserts that section 6.1 of the Operator Manual, titled “Lubrication”, and subsection 6.1(B), titled “Cold Weather Conditions”, do not identify a specific brand of degreaser.<sup>140</sup>

[62] PWGSC further asserts that Cadex seems to be suggesting that Bore Tech Blast Degreaser must be used for the MCSWs to function. In PWGSC’s view, such a suggestion is not consistent with that degreaser being expressed as a recommendation in the Operator Manual, which also clearly states that other degreasers may be suitable.<sup>141</sup> PWGSC states that if the use of Bore Tech Blast Degreaser is mandatory, Cadex’s MCSWs would not be suitable.<sup>142</sup> PWGSC also notes that an

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<sup>129</sup> Exhibit PR-2021-040-01 at 37.

<sup>130</sup> *Ibid.* at 36, para. 67.

<sup>131</sup> *Ibid.* at 35, para. 64.

<sup>132</sup> *Ibid.* at 37, para. 68.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.* at 37.

<sup>135</sup> *Ibid.* at 35.

<sup>136</sup> *Ibid.*; Exhibit PR-2021-040-27 at para. 26.

<sup>137</sup> Exhibit PR-2021-040-18 at 18.

<sup>138</sup> Annex D, Appendix 3, section 3.8.2 of the RFP sets out the procedure for Test 8; section 3.8.2(b) states as follows: “Condition Magazines, cartridges, and Rifle with Suppressor attached to the temperature specified in Requirement 3.7.1 of Annex C, +/- 3°C, for 12-24 hours, using Manufacturer’s recommended preparation procedure for low temperature operation.”

<sup>139</sup> Exhibit PR-2021-040-18 at 18.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.* at 19.

<sup>142</sup> *Ibid.* at 18, 19.

aerosol degreaser like Bore Tech Blast Degreaser could likely not be deployed because such canisters are not permitted on aircraft.<sup>143</sup>

[63] In its comments on the GIR, Cadex objects to PWGSC's argument regarding the fact that the "Cold Weather Conditions" information in section 6.1(B) of the Operator Manual does not identify Bore Tech Blast Degreaser.<sup>144</sup> Cadex asserts that the argument is unreasonable because it overlooks the basic and common sense layout of the Operator Manual.<sup>145</sup> Cadex then argues that the chapter titled "Recommended Consumables" in the Operator Manual "calls for the use of Bore Tech Blast Degreaser at section 9 at page 74, expressly stating that there are risks involved in using other consumables", which is "an express indication that a departure from Cadex's recommended consumables may result in malfunctions".<sup>146</sup> Cadex faults PWGSC for not using the recommended degreaser or at least consulting with Cadex to confirm that an alternative degreaser was suitable.<sup>147</sup>

[64] Also, in its comments on the GIR, Cadex suggests that PWGSC may have introduced undisclosed evaluation criteria.<sup>148</sup> Cadex notes that the RFP does not indicate which consumables may or may not be used. If PWGSC and DND envisaged the use of a specific degreaser, such as acetone, or that a degreaser could not be in a pressurized canister, then according to Cadex, such criteria should have been disclosed to bidders.<sup>149</sup>

[65] Stoeger submits that the RFP required bidders to provide an accessory kit with tools, parts and items necessary to maintain the rifle, and Cadex did not include its solvent in the kit.<sup>150</sup> Stoeger further submits that its rifle was evaluated and cleaned with solvents presently available and issued by the CAF and that it can be maintained with any readily available cleaners.<sup>151</sup>

### Analysis

[66] For the reasons that follow, the Tribunal finds that PWGSC's use of acetone to prepare the PPS in Test 8 was not contrary to the RFP and did not ignore vital information in Cadex's Operator Manual and Maintenance Manual. The Tribunal also finds that whether PWGSC introduced undisclosed evaluation criteria is not at issue in this complaint.

[67] The Tribunal agrees with Cadex that the RFP required Test 8 to be conducted "using Manufacturer's recommended preparation procedure for low temperature operation". However, Cadex's recommended preparation procedure for low temperature operation does not identify a specific solvent/degreaser for cleaning the firing pin, the shroud or the bolt, and there is no cross-reference to any other part of Cadex's bid that might prescribe the mandatory use of specific solvents/degreasers.

[68] More specifically, while the section on low temperature operation does contain an obvious warning, it is a specific warning against "using oil or grease in cold weather" without any reference

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<sup>143</sup> Exhibit PR-2021-040-18 at 18.

<sup>144</sup> Exhibit PR-2021-040-27 at 13.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* at 13–14.

<sup>147</sup> *Ibid.* at 14.

<sup>148</sup> *Ibid.* at 15.

<sup>149</sup> *Ibid.*

<sup>150</sup> Exhibit PR-2021-040-26 at para. 6.

<sup>151</sup> *Ibid.* at para. 4.

to solvents/degreasers. Notably, in respect of the firing pin assembly at issue,<sup>152</sup> the low temperature operation procedure reads as follows: “Use a good quality solvent/degreaser and a clean rag to wipe down the firing pin assembly. Ensure that all fouling and lubricant residue are removed.”<sup>153</sup> The procedure does not specify a particular type or brand of solvent/degreaser, offers no guidance on what constitutes “good quality”, and does not refer the user to another section of the Operator’s Manual or any other resource. Therefore, the Tribunal does not consider the warning regarding low temperature operation to be a warning against the selection of a specific solvent/degreaser. Where Cadex had concerns about using a particular consumable under certain conditions, the Operator Manual addressed the concern directly. This degree of specificity can be seen, for example, in the statement in section 6.1.A.2 and the note in bold on page 1,012 of the protected Exhibit PR-2021-040-01A.

[69] The Tribunal finds the RFP did not expressly require DND to ensure that a specific brand or type of solvent/degreaser was used to prepare the PPS in Test 8.

[70] The Tribunal has also considered whether the RFP indirectly required DND to use Bore Tech Blast Degreaser in Test 8. It is true that the chapter titled “Recommended Consumables” of the Operator Manual only recommends Bore Tech Blast Degreaser.<sup>154</sup> The use of the term “recommended” in the title implies a suggested consumable.<sup>155</sup> Indeed, that chapter, read in its entirety, indicates that other consumables may be compatible, without identifying any such products.<sup>156</sup> Moreover, the chapter does not specifically reference low temperature operation, and there is no information stating or suggesting that the recommended degreaser should “absolutely” have been used in a low temperature environment.

[71] The Tribunal does not agree with Cadex’s suggestion that DND should have taken steps to verify the compatibility of a non-Bore Tech Blast Degreaser solvent/degreaser in order to carry out Test 8. First, Cadex’s submission that the chapter expressly states that there are risks involved in using other consumables is incorrect. There is no such express statement, which means Cadex’s assertion that such a statement is an “express indication” that departing from a recommended consumable may result in malfunctions is unfounded. Second, the chapter “suggests” and “recommends” Bore Tech Blast Degreaser and states that other products may be found suitable, subject to the operator validating product compatibility. There is no specified verification process and nothing suggesting that “verification” could not be derived from the CAF’s past experience cleaning firearms with degreasers.

[72] The evaluator who administered Test 8, and who has served with the CAF for 23 years,<sup>157</sup> attests that the acetone used during Test 8 is a good solvent/degreaser commonly used on rifles and equipment.<sup>158</sup> The Tribunal acknowledges Cadex’s experiments using acetone as a degreaser in August 2021. These experiments underpin Cadex’s position that acetone is not a good quality degreaser. However, there is no evidence to determine if these experiments were conducted in an

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<sup>152</sup> See, for example, Exhibit PR-2021-040-27 at paras. 26, 43; Exhibit PR-2021-040-01 at paras. 43, 72.

<sup>153</sup> Exhibit PR-2021-040-01 at 36.

<sup>154</sup> *Ibid.*

<sup>155</sup> “Recommended” can be interpreted as meaning “suggested” as fit for some purpose or use. *Canadian Oxford Dictionary*, 2nd ed., by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, s.v. “recommend”.

<sup>156</sup> Exhibit PR-2021-040-01A (protected) at 1034.

<sup>157</sup> Exhibit PR-2021-040-18 at 169.

<sup>158</sup> *Ibid.* at 170, at paras. 3(b), 18.

independent fashion free from the risk of confirmation bias. On balance, the Tribunal prefers the assessment of the evaluator, who works in an environment that regularly uses acetone as a degreaser, over Cadex's assessment based on its own experiments using a solvent/degreaser that Cadex does not use regularly for the type of degreasing at issue. The Tribunal notes that the emails from Bore Tech customer service do not state or imply that acetone is not a good quality solvent/degreaser or that it cannot or should not be used with MCSWs generally or Cadex's MCSWs in particular.<sup>159</sup> Therefore, the Tribunal finds that PWGSC and DND reasonably interpreted what constituted a good quality solvent/degreaser for use in Test 8.

[73] Indeed, in the Operator Manual, it is expressly indicated where Cadex has concerns about a particular consumable.<sup>160</sup> Absent an express statement from Cadex in its bid submission (or its Operator Manual) that it required or expected DND to use the sole recommended consumable for Test 8, or to take prescribed steps to verify the compatibility of a different consumable, or that the PPS may fail to operate properly if the recommended degreaser was not used, it was reasonable for Test 8 to be conducted using a solvent/degreaser familiar to the CAF.

[74] Regarding Cadex's reliance on *Oshkosh* to suggest that DND was required to adhere to recommendations in the Operator Manual in conducting Test 8, the circumstances in that complaint are distinguishable. In *Oshkosh*, the RFP stated that bidders should submit specific information with their bids,<sup>161</sup> and expressly tied the requested information to evaluations testing.<sup>162</sup> One part of the RFP expressly stated that "settings will be set as recommended by the Bidder".<sup>163</sup> The Tribunal stated that it seemed reasonable that the invitation to submit information was intended to assist evaluators, making it reasonable for bidders to have concluded that the information would be used by the evaluators and it was therefore incumbent on PWGSC to consider the information provided.<sup>164</sup> In the complaint at hand, the RFP did not invite bidders to submit information for specific types or brands of consumables. As noted by Cadex, the "RFP is wholly silent as regards what consumables may or may not be used in the course of maintaining or preparing the MCSW during testing."<sup>165</sup> Thus, the basis for the Tribunal's conclusion in *Oshkosh* does not exist in the current complaint.

[75] The Tribunal has found that the RFP did not require DND to use Bore Tech Blast Degreaser as recommended by Cadex. Therefore, Cadex's ground of complaint that PWGSC did not follow the terms of the RFP is not valid. The Tribunal has also found that DND reasonably interpreted Cadex's Operator Manual in deciding that acetone is a good-quality solvent/degreaser and that the manual did not require the use of a specific type or brand of degreaser for Test 8 and did not prohibit use of a non-Bore Tech degreasing product. Therefore, Cadex's ground of complaint that PWGSC ignored vital information in the bid is not valid.

[76] The Tribunal acknowledges Cadex's allegation that PWGSC may have introduced undisclosed evaluation criteria. However, the allegation is based on information set out in the GIR,<sup>166</sup> including PWGSC's comments regarding degreasers in pressurized canisters and the use of acetone as a degreaser. Subsection 30.14(1) of the CITT Act requires the Tribunal to limit its considerations

<sup>159</sup> Exhibit PR-2021-040-01 at 473–476.

<sup>160</sup> Exhibit PR-2021-040-01A (protected) at 1012.

<sup>161</sup> *Ibid.* at para. 117.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.* at para. 185.

<sup>164</sup> *Ibid.* at paras. 142, 144.

<sup>165</sup> Exhibit PR-2021-040-27 at para. 35.

<sup>166</sup> *Ibid.* at paras. 33, 34.

to the subject matter of this complaint. The Tribunal has held previously that, if the basis of a different breach or new ground of complaint is revealed during a complaint process, including where an allegation is raised for the first time in a complainant's comments on the GIR, a new complaint must be filed.<sup>167</sup> Therefore, the Tribunal has decided not to conduct an inquiry into this ground of complaint. In any event, PWGSC's views expressed in its comments were not used to disqualify Cadex's bid.

### **The evaluation process was not unfair**

#### Positions of the parties

[77] Cadex submits that PWGSC's misrepresentation that tests 1 to 12 were complete in mid-June 2021 deprived Cadex of the ability to witness the conduct of Test 8,<sup>168</sup> which was held in July 2021. Cadex further submits that, at the time Test 8 was being scheduled for July, PWGSC should have disclosed that the test had not been conducted.<sup>169</sup> Cadex argues that, if it had received the opportunity to witness Test 8, it would have attended and objected to the use of acetone as a degreaser and pointed out that the PPS was not being degreased properly.<sup>170</sup> Essentially, Cadex is arguing that it could have prevented the use of acetone and ensured the use of Bore Tech Blast Degreaser, which would have resulted in Cadex's PPS passing Test 8.

[78] PWGSC submits that Cadex knew as of June 23, 2021, that the Phase II testing did not follow the number sequence of the tests and that Bore Tech Blast Degreaser was not used.<sup>171</sup> In PWGSC's opinion, the fact that Cadex did not raise these issues following the site visit undermines its claim that they had any impact on the functioning of the PPS.<sup>172</sup>

[79] Stoeger did not make a submission on this matter.

[80] In its comments on the GIR, Cadex denies knowing in June 2021 that tests 8, 9 and 12 had not been conducted.<sup>173</sup> Cadex argues that, if it had received this information in June, it would have been referenced in site visit reports or during internal Cadex debriefings.<sup>174</sup>

#### Analysis

[81] It is unfortunate that PWGSC reported that tests 1 to 12 had been completed by mid-June when in fact Test 8 was not completed until mid-July 2021. However, this miscommunication is not sufficient for the Tribunal to find that the evaluation was procedurally unfair.

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<sup>167</sup> *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (18 December 2020), PR-2020-024 (CITT), at para. 15; *Storeimage v. Canadian Museum of History* (18 January 2013), PR-2012-015 (CITT), at paras. 41–46; *Falcon Environmental Inc. v. Department of Public Works and Government Services* (11 January 2021), PR-2020-034 (CITT), at para. 54.

<sup>168</sup> Exhibit PR-2021-040-01 at 42.

<sup>169</sup> *Ibid.* at 44.

<sup>170</sup> *Ibid.* at 43.

<sup>171</sup> Exhibit PR-2021-040-18 at 20.

<sup>172</sup> *Ibid.* at 21.

<sup>173</sup> Exhibit PR-2021-040-27 at paras. 12, 15.

<sup>174</sup> *Ibid.* at para. 13.

[82] The Tribunal's review of the RFP confirms that there was no guarantee that a manufacturer's representative would be allowed to attend evaluation testing. There was an accommodation made for attendance at some testing;<sup>175</sup> however, the RFP did not require PWGSC to permit bidders to attend one or more tests. In fact, according to PWGSC, COVID-19 protocols in place at the time of Test 8, in July 2021, would not have permitted an outsider to attend the tests.<sup>176</sup>

[83] Cadex's speculation that the results of Test 8 would have been different had they been allowed to attend the test is just that, speculation. Even if Cadex had been present and insisted that Bore Tech Blast Degreaser be used for the preparation of the PPS for Test 8, DND would have been within its rights to refuse that request because, as explained above, the evaluators, in fact, followed the recommended procedure outlined in the Operator Manual.

[84] Therefore, Cadex has not established that the evaluation process was unfair. The Tribunal finds that this ground of complaint is not valid.

## CONCLUSION

[85] For the reasons above, the Tribunal finds that Cadex's complaint regarding PWGSC's evaluation of the PPS MCSWs is not valid. PWGSC conducted the evaluation in accordance with the solicitation documents, as required by applicable trade agreements.

## COSTS

[86] Cadex and PWGSC request their costs for this complaint. Cadex also requests its bid preparation costs.

[87] The Tribunal has broad discretion to award costs under section 30.16 of the CITT Act. The Tribunal generally awards costs to the successful party.<sup>177</sup> However, given PWGSC's mistaken communication of incorrect information to Cadex in June 2021, which contributed to Cadex's concerns about the evaluation process and contributed to its motivation to file this complaint, the Tribunal directs each party to bear its own costs.

## DETERMINATION

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

Randolph W. Heggart  
Randolph W. Heggart  
Presiding Member

<sup>175</sup> See, for example, Exhibit PR-2021-040-01 at 21, 445.

<sup>176</sup> Exhibit PR-2021-040-18 at 149.

<sup>177</sup> *Procurement Costs Guideline* at article 2.1.

**APPENDIX I****PHASES 2 AND 3 TECHNICAL EVALUATION PROCEDURES (TESTS)  
IN RFP ANNEX D, APPENDIX 3<sup>178</sup>**

Test 1: Ammunition Compatibility/Safety Inspection

Test 2: Rifle Chamber

Test 3: Safety Mechanism Operation

Test 4: Calibre Change Duration

Test 5: Muzzle Brake and Suppressor Operation

Test 6: Precision And Accuracy Testing

Test 7: Trigger Pull Force

Test 8: Low Temperature Operation

Test 9: High Temperature Operation

Test 10: Interchangeability Test

Test 11: Suppressor Sound Attenuation

Test 12: Safety Drop

Test 13: Endurance, Precision and Suppressor Sound Attenuation Testing

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<sup>178</sup> Exhibit PR-2021-040-01 at 325–335.