



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATIONS AND REASONS

Files No. PR-2019-020R and  
No. PR-2019-025R

Heiltsuk Horizon Maritime  
Services Ltd. and  
Horizon Maritime Services Ltd.

v.

Department of Public Works and  
Government Services

*Determinations and reasons issued  
Friday, September 24, 2021*

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IN THE MATTER OF a complaint filed by Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd., on June 7, 2019, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND IN THE MATTER OF a complaint filed by Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd., on July 30, 2019, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO determinations by the Canadian International Trade Tribunal on October 18, 2019, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, that the complaints were valid in part;

AND FURTHER TO decisions of the Federal Court of Appeal on February 10, 2021, setting aside the Tribunal's determinations of October 18, 2019, and remitting the complaints back to the Tribunal.

**BETWEEN**

**HEILTSUK HORIZON MARITIME SERVICES LTD. AND  
HORIZON MARITIME SERVICES LTD.**

**Complainants**

**AND**

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

**Government  
Institution**

**DETERMINATIONS**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaints are not valid.

In File No. PR-2019-020R, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal awards the Department of Public Works and Government Services its complaint costs in the amount of \$1,150, to be paid by the complainants.

In File No. PR-2019-025R, the Tribunal determines that each party will bear its own costs.

Peter Burn  
\_\_\_\_\_  
Peter Burn  
Presiding Member

Tribunal Panel:	Peter Burn, Presiding Member
Tribunal Counsel:	Eric Wildhaber, Counsel Jessye Kilburn, Counsel
Complainants:	Heiltsuk Horizon Maritimes Services Ltd. and Horizon Maritime Services Ltd.
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Government Institution:	Department of Public Works and Government Services
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## STATEMENT OF REASONS

### OVERVIEW

[1] These reasons concern two complaints filed by Horizon Maritime Services Ltd. and Heiltsuk Horizon Maritime Services Ltd. (collectively Heiltsuk Horizon). These two complaints were the second and third of five complaints filed by Heiltsuk Horizon in relation to the same procurement (Solicitation No. F7017-160056/C). The procurement was conducted by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans, for the services of two emergency towing vessels on a time charter basis. PWGSC awarded the contract to Atlantic Towing Ltd. (ATL).

[2] On January 2, 2019, the Tribunal determined that Heiltsuk Horizon's first complaint (PR-2018-023) was valid in part, finding that PWGSC had unreasonably evaluated mandatory requirement 12 (MR 12) relating to the vessels' bollard pull.<sup>1</sup> The Tribunal found that "it was unreasonable for PWGSC to conclude that ATL's bid, on its face, satisfied MR 12" and recommended that the bids be re-evaluated with respect to MR 12.<sup>2</sup>

[3] Upon re-evaluation, ATL was found to be compliant with MR 12 and remained the successful bidder. Heiltsuk Horizon brought the second and third complaints (PR-2019-020 and PR-2019-025) to challenge this re-evaluation. The Tribunal found, on October 18, 2019, that these complaints were valid in part and recommended that PWGSC again re-evaluate the compliance of all bids with MR 12.<sup>3</sup>

[4] The parties brought five applications for judicial review challenging the Tribunal's decisions in the first, second and third complaints. On February 10, 2021, the Federal Court of Appeal (FCA) upheld the Tribunal's first decision and remitted the second and third decisions back to the Tribunal.<sup>4</sup>

[5] The Tribunal has therefore re-examined the second and third complaints in accordance with the reasons of the FCA. For the reasons below, the Tribunal determines that the second and third complaints are not valid. As the two complaints are based on the same facts and are closely interrelated, the Tribunal issues these single reasons for both determinations.

### BACKGROUND

#### The solicitation

[6] The solicitation was issued on February 5, 2018. The bid closing date was April 13, 2018, and Heiltsuk Horizon submitted its bid on this date. Nine bids were submitted in total. ATL was awarded the contract on August 9, 2018.

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<sup>1</sup> *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 (CITT) [*Heiltsuk Horizon I*].

<sup>2</sup> *Heiltsuk Horizon I* at paras. 69, 98.

<sup>3</sup> *Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (18 October 2019), PR-2019-020 and PR-2019-025 (CITT) [*Heiltsuk Horizon II and III*].

<sup>4</sup> *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26 [*Heiltsuk Horizon FCA*].

**The first complaint (PR-2018-023)**

[7] Heiltsuk Horizon filed its first complaint on August 20, 2018, which alleged that PWGSC had displayed bias in favour of ATL and that ATL's bid was non-compliant because it failed to take into account engine-driven consumers in calculating bollard pull, as required under MR 12.

[8] On January 2, 2019, the Tribunal rejected the bias allegations but found that PWGSC had unreasonably evaluated ATL's compliance with MR 12.<sup>5</sup> As such, the Tribunal recommended that PWGSC re-evaluate MR 12. The Tribunal also recommended that the contract remain with ATL until the re-evaluation was completed, but that PWGSC undertake no further expenditure under the contract pending the re-evaluation.

[9] On May 27, 2019, PWGSC notified the Tribunal and Heiltsuk Horizon that it had re-evaluated MR 12, that all bidders had been found to be compliant with MR 12, and that ATL remained the successful bidder.

**The second complaint (PR-2019-020)**

[10] Heiltsuk Horizon filed its second complaint on June 7, 2019, alleging that the re-evaluation of ATL's bid was unreasonable, that PWGSC engaged in impermissible bid repair, and that PWGSC displayed bias in favour of ATL.

[11] The Tribunal granted ATL's request for intervener status on July 3, 2019. PWGSC filed its Government Institution Report (GIR) on July 16, 2019, and ATL filed its comments on the GIR on July 23, 2019. Heiltsuk Horizon filed its response on August 2, 2019.

**The third complaint (PR-2019-025)**

[12] On July 30, 2019, Heiltsuk Horizon filed its third complaint, alleging that new information disclosed in the GIR for the second complaint revealed that PWGSC's re-evaluation of *all* bidders' compliance with MR 12 had been unreasonable. Heiltsuk Horizon also requested further disclosure in five areas.

[13] On August 8, 2019, the Tribunal requested that PWGSC include four of Heiltsuk Horizon's five disclosure requests in the GIR.

[14] On September 3, 2019, PWGSC filed the GIR for the third complaint, in which it also responded to Heiltsuk Horizon's submissions of August 2, 2019, in the second complaint.

[15] ATL submitted its comments on the GIR on September 9, 2019. On September 17, 2019, Heiltsuk Horizon submitted its response to the GIR and the intervener's comments.

[16] On October 18, 2019, the Tribunal determined that the second and third complaints were valid in part.<sup>6</sup> The Tribunal again rejected Heiltsuk Horizon's bias allegations and again found that PWGSC's re-evaluation of MR 12 was unreasonable. As such, the Tribunal recommended that

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<sup>5</sup> *Heiltsuk Horizon I.*

<sup>6</sup> *Heiltsuk Horizon II and III.*

PWGSC again re-evaluate MR 12 for all bids, but it did not recommend that ATL's contract be cancelled or that it be excluded from the re-evaluation.

### **The judicial reviews**

[17] The FCA heard concurrently the five applications for judicial review relating to the series of complaints above, and it rendered one set of reasons on February 10, 2021.

[18] Heiltsuk Horizon challenged the Tribunal's first decision, arguing that ATL's bid should have been disqualified from the re-evaluation and its contract terminated. The FCA upheld the Tribunal's first decision.

[19] All three parties challenged the Tribunal's second and third decisions. PWGSC and ATL argued that the Tribunal imposed an interpretation of MR 12 that had no basis in the solicitation and failed to accord deference to the re-evaluators. Heiltsuk Horizon challenged the Tribunal's dismissal of its bias allegations, as well as the Tribunal's assessment of remedy, arguing that ATL should have been disqualified from the re-evaluation and its contract terminated. The FCA found in favour of PWGSC and ATL, and it remanded the second and third complaints to the Tribunal for reconsideration.<sup>7</sup>

### **The remand proceedings**

[20] On March 1, 2021, Heiltsuk Horizon filed the FCA's judgments and reasons with the Tribunal. Heiltsuk Horizon requested that the remanded complaints not be disposed of before either (1) the deadline to file an application for leave to appeal to the Supreme Court of Canada had passed, or (2) the date on which the Supreme Court of Canada disposed of the matter. Heiltsuk Horizon also requested that parties be allowed to make submissions prior to the Tribunal's disposition of the second and third complaints, specifically on the issue of whether there was a latent ambiguity in MR 12.

[21] On March 2, 2021, ATL communicated that it intended to respond to Heiltsuk Horizon's requests and asked the Tribunal not to issue any directions on this matter until all parties had had the opportunity to address the request.

[22] On March 5, 2021, both PWGSC and ATL objected to Heiltsuk Horizon's requests. They argued that Heiltsuk Horizon should seek a stay from the Supreme Court of Canada if it wished to delay the disposition of the complaints pending an appeal of the FCA's decisions, and that Heiltsuk Horizon should not be allowed to make further submissions to the Tribunal on the disposition of the remanded complaints. They also requested the opportunity to make submissions on costs.

[23] On March 10, 2021, Heiltsuk Horizon responded to the submissions of ATL and PWGSC.

[24] On March 18, 2021, ATL submitted that it had recently learned that Horizon Maritime Services Ltd. had recently retained a consultant lobbyist, Mr. Brad Duguid, who had identified the Tribunal as one of the government institutions to be lobbied by him on behalf of Horizon Maritime Services Ltd. ATL requested that the Tribunal confirm whether Mr. Duguid had engaged in any lobbying activity aimed at the Tribunal, and it requested copies of all communications between

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<sup>7</sup> *Heiltsuk Horizon FCA.*

Mr. Duguid, the complainants, counsel for the complainants, and any Tribunal member or staff that were not already on the record.

[25] On March 22, 2021, counsel for Heiltsuk Horizon submitted that they had spoken with Mr. Duguid, who confirmed that he had not engaged in any lobbying activity aimed at the Tribunal and that he had only identified the Tribunal in his lobbyist registration out of an abundance of caution in case he needed to request documents to assist him in his unrelated advisory activities. They confirmed that Mr. Duguid's lobbying was unrelated to the Tribunal's proceedings and that no correspondence exists between Mr. Duguid and Heiltsuk Horizon, Heiltsuk Horizon's counsel or any Tribunal member or staff.

[26] On March 22, 2021, the Tribunal stated the following in a letter to parties:

The Tribunal is an independent, quasi-judicial institution that does not typically engage with lobbyists. Further, the Tribunal does not engage in substantive *ex parte* communications, regardless whether these are by parties or by lobbyists. All correspondence and submissions relating to a complaint are put on the record of that complaint and are served on all parties. There were no such documents received from Mr. Duguid or any other lobbyist in these inquiries.<sup>8</sup>

[27] On April 12, 2021, Heiltsuk Horizon notified the Tribunal that it had decided not to appeal the FCA's decision. It reiterated its request to make submissions on the disposition of the remanded complaints, and it requested that the Tribunal delay its reconsideration of the remanded complaints until after the determination was issued in Heiltsuk Horizon's fifth complaint (File No. PR-2020-068).

[28] On April 13, 2021, PWGSC requested that the Tribunal dismiss both the second and third complaints, with costs, and without further submissions.

[29] On May 28, 2021, PWGSC noted that the Tribunal had recently disposed of the fifth complaint (File No. PR-2020-068) and reiterated its request that the Tribunal dismiss both the second and third complaints, with costs, and without further submissions.

[30] On June 8, 2021, the Tribunal acknowledged receipt of correspondence from Heiltsuk Horizon, PWGSC and ATL giving their views on the remand proceedings, and the Tribunal noted that it was examining the matter and would get back to the parties in due course.

[31] The Tribunal decided that the existing record was sufficient to dispose of the issues in this remand, for the reasons set out below. As such, the Tribunal did not invite further submissions from parties.

## TRIBUNAL'S ANALYSIS

### Overview

[32] Heiltsuk Horizon made several allegations in its second and third complaints; however, not all these allegations are still relevant in these remand proceedings. The FCA found that the Tribunal properly dismissed Heiltsuk Horizon's allegations of favouritism and reasonable apprehension of

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<sup>8</sup> Exhibit PR-2019-020R-08.



bias.<sup>9</sup> The FCA did not address the Tribunal's conclusions that Heiltsuk Horizon had standing<sup>10</sup> or that PWGSC did not engage in impermissible bid repair.<sup>11</sup>

[33] As such, the following three issues remain to be determined. First, the FCA quashed the Tribunal's second and third decisions on the basis that the Tribunal's assessment of MR 12 was unreasonable, and thus the Tribunal must reconsider this issue in accordance with the FCA's reasons. Second, the Tribunal will consider Heiltsuk Horizon's alternative argument that MR 12 is latently ambiguous. Finally, the Tribunal will consider the requests for costs made by PWGSC and ATL.

### **Was PWGSC's interpretation of MR 12 reasonable?**

[34] The central dispute in the second and third complaints has been over how to interpret the underlined phrase in MR 12, which reads as follows:

The Bidder's vessels must exert a minimum continuous bollard pull of no less than 120 tonnes when *all required engine driven consumers (shaft generators, etc.)* are taken into account.<sup>12</sup>

[Emphasis added]

[35] Heiltsuk Horizon has maintained that ATL's vessels have insufficient bollard pull to meet MR 12, and that PWGSC's evaluation did not properly account for the ways in which engine-driven consumers would reduce the vessels' available bollard pull. PWGSC and ATL have maintained that the evaluators were entitled to rely on the bollard pull certificates provided with the bids, as it was for the independent certifying body to determine which engine-driven consumers to account for in assessing bollard pull.

[36] The FCA decided in favour of PWGSC and ATL. The Court was "not convinced that [PWGSC's re-evaluators] failed to apply their expertise and experience to the task or ignored the language of MR 12".<sup>13</sup> Furthermore, the FCA stated that its findings "seal the fate of Heiltsuk Horizon's four complaints filed with the Tribunal in connection with the [solicitation at issue]".<sup>14</sup>

[37] The FCA noted that the re-evaluators did research on the bollard pull testing procedures of Det Norske Veritas (DNV), which is the classification society that provided the bollard pull certificates for ATL's vessels:<sup>15</sup>

The DNV procedures, as found on the internet . . . confirmed that "all auxiliary equipment such as pumps, generators and other equipment, which are driven from the main engine(s) or propeller shaft(s) in normal operation of the vessel shall be connected during the test". . . . Classification society surveyors would have identified any deviation from the

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<sup>9</sup> *Heiltsuk Horizon II and III* at paras. 34–40; *Heiltsuk Horizon FCA* at paras. 115, 117.

<sup>10</sup> *Heiltsuk Horizon II and III* at paras. 29–33.

<sup>11</sup> *Ibid.* at paras. 41–46.

<sup>12</sup> Exhibit PR-2019-020-01B at 1330.

<sup>13</sup> *Heiltsuk Horizon FCA* at para. 163.

<sup>14</sup> *Ibid.* at para. 185. The fourth complaint to which the FCA refers was not accepted for inquiry by the Tribunal: *Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd.* (25 September 2019), PR-2019-034 (CITT).

<sup>15</sup> *Heiltsuk Horizon FCA* at para. 158.

testing procedure on the certificate and would only conduct the test with the vessel in a safe condition to operate.

[38] As the FCA explained, the re-evaluators were asked to confirm their understanding of the word “required” in the context of MR 12, and they “achieved consensus that ‘required’ means ‘those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected in the Classification Society Bollard Pull testing procedure’ ”.<sup>16</sup>

[39] In sum, as the FCA explained, “the record shows that the [re-evaluators] consulted the relevant DNV rules and made their assessment of Atlantic’s compliance with MR 12 based on their expert understanding of these rules”.<sup>17</sup>

[40] The FCA also noted the following explanation in the re-evaluation report of which power consumers would be required during a bollard pull test:<sup>18</sup>

The evaluators noted that significant *consumers such as shaft generators would not be required during the Bollard Pull test* and that those consumers such as communication equipment, radar, lights machinery ventilation fans would use minimal power that would be supplied by alternate sources of power. In this instance, the Atlantic Towing bid’s vessel specifications indicated the availability of auxiliary generators that would provide this functionality.

[Emphasis added]

[41] At first glance, it may seem incongruent that shaft generators would not be required to be considered, when MR 12 itself explicitly mentions shaft generators. However, the FCA found that the re-evaluators did not ignore the language of MR 12.<sup>19</sup> As mentioned above, according to the re-evaluators, “ ‘required’ means ‘those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected in the Classification Society Bollard Pull testing procedure’ ”.<sup>20</sup> This implies that “shaft generators, etc.” is included in MR 12 merely as an example of engine-driven consumers that *may* be “required”, but that shaft generators or other engine-driven consumers are not “required” within the meaning of MR 12 if the classification society does not require that they be accounted for in the bollard pull test.

[42] In light of the guidance above, the Tribunal concludes that PWGSC re-evaluated bids according to a reasonable interpretation of MR 12.

### **Does MR 12 contain a latent ambiguity?**

[43] Heiltsuk Horizon requested the opportunity to make submissions on whether there was a latent ambiguity in MR 12. It submitted that it raised this issue in its first complaint, which was incorporated into the record of the second and third complaints.

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<sup>16</sup> *Ibid.* at para. 39.

<sup>17</sup> *Ibid.* at para. 162.

<sup>18</sup> *Ibid.* at para. 159.

<sup>19</sup> *Ibid.* at para. 163.

<sup>20</sup> *Ibid.* at para. 39.

[44] Heiltsuk Horizon also submitted that if there had been only one reasonable outcome open to the Tribunal, then the FCA would have substituted its own judgment rather than remitted the matter back to the Tribunal. Given that the Tribunal found PWGSC's evaluation to be unreasonable in the first three complaints, Heiltsuk Horizon submitted that it would be unfair for the Tribunal to now skip over its alternate arguments on ambiguity, which it submits the Tribunal did not yet consider.

[45] According to PWGSC, Heiltsuk Horizon's request to make submissions on how to dispose of the complaint was an attempt to undermine the FCA's decisions. PWGSC submitted that Heiltsuk Horizon seeks to raise arguments that were not raised before the Tribunal or the FCA.

[46] ATL also submitted that Heiltsuk Horizon was attempting to raise new arguments and new grounds of complaint, and that it was not entitled to relitigate the matter given the clear directions of the FCA.

[47] Contrary to PWGSC's submission, Heiltsuk Horizon is correct that it raised the issue of a latent ambiguity in MR 12 in its first complaint<sup>21</sup> and that the record of the first complaint was incorporated into the records of the second<sup>22</sup> and third<sup>23</sup> complaints. Heiltsuk Horizon raised the latent ambiguity issue as an alternative argument: it stated that if the Tribunal were to agree with PWGSC's view that MR 12 simply required a valid bollard pull certificate regardless of the certificate's content, then MR 12 contains a latent ambiguity. It submitted that its own bid was based on the costlier vessels necessary to have an *effective* bollard pull of 120 tonnes in emergency towing conditions, and it therefore argued that it should not be penalized for how it read an ambiguous requirement. In support of this position, it cited a decision in which the Tribunal found that the solicitation was "so latently ambiguous that a bidder would likely have required specialized legal training to be alerted to its ambiguities",<sup>24</sup> such that "neither party could be wronged for not seeking further clarification sooner in the procurement process".<sup>25</sup>

[48] Heiltsuk Horizon sought to make further submissions on this latent ambiguity argument in these remand proceedings. The Tribunal is of the view that further submissions were not necessary and that this argument ought to be decided on the basis of the existing record.

[49] The FCA has already assessed the competing interpretations of MR 12, and the Tribunal is bound by its conclusions. As explained above, the FCA was "not convinced that the [re-]evaluators failed to apply their expertise and experience to the task or ignored the language of MR 12".<sup>26</sup> The FCA rejected the interpretation of MR 12 advanced by Heiltsuk Horizon and overturned the Tribunal's decisions that adopted this interpretation. As such, if one of the two competing interpretations of MR 12 has been rejected as unreasonable by the FCA, it would be illogical for the Tribunal to find a latent ambiguity in MR 12. In the FCA's words, its findings "seal the fate" of Heiltsuk Horizon's complaints in respect of MR 12.<sup>27</sup>

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<sup>21</sup> Exhibit PR-2018-023-51A at 5–6.

<sup>22</sup> Exhibit PR-2019-020-02.

<sup>23</sup> Exhibit PR-2019-025-02.

<sup>24</sup> *Rockwell Collins Canada Inc. v. Department of Public Works and Government Services* (13 October 2017), PR-2017-006 (CITT) at para. 67.

<sup>25</sup> *Ibid.* at para. 70.

<sup>26</sup> *Heiltsuk Horizon FCA* at para. 163.

<sup>27</sup> *Ibid.* at para. 185.

[50] The Tribunal must also consider its own decision in the first complaint, which was upheld by the FCA.<sup>28</sup> The FCA explained the Tribunal's interpretation of MR 12 in the first decision as follows:

With respect to the meaning of "required" in MR 12, the Tribunal was of the view that the parties' submissions and evidence indicated a "common understanding" that it refers to the power-driven consumers required "for the normal operations" of emergency towing vessels (Decision I at para. 64). At the same time, the Tribunal acknowledged that MR 12 "did not specify a list of power-driven consumers that had to be considered and deducted from the rated bollard pull" but held that this was "beside the point" given that all required engine driven consumers were, under MR 12, to be taken into account in establishing a vessel's minimum bollard pull (Decision I at para. 64).<sup>29</sup>

[51] In light of the guidance above, the Tribunal concludes that there was no latent ambiguity in MR 12. Further submissions from Heiltsuk Horizon on this issue would have served no purpose and would not have aided the Tribunal in reaching a different conclusion.

## Conclusion

[52] For the reasons above, the Tribunal determines that PWGSC's evaluation of MR 12 was reasonable and that MR 12 did not contain a latent ambiguity. As a result, Heiltsuk Horizon's second and third complaints are not valid.

## COSTS

[53] Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*,<sup>30</sup> the Tribunal may award costs of, and incidental to, any procurement complaint proceedings. In determining the amount of cost award, the Tribunal considers its *Procurement Costs 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.

[54] PWGSC requested the opportunity to make submissions on the amount of costs it would be awarded if the second and third complaints were dismissed. It also submitted that it had paid costs to Heiltsuk Horizon in respect of the second and third complaints, which it requested that Heiltsuk Horizon repay.

[55] Heiltsuk Horizon submitted that it did not believe it had received costs from PWGSC for the first, second or third complaints, but that it was confident that parties could resolve any outstanding issues of costs without the Tribunal's intervention.

[56] ATL also requested to make submissions on costs. It submitted that Heiltsuk Horizon's request to be awarded the contract was its main reason for participating in the proceedings. According to ATL, Heiltsuk Horizon was wrong to make this request while simultaneously not revealing to the Tribunal that it had decommissioned its vessels.

[57] The Tribunal is of the view that no further submissions on costs are warranted. The Tribunal has already assessed the level of complexity of these complaints in its previous decisions, in

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<sup>28</sup> *Ibid.* at para. 187.

<sup>29</sup> *Ibid.* at para. 86.

<sup>30</sup> R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

accordance with the *Procurement Costs Guideline*,<sup>31</sup> and the FCA did not address the Tribunal's reasoning on costs. In these remand proceedings, the Tribunal will follow an approach to assessing costs that is similar to the one used in its previous decisions.

[58] In its previous decision, the Tribunal awarded no costs to Heiltsuk Horizon for the second complaint, because it had made unsupported allegations of bias that unnecessarily complicated the proceedings. The Tribunal assessed the level of complexity of the third complaint as Level 1 and, according to the *Procurement Costs Guideline*, awarded costs of \$1,150 to Heiltsuk Horizon.

[59] The Tribunal is of the view that the second complaint was of Level 1 complexity as well. As the remand proceedings involved only a few short submissions from parties, the Tribunal finds no reason to alter this assessment.<sup>32</sup> As such, the Tribunal awards PWGSC costs in the amount of \$1,150 in respect of the remand of the second complaint, to be paid by Heiltsuk Horizon.

[60] In the third complaint, although PWGSC was successful, it unnecessarily complicated the proceedings by making unsupported allegations that Heiltsuk Horizon lacked standing.<sup>33</sup> While costs are generally awarded to the winning party, the Tribunal has on occasion declined to do so "in keeping with [its] discretion as a court of record and master of its own procedure . . .".<sup>34</sup> For example, the Tribunal has declined to award costs to a winning party that withheld relevant information and/or unduly complicated the proceedings.<sup>35</sup> For similar reasons, as mentioned above, the Tribunal previously awarded no costs to Heiltsuk Horizon for the second complaint because it had made unsupported allegations of bias that unnecessarily complicated the proceedings. As such, in respect of the remand of the third complaint, each party will bear its own costs.

[61] The Tribunal awards no costs to ATL. The Tribunal typically does not award costs to interveners.<sup>36</sup> ATL made essentially the same arguments as PWGSC and did not contribute to the

<sup>31</sup> *Heiltsuk Horizon II and III* at paras. 73–76.

<sup>32</sup> See *Canadian North Inc. v. Department of Indian Affairs and Northern Development* (15 May 2007), PR-2006-026R (CITT) at para. 15, in which the Tribunal stated as follows: "The Tribunal does not consider that the Federal Court of Appeal's decision affects the reasons for which it awards costs, or the manner in which it determines the amount of the cost award. The Tribunal sees no reason to deviate from its previous decision regarding costs."

<sup>33</sup> *Heiltsuk Horizon II and III* at paras. 29–33. For a similar situation, see, for example, *Workplace Medical Corp. v. Canada Food Inspection Agency* (28 July 2015), PR-2015-004 (CITT) at para. 49.

<sup>34</sup> *Francis H.V.A.C. Services Ltd. v. Department of Public Works and Government Services* (2 September 2016), PR-2016-003 (CITT) [*Francis H.V.A.C.*] at para. 53.

<sup>35</sup> See, for example, *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. 66, citing: *Francis H.V.A.C.* at para. 57; *The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency* (20 March 2017), PR-2016-041 (CITT) at para. 90; *Workplace Medical Corp. v. Canada Food Inspection Agency* (28 July 2015), PR-2015-004 (CITT) at para. 49.

<sup>36</sup> *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (5 January 2020) PR-2020-024 (CITT) at para. 66, citing: *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at para. 119; *TPG Technology Consulting Limited v. Department of Public Works and Government Services* (20 December 2007), PR-2007-060 (CITT) at 38; *Canadian North Inc. v. Department of Indian Affairs and Northern Development* (5 April 2007), PR-2006-026R (CITT) at paras. 16–28; *Bosik Vehicle Barriers Ltd. v. Department of Public Works and Government Services* (6 May 2004), PR-2003-082 (CITT) at paras. 37–39; *Bell Mobility v. Department of Public Works and Government Services* (14 July 2004), PR-2004-004 (CITT) at paras. 46–47; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at paras. 96–99.

Tribunal's deliberations by adding a viewpoint that otherwise would not have been considered.<sup>37</sup> Furthermore, similarly to PWGSC, ATL complicated the proceedings of the third complaint by making unsupported allegations that Heiltsuk Horizon lacked standing.

[62] These assessments of costs are final and not preliminary.

[63] Finally, in respect of the parties' submissions about payment of costs awarded in previous Tribunal decisions, the Tribunal trusts that parties will settle any remaining accounts between themselves without the Tribunal's further intervention.

## DETERMINATIONS

[64] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are not valid.

[65] In File No. PR-2019-020R, pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its complaint costs in the amount of \$1,150, to be paid by Heiltsuk Horizon.

[66] In File No. PR-2019-025R, the Tribunal determines that each party will bear its own costs.

Peter Burn

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Peter Burn

Presiding Member

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<sup>37</sup> See *Canadian North Inc. v. Department of Indian Affairs and Northern Development* (15 May 2007), PR-2006-026R (CIIT) at para. 17.