



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File PR-2021-058

Gregory Kerr Limited

v.

Department of Public Works and  
Government Services

*Determination issued  
Monday, May 2, 2022*

*Reasons issued  
Tuesday, May 10, 2022*

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IN THE MATTER OF a complaint filed by Gregory Kerr Limited pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

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**

**GREGORY KERR LIMITED**

**Complainant**

**AND**

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

**Government  
Institution**

**DETERMINATION**

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

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

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

Tribunal Panel:	Susan D. Beaubien, Presiding Member
Tribunal Secretariat Staff:	Isaac Turner, Counsel Morgan Oda, Registrar Officer Geneviève Bruneau, Registrar Officer
Complainant	Gregory Kerr Limited
Counsel for the Complainant:	Colin Piercey Calvin DeWolfe
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Peter J. Osborne Veronica Tsou

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## STATEMENT OF REASONS

[1] This complaint arises from an invitation to tender (ITT) (solicitation EB144-221443/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO).

[2] The complainant, Gregory Kerr Limited (GKL), submitted a bid by the closing date which turned out to be the lowest-priced bid that was received by PWGSC. However, GKL's bid was disqualified because PWGSC asserted that the validity of the required bid bond provided by GKL could not be verified. GKL contends that the bond was both real and verifiable and that PWGSC should have awarded the contract to GKL.

## FACTUAL BACKGROUND

[3] The ITT was published on November 8, 2021, seeking proposals for a scope of work required by the Canadian Coast Guard, which is a special operating agency within DFO.<sup>1</sup> The work comprised repairs to a floating wharf structure located in Sambro, Nova Scotia, including the installation of new socketed pipe piles and lateral bracing around the existing floating dock structure, removal and replacement of existing float-to-float connections, and the installation of sliding strips.<sup>2</sup> The work was considered to be urgent and required completion by March 31, 2022.<sup>3</sup>

[4] Following the issuance of one amendment,<sup>4</sup> the tender closed on November 25, 2021. Three bids were received, including a bid submitted by GKL.<sup>5</sup>

[5] The unofficial results of the tender competition were posted by PWGSC on or about November 30, 2021. As a consequence, GKL learned that its quoted price was the lowest of the three bids that had been submitted. This caused GKL to conclude that it was the winning bidder and would be awarded a contract in due course. Over the next few days, GKL sent emails to PWGSC inquiring about next steps and expressing an eagerness to commence work.<sup>6</sup>

[6] On December 6, 2021, PWGSC wrote to GKL to advise that a contract for the solicitation would not be awarded to GKL. The regret letter provided the following explanation:

Unfortunately your bid was found to be unresponsive to the mandatory requirements of the solicitation, as it did not meet SI04 BID SECURITY REQUIREMENTS, specifically SI04 section 2.1. e. Your bid bond was not the original document and lacked the verification links required for the confirmation process.<sup>7</sup>

[7] Upon receiving the regret letter, the president of GKL (Mr. Gregory Kerr) immediately contacted PWGSC to contest the rejection of GKL's bid. He provided copies of correspondence

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<sup>1</sup> Exhibit PR-2021-058-01B at 1–20, 25–117; Exhibit PR-2021-058-07A at 1–41, 46–138; Exhibit PR-2021-058-16 at 30–49, 52–144.

<sup>2</sup> Exhibit PR-2021-058-01B at 37; Exhibit PR-2021-058-07A at 63; Exhibit PR-2021-058-16 at 69.

<sup>3</sup> Exhibit PR-2021-01B at 13; Exhibit PR-2021-058-07A at 13, 34; Exhibit PR-2021-058-16 at 22, 42.

<sup>4</sup> On November 11, 2021. See Exhibit PR-2021-058-01B at 21–22; PR-2021-058-07A at 42–45; Exhibit PR-2021-058-16 at 50–51.

<sup>5</sup> Exhibit PR-2021-058-01B at 126–133; Exhibit PR-2021-058-16 at 148–155.

<sup>6</sup> Exhibit PR-2021-058-01 at 27–96; Exhibit PR-2021-058-01A at 9-13; Exhibit PR-2021-058-16 at 166–172.

<sup>7</sup> Exhibit PR-2021-058-01 at 14; Exhibit PR-2021-058-16 at 146.

between GKL and its surety, Trisura Guarantee Insurance Company (Trisura), pertaining to the disputed bond. GKL contended that the rejection must have been an error, that the bond could be verified on Trisura's website, and that GKL had performed that exercise by way of confirmation. In the alternative, GKL stated that it could provide PWGSC with cash security, an irrevocable letter of credit "or anything else that will get us the work".<sup>8</sup>

[8] The next day,<sup>9</sup> Mr. Kerr placed follow-up telephone calls to PWGSC but was unable to immediately reach the person having carriage of PWGSC's file. He sent a further email with contact details for individuals at Trisura who would be able to confirm and verify GKL's bid.<sup>10</sup>

[9] Shortly thereafter, Trisura provided PWGSC with written confirmation of GKL's bid. In doing so, Trisura stated that it was unclear why GKL's bid was found to be non-compliant. On Trisura's review, all of GKL's bid bond documentation appeared to be in order. Trisura offered to answer any questions that PWGSC might have.<sup>11</sup>

[10] It appears that Mr. Kerr subsequently had a telephone discussion with the PWGSC supply officer handling the file. This resulted in an email sent to Mr. Kerr at the end of the day, on December 7, 2021, which purported to provide clarification for PWGSC's decision that GKL's bid bond was non-verifiable.<sup>12</sup>

[11] According to PWGSC, as GKL's bid bond was submitted in PDF format and merged with the rest of GKL's bid as a single document, the verification links within the bid bond were apparently disabled. As a result, PWGSC claimed that it was unable to confirm the validity of the bond.

[12] It appears that PWGSC did attempt to verify the Bid Bond using Trisura's website. This action did not confirm the bond authenticity but rather directed PWGSC to contact Trisura Support by either telephone or email. PWGSC declined to take these steps, or any additional ones, beyond the website check.

[13] To support its actions, PWGSC relied upon the "Bid Security Requirements" prescribed by the tender.

[14] In GKL's view, it fully complied with each of the bid security requirements.

[15] GKL asserts that idiosyncrasies inherent in the bid submission platform (Canada Post Corporation's epost Connect service) used by PWGSC could be responsible for disrupting or extinguishing embedded links in digital bid bonds submitted by prospective bidders. It claims to have been informed by PWGSC that steps were being taken to phase out the use of the epost Connect service. These contentions are disputed by PWGSC.

[16] PWGSC's Supply Officer undertook to speak to a manager with respect to GKL's complaint. On December 15, 2021, PWGSC advised GKL in writing that PWGSC had made a final decision that GKL's bid was non-responsive to the ITT, for several reasons. The bid bond lacked embedded digital certificates that could be verified. Moreover, the bid bond was not an original document,

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<sup>8</sup> Exhibit PR-2021-058-01 at 23-24; Exhibit PR-2021-058-01A at 7; Exhibit PR-2021-058-16 at 175-176.

<sup>9</sup> On December 7, 2021.

<sup>10</sup> Exhibit PR-2021-058-01 at 22-23; Exhibit PR-2021-058-01A at 6; Exhibit PR-2021-058-16 at 174.

<sup>11</sup> Exhibit PR-2021-058-01 at 21; Exhibit PR-2021-01A at 5; Exhibit PR-2021-058-16 at 178.

<sup>12</sup> Exhibit PR-2021-058-01 at 19-21; Exhibit PR-2021-058-01A at 4-5; Exhibit PR-2021-058-16 at 182-184.

having been merged with another PDF document. Even when the bid bond was uploaded to Trisura's website for verification, the website returned a "non-verified" result. In PWGSC's view, resubmission of the bid bond would constitute bid repair, which would be impermissible.<sup>13</sup>

[17] GKL filed a complaint with the Tribunal on December 15, 2021.<sup>14</sup> In its complaint, GKL asserted that its bid bond is both authentic and verifiable and that its bid had been unfairly deemed non-compliant with the ITT. It asks that it be awarded the contract for the Sambro dock repair work or, alternatively, that it be awarded compensation for lost profits, lost opportunity and costs, all in an amount to be specified by the Tribunal.

[18] At the Tribunal's request, GKL filed additional material on December 17, 2021.<sup>15</sup>

[19] The Tribunal accepted GKL's complaint for inquiry on December 24, 2021.<sup>16</sup>

[20] PWGSC informed the Tribunal that a contract award letter was issued to Dexter Construction Company (Dexter) on January 6, 2022.<sup>17</sup> The Tribunal notified Dexter of GKL's complaint and advised that Dexter could, at its option, seek leave to intervene in the proceeding.<sup>18</sup> Dexter did not seek standing as an intervener.

[21] At PWGSC's request, the Tribunal granted an extension of time for the filing by PWGSC of the Government Institution Report (GIR).<sup>19</sup> The Tribunal also extended the timeframe for issuing its determination of GKL's complaint to 135 days, pursuant to paragraph 12(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>20</sup>

[22] The GIR was filed on February 4, 2022, and included an affidavit of Ms. Rachel Miller.<sup>21</sup>

### **First Miller Affidavit**

[23] Ms. Miller is employed by PWGSC as a Supply Officer for the Atlantic Region. She was the contracting authority on behalf of DFO for the ITT in issue. This responsibility caused her to be the sole point of contact with bidders during the course of the solicitation.

[24] In her affidavit, Ms. Miller provides a brief description of the role of the Canadian Coast Guard within DFO. The mandate of the Canadian Coast Guard includes the provision of "key maritime services, including channel maintenance, marine search and rescue and marine traffic management".<sup>22</sup>

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<sup>13</sup> Exhibit PR-2021-058-01A at 41-42; Exhibit PR-2021-058-16 at 186-187.

<sup>14</sup> Exhibit PR-2021-058-01.

<sup>15</sup> Exhibit PR-2021-058-01B.

<sup>16</sup> Exhibit PR-2021-058-05.

<sup>17</sup> Exhibit PR-2021-058-07.

<sup>18</sup> On January 10, 2022. See Exhibit PR-2021-058-08. On the same day, the Tribunal issued a postponement of award of contract order. See Exhibit PR-2021-058-09. On January 24, 2022, PWGSC confirmed that the contract had in fact been awarded. See Exhibit PR-2021-058-10. Accordingly, the Tribunal issued a rescission of postponement of award of contract order. See Exhibit PR-2021-058-15.

<sup>19</sup> Exhibit PR-2021-058-14.

<sup>20</sup> Exhibit PR-2021-058-19.

<sup>21</sup> Exhibit PR-2021-058-16.

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

[25] The ITT was directed to what Ms. Miller characterized as “urgent structural repairs to a floating dock” at a site used by the Canadian Coast Guard in Sambro, Nova Scotia. The work required completion by March 31, 2022.<sup>23</sup>

[26] Ms. Miller summarizes the content of the ITT and the aspects of the bid evaluation that are relevant to this complaint. In her view, there are five ways by which GKL’s bid bond may be verified. The bid bond contains four encrypted hyperlinks, namely the signature of the bidder, the signature of the surety company, the corporate seal of the bidder, and the corporate seal of the surety. Clicking on any of those links will open the surety’s online verification tool or that of a verification service provider that has been approved by the surety.<sup>24</sup>

[27] The fifth method of verification, as characterized by Ms. Miller, is use of a tool on the website of the surety company or that of an approved verification service provider. This method requires the uploading of the electronic bid bond (e-bond). If the e-bond is authentic, the website generates a confirmatory message.<sup>25</sup>

[28] When Ms. Miller attempted each of these methods in relation to GKL’s bond, she was unable to verify the bond. She testifies that clicking on the signatures and seals in the bid document only generated an invitation for her to input her own signature into the document. Uploading the e-bond into the verification tool on Trisura’s website generated the following message:

**Bond Name: EB144-221443\_A - NON-VERIFIED**

- Bond authenticity cannot be confirmed
- Bond cannot be validated. For more information please contact Trisura Support at 1-844-264-3317 or email us at [info.portal@trisura.com](mailto:info.portal@trisura.com) ([info.portal@trisura.com](mailto:info.portal@trisura.com))<sup>26</sup>

[29] Ms. Miller made a second attempt at verification by separating the e-bond document from the other pages in the PDF document that comprised GKL’s bid and uploading that page alone. The website again generated the message that the bond could not be verified and contained an invitation to contact Trisura Support.<sup>27</sup>

[30] Ms. Miller did not contact Trisura Support. After consulting the provisions of the ITT, Ms. Miller concluded that GKL’s bid was non-compliant. She consulted with a colleague who agreed with her finding.<sup>28</sup>

[31] Ms. Miller then summarizes subsequent communications that she had with GKL, including her transmission of the regret letter and the discussions that ensued. She states that Mr. Kerr had “conjectured” that the problems with verification of the bond were “linked to epost Connect” and invited her to contact Trisura directly.<sup>29</sup>

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

<sup>24</sup> *Ibid.* at 23.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 24. See Exhibit PR-2021-058-16 at 157–158.

<sup>27</sup> Exhibit PR-2021-058-16 at 24. See Exhibit PR-2021-058-16 at 160–161.

<sup>28</sup> Exhibit PR-2021-058-16 at 24.

<sup>29</sup> *Ibid.* at 25–26.



[32] According to Ms. Miller, she had no reason to believe that the use of the epost Connect service was problematic. E-bonds are routinely received via this platform without problems so long as they comply with the requirements of being a single, original PDF document as provided by the surety. No other bidder in the procurement at issue had encountered any issue with e-bonds submitted using the epost Connect service.<sup>30</sup>

[33] In Ms. Miller's view, the merging of the original bid bond with the other pages of GKL's bid into a new, single PDF file constituted a "tampering" of the original bid bond that caused the verification process to fail. She refers to explicit warnings on the bond document and Trisura's website to the effect that any tampering, altering or changing of the original PDF file, including by way of software that splits or combines pages within the PDF format, will void the validity of the e-Bond.<sup>31</sup>

[34] Ms. Miller concedes that Trisura provided confirmation of the bond's validity by way of email dated December 7, 2021.<sup>32</sup> She refers to further telephone and email discussions with Mr. Kerr and PWGSC's decision to uphold the rejection of GKL's bid.<sup>33</sup>

[35] For future reference, Ms. Miller states that she also advised Mr. Kerr of the appropriate way to submit e-bonds.<sup>34</sup>

[36] As of the date of her affidavit<sup>35</sup>, Ms. Miller confirmed that work was underway at the Sambro site and on track for completion of the needed construction by the prescribed date of March 31, 2022.

[37] Copies of the ITT, regret letter, GKL's bid, bid verification attempts and correspondence between PWGSC on the one hand and GKL and Trisura on the other, were all attached as exhibits to Ms. Miller's affidavit.

[38] GKL provided comments in reply to the GIR on February 15, 2022, which included an affidavit of Mr. Kerr, ostensibly in reply to Ms. Miller's affidavit.<sup>36</sup>

### **Kerr Affidavit**

[39] Mr. Kerr is the Director and President of GKL.

[40] In his affidavit, Mr. Kerr testifies that GKL's bid complied with the bid bond requirements of the ITT. After reviewing the provisions of SI04.2.1. of the ITT, Mr. Kerr states that GKL submitted its e-bond by "dragging and dropping" the original Trisura bid bond into GKL's other electronic bid documents. GKL believed that this allowed its e-bond to constitute a "single file" as required by SI04.2.1.b. of the ITT.<sup>37</sup>

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<sup>30</sup> *Ibid.* at 26.

<sup>31</sup> *Ibid.* at 26–27.

<sup>32</sup> *Ibid.* at 27.

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

<sup>34</sup> *Ibid.* at 28.

<sup>35</sup> On February 3, 2022.

<sup>36</sup> Exhibit PR-2021-058-17.

<sup>37</sup> *Ibid.* at 19.

[41] Mr. Kerr asserts that he was able to verify the bond using Trisura's website and advised Ms. Miller accordingly. He disagrees that there are only five ways to verify an e-bond. In his view, a surety company can and will verify the validity of an e-bond if a procuring entity provides a Bond Number that is unique to the e-bond at issue. Mr. Kerr asserts, on information and belief, that Trisura has previously used this method to verify bonds to assist procurement agencies with bond verification. Indeed, Trisura provided such verification of GKL's e-bond directly to Ms. Miller in the procurement.<sup>38</sup>

[42] In Mr. Kerr's view, GKL's e-bond could have been readily verified had PWGSC contacted Trisura directly upon being unable to verify the bond's validity using the online methods described by Ms. Miller.<sup>39</sup>

[43] Mr. Kerr has a different recollection of his telephone conversation with Ms. Miller concerning the epost Connect service. According to Mr. Kerr, Ms. Miller admitted that the same difficulties encountered in relation to the GKL bid bond had been experienced by "many contractors" on other PWGSC procurements. He concedes that Ms. Miller did not provide details on the frequency of this issue, but he formed the impression that "it was not uncommon".<sup>40</sup>

[44] According to Mr. Kerr, GKL has previously submitted e-bonds from Trisura "using the same method as the subject procurement". On those occasions, no difficulties with bond verification were encountered and GKL's bids were not deemed to be non-compliant.<sup>41</sup>

[45] Mr. Kerr disputes the characterization of the Trisura bond as having been "tampered with" in any way. GKL simply dragged and dropped the bond document into its bid in accordance with past practices on other procurements and its review of the ITT requirements.<sup>42</sup>

[46] The Kerr affidavit addresses an alleged discrepancy in the timing of the regret letter and Mr. Kerr's response thereto. Mr. Kerr takes issue with Ms. Miller's statement that GKL responded to the regret letter nearly four hours after it was sent. He states that the regret letter was received at 7:26 p.m. on December 6, 2021, and he responded to Ms. Miller at 7:51 p.m. on that same day.<sup>43</sup>

[47] With respect to jobsite activity by Dexter as described by Ms. Miller, Mr. Kerr testifies that he attended an adjacent property on February 2, 2022, and discerned no visible activity, marine equipment or other signs that would indicate that a contractor had mobilized on site.<sup>44</sup> Similar observations were subsequently made by other GKL employees on each of February 3, 7, and 10, 2022.<sup>45</sup>

[48] PWGSC objected to the Kerr affidavit and GKL's submissions as being an improper reply. It argued that GKL had restated facts that were either in the complaint or that should have been argued

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<sup>38</sup> *Ibid.*

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

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

<sup>41</sup> *Ibid.*

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

<sup>43</sup> *Ibid.* at 21. See Exhibit PR-2021-058-17 at 23.

<sup>44</sup> Exhibit PR-2021-058-17 at 21. A photograph of the job site taken by Mr. Kerr on February 2, 2022, was attached to his affidavit as Exhibit PR-2021-058-17 at 25.

<sup>45</sup> Exhibit PR-2021-058-17 at 21.

at first instance. By raising the issue of latent ambiguity and conducting an itemized analysis of SI04.2.1. in the ITT to argue that its bid was compliant, PWGSC alleged that GKL had split its case.

[49] PWGSC accordingly brought a motion asking the Tribunal to strike GKL's reply in its entirety or, in the alternative, to permit PWGSC to file a sur-reply directed to the allegedly new issues raised by GKL's reply.<sup>46</sup>

[50] For its part, GKL argued that PWGSC was seeking relief that was unwarranted and disproportionate. The Tribunal's procedures are intended to be somewhat flexible. The *Canadian International Trade Tribunal Rules* provide for the complainant to file comments on the GIR and as such, the scope of permissible comment should be broadly construed. A complainant should not be expected to anticipate the evidence of the government institution or every possible argument that may be advanced. Accordingly, in GKL's view, it was merely addressing the arguments raised by PWGSC and providing a contextual restatement or reframing of the facts in order to respond to Ms. Miller's affidavit or the arguments as presented by PWGSC.

[51] GKL submits that it is not impermissible case splitting to address, in pinpoint fashion, what it views as PWGSC's misunderstanding or mischaracterization of GKL's complaint. It contends that latent ambiguity within the ITT's directions to bidders and GKL's interpretation and application of the provisions of SI04.2.1. have been in issue from the outset. In commenting on the GIR, GKL says that it was providing its own interpretation and refutation of PWGSC's comments. As the interpretation of the ITT requirements is in issue between the parties, the scope of the words used in the ITT should be fully discussed.

[52] GKL indicated that it had no objection to leave being granted to PWGSC for the filing of a sur-reply.<sup>47</sup>

#### Analysis – PWGSC motion

[53] The concept of “case splitting” is generally recognized as applying in both criminal and civil contexts. It was summarized by the Supreme Court of Canada in *R. v. Krause*, as follows:

. . . The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 1975 CanLII 1240 (ON CA), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, 1966 CanLII 282 (ON CA), [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. *This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence---as much as it deemed necessary at the outset---then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled*

<sup>46</sup> Exhibit PR-2021-058-18; Exhibit PR-2021-058-20.

<sup>47</sup> Exhibit PR-2021-058-21.

*at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.*<sup>48</sup>

[Emphasis added]

[54] As such, allegations of case splitting typically arise where a party has submitted a reply extending beyond the scope of its original complaint, pleading, or argument by introducing new grounds, issues or evidence. The jurisprudence has developed principles concerning the proper scope of reply evidence which may be applied to discern whether a party is using reply to lead evidence that should have been part of its case in chief. These principles may be summarized as follows:

1 - Evidence which is simply confirmatory of evidence already on the record is not to be allowed.

2 - Evidence which is directed to a matter raised for the first time in cross-examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.

3 - Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.

4 - Evidence which is excluded because it should have been led as part of the plaintiffs' case in chief will be examined to determine if it should be admitted, as a matter of discretion.<sup>49</sup>

[55] Furthermore, the factors of procedural fairness and the importance of ensuring that all relevant facts are placed on the record should be taken into account.<sup>50</sup>

[56] The foregoing principles are applicable not only to evidence but also to new allegations and arguments that are made by way of reply. Ultimately, the question is whether the interests of justice mitigate in favour of permitting the scope of the expanded or contested scope of reply.<sup>51</sup>

[57] Procurement disputes before the Tribunal are not brought in the procedural framework of an action. Rather, they take the form of an inquiry. As such, the Tribunal tends, as a general principle, to take a somewhat more flexible procedural approach.

[58] Many of the objections made by PWGSC are rooted in the argument that GKL is repeating or restating its arguments in chief. Strictly speaking, this is not a proper reply and PWGSC's submissions have some foundation, at least in part.

[59] Notwithstanding, the Tribunal concluded that the evidence and allegations made by GKL in its reply were in play throughout, even if not explicitly stated in the complaint *per se*. The complaint was supported by the record of correspondence between GKL and PWGSC, after the regret letter was issued. In seeking redress from PWGSC and throughout this proceeding before the Tribunal, up to

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<sup>48</sup> [1986] 2 SCR 466 at para. 15.

<sup>49</sup> See *Halford v Seed Hawk Inc.*, 2003 FCT 141 [*Halford*] at paras. 7–15; *Angelcare Development Inc. v. Munchkin, Inc.*, 2020 FC 1185 at paras. 8–15.

<sup>50</sup> *Amgen Canada Inc. v Apotex Inc.*, 2016 FCA 121 [*Amgen*].

<sup>51</sup> *Amgen* at para. 13.

and including its comments on the GIR, the crux of GKL's arguments have remained essentially unchanged, even if the expression of those arguments may have evolved somewhat.

[60] As such, the Tribunal concluded that PWGSC was not taken by surprise or prejudiced to any significant degree by GKL's reply. In these particular circumstances, it would have been disproportionate to strike the reply as requested by PWGSC and the interests of justice would not have been served by acceding to PWGSC's request for that relief.

[61] Accordingly, and having regard to the concurrence reached by the parties, the Tribunal granted leave to PWGSC to file a limited sur-reply confined to addressing what PWGSC alleged were new matters raised in the Kerr affidavit and GKL's submissions.<sup>52</sup>

[62] By way of a sur-reply, PWGSC filed additional submissions and a further affidavit of Ms. Miller.<sup>53</sup>

### **Second Miller Affidavit**

[63] In her second affidavit, Ms. Miller disputes having made the statement attributed to her by Mr. Kerr concerning problems encountered by other contractors when using the epost Connect service to submit e-bonds. She does not believe this to be true and, as such, asserts that it is unlikely that she would have made that statement to Mr. Kerr.<sup>54</sup>

[64] Ms. Miller further states that she has been a contracting authority for almost 40 procurements and the e-bond verification issue encountered by GKL "is not common".<sup>55</sup>

[65] The Tribunal advised the parties of their right to request an oral hearing at which witness testimony could be presented and further submissions made to the Tribunal. Neither party requested an oral hearing.

## **POSITIONS OF THE PARTIES**

### **PWGSC**

[66] In responding to GKL's complaint, PWGSC made the following arguments.

[67] According to PWGSC, the ITT complies with the provisions of the Canadian Free Trade Agreement (CFTA) because it provides prospective bidders with all of the information necessary for responding to the tender. A bid must comply with all the mandatory requirements of a tender to be eligible for the award of a contract.

[68] The onus rests with the bidder to demonstrate compliance with the tender requirements. Where conformity with mandatory requirements is in issue, the test is one of strict compliance. This is required by the overriding principles of openness, fairness and good faith inherent to the procurement system. As such, any failure to meet tender requirements cannot be dismissed as a

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<sup>52</sup> Exhibit PR-2021-058-22.

<sup>53</sup> Exhibit PR-2021-058-23.

<sup>54</sup> *Ibid.* at 5-6.

<sup>55</sup> *Ibid.* at 6.

minor irregularity and PWGSC is thus precluded from awarding a contract to a bidder who has not complied with the essential requirements of a tender document.

[69] PWGSC refers to previous decisions of the Tribunal holding that the submission of bid security in the form required by the solicitation documents is an essential requirement of a tender.<sup>56</sup> In this case, the ITT stated that bid security could be provided by way of security deposit or bid bond, which could be submitted electronically. Where security is provided by way of e-bond, SI04 of the ITT clearly prescribes requirements for doing so. PWGSC submits that the imperative language used in SI04 operates to render the e-bond submission criteria as being mandatory requirements of the tender.

[70] According to PWGSC, it was incumbent on GKL to exercise due diligence when submitting its e-bond. PWGSC points to provisions in the ITT and wording on Trisura's website which cautions against "tampering" of the bid bond, up to and including combining the bond document with other PDF documents. By combining the original bid bond with other bid documents to form a single PDF file, PWGSC contends that GKL "tampered" with its bond, thus making it unverifiable. In doing so, GKL failed to use due diligence as the ITT specifically cautions that submission of a non-verified bond will cause the bid to be non-compliant. The subsequent online verification of the e-bond by GKL can be explained by the fact that GKL was in possession of the original bond document which PWGSC did not have.

[71] The subsequent email verification of the bond as provided by Trisura could not be accepted because PWGSC would have used a method of bond verification that was extraneous to the tender document. There was no duty on PWGSC to waive the problems with GKL's bond as being a minor irregularity. As the bid security requirements were mandatory criteria, PWGSC had a duty to ensure strict compliance.

[72] PWGSC dismisses Kerr's allegations concerning the limitations of the epost Connect service as being speculative and unfounded.

[73] In PWGSC's view, this is not a situation where PWGSC made any error, technical or otherwise, in using the epost Connect service or with respect to its attempts to verify GKL's bid bond. Rather, it says that GKL chose to provide security by way of an e-bond and that the outcome is attributable to GKL's own error in assembling and submitting its bid documents. As such, PWGSC acted reasonably in finding that GKL's bid was non-compliant, and it asks that the complaint be dismissed.

[74] In the alternative that the complaint is upheld, PWGSC submits that GKL's remedy should be limited to compensation for lost profits. Not only was PWGSC acting in good faith throughout, but any deficiency in the overall procurement process would have been minor. Moreover, work on the project is underway and has been significantly performed. Given those circumstances, PWGSC cites jurisprudence that compensation for lost profits is the preferred remedy, as opposed to bid resubmission, bid re-evaluation or contract termination.

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<sup>56</sup> See, for example, *9198-6919 Québec Inc. O/A Verreault Inc.* (2 August 2012), PR-2012-011 (CITT) at para. 21 [*Verreault*]; *Secure Energy (Onsite Services) Inc.* (24 July 2017), PR-2017-020 (CITT) at para. 32 [*Secure Energy*]. See also, *Alliance Energy Ltd.* (16 December 2021), PR-2021-057 (CITT) at para. 18 [*Alliance Energy*].

**GKL**

[75] GKL relies upon Article 509(07) of the CFTA which imposes a duty on procuring entities to conduct bid evaluations that are both fair and transparent. If certain bid criteria are to be treated as being essential, the tender documents must be explicit in that regard.

[76] In this case, GKL maintains that PWGSC relied upon “misleading and indeed confusing language” in the ITT as underpinning the decision to reject GKL’s bid.

[77] The ITT states that a bid bond must be “in an approved form”, “properly completed”, with “valid and enforceable signatures” and bearing the seal of an approved surety. GKL maintains that its bond met all of these requirements.

[78] GKL emphasizes that the provisions of the CFTA, notably Article 509(7) and its paragraphs, require clarity. As such, there was a duty on PWGSC to ensure that the content of the ITT was not misleading to prospective bidders. Any such lack of clarity in the tender document cannot be cured by reference to extraneous or third-party material such as, in this case, the content of Trisura’s website.

[79] GKL concedes that the procuring entity is free to regulate the form of bid bonds so long as this is done “in a clear manner”.

[80] According to GKL, the potential for an e-bond to be corrupted by combining it with other documents creates a latent ambiguity in the tender. This is all the more so when the ITT does not alert prospective bidders to this possibility and the potential risk is known to PWGSC. In this regard, GKL refers to the statement allegedly made by Ms. Miller to Mr. Kerr concerning bond verification issues encountered by other bidders when using the epost Connect service which was not acknowledged by the GIR.

[81] As such, GKL argues that the cases cited by PWGSC in support of the proposition that essential requirements must be strictly construed are distinguishable on their facts.

[82] GKL refers to the five distinct e-bond requirements prescribed by SI04.2.1. It argues that GKL adopted a reasonable interpretation of each requirement, including that any verification method was permissible. GKL’s bond was originally in the form of an electronic encrypted file whose encrypted signatures and seals became corrupted through no fault of GKL.

[83] In GKL’s view, PWGSC wrongly asserts that the inability to verify the bond using Trisura’s online tool renders the bond non-verifiable. This assumes that no other method may be used to verify the bond. Relying upon the ordinary meaning of the word “verify”, GKL asserts that the bond could have been verified had PWGSC contacted Trisura directly.

[84] GKL further contends that the wording of SI04.2.b which states that the bond must be in a “single file, allowable format” led GKL to believe that the bid bond had to be combined for submission with the other bid materials. In this regard, GKL cites dictionary definitions for the noun “file” and argues that these refer to a collection or multitude of records which have been combined together. As such, in using the word “file” in the ITT, PWGSC was inviting bidders to submit all bid materials (including the e-bond) together in combination, especially since the noun “file” is modified

by the adjective “single”. If the intention had been to prescribe that the bid bond should be kept or submitted separately from the other bid documents, the ITT should have explicitly said so.

[85] GKL refers to the wording of SI04 2.1.c. which allows for the bond to be verified by Canada, at its discretion, “at any time” during the life of the bond. In GKL’s view, the bond was verifiable at any time had PWGSC simply contacted Trisura. An email from Trisura confirming the bond’s validity satisfies the requirement of SI04 2.1.d. that the verification result provide a “clear, immediate and printable indication of pass or fail” with respect to the bond’s validity.

[86] With reference to SI04 2.1.e, GKL says that it did not scan or copy the bond but submitted the original bond to PWGSC by “dragging and dropping” the original bond into a single file with the rest of its bid.

[87] As the relevant provisions of the ITT contained a latent ambiguity, GKL was under no obligation to seek clarification because it adopted a reasonable interpretation of the language in SI04 2.1. of the ITT. It had no grounds to believe that its bid might be considered as being non-compliant.

[88] If the Tribunal concludes that the wording of the ITT led GKL to act reasonably in submitting its bid documents in a manner that was non-compliant, then the complaint should be upheld. On the other hand, if the ITT contained a latent ambiguity, then PWGSC acted unreasonably in rejecting the bid and GKL’s complaint is thus valid.

[89] GKL contests PWGSC’s evidence that Dexter has mobilized and is onsite. Notwithstanding, as the contract is underway, GKL accepts that its remedy should take the form of compensation for lost profits and costs, should its complaint be upheld.

#### Sur-reply by PWGSC

[90] PWGSC contests GKL’s assertion that the ITT has a latent ambiguity because it does not mention the possibility of the bid bond becoming corrupted when it is combined with other documents, as explained on Trisura’s website. There was no need for such an explanation to be provided given that the ITT provides explicit instructions for submission of the bid bond which, if followed, would have avoided this problem. As such, PWGSC says that the statements on Trisura’s website corroborate, not supplement, the instructions provided in the ITT. There is no interpretation of the ITT that could lead to the conclusion that encryption of the bond and embedding of digital certificates was unnecessary, or that the e-bond could be submitted as part of a combined file. If the bidder manipulates the PDF file so as to remove the encryption or the embedded digital certificates, it has the option to seek assistance from the Contracting Authority or to troubleshoot the issue.

[91] PWGSC disputes the allegation that it has withheld any information concerning difficulties encountered by previous or other bidders with respect to the submission of e-bonds, as alleged by GKL.

[92] Finally, PWGSC disagrees that email or telephone inquiry to a surety would satisfy the ITT criteria for “immediate” verification of the bond. While it is possible that a response to such an inquiry may be immediate or be generated within a short timeframe, it does not guarantee an immediate “pass or fail” answer.



## ANALYSIS

[93] There is no dispute that the ITT pertains to a “designated contract” within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act* (CITT Act).

[94] The issues for decision are relatively narrow and may be summarized as follows:

- (1) Is provision of bid security an essential or mandatory requirement of the tender?
- (2) If yes, is there an ambiguity, latent or otherwise, in the terms of the ITT which define the bid security requirements?
- (3) Did GKL comply with mandatory requirements of the tender concerning bid security?
- (4) Did PWGSC act reasonably in finding that GKL’s bid was non-complaint?

[95] In determining these issues, the ITT must be read holistically. Relevant provisions must be viewed in the overall context of the tender conditions and not read as isolated, standalone provisions.<sup>57</sup>

[96] The first section of the ITT is entitled “Special Instructions to Bidders” (Special Instructions). It comprises numerous sub-headings, each of which addresses an aspect of the tender and its requirements. The first subheading is SI01- “Bid Documents” whose second condition reads as follows:

2. General Instructions - Construction Services - Bid Security Requirements R2710T is incorporated by reference and is set out in the Standard Acquisition Clauses and Conditions (SACC) Manual, issued by Public Works and Government Services Canada (PWGSC). The SACC Manual is available on the PWGSC Web site: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/R><sup>58</sup>

[97] Bid Security Requirements are specifically addressed in SI04 of the Special Instructions. SI04 refers to R2710T of the SACC Manual which is incorporated by reference. SI04 further states that the bid security provisions of GI08 of R2710T are modified by deletion of its item 2 and replacement with new provisions 2 and 2.1.<sup>59</sup> This constitutes a specific drafting amendment introduced by PWGSC for the purposes of the tender at issue.

[98] As amended, and incorporated by reference into SI04 of the ITT, the relevant provisions governing bid security for this tender are thus as follows:

1. The Bidder shall submit bid security with the bid in the form of a bid bond or a security deposit in an amount that is equal to not less than 10 percent of the bid amount. Applicable Taxes shall not be included when calculating the amount of any

<sup>57</sup> *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69 at para. 64; *Kileel Developments Ltd. v. Department of Public Works and Government Services* (4 April 2019), PR-2018-042 (CITT) at para. 60, aff’d *Kileel Developments Ltd. v. Canada (Attorney General)*, 2020 FCA 163.

<sup>58</sup> Exhibit PR-2021-058-01B at 4; Exhibit PR-2021-058-07A at 4, 24; Exhibit PR-2021-058-16 at 33.

<sup>59</sup> Exhibit PR-2021-058-01B at 4–5; Exhibit PR-2021-058-07A at 4–5, 24–25; Exhibit PR-2021-058-16 at 33–34.

bid security that may be required. The maximum amount of bid security required with any bid is \$2,000,000.

2. A bid bond (form PWGSC-TPSGC 504) shall be in an approved form, properly completed, with valid and enforceable signatures and sealed by the approved bonding company whose bonds are acceptable to Canada either at the time of solicitation closing or as identified in Treasury Board Appendix L, Acceptable Bonding Companies.

2.1 A bid bond may be submitted in an electronic format (Electronic Bonding (E-Bond)) if it meets the following criteria:

- a. The version submitted by the Bidder must be an electronic encrypted file with embedded digital certificate verifiable by Canada with respect to the totality and wholeness of the bond form, including: the content; all digital signatures; all digital seals; with the Surety Company, or an approved verification service provider of the Surety Company.
- b. The version submitted must be viewable, printable and storable in standard electronic file formats compatible with Canada, and in a single file, allowable format pdf.
- c. The verification may be conducted by Canada immediately or at any time during the life of the Bond and at the discretion of Canada.
- d. The results of the verification must provide a clear, immediate and printable indication of pass or fail regarding Item 2.1.a.
- e. Submitting copies (**non-original, non-verifiable or scanned copy**) of signed and sealed bid bond are not acceptable. Failure to submit an original or verifiable bond will render the bid non-compliant. Non-compliant bids will be given no further consideration. A scanned copy of a bond does not constitute a digital bond.

2.2 Bonds failing the verification process will NOT be considered valid.

2.3 Bonds passing the verification process will be treated as original and authentic.

[99] For the purposes of SI04 2., Trisura is recognized as being one of the Acceptable Bonding Companies.

[100] Additional bid security requirements 3 to 7 found in GI08 of R2710T address bid security that is given by way of various alternatives, including a security deposit and an irrevocable letter of credit, as well as contingencies dealing with lapse of security and Canada's right to hold security from at least three compliant bidders. Those provisions likewise apply to the tender but are not relevant to this complaint, given that GKL chose to provide security by way of e-bond.

[101] SI05 of the Special Instructions is entitled "Submission of Bid". It refers to GI09 of R2710T. As noted above, the content of R2710T is incorporated by reference into the ITT. However, SI05

includes an explicit modification of GI09 by adding subparagraph 5, which serves to permit use of the epost Connect service to submit bids.<sup>60</sup>

[102] Accordingly, the “Submission of Bid” provisions of the ITT which are relevant to this complaint are as follows:

1. The Bid and Acceptance Form, duly completed, and the bid security shall be enclosed and sealed in an envelope provided by the Bidder, and shall be addressed and submitted to the office designated on the Front Page “Invitation to Tender” for the receipt of bids. The bid must be received on or before the date and time set for solicitation closing.
2. Unless otherwise specified in the Special Instructions to Bidders
  - a. the bid shall be in Canadian currency;
  - b. the requirement does not offer exchange rate fluctuation risk mitigation. Requests for exchange rate fluctuation risk mitigation will not be considered. All bids including such provision will render the bid non-responsive.
3. Prior to submitting the bid, the Bidder shall ensure that the following information is clearly printed or typed on the face of the bid envelope:
  - a. Solicitation Number;
  - b. Name of Bidder;
  - c. Return address; and
  - d. Closing Date and Time.
4. Timely and correct delivery of bids is the sole responsibility of the Bidder.
5. Electronic Bid Submission by epost Connect service
  - a. Unless specified otherwise in the bid solicitation, bids may be submitted by using the epost Connect service provided by Canada Post Corporation.
  - b. The only acceptable email address to use with epost Connect for responses to bid solicitations issued by PWGSC is:

Atlantic  
(NS):TPSGC.RAReceptionSoumissionsNEARBidReceivingNS.PWGSC@tpsgc-pwgsc.gc.ca

**Note:** Bids emailed directly to this email address will be rejected and deemed non-compliant. This email address is to be used to open an epost Connect conversation, as

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<sup>60</sup> Exhibit PR-2021-058-01B at 5–6; Exhibit PR-2021-058-07A at 5–6, 25–26; Exhibit PR-2021-058-16 at 34–35.

detailed in c., or to send proposals through an epost Connect message if the Bidder is using its own licensing agreement for epost Connect.

- c. To submit a bid using epost Connect service, the Bidder must either:
  - i. send directly its bid only to the specified PWGSC Bid Receiving Unit, using its own licensing agreement for epost Connect provided by Canada Post Corporation; or
  - ii. send as early as possible, and in any case, at least six business days prior to the solicitation closing date and time, (in order to ensure a response), an email that includes the bid solicitation number to the specified PWGSC Bid Receiving Unit requesting to open an epost Connect conversation. Requests to open an epost Connect conversation received after that time may not be answered.
- d. If the Bidder sends an email requesting epost Connect service to the specified Bid Receiving Unit in the bid solicitation, an officer of the Bid Receiving Unit will then initiate an epost Connect conversation. The epost Connect conversation will create an email notification from Canada Post Corporation prompting the Bidder to access and action the message within the conversation. The Bidder will then be able to transmit its bid afterward at any time prior to the solicitation closing date and time.
- e. If the Bidder is using its own licensing agreement to send its bid, the Bidder must keep the epost Connect conversation open until at least thirty (30) business days after the solicitation closing date and time.
- f. The bid solicitation number should be identified in the epost Connect message field of all electronic transfers.
- g. It should be noted that the use of epost Connect service requires a Canadian mailing address. Should a bidder not have a Canadian mailing address, they may use the Bid Receiving Unit address specified in the solicitation in order to register for the epost Connect service.
- h. For bids transmitted by epost Connect service, Canada will not be responsible for any failure attributable to the transmission or receipt of the bid including, but not limited to, the following:
  - i. receipt of a garbled, corrupted or incomplete bid;
  - ii. availability or condition of the epost Connect service;
  - iii. incompatibility between the sending and receiving equipment;
  - iv. delay in transmission or receipt of the bid;
  - v. failure of the Bidder to properly identify the bid;

- vi. illegibility of the bid;
  - vii. security of bid data; or,
  - viii. inability to create an electronic conversation through the epost Connect service.
- i. The Bid Receiving Unit will send an acknowledgement of the receipt of bid document(s) via the epost Connect conversation, regardless of whether the conversation was initiated by the supplier using its own license or the Bid Receiving Unit. This acknowledgement will confirm only the receipt of bid document(s) and will not confirm if the attachments may be opened nor if the content is readable.
  - j. Bidders must ensure that they are using the correct email address for the Bid Receiving Unit when initiating a conversation in epost Connect or communicating with the Bid Receiving Unit and should not rely on the accuracy of copying and pasting the email address into the epost Connect system.
  - k. A bid transmitted by epost Connect service constitutes the formal bid of the Bidder.

#### **Is provision of bid security an essential or mandatory requirement of the tender?**

[103] SI04 1. and SI04 2. of the ITT use mandatory language in stating that a bidder “shall” submit bid security with its bid as either a bid bond or security deposit. The use of the word “shall”, in the context of a tender document is construed as being a mandatory requirement.<sup>61</sup>

[104] Once the bidder chooses between these alternative forms of security, the tender prescribes mandatory criteria that must be fulfilled in order to provide valid security, whether as a bid bond or as a security deposit.

[105] If the bidder chooses to use a bid bond, then SI04 2. requires that the bid bond “shall be in an approved form, properly completed, with valid and enforceable signatures and sealed by [an] approved bonding company . . . .”<sup>62</sup> If, on the other hand, the bidder elects to provide security by way of a security deposit, then conditions in GI08 of R2710T prescribe, using mandatory language, the conditions that must be fulfilled to provide valid security in the form of a bill of exchange, a money order, a bank draft, an irrevocable letter of credit, for example.

[106] Having regard to the foregoing, the Tribunal finds that the terms of the ITT impose a mandatory requirement for a bidder to provide bid security. The bidder is provided several alternative options with respect to the form that the bid security may take. Once the bidder chooses the *form* of

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<sup>61</sup> See for example, *Hike Metal Products Ltd.* (14 November 2003), PR-2003-061 (CITT); *Dac Aviation Internationale Ltée* (29 July 2004), PR-2004-023 (CITT).

<sup>62</sup> Exhibit PR-2021-058-01B at 4; Exhibit PR-2021-058-07A at 4, 24; Exhibit PR-2021-058-16 at 33.

bid security, mandatory requirements again come into play. The ITT incorporates mandatory language with respect to conditions that must be met for a specific type of security to be valid.<sup>63</sup>

[107] From among the bid security options, GKL chose to provide security by way of bid bond. This leads to a consideration of whether the terms of the ITT governing security by way of bid bond are ambiguous.

**Is there an ambiguity, latent or otherwise, in the terms of the ITT which define the bid security requirements?**

[108] SI04 2. of the ITT prescribes, using the mandatory wording “shall”, that a bid bond must be in approved form (form PWGSC-TPSGC 504). There is no dispute that GKL used the requisite form.

[109] In addition, SI04 2. of the ITT requires that the bid bond shall be “properly completed, with valid and enforceable signatures and sealed by [an] approved bonding company . . . .” The Tribunal is satisfied from the evidence that the requisite form was properly completed, signed and sealed by GKL and an approved bonding company (Trisura), at least initially. The issue is whether the signatures and seals as applied to the form were later nullified or invalidated.

[110] Although bidders are required to use a specific form (PWGSC-TPSGC 5042) to submit a bid bond, the terms of the ITT do not mandate a specific method for delivery of the bond to PWGSC. GI09 1. (incorporated by reference as SI05 1. of the ITT) provides that the completed Bid and Acceptance form, and the bid security, shall be enclosed and sealed in an envelope, which is to be addressed and submitted to the contracting authority at a prescribed address listed on the front page of the tender document.

[111] However, as noted above SI05 also includes the alternative of submitting the bid using the epost Connect service. This is an explicit variation of the standard terms found in R2710T that PWGSC chose to include as part of the ITT.

[112] The wording of SI05 makes it clear that the option of using the epost Connect service is an *addition* to the provisions of GI09 1. which specifies that bids are to be delivered in hard copy (sealed envelope). SI05 makes no mention of any other modification to GI09, such as the removal of GI09 1. – it simply adds a new condition SI05 5., by way of the following wording:

R2710T GI09 Submission of bid is modified as follows

Add subparagraph 5 - Electronic Bid Submission by epost Connect service<sup>64</sup>

[113] The wording of SI05 5. uses permissive, not mandatory, language, as follows:

Unless specified otherwise in the bid solicitation, bids *may* be submitted by using the epost Connect service provided by Canada Post Corporation.<sup>65</sup>

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<sup>63</sup> As noted above, this finding is consistent with previous decisions of the Tribunal indicating that the submission of bid bonds in an approved form, as described by the relevant tender documents, is an essential requirement. See *Verreault* at para. 21, *Secure Energy* at para. 32, *Alliance Energy* at para. 18.

<sup>64</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

<sup>65</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

[Emphasis added]

[114] Accordingly, the Tribunal is satisfied that the tender provides two alternatives, i.e. co-existing methods for bid submission, at the option of the bidder. The bid may either be submitted by way of hard copy, as provided by SI05 1., or electronically, as provided by SI05 5. In either scenario, the tender sets forth instructions for compliance for each delivery method that must be met, whichever is chosen by the bidder.

[115] As noted above, SI04 of the ITT is directed to Bid Security Requirements. SI04 1. imposes the requirement to provide bid security by way of bond or security deposit and SI04 2. prescribes the form to be used, together with associated instructions, where the security is provided by way of bond.

[116] SI04 2.1. uses permissive language<sup>66</sup> to allow the bidder, at its option, to submit a bond electronically using the epost Connect service. There is no language in SI04 2.1. that *requires* a bidder to use the epost Connect service to submit a bond – the option of submitting the bid security as a hard copy remains available.

[117] Allowing bidders to choose between methods of submission is not inherently contradictory, nor does it create ambiguity. Indeed, given the various ways for providing bid security and the rules associated with each of them, some degree of flexibility for the submission of materials seems reasonable.

[118] However, if a bid bond is submitted electronically, SI04 2.1. makes it clear that such an electronic submission is *contingent* on fulfilling each of criteria (a) through (e). It reads as follows:

2.1 A bid bond *may* be submitted in an electronic format (Electronic Bonding (E-Bond)) *if it meets the following criteria:*<sup>67</sup>

[Emphasis added]

[119] As such, once a bidder chooses the method provided by SI04 2.1., that bidder must satisfy each of SI04 2.1.a. through SI04 2.1.e., which define requirements that are both mandatory and cumulative.

[120] The Tribunal now turns to a consideration of the individual criteria of SI04 2.1.

[121] SI04 2.1.a. reads as follows:

The version submitted by the Bidder must be an electronic encrypted file with embedded digital certificate verifiable by Canada with respect to the totality and wholeness of the bond form, including: the content; all digital signatures; all digital seals; with the Surety Company, or an approved verification service provider of the Surety Company.<sup>68</sup>

[122] At issue is whether the bid bond submitted by GKL was an “electronic encrypted file with embedded digital certificate verifiable by Canada”. Significantly, the wording of SI04 2.1.a. states that the “version” of the bond submitted by the bidder must be “verifiable” by Canada with respect to

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<sup>66</sup> A bid bond *may* be submitted.

<sup>67</sup> Exhibit PR-2021-058-01B at 4; Exhibit PR-2021-058-07A at 4, 24; Exhibit PR-2021-058-16 at 33.

<sup>68</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

the specified attributes (i.e. digital signatures and seals). The use of the word “version” indicates that the bond submitted to PWGSC need not be “original”, so long as it is “verifiable”.

[123] Verification is not limited to the fact that a bond exists or has been issued by the surety to the bidder. In order to comply with SI04 2.1.a., the “totality and wholeness of the bond” must be verifiable, and this extends to all digital signatures and digital seals. There is no evidence before the Tribunal that a digital signature or seal can be verified in any way other than electronically.

[124] The evidence demonstrates that GKL had *obtained* an encrypted bond with embedded digital certificates from Trisura, and that digital signatures and seals were affixed to the bond document. However, the facts compel the conclusion that this original bond actually remained in the possession of GKL throughout and was either not submitted to, or not received by, PWGSC.

[125] Trisura’s bond was provided in the prescribed form PWGSC-TPSGC 504. However, at the very top of the page, the following wording appears, presumably affixed by Trisura:

To verify the authenticity of this bond please go to Trisura's website <https://secure.trisura.com/bondcheck/> and upload a copy of this bond. *To verify the bond, please refer to the instructions attached to this bond.*<sup>69</sup>

[Emphasis added]

[126] It is unclear whether the “instructions” attached to the bond are limited to Trisura’s direction alone, (at the top of the page) prescribing that verification of bond authenticity is to be carried out on Trisura’s website. This is of little consequence. The ITT does not prescribe a specific procedure for verification. Rather, SI04 2.1.a. requires only that the bond be “verifiable” with the surety or its approved service provider with respect to certain specified characteristics, including digital signatures and seals. As such, SI04 2.1.a. speaks to an outcome.

[127] Accordingly, the mechanism for bond verification is not prescribed by either PWGSC or by the terms of the tender. Instead, the system or tool for bond verification is provided and controlled by the surety, who is selected by the bidder. All that SI04 2.1.a. requires is that this tool (or system) be available and accessible to PWGSC, should it decide to verify the authenticity of the bond.

[128] As the provision of “verifiable” bid security is a mandatory requirement of the ITT, the onus falls to the bidder to ensure that it selects the services of a surety that is not only on the list of Approved Bond Companies, but also one who provides a product that meets the requirements of the ITT with respect to bond verification.

[129] It is this due diligence exercise, not any wording of the ITT, which brings the scope of Trisura’s instructions, including the content of Trisura’s website, into play. The relevant information is as follows:

Trisura Guarantee Insurance Company is a federally licensed bonding company. Trisura has developed its own proprietary e-Bond platform with similar functionality and features as other third party e-Bond providers. Trisura’s platform has been assessed by the Surety Association of Canada and meets their threshold criteria.

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<sup>69</sup> Exhibit PR-2021-058-01 at 13; Exhibit PR-2021-058-01B at 133; Exhibit PR-2021-058-16 at 155.



A Trisura e-Bond can be verified by one of two ways.

1. Use the below online bond verifier to ensure that the e-Bond has not been tampered with and is indeed valid
2. Open the e-Bond in Adobe Reader to verify the bond by clicking on the e-signature(s) and/or the signature panel

To upload a bond and verify signatures, please press CHOOSE BOND and browse to the file on your computer and then press VERIFY BOND.

Please be advised that any tampering or altering to the final PDF copy of the bond with third party software will void the validity of the e-Bond. This includes software that splits or combines pages of documents into separate PDFs.<sup>70</sup>

[130] There is an explicit warning against combining or splitting the bond (as received from Trisura) with other documents, in conjunction with third party software. There is no evidence as to whether this limitation is common to the industry with respect to verification of e-bonds, or whether it is unique or attributable to the features of Trisura's "proprietary e-Bond platform" that is said to have "similar" functionality and features as other providers of e-bonds.

[131] In any event, the Tribunal finds that this aspect of Trisura's e-bond product was known to GKL, or is deemed to have been known by GKL, because of the due diligence required of bidders with respect to mandatory bidding requirements.

[132] GKL is adamant that it did not "tamper with" or "alter" the e-bond that it obtained from Trisura. Rather, in submitting its bid documents to PWGSC, GKL "dragged and dropped" the e-bond "into" the other bid documents. Indeed, Mr. Kerr's affidavit indicates that the objective of the "drag and drop" exercise was to create a composite file for transmission to PWGSC.<sup>71</sup>

[133] The Tribunal has assessed the evidence on the civil standard of proof, namely the balance of probabilities. Having done so, the Tribunal finds that the exercise of "dragging and dropping" rendered the bond non-verifiable with respect to the parameters defined by SI04 2.1.a. The Tribunal has no doubt that GKL was acting in good faith throughout.

[134] There is no evidence concerning the software that may have been used by GKL in assembling its bid documents. On the basis of the record, the Tribunal is left to conclude that the exercise of "dragging and dropping" the bond "into" other bid documents served to combine the bond with other PDF documents, which Trisura explicitly cautioned would void the bond. In "dragging and dropping", it is likely that the software on the computer used by GKL created a copy of the bond without replicating the embedded digital certificates. The composite file containing this copy was sent to PWGSC, while the original bond, as received from Trisura, was retained by GKL's computer.

[135] The bond document states that the bond may be verified by uploading a copy of the bond on Trisura's website. The website page, as printed by Ms. Miller, directs the user to press "Choose Bond",

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<sup>70</sup> Exhibit PR-2021-058-01A at 34–37; Exhibit PR-2021-058-16 at 157–158, 160–161. See also Exhibit PR-2021-058-01B at 23–24.

<sup>71</sup> Exhibit PR-2021-058-17 at para. 17.

browse to locate the “file” on the user’s computer, and then press “Verify Bond”.<sup>72</sup> If the file that is located by browsing, selected, and uploaded is the composite file created as a result of the “drag and drop” exercise, then the Trisura website would receive a bond that has been combined with other documents, which would contravene Trisura’s caution against combining PDF pages. Conversely, if the file being uploaded extracts the bond from the composite file, this indicates that the originating file has been split, again creating a conflict with the instructions that the bond should not be subjected to software that “splits” PDF files.

[136] The Tribunal accepts that GKL was able to conduct its own verification of the bond, as testified by Mr. Kerr. Based on the evidence before it, the Tribunal concludes that GKL’s verification succeeded because it entailed the uploading of the original bond to the Trisura website.

[137] The Tribunal has considered GKLs’ argument that the epost Connect service was responsible for stripping the digital certificates from the bond, rendering it non-verifiable. Neither party provided evidence concerning the software and operation of the epost Connect service. The only evidence were allegations by GKL that PWGSC was aware of previous bidders encountering problems. This evidence is anecdotal hearsay and PWGSC denies having made any such statements to GKL.

[138] However, even if the Tribunal were to assume that the epost Connect service is theoretically capable of invalidating an e-bond, the evidence would have to show that there is no other plausible explanation for the invalidation of the bond. For the reasons given above, there is evidence that the bond document was handled in a manner that was contrary to the explicit instructions of the surety responsible for issuance of the bond.

[139] In summary, although GKL had *obtained* a verifiable bond from Trisura, that bond was not *transmitted*, in either original or verifiable form, to PWGSC. This is not attributable to any ambiguity in the language used by the ITT. To the extent that there was any confusion or ambiguity concerning the process of bond verification, it may have arisen from the instructions or process provided by Trisura, but the Tribunal makes no finding in this regard. The sole issue before the Tribunal is whether the tender document contains a latent ambiguity. It does not.

[140] Non-compliance with SI04 2.1.a. alone is sufficient to find that GKL’s bid was non-compliant. Notwithstanding, the Tribunal will address the other provisions of SI04 2.1.

[141] SI04 2.1.b. provides as follows:

The version submitted must be viewable, printable and storable in standard electronic file formats compatible with Canada, and in a single file, allowable format pdf.<sup>73</sup>

[142] The bond document as submitted by GKL, is viewable, printable and storable in standard electronic file format. This is apparent from the copy of the bond that was attached as Exhibit C to Ms. Miller’s affidavit.<sup>74</sup>

[143] It is significant that SI04 2.1.b. uses the word “version” as opposed to the word “bond”. This indicates that a bidder need not submit an original bond document, so long as the document that is

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<sup>72</sup> Exhibit PR-2021-058-16 at 157–158, 160–161. See also Exhibit PR-2021-058-01A at 34–37.

<sup>73</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

<sup>74</sup> Exhibit PR-2021-058-16 at 155. See also: Exhibit PR-2021-058-01 at 13; Exhibit PR-2021-058-01B at 133.

submitted is in the prescribed form and is verifiable as a bond by satisfying the verification criteria of SI04 2.1.a. through SI04 2.1.e.

[144] At issue here is the requirement that the “version” be in a “single file, allowable format pdf”. GKL argues that this wording requires that the bond be combined with the other bid documents. It points to dictionary definitions indicating that the word “file” means a plurality, or combination of individual documents.

[145] The definitions relied upon by GKL are largely framed with respect to *physical* documents that, when kept together, are referred to as a “file”. GKL’s argument is premised on transposing that meaning to non-physical documents. However, the connotation with respect to non-physical, electronic documents, is slightly different.

[146] The most relevant of the definitions provided by GKL is the definition of the noun “file”, which reads as follows:

- (d) “a complete collection of data (such as text or a program) treated by a computer as a unit especially for purposes of input and output”<sup>75</sup>

[147] This definition of “file”, in an electronic context, refers to a collection of data, not to a collection of individual physical paper documents. An electronic “file” may thus be the transformation or manifestation of the data that would comprise a single physical page or, alternatively, of a multiplicity of documents that have been combined into a format such as PDF format. A physical counterpart may be referred to as a “document” if the pages are held together by, for example, use of a staple or a paper clip. A plurality of documents would form a “file” if they are collected together and enclosed within a folded enclosure or cover that is designed to hold a multiplicity of individual documents.

[148] GKL uses the example of a “zip folder” to argue that electronic “files” may be held or stored within “folders”. While this may be true, the argument is underpinned by the assumption that the e-bond was *only* a “file”, as required by SI04 2.1.b., because it was combined with the documents that made up GKL’s bid.

[149] This argument takes the words “single file, allowable format pdf” out of the overall context of SI04 2.1.b. which clearly refers to the bond alone, and not to the bid, or to the bond and bid documents in combination. The subject of the sentence comprising SI04 2.1.b. is the word “version” which refers to the bid security in the form of a bond that is submitted to Canada. The antecedent for the word “version” is found in SI04 2.1.a. which, taken in context, in turn refers back to the preamble of SI04 2.1., which defines the characteristics of an e-bond. It reads as follows:

A bid bond may be submitted in an electronic format (Electronic Bonding (E-Bond)) if it meets the following criteria:<sup>76</sup>

[150] As such, each of the conditions imposed by SI04 2.1.a. through SI04 2.1.e. pertain to the e-bond, *and not to the entire bid package* as submitted by the bidder.

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<sup>75</sup> Exhibit PR-2021-058-17, para. 51, citing *Merriam-Webster Dictionary*, “File” <Online: <https://www.merriam-webster.com/dictionary/file>>.

<sup>76</sup> Exhibit PR-2021-058-01B at 4; Exhibit PR-2021-058-07A at 4, 24; Exhibit PR-2021-058-16 at 33.

[151] In other words, SI04 2.1. does *not* provide instructions with respect to submission of the overall bid, but rather the bid security *per se*, in the form of a verifiable bid bond. SI04 2.1.b. requires that the “version” of the bid bond being submitted be a “single file, allowable format pdf”. It does not refer to the other bid documents.

[152] A separate provision (SI05) provides instructions concerning submission of the bid. There are no provisions which explicitly require that the bid and the bid security be combined for submission as a single document or file.

[153] Indeed, when read in the overall context of SI04 2.1., the requirement in SI04 2.1.b. that the bid bond be in “single file, allowable format pdf” actually *points away* from combining the bid bond with any other documents (whether characterized as a “file” or as a “folder”). This follows from the instruction that the “version” of the bond as submitted have characteristics (i.e. encryption, embedded digital certificates, digital signatures, digital seals) needed for verification. This is especially the case if the features of Trisura’s bond and verification system were known to GKL and PWGSC as being representative of general industry practice.

[154] The words “single file, allowable format pdf” cannot be selectively extracted and assigned a meaning without consideration of the overall context in which those words appear in the ITT. Words may have a different meaning when placed in a different context, but this does not serve to create an ambiguity.

[155] This conclusion is reinforced by SI04 2.3. which reads as follows:

Bonds passing the verification process will be treated as original and authentic.<sup>77</sup>

[156] So long as the bond document is electronically verifiable as prescribed by SI04 2.1., it is deemed to be both “original” and “authentic”. In other words, a bidder need not submit the original bond document electronically, so long as the “version” of the bond as submitted retains the embedded electronic information that is required for its verification.

[157] SI04 2.1.c. reads as follows:

The verification may be conducted by Canada immediately or at any time during the life of the Bond and at the discretion of Canada.<sup>78</sup>

[158] This provision uses permissive, not mandatory language. PWGSC was not *required* to verify GKL’s e-bond or, for that matter, the e-bond or other form of bid security provided by any other bidder. However, once PWGSC exercised its discretion to verify bid security before awarding a contract, it had the obligation to carry out that verification fairly and reasonably, within the boundaries set by the ITT.<sup>79</sup>

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<sup>77</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

<sup>78</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

<sup>79</sup> *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) at para. 80; *Deloitte Inc. v. Department of Public Works and Government Services* (10 June 2015), PR-2014-055 (CITT) at para. 60; *Accipter Radar Technologies Inc. v. Department of Public Works and Government Services* (26 April 2019), PR-2018-049 (CITT) at para. 99.

[159] As noted above, the verification parameters are set with reference to electronic information that is encrypted and embedded within the bond document. Although SI04 2.1.c. affords broad discretion with respect to *when* any bond verification may be carried out, SI04 2.1. is drafted quite narrowly concerning the verification process that must be used. It leaves no room for PWGSC to simply satisfy itself that the named surety has issued the requisite bond to the bidder, such as by calling or otherwise reaching out to the surety.

[160] Instead, verification is defined *only* with reference to obtaining confirmation from the surety's online verification tool<sup>80</sup> with respect to one or more of the embedded certificates, digital signatures and seals. If this does not occur, SI04 2.2. deems the e-bond to be invalid and the bid is consequently non-compliant because acceptable bid security has not been provided.

[161] In this case, the evidence shows that PWGSC followed Trisura's instructions as printed on the heading of the bond document. The fact that the verification failed is not the result of any discernable error made by PWGSC in carrying out Trisura's instructions.

[162] GKL argues that PWGSC should have taken the further step of contacting Trisura to verify the bond. However, this would have involved taking a verification step that is outside of the scope of the specific verification process as defined by the ITT.

[163] In drafting the ITT, PWGSC has designed stringent tender requirements that limit its discretion in ascertaining whether a bidder has provided valid bid security. As a practical matter, this leaves PWGSC little room to retain a lower-priced bid where verification of bid security fails for what may be characterized as a technicality. In turn, this may lead to an increase in the cost of procuring the goods or services that are the subject of the tender.

[164] However, this is the result of decisions made at the stage of drafting the tender document. Those decisions may or may not be optimal, especially when viewed with the benefit of hindsight. Once the tender has been drafted and the rules of the competition are fixed, the Tribunal's review is limited to ensuring that the rules have been followed. It cannot retroactively rewrite those rules such as, in this case, to afford PWGSC a discretion or latitude that was not contemplated by the terms of the tender.

[165] SI04 2.1.d. reads as follows:

The results of the verification must provide a clear, immediate and printable indication of pass or fail regarding Item 2.1.a.<sup>81</sup>

[166] Exhibits D and E to Ms. Miller's affidavit reflect the intended application of SI04 2.1.d.<sup>82</sup> GKL argues that PWGSC should have taken the next step of telephoning Trisura Support, as invited, to verify the bond.

[167] This argument would have had some traction if the terms of the tender had been drafted to allow PWGSC greater discretion in verifying the e-bond, such as by making further inquiries to confirm bid security, in the event that online verification could not be effected, as discussed above.

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<sup>80</sup> Or a similar tool provided by a service provider approved by the surety.

<sup>81</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

<sup>82</sup> Exhibit PR-2021-058-16 at 157–158, 160–161.

As drafted, the terms of the tender do not address that contingency. The wording of SI104 2.2. is categorical. If the e-bond does not pass the online verification, the bond is invalid.

[168] The Tribunal agrees with PWGSC that a telephone or email inquiry of Trisura would not generate an “immediate” indication of bond validity, as contemplated by this requirement. For reasons given above, SI04 2.1. is framed with reference to an online verification tool which is the common thread running through each of SI04 2.1.a. through SI04 2.1.e.

[169] SI04 2.1.e. reads as follows:

Submitting copies (non-original, non-verifiable or scanned copy) of signed and sealed bid bond are not acceptable. Failure to submit an original or verifiable bond will render the bid non-compliant. Non-compliant bids will be given no further consideration. A scanned copy of a bond does not constitute a digital bond.<sup>83</sup>

[170] When read in context of SI04 2.1.a. through SI04 2.1.d., this provision merely amplifies and underscores those previous requirements. An original e-bond will possess the features required for verification (i.e. encryption, embedded digital certificates, digital signatures, seals) and a “version” of the original which retains those features will be verifiable and valid. Any other copy, whether generated by scanning or otherwise, that does not preserve or retain the verification criteria will be non-verifiable and will consequentially render the bid non-compliant.

[171] GKL argued that it has not encountered problems with previous submission of e-bonds to PWGSC. This argument essentially invites the Tribunal to infer that the circumstances surrounding the invalidation of this e-bond are an anomaly. However, the underlying premise of this argument is that those previous tenders had wording that is essentially identical to the ITT. There is no evidence to this effect.

[172] Even assuming otherwise, there are several possible explanations, none of which can be confirmed from the record before the Tribunal. For example, PWGSC might have elected *not* to check bond validity, or did so at some later date, after the contract was awarded or was underway. Alternatively, GKL might not have been the lowest bidder and PWGSC dispensed with the exercise of verifying GKL’s bond in those circumstances.

[173] In the further alternative, the tender provisions might have been more liberally drafted, conferring greater discretion on PWGSC with respect to bond verification methods.

[174] As such, this argument premised on past experience is unsupported and essentially speculative. It does not assist GKL.

### **Did GKL comply with mandatory requirements of the tender concerning bid security?**

[175] GKL, acting in good faith, may have misunderstood the requirements of SI04 2.1. Indeed, this is the likely explanation for what has transpired. However, for the reasons given above, this does not create ambiguity in the wording of the ITT. Nor does it change the fact that the Trisura bond was rendered non-verifiable, even inadvertently. A threshold of strict compliance applies with respect to mandatory requirements.

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<sup>83</sup> Exhibit PR-2021-058-01B at 5; Exhibit PR-2021-058-07A at 5, 25; Exhibit PR-2021-058-16 at 34.

[176] For the reasons given above, the mandatory criteria for bid security pertaining to an e-bond, as defined by SI04 2.1., have not been fulfilled.

### **Did PWGSC act reasonably in finding that GKL's bid was non-complaint?**

[177] It is well settled that a procuring entity must act reasonably when evaluating a bid for compliance. According to the Tribunal's jurisprudence, an evaluation will be reasonable where it is supported by a tenable explanation, even if that explanation is not one that the Tribunal itself finds compelling.<sup>84</sup>

[178] The Tribunal finds no grounds to conclude that PWGSC acted unreasonably. PWGSC followed the prescribed processes for bid evaluation. It declined to take the further step of contacting Trisura Support, but nothing in the prescribed processes contemplated, much less authorized, such a step, given how PWGSC chose to structure the verification protocols when drafting the ITT.

[179] The Tribunal has considerable sympathy for the circumstances faced by GKL. However, for all of the reasons given above, there are no tenable grounds upon which the Tribunal is able to intervene. The complaint must be dismissed.

### **COSTS**

[180] As a general principle, costs usually follow the event.<sup>85</sup> As PWGSC has been successful and has requested costs, the Tribunal provisionally awards PWGSC its reasonable costs for this proceeding.

[181] The issues in dispute were focused, which tended to narrow the complexity of the case. One interlocutory motion was brought, which typically increases the complexity of the case. However, that motion was largely resolved on consent, namely that PWGSC be granted leave to file a sur-reply. In such circumstances, neither party should receive costs of the motion.

[182] Taking all of these factors into account, the Tribunal's preliminary determination is that costs of this inquiry fall within Level 1 of the Tribunal's *Procurement Costs Guideline*.

[183] The Tribunal emphasizes that these findings with respect to costs are both preliminary and provisional. The parties may make submissions on costs within 15 days of the date of this statement of reasons. Upon receipt and consideration of submissions from the parties, the Tribunal will render a final order with respect to costs.

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<sup>84</sup> For example, see *Joint Venture of BMT Fleet Technology Limited and Notra Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CIIT) at para. 25. See also *C3 Polymeric Limited v. National Gallery of Canada* (14 February 2013), PR-2012-020 (CIIT) at para. 38; *Cache Computer Consulting Group v. Department of Public Works and Government Services* (25 July 2021), PR-2020-088 (CIIT) at para. 92.

<sup>85</sup> *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199 at paras. 26–28.

**DETERMINATION**

[184] For the above reasons and pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

Susan D. Beaubien

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Susan D. Beaubien  
Presiding Member