



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File PR-2022-033

Eight Bells Consulting Services  
Incorporated

v.

Treasury Board Secretariat

*Determination issued  
Wednesday, December 21, 2022*

*Reasons issued  
Wednesday, January 11, 2023*

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IN THE MATTER OF a complaint filed by Eight Bells Consulting Services Incorporated 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**

**EIGHT BELLS CONSULTING SERVICES INCORPORATED**

**Complainant**

**AND**

**THE TREASURY BOARD SECRETARIAT**

**Government  
Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act* (CITT Act), the Canadian International Trade Tribunal determines that the complaint is valid in part.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards Eight Bells Consulting Services Incorporated its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by the Treasury Board Secretariat. In accordance with the *Procurement Costs Guidelines* (Guidelines), the Tribunal's preliminary indication of the level of complexity is Level 1 and the preliminary indication of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the Guidelines. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Susan Beaubien

Susan Beaubien  
Presiding Member

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

Tribunal Panel:	Susan Beaubien, Presiding Member
Tribunal Secretariat Staff:	Nadja Momcilovic, Counsel Zackery Shaver, Counsel Matthew Riopelle, Registrar Officer Morgan Oda, Registrar Officer
Complainant:	Eight Bells Consulting Services Incorporated
Government Institution:	Treasury Board Secretariat
Counsel for the Government Institution:	Julie St-Amour Klodiana Hito

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## STATEMENT OF REASONS

[1] Eight Bells Consulting Services Incorporated (Eight Bells) has filed a complaint concerning a solicitation, the Notice of Intended Procurement 24062-22-363 (NIP), issued by the Treasury Board Secretariat (TBS).<sup>1</sup>

[2] The NIP was published on July 22, 2022, and advised that TBS had a requirement for the services of three procurement specialists at senior and junior levels, with prescribed levels of security clearance. The tender was issued pursuant to a Task and Solutions Professional Services (TSPS) supply arrangement for task-based professional services and was open only to entities that held a previously issued supply arrangement under solicitation E60ZT-18TSPS and were qualified under Tier 1 of the category “3.7 Procurement Specialist”.<sup>2</sup>

[3] Fifteen holders of TSPS supply arrangements (SA Holders) were listed as having been invited to bid on the solicitation.<sup>3</sup>

[4] After viewing the NIP as published, Eight Bells contacted TBS on July 25, 2022, and asked for a copy of the solicitation documents underpinning the NIP. Eight Bells stated that it was a “TSPS SA Holder” and was possibly interested in participating in the solicitation process. However, to assess and gauge its interest in doing so, it required additional information concerning the scope of the tender requirements.<sup>4</sup>

[5] TBS replied the following day. It advised Eight Bells that it could not find Eight Bells on the list of approved suppliers eligible to compete for the tender requirement. For that reason, TBS declined to “officially add [the] firm [Eight Bells] to this requirement.”<sup>5</sup> Eight Bells was invited to advise of any alternate business name used by Eight Bells that might appear on the list of approved suppliers relevant to the search criteria used by TBS.<sup>6</sup>

[6] Eight Bells repeated its request that it be provided a copy of the solicitation documents. From the exchange of email correspondence with TBS, Eight Bells was, by this time, aware that the tender was seeking the services of two senior procurement officers and one junior procurement officer. Eight Bells contended that it was unclear why all those resources would necessarily have to be provided under a single contract. It appeared to view the issue as arising from an unduly narrow set of search criteria used by TBS to generate a list of suppliers invited to bid.<sup>7</sup> A copy of the solicitation documents would cast light on this issue.<sup>8</sup>

[7] TBS maintained its refusal to provide Eight Bells with a copy of the solicitation documents. It appeared to view Eight Bells’ request for these documents as tantamount to a request that Eight

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<sup>1</sup> Exhibit PR-2022-033-01.

<sup>2</sup> *Ibid.* at 13–15.

<sup>3</sup> *Ibid.* at 15.

<sup>4</sup> *Ibid.* at 10, 17–18

<sup>5</sup> *Ibid.* at 18.

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

<sup>7</sup> The search criteria used by TBS included procurement specialists at the junior and senior levels. Given that Eight Bells was only awarded a supply arrangement for procurement officers at the senior level, it did not show up in the results. See Exhibit PR-2022-033-01 at 18.

<sup>8</sup> Exhibit PR-2022-033-01 at 18.

Bells be added to the list of approved suppliers invited to bid on the NIP, even though Eight Bells did not meet the search criteria used by TBS to compile the list of invited bidders.<sup>9</sup>

[8] There was further discussion between Eight Bells and TBS concerning the search criteria. This led Eight Bells to conclude that it could become a qualified bidder by “making changes” to the terms of its supply arrangement. Indeed, Eight Bells contends that it ticked two additional boxes on its online supply arrangement submission, on or about August 1, 2022, to indicate that it could also provide a junior and an intermediate procurement specialist, so that it would now “meet” the search criteria used by TBS.<sup>10</sup>

[9] On August 2, 2022, TBS advised Eight Bells that the changes would not become effective until they were reviewed as a new bid proposal under the supply arrangement.<sup>11</sup> The timeline for this review would be too late to enable Eight Bells to be included as an invited bidder for the purposes of the NIP.

[10] On August 7, 2022, Eight Bells filed a complaint with the Canadian International Trade Tribunal. It asked that Eight Bells be “given” the solicitation documents for the NIP. The grounds for Eight Bells’ complaint may be summarized as follows:

- (i) the description of the tender requirements, either with respect to the Notice of Planned Procurement (NPP)<sup>12</sup> or the NIP, were not articulated as required by the World Trade Organization Agreement on Government Procurement (WTO-AGP) Article VII 2.b;
- (ii) the NIP did not provide specifics on the limitations to the number of suppliers and the associated criteria for limiting the number of suppliers as required by WTO-AGP Article IX.5;
- (iii) Eight Bells was wrongly excluded from consideration based on insufficient time for qualification, contrary to WTO-AGP Article IX.11.<sup>13</sup>

[11] By way of remedy, Eight Bells asked the Tribunal to direct that the contracting authority (TBS) provide Eight Bells with a copy of the solicitation documents.<sup>14</sup>

[12] The Tribunal accepted Eight Bells’ complaint for inquiry on August 15, 2022.<sup>15</sup>

[13] On September 20, 2022, TBS filed a Government Institution Report (GIR).<sup>16</sup> The GIR comprised written submissions and several exhibits, including a copy of the full solicitation for the NIP<sup>17</sup> and an affidavit of Natasha Hickey, who is employed as Manager of the Online Professional

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<sup>9</sup> *Ibid.* at 19–20.

<sup>10</sup> *Ibid.* at 20.

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

<sup>12</sup> In its complaint, Eight Bells referred to the TSPS supply arrangement as the NPP whereas it referred to TBS’s published notice that prompted it to request the solicitation documents as the NIP. These reasons will accordingly refer to these elements as such.

<sup>13</sup> Exhibit PR-2022-033-01 at 7.

<sup>14</sup> *Ibid.* at 8.

<sup>15</sup> Exhibit PR-2022-033-03.

<sup>16</sup> Exhibit PR-2022-033-10.

<sup>17</sup> *Ibid.* at 22.

Services Division with the Department of Public Works and Government Services (PWGSC), the department that established the TSPS supply arrangements for the benefit of PWGSC and other government departments and agencies.<sup>18</sup>

[14] In her affidavit, Natasha Hickey testified that PWGSC provides an ongoing opportunity for suppliers to pre-qualify under a perpetual Request for Supply Arrangement (RFSA) solicitation, with received proposals being assessed on a revolving quarterly basis. According to Natasha Hickey, this is not a simple application or enrollment process but a competitive tender process that requires evaluation of bids against two different tiers and a multiplicity of resource streams with associated criteria.<sup>19</sup>

[15] Eight Bells responded to the GIR on September 29, 2022, by filing extensive comments which addressed the arguments made by TBS.<sup>20</sup>

[16] TBS took the view that Eight Bells had added new material and expanded its complaint by alleging that, in seeking supply arrangement qualification for junior and intermediate level procurement specialists, it had merely “checked two boxes” on a form, rendering the application a formality that should take a nominal time to review and approve. TBS requested leave to file a sur-reply,<sup>21</sup> including an affidavit from Melody Jeurond, Acting Director of the Online Professional Services Division of PWGSC.<sup>22</sup>

[17] According to Melody Jeurond, Eight Bells’ submission was, in substance, more complex than just checking two boxes using an online form. In doing so, Eight Bells had resubmitted all the voluminous materials that had supported its proposal for a supply arrangement with respect to a senior level resource. This material would now have to be re-evaluated with respect to the additional levels of expertise (junior and intermediate) for which a supply arrangement is now being sought. This evaluation would take place, in conjunction with the review of proposals from other bidders, within the current review period for the ongoing TSPS solicitation.<sup>23</sup>

[18] Eight Bells did not contest the sur-reply of TBS but did submit further comments of its own in response.<sup>24</sup> It submitted that the scope of its complaint had not been expanded and that Eight Bells had raised, from the outset, that the NIP was deficient for not disclosing the criteria for limiting the number of suppliers invited to bid. It also pointed out that the complaint had stated that Eight Bells had not been provided with sufficient time to become a qualified supplier. As such, Eight Bells submitted that an allegation concerning the lack of complexity associated with evaluating its proposal to become qualified to provide junior and intermediate level resources is not new but rather consistent with the complaint as filed.

[19] Although sur-reply, much less reply to sur-reply, is unusual, the Tribunal accepted the filing of all this material, which has been given due consideration as appropriate.

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<sup>18</sup> *Ibid.* at 180.

<sup>19</sup> *Ibid.* at 180–182.

<sup>20</sup> Exhibit PR-2022-033-13.

<sup>21</sup> Exhibit PR-2022-033-14.

<sup>22</sup> *Ibid.* at 6.

<sup>23</sup> *Ibid.* at 6–7.

<sup>24</sup> Exhibit PR-2022-033-16.

## POSITIONS OF THE PARTIES

[20] The positions of the parties may be briefly summarized as follows.

[21] Eight Bells takes the position that the NIP was deficient in providing an adequate description of the work and tasks to be performed by a winning bidder. The differentiation and allocation of tasks to be performed at the junior, intermediate and senior levels was unclear. To the extent that the tasks are severable and allocated as between junior and senior resource levels, Eight Bells should be permitted to bid with respect to the senior level work for which it is an SA Holder.

[22] Further, Eight Bells contends that the NIP does not address criteria for limiting the number of suppliers eligible to participate in the procurement.

[23] To the extent that Eight Bells requires additional supply arrangement qualifications, it says that the review process should amount to a mere formality. By not expediting or promptly reviewing Eight Bells' proposal to seek a supply arrangement of expanded scope, PWGSC wrongly denied Eight Bells the opportunity to participate in the tender by asserting that there was insufficient time to process and review the proposal submitted by Eight Bells for an expanded supply arrangement.

[24] For its part, TBS contends that Eight Bells' complaint is untimely and moot and that Eight Bells lacks standing. It disputes Eight Bells' contention that the trade agreements have been contravened and asserts that the tender competition has been properly limited to qualified SA Holders. As Eight Bells did not hold a supply arrangement of requisite scope, it was not eligible to bid as an invited supplier and was properly excluded.

[25] TBS disputes that PWGSC's evaluation of Eight Bells' proposal to secure a supply arrangement for other levels of procurement expertise is a trivial matter of low complexity that can be summarily processed without the usual scope of review. Supply arrangements are specifically designed to allow the quick and efficient procurement of resources as needed. For this system to work efficiently and as intended, there must be a structured process to evaluate the ongoing influx of applications using available resources while not prejudicing or delaying procurement from suppliers who have already qualified under the supply arrangement.

[26] TBS asks that Eight Bells' complaint be dismissed, with costs.

## ANALYSIS

[27] In its submissions to the Tribunal, TBS argued that Eight Bells' complaint is late; that Eight Bells does not have standing to bring this complaint to the Tribunal, as it is not a qualified supplier; and that the complaint is moot because Eight Bells was provided with a copy of the solicitation documents during the proceedings.

[28] The Tribunal's authority to conduct inquiries concerning procurement matters arises from the *Canadian International Trade Tribunal Act*<sup>25</sup> (CITT Act) and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>26</sup> (Regulations).

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<sup>25</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>26</sup> SOR/93-602.



[29] The CITT Act and the Regulations prescribe certain conditions that must be present before the Tribunal can commence an inquiry into a complaint, namely:

- (a) the complaint must be timely;
- (b) the complaint must pertain to a “designated contract” within the meaning of the CITT Act and the Regulations;
- (c) the complaint must be filed by a “potential supplier” of the goods and/or services being procured; and
- (d) there must be a reasonable indication that the procurement has not been conducted in accordance with applicable trade agreements.<sup>27</sup>

[30] All these conditions must be present. The arguments raised by the parties only touch upon conditions (a), (c) and (d). There is no disagreement that the procurement pertains to a “designated contract”.

[31] The Tribunal finds that, as outlined below, Eight Bells meets these requirements.

### **Timeliness**

[32] To the extent that Eight Bells contends that the supply arrangement issued to it was underpinned by a deficient NPP, the Tribunal agrees with TBS that such a complaint is out of time.

[33] A potential supplier who has made an objection to a contracting authority and who has been denied relief may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.<sup>28</sup>

[34] The supply arrangement was issued to Eight Bells on or about June 17, 2021.<sup>29</sup> The scope of that supply arrangement was limited to qualifying Eight Bells to supply the services of a senior procurement officer. If Eight Bells was of the view that the supply arrangement should have also extended to the services of a junior procurement officer, then it should have challenged the evaluation of its proposal at that time. Over a year has elapsed, and Eight Bells is out of time to complain that the supply arrangement it received should have extended to, or qualified, Eight Bells with respect to the services of a junior procurement officer.

[35] Moreover, there is some evidence to suggest that Eight Bells received a supply arrangement of the scope that it had actually applied for or, at the very least, that Eight Bells was aware that its supply arrangement was limited to the provision of the services of a senior procurement officer, as it made no mention of holding a supply arrangement for any other level of expertise.<sup>30</sup>

[36] In its initial written complaint to TBS, Eight Bells took the view that it had insufficient information, in the absence of the solicitation documents for the NIP, to determine whether the senior and junior level resources were severable, in terms of supply. As an SA Holder at the senior level, the

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<sup>27</sup> Section 30.11 of the CITT Act; section 6 of the Regulations.

<sup>28</sup> Subsections 6(1) and (2) of the Regulations.

<sup>29</sup> Exhibit PR-2022-033-10 at 181.

<sup>30</sup> *Ibid.* at 187.

evidence indicates that Eight Bells was of the view that it should have been able to bid on the NIP with respect to the senior level position alone:

I would very much want to participate in this requirement. The challenge is that I have no idea what the requirement actually entails. For instance, based on our exchange of emails, I now know that the requirement is for two seniors and one junior. Based on the work, I may decide not to participate or I may very much want to participate. There is no good reason for you not to provide me with a copy of the solicitation document as I am a senior procurement officer with a TSPS SA at the FSC secret level. The challenge is your search criteria. It is not clear why the Work would require all resources to be under the same contract. I might be able to understand the requirement if you share the information. Once again, I request a copy of the solicitation document and all of its annexes and attachments.<sup>31</sup>

[37] As its discussions with TBS continued, it appears that Eight Bells' perception of the situation evolved somewhat. Eight Bells seems to have reached the conclusion that the search criteria used to generate the list of invited suppliers was either arbitrary or unduly technical, because a qualification to supply a junior level resource was not regarded as being subsumed within, or interchangeable with, a qualification to supply a senior level resource.

[38] Even if this aspect of the complaint was not out of time, there is no basis for the Tribunal to find that the evaluation of the proposal submitted by Eight Bells referable to the NPP was flawed. Eight Bells might have decided, for its own reasons, to limit its proposal in response to the NPP to the provision of a senior level resource. In the alternative, it might have applied for a supply arrangement to provide resources at both the senior and junior levels but received approval only for the senior level resource. In the former scenario, the benefit of hindsight now showing that a qualification to provide a senior level resource does not also extend to junior level resources does not create retroactive grounds for complaint against the contracting authority with respect to a supplier's own decision concerning the scope of the supply arrangement that it wished to receive. In the latter scenario, a decision by the contracting authority to award a supply arrangement of more limited scope than was applied for amounts to a complaint concerning the evaluation of the supplier's proposal. If the outcome of the evaluation process had been viewed as unsatisfactory, it was incumbent on Eight Bells to make a complaint at that time. It is now too late to do so.

[39] In any event, there is no evidence before the Tribunal concerning what transpired. For the reasons given above, the Tribunal would, notwithstanding, be unable to provide any recourse.

[40] With respect to the content of the NIP as published on July 27, 2022, the Tribunal finds that the complaint filed by Eight Bells is timely, as it was submitted within 10 working days after Eight Bells was denied relief by TBS.

### **Standing**

[41] TBS submits that Eight Bells lacks standing to bring this complaint because it was not a "qualified supplier". As Eight Bells was not an SA Holder for both junior and senior level procurement specialists, it thus could not be a "potential supplier" within the meaning of section 30.1 of the CITT Act.

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<sup>31</sup> *Ibid.* at 186.

[42] The Tribunal rejects the argument that Eight Bells lacks standing. The complaint is rooted in the premise that the NIP did not provide sufficient information for Eight Bells to determine whether it could submit a proposal to supply resources (senior level specialist) coextensive with the supply arrangement that it does hold.

[43] As such, the objection to standing is a circular argument. If the terms of the solicitation did, in fact, allow for a proposal that was severable with respect to supplied resources, a prospective bidder such as Eight Bells would have no recourse to challenge a solicitation that is arguably defective on the very issue as to whether the bidder is (or is not) a “potential supplier”.

### **Mootness**

[44] TBS also contends that the complaint is now moot because Eight Bells was provided with a copy of the solicitation documents on September 15, 2022, shortly after Eight Bells filed its complaint with the Tribunal. As this was the remedy sought by Eight Bells, TBS takes the position that the complaint should be dismissed as moot.

[45] An issue or proceeding becomes moot when there is no longer a live controversy between the parties. If the proceeding is moot, the court or tribunal retains a discretion to hear and decide the matter. In exercising that discretion, the following factors should be considered: (1) the existence of an adversarial relationship between the parties; (2) concern for judicial economy; and (3) public interest in having the issue decided.<sup>32</sup>

[46] In this case, there remains a live controversy between the parties. The grounds identified in the complaint were not limited to an allegation that Eight Bells was wrongly denied a copy of the solicitation documents. Although that was the initial request made by Eight Bells, the crux of the complaint seems to have expanded and evolved into an expectation that Eight Bells should be added to the list of bidders invited to submit proposals in response to the NIP based on the supply arrangement currently held by Eight Bells or that the terms of that supply arrangement should be expeditiously amended to enable Eight Bells to become an invited bidder. These grounds are within the scope of the complaint as originally filed. They serve to create justiciable issues between the parties that remain unresolved by the provision of the solicitation documents. As such, the Tribunal concludes that there remains a *lis* or adversarial relationship between the parties. The complaint is not moot.

[47] The Tribunal now turns to a consideration of Eight Bells’ three grounds of complaint.<sup>33</sup>

[48] Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations provides that the Tribunal is required to determine whether the procurement was

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<sup>32</sup> *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (25 November 2020), PR-2020-031 (CITT) at para. 33, referring to *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at para. 37; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

<sup>33</sup> Exhibit PR-2022-033-01 at 7.

conducted in accordance with the requirements set out in the applicable trade agreements, which include the WTO-AGP and the Canada Free Trade Agreement (CFTA).<sup>34</sup>

**Ground 1: The description of the tender requirements in the NIP was not sufficiently articulated**

[49] In its first ground of complaint, Eight Bells contends that the NIP does not comply with WTO-AGP Article VII 2 b),<sup>35</sup> which provides as follows:

*Notice of Intended Procurement*

...

2. Except as otherwise provided in this Agreement, each notice of intended procurement shall include:

...

b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity; ...

[50] As published, the NIP appears to be restricted to a notice which provides a summary overview of the procurement and its requirements. However, the underlying solicitation documents which contained full details of the solicitation were not published and were provided only to SA Holders invited by TBS.

[51] Although the NIP did disclose TBS's need for three procurement specialists (senior and junior) with an estimated contract value of up to \$3,750,000.00 (including applicable taxes), it did not contain all the details that Eight Bells required to make an informed decision as to whether it was qualified or able to bid. As noted above, Eight Bells appears to have been interested in bidding as a qualified SA Holder for a senior procurement specialist if the solicitation contemplated that the services being procured could be provided by more than one supplier under separate contracts.

[52] In the Tribunal's view, this is the type of query that a contracting authority might receive from a prospective bidder during a tender. Such questions are typically answered with the information being made available to all prospective bidders. Eight Bells posed this question at least implicitly when it asked to receive a copy of the solicitation documents.

[53] On a purposive reading, WTO-AGP Article VII 2 b) is directed to ensuring that sufficient information concerning a solicitation is provided to enable prospective bidders to make an informed decision as to whether they can reasonably prepare a responsive bid or whether it is in their interest

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<sup>34</sup> Section 1.5 of TBS's request for proposals indicated that the requirement was subject to the WTO-AGP, the CFTA and the nine international trade agreements that have chapters covering government procurement. For the purposes of this inquiry, the Tribunal will, for the most part, refer to the provisions of the WTO-AGP, given that only provisions of this agreement were cited by Eight Bells in its complaint.

<sup>35</sup> Although not raised by Eight Bells, Article 506(6) of the CFTA indicates that, among other things, "[e]ach tender notice shall include: ... (b) a brief description of the procurement; (c) the nature and the quantity, or estimated quantity, of the goods or services to be procured unless those requirements are included in tender documentation ...".

to undertake that effort. This is generally consistent with the purposes of the regulatory regime governing government procurement, as discussed in *Canada (Attorney General) v. Almon Equipment Limited*.<sup>36</sup>

[54] In this case, even though all specifics of the procurement, such as those sought by Eight Bells, were not spelled out in the NIP *per se*, the objectives of Article VII 2 b) would still be met by making the solicitation documents available, if not by way of download or other association with the NIP then on request. TBS declined to do so in this case.

[55] Based on the evidence, the Tribunal concludes that TBS appears to have operated on a mistaken assumption. As Eight Bells did not hold a supply arrangement to supply all resources being procured, TBS apparently took the view that providing a copy of the solicitation documents would be inviting an unqualified bidder to submit a proposal.

[56] This was not the case. TBS could have provided the solicitation documents with a caveat that the documents were being provided for information purposes only and should not be taken as an invitation to bid.

[57] Indeed, the solicitation documents explicitly contemplate a wider audience than just those SA Holders identified by TBS who have been extended an invitation. Attachment 1 to Part 1, List of Suppliers, identifies the entities invited to bid and further provides as follows:

This list will not be updated if additional suppliers request copies of the bid solicitation.

Only selected TSPS SA Holders currently holding a TSPS SA under the E60ZT-18TSPS series of SAs are invited to compete. SA Holders may not submit a bid in response to this bid solicitation unless they have been invited to do so. However, should an uninvited SA Holder wish to be invited, it may contact the Contracting Authority to request an invitation at any time prior to five business days before the published bid closing date, and an invitation will be made to that SA Holder unless it would not be consistent with the efficient operation of the procurement process. In no circumstance will such an invitation require Canada to extend a bid closing date. The following SA Holders have been initially invited to bid on this requirement.

SA Holders that are invited to compete as a joint venture must submit a bid as that joint venture SA Holder, forming no other joint venture to bid. Any joint venture must be already qualified under the E60ZT-18TSPS series as that joint venture at the time of bid closing in order to submit a bid.<sup>37</sup>

[58] As such, the terms of the solicitation clearly contemplate that qualified bidders who are not initially included on the list of invitees may request an invitation. For that to occur, those uninvited bidders would need to have a copy of the solicitation documents.

[59] The solicitation contemplates the issuance of invitations to additional bidders unless this would be inconsistent with the efficient operation of the procurement process. In the Tribunal's view, merely receiving the solicitation documents does not confer the right to bid. An uninvited supplier must still request an invitation. Whether such an invitation is actually extended is a matter of

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<sup>36</sup> 2010 FCA 193 at paras. 21–23.

<sup>37</sup> Exhibit PR-2022-033-10 at 29.

discretion for the procuring entity. It requires a consideration of whether adding more bidders would be unduly disruptive to the procurement process. That issue does not arise in these circumstances, as Eight Bells did not have an opportunity to request an invitation.

[60] This being said, as Eight Bells was not fully qualified under the supply arrangement in question, such an invitation would likely not have been extended, even if requested. Notwithstanding, the process followed by TBS short-circuited, for practical purposes, the process contemplated by the solicitation documents. By treating Eight Bells' request for the solicitation documents as being tantamount to a request to be added to the list of invited bidders, the process for adding bidders was pre-empted without Eight Bells having been given the opportunity to request an invitation.

[61] These solicitation documents were meant to be shared with other potentially interested parties, upon request, as outlined by the procedure in Attachment 1 to Part 1, List of Suppliers.<sup>38</sup> As such, the Tribunal concludes that Eight Bells had a right to receive the solicitation documents. Had all the information prescribed in WTO-AGP Article VII 2 b)<sup>39</sup> been included in the NIP, this document would have been sufficient to inform Eight Bells of the nature of the procurement. TBS's refusal to provide those documents is sufficient for the Tribunal to conclude that the first ground of Eight Bells' complaint is justified, albeit on a narrow basis.

**Ground 2: The NIP did not unreasonably limit the number of suppliers who could participate in the bid**

[62] The second ground of Eight Bells' complaint contends that the NIP did not provide any specifics on the limitations to the number of suppliers and associated criteria, contrary to WTO-AGP Article IX.5, which provides as follows:

Article IX Qualification of Suppliers

*Registration Systems and Qualification Procedures*

...

*Selective Tendering*

...

5. A procuring entity shall allow all qualified suppliers to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

[63] For the reasons given above, the procurement did not limit the number of suppliers who could compete in the tender process, subject to those suppliers being qualified. The requirement for all invited bidders to be qualified SA Holders creates a level playing field, as all prospective bidders must meet the same standard. The solicitation further defines a process for any uninvited bidder to request an invitation to the competition. The full scope of these requirements was set forth in the solicitation documents which, for practical purposes, are incorporated by reference into the NIP as

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<sup>38</sup> Exhibit PR-2022-033-06.A at 152.

<sup>39</sup> As well as the information listed in Article 506(6) of the CFTA.

published, so long as the solicitation documents are made available, such as by way of download, on request or some other means that renders all information accessible to potential bidders who may be interested.

[64] Although TBS did not make the solicitation documents available to Eight Bells, this does not change the fact that the provisions of the solicitation did not limit or unreasonably restrict the number of bidders who could participate. Accordingly, there is no contravention of WTO-AGP Article IX.5, and the second ground of the complaint must be dismissed.

### **Ground 3: Eight Bells was not wrongly excluded from bidding**

[65] In its third ground of complaint, Eight Bells contends that it was wrongly excluded from participating in the tender because it had insufficient time to become a qualified supplier, contrary to WTO-AGP Article IX.11, which provides as follows:

#### Article IX Qualification of Suppliers

##### *Registration Systems and Qualification Procedures*

...

11. Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents, within the time-period provided for in Article XI:2, a procuring entity shall examine the request. The procuring entity shall not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time-period allowed for the submission of tenders.

[66] There are two aspects to this ground of complaint. To the extent that Eight Bells sought to be added to the list of invited bidders, the Tribunal agrees with TBS that due consideration was given to Eight Bells' view that it should be permitted to bid. This process took the form of an exchange of email correspondence between Eight Bells and TBS during the period of July 25 to August 2, 2022.

[67] TBS declined to invite Eight Bells to compete because Eight Bells held a supply arrangement to supply only part of the resources being procured. To have admitted Eight Bells into the competition under those conditions would have created asymmetry between invited bidders and other bidders with partial supply arrangement qualifications who would not have been invited or been aware that holding a supply arrangement for all resource requirements was not a mandatory prerequisite. In effect, this would have amounted to rewriting the invitation requirement to accommodate Eight Bells, to the prejudice of other entities in the same position.

[68] Nor is it incumbent on a procuring entity to amend or adjust the terms of the tender to accommodate a particular bidder. It is well established that a procuring entity is free to frame the

tender in a way that best meets operational requirements.<sup>40</sup> In the context of this case, TBS was under no obligation to restructure the tender so that Eight Bells could submit a bid limited to supplying a senior resource that it was qualified to provide, having regard to the terms of the supply arrangement that it held.

[69] Eight Bells also takes the position that WTO-AGP Article IX.11 is contravened because TBS did not treat its application to acquire a supply arrangement for the junior level resource as a mere formality or otherwise expedite that application to enable Eight Bells to be added to the list of bidders for the NIP.

[70] Significantly, this facet of Eight Bells' complaint pertains not to the NIP at issue but rather to another competitive tender process where proposals are submitted and evaluated for the purpose of issuing a supply arrangement. Essentially, Eight Bells is urging the Tribunal to make a finding that Eight Bells should be granted a supply arrangement for the junior level resource. This would place the Tribunal in the shoes of the PWGSC evaluators at first instance, which is not the role of the Tribunal. Within the regulatory regime, the Tribunal's function is to provide oversight and not to displace the evaluation process of the procuring entity.

[71] Moreover, even if the Tribunal could entertain such an argument, it would require a finding that the qualification requirements for senior and junior level resources be deemed as interchangeable. The Tribunal cannot presume that the qualifications and skill set for these two positions fully overlap or that the criteria for the junior level position are merely a subset or otherwise subsumed within those of the senior level position. Indeed, the evidence before the Tribunal is to the contrary. Natasha Hickey's affidavit states that the review process is not a mere formality but entails some complexity to ensure that a prospective supplier meets the qualifications of the supply arrangement. The Tribunal accepts her evidence on these issues.

[72] For the same reasons, the Tribunal declines to order PWGSC to fast-track Eight Bells' application for an expanded supply arrangement. The evidence demonstrates that the process for qualifying for a supply arrangement is open and ongoing, with evaluations being conducted on a quarterly basis. This is consistent with the requirements of WTO-AGP Article IX.7, which provides as follows:

7. A procuring entity may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:

...

b) where published by electronic means, made available continuously, in the appropriate medium listed in Appendix III.

[73] Having regard to the evidence provided by Natasha Hickey, expediting Eight Bells' application as a mere formality would create conditions where Eight Bells' application could receive

<sup>40</sup> See e.g. *Vaisala Oyj v. Department of Public Works and Government Services* (29 December 2017), PR-2017-022 (CITT) at para. 82; *2040077 Ontario Inc. o/a FDF Group* (27 August 2014), PR-2014-024 (CITT) at para. 19; *Accent on Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at paras. 60, 65, 70; *Bajai Inc.* (7 July 2003), PR-2003-001 (CITT); *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).



a more cursory or abbreviated review than those of other applicants. The RFSA is not merely administrative in nature. It remains a competitive tender process where commercial entities submit proposals demonstrating their qualifications for an award of a supply arrangement. As such, this requires a consistent and fairly applied evaluation process where all applicants are subjected to the same degree of scrutiny on a level playing field.

[74] Further, given that the RFSA process remains ongoing and open, it is not unreasonable to conclude that the limited supply arrangement now held by Eight Bells arises from an earlier decision made by Eight Bells to refrain from seeking a supply arrangement for the junior level resource. If so, any perceived disadvantage that is consequential to that decision is largely self-inflicted. In the alternative, if a prior application filed by Eight Bells for a supply arrangement with respect to the junior level position was rejected, any such outcome cannot be circumvented or reversed by treating a new application as a formality to be examined in a truncated review process.

[75] In addition, the proposed timeline for reviewing Eight Bells' application for a supply arrangement with respect to a junior level specialist is generally consistent with the time that was taken to review Eight Bells' application for the supply arrangement that it now holds, and with the time taken to review the applications of competing bidders. For that reason, the Tribunal cannot find that the proposed time for reviewing the new proposal submitted by Eight Bells for a supply arrangement with respect to junior and intermediate level resources to be unreasonable.

[76] Having regard to the foregoing, Eight Bells' third ground of complaint is dismissed.

## **REMEDY**

[77] Given that the Tribunal determined that Eight Bells' first ground of complaint, arguing that the description of the tender requirements in the NIP was deficient, was valid, it now turns to the issue of remedy. Subsection 30.15(2) of the CITT Act lists the remedies that the Tribunal may award to a complainant. It reads as follows:

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

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

[78] When recommending a remedy, the Tribunal is required to consider the factors specified by subsection 30.15(3) of the CITT Act, which reads as follows:

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

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;

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

### **The seriousness of any deficiency in the procurement process**

[79] The deficiency in this case had no significant effect on the competitiveness of the procurement process. It amounted to a procedural error in providing timely information but did not change the fact that Eight Bells did not hold a supply arrangement of the requisite scope that would have made it eligible to submit a proposal.

### **The degree to which the complainant and all other interested parties were prejudiced**

[80] As Eight Bells would not have been eligible to submit a proposal even if the solicitation documents had been promptly provided on request, the Tribunal finds that it has not been prejudiced.

[81] For the reasons given above, a risk of potential prejudice to other bidders would have been created if the terms of the solicitation were retroactively amended to accommodate Eight Bells in submitting a proposal directed to supplying a portion of the resources being procured (senior procurement resource) or in fast-tracking Eight Bells' application under the TSPS tender with respect to securing a supply arrangement for the junior and intermediate resource positions. Such an outcome would operate to place Eight Bells in a preferential position relative to other participants in the quarterly phase of the ongoing TSPS procurement for qualification under the supply arrangement.

### **The degree to which the integrity and efficiency of the competitive procurement system was prejudiced**

[82] There is a public interest in ensuring that the procurement of goods and services using public funds is carried out fairly and transparently. To achieve this objective, procurement processes must be characterized by both integrity and efficiency.

[83] The Tribunal finds no evidence that the cause of the deficiency is due to some endemic or major flaw within the procurement framework. As noted above, the Tribunal is persuaded that TBS made a procedural error. It correctly noted that Eight Bells was not qualified to bid because it did not have a supply arrangement of the scope required by the solicitation. Instead of providing the solicitation documents with that caveat and dealing with any subsequent and formal request by Eight Bells for an invitation to bid, the procedural steps were conflated.

[84] In light of the foregoing, the Tribunal is not persuaded that the integrity and efficiency of the procurement system have been significantly compromised or prejudiced.

**Whether the parties acted in good faith**

[85] The good faith and honesty of the public servants overseeing the procurement process is presumed.<sup>41</sup> There is no evidence here to rebut that presumption. Although an error was made, the Tribunal is satisfied from the correspondence exchanged that the parties were acting in good faith throughout. TBS did not deliberately or intentionally seek to disadvantage Eight Bells.

**The extent to which the contract was performed**

[86] Any proposal that Eight Bells would have submitted, with or without being added to the invited bidder list, would have been rejected due to the lack of a supply arrangement of the requisite scope. As such, the award of the contract to another bidder and the degree, if any, to which that contract has already been performed, does not attract any weight in these circumstances.

[87] As such, it would be disproportionate for the Tribunal to recommend that the existing contract be terminated and that a new solicitation for the designated contract be issued.

[88] As Eight Bells did not submit a bid and was not eligible to do so, there are no grounds for the Tribunal to direct a re-evaluation of the bids, nor is there any evidence that the bids that were received were improperly evaluated. For the same reason, the Tribunal concludes that it would be inappropriate to recommend that the contract be awarded to Eight Bells.

[89] Accordingly, the Tribunal is left to consider a remedy of monetary compensation pursuant to paragraph 30.15(2)(e) of the CITT Act, which confers the Tribunal with a broad remedial discretion.<sup>42</sup>

[90] As Eight Bells did not prepare a bid responsive to the NIP, it has incurred no bid preparation costs that should be compensated. Nor should it receive any bid preparation costs for the bid submitted for an expanded supply arrangement; that is a separate procurement process and there is no evidence that Eight Bells will not be given adequate consideration. Moreover, by its own admission, the effort to submit a proposal for the expanded supply arrangement involved minimal effort on the part of Eight Bells, although the evidence indicates<sup>43</sup> that a full review will be conducted by PWGSC against the supply arrangement for the junior and intermediate resource positions.

[91] In considering a remedy pursuant to subsection 30.15(2) of the CITT Act, the Tribunal must be mindful of the importance of potential bidders having confidence in the integrity of the procurement system. This principle was explained by the Federal Court of Appeal in *Canada (Attorney General) v. Envoy Relocation Services* as follows:

[22] Although performing essentially adjudicative functions when it inquires into complaints by disappointed bidders on government contracts that they were unfairly treated, the CITT must exercise its powers with a view to, among other things, maintaining potential bidders' confidence in the integrity of the procurement system. An erosion of confidence would have a detrimental impact on the competitiveness of bidding. Hence, it should not be

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<sup>41</sup> *MasterBedroom Inc.* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at paras. 15–16.

<sup>42</sup> See e.g. *Systèmes Equinox Inc. v. Canada (Public Works and Government Services)*, 2012 FCA 51.

<sup>43</sup> Exhibit PR-2022-033-14 at 6–7.

assumed that the CITT's power to recommend compensation is exercisable exclusively on the basis of common law principles.<sup>44</sup>

[92] Having weighed the relevant factors as discussed above, the Tribunal finds that the systemic concerns contemplated by section 30.15(2) of the CITT Act do not mitigate in favour of a monetary award, which would be disproportionate on the facts in this particular case.

[93] Eight Bells has already received the only remedy that it asked for, namely a copy of the solicitation documents. Having regard to the reasons given above and taking into account the provisions of subsection 30.15(3) of the CITT Act, the Tribunal finds that no other remedy should be granted.

## **COSTS**

[94] The Tribunal is conferred with a broad statutory discretion concerning the allocation of costs in a procurement dispute. A decision to award costs (or not) must be made on a principled basis, having regard to the circumstances of the case at issue.

[95] The Tribunal is also mindful of the general principles that costs usually follow the event and that parties will typically bear their own costs where success is mixed.

[96] However, in this case, the Tribunal considers that the filing of the complaint might have been avoided entirely if TBS had acceded to Eight Bells' initial request for a copy of the solicitation documents. As noted above, the refusal to provide those documents may have been premised on a mistaken belief that providing the solicitation documents would operate to make Eight Bells an invited, but unqualified, bidder.

[97] Notwithstanding, it is the Tribunal's view that the refusal to provide the solicitation documents was unreasonable and served to create a sense of grievance for Eight Bells which continued to escalate, giving rise to additional grounds of complaint.

[98] For these reasons, and in these somewhat unusual circumstances, the Tribunal has reached the preliminary and provisional conclusion that Eight Bells should be awarded its costs incurred in preparing and proceeding with its complaint before the Tribunal, which costs are to be paid by TBS. As the issues were not particularly complex and the volume of materials was relatively modest, the Tribunal's preliminary indication is that costs of this inquiry fall within Level 1 of the Procurement Costs Guidelines (Guidelines), which carries a set cost award of \$1,150.

## **DETERMINATION**

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

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<sup>44</sup> 2007 FCA 176 at para. 22.

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

Susan D. Beaubien

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Susan D. Beaubien  
Presiding Member