Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File PR-2022-053

Chantier Davie Canada Inc. and
Wärtsilä Canada Inc.

v.

Department of Public Works and Government Services

Determination issued
Wednesday, February 1, 2023

Reasons issued
Tuesday, February 14, 2023

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IN THE MATTER OF a complaint filed by Chantier Davie Canada Inc. and Wärtsilä Canada Inc., 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

CHANTIER DAVIE CANADA INC. AND WÄRSTILÄ CANADA INC.	**Complainants**

AND

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

DETERMINATION

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

The ground of complaint concerning the adequacy of the debriefing is not valid.

The grounds of complaint concerning the evaluation of the bid submitted by Heddle Marine Service Inc. do not disclose a reasonable indication of a breach of the Canadian Free Trade Agreement because they were not presented with supporting evidence at the time of filing the complaint. Pursuant to subsection 30.13(5) of the CITT Act and section 10 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Tribunal therefore ceases the inquiry and dismisses the complaint concerning these allegations or unsupported grounds of complaint.

The Department of Public Works and Government Services (PWGSC) failed to recognize that Chantier Davie Canada Inc. and Wärtsilä Canada Inc. met the requirements of section 6.6 of the solicitation. The ground of complaint concerning this issue is therefore valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that PWGSC remedy the breach of the Canadian Free Trade Agreement by re-evaluating the bids received in response to the solicitation.

Each party will bear its own costs.

Eric Wildhaber

Eric Wildhaber
Presiding Member

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

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STATEMENT OF REASONS

OVERVIEW

[1] This matter pertains to a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (CITT Act) made by Chantier Davie Canada Inc. (Chantier Davie) and Wärtsilä Canada Inc. (Wärtsilä) regarding an invitation to tender (ITT) (solicitation F7049-200041/B) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO). DFO requires work on the CCGS *Terry Fox*, including docking, inspection, repair, maintenance and alterations on the vessel, and work on certain major components, including its propulsion system.

[2] In their complaint, Chantier Davie and Wärtsilä[2] alleged that PWGSC breached trade agreement debriefing obligations and that their bid was evaluated incorrectly (PWGSC disqualified Chantier Davie and Wärtsilä based on an issue pertaining to its labour agreements). They also argued that PWGSC should have declared non-compliant the prevailing bid, submitted by Heddle Marine Service Inc. (Heddle), on Chantier Davie and Wärtsilä's belief that Heddle would not have met certain requirements of the ITT.

[3] As explained below, the Canadian International Trade Tribunal finds that the complaint is valid in part: Chantier Davie and Wärtsilä's bid was improperly declared non-compliant. It is recommended that this be remedied by re-evaluating the compliant bids. The other grounds of complaint are not valid.

PROCUREMENT PROCESS

[4] The ITT was issued on November 2, 2021. The bidding period closed on July 19, 2022.[3]

[5] PWGSC received three bids in response to the solicitation.[4]

[6] On October 27, 2022, PWGSC awarded the contract to Heddle.

[7] On October 28, 2022, Heddle began executing the contract.

[8] By regret email from PWGSC dated October 28, 2022, Chantier Davie and Wärtsilä learned, *inter alia*, that their bid had been rejected for failure to meet clause 6.6 of the ITT, which reads as follows:[5]

> **6.6 Valid Labour Agreement**

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1 R.S.C., 1985, c. 47 (4th Supp.).

2 Chantier Davie took the active lead at the debriefing stage with PWGSC and during the complaint proceedings at the Tribunal. Nevertheless, for purposes of uniformity in the drafting of these reasons, the complainants are systematically referred to together even though specific actions may have been undertaken, from time to time, by counsel or representatives of one company and not of the other. Fundamentally, Chantier Davie and Wärtsilä bid together and brought the complaint together.

3 Exhibit PR-2022-053-01 at 2603.

4 Exhibit PR-2022-053-30 at 6.

5 Exhibit PR-2022-053-01 at 61.

> If the Bidder has a labour agreement, or other suitable instrument, in place with all its unionized labour, it must be valid for the proposed period of any resulting contract. Documentary evidence of the agreement or suitable instrument must be provided in their bid. The Bidder must provide a letter stating that they are a non-unionized facility if applicable.

[9] On November 5, 2022, Chantier Davie and Wärtsilä requested an in-person debriefing with PWGSC.[6]

[10] On November 8, 2022, PWGSC denied the request for an in-person debriefing, but it provided a written debriefing.

[11] On November 8, 2022, Chantier Davie and Wärtsilä asked PWGSC to reconsider its refusal to hold an in-person debriefing.[7]

[12] On November 10, 2022, PWGSC reiterated that it would not hold an in-person debriefing, but it provided another written debriefing and stated that it considered the matter closed.[8]

PROCEDURAL HISTORY BEFORE THE TRIBUNAL

[13] On November 14, 2022, Chantier Davie and Wärtsilä filed a complaint with the Tribunal.[9]

[14] On November 17, 2022, the Tribunal accepted the complaint for inquiry,[10] in accordance with subsection 30.13(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations).[11]

[15] On November 30 and December 1, 2022, Heddle filed a request to intervene in the proceedings.[12] The request was granted on December 2, 2022.[13]

[16] On December 23, 2022, PWGSC submitted the Government Institution Report (GIR).[14]

[17] On January 9, 2023, Chantier Davie and Wärtsilä requested that the Tribunal recognize Gary S. Rosen as an expert in Quebec labour law.[15]

[18] On January 10, 2023, Heddle submitted comments in opposition to Gary S. Rosen being qualified as an expert.[16]

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6 Exhibit PR-2022-053-01.A at 2199; Exhibit PR-2022-053-52 at 82.
7 Exhibit PR-2022-053-01.A at 2202.
8 *Ibid.* at 2208–2209.
9 Exhibit PR-2022-053-01.
10 Exhibit PR-2022-053-04; Exhibit PR-2022-053-05.
11 SOR/93-602.
12 Exhibit PR-2022-053-08; Exhibit PR-2022-053-10.
13 Exhibit PR-2022-053-15.
14 Exhibit PR-2022-053-30.
15 Exhibit PR-2022-053-37.
16 Exhibit PR-2022-053-38.

[19] On January 11, 2023, Heddle filed its comments on the GIR,[17] and PWGSC submitted comments opposing Chantier Davie and Wärtsilä's request concerning Gary S. Rosen.[18]

[20] On January 12, 2023, Chantier Davie and Wärtsilä requested that the Tribunal recognize Manpreet Singh as an expert and that he be granted access to the confidential record.[19]

[21] On January 13, 2023, PWGSC and Heddle submitted comments in opposition to the qualification of Manpreet Singh,[20] and Chantier Davie and Wärtsilä submitted a reply to the comments by PWGSC and Heddle regarding Gary S. Rosen.[21]

[22] On January 16, 2023, Chantier Davie and Wärtsilä submitted a reply to the comments filed by PWGSC and Heddle regarding Manpreet Singh.[22]

[23] On January 19, 2023, the Tribunal acknowledged receipt of the parties' submissions concerning the proposed experts.[23] The Tribunal informed the parties that the request for the qualification of Gary S. Rosen was denied and that a decision on the request pertaining to Manpreet Singh would be made after Chantier Davie and Wärtsilä had filed comments on the GIR.

[24] On January 23, 2023, Chantier Davie and Wärtsilä filed comments on the GIR.[24]

[25] On January 25, 2023, Heddle and PWGSC filed letters objecting to various aspects of Chantier Davie and Wärtsilä's comments on the GIR on the basis that they constituted evidence that should have been included with the materials that were submitted to the Tribunal at the time of filing the complaint.[25]

[26] Chantier Davie and Wärtsilä submitted reply comments to the Tribunal on January 30, 2023.

ANALYSIS

[27] In considering Chantier Davie and Wärtsilä's complaint, the Tribunal is required by subsection 30.14(2) of the CITT Act to decide whether PWGSC acted in accordance with the prescribed procedures and requirements found in the solicitation. The Tribunal must also determine, pursuant to section 11 of the Regulations, whether the procurement was conducted in accordance with the requirements of the applicable trade agreements. The only trade agreement applicable to the solicitation is the Canadian Free Trade Agreement (CFTA).[26]

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17 Exhibit PR-2022-053-41.
18 Exhibit PR-2022-053-42.
19 Exhibit PR-2022-053-43. Chantier Davie and Wärtsilä had initially requested that the Tribunal recognize four other individuals as experts but withdrew that request and eventually replaced these individuals with Manpreet Singh.
20 Exhibit PR-2022-053-45; Exhibit PR-2022-053-46.
21 Exhibit PR-2022-053-47.
22 Exhibit PR-2022-053-49.
23 Exhibit PR-2022-053-51.
24 Exhibit PR-2022-053-01 at 44.
25 Exhibit PR-2022-053-53; Exhibit PR-2022-053-54.
26 See the CFTA, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf> (entered into force 1 July 2017). See also Exhibit PR-2022-053-01 at 44.

Preliminary matter

[28] In their respective letters of January 25, 2023, Heddle and PWGSC asked the Tribunal to strike various portions or the entirety of the comments on the GIR that were filed by Chantier Davie and Wärtsilä. On January 30, 2023, Chantier Davie and Wärtsilä submitted reply comments on this subject.

[29] The request is denied. Truncating the record for the reasons raised by Heddle and PWGSC is not necessary. The materials filed by Chantier Davie and Wärtsilä at the stage of filing their comments on the GIR, and afterwards, provide a full record of how Chantier Davie and Wärtsilä failed to lead with evidence in chief when filing portions of their complaint.

There was no violation of CFTA debriefing obligations

The only issue of contention at the debriefing stage was the format of the debriefing

[30] The ground of complaint raised by Chantier Davie and Wärtsilä with respect to PWGSC's debriefing obligations under the CFTA is not valid.

[31] The salient paragraphs of Chantier Davie and Wärtsilä's complaint read as follows:[27]

> 6. To make matters worse, *the selected bidder (i.e., Heddle) did not – and could not – meet the mandatory requirements of the Solicitation*. Namely, *the propulsion main engines* ("**PMEs**") that Heddle put forward for the Vessel's new propulsion system *were either (a) no longer in production, and/or (b) failed to meet the mandatory and technical specifications* of the Solicitation pertaining to having at least five (5) similar icebreaker installations in other vessels currently in operation. *Likewise, Heddle's PME supplier does not have an established PME workshop and repair facility in Eastern Canada* to support the maintenance of their engines, as required by the Solicitation and the resulting contract. As a result, it is incapable of meeting the mandatory performance requirements and performing the work under the contract – at least, according to the statement of work set out in the Solicitation.
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> 7. On November 5, 2022, the Complainants *requested a debrief to canvass these issues* with PSPC. *It instead repeated, in writing, the same reasons relied upon in the Rejection Letter* –namely, the (alleged) failure to show proof of valid labour agreements during the period of the contract – without any further explanation. In addition, PSPC added that the Complainants' bid was not the lowest price out of the bids received. *PSPC did not allow the Complainants to ask any questions or request any clarifications* and ended the curt letter with the following sentence: "Canada considers this matter to be closed."
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> …
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> 35. On November 5, 2022, the Complainants *requested a debrief to examine these issues with PSPC and seek clarity on the results of the evaluation*. On November 8, 2022, and again on November 10, 2022, *PSPC responded to the Complainants' request by repeating the reasons outlined in the Rejection Letter*. PSPC, further, added that the

[27] Exhibit PR-2022-053-01 at 23–24, 32.

> Complainants' bid was not the lowest bid. *No opportunity was given to the Complainants to pose questions or seek clarifications*. Attached hereto as **Appendix "F"** to this Complaint is a copy of email correspondence between Davie and the Respondent dated November 5 and 8, 2022, and subsequent correspondence from the Respondent dated November 10, 2022.
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> [Italics added for emphasis, bold in original]

[32] Chantier Davie and Wärtsilä later detailed their ground of complaint concerning the debriefing process in their comments on the GIR. This was out of order because parties ought to use the comments on the GIR to respond to the GIR, not to further detail a ground of complaint. As provided in subsection 30.11(2) of the CITT Act, grounds of complaint are to be specified, in chief, at the time of filing a complaint, not afterwards.[28]

[33] Regardless, contrary to contentions made by Chantier Davie and Wärtsilä, the Tribunal finds that PWGSC had never refused to debrief Chantier Davie and Wärtsilä on substantive issues germane to its bid and to that of the winning bidder. The evidence on file shows that Chantier Davie and Wärtsilä did not raise any substantive issue in their requests for a debriefing. Rather, Chantier Davie and Wärtsilä's request for a debriefing pertained *only* to the way they wanted a debriefing to take place: they insisted that they be afforded the opportunity of an in-person debriefing—in other words, Chantier Davie and Wärtsilä did not accept the written debriefing format that was being offered, and they clearly wanted to dialogue with PWGSC at an in-person meeting. This was a purely procedural quarrel, not a substantive one.

[34] As such, when they asked for the in-person debriefings, Chantier Davie and Wärtsilä never indicated that they could prove that they met the requirement of section 6.6 of the ITT (and therefore, that they were seeking a re-evaluation of their bid). Nor did Chantier Davie and Wärtsilä raise in their correspondence with PWGSC the issues pertaining to results of the evaluation of the winning bidder. Those concerns were raised for the first time in the complaint. It follows that, because Chantier Davie and Wärtsilä had not raised substantive issues when corresponding with PWGSC at the debriefing stage, then, naturally, PWGSC would never have been expected to respond to substantive grievances that had never been aired. These issues were simply not raised when requesting the in-person debriefing.

[35] The only dialogue that occurred at the debriefing stage is as follows. Chantier Davie and Wärtsilä insisted twice that an in-person debriefing take place. Twice, PWGSC denied the request on the basis that the solicitation allowed for a written debriefing. PWGSC had indeed correctly identified that the CFTA does not require that debriefings take place in person and that the ITT provided for debriefings in writing.[29]

[36] The Tribunal notes that the CFTA mandates government institutions to follow circumscribed debriefing obligations,[30] which PWGSC met in this instance: PWGSC disclosed the name of the successful supplier, the value and date of the successful tender, and the reasons why Chantier Davie

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28 See *Hone People Development Consulting Corp.* (11 April 2022), PR-2021-085 (CITT) at para. 54.

29 Section 1.3 of the ITT reads as follows: "1.3 Debriefings - Bidders may request a debriefing on the results of the bid solicitation process. Bidders should make the request to the Contracting Authority within 15 working days of receipt of the results of the bid solicitation process. The debriefing *may be in writing*, by telephone, by video conference or in person" [emphasis added].

30 See CFTA, Article 516.

and Wärtsilä's bid had not been selected. In addition, PWGSC offered a written debriefing to Chantier Davie and Wärtsilä.

[37] The fact that Chantier Davie and Wärtsilä were unsatisfied with the written format of the debriefing does not constitute a violation of any trade agreement obligation. PWGSC met its trade agreement obligations and, consequently, this ground of complaint is not valid.

Chantier Davie and Wärtsilä did not avail themselves of the debriefing process

[38] In its regret email dated October 28, 2022, PWGSC invited Chantier Davie and Wärtsilä to contact the contracting authority should they "require further information regarding the evaluation of [their] bid".

[39] By insisting on an in-person debriefing instead of accepting the trade-agreement compliant written debriefing opportunity that PWGSC was offering them, Chantier Davie and Wärtsilä forwent any meaningful debriefing opportunity offered to them by PWGSC. By the same token, Chantier Davie and Wärtsilä failed to test against reality their hypothesis that Heddle could not have met certain requirements of the ITT in respect of maintenance facilities and the propulsion main engines.

[40] Chantier Davie and Wärtsilä appear not to have contemplated communicating in writing their concerns on the evaluation of their bid or of Heddle's bid. Nevertheless, nothing was preventing Chantier Davie and Wärtsilä from dialoguing with PWGSC in writing at the debriefing stage.

[41] The CFTA, the sole trade agreement applicable to the ITT, contains only circumscribed debriefing obligations to disclose the name of the successful supplier, to disclose the value and date of the successful tender, and to disclose to the losing bidder the reasons why its bid was not selected. In contrast, the World Trade Organization Agreement on Government Procurement (WTO-AGP) goes further. It requires government institutions to explain "the relative advantages of the *successful supplier's tender*" [emphasis added][31] or, in other words, to explain why the winning bidder won.

[42] However, that does not mean that debriefings should or need be limited to meeting only minimal trade agreement obligations. Government institutions in fact often offer "enhanced

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[31] See WTO-AGP, Article XVI(1); see also the Comprehensive Economic and Trade Agreement, article 19.15:1, which similarly required that government institutions provide "an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender". The Tribunal is not unsympathetic to what appears to have been Chantier Davie and Wärtsilä's desire to have an in-person meeting with the contracting authority. After all, they had expanded considerable time, resources, and money to put together a bid. The written debriefings that it received were succinct and largely repetitive. Chantier Davie and Wärtsilä wanted to sit down with PWGSC to discuss its evaluation and Heddle's bid. Chantier Davie and Wärtsilä appear to have concluded that their attempts at dialoguing with PWGSC were going nowhere because of PWGSC's refusal to hear them out at an in-person meeting. There was clearly miscommunication or poor communication. Similar obligations to provide information on the relative advantages of the tender that the entity selected are required by, *inter alia*, Article Kbis-11 of the Canada-Chile Free Trade Agreement; Article 1410:7 of the Canada-Colombia Free Trade Agreement; Article 1410:7 of the Canada-Peru Free Trade Agreement; Article 17.13:1 of the Canada-Honduras free Trade Agreement; Article 10.16:1 of the Canada-Ukraine Free Trade Agreement; and Article 16.11:7 of the Canada-Panama Free Trade Agreement. Article 15.16 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership also provides for the option to provide such information to an unsuccessful bidder.

debriefings".[32] For example, while strict compliance with the CFTA might require nothing more than explaining to a losing bidder why its own bid was lacking, government institutions will in fact give an "enhanced debriefing" to apprise the losing bidder of why the winning bidder won, in effect by providing the "relative advantages of the successful supplier's tender" (even though it is not strictly required to do so unless the WTO-AGP is applicable).

[43] Enhanced debriefings are a best practice because they allow losing bidders, among other things, to understand, for themselves, whether they lost fairly. They can be an opportunity to allow losing bidders to test any beliefs that they have in relation to their expectation of what a competitor might have bid. Importantly, this process can allow a government institution to be alerted to any oversight or mistake that warrants correction, if necessary.[33] Even if a difference of opinion on a given matter does not lead to corrective measures by a government institution, this dialogue can at least allow bidders to contemplate a complaint to the Tribunal, and to properly ground a complaint if a bidder decides to go forward with one.

[44] The debriefing stage occurs after contract award. This is important because the courts have recognized that the strict or absolute confidentiality of bids during bidding and evaluation, which is observed to preserve the integrity of the competitive procurement system, can open up, after contract award, to take into account the balancing of other considerations, chiefly ones of greater public transparency. This ought to allow a losing bidder to access information necessary to scrutinize public procurement decisions as a matter of public accountability.[34]

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32 An "enhanced debriefing" is a debriefing that goes beyond what might be necessary to comply with strict trade agreement obligations only.

33 A government institution has a vested interest in ensuring that it has properly evaluated bids to avoid mistakes, and to ensure the integrity of the competitive procurement system. See *Marine Recycling Corporation and Canadian Maritime Engineering Ltd. v. Department of Public Works and Government Services* (22 January 2021), PR-2020-038, PR-2020-044 and PR-2020-056 (CITT) at para. 41; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 137; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 52; *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 at para. 33.

34 For reasons of public accountability, the courts have recognized that the absolute confidentiality of bids during the bidding and evaluation processes must give way to a more balanced and open disclosure of information other than that which is strictly business confidential. This honest and open way of doing things promotes fairness and accountability and the integrity of the competitive procurement system. See *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FC 254 at para. 18, citing *Société Gamma Inc. v. Canada (Department of Secretary of State)* (1994), 79 F.T.R. 42 (T.D.):

> General information about the applicant and the nature and quality of its work not otherwise exempted appears to me to be of a nature not inherently confidential. One must keep in mind that these proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. *In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.*
>
> [Emphasis added]

See also *Savik Enterprises v. Nunavut (Commissioner)*, 2004 NUCJ 4 (N.C.J.) at paras. 24–28.

[45] PWGSC has no obligation to invite criticism or to volunteer information for scrutiny above what it is compelled to do under its trade agreement obligations. However, it may wish to consider being reasonably proactive in inviting communications. In this instance, after PWGSC refused Chantier Davie and Wärtsilä's requests for an in-person debriefing, PWGSC should likely have understood that Chantier Davie and Wärtsilä had something to say and could therefore have invited them to make any concerns known *in writing*.[35] As events unfolded, it appears, instead, that Chantier Davie and Wärtsilä felt that they had no choice but to turn to the Tribunal.[36] Avoiding litigation, where possible, is a benefit to the integrity and efficiency of the competitive procurement system.

[46] Aggrieved bidders should not shy away from asking a government institution to explain and justify its decisions.[37] If bidders do not get satisfactory disclosure of information, Parliament has provided for an access to information mechanism.[38] This is a further avenue of information gathering that can serve to provide evidence to ground allegations for the purposes of a complaint to the Tribunal. The first step, however, is to pose questions and to ask for information. Chantier Davie and Wärtsilä did neither; they ran to the Tribunal without ever asking PWGSC to divulge the information on which it based its decision.[39]

[47] Chantier Davie and Wärtsilä had evidence in hand to explain why their bid should not have been disqualified. They had evidence to provide in support of their compliance with section 6.6 of the ITT—that ground of complaint is properly before the Tribunal. However, Chantier Davie and Wärtsilä *had only suspicions* as to what Heddle likely bid (and, consequently, as to how its bid may fail to satisfy the requirements of the ITT) but no hard facts. They tried to confirm their suspicions through an evidence-gathering exercise conducted within the present proceedings. At its simplest, in respect of their allegations concerning Heddle's bid (criteria M19d and M19h), Chantier Davie and Wärtsilä are trying to use the Tribunal's inquiry process as a debriefing to understand how Heddle prevailed. Chantier Davie and Wärtsilä would then try to demonstrate why Heddle should not have prevailed. The Tribunal cannot allow this type of exercise to go on inside a procurement review case

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35 If sophisticated parties like Chantier Davie and Wärtsilä had as hard a time as they did in communicating with PWGSC, it is easy to imagine that bidders who are less familiar with the procurement system may have found themselves with no idea as to how to proceed if confronted by a similar situation.

36 PWGSC did end its letter of November 10, 2022, with the following statement: "This letter provides you with Canada's debriefing and final position with respect to the evaluation of the Davie/Wärtsilä bid. Accordingly, Canada considers the matter closed."

37 If government institutions do not maintain sufficiently open lines of communication, provide sufficient explanations or release of pertinent information, then they run the risk of leaving aggrieved bidders with the conviction that they should have won a tender and feel cheated out of an opportunity in favour of a competitor whom they perceive to be non-compliant or be providing a lesser solution than theirs. When an aggrieved bidder raises with a government institution a perceived fault in the winning bidder's ability to provide the requested solution, then a best practice would be for the government institution to explain the relative advantage that allowed the winning bidder to prevail and be able to justify that decision in a reasonable manner. To be sure, some losing bidders will always find it difficult or impossible to concede rightful loss of an opportunity. At one point, a government institution can unilaterally put an end to a dialogue that is unreasonable, for instance because it goes on for too long or because it continues to rehash the same issues. Aggrieved bidders must be mindful of the timelines within which they must file a complaint with the Tribunal.

38 *Access to Information Act* (R.S.C., 1985, c. A-1).

39 An aggrieved bidder is not required to exhaust any possible debriefing option or to make an objection to a government institution before coming to the Tribunal, but it must bring evidence to support any ground of complaint. Debriefings, and objections, may provide opportunities for parties to gain knowledge and evidence to support a complaint to the Tribunal.

because the bid challenge mechanism was not designed for the purpose for which Chantier Davie and Wärtsilä are trying to use it.

[48] The re-evaluation of the bids that will occur because of the remedy for the violation of the CFTA that is discussed below will provide PWGSC with the opportunity to re-examine any information of interest that came to its attention during these proceedings and to take appropriate action, if necessary. A further debriefing opportunity will arise after the new evaluation.

[49] Any document concerning the evaluation of bids that Chantier Davie and Wärtsilä wish to review can be requested of PWGSC for public release with appropriate redactions or sought through an access to information request, where the appropriateness of record releases and any redactions can be tested if necessary. If Chantier Davie and Wärtsilä gather evidence that supports any belief that the procurement was not conducted in accordance with PWGSC's obligations, then Chantier Davie and Wärtsilä can file a new complaint to the Tribunal.

Certain allegations did not disclose a reasonable indication of a breach of the CFTA

[50] Chantier Davie and Wärtsilä made allegations to the effect that PWGSC failed to properly evaluate Heddle's bid with respect to requirements M19d (pertaining to workshop facilities) and M19h (regarding propulsion engines).[40] The Tribunal finds that these allegations, as contained in the complaint, did not disclose a reasonable indication of a breach of the CFTA, because they were made without providing evidence at the time of filing the complaint.

[51] When a party comes to the Tribunal, it must provide evidence to support its allegations. Complainants must bring facts. It is not sufficient for them to come with allegations based on speculation.

[52] Commenting on *Macadamian Technologies Inc.*, the author P. Emanuelli remarked the following:

> [A] complainant cannot simply make general assertions that the supplier who was awarded a contract did not meet the necessary requirements and then shift the onus to the government to prove each aspect of its evaluation. To do so would, in effect, put the onus on the government to reconduct its evaluation and put the Tribunal in the position of performing a post-award audit of that evaluation.[41]

[53] In establishing the Tribunal, Parliament developed a procurement review mechanism that is open and expeditious. The CITT Act and the *Canadian International Trade Tribunal Rules* structure proceedings so that the Tribunal can discharge all cases within the strict timelines that Parliament has mandated. Tribunal proceedings are not court proceedings.[42]

[54] The CITT Act requires parties to gather their evidence prior to complaining to the Tribunal. A party must have evidence from the beginning to support its allegations, because the CITT Act

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40 Exhibit PR-2022-053-01 at 23, 31–32.

41 P. Emanuelli, *Government Procurement*, 4th Edition, at 951. See also *Macadamian Technologies Inc.* (13 June 2002), PR-2001-069 (CITT).

42 On the distinction between the courts and the Tribunal and other procurement review mechanisms in Canada, see: Dustin Kenall, "Administrative Remedies for Administrative Disputes: Perfecting Public Control of Public Procurement", *Canadian Journal of Administrative Law and Practice* (volume 31, no. 2 [June 2018]).

requires a complaining party to demonstrate a reasonable indication of a breach of any alleged trade agreement obligation. A reasonable indication of a breach of a trade agreement obligation cannot be demonstrated on allegations alone; evidence supporting an allegation is required.

[55] Chantier Davie and Wärtsilä made bald allegations in their complaint without providing evidence in support; they later attempted to seek evidence by adjoining an expert to investigate the matter. Parties cannot buttress a complaint that contains allegations unsupported by sufficient evidence, let alone allegations that are supported by *no* evidence, as was the case here, by embarking on a fact-finding mission in the context of a proceeding at the Tribunal. The Tribunal has repeatedly stated that its process cannot be used for evidence gathering or to conduct a "fishing expedition".[43] Importantly, too, the Tribunal does not have a mandate to conduct at-large investigations into the procurement system as a whole or a given solicitation in particular.[44] It examines only allegations that have *demonstrated through evidence* a reasonable indication of a breach of a trade agreement obligation. Mere allegations are simply not examined.

[56] By seeking to have Manpreet Singh qualified as an expert, Chantier Davie and Wärtsilä, in effect, sought to have him authorized as an evidence-seeking agent. Indeed, Chantier Davie and Wärtsilä asked that Manpreet Singh be allowed to comb an extensive part of the confidential record and requested that the Tribunal order the disclosure of all documents relating to the evaluation of Heddle's technical bid.[45] In the Tribunal's view, the only objective of this request can be to allow Chantier Davie and Wärtsilä to identify faults in PWGSC's evaluation, in other words: to gather evidence of mistakes that they suspected might exist or to attempt to gather evidence to retrospectively support the mere allegations that they made in the complaint. Again, the Tribunal is not the place to do this. A party must bring enough evidence at the first instance at the time of filing its complaint to demonstrate a reasonable indication of a breach of a trade agreement obligation. Here, Chantier Davie and Wärtsilä brought none.

[57] The request concerning Manpreet Singh is moot because his qualification as an expert witness was being sought in connection with the allegations made by Chantier Davie and Wärtsilä regarding Heddle's purported inability to meet certain requirements of the ITT. Since those allegations did not disclose a reasonable indication of a breach of the CFTA for lack of supporting evidence or information, Manpreet Singh could not be used to remedy that deficiency.

[58] Pursuant to subsection 30.13(5) of the CITT Act and section 10 of the Regulations, the Tribunal therefore ceases the inquiry and dismisses the complaint concerning these unsupported grounds of complaint.

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43 A "fishing expedition" has been defined by the Federal Court of Appeal as "a search by an empty-handed party looking for something to grasp onto." See *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Ltd.*, 2021 CarswellNat 510, 2021 FCA 26 (FCA). See also *Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (9 August 2010), PR-2009-132 to PR-2009-153 (CITT) [*Enterasys*] at para. 67; *Pomerleau Inc. v. Department of Public Works and Government Services* (21 May 2015), PR-2014-048 (CITT) at paras. 26–32; *Toromont Cat v. Department of Public Works and Government Services* (22 January 2016), PR-2015-054 (CITT) at para. 20.

44 *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15324 (FCA).

45 Exhibit PR-2022-053-43 at 1; Exhibit PR-2022-053-49 at 3–4.

The request for an expert in Quebec labour law is denied

[59] Chantier Davie and Wärtsilä requested that Gary S. Rosen be qualified as an expert witness in Quebec labour law so that he could provide evidence on that subject. No report of proposed testimony was provided when the request was made. PWGSC and Heddle objected to this request.

[60] There were two obstacles to the request concerning Gary S. Rosen: (i) the Tribunal does not share the view advocated by Chantier Davie whereby Quebec law ought to be considered "foreign law"; (ii) the Tribunal does not require evidence on how Quebec law ought to be interpreted; arguments suffice.

[61] On the first obstacle, it is sufficient to recall that the Tribunal is subject to section 17 of the *Canada Evidence Act*, which provides that "[j]udicial notice shall be taken of … all … Acts of the legislature of any … province [which now forms or hereafter may form part of Canada] … whether enacted before or after the passing of the *Constitution Act, 1867*."[46] In short, experts are not required to prove the material content of Quebec laws because they are domestic laws that the Tribunal can readily access and is statutorily bound to access and consider.

[62] On the second obstacle, the Tribunal recalls that parties are always free to engage lawyers on their respective teams that are competent in specific areas of the law in relevant jurisdictions. The Tribunal presumes the expertise in the law of learned counsel that appear before it. Formal recognition of legal expertise is not necessary. It is generally to be viewed as superfluous as well because, ultimately, the Tribunal is the final interpreter and arbiter of the law argued in its proceedings.

[63] The Tribunal is satisfied that the parties had sufficient opportunities to make representations in argument on the aspects of Quebec labour law at issue in this matter. The request concerning Gary S. Rosen is denied.

The complainants' bid was improperly disqualified

[64] PWGSC disqualified Chantier Davie and Wärtsilä's bid on the basis that a collective agreement for part of its workforce would be *expired* at the time of the work.[47] Section 6.6 of the ITT pertains to the *validity* of a collective agreement. Section 59 of the Quebec *Labour Code* provides for the continued validity of the terms of a collective agreement beyond its expiry; similar provisions exist in labour legislation across Canada. A collective agreement is valid from the moment it is registered with the ministère du Travail du Québec and until a new one replaces the former one. As such, the validity of Chantier Davie and Wärtsilä's labour agreement cannot be questioned. If PWGSC intended to eliminate bidders with expired collective agreements, it should have said so explicitly. Since it did not, this constitutes a latent ambiguity in the ITT whereby PWGSC applied improper evaluation criteria in evaluating the bid submitted by Chantier Davie and Wärtsilä.[48]

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46 Other jurisdictions in Canada have adopted the same rule. See, for example, section 2807, *Civil Code of Québec*.

47 Exhibit PR-2022-053-01.A at 2208; Exhibit PR-2022-053-30 at 10.

48 *Cifelli Systems* (21 June 2001), PR-2000-065 (CITT); *TELUS Integrated Communications* (2 November 2000), PR-2000-017 and PR-2000-035 (CITT); *IBM Canada Ltd.* (24 April 1998), PR-97-033 (CITT); *Deloitte Inc. v. Department of Fisheries and Oceans and Department of Public Works and Government Services* (25 July 2017), PR-2016-069 (CITT).

[65] In PWGSC's affidavit, Charles McColgan deposed that the "intention behind [section 6.6 of the ITT] is to *eliminate* the *risk* that Canada will *deliver a vessel* to a shipyard *under a contract* and then have that shipyard in a strike or lockout, thus delaying the work and leaving Canada without its vessel for a potentially lengthy period of time" [emphasis added].[49]

[66] That statement warrants scrutiny because the Tribunal is of the view that it is impossible to completely eliminate the risk that a workplace will be in a strike or lockout through an evaluation criterion. As such, the Tribunal finds that it is not reasonable to understand section 6.6 of the ITT as a means of bid evaluation precisely because the risk of labour problems inside a workplace can never be fully eliminated. This is true of both unionized and non-unionized workplaces. It is also true inside unionized workplaces where the collective agreement has not yet expired.

[67] For example, a non-unionized workplace can also be subject to a work stoppage (e.g. employees can refuse to work for safety reasons, workers can walk off the job, or the tight labour market may prevent a workplace from having sufficient workers on force to get the job done). From one day to the next, workers in a non-unionized workplace could associate under an accredited bargaining agent, start bargaining and acquire a first collective agreement or they could be in the period between accreditation and the conclusion of a first collective agreement. Illegal strikes and lockouts can occur prior to the expiry of a collective agreement, as they can after one expires. It is difficult for the Tribunal to conceive how unionized workplaces could be scored compared to non-unionized workplaces, or how a fair and non-discriminatory scoring methodology could be structured to account for such distinctions and such typically unforeseeable events. Yet, PWGSC scored this purported evaluation requirement with a grade of pass or fail. Conversely, just because a collective agreement is expired or set to expire on a certain date in the future does not necessarily mean that a strike or a lockout will occur.

[68] Nothing in the language of section 6.6 of the ITT demonstrates that the purported goal of that section, as argued by PWGSC and Heddle in these proceedings, is achievable by means of bid evaluation requirement. Section 6.6 as understood by PWGSC contained no possible liability for a non-unionized workplace, which is inherently lopsided. If section 6.6 of the ITT was intended as an evaluation tool, the clause contains another inherent latent ambiguity because it was evaluated as a pass or fail criterion that is potentially impossible to meet. A bidder can never guarantee that it will not be the subject of a labour disruption, and PWGSC cannot assume that labour disruptions can happen only in unionized workplaces with expired labour agreements because they can occur elsewhere, too.

[69] As such, the Tribunal is of the view that section 6.6 of the ITT cannot be read as having set out an evaluable selection criterion, let alone one that contains an inherent difference of treatment

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49 Exhibit PR-2022-053-30 at 25.

between unionized workplaces and non-unionized workplaces, which would necessarily follow from PWGSC and Heddle's submissions in respect of that clause.[50]

[70] When the inherent latent ambiguities identified above are removed from the background, the only remaining reasonable purpose of section 6.6 of the ITT is as a means of information collection pertaining to eventualities of contract administration after contract award. Through the lens of contract administration, Charles McColgan's testimony makes sense. To paraphrase almost verbatim: PWGSC will not deliver a vessel to a shipyard under a contract where there is labour disruption.[51]

[71] Because the risk of labour disruption can never be eliminated, the information requested at section 6.6 of the ITT would nevertheless help the Canadian Coast Guard to gage the risk of labour disruption, whether ongoing or reasonably imminent, in the lead-up to the delivery of a vessel to a unionized shipyard under contract (i.e. one to whom a contract has been awarded).[52] There is evidence on file that PWGSC had previously administered its contractual relations with a supplier in that very same manner: when faced with the risk of delivering a vessel to a shipyard entering into a period of possible labour disruption, it waited until the risk decreased before delivering the vessel for contract execution. That was a perfectly legitimate and reasonable way of doing business, but the information was assessed as a matter of contract administration, not as a means of bid evaluation.[53]

[72] In the Tribunal's view, sections 6.6 and 2.7 of the ITT must be read together. The information being sought by section 6.6 of the ITT will help PWGSC to assess, after contract award, but prior to the delivery of the vessel for contract execution, whether the winning bidder is able to follow through on the certification that it gave at section 2.7 of the ITT at the time of bidding. Section 2.7 of the ITT reads, in relevant part, as follows: "By submitting a bid, the Bidder certifies that they have sufficient materiel and human resources allocated or available and that the Work Period comprised is adequate to, both, complete the known work and absorb a reasonable amount of unscheduled work".[54] Chantier Davie and Wärtsilä provided the information required at section 6.6 of the ITT to allow PWGSC to make any verifications necessary to confirm the certification made through section 2.7 of the ITT, as a matter of contract administration; therefore, Chantier Davie and Wärtsilä met the requirements of section 6.6 of the ITT.

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50 It is difficult for the Tribunal to conceive that any government institution would adopt such an evaluation criterion because it could well have the collateral effect of interfering with the exercise of the collective bargaining process: refusing to receive bids from a given unionized supplier unless it has a non-expired collective agreement in place on a given date in the future (a date that is in fact difficult to determine with certainty because start dates for projects are often delayed) could have the effect of pressuring workers to accept, with possible haste, new and potentially *less favourable* labour conditions so that their employer can remain in the bidding for orders from the government institution. A government institution could "time" the delivery of its requirements to advantage or disadvantage certain bidders depending on the date of expiry of their collective agreements or their non-unionized status. As such, the Tribunal is not convinced that the position argued by PWGSC in the present litigation concords with the true intention of section 6.6 of the ITT. Regardless, if this was PWGSC's intention, it was dissimulated in the latent ambiguities of that section, as discussed in the core of the text of these reasons, and therefore cannot be retained as a valid evaluation criterion.

51 Exhibit PR-2022-053-30 at 25

52 *Ibid.*

53 Exhibit PR-2022-053-30.A at 24–27.

54 Exhibit PR-2022-053-01 at 48.

[73] PWGSC applied latently ambiguous evaluation criteria to declare Chantier Davie and Wärtsilä's bid non-compliant. That evaluation was unreasonable and therefore constitutes a breach by PWGSC of its obligations under the CFTA. This ground of complaint is valid.

Other remarks

[74] The GIR raised various confidential arguments that the Tribunal need not address because of the outcome of this matter.[55]

[75] To the extent that any entirely new grounds of complaint were raised for the first time by Chantier Davie and Wärtsilä in its comments on the GIR, they are purposely not addressed in substance by the Tribunal because they are procedurally out of order. A new ground of complaint requires a new complaint; it cannot be added onto an ongoing complaint.[56]

REMEDY

[76] In considering an appropriate remedy, the Tribunal noted that the elimination of Chantier Davie and Wärtsilä because of a misapplied evaluation criterion constitutes a prejudice to Chantier Davie and Wärtsilä, to the procurement process and generally to the integrity of the competitive procurement system.

[77] As a remedy to PWGSC's improper evaluation and disqualification of the proposal made by Chantier Davie and Wärtsilä, PWGSC is to re-evaluate Chantier Davie and Wärtsilä's bid and other valid bids on the same footing.

[78] The Tribunal considered that there was no evidence of bad faith on behalf of PWGSC and notes that contract performance has only recently begun.

[79] The Tribunal leaves it to PWGSC to decide on the appropriateness of pursuing that work until the re-evaluation is completed and the original winner confirmed or infirmed and a new contract awarded.

[80] In the event that Chantier Davie and Wärtsilä were to prevail further to a re-evaluation of the bids, Chantier Davie and Wärtsilä should be compensated for any work that they would have done but for the execution of that work by Heddle under the contract that should not have been awarded to it. In that case, the Tribunal asks that parties negotiate a settlement and, if that fails, they can submit any claim for reasonable compensation to the Tribunal. The Tribunal retains jurisdiction to dispose of that matter, if necessary.

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55 Exhibit PR-2022-053-30.A at 19–21, 27–28.

56 *Enterasys* at paras. 76–82. Procedural fairness and natural justice considerations dictate that, as a general rule, a complainant should not be allowed to split its case by introducing additional evidence in support of its allegations that does not respond to the contents of the GIR when it files its comments on the GIR. In this regard, the Tribunal notes that, pursuant to the *Canadian International Trade Tribunal Rules*, the GIR is the only opportunity for the procuring entity to respond in detail to the allegations made in a complaint and to the complainant's evidence, if any.

DETERMINATION

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

[82] The ground of complaint concerning the adequacy of the debriefing is not valid.

[83] The grounds of complaint concerning the evaluation of the bid submitted by Heddle do not disclose a reasonable indication of a breach of the CFTA, because they were not presented with supporting evidence at the time of filing the complaint. Pursuant to subsection 30.13(5) of the CITT Act and section 10 of the Regulations, the Tribunal therefore ceases the inquiry and dismisses the complaint concerning these allegations or unsupported grounds of complaint.

[84] PWGSC failed to recognize that Chantier Davie and Wärtsilä met the requirements of section 6.6 of the solicitation. The ground of complaint concerning this issue is therefore valid.

[85] Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that PWGSC remedy the breach of the CFTA by re-evaluating the bids received in response to the solicitation.

[86] As the success in this matter is divided, each party will bear its own costs.

Eric Wildhaber

Eric Wildhaber
Presiding Member