Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File PR-2023-006

Chantier Davie Canada Inc. and
Wärtsilä Canada Inc.

v.

Department of Public Works and Government Services

Determination issued
Wednesday, September 6, 2023

Reasons issued
Friday, September 22, 2023

Corrigendum issued
Monday, August 19, 2024

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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 WÄRTSILÄ 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.

Pursuant to subsection 30.15(4) of the CITT Act, the Tribunal awards Chantier Davie Canada Inc. and Wärtsilä Canada Inc. (the complainants) their reasonable bid preparation costs, which costs are to be paid by the Department of Public Works and Government Services (PWGSC).

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that PWGSC compensate the complainants for their lost opportunity to profit but only if there were no responsive bids with an evaluated price equal to or lower than that of Heddle Marine Service Inc. If compensation for lost opportunity is payable, the Tribunal recommends that the amount of compensation be reduced by an amount equal to the complainants' reasonable bid preparation costs.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards the complainants their reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guidelines*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and its preliminary indication of the amount of the cost award is $4,700.

The Tribunal asks the parties to make best efforts to negotiate and report back to it on the outcome of discussions regarding bid preparation costs, the amount of compensation for lost opportunity and litigation costs within 60 days of the date of issuance of its reasons. The Tribunal encourages parties to share all relevant information with maximum transparency, at least among counsel who filed a confidentiality undertaking, but only after having considered public release of information to the greatest extent possible. Should the parties be unable to agree on these issues, the Tribunal will advise as to next steps. The Tribunal reserves jurisdiction to establish the final amounts for bid preparation costs, compensation for lost opportunity and litigation costs.

Eric Wildhaber

Eric Wildhaber
Presiding Member

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

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 WÄRTSILÄ CANADA INC.	**Complainants**

AND

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

CORRIGENDUM

The last sentence of paragraph 42 should read as follows:

Heddle provided the requisite certifications in the form of letters with the supplier's letterhead, as required by M19(d).

The first sentence of paragraph 43 should read as follows:

The Tribunal does not read mandatory requirement M19(d) as argued by Chantier Davie and Wärtsilä.

The information previously designated as confidential in paragraph 60 and footnote 62 has been made public.

Tribunal Panel:	Eric Wildhaber, Presiding Member
Tribunal Secretariat Staff:	Yannick Trudel, Counsel Rigers Alliu, Counsel Badih Abboud, Registrar Officer Morgan Oda, Senior Registrar Officer
Complainants:	Chantier Davie Canada Inc. and Wärtsilä Canada Inc.
Counsel for the Complainants:	Marcia Mills Nabila Abdul Malik Gabrielle Cyr Novera Khan Peter N. Mantas Christopher Little Alexandra Logvin Julien Frigon Alexander Valverde
Government Institution:	Department of Fisheries and Oceans
Counsel for the Government Institution:	Valerie Arseneault Samantha Gervais Julie Dufour Aaron King Don Karl Roberto Andrew Gibbs Calina Ritchie
Intervener:	Heddle Marine Service Inc.
Counsel for the Intervener:	Marc McLaren-Caux Gerry Stobo Alexander Hobbs Jan Nitoslawski Eric Machum Seamus Ryder Luke Hunter Nathan Stanley

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STATEMENT OF REASONS

THE COMPLAINT PROCEEDINGS

[1] This matter concerns a complaint filed by Chantier Davie Canada Inc. (Chantier Davie) and Wärtsilä Canada Inc. (Wärtsilä) on April 24, 2023, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (CITT Act). On April 27, 2023, the Canadian International Trade Tribunal accepted the complaint for inquiry in accordance with subsection 30.13(1) of the CITT Act on the basis that it met the requirements of sections 6 and 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[2] (Regulations). The only trade agreement applicable to the solicitation is the Canadian Free Trade Agreement[3] (CFTA).

[2] This is the third complaint by Chantier Davie and Wärtsilä concerning the manner in which the Department of Public Works and Government Services (PWGSC) evaluated the bids that it received following an invitation to tender (ITT) (solicitation F7049-200041/B) for the completion of certain work, including the replacement of the propulsion system (engines and other propulsion machinery equipment), required by the Department of Fisheries and Oceans on the Canadian Coast Guard Ship (CCGS) *Terry Fox*. PWGSC awarded the contract to Heddle Marine Service Inc. (Heddle).

[3] The first complaint (PR-2022-053) was dealt with in *Chantier Davie Canada Inc. and Wärtsilä Canada Inc. v. Department of Public Works and Government Services*:[4] the Tribunal found that Chantier Davie and Wärtsilä's bid was improperly disqualified and, as a remedy, recommended that PWGSC re-evaluate the bids received in response to the solicitation.

[4] The second complaint (PR-2022-076) was filed shortly after the re-evaluation and was dealt with in *Chantier Davie Canada Inc. and Wärtsilä Canada Inc. v. Department of Public Works and Government Services*:[5] the Tribunal found that the complaint was premature, as a denial of relief from PWGSC had not yet been received. After having received a denial of relief, Chantier Davie and Wärtsilä filed the present complaint with the Tribunal.

[5] When the complaint was filed on April 24, 2023, Chantier Davie and Wärtsilä requested that the Tribunal decide this matter under the 45-day abbreviated calendar for procurement complaints, which paragraph 12(b) of the Regulations and rule 107 of the *Canadian International Trade Tribunal Rules*[6] (CITT Rules) refer to as the "express option".[7] When the Tribunal accepted the complaint for inquiry on April 27, 2023, it sought PWGSC's views on the request. On May 3, 2023, PWGSC

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1 R.S.C., 1985, c. 47 (4th Supp.).
2 SOR/93-602.
3 CFTA, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2023/08/CFTA-Consolidated-Version-August-17-2023.pdf> (entered into force July 1, 2017). See, in that regard, Exhibit PR-2023-006-01 at 219.
4 (1 February 2023), PR-2022-053 (CITT) [*Chantier Davie I*].
5 (21 March 2023), PR-2022-076 (CITT) [*Chantier Davie II*].
6 SOR/91-499. Subrule 107(2) of the CITT Rules provides that "[t]he Tribunal may apply the express option in the case of any complaint that is suitable for resolution within 45 days."
7 Exhibit PR-2023-006-01 at paras. 18, 120–125.

provided views opposing the use of the express option.[8] On May 5, 2023, the Tribunal decided that this matter was not suited for the express option and instead decided to follow the 90-day calendar for procurement proceedings.[9]

[6] At the time of communicating its decision, the Tribunal indicated that it would give reasons in its decision on the merits of the complaint. Those reasons are as follows: it was clear to the Tribunal that the complaint was not suitable for resolution within 45 days because of the complexity of the matter, the size of the record and the likely addition of an intervener. Indeed, after having refused to apply the express option, Heddle was added as an intervener on May 11, 2023.[10] Also, the proceeding subsequently became more complex by reason of the filing of a motion and the need for an oral hearing on that motion—those events confirmed that the express option was inappropriate for this matter. Ultimately, even the 90-day calendar for procurement proceedings would prove to be insufficient.

[7] On May 19, 2023, PWGSC filed a motion requesting that the Tribunal dismiss the complaint for lack of jurisdiction.[11] On May 30, 2023, Heddle filed comments supporting the motion.[12] On June 9, 2023, Chantier Davie and Wärtsilä filed comments opposing the motion.[13] On June 14, 2023, PWGSC submitted a reply to the comments that were made on the motion.[14]

[8] Further to requests of the parties over the course of this proceeding, certain documents from inquiry PR-2022-053 were copied into the present file.[15]

[9] On June 20, 2023, the Tribunal advised the parties that the deadlines for the filing of the Government Institution Report (GIR) and Heddle's comments on the complaint and the GIR were suspended pending the Tribunal's ruling on the motion. They were further advised that the deadline for the issuance of the Tribunal's determination in respect of the complaint would be extended to 135 days from the filing of the complaint (i.e., by no later than September 6, 2023), pursuant to paragraph 12(c) of the Regulations.[16]

[10] On June 22, 2023, the Tribunal advised the parties that it would hold an oral hearing on the motion and proposed certain dates to the parties.[17] On June 27, 2023, by videoconference, the Tribunal held an oral hearing on the motion where it heard representations from the parties and posed

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8 Exhibit PR-2023-006-07. The Tribunal notes, however, that at the time of making its representations on the appropriateness of the express option, PWGSC did not mention that, as of March 2, 2023, it had lifted the stop work order it had previously decided to issue to Heddle regarding the execution of the work under the designated contract. PWGSC mentioned this fact only subsequently in the GIR; see Exhibit PR-2023-006-40 at para. 98.

9 Exhibit PR-2023-006-10. In assessing a request to apply the express option, the Tribunal must determine whether the complaint is suitable for the express option, taking all relevant factors into account. These include the reasons for the request, the complexity of the case, the timeliness of the request, possible prejudice to other parties and whether a shortened timetable will compromise the Tribunal's ability to fully and fairly assess the submissions of the parties. See *PricewaterhouseCoopers LLP v. Immigration and Refugee Board of Canada* (16 October 2020), PR-2020-035 (CITT) at para. 15.

10 Exhibit PR-2023-006-13.

11 Exhibit PR-2023-006-17.B; Exhibit PR-2023-006-17.A (protected); Exhibit PR-2023-006-17.B (protected).

12 Exhibit PR-2023-006-24.

13 Exhibit PR-2023-006-25; Exhibit PR-2023-006-25.A (protected);

14 Exhibit PR-2023-006-26.

15 Exhibit PR-2023-006-04; Exhibit PR-2023-006-05; Exhibit PR-2023-006-33.

16 Exhibit PR-2023-006-28.

17 Exhibit PR-2023-006-29.

various questions.[18] On June 30, 2023, the Tribunal decided to grant the motion in part; nevertheless, the primary issues remained under inquiry.[19] In communicating its decision, the Tribunal provided summary reasons along with procedural directions for the pursuit of the inquiry.[20] An edited version of those reasons is included in the appendix to these reasons.

[11] The Tribunal accommodated the parties' requests for additional time to file their remaining submissions[21] such that PWGSC submitted a GIR on July 14, 2023;[22] Heddle filed comments on the complaint and the GIR on July 21, 2023;[23] and Chantier Davie and Wärtsilä filed comments in reply to both the GIR and Heddle's comments on August 2, 2023.[24] The Tribunal accepted that PWGSC file certain remarks on August 10, 2023—a sur-reply of sorts—because it pointed Chantier Davie and Wärtsilä to two important facts on the record that they may have forgotten or not previously noted.[25]

[12] The parties designated as confidential a considerable amount of information in this proceeding. The Tribunal had no basis to interfere with the designations made by the parties in this proceeding either under the CITT Act or the Rules. The Tribunal made all efforts to keep confidential portions of these reasons to a minimum.

[13] The Tribunal usually decides procurement matters based on the written information on record. The parties, represented by counsel, had the opportunity to file evidence and submissions during this proceeding. Given that no oral hearing on the merits of the complaint was requested, and that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and ruled on the complaint based on the written information on the record.

THE REQUEST TO RECONSIDER THE DECISION ON THE MOTION IS DENIED

[14] In its comments on the complaint and the GIR, Heddle invited the Tribunal to reconsider the decision it made on PWGSC's motion. Heddle expressed the view that the Tribunal had erred in its findings because of a misconception that there had been *two contract awards* in respect of the solicitation and that the complaint was not timely.[26] Although it did not explicitly ask the Tribunal to reconsider its decision on the motion, PWGSC also called into question the Tribunal's decision on the motion by raising various arguments in the GIR.[27]

[15] The invitation, which the Tribunal plainly views as a request to reconsider the Tribunal's decision on the motion, is denied. In the paragraphs that follow, the Tribunal addresses the reasons why it maintains its decision on the motion.

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18 The hearing was held pursuant to rule 105 of the CITT Rules in order to hear the parties on PWGSC's motion; See *Transcript of Public Hearing* and *Transcript of In Camera Hearing*.

19 Exhibit PR-2023-006-37.

20 In its decision, the Tribunal reserved the right to address the reasons in greater detail or to provide an edited version for inclusion in the statement of reasons at the conclusion of the inquiry on the merits.

21 Exhibit PR-2023-006-37; Exhibit PR-2023-006-39; Exhibit PR-2023-006-45.

22 Exhibit PR-2023-006-40; Exhibit PR-2023-006-40.A (protected); Exhibit PR-2023-006-40.B (protected).

23 Exhibit PR-2023-006-42; Exhibit PR-2023-006-42.A (protected); Exhibit PR-2023-006-42.B (protected).

24 Exhibit PR-2023-006-46; Exhibit PR-2023-006-46.A (protected).

25 Exhibit PR-2023-006-47; Exhibit PR-2023-006-47.A (protected).

26 Exhibit PR-2023-006-42, *inter alia*, at paras. 3–4, 7–11.

27 Exhibit PR-2023-006-40, *inter alia*, at paras. 42–47, 54–62.

[16] Contrary to what is asserted by Heddle, the Tribunal's summary reasons on the motion did *not* state that there had been two contract *awards*, but rather that PWGSC had made two procurement or contract *award decisions*. It is true that, for the purposes of its contractual relations with Heddle, PWGSC made only one contract award. However, for the purposes of the procurement process that unfolded in this matter, the Tribunal finds that PWGSC did in fact make two *contract award decisions*. Each of those contract award decisions is subject to an objection or a complaint by a potential supplier and scrutiny by the Tribunal.[28] As the Tribunal stated in its summary reasons on the motion, the first contract award decision was the subject of *Chantier Davie I*. The second contract award decision confirmed the outcome of the first contract award decision—that the contract would be maintained with Heddle. A first attempt to challenge the second contract award decision was found to be premature in *Chantier Davie II*, because Chantier Davie and Wärtsilä had made an objection to PWGSC but had not yet received a denial of relief at the time of filing that complaint. The present complaint also concerns the second contract award decision and was properly filed, within the time limits prescribed by section 6 of the Regulations,[29] after Chantier Davie and Wärtsilä received a denial of relief from PWGSC.

[17] To be clear, the *first contract award decision* was made by PWGSC at the time of the initial evaluation of the bids that it received in response to the solicitation. Based on the first contract award decision, PWGSC awarded the contract to Heddle. That was indeed the only *contract award* made in this matter. However, the procurement process was re-engaged after the Tribunal's finding in *Chantier Davie I*: when it implemented the Tribunal's recommendation in *Chantier Davie I*, PWGSC had to again turn its mind to evaluating the bids, to decide whether to maintain the contract with Heddle, to award it to another compliant bidder or to terminate the contract and retender the requirement. The Tribunal in *Chantier Davie I* envisaged those outcomes.[30] Ultimately, PWGSC decided to maintain the contract with Heddle and to lift the stop work order that it imposed on Heddle when the complaint in PR-2022-053 was accepted for inquiry. It remains that the decision to

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28 According to subsection 30.11(1) of the CITT Act, the Tribunal's jurisdiction concerns "*any* aspect of the procurement process that relates to a designated contract …" [emphasis added]. It was not contested that Chantier Davie and Wärtsilä's complaint relates to a designated contract within the meaning prescribed by the CITT Act and the Regulations.

29 Subsection 6(1) of the Regulations provides that a potential supplier may file a complaint with the Tribunal if it does so "not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to [it]". Pursuant to subsection 6(2) of the Regulations, a potential supplier may also file a complaint following an objection made to the relevant government institution when relief is denied by that government institution. In that case, the complaint with the Tribunal must be filed "… within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

30 See, *inter alia*, *Chantier Davie I* at paras. 77, 79–80. At para. 77, the Tribunal indicated that, "[a]s 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*." [emphasis added] The Tribunal further indicated, at para. 79, as follows: "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*" [emphasis added]. Moreover, at para. 80, the Tribunal stated the following: "*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" [emphasis added].

maintain the award to Heddle was an event that took place during the procurement process, and it is that decision that constitutes the *second contract award decision* that the Tribunal referred to in its summary reasons on the motion. It is the *second contract award decision* that is the subject of the present complaint.

[18] Tied to this issue are other arguments made by Heddle[31] and PWGSC,[32] implying that the re-evaluation conducted by PWGSC further to the Tribunal's recommendation in *Chantier Davie I* was limited to the issue of bidders' compliance with section 6.6 of the ITT and that, as a result, PWGSC did not have to take a second look at whether Heddle's bid complied with the other mandatory requirements that are of concern. That argument is beside the point because, irrespective of the scope of the re-evaluation conducted by PWGSC when it implemented the Tribunal's recommendation in *Chantier Davie I*, PWGSC still had to ensure that it had awarded the contract to a responsive bidder when it made its second contract award decision. That is the case *even if* the second contract award decision was to simply maintain the first procurement award decision awarding the contract to Heddle. Indeed, procuring entities have an obligation, under trade agreements, and in this case the CFTA, to solely consider, for a contract award, bids that are compliant with the terms of the tender documents.[33] In the Tribunal's view, that obligation applies to all contract award decisions, and even more so when a procuring entity has been made aware of information that casts serious concerns as to the compliance of a bid with respect to mandatory requirements set out in the tender documents. The terms of the ITT also provide that bids that do not comply with all the mandatory requirements or evaluation criteria will be declared non-responsive and receive no further consideration.[34]

[19] In its summary reasons on the motion, the Tribunal found that the complaint did not concern an issue of enforcement of the Tribunal's recommendation in *Chantier Davie I*. This is so because the complaint in the present matter is in fact a new procurement review challenge in its own right, this time pertaining to the second contract award decision.

[20] In *Chantier Davie I*, Chantier Davie and Wärtsilä raised grounds of complaint concerning Heddle's non-compliance with mandatory requirements M19(d) and M19(h) of the ITT. Those grounds of complaint pertained to the first contract award decision. The Tribunal ceased to inquire into, and dismissed, those grounds of complaint pursuant to subsection 30.13(5) of the CITT Act and section 10 of the Regulations for procedural reasons: they were out of order. Precisely, the Tribunal found that these grounds of complaint rested on allegations that 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*. Indeed, it was only after PWGSC filed the GIR that Chantier Davie and Wärtsilä provided information supported by evidence regarding Heddle's possible non-compliance with the mandatory requirements of the ITT, which was improper for reasons related to procedural

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31 Exhibit PR-2023-006-42, *inter alia*, at paras. 7, 10, 30, 33.

32 Exhibit PR-2023-006-40, *inter alia*, at paras. 42–47, 54–62, 69; Exhibit PR-2023-006-40.A (protected), *inter alia*, at paras. 42–47, 54–62, 69.

33 Article 515(4) of the CFTA provides as follows: "To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation." See also Article 515(5) of the CFTA, which provides as follows: "Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation …".

34 See, *inter alia*, sections 4.1.1.4 and 4.2 of the ITT, in Exhibit PR-2023-006-01 at 230, 233.

fairness.[35] The information in question was made available by Chantier Davie and Wärtsilä to PWGSC by way of an affidavit by I. Brouwer at the time of responding to the GIR.[36]

[21] Ultimately, in *Chantier Davie I*, the Tribunal found, in the context of the first contract award decision, that there had been an improper evaluation of section 6.6 of the ITT in violation of the CFTA. From that point, the procurement process was re-engaged, and the Tribunal expressly envisaged that the re-evaluation would provide PSWSC with the opportunity to re-examine "any information of interest that came to its attention during [the proceeding in PR-2022-053] and to take appropriate action, if necessary."[37]

[22] As stated in its summary reasons on the motion, PWGSC was free to conduct the re-evaluation as it saw fit. PWGSC was under no obligation to consider or be persuaded by the information contained in the I. Brouwer affidavit, or any other information that came to its attention during the proceeding in PR-2022-053, for purposes of implementing the Tribunal's recommendation in *Chantier Davie I* (again, as such, this is not a matter of enforcement of *Chantier Davie I*). If PWGSC chose to ignore that information at the time of the re-evaluation which led to the second contract award decision, which it seemingly did, PWGSC did so at its own risk. That risk was not in respect of improperly implementing the Tribunal's recommendation in *Chantier Davie I*, but rather of being in violation of its trade agreement obligation to award the contract (or to maintain the award of that contract) to a compliant bidder when coming to the second contract award decision.

[23] As stated above, when PWGSC began re-evaluating the bids, it re-engaged the procurement process.[38] That re-evaluation took place on or around March 2, 2023. For the purposes of coming to its second contract award decision, PWGSC necessarily had to satisfy itself that Heddle's bid was responsive (or still responsive) because, as discussed above, a contract can only be awarded to a bidder with a responsive bid (or maintained). Put differently, when re-evaluating the bids, PWGSC had a duty to reconsider its prior evaluation conclusion when forming the view upon which it was to base the second contract award decision. If PWGSC thought that its evaluators had information that would allow the evaluation to withstand the scrutiny of the assessment offered in the I. Brouwer affidavit, then PWGSC would have been justified in making the second contract award decision. Importantly, if PWGSC had such information in hand, it did not provide it to the Tribunal in these proceedings.

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35 See *Chantier Davie I* at paras. 24–25, 32, 50–58, 83.

36 The GIR in *Chantier Davie I* had been received and filed with the Tribunal on December 23, 2022, in Exhibit PR-2023-006-06 and Exhibit PR-2023-006-06.A (protected); Chantier Davie and Wärtsilä's comments on the GIR and Heddle's submissions in *Chantier Davie I* had been received and filed with the Tribunal on January 23, 2023, in Exhibit PR-2023-006-35 (protected).

37 *Chantier Davie I* at para. 48.

38 The Tribunal has recognized that it has jurisdiction to hear complaints where a procurement process was "re-engaged" following a contract award in instances where a contract was terminated and the requirement retendered, given that it concerned an aspect of the procurement process. See, for example, *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-046 (CITT) at paras. 37–39; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at paras. 17–37, upheld by the Federal Court of Appeal in *Canada (Attorney General) v. Valcom Consulting Group Inc.*, 2019 FCA 1. While the factual context in the cases cited above may differ from the particular circumstances of this matter, in the Tribunal's view, the same principle ought to be applied.

[24] PWGSC cannot claim, nor can Heddle for that matter, as it was attempted in their pleadings, that the Tribunal's finding in *Chantier Davie I*—regarding grounds of complaint pertaining to the first contract award decision that were procedurally out of order in that matter—can immunize PWGSC from failing to reconsider an improper evaluation conclusion when forming the view upon which it was to base the second contract award decision. There is no basis for that claim. To adopt another view would allow PWGSC to subtract itself by its own will from the disciplines of the trade agreements. The Tribunal sees no basis in law to accept that approach.

[25] Moreover, the issue of the timeliness of the present complaint was examined in the Tribunal's summary reasons on the motion. Here too, Heddle and PWGSC's arguments in respect of timeliness as a basis for the Tribunal to reconsider its decision on the motion miss the point. There were timeframes to file a timely complaint against the first contract award decision. There were new ones in respect of the second contract award decision. The Tribunal's summary reasons for the motion recap the events that demonstrate how the grounds of complaint made in this matter were timely. In sum, because of the procurement process being re-engaged, the grounds of complaint in this matter became known to Chantier Davie and Wärtsilä only after the second contract award decision.[39]

[26] Finally, it is clear in the Tribunal's view that, fundamentally, PWGSC's and Heddle's positions in this matter are beside the point of an entirely separate issue that underlies the very basic matter in issue in this case: that issue is whether PWGSC can justify its decision to maintain a contract with Heddle for the CCGS *Terry Fox* at the time the procurement process was re-engaged, when there is evidence of a mandatory requirement not being met. The efforts made by PWGSC and Heddle in these proceedings to defend their positions centred on unconvincing legalities. They provided few, if any, facts in support of their position. As examined below, the Tribunal concluded that the evidence shows that the second contract award decision was indefensible.

CLAIMS AGAINST PWGSC

[27] Chantier Davie and Wärtsilä claimed that PWGSC improperly maintained a contract award to Heddle following the re-evaluation that was conducted further to the Tribunal's recommendation made at the conclusion of its inquiry in *Chantier Davie I*. Chantier Davie and Wärtsilä base that claim on the two grounds that follow:

[39] The Tribunal also is not persuaded by PWGSC's argument raised in the GIR with respect to the timeliness of the ground of complaint concerning the purportedly undisclosed criterion, i.e., [ ], given that the procurement process was re-engaged. However, in any event, as discussed below, that ground of complaint ultimately is moot.

- Ground 1: the engines bid by Heddle do not meet mandatory requirement M19(h) of the ITT.[40]

- Ground 2: Heddle's bid is non-compliant with mandatory requirement M19(d) of the ITT concerning maintenance facilities.[41]

[28] Chantier Davie and Wärtsilä made other claims relating to PWGSC's conduct. They claimed that PWGSC applied an undisclosed evaluation criterion[42] and that PWGSC did not respect its debriefing obligations.[43] The Tribunal did not consider those two claims because its finding on Ground 1 was sufficient to dispose of the complaint. Ground 2 was addressed only because of the claim made by Chantier Davie and Wärtsilä to the effect that *only they* had the requisite maintenance facilities in place at the time of bid closing, an issue that will be relevant for the purposes of the parties' negotiations regarding the quantum of the compensation. A ground of complaint made by Chantier Davie and Wärtsilä pertaining to a purported issue of contract splitting was summarily dismissed when the Tribunal ruled on PWGSC's motion to dismiss.[44]

[29] The Tribunal also addresses the issue of transparency in the context of debriefing obligations under the section entitled "Remarks" below.

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40 Mandatory requirement M19(h) of the ITT, as amended, provides that "[t]he Bidder must demonstrate that *the proposed PM equipment* (for M19h, only, *engines* and gearboxes) be of proven performance in comparable vessel services (ice breaking, off-shore service vessel, dredges or ferry applications), of comparable vessel arrangement (4 engine, 2-shaft direct drive with CPP, controllable pitch propeller arrangement) and comparable total power (a minimum of 15.5 MW)" [emphasis added]. M19(h) of the ITT further provides that "[t]he Bidder must include five *installation references wherein, the proposed PM* (for M19h, *engines* and gearboxes; note that each component must have 5 references in total, hence there could be up to a total of 10 references required to be submitted) *has been applied*; each reference *must demonstrate* the installation to be of comparable: 1) service (an ice breaking vessel, off-shore service vessel, dredges, or ferry service vessel); 2) arrangement (an arrangement of 4 engines, 2-shaft direct drive with controllable pitch propeller, CPP); and 3) total power (a minimum of 15.5 MW)" [emphasis added]. See Exhibit PR-2023-006-01 at 361, 490, 1711.

41 Mandatory requirement M19(d) of the ITT, as amended, provides that "[t]he Bidder must demonstrate that the proposed PME manufacturer (or manufacturers) is (are) capable of providing after service support specific to the make and model of the proposed PME components." M19(d) of the ITT further provides that "[t]he Bidder must provide evidence from each different component PME Manufacturer, *in the form of a letter with the supplier's letterhead, that it can provide* the following support: 1. Provide 24 hours/7 days phone technical support for the PME in English; 2. Provide workshop services for overhaul, calibration and testing of components within Eastern Canada (NS, NB, PE, NL); 3. Provide technicians' presence within 24 hours of Newfoundland and their workshop, to assist with repairs, maintenance and training; 4. Provide supplier parts' storage for one set of International Association of Classification Societies (IACS) spare parts and frequently used items, such as fuel and lube oil filters, fuel injector nozzles, and seal kits; 5. Provide all other major overhaul parts, not stored, within 90 calendar days of order (provide a list of major overhaul parts accounted for in Table 3 of Annex H, appendix 1: Total Life Cycle Cost) ; and 6. Provide logistical support chains (sales office) within Canada" [emphasis added]. See Exhibit PR-2023-006-01 at 359–360, 1709, 2307.

42 That issue was designated as confidential by the parties; see, *inter alia*, Exhibit PR-2023-006-01.A (protected) at paras. 79–91, 110, 113.

43 See Exhibit PR-2023-006-01, *inter alia*, at paras. 9–13, 35–39, 40, 47–48; Exhibit PR-2023-006-01.A (protected), *inter alia*, at paras. 9–13, 35–39, 40, 47–48.

44 See the Tribunal's decision on the motion with summary reasons reproduced in the appendix to these reasons or Exhibit PR-2023-006-37.

[30] As examined in the previous section of these reasons, the Tribunal did not agree with the way PWGSC and Heddle framed the issues germane to this matter. The same is so in respect of two issues argued by Chantier Davie and Wärtsilä. Indeed, Chantier Davie and Wärtsilä, argued, in brief, that PWGSC had an obligation arising from the Tribunal's determination in *Chantier Davie I* to do a "complete re-evaluation of the bids" including in respect of M19(d) and M19(h) and not just in relation to the requirement at section 6.6 of the ITT (the first issue).[45] Chantier Davie and Wärtsilä also argued that PWGSC had a positive obligation to "correct an error" regardless of how or when it became aware of it (the second issue).[46]

[31] Chantier Davie and Wärtsilä's description of the first issue requires restating: there was no obligation to undertake a "complete re-evaluation of the bids" arising from the Tribunal's determination in *Chantier Davie I*; the Tribunal's recommendation in that matter left the scope of the re-evaluation up to PWGSC (again, the present complaint does not relate to the enforcement of the Tribunal's recommendation in *Chantier Davie I*). Nevertheless, properly framed, there is a legitimate issue for inquiry as follows: PWGSC had an obligation to ensure that it was considering only compliant or responsive bids at the time of reaching the second contract award decision. The question therefore remains of whether PWGSC met that obligation.

[32] Likewise, the second issue requires restatement for a proper analysis to be undertaken. The issue for PWGSC was not so much that it had a positive obligation *per se* to "correct an error" at any point in time. Rather, PWGSC had the obligation to ensure that it was properly applying the ITT's evaluation criteria when it identified the responsive bids that could be in the running for consideration by PWGSC at the time of the second contract award decision. The question therefore remains of whether PWGSC properly applied itself in that regard.

[33] It is in limited circumstances only that the Tribunal interferes with evaluations. A circumstance that warrants intervention by the Tribunal is when the evaluators have not applied themselves in evaluating a proposal or have ignored vital information.[47] This case is one of those circumstances.[48]

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45 Exhibit PR-2023-006-01, *inter alia*, at paras. 13, 50.

46 Exhibit PR-2023-006-01, *inter alia*, at para. 55.

47 See, for example, *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.

48 See articles 500 and 502 of the CFTA. Additionally, the Tribunal recalls the observations made by the Federal Court of Appeal in *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at paras. 22–23, regarding the Tribunal's role within the federal procurement regime. There are four purposes underlying the regulatory regime regarding federal government procurement, which consist of the following: fairness to competitors in the procurement system, ensuring competition among bidders, efficiency and integrity. The Federal Court of Appeal further indicated that these purposes, along with "the overarching concept of value for taxpayers, are essential aspects of good governance [and that] they must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies."

GROUND 1 – PWGSC CHOSE NON-COMPLIANT ENGINES

[34] Procuring entities must ensure that proposals are properly assessed against the mandatory requirements of the solicitation. Indeed, bid compliance with mandatory requirements is assessed thoroughly and strictly.[49]

[35] With respect to Ground 1, I. Brouwer, in the affidavit provided by Chantier Davie and Wärtsilä, extensively sets out the reasons why Heddle *could not* meet the requirements of the ITT with respect to the proposed propulsion machinery, namely the engines. PWGSC was sparse in its arguments[50] and chose *not* to counter the facts set out in that affidavit.[51] The Tribunal finds that the facts contained in that affidavit forensically and convincingly demonstrate in exacting detail that Heddle *could not* comply with mandatory requirement M19(h) of the ITT.

[36] I. Brouwer works for Wärtsilä, but there was nothing on the record to cause the Tribunal to doubt his testimony, which is reflective of an in-depth knowledge of his industry gained through considerable professional experience. I. Brouwer explained the ITT's technical requirements, the specifications of the engines bid by Chantier Davie and Wärtsilä, and those of their competitors, in simple terms. He demonstrates in a logical sequence of unopposed facts how Heddle would have been unable to bid an engine that meets mandatory requirement M19(h) of the ITT. In the affidavit, I. Brouwer provided PWGSC with essential information that it seemingly chose to ignore at the time of coming to its second contract award decision.

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49 *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

50 The sole arguments raised and relied upon by PWGSC in this proceeding regarding the compliance with M19(h), if any, as well as M19(d), are those set out in paragraphs 69 to 75 of the GIR (Exhibit PR-2023-006-40).

51 In its bid, Heddle offered to provide the Bergen engine model [ ]. However, Heddle did not provide installation references for the engine model [ ] to demonstrate the proven performance mandatory requirements of its proposed propulsion machinery set out in M19(h), i.e., the five (5) installation references where the proposed propulsion machinery, for both the engines and the gearboxes, had been applied in installations that are of comparable vessel service, arrangement and total power. It was only further to a clarification request from PWGSC that Heddle provided the said installation references; see Exhibit PR-2023-006-06.A (protected) at 106, 123–125. In particular, PWGSC's clarification request was formulated as follows: "[

]" [emphasis added].

However, a near majority of the installation references that were subsequently provided by Heddle were referring to a previous engine model [ ]; see Exhibit PR-2023-006-06.A (protected) at 125. The only evidence on the record providing additional information from PWGSC in respect of the engine compliance issue consists of an affidavit by the Technical Authority for the solicitation, available in Exhibit PR-2023-006-06.A (protected) at 127–130, and more particularly at paras. 15–17, having been filed by PWGSC as part of the GIR during the course of *Chantier Davie I*. Through that affidavit, the Technical Authority claimed that the "changes to the most recent Bergen model [ ], as compared to the previous model [ ], included enhancements that, based on [his] experience and understanding of engines, all manufacturers make to an engine model over time." The claim purports to rest on the evaluator's years of experience and "research" that the affiant would have conducted. The "research" referred to is not referenced. No other details are given. The I. Brouwer affidavit is a complete and convincing response, in plain language, that dismantles the claims made in the Technical Authority's affidavit. PWGSC never provided evidence to counter those claims even though it had an opportunity to do so when filing the GIR in this proceeding.

[37] At paragraphs 12 to 23 of its comments on the complaint and the GIR, Heddle makes allegations in support of the compliance of the engines that it bid.[52] However, on one hand, those allegations were not supported by affidavit evidence, other than by adopting the views of PWGSC's witness; on the other, the Technical Authority's views were contradicted point by point by I. Brouwer. As such, the best evidence on file in respect of the issues addressed by Heddle is the testimony provided by I. Brouwer.[53]

[38] The I. Brouwer affidavit shows that PWGSC ignored vital information contained in Heddle's bid, or that PWGSC did not properly understand Heddle's bid or apply itself in assessing the bid, such that PWGSC found Heddle's bid to be compliant, whereas it ought to have been declared unresponsive because Heddle *did not* comply with mandatory requirement M19(h) of the ITT. PWGSC improperly decided to maintain the contract with Heddle following its re-evaluation, despite compelling evidence demonstrating that Heddle's bid was non-compliant.

[39] That conclusion means that PWGSC has effectively sole-sourced from Heddle the work on the CCGS *Terry Fox*. Therefore, PWGSC violated the CFTA, because it chose to maintain an award to Heddle, a non-compliant bidder. On this basis, the complaint is valid.

[40] There is nothing reasonable in accepting a non-compliant bid for contract award or deciding to maintain such an award in the face of information demonstrating non-compliance. No deference is owed in a situation where a sole-source procurement took place under the guise of a competitive procurement. As such, this is an instance, provided for in the case law, where it is appropriate and, in fact, necessary that the Tribunal intervene and substitute its judgment for that of the improper evaluation conducted by the government institution.

GROUND 2 – THE MAINTENANCE CERTIFICATIONS WERE COMPLIANT

[41] For Ground 2, Chantier Davie and Wärtsilä relied on a reading of mandatory requirement M19(d) of the ITT whereby bidders would have had to demonstrate that they possessed certain maintenance facilities at the time of bid closing.

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52 Heddle also called into question Chantier Davie and Wärtsilä's bid compliance without adducing any evidence or technical evidence in support of its allegations. As stated in subsection 30.14(1) of the CITT Act, when conducting an inquiry, the Tribunal shall limit its considerations to the subject matter of the complaint. The Tribunal is not inquiring into the adequacy of Chantier Davie and Wärtsilä's bid. Chantier Davie and Wärtsilä's grounds of complaint were limited to the compliance of Heddle's bid. As a result, Heddle's allegations fall outside the scope of the complaint and will therefore not be addressed by the Tribunal.

53 See, *inter alia*, Exhibit PR-2023-006-01 at 161–167, at paras. 69–86, as well as the exhibits attached to the affidavit and referred thereto. In essence, the Tribunal accepts from I. Brouwer's uncontested testimony that Heddle's installation references to previous engine model [ ] were improper and could not have been relied on to demonstrate the proven performance *of its proposed propulsion machinery*, in accordance with the specifications set out in mandatory requirement M19(h), the model being materially distinct in every aspect from the proposed model [ ]. As a result, the Tribunal finds that Heddle did not provide the five installation references that were required to demonstrate the proven performance of its proposed engines. In fact, Heddle's bid did not provide any installation references of its proposed engine model [ ] (see Exhibit PR-2023-006-06.A [protected] at 106, 123–125), which the Tribunal finds is consistent with the testimony of I. Brouwer that none could be found or provided.

[42] The Tribunal does not read the ITT as being prescriptive in the manner envisaged by Chantier Davie and Wärtsilä. Rather, the Tribunal agrees with PWGSC and Heddle's submissions on this issue. The ITT requested certifications that bidders agree to provide support maintenance services as set out in the ITT. Heddle provided the requisite certifications in the form of letters with the supplier's letterhead, as required by M19(h).[54]

[43] The Tribunal does not read mandatory requirement M19(h) as argued by Chantier Davie and Wärtsilä. Contrary to Chantier Davie and Wärtsilä's allegations on this ground, the Tribunal finds that the ITT did not require bidders to have maintenance facilities in place at the time of bid closing but only that they be able to deliver on the services post-contract award. Therefore, PWGSC's evaluation of this aspect of Heddle's bid was reasonable.

[44] In light of the foregoing, the Tribunal finds that this ground of complaint is therefore not valid.

REMEDY

[45] In accordance with subsection 30.15(2) of the CITT Act, where the Tribunal determines that a complaint is valid, as is the case here, the Tribunal can recommend such remedy as it considers appropriate including any one or more of the following:

(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.

[46] In accordance with subsection 30.15(3) of the CITT Act, when deciding what remedies to recommend, the Tribunal is to consider all the circumstances relevant to the procurement, including the following:

(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.

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54 Exhibit PR-2023-006-06.A (protected) at 113–121.

[47] The Tribunal finds, in turn, for each of those paragraphs of subsection 30.15(3) of the CITT Act, that this matter: (a) raised a very serious deficiency in the procurement process; (b) revealed a high degree of prejudice to the complainants and perhaps others; and (c) caused a high degree of prejudice to the integrity of the competitive procurement system. Regarding (d), there was no indication of bad faith.

[48] Because of the conclusion on Ground 1, the situation is such that PWGSC has effectively sole-sourced from Heddle the work on the CCGS *Terry Fox* under the guise of a competitive process in contravention of the CFTA. This compromised the integrity of the competitive procurement system. The Tribunal considers this situation to be unfortunate because it puts that system into disrepute.

[49] Under subsection 30.15(4) of the CITT Act, the Tribunal can award a complainant its reasonable costs incurred in preparing a response to the solicitation, also known as bid preparation costs.

[50] At the very least, Chantier Davie and Wärtsilä are owed their reasonable bid preparation costs incurred because they likely would not have submitted a bid in response to the ITT had they known that PWGSC would award the contract to a non-compliant bidder and ultimately maintain that award in the face of clear evidence demonstrating that bidder's non-compliance. PWGSC did not follow the rules and, when it had the opportunity to properly apply the ITT's evaluation criteria after it was handed information that would have allowed such a proper application, it failed to do so. The consequence of that approach is PWGSC's liability for reasonable costs incurred in preparing a response to the solicitation, which costs are to be deducted from any other compensation for lost opportunity so as not to double indemnify. PWGSC ought to review the procedures that it followed and the choices that it made in connection with this solicitation to avoid a situation like this occurring again.

[51] Had PWGSC not lifted the stop work order on March 2, 2023 (which effectively authorized Heddle to start executing the contract), it would have been possible for the Tribunal to order the cancellation of the contract and the retender of the ITT. That would have been the fairest outcome for this matter and the remedy that the Tribunal would normally have recommended in this type of circumstance.[55] However, the state of advancement of the contract is now such that it would be irresponsible for the Tribunal to recommend a cancellation and retender remedy at this stage. It would be irresponsible because it would have the collateral effect of inflicting unacceptable cost to taxpayers and create a situation that might jeopardize an important mission of the Canadian Coast Guard and thereby endanger the lives of Canadians.[56]

[52] The situation is therefore such that the Tribunal is unable to recommend any of the remedies provided for at paragraphs 30.15(2)(a) to (d) of the CITT Act. In the circumstances, the Tribunal considers that the remedy of monetary compensation provided for at paragraph 30.15(2)(e) of the CITT Act, in this instance, for lost opportunity to profit, is appropriate. This remedy is warranted, however, only if there were no responsive bids with an evaluated price equal to or lower than that of

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55 The interests of the competitive procurement system would also have been better served by this remedy.

56 See the affidavit of Adam Wettges, dated July 13, 2023; Exhibit PR-2023-006-40 at 32–39; Exhibit PR-2023-006-40.A (protected) at 30–37.

Heddle.[57] In that case, the opportunity for Chantier Davie and Wärtsilä to do the work that is currently being executed by Heddle and profit therefrom would be lost forever because the contract will remain with Heddle.

[53] The Tribunal notes that, in their submissions, PWGSC and Chantier Davie and Wärtsilä provide the same starting basis for the discussion of a reasonable amount of compensation for lost opportunity. In short, they appear to agree on the amount of profit that the contract was susceptible of generating for a winning bidder. They differ, however, on the final amount of compensation for lost opportunity to profit that ought to be awarded to Chantier Davie and Wärtsilä.[58]

[54] At this stage, the Tribunal is of the view that the parties ought to be given the opportunity to negotiate any outstanding issues regarding the quantum of compensation to be paid to Chantier Davie and Wärtsilä.

[55] The Tribunal reserves jurisdiction to establish the final amounts for bid preparation costs and the compensation for lost opportunity.

LITIGATION COSTS

[56] As a general principle, costs usually follow the event.[59] Pursuant to section 30.16 of the CITT Act, as Chantier Davie and Wärtsilä have been successful, the Tribunal preliminarily awards Chantier Davie and Wärtsilä their reasonable costs for this proceeding.

[57] In accordance with the *Procurement Costs Guidelines*,[60] the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3. The procurement at issue involved a complex series of services and goods, which included an element of service for installation and maintenance. The legal issues that arose from the complaint as well as PWGSC's motion requesting the dismissal of the complaint were complex. Indeed, the proceeding became more complex by reason of the filing of a motion, and the need for an oral hearing on that motion. The inquiry involved the presence of an intervener, and circumstances were such that the Tribunal was also required to extend the proceeding to the 135-day timeframe. Therefore, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, which has an associated flat-rate amount of $4,700.

[58] The Tribunal's findings with respect to costs are preliminary. The Tribunal reserves jurisdiction to establish the final amounts with respect to litigation costs.

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57 The Tribunal notes that PWGSC indicated that, further to the re-evaluation that was conducted, Heddle's bid remained the bid with the lowest evaluated price; Exhibit PR-2023-006-40 at, *inter alia*, paras. 27, 32.

58 Exhibit PR-2023-006-40 and Exhibit PR-2023-006-40.A (protected) at paras. 106–108; Exhibit PR-2023-006-46 at paras. 136, 140–142.

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

60 Online: <https://www.citt-tcce.gc.ca/en/procurement-inquiries/procurement-costs-guidelines>.

REMARKS

The undisclosed criterion

[59] Because the complaint is valid based on Ground 1, the Tribunal did not need to address Chantier Davie and Wärtsilä's claim that a purportedly undisclosed criterion relating to [ ] had been improperly applied by PWGSC when evaluating the bids.[61]

[60] Nevertheless, the Tribunal believes that it is important to make the two remarks that follow in anticipation of the need to determine any final amount of compensation. First, the Tribunal is of the view that the ITT allowed PWGSC to cancel the solicitation at its sole discretion if offers exceeded its budget.[62] Second, the Tribunal accepts that PWGSC would not have increased its expenditure above the amount of the value of the contract that was awarded to Heddle, which was already a significant increase above its originally foreseen and budgeted expenditure. Parties' submissions appear to recognize these facts as the starting basis for calculating lost opportunity. The Tribunal encourages the parties to adhere to those realities when they attempt to negotiate an amount for lost opportunity.

Transparency beyond strict debriefing obligations

[61] In *Chantier Davie I*, the Tribunal found that PWGSC had not, strictly speaking, violated its debriefing obligations, but the Tribunal nevertheless made various remarks on how PWGSC ought to have understood that Chantier Davie and Wärtsilä had legitimate grievances that they wanted to bring to PWGSC's attention.[63] In the present complaint, the record indicates that PWGSC had no interest in engaging in any debriefing discussion with Chantier Davie and Wärtsilä.

[62] The issue of the adequacy of the debriefing that occurred in this matter is not necessary to decide because of the Tribunal's finding on Ground 1. However, because Article 502(1) of the CFTA contains a general requirement that government institutions conduct procurements with openness and transparency, the Tribunal asks PWGSC to consider whether it is meeting those obligations when it debriefs bidders with no more information than the elements listed at Article 516 of the CFTA; in essence, the Tribunal asks PWGSC to question whether the provision of those elements alone can be called a "debriefing" at all. Those elements are, in fact, perfunctory and seemingly offer only minimal accountability from government institutions at the end of a procurement process. Strict

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61 *Inter alia*, in Exhibit PR-2023-006-01.A (protected) at paras. 79–91, 110, 113. The issue of [ ] was raised as a ground of complaint, but the Tribunal determined that the issue as a ground of complaint was ultimately irrelevant or not founded for the reasons that follow. [ ] was never an issue in *Chantier Davie I* because the contract was awarded, albeit improperly, to Heddle based on PWGSC's belief that only Heddle had provided a responsive bid, but not because of the application by PWGSC of a purported undisclosed criterion relating to [ ]. The issue is equally irrelevant in the present complaint because Chantier Davie and Wärtsilä's argument appears to have been predicated upon the misconception that there was not another bidder and that Chantier Davie and Wärtsilä had the only other valid bid; in any event, the Tribunal does not know what [ ] by the other responsive bidder. In addition to the preceding reasons, the issue of [ ] is also moot because of the Tribunal's finding on Ground 1. The issue is therefore relevant only to the issue of the appropriate remedy as examined in the text in the core of these reasons above.

62 See section 4.2 of the ITT, *in fine*; Exhibit PR-2023-006-01 at 233.

63 See *Chantier Davie I* at paras. 30–46.

adherence to providing losing bidders with no more information than what is listed at Article 516 of the CFTA leaves losing bidders with essentially no means of fully understanding why they lost.

[63] In the present instance, PWGSC showed no openness to providing Chantier Davie and Wärtsilä with any information that would have allowed them to ascertain whether they rightfully lost to Heddle. This approach ignores the fact that losing bidders undoubtedly ought to be able to know what was procured at the end of a procurement process with some detail, except for exceptional circumstances, such as ones relating to national security or the protection of human health and safety.

[64] There are multiple advantages to providing losing bidders with meaningful debriefings, i.e., where a losing bidder is informed about the relative merits of the winning bid over its own. Government institutions and bidders have a vested interest in allowing losing bidders to learn from their shortcomings so that they can prepare better bids whenever a new opportunity arises. This enhances competition for the future so that the chances that government institutions will be offered good value for money is maintained or increased. Providing information beyond the strict elements listed at Article 516 of the CFTA also lets bidders know or verify whether they were treated fairly. It increases faith in the competitive procurement system and maintains a healthy competitive business environment. It lets bidders know that they are treated with respect and not taken for granted. It lets the supplier community know that public funds have been properly used to purchase goods and services in accordance with the stated rules of a given procurement process. It provides an equal playing field. It allows losing bidders the opportunity to exchange information with government institutions so that the appropriateness of an evaluation can be tested. It allows government institutions to verify whether their procurement award decisions are properly founded or to correct them if such information gives them cause to overturn their initial decision, as ought to have been done by PWGSC in this instance.

[65] Otherwise, strict adherence to providing no more than the elements listed at Article 516 of the CFTA allows government institutions to entertain the unfortunate belief that they can essentially just tell losing bidders to go away and leave them alone. How can potential suppliers be satisfied with a government institution's procurement award decision in circumstances like that? This also leads to the question of how a potential supplier can ask for accountability through the procurement review process if the government institution is reluctant or refuses to engage in explaining its decision. As a result, this often forces complainants to ground a complaint to the Tribunal on little more than their own assessment (essentially a guess) of why they might have been eliminated or why their competitor might have prevailed. In turn, this creates situations where suppliers see their complaints to the Tribunal shut down during the gate-keeping examination of a complaint for lack of evidence. In circumstances like that, the Tribunal may have to ask itself how a complainant can be expected to bring evidence of an issue that it had to make a guess about, for lack of the government institution's willingness to engage regarding its accountability vis-à-vis its procurement award decision.

[66] Therefore, the practice of providing, during oral or written debriefings, no more information to losing bidders than what is listed at Article 516 of the CFTA appears to become a means of transparency avoidance. That would appear to be in contradiction with the general objective of transparency promotion of Article 502(1) of the CFTA. In effect, when government institutions give no more information to losing bidders than what is strictly required of them by Article 516 of the CFTA, losing bidders have no way to satisfy themselves, even partially, that the rules of the game were followed, let alone fully ascertain whether they lost fair and square. Government institutions that practise bidder debriefing in that reductionist manner, by design or otherwise, are effectively

leaving losing bidders in the dark. Government institutions may want to query whether they are providing sufficient accountability or allowing access to justice to properly operate in circumstances like that.

[67] In contrast, there are various international trade agreements that explicitly require government institutions to provide losing bidders with the relative advantages of the winning bid over theirs.[64] Government institutions may want to consider affording domestic suppliers bidding on opportunities under the CFTA with the same transparency afforded to foreign suppliers that benefit from the more explicit debriefing obligations that are contained in various international trade agreements to which Canada is a party. Otherwise, Canada is, in effect, treating domestic suppliers subject to only the CFTA *less* favourably than foreign suppliers under international trade agreements.

[68] While this subject was not necessary to address because of the Tribunal's finding on Ground 1, government institutions may want to consider whether the general transparency requirement of Article 502(1) of the CFTA does not already allow for domestic suppliers seeking debriefings to benefit from a treatment *equal* to that afforded to foreign suppliers under international trade agreements, despite previous examination of this issue by the Tribunal.

DETERMINATION

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

[70] Pursuant to subsection 30.15(4) of the CITT Act, the Tribunal awards Chantier Davie Canada Inc. and Wärtsilä Canada Inc. (the complainants) their reasonable bid preparation costs, which costs are to be paid by PWGSC.

[71] Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that PWGSC compensate the complainants for their lost opportunity to profit but only if there were no responsive bids with an evaluated price equal to or lower than that of Heddle Marine Service Inc. If compensation for lost opportunity is payable, the Tribunal recommends that the amount of compensation be reduced by an amount equal to the complainants' reasonable bid preparation costs.

[72] Pursuant to section 30.16 of the CITT Act, the Tribunal awards the complainants their reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guidelines*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and its preliminary indication of the amount of the cost award is $4,700.

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64 This was further discussed in *Chantier Davie I*. See, for example, Article XVI(1) of the World Trade Organization Agreement on Government Procurement, which requires government institutions to explain "the relative advantages of the *successful supplier's tender*" [emphasis added]. See also article 19.15:1 of the Comprehensive Economic and Trade Agreement, 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, for its part, provides for the option to provide such information to an unsuccessful bidder.

[73] The Tribunal asks the parties to make best efforts to negotiate and report back to it on the outcome of discussions regarding bid preparation costs, the amount of compensation for lost opportunity and litigation costs within 60 days of the date of issuance of its reasons. The Tribunal encourages parties to share all relevant information with maximum transparency, at least among counsel who filed a confidentiality undertaking, but only after having considered the public release of information to the greatest extent possible. Should the parties be unable to agree on these issues, the Tribunal will advise as to the next steps. The Tribunal reserves jurisdiction to establish the final amounts for bid preparation costs, compensation for lost opportunity and litigation costs.

Eric Wildhaber

Eric Wildhaber
Presiding Member

APPENDIX[65]

BY EMAIL

June 30, 2023

To: Counsel of Record

Subject: Complaint No. PR-2023-006
Solicitation Number F7049-200041/B
Chantier Davie Canada Inc. & Wärtsilä Canada Inc.

This is further to written submissions relative to the motion by the Department of Public Works and Government Services (PWGSC) requesting the dismissal of the complaint filed by Chantier Davie Canada Inc. and Wärtsilä Canada Inc. (collectively Chantier Davie and Wärtsilä), and further to the oral hearing into this matter that was held on June 27, 2023.

In the interest of furthering the orderly and timely pursuit of the inquiry, whose statutory timetable for completion is fast approaching, the Tribunal hereby communicates its decision, summary reasons (that may be addressed in greater detail or edited for inclusion in the statement of reasons at the conclusion of the inquiry on the merits), and certain procedural directions for the next steps in this inquiry.

Summary reasons are provided in this manner chiefly by necessity of timeliness considerations given that this inquiry must be completed by September 6, 2023, and so that the parties can without delay focus their remaining opportunities for submissions on the issues that properly remain in dispute in this matter.

Tribunal's decision on the motion

The motion is granted in part.

Summary reasons

The complaint does not pertain to enforcement[66]

This matter does not pertain to the enforcement of the Tribunal's recommendation in PR-2022-053.

The complaint in PR-2022-053 related to an earlier contract award decision by PWGSC to award the solicitation to Heddle Marine Service Inc. (Heddle). That first contract award decision was further to a first evaluation of bids. At the conclusion of its inquiry in PR-2022-053, the Tribunal found that PWGSC's first contract award decision had been made in violation of the Canadian Free Trade Agreement (CFTA). A new evaluation of bids was recommended.

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65 This is an edited version of the Tribunal's decision that was issued on June 30, 2023. The only additions that were made are the footnotes which are provided for ease of reference by the reader to where the issues that were argued by the parties can be found on the record.

66 See, *inter alia*, Exhibit PR-2023-006-17.B at paras. 28–37; Exhibit PR-2023-006-24; Exhibit PR-2023-006-25 at paras. 22–37, 74–83; Exhibit PR-2023-006-26.

PWGSC conducted a second evaluation of bids. As far as the Tribunal is concerned, PWGSC was free to conduct that evaluation as it saw fit. To the extent that the complaint purports to seek the enforcement of the Tribunal's recommendation in PR-2022-053, if at all, that matter is beyond the scope of this inquiry because the Tribunal does not have the jurisdiction to examine the enforcement of its recommendations.

After the second evaluation, PWGSC made a new contract award decision. The second contract award decision also concluded that Heddle was to be awarded the contract.

The present complaint pertains to the second contract award decision made by PWGSC. That decision concluded the procurement process in this matter. The Tribunal has jurisdiction to hear complaints in respect of any aspect of the procurement process.

The complaint is timely[67]

PWGSC made the second contract award decision known to Chantier Davie and Wärtsilä on March 2, 2023. On March 13, 2023, Chantier Davie and Wärtsilä sought a debriefing on a series of questions. The questions posed in the debriefing request gave PWGSC notice that Chantier Davie and Wärtsilä had objections regarding the evaluation of Heddle's bid.

Chantier Davie and Wärtsilä filed a complaint on March 16, 2023 (PR-2022-076), which the Tribunal found to be premature because a debriefing request to PWGSC was still pending.

On April 6, 2023, PWGSC indicated to Chantier Davie and Wärtsilä that it would not be responding to their concerns in a debriefing or otherwise; that constituted a denial of relief by PWGSC.

The present complaint (PR-2023-006) was filed with the Tribunal on April 24, 2023.

All relevant filings were made within the timeframes provided for at section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations.*

There is no *res judicata*[68]

The issues raised in the grounds of complaint were not previously the subject of decisions on their merits in PR-2022-053 or PR-2022-076. To the extent that they were raised in PR-2022-053 in respect of the first contract award decision, they pertained to that first decision and were set aside for procedural reasons.

There is no bar to the same or similar grounds being raised as they are now directed at the adequacy of the second contract award decision.

There is consequently no *res judicata*.

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67 See, *inter alia*, Exhibit PR-2023-006-17.B at paras. 38–47; Exhibit PR-2023-006-24; Exhibit PR-2023-006-25 at paras. 38–49.

68 See, *inter alia*, Exhibit PR-2023-006-17.B at paras. 48–79; Exhibit PR-2023-006-24; Exhibit PR-2023-006-25 at paras. 50–83; Exhibit PR-2023-006-26.

The ground of complaint concerning a purported "division of procurement requirements" is summarily dismissed

The Tribunal agrees with the submissions made by PWGSC in the context of this motion to the effect that Chantier Davie and Wärtsilä's arguments relative to a purported violation of Article 503(1) of the CFTA are not relevant in the context of this complaint.[69] The Tribunal ceases its inquiry in respect of that issue.

The issues that remain under inquiry

In their complaint, Chantier Davie and Wärtsilä have made serious allegations, substantiated by *prima facie* evidence, that disclose a reasonable indication that PWGSC ignored, at the time of making the second contract award decision, vital information in its possession that calls into question its evaluation of Heddle's bid in respect of two mandatory criteria. A contract can be awarded to a valid bidder only.

Another ground of complaint relating to information that was provided to counsel on a confidential basis during PR-2022-053 also raises a reasonable indication of a breach of the CFTA.

Issues relating to the adequacy of the debriefing are not without basis on their face and are therefore not susceptible for dismissal at this stage. The inquiry into this subject can proceed as well.

The pursuit of the inquiry will allow PWGSC the opportunity to answer Chantier Davie and Wärtsilä's serious allegations of deficiencies that call into question the integrity of the competitive procurement system.

Procedural directions for the pursuit of the inquiry

The next step in these proceedings provides for the filing of a Government Institution Report (GIR) by PWGSC and comments by Heddle on the complaint. The Tribunal had initially envisaged that Heddle file comments on the complaint at the same time as PWGSC would file a GIR.

In the context of this motion, PWGSC and Heddle asked for additional time to make their filings in the event that the inquiry was to proceed.

As that is the case, the Tribunal grants those requests with the adjustments that follow which are, again, necessary given the statutory timeframe under which the inquiry must proceed; the Tribunal has also decided that the conduct of this matter would best be served by staggering Heddle's submission until after the filing of the GIR:

- PWGSC will have until **noon ET on July 14, 2023**, to file a GIR;
- Heddle will have until **noon ET on July 18, 2023**, to file comments on the complaint and the GIR.
- Chantier Davie and Wärtsilä will then have until no later than **noon ET on July 27, 2023**, to file with the Tribunal their comments on both the GIR and any submissions filed by Heddle.

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69 See Exhibit PR-2023-006-17.B at paras. 90–91, 93.

Should you have any questions concerning this letter, please contact [ ] at [ ].

Eric Wildhaber
Presiding Member

c.c.: Mr. [ ], Department of Public Works and Government Services