



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2008-048R

Almon Equipment Limited

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Tuesday, March 1, 2011*

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IN THE MATTER OF a complaint filed by Almon Equipment Limited pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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*;

AND FURTHER TO a determination of the Canadian International Trade Tribunal dated June 23, 2009, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a judgment of the Federal Court of Appeal dated July 20, 2010, that set aside the Canadian International Trade Tribunal's determination dated June 23, 2009, and referred the matter back to the Canadian International Trade Tribunal for re-determination.

**BETWEEN**

**ALMON EQUIPMENT LIMITED**

**Complainant**

**AND**

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

**Government Institution**

**DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Almon Equipment Limited for its lost opportunity by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder on Requirement 2 of the Statement of Work for Solicitation No. W0125-088713/B.

The Canadian International Trade Tribunal recommends that Almon Equipment Limited and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, Almon Equipment Limited shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of Almon Equipment Limited's submission to file a response. Almon Equipment Limited will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Almon Equipment Limited its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's indication of the level of complexity for these complaint cases is Level 3, and its indication of the amount of the cost award is \$4,100. If any party disagrees with the indication of the level of complexity or the indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey  
Presiding Member

Pasquale Michaele Saroli

Pasquale Michaele Saroli  
Member

Stephen A. Leach

Stephen A. Leach  
Member

Gillian Burnett

Gillian Burnett  
Acting Secretary

Tribunal Members: Jason W. Downey, Presiding Member  
Pasquale Michael Saroli, Member  
Stephen A. Leach, Member

Director: Randolph W. Heggart

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Complainant: Almon Equipment Limited

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## STATEMENT OF REASONS

1. This is a determination on remand by the Canadian International Trade Tribunal (the Tribunal) further to a judgment of the Federal Court of Appeal (the Court) in *Canada (Attorney General) v. Almon Equipment Limited*.<sup>1</sup> Before setting out its reasons in this matter, the Tribunal will recall the proceedings in its original inquiry, those before the Court and those in the course of this remand.

### BACKGROUND

#### Tribunal's Inquiry in File No. PR-2008-048

2. On February 9, 2009, Almon Equipment Limited (Almon) filed a complaint with the Tribunal pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>2</sup> The complaint concerned Solicitation No. W0125-088713/B, a Request for Proposal (RFP) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for two requirements regarding aircraft ground de-icing and glycol recovery programs at Canadian Forces Base (CFB) Trenton. Requirement 1 was for the removal of snow and ice from aircraft to prepare them for flight, and Requirement 2 was for the reclamation and disposal of glycol and glycol-contaminated materials resulting from the snow and ice removal. The contract period was one year, the 2008-2009 season, with options for two additional one-year periods, i.e. the 2009-2010 and 2010-2011 seasons.

3. On February 18, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry in part. In its complaint, Almon had identified seven grounds of complaint, five of which were not accepted for inquiry by the Tribunal and two of which were accepted in part.<sup>3</sup> The Tribunal determined that only certain elements of two grounds of complaint relating to the evaluation of Almon's proposal met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>4</sup> and would therefore be accepted for inquiry. Specifically, the Tribunal determined that only Almon's allegations relating to the evaluation of sections (d), (e), (f) and (i) of rated criterion 1.1.2 relating to Requirement 1 and sections (a) and (e) of rated criterion 1.1.2 relating to Requirement 2 provided a reasonable indication that PWGSC had not conducted the procurement in accordance with the only applicable trade agreement, i.e. the *Agreement on Internal Trade*.<sup>5</sup>

4. During the course of its inquiry, the Tribunal granted intervener status to the companies that Almon had alleged were improperly awarded contracts for Requirement 1 and Requirement 2. On April 22, 2009, the Tribunal held a public hearing in Ottawa, Ontario. In its determination, issued on June 23, 2009,<sup>6</sup> the Tribunal found that the complaint was valid in part with respect to both Requirement 1 and Requirement 2.

5. Regarding Requirement 1, the Tribunal considered that, due to the relative scores of Almon's and the winning bidder's proposals, Almon would not have been awarded the contract even if it had been awarded full marks under each of the criteria in respect of which the Tribunal found that PWGSC had failed

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1. 2010 FCA 193 (CanLII) [*Almon FCA*].

2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

3. As noted by the Court in paragraph 24 of its judgment, neither party "... attack[ed] this screening decision by the Tribunal." The Tribunal will therefore not expand the current determination to consider any of the other grounds of complaint not accepted for inquiry by the Tribunal in the original inquiry.

4. S.O.R./93-602 [*Regulations*].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*].

6. *Re Complaint Filed by Almon Equipment Limited*, PR-2008-048 (CITT) [*Almon*].

to properly conduct the evaluation. Therefore, because Almon had not, in the Tribunal's view, suffered prejudice as a result of PWGSC's actions, the Tribunal did not recommend a remedy in relation to Requirement 1.

6. Regarding Requirement 2, the Tribunal was of the view that an appropriate evaluation of the criteria in respect of which it found that PWGSC had failed to properly conduct the evaluation could well have resulted in Almon being declared the successful bidder. Accordingly, the Tribunal found that Almon had been deprived of the opportunity to be awarded the contract and to earn the associated profit. In these circumstances, and given that three bidders were found by PWGSC to be compliant, the Tribunal recommended that PWGSC compensate Almon for its lost opportunity by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder regarding Requirement 2.

### Judgment of the Court

7. Each party filed an application for judicial review with the Court, which summarized the applications as follows:

- (1) *Almon's application for judicial review (A-299-09)*. This focuses on the Tribunal's exercise of remedial decision.
- (2) *Public Works' application for judicial review (A-298-09)*. This focuses on the Tribunal's finding of fact.<sup>7</sup>

8. The Court found that the Tribunal had committed reviewable errors in its recommendations with respect to remedy and certain findings of fact.

9. With respect to the Tribunal's recommendations on remedy, the Court found that the Tribunal:

... erred by failing to consider whether the evaluators' record-keeping and procedures might have affected the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(c) of the [CITT] Act.

...

... did not follow subsection 30.15(2) of the [CITT] Act, namely to assess what remedy out of the range of remedies suggested by Parliament would be appropriate in all the circumstances.<sup>8</sup>

10. With respect to the Tribunal's findings of fact, the Court indicated the following:

... the findings made by the Tribunal [regarding the credibility on the part of the evaluators who were heard as witnesses at the hearing], without further explanation from the Tribunal, appear to be internally inconsistent, incompatible or arbitrary, and do not necessarily lead to the Tribunal's ultimate conclusion ...

...

... the Tribunal has to explain these matters to the parties and to the public in transparent, intelligible reasons that demonstrate that it is not taking arbitrary positions ...<sup>9</sup>

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7. *Almon FCA* at para. 3.

8. *Ibid.* at paras. 50, 51.

9. *Ibid.* at paras. 63, 64.

11. The Court also provided the following additional guidance:
- ... After the matter is remitted back to it, the Tribunal's job will be to receive whatever additional evidence it considers appropriate in light of these reasons, examine all of the evidence including "the body of evidence", make appropriate findings from that evidence, and apply subsections 30.15(2) and 30.15(3) of the [CITT] Act . . . .<sup>10</sup>
12. The body of evidence referred to in the preceding excerpt encompasses the following sources of evidence:
- (a) Item 1 – The comments of the evaluators on the consensus scoring sheets.
  - (b) Item 2 – The comments of the evaluators on the individual scoring sheets.
  - (c) Item 3 – The letter of January 28, 2009 from [PWGSC].
  - (d) Item 4 – The Government Institution Report.
  - (e) Item 5 – The testimony of the technical evaluators at the hearing held on April 22, 2009.<sup>11</sup>

### **Tribunal's Inquiry on Remand**

13. On July 30, 2010, the Tribunal advised both PWGSC and Almon that the term of office of Ms. Ellen Fry, the Tribunal Member who had made the original determination, had expired and that a newly constituted panel of members<sup>12</sup> intended to proceed with the remand inquiry on the basis of the existing record. The Tribunal invited the parties to make submissions on the Tribunal's intended course of action.

14. On August 10, 2010, PWGSC submitted the following views:
- It would be contrary to the principles of fairness and natural justice for the Tribunal to broaden the scope of the re-determination beyond the subject matter of the complaint as accepted on February 18, 2009.
  - The Tribunal had to consider all relevant and probative evidence in determining whether PWGSC properly evaluated Almon's proposal. On the full body of evidence presented by the parties, it was clear that there had been no breach of the *AIT*.
  - The Tribunal had, in its June 23, 2009, determination, properly concluded that Almon would not have been awarded the contract with respect to Requirement 1. The re-determination did not therefore warrant a remedy with respect to Requirement 1.
  - If the Tribunal found that a remedy was warranted with respect to Requirement 2, the remedy would have to take into account that:
    - (1) the evaluators acted in good faith;
    - (2) there had been no prejudice to the integrity and efficiency of the procurement process; and
    - (3) the contracts at issue had been fully performed.

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10. *Ibid.* at para. 54.

11. *Ibid.* at para. 58. This "body of evidence" is also described at para. 35 of the statement of reasons for the Tribunal's determination in *Almon*.

12. That panel was originally constituted of Mr. Jason W. Downey (Presiding Member), Mr. André F. Scott (Member) and Mr. Stephen A. Leach (Member). Upon being named to the Federal Court on October 1, 2010, Justice Scott took leave of his responsibilities at the Tribunal. Mr. Pasquale Michaele Saroli (Member) replaced Justice Scott on this panel.

15. On August 16, 2010, Almon responded to PWGSC's submission and expressed (a) disagreement with PWGSC's contention that the body of evidence established that there had been no breach of the *AIT* and (b) its view that the Court's decision<sup>13</sup> allowed the Tribunal to reconsider its findings with respect to both Requirement 1 and Requirement 2, pursuant to subsection 30.15(2) of the *CITT Act*. Almon also took issue with PWGSC's assertion that the contract had been fully performed, noting that it had been extended for the 2010-2011 season, with the work not yet having been performed.

16. Neither party addressed the issue of how the panel constituted to hear this remand inquiry should deal with the *viva voce* evidence heard by Member Fry during the course of the original inquiry.

17. Accordingly, on September 30, 2010, the Tribunal advised the parties that, given that the new panel had not heard any of the oral testimony first hand, and being mindful of the rules of natural justice, it was inclined to reconvene the same witnesses that appeared before Member Fry so that it could assess, for itself, the various issues that were germane to this matter. In addition to setting a tentative date for the hearing, the Tribunal advised the parties that it would be amenable to receiving a joint proposal from the parties on how the matter could proceed without an oral hearing.

18. On October 1 and 4, 2010, Almon and PWGSC, respectively, submitted that, as the Tribunal had sufficient evidence before it, the Tribunal could re-determine the matter without the need to reconvene the original witnesses. Both parties also advised that, if the Tribunal considered it necessary, they would be available to make further oral submissions on any evidentiary or procedural matters.

19. On October 8, 2010, Almon advised as follows:

- it did not intend to submit any additional evidence;
- its position was that the Tribunal had sufficient evidence before it to make the necessary re-determination without recalling the witnesses and hearing their evidence anew; and
- its position was that the Tribunal should proceed with the re-determination on the basis of the available evidence, including the transcripts of the original hearing, representations and arguments.

20. On October 12, 2010, PWGSC confirmed its position that an oral hearing was unnecessary and that the Tribunal had all the necessary evidence before it to undertake a re-determination of this matter.

21. On October 15, 2010, after considering the parties' submissions, the Tribunal advised that it had decided to proceed on the basis of the existing written record and that it would not hold an oral hearing.

## **TRIBUNAL'S ANALYSIS ON REMAND**

### **Scope of Inquiry on Remand**

22. As indicated above, the Court found that the Tribunal's findings, in respect of the credibility of the evaluators, appeared to be internally inconsistent, incompatible or arbitrary and therefore did not provide a proper basis for the Tribunal's ultimate conclusion that the evaluators' reasons for their scores could only be found in the consensus scoring sheets. The Court instructed the Tribunal, on remand, to "... examine all of the evidence including 'the body of evidence', make appropriate findings from that evidence, and apply

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13. Para. 8 of Almon's submission referencing paras. 51-53 in *Almon FCA*.

subsections 30.15(2) and 30.15(3) of the [CITT] Act . . . .”<sup>14</sup> Accordingly, the Tribunal will first re-examine the merits of the complaint with respect to Requirement 1 and Requirement 2. The Tribunal will then proceed to a consideration of an appropriate remedy, if any.

23. Almon’s grounds of complaint that were initially accepted for inquiry by the Tribunal related to PWGSC’s evaluation of sections (d), (e), (f) and (i) of rated criterion 1.1.2 under Requirement 1 and sections (a) and (e) of rated criterion 1.1.2 under Requirement 2. The Tribunal notes that Almon’s complaint focused solely on the manner in which its own bid had been evaluated and did not extend to the evaluation of the contract awardee’s proposal in respect of either Requirement 1 or Requirement 2.

### Evaluation of Requirement 1

24. With respect to the review of decisions made by the evaluators, the Tribunal recalls its determination in File No. PR-2005-004,<sup>15</sup> in which it indicated that “[it] will interfere only with an evaluation that is *unreasonable*”,<sup>16</sup> with the Tribunal substituting its judgment for that of the evaluators “. . . only when the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, *have wrongly interpreted the scope of a requirement*, have based their evaluation on undisclosed criteria or have otherwise not conducted the substantive evaluation in a procedurally fair way”<sup>17</sup> [emphasis added].

25. The Tribunal notes that the evaluators’ testimony contained certain inconsistencies, as a result of which it remains unclear (1) whether the three evaluators each had their own copy of the bids, (2) whether the bids had been shared among the evaluators and (3) whether all three evaluators met as a group to determine the final consensus scores or if only two had been present, with the third only contacted, after that meeting, by telephone.<sup>18</sup>

26. In the Tribunal’s view, these inconsistencies are the likely result of imperfect recollection and do not, in and of themselves, impugn the good faith and integrity of the evaluators; they do however undermine, at least to some extent, the reliability of the evaluators’ testimony about events central to this matter.

27. Indeed, the evaluators’ imperfect recollection of events in this case underscores the importance of proper record keeping to the integrity and efficiency of the competitive procurement system. In this regard, and as examined in greater detail below, faulty record keeping fails both purchasers and suppliers, and poses serious challenges to the Tribunal’s procurement review mandate. In short, it fails the public procurement system as a whole.

28. The credibility and integrity of the competitive procurement system rest, in large part, not only on bids being properly assessed against the prescribed evaluation criteria in actual fact but also on the supplier community’s perception that bid evaluations have been conducted in a fair and transparent manner. In this regard, adequate record keeping by procurement authorities is integral to the ability of a potential supplier to assess whether its bid has been fairly evaluated against the rated criteria contained in a solicitation and to identify and assess potential grounds of complaint.

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14. *Almon FCA* at para. 54.

15. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005) (CITT).

16. *Ibid.* at para. 51.

17. *Ibid.* at para. 52.

18. *Almon, Transcript of Public Hearing*, 22 April 2009, at 106-107, 248-49.

29. Proper record keeping allows the procurement authority to justify its decisions and the reviewing body to determine precisely what has transpired. In addition, it is conducive to fulfillment by a procurement authority of its duty of fairness to all potential suppliers.<sup>19</sup> Finally, proper record keeping contributes to the Tribunal's ability to fully assess the validity of procurement complaints brought before it.<sup>20</sup> It is therefore incumbent upon procurement authorities to keep proper records.<sup>21</sup>

30. Having reviewed the typewritten<sup>22</sup> and handwritten<sup>23</sup> consensus scoring sheets, the Tribunal considers that the explanatory comments that support the specific scores were at times deficient, illegible, unintelligible or even non-existent. With respect to the comments that those documents did contain and to which both the Government Institution Report (GIR)<sup>24</sup> and testimony at the hearing<sup>25</sup> referred, the Tribunal is of the view that they did not reflect the totality of the factors that were taken into account in determining the specific scores for Almon's bid. The failure to fully identify the factors upon which the scoring was based renders it difficult for the Tribunal to assess whether Almon's bid has been fairly evaluated against the rated criteria prescribed in the RFP.

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19. The duty of fairness is a cornerstone of the competitive procurement system. See *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.

20. The preamble of the *AIT* cites the resolve of its parties to "... **PROMOTE** equal economic opportunity for Canadians..." [emphasis added]. Article 101(4)(a) recognizes "the need for *full disclosure of information... policies and practices* that have potential to impede an open, efficient and stable domestic market" [emphasis added]. Article 101(4)(d) calls for "... the need for supporting *administrative, dispute settlement and compliance mechanisms* that are accessible, timely, *credible and effective*" [emphasis added]. In addition, the requirement to keep records for a certain period of time that is contained in other trade agreements (although strictly not contained in the *AIT*) have considerations of fairness, good faith and transparency, as their fundamental *raison d'être*. The Tribunal is persuaded that similar considerations, although not expressly stated, nevertheless permeate the *AIT*.

21. The Tribunal notes that, although the only trade agreement applicable to the services at issue, the *AIT*, does not contain any specific direction regarding record keeping, Article XX of the *Agreement on Government Procurement* (15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)) provides that "... [e]ach Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years." Article 1017 of the *North American Free Trade Agreement (North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 17 December 1992, 1994 Can. T.S. No. 2 [entered into force 1 January 1994])* provides that "... each Party shall ensure that each of its entities maintains complete documentation regarding each of its procurements, including a written record of all communications substantially affecting each procurement, for at least three years from the date the contract was awarded, to allow verification that the procurement process was carried out in accordance with this Chapter." The Tribunal notes that subsection Kbis-11(3) of the *Canada-Chile Free Trade Agreement (Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile, 1997 Can. T.S. No. 50 [entered into force 5 July 1997])*, which came into effect on September 5, 2008, and Article 1410 of the *Canada-Peru Free Trade Agreement (Free Trade Agreement between Canada and the Republic of Peru, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>)* [entered into force 1 August 2009]) contain similar requirements.

22. Complaint, confidential exhibit 10 at 3, 5.

23. *Almon*, protected additional documents filed by PWCSC at tabs 1, 2, 3.

24. Part III at para. 12.

25. *Almon, Transcript of Public Hearing*, 22 April 2009, at 70, 140, 211, 250.

31. Furthermore, while the Tribunal is of the view that the body of evidence on record, considered as a whole, does provide some explanation for the evaluators' assessment of Almon's bid, it also recognizes that such evidence is an imperfect "after-the-fact" substitute for adequate notes taken by evaluators contemporaneously to the evaluation.<sup>26</sup>

32. The Tribunal is of the view that any approach to this question must strike an appropriate balance that ensures the right of each bidder to an evaluation of its bid in a fair and transparent manner without creating an unduly rigorous and impractical standard for purchasers and, specifically, for evaluators. Whether such a balance is struck depends upon the particular facts of each case.

33. In the circumstances of the present case, the Tribunal's view is that the failure of the evaluators to set out, in the contemporaneous record, all the factors that were considered in the scoring of Almon's technical bid constituted a fundamental deficiency in the evaluation process itself. It is the Tribunal's further view that such a deficiency could not be "cured" after the fact by information contained in subsequent evidence and information (e.g. the GIR and testimony) of which Almon could not reasonably be expected to have had knowledge at the time the complaint was filed.

34. However, in the specific circumstances of this case, in assessing whether the bid had been fairly evaluated against the prescribed criteria of the RFP, the Tribunal has no reason, from a practical standpoint, to disregard subsequently provided information to which Almon was privy and had a reasonable opportunity to consider in advance of filing its complaint (i.e. information garnered from the September 22, 2009, debriefing session and PWGSC's letter of January 28, 2009).

35. The Tribunal makes this finding because of the direct link between such additional information and the initial evaluation, and Almon's ability to take such information into consideration prior to filing its complaint.

36. In the Tribunal's view, such subsequently provided information is not new information, but simply an elaboration on the comments of evaluators in the contemporaneous evaluation records. In this regard, the Tribunal finds that the letter of January 28, 2009, which preceded the filing of the complaint and contained information that elaborated or clarified the specific points contained in the consensus scoring sheets, is relevant to the assessment of whether Almon's proposal had been properly evaluated against the rated criteria prescribed in the RFP.

37. In this regard, with respect to Requirement 1, the Tribunal is of the view that a reading of the comments on the consensus scoring sheet, together with the elaborations contained in the PWGSC's subsequent letter regarding all the criteria under investigation in the Tribunal's inquiry (i.e. sections [d], [e], [f] and [i] of rated criterion 1.1.2 relating to Requirement 1), provides a consistent and adequate explanation of the point deductions in Almon technical proposal in respect of specifically prescribed rated criteria.

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26. This is said with particular consideration to the following: the September 22, 2009, debriefing session between Almon, PWGSC and DND; the letter dated January 28, 2009, from PWGSC to Almon in response to concerns raised by Almon after receiving its debriefing; the GIR filed with the Tribunal on March 16, 2009; and the testimony of the PWGSC contracting officer and DND technical evaluators at the hearing held on April 22, 2009.

38. Having regard to the entire body of relevant evidence, the Tribunal finds no basis that would justify interfering with the evaluators' assessment of Requirement 1 and, therefore, finds the complaint not valid in relation to Requirement 1. Accordingly, no remedy is recommended.

### **Evaluation of Requirement 2**

39. The Tribunal also considered the body of evidence on record as a whole in relation to the evaluation of Almon's proposal regarding Requirement 2.

#### Section (a) of Rated Criterion 1.1.2

40. Part 4 of the RFP reads as follows:

##### **1.1.2 Point Rated Technical Criteria - Requirement 2**

- a) Understanding of the requirements of the Statement of Work - **Requirement 2** and has demonstrated a clear understanding of the objectives of the project. **20 Points Maximum**

41. Requirement 2 is in respect of fluid recovery and entails the provision of all labour, materials and equipment to collect, recycle and dispose of glycol, glycol-contaminated snow and water and all other glycol-contaminated materials relating to aircraft de-icing and anti-icing. In terms of specific requirements, paragraph 4.2, "Glycol Storage", of the Statement of Work (SOW) provides as follows:

#### 4.2 Glycol Storage

- 4.2.1 Diluted glycol fluids may be stored in one of 5 storage tanks owned by 8 Wg/CFB Trenton. These 4 tanks are located at the west end of the flight line. The 4 horizontal tanks have capacities of 50,000 litres each with the vertical having a capacity of 91,000 litres. The vertical tank shall be used to store high concentrate only. **Ensure that there is always sufficient reserve capacity in these tanks to permit prompt and timely glycol recovery.**
- 4.2.2 *8 Wing Trenton considers a high concentrate to be greater than or equal to 4%. Ensure that there is a supply of low concentrate glycol available in the horizontal tanks for feeding to the sewage treatment plant. If concentrations greater than 4% are fed into the horizontal tank, ensure that there is sufficient storage space to immediately blend the glycol into a concentration of less than 4%.*

[Emphasis added]

42. Almon's proposal received less than the full 20 marks available under this criterion. The consensus scoring sheet contained the following comments regarding the deduction of points: "Expect to blend spent fluids for disposal" and "Do not understand that > 4% must be removed". PWGSC's letter dated January 28, 2009, provided a more complete explanation for the deduction of points.

43. In addition, the Tribunal heard evidence from Mr. Drew Craig, 8 Wing Environmental Officer at CFB Trenton, who was one of the technical evaluators and the acknowledged environmental expert regarding the requirements of the RFP.<sup>27</sup> Given Mr. Craig's role, the Tribunal believes that he provided the most relevant and probative testimony in support of the scoring of Almon's proposal as it related to glycol risk issues and the management of horizontal tank glycol concentrations under section (a) of rated criterion 1.1.2.

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27. Almon, *Transcript of Public Hearing*, 22 April 2009, at 138.

44. In particular, when asked to comment, Mr. Craig, who provided advice on the RFP, including with respect to the concentrations that should be stored in the glycol storage tanks,<sup>28</sup> expressed the following concerns about Almon's proposal:

The proposal did not give me confidence that the company understood these requirements and the objectives of the project.

...

... I saw a plan that was based completely around reliance on DND providing resources, having room in the waste water treatment plant to accept glycol.

I did not see a plan in place to deal with glycol properly in the event that the sewage treatment plant was unable to accept glycol.<sup>29</sup>

45. The Tribunal considers that there are two distinct issues regarding the technical evaluators' scoring of Almon's proposal with respect to this criterion: (a) the immediate dilution of glycol from levels above 4 percent to the accepted 4 percent concentration or less; and (b) the physical removal of glycol from CFB Trenton.

– Immediate Dilution of Glycol

46. In the Tribunal's view, the strict interpretation ascribed by the evaluation team to the word "immediately" in paragraph 4.2.2 of the SOW, in its scoring of Almon's proposal under section (a) of rated criterion 1.1.2, was not unreasonable and was indeed consonant with the following:

- a plain reading of paragraph 4.2.2 of the SOW in respect of Requirement 2 of the RFP, which, by its own terms, links the immediacy of the blending to the act of feeding concentrations of greater than 4 percent into the horizontal tanks;
- the meaning of the word "immediately" in the context of its usage elsewhere in the SOW in respect of Requirement 2;<sup>30</sup>
- the importance ascribed by the RFP to the environmentally safe handling and disposal of glycol, as underscored, for example, by the fact that 20 points were allocated to the "[u]nderstanding of the environmental impact of the need for collection of the spent fluids", under section (b) of rated criterion 1.1.2; and
- the well-understood toxicity of glycol and the threat that its improper handling and disposal present to the environment.<sup>31</sup>

47. The Tribunal, therefore, considers it entirely reasonable that the failure of a bidder to properly address the requirement for the immediate dilution of glycol solutions would lead to a reduction of the score awarded to that bidder.

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28. *Ibid.* at 164.

29. *Ibid.* at 171.

30. For example, the SOW in respect of Requirement 2 provides as follows: "It is critical that glycol collection activities are started and completed *immediately* after the completion of aircraft de-icing." [Emphasis added]

31. *Almon, Transcript of Public Hearing*, 22 April 2009, at 168-169.

– Removal of Glycol From CFB Trenton

48. Among the reasons for the loss of points, cited by PWGSC in its letter of January 28, 2009, were the environmental risks associated with the possibility of having to store glycol-contaminated fluid at levels beyond the storage capacity available at CFB Trenton, resulting from Almon's proposal to truck waste fluid off site in accordance with a company-proposed schedule, rather than "immediately".

49. In this regard, the Tribunal reaffirms its original conclusion that there is no requirement in the RFP for all high-concentrate fluid to be removed from the site *immediately* or no indication that such a requirement should reasonably be inferred.<sup>32</sup>

50. Indeed, while the SOW identifies the collection, recycling and disposal of glycol as distinct activities, it limits the *immediacy* requirement to *collection* activities, with no explicit requirement for the immediate off-site disposal of these fluids. Paragraph 2.0 reads as follows:

**2.0 Objectives**

8 Wing CFB Trenton, Ontario has a requirement to *collect, recycle* and *dispose* of glycol, glycol-contaminated snow and water and all other glycol-contaminated materials related to the Aircraft Ground-icing Program. It is critical that glycol *collection activities* are started and completed *immediately* after the completion of aircraft de-icing.

[Emphasis added]

51. The Tribunal understands that there are three distinct requirements under this objective, i.e. (1) to *collect*, (2) to *recycle* and (3) to *dispose*. However, the only activity to which the term "*immediately*" is attached is "*collection*".

52. In the Tribunal's view, that the immediacy requirement does not extend to the off-site removal of these fluids is further supported by paragraph 4.2.3 of the SOW, which contemplates the possibility of having to install additional temporary on-site storage tank capacity during the contract period. It reads as follows:

*If these 5 tanks are not of sufficient capacity, provide and install additional and sufficient tank capacity. Contractor owned tanks must be removed promptly at the end of the contract period. Failure to do so will . . . result in the tanks becoming the property of 8 Wg/CFB Trenton.*

[Emphasis added]

53. The Tribunal therefore concludes that, in evaluating Almon's proposal, the evaluators did not properly apply the rated criterion. Through its own analysis of the body of evidence, the Tribunal therefore confirms the findings in its original determination on this point as follows:

96. The Tribunal notes the technical evaluators' expressed concerns regarding Almon's statement that "[f]luid will only be t[r]ucked off site when it is convenient to do so and when there are sufficient volumes to make it economically viable." However, the Tribunal cannot locate any requirement in the RFP that all high concentrate fluid be removed from the site immediately or that would indicate that this requirement should reasonably be inferred.

97. The Tribunal therefore concludes that, in evaluating this criterion, the evaluators did not apply the criteria disclosed in the tender documents.

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32. *Almon* at para. 96.

54. That being the case, the Tribunal is of the view that, by having wrongly interpreted the scope of a requirement and by having based their evaluation on undisclosed criteria, the evaluators were unreasonable in their assessment on this aspect.

Section (e) of Rated Criterion 1.1.2

55. Part 4 of the RFP reads as follows:

**1.1.2 Point Rated Technical Criteria - Requirement 2**

...

- e) Demonstrated approach in meeting operational start dates including the identification of equipment and resources to be applied at the various stages and over the length of the Contract, including back-up resources and contingency planning. **50 Points Maximum**

Rating scale:

Approach extremely logical and realistic with excellent equipment and resources (including back-up and contingency) - 50 points

Approach very logical and realistic with very good equipment and resources (including back-up and contingency) - 40 to 49 points

Approach fairly logical and realistic with adequate equipment and resources (including back-up and contingency) - 30 to 39 points

Inadequacy in any one of the factors (approach, equipment and resources, including back-up and contingency) will deem a proposal non-responsive.

56. Almon's proposal received less than the full 50 marks. The consensus scoring sheet contained four comments, and PWGSC's letter dated January 28, 2009, provided a more detailed explanation of the reasons for which points were deducted. During the hearing, additional comments were provided by the technical evaluators.

57. In reviewing the body of evidence, the Tribunal adopts the position set out in its determination dated June 23, 2010.<sup>33</sup> In short, the Tribunal finds that this ground of complaint is not valid because it considers that PWGSC was not unreasonable in evaluating that portion of Almon's proposal with respect to section (e) of rated criterion 1.1.2 relating to Requirement 2 contained in Part 4 of the RFP.

58. Overall, the Tribunal finds no basis that would justify interfering with the evaluators' assessment of sections (d), (e), (f) and (i) of rated criterion 1.1.2 relating to Requirement 1 and section (e) of rated criterion 1.1.2 relating to Requirement 2. However, with respect to the evaluation of section (a) of rated criterion 1.1.2 relating to Requirement 2, specifically regarding the requirement to remove the glycol from CFB Trenton, the Tribunal finds that the evaluation of Almon's proposal was unreasonable and, therefore, that the complaint is valid in part in relation to Requirement 2.

## **REMEDY**

59. In the decision that led to this proceeding, the Court found that the Tribunal erred by failing to consider whether the evaluators' record keeping and procedures might have affected the integrity and efficiency of the competitive procurement system under paragraph 30.15(3)(c) of the *CITT Act*.

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33. *Almon* at paras. 99-106.

60. The Court indicated that the Tribunal inappropriately narrowed its examination under paragraph 30.15(3)(c) of the *CITT Act* to whether the evaluators applied the proper criteria to Almon's proposal, whereas important parts of the body of evidence had been ignored by the Tribunal without considering the potential impact on the integrity and efficiency of the competitive procurement system and whether the evaluation of the scores awarded to both Almon's and the winning bidder's proposals could have been affected.

61. The Court also found that the Tribunal had improperly limited the remedy of its original determination to compensation without having considered the other remedies sought by Almon. The Court specifically noted that, in its view, "... the Tribunal did not follow subsection 30.15(2) of the [CITT] Act, namely to assess what remedy out of the range of remedies suggested by Parliament would be appropriate in all the circumstances."<sup>34</sup>

62. The Court stated that, while this error may have been prompted by, what it termed, the Tribunal's "... failure to appreciate the potential significance of the body of evidence concerning the evaluators' conduct",<sup>35</sup> in viewing the matter before it only in narrow terms, i.e. as a credibility issue rather than as an issue relevant to the integrity of the procurement system, "... might have led the Tribunal to choose a narrower remedy than it should have."<sup>36</sup>

63. As noted above, four of the five trade agreements for which the Tribunal adjudicates procurement disputes contain a requirement that the contracting entity maintain complete documentation regarding each of its procurements for at least three years from the date on which the contract was awarded. This is to allow verification that the procurement process was carried out in accordance with the relevant trade agreements.

64. Having reviewed the body of evidence, the Tribunal finds no indication of a deliberate effort on the part of either the technical evaluators or the PWGSC contracting officer to conceal information. However, the Tribunal remains concerned about the lack of information that passed between them regarding the original evaluation of the proposals and record keeping that is not consonant with the intent or the letter of the trade agreements.

65. The Tribunal is also of the view that, had proper record-keeping procedures been in place, a more complete and immediately persuasive explanation of the reasons for the deduction of points might have been available to Almon at the time of the debriefing and that its complaint (and the ensuing proceedings) might have been avoided.

66. As mentioned above, even if the imperfect recollection and inadequate record keeping undermined the reliability of the evidence, it did not go so far as to impugn the *bona fides* of the evaluators in conducting the procurement at issue. Again, the unique facts of the present case allow it to withstand allegations of inappropriate behaviour.

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34. *Almon FCA* at para. 51.

35. *Ibid.* at para. 52.

36. *Ibid.*

67. That being said, the Tribunal recommends that PWGSC review, with its procurement officials, the obligations contained in the trade agreements with respect to proper record keeping. In particular, it should note the need for evaluation exercises to contain a contemporaneous explanation of the scores awarded against each of the prescribed rated criteria that is sufficient to avoid the need for reliance on extraneous and after-the-fact evidence or information.

68. Regarding Requirement 1, in light of the above conclusion that the complaint was not valid, no remedy is warranted.

69. With respect to Requirement 2, subsection 30.15(3) of the *CITT Act* provides as follows:

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

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

70. The Tribunal considers that the deficiencies in record keeping identified in this matter constitute an infringement on the integrity of the competitive procurement system and must be dealt with accordingly. However, despite those deficiencies, the Tribunal is of the view that there was no evidence to indicate that the evaluators were not sincere or that they acted other than in good faith in the conduct of their evaluations.

71. According to subsection 30.15 (2) of the *CITT Act*, the Tribunal may recommend any one or more of the following remedies:

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

72. Given that the third and final de-icing and anti-icing season is well underway, the Tribunal does not consider that the remedies provided for in paragraph 30.15 (2)(a), (b), (c) or (d) are reasonably viable options in the circumstances.

73. Having regard to the entire body of evidence, an appropriate evaluation against the rated criteria, which the Tribunal has found PWGSC failed to conduct, could have resulted in Almon being the successful bidder. Accordingly, it is clear to the Tribunal that Almon was deprived of the opportunity to be awarded the contract and to earn the associated profit. Along with the two other bidders that were previously found to be compliant by PWGSC, Almon was therefore one of three bidders that could have successfully vied for the contract that was ultimately awarded. Accordingly, the Tribunal estimates that the prejudice that Almon suffered is equal to one third of the profit that it would have earned had it been the successful bidder on Requirement 2.

74. Given that both the 2008-2009 and the 2009-2010 de-icing and anti-icing seasons are over and that PWGSC has exercised the option for the final additional year of service, the Tribunal recommends that Almon be compensated for one third of the profit that it would have earned for all three seasons of the collection and disposal of glycol and glycol-contaminated materials resulting from the snow and ice removal. The basis for all calculations shall be the financial proposal submitted by Almon in response to Solicitation No. W0125-088713/B and the actual expenditures by DND during the course of the performance of the awarded contract.

## **COSTS**

75. The Tribunal also awards Almon its reasonable costs incurred in preparing and proceeding with the complaint.

76. Even though the Tribunal finds that the evaluation of Requirement 1 was done properly and that this ground of complaint is not valid, it awards Almon its costs because the inadequate record keeping was the root cause for the complaint and all related subsequent proceedings.

77. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (Level 3).

78. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

79. The complexity of the procurement was medium, in that it was for a defined service project on an as-required basis.

80. The complexity of the complaint was high, in that the complaint involved evaluating a significant number of rated technical criteria for two separate but related requirements.

81. Finally, the complexity of the complaint proceedings was high, as a public hearing was held, the 135-day time frame was required, and the parties filed information beyond the normal scope of proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's indication of the amount of the cost award is \$4,100.

## **DETERMINATION OF THE TRIBUNAL**

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

83. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Almon for its lost opportunity by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder regarding Requirement 2 of the SOW for Solicitation No. W0125-088713/B.

84. The Tribunal recommends that Almon and PWGSC negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Tribunal on the outcome.

85. Should the parties be unable to agree on the amount of compensation, Almon shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of Almon's submission to file a response. Almon will then have 5 working days after the receipt of the PWGSC's reply submission to file any additional comments.

86. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Almon its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's indication of the level of complexity for these complaint cases is Level 3, and its indication of the amount of the cost award is \$4,100. If any party disagrees with the indication of the level of complexity or the indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey  
Presiding Member

Pasquale Michaele Saroli

Pasquale Michaele Saroli  
Member

Stephen A. Leach

Stephen A. Leach  
Member