Federal Court of Appeal | Cour d'appel fédérale

Date: 20180130

Docket: A-45-17

Citation: 2018 FCA 27

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

L.P. ROYER INC.

Respondent

Heard at Montreal, Quebec, on January 16, 2018.

Judgment delivered at Ottawa, Ontario, on January 30, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an application for judicial review of a decision by the Canadian International Trade Tribunal (the Tribunal) dated January 10, 2017, with reasons issued on January 25, 2017 (the Reasons). The Tribunal found that the complaint filed by L.P. Royer Inc. (the respondent or Royer) following the rejection of its bid as part of a procurement process administered by the Department of Public Works and Government Services (PWGSC) was valid. The Attorney General of Canada (the applicant) is applying to this Court to have the Tribunal's determination

set aside on the ground that the Tribunal allegedly erred in its interpretation of the Request for Proposals (RFP) by adopting a literal and disjunctive approach that disregarded the main objective of the request. More specifically, the applicant maintains that PWGSC was entitled to consider the premature wear of the boots submitted in the final step of the evaluation process and find that the respondent's proposal was non-responsive.

[2] I am of the view that the Tribunal's determination was reasonable. According to the determination, the evaluation team did not have the authority to declare, once the evaluations in the field had begun, that a bid was non-responsive on the basis of a criterion that was not stated in the RFP. In addition, I see no reason to reject the Tribunal's finding that PWGSC was wrong to determine that the respondent wanted to amend its bid during the process and that its boots were not ready for mass production. Therefore, I would dismiss the application for judicial review with costs.

I. Facts

[3] On May 6, 2015, on behalf of the Department of National Defence (DND), PWGSC issued RFP No. W8486-151946/A for the purchase of "mukluk"-type winter boots to be worn by members of the Canadian Armed Forces in extreme cold weather, that is, in temperatures ranging from 0 to -51 degrees Celsius. The bidders had until August 11, 2015, to submit their bids.

[4] The evaluation procedures and selection method are described in part 4 of the RFP. With respect to the technical evaluations specifically, article 4.1.1 sets out three phases. The purpose of phase 1 (article 4.1.1.1) is to determine the bidder's capability to meet the mandatory technical

requirements through pre-award samples. More specifically, it is specified that the pre-award samples will be evaluated for quality of workmanship and conformance to the measurements and materials specified in Annex I. Along with the pre-award samples, the bidder must provide a laboratory analysis of the product offered that included the results of the trials listed in Annex I, along with the certificates of compliance for the products. I note that the requirements mentioned in Annex I include the boot's upper materials' resistance to breaking and tearing and the outsole's resistance to abrasion. The performance specifications are stated in Annex B.

[5] The bids that are deemed to be compliant in the first phase are then, in phase 2, subjected to a point-rated technical evaluation, the details of which can be found in Annex E (article 4.1.1.2). The technical evaluation is concerned with the chromaticity coordinates and the luminance of the white colour used for the upper materials, the drying rate of the removable liner, the moisture vapour transmission rate, the ease of ignition of the removable liner, and slip resistance. Once again, the performance specifications for each of the technical evaluations can be found in Annex B.

[6] At the end of Phase 2, the responsive bids with the lowest cost per point are recommended for award of a trial contract, up to a maximum of three contracts (article 4.2.1). It appears that the respondent's proposal satisfied all of the criteria for the first two phases and was not issued any deviations, infractions or observations from PWGSC. On September 17, 2015, a trial contract was therefore awarded to the respondent, and a trial contract was awarded to AirBoss Engineered Products Inc. (AirBoss).

[7] Following the award of trial contracts, the contractor must supply 50 mukluk shells and 100 pairs of removable liner(s), removable insole(s) and replacement laces. Phase 3 is divided into two steps. The bids must first be the subject of a technical evaluation for the quality of workmanship and for compliance with the requisite technologies in accordance with Annex F, which itself refers to Annex B. Second, the boots are tested in the field by members of the military in accordance with the criteria established in Annex G (article 4.1.1.3).

[8] In the technical evaluation, all of the samples are examined to confirm the quality of workmanship and the bidder's capability to meet the requisite technologies outlined in Annex B (see article 1.2 of Annex F and article 1.3.2 of Annex B). At that stage, DND's team of experts can issue deviations, infractions or observations. Article 1.3.1.4 of Annex F states the following:

> **1.3.1.4 Maximum infractions.** No workmanship and construction deviations will be accepted in any of the trial samples. A maximum of three (3) workmanship and construction infractions will be accepted in any of the trial samples. Observations will be noted and referenced in the pre-award evaluation to then be corrected in production. Workmanship or construction issues found with the submission not listed in Table II will be deemed as an observation.

[9] Table II, which addresses the evaluation of the quality of workmanship and construction, specifies a certain number of criteria that refer to Annex B. Of those criteria, two are relevant for the purposes of this matter. The first lists the "[c]uts, tears, holes, rips, mend[s], lumps, creases, weak place[s], or other deficiencies seriously affecting serviceability", while the other refers to "[m]aterial defects such as, but not limited to, boney, loose, flanky, or otherwise inferior leathers, weak spots or mends, discolouration, etc.". Moreover, these infractions are considered observations, that is, "a workmanship or construction issue evaluated to be non-compliant that

does not necessarily affect serviceability of the boot but affects overall quality assurance" (article 1.3.1.3 of Annex F).

[10] The user evaluation, which is the final step in the evaluation process, is used to "confirm if proposed mukluk assemblies meet the identified performance requirements for Canadian Armed Forces personnel" (article 1.1 of Annex G). This evaluation is done by a representative group of well-trained soldiers of the Canadian Army; it takes place over "approximately" four weeks, the first of which allows them to familiarize themselves with the evaluation and to properly understand the tasks to be completed and the action to be taken, while the other three are for evaluating the mukluks proposed by the bidders (article 1.3.3 of Annex G). The evaluation is based on 17 mandatory performance requirements and/or design criteria; each criterion is graded on a 7-point scale, and the total score is calculated by adding up those results (article 1.5 of Annex G). Moreover, article 1.6.3 states the following:

> **1.6.3** To confirm if proposed mukluk assemblies meet the identified performance requirements for Canadian Armed Forces personnel, proposed mukluk assemblies must achieve all of the following criteria to be considered compliant:
>
> **a.** The average score for the proposed mukluk assembly must be greater than the average score of the current in-service mukluk; and
>
> **b.** The average score for the proposed mukluk assembly must be equal to or greater than 57% of the Maximum Possible Score of 119 (7 points x 17 questions).
>
> (Emphasis in original.)

[11] Lastly, article 4.2 of the RFP specifies the method for selecting the bidder. This provision specifies that a bid "must comply with all requirements of the bid solicitation and meet all mandatory technical and financial evaluation criteria to be declared responsive". Article 4.2.1

establishes how the trial contracts are awarded (see paragraph 6 of these reasons). Lastly, article 4.2.2 refers to the awarding of the main contract. Here is how it is worded:

> **4.2.2 Main contract**
>
> To be declared responsive, a bid must meet the criteria at Annex G.
>
> The responsive bid with the highest score in the User Evaluation Trial will be recommended for award of the Main Contract.

[12] As mentioned earlier, PWGSC awarded a trial contract to the respondent on September 17, 2015. On November 4, 2015, Royer wrote to PWGSC regarding a [TRANSLATION] "request to change the outer liner" accompanied by an illustrated explanation proposing to change the liner, at its own expense, to improve its resistance to the conditions of extreme cold that soldiers deal with (Exhibit 9 of the revised Government Institution Report attached to Exhibit R of the affidavit of Sylvie Hayes, Applicant's Record, Volume 1, Tab R at p. 402). It appears from the evidence that PWGSC did not reply to that email. In accordance with the trial contract, the respondent delivered its mukluks to PWGSC on December 17, 2015. Having not received any news from PWGSC, the respondent emailed the contracting authority identified in the RFP twice to follow up, once on April 20 and again on June 1, 2016. In the first of the two emails, the respondent's chief executive officer took the opportunity to state the following:

> [TRANSLATION]
>
> We would like to inform you that ROYER also conducted intensive trials of the product in December, January and February. Following comments received from our users, we have improved the abrasion resistance of the outer laminate of the insulating liners. Accordingly, in the event that DND's technical authority issues an observation in that regard, we would like to inform you of the improvement that we would like to make, at the appropriate time, to the insulating liners.
>
> Exhibit 9 of the revised Government Institution Report attached to Exhibit R of the affidavit of Sylvie Hayes, Applicant's Record, Volume 1, Tab R at p. 406.

[13] On July 8, 2016, PWGSC informed the respondent that it had awarded the contract to AirBoss, which had received a result of 76% in the field trials. The evaluation team's report attached to PWGSC's letter stated that Royer's bid had been rejected for the following reasons:

> i. The materials used in the liner submission failed to "hold up under the extreme conditions found in Field, Garrison and Combat operations".
>
> ii. Bidder B's proposed submission is not "production-ready" as the liner would require additional development, the materials and boot assembly utilized would require re-testing in order to comply with the performance mandatories, and the boot assembly would require UAPE [(User Acceptance Performance Evaluation)] in order to determine compliance.
>
> Exhibit 4 of the revised Government Institution Report attached to Exhibit R of the affidavit of Sylvie Hayes, Applicant's Record, Volume 1, Tab R at p. 325.

[14] On July 18, 2016, the respondent sent PWGSC an objection letter essentially requesting that Phase 3 of the evaluation process be completed and that no contract be awarded before the user trial evaluations were finished.

[15] PWGSC rejected that objection in a letter dated August 19, 2016. The letter states that the respondent's bid was declared non-responsive because the materials used in the construction of the boots did not hold up under the extreme conditions described in Annex B, and because the submitted boots would have to undergo changes that the evaluation team deemed to be significant, and that they were therefore not production-ready in accordance with the requirements of Annex B. In that same response, PWGSC indicated that it had compiled the results of the user evaluation trials; the overall grade given by users to the boots proposed by the respondent was 79.8%.

[16] On August 31, 2016, the respondent filed a complaint with the Tribunal. The Tribunal informed the parties on September 6, 2016, that it had decided to conduct an inquiry into the complaint since it met the requirements of section 30.13 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602.

II. Impugned decision

[17] In analyzing the evaluation process and reasons given by PWGSC for rejecting the respondent's bid, the Tribunal first questioned PWGSC's statement to the effect that the boot liners submitted by the respondent did not hold up under the extreme conditions in which they were used, given that the members of the military had preferred these boots to those of AirBoss and had given them a higher evaluation rating (Reasons at para. 44).

[18] The Tribunal then found that PWGSC had not awarded the contract in accordance with the evaluation criteria in the RFP. Article 4.2.2 of the RFP (cited at paragraph 11 of these reasons) states that the responsive bid to which the users gave the highest score would be recommended for award of the main contract. According to the Tribunal, this was the "ultimate evaluation criterion" (Reasons at para. 48). Since Royer had received a higher average score than AirBoss, it should have been awarded the contract. PWGSC's opposite decision was therefore unreasonable, and the Tribunal had to intervene.

[19] The Tribunal also determined that the applicant had applied an undisclosed criterion, which is inconsistent with article 506(6) of the *Agreement on Internal Trade*, C. Gaz.

1995.I.1323, which specifies that tender documents "shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria". Indeed, PWGSC alleged that the boots showed signs of wear, which implied that the materials used in the construction of the boots did not hold up under the extreme conditions described in Annex B and therefore did not meet the requirements of the performance specification in Annex B. However, it was in Phase 3(a) that quality of workmanship and conformance to the requisite specifications were to be evaluated, that is, prior to the trials. The trials by the members of the military were not covered by Annex B, but solely by Annex G. The Tribunal provided the following explanation at paragraph 54 of the Reasons:

> . . . the examination of the mukluks in accordance with the performance specifications in Annex B, including the presence of abrasions, was not supposed to happen after the trials, but before—using samples that had not yet been worn. According to the terms of the RFP, the mukluks could not have been re-evaluated in such a manner after having been subjected to field use.
>
> (Emphasis in original.)

[20] By citing signs of wear that exceeded those permitted in the solicitation, PWGSC either failed to respect the sequence of steps in the evaluation process or arbitrarily added a new evaluation procedure, neither of which is consistent with the RFP (Reasons at para. 56). The Tribunal agreed that the absence of such a disqualification process may appear odd, but added that it is not up to the Tribunal to remedy the evaluation method that was selected by PWGSC and that was clearly stated in the RFP.

[21] The Tribunal also rejected PWGSC's argument that Royer's average score was invalid because the evaluation of the mukluks had been interrupted. Relying on the very broad wording used to define the duration of the evaluation in Phase 3(b), the Tribunal rejected this *ex post facto*

justification. The French version of Annex G's article 1.3.3 refers to an evaluation of four weeks "environ" [[TRANSLATION] "approximately"] (one week of familiarization and three weeks of evaluation), while the English version specifies an evaluation period of "up to 3 weeks" (Reasons at para. 60). In that context, the three weeks of evaluation for the respondent's mukluks were found to be sufficient (Reasons at paras. 59–63).

[22] Lastly, the Tribunal determined that PWGSC did not evaluate the respondent's bid "as received", which constitutes a procedural flaw. In fact, PWGSC inferred that Royer had amended its proposal after the bid closing date, which was not the case. The fact that Royer unilaterally notified PWGSC that it could improve the mukluks at its own expense, even when there was no response to that correspondence, could not constitute an attempt to cure deficiencies in its bid or an admission that its product was not production-ready. PWGSC's duty was limited to evaluating Royer's original proposal, nothing more.

[23] With respect to remedies, the Tribunal gave the parties 30 days to agree on appropriate compensation for the respondent; if they failed to do so, it would accept submissions on the quantum of compensation to be paid to Royer. It nevertheless recommended compensation for loss of reasonable profits on each pair of mukluks delivered to PWGSC under the contract with AirBoss, and the award of a new contract to the respondent equivalent to the balance of the mukluks remaining on the contract with AirBoss that had not yet been provided.

III. Issues

[24] This application for judicial review raises the following two issues:

A. Did the Tribunal err in finding that the evaluation team no longer had the authority, once the evaluations in the field had begun, to declare that a bid was non-responsive on the ground that it no longer met one of the mandatory requirements stated in Annex B?

B. Did the Tribunal err in declaring that PWGSC was wrong in considering that the respondent wanted to amend its bid during the process and that its boots were not ready for mass production?

IV. Analysis

[25] The two parties rightly agree that Tribunal decisions on tendering matters are reviewable on the standard of reasonableness. This Court has indeed confirmed on more than one occasion that Tribunal decisions with respect to complaints concerning a request for proposals should be afforded considerable deference on judicial review (see for example *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16 at para. 6, [2015] F.C.J. No. 45; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at paras. 4 and 33, 405 N.R. 91; *Defence Construction (1951) Limited v. Zenix Engineering Ltd.*, 2008 FCA 109 at para. 20, 377 N.R. 47; *Ready John Inc v. Canada (Public Works and Government Services)*, 2004 FCA 222 at para. 29, 324 N.R. 54). Consequently, this Court will not intervene so long as the Tribunal's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 (*Dunsmuir*)).

A. *Did the Tribunal err in finding that the evaluation team no longer had the authority, once the evaluations in the field had begun, to declare that a bid was non-responsive on the ground that it no longer met one of the mandatory requirements stated in Annex B?*

[26] The applicant argues that the Tribunal erred in accepting that the evaluators were precluded from relying on the mandatory criteria stated in Annex B at the user trial stage to find that the respondent's bid was non-responsive. In the applicant's view, those mandatory requirements had to be met throughout the evaluation procedure and throughout the term of the main contract. However, the significant signs of wear on the insulating liner of the proposed boots following the user trial allowed the evaluators to determine that Royer's mukluks no longer met the first of the essential performance requirements mentioned in Annex B, namely that the boots be of a higher quality than what is offered on the market and hold up to the extreme conditions in which the boots are intended to be used.

[27] Since the respondent chose in its bid to be governed by the laws in force in Quebec, as is authorized in article 2.4 of the RFP, the applicant argues that the Tribunal had to take the intention of the parties into account in interpreting the contract. Articles 1425 and 1427 of the *Civil Code of Québec*, S.Q. 1991, c. 64, read as follows:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.
. . .	[…]
1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.	**1427.** Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'ensemble du contrat.

[28] This Court has also recognized the importance of relying on the overall purpose and objectives of a request for proposals when interpreting its essential requirements, rather than considering them in an isolated and disjunctive manner (*Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services*), [2000] F.C.J. No. 999 at para. 18, 260 N.R. 367). However, the applicant contends that this is precisely what the Tribunal failed to do in finding that the requirements of Annex B only had to be met during the first stages of the evaluation procedure, yet could no longer be considered once the evaluations in the field had begun. According to the applicant, it would be unreasonable to claim that field trials cannot allow the government to reject a product whose quality is patently deficient. That would be contrary to article 4.2, under which a bid is only responsive if all of the essential requirements of the RFP are met, and it would be contrary to the need that the RFP was seeking to fulfill, that being the supply of mukluks for which all of the materials used must hold up under extreme conditions in the field and whose workmanship is expected to exceed that of comparable boots on the market (article 6.B.2 of the RFP, which refers to Annex A, and article 2.1 of Annex B).

[29] To succeed, it is not enough for the applicant to show that his alternative interpretation of the contract is reasonable; it must instead satisfy this Court that the Tribunal's interpretation is unreasonable. It has not demonstrated this. A reading of the RFP shows that the Tribunal found that the evaluation of the mukluks had to proceed in sequence, such that only the boots that passed Phase 1 and Phase 2 of the evaluation were submitted for Phase 3, and that the quality of workmanship and conformance to the requisite specifications in Annex B had to be evaluated prior to the user trials. This reading of the RFP appears completely reasonable to me and is

supported not only by the wording of the provision setting out the selection method, but also by the very structure of the evaluation process chosen by the applicant.

[30] The very use of the term "phase" in article 4.1.1 to describe the three stages of the technical evaluation suggests a sequential process. The *Le Petit Robert* dictionary defines the French word "phase", in its ordinary meaning, as "*chacun des états successifs d'une chose en evolution*" [[TRANSLATION] "each of the successive states of something that is evolving"]. Additionally, it is clear upon reading article 4.1.1.2 that only the responsive bids from Phase 1 would undergo the evaluation required by Phase 2.

[31] It is the same for Phase 3. Under article 4.2.1, only the responsive bids (that is, those that meet the criteria of Phase 1) that have the lowest cost per point following the evaluation in Phase 2 will be recommended for award of a trial contract (up to a maximum of three contracts).

[32] Lastly, article 1.3 of Annex F states that the evaluation of the workmanship and construction of all of the samples submitted in the trial stage will result in either a pass or a fail. It is important to note that it is in the first stage of Phase 3 that the quality of workmanship and conformance to the requisite technologies mentioned in Annex B was to be evaluated. I will return to Table II later on; it is sufficient to mention here that the infractions for failing to meet the various evaluation criteria are classified as deviations, infractions, and observations. While deviations are not accepted, a sample submitted for trial could have up to three infractions without being rejected. With respect to observations, they are noted "and referenced in the pre-award evaluation to then be corrected in production" (article 1.3.1.4 of Annex F).

[33] The purpose of the final stage, the user evaluation, is to "confirm" that the submitted samples meet the identified performance requirements for Canadian Armed Forces personnel (article 1.1 of Annex G). The use of the word "confirm" suggests that this is indeed the last stage of the evaluation process, and that the objective is no longer to verify the mukluks' conformance to the technical criteria in Annex B, but in fact to ensure that they have been adapted for the living conditions of members of the military in the field. It is significant that the mandatory performance requirements and the design criteria on which the members of the military participating in the evaluation had to provide an opinion are listed exhaustively in article 1.4.5 of Annex G, and they do not mention the mukluks' durability or resistance to wear. Article 1.5 reads as follows:

> **1.5 Final Evaluation:** The final user evaluation will consist of [a] questionnaire designed to allow participants to rate the performance of the proposed mukluk assemblies for each of the criteria above. Each question will have equal weighing. Ratings will be done using a seven (7) point scale . . . .

[34] As previously mentioned (in paragraph 11 of these reasons), the RFP specifies in article 4.2.2 that the bidder with the highest score from the evaluators will be awarded the main contract once the final evaluation is complete. No mention is made of any intervention whatsoever by evaluators or experts from DND at that stage of the process or of the possibility of an additional or overall evaluation of the bid that obtained the best result. As noted by counsel for the applicant, it is true that article 4.2.2 specifies that the "responsive" bid with the highest score will be recommended for award of the main contract. The use of that term, however, is not intended to indirectly reintroduce a new requirement of compliance with the criteria in Annex B; rather, it is a reference to the first paragraph of that article, which states that a bid must meet the criteria at Annex G to be declared responsive.

[35] In short, I am of the view that the Tribunal did not err in finding that the respondent's mukluks could not be eliminated as a result of wear during their use by members of the military in the trial period. In the view of the Tribunal, the ground raised by PWGSC constituted a failure to comply with the sequence of stages in the evaluation process or even the arbitrary addition of a new evaluation procedure. Given the structure and wording of the RFP and its annexes, I find that this reading is within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

[36] The applicant argues that the Tribunal's interpretation clearly did not accord with the intention of the parties and would lead to an absurd result, to the extent that it would disregard the main objective of the RFP, which was to obtain high quality winter boots to allow members of the military to deal with extreme winter temperatures. This argument warrants some comments.

[37] First of all, I note that nowhere in Annex B is there any mention of a requirement for durability or resistance to wear. The emphasis is instead on the boots' comfort and resistance to the extreme conditions in the field. In fact, a careful reading of the performance requirements for the whole boot (article 2 of Annex B) and the removable liner (article 5 of Annex B) offers no indication of premature wear. In the revised Government Institution Report (attached to Exhibit R of the affidavit of Sylvie Hayes, Applicant's Record, Volume 1, Tab R at pp. 106 *et seq*.) filed before the Tribunal, the applicant relies on some excerpts from article 2.1 of Annex B to argue that the materials used in the construction of the respondent's boots are not durable enough to serve their intended purposes and therefore do not meet the described

performance requirements. There was also an allegation that the noted abrasions are more than minor and show that the proposed boots are not ready for mass production. However, an overall reading of the provision does not support this interpretation:

> **2.1 General**: The PIECWM Assembly design must incorporate fabrics and materials to ensure the foot (to ankle height) remains dry from exterior sources. Materials used in the production of this item are expected to be of standard commercial practice but must be modified, if necessary, in order to meet the needs and requirements of CF members in the environment for which the item is intended. It is expected that all materials used to meet the Performance Specification will hold up under the extreme conditions found in Field, Garrison and Combat operations conducted under extreme conditions described below. Materials should be selected to optimize the overall boot performance for the given environment, not specifically address a single measure of performance (i.e., weight, comfort, water absorption, etc.). The quality and workmanship of the item is expected to exceed that found in the commercial market, given the environment for which the item is intended. Any design utilized must be production-ready utilizing conventional mass production methods.
>
> (Emphasis in original.)

[38] The performance objective sought is clearly comfort and keeping soldiers' feet as warm as possible in the extreme environment and climate in which the boots will be used. The same is true for the removable liner's performance requirements, which also emphasize ease of use, flexibility, ability to be washed and dried quickly, and materials that provide insulation and moisture management to the foot (article 5 of Annex B). Premature wear, supposing that it can be shown, does not appear to be a significant or even relevant performance requirement in view of the performance specifications that were deemed worthy of mention in Annex B of the RFP. Indeed, it would have been easy to make it an essential requirement, or at the very least a desirable requirement, in Annex B if one wanted to attach the least bit of importance to it.

[39] Annex F is no more explicit in this regard. It does list a few criteria from which we can infer a requirement of durability (for example, “[c]uts, tears, holes, rips, mend[s], lumps, creases, weak place[s], or other deficiencies seriously affecting serviceability”, “[m]aterial defects such as, but not limited to, boney, loose, flanky, or otherwise inferior leathers, weak spots or mends, discolouration, etc.”, “[p]oor or uneven lasting affecting serviceability”). However, all of those criteria can only be the subject of observations and can consequently be corrected during production.

[40] In short, I see nothing in the Tribunal’s interpretation of the RFP that is contrary to the intention of the parties. As the Tribunal highlights in paragraph 57 of the Reasons, it may seem odd that the applicant did not see fit to explicitly make it possible for the DND evaluation committee to reject a bid on the ground that the user trials revealed premature wear in the boots. Such a requirement could have been part of Phase 3(b) of the process or even inserted as part of a final and overall evaluation. The RFP, however, is not structured in that way, and it was not the Tribunal’s place to add a criterion that did not appear in it.

[41] Finally, the applicant submitted that the Tribunal’s interpretation would lead to an incongruous situation because the requirements in Annex B would temporarily cease to be applicable during Phase 3(b) and would then come back into effect as soon as the main contract is awarded. It would result in an absurd situation to the extent that the respondent would have failed to comply with the essential conditions stated in Annex B as soon as the main contract was awarded to it.

[42] Article 6.B.23 of the RFP does specify that the contractor whose bid has been selected must provide pre-production samples before commencing production according to the needs of the contract. The contract may also be terminated if the technical authority rejects the second pre-production samples (article 6.B.23(4)). Another paragraph from the same article states that a notice of full acceptance or conditional acceptance does not relieve the contractor from complying with all of the requirements of the contract's specifications (article 6.B.23(7)).

[43] That being said, the applicant's argument rests on the premise that the respondent's boots did not in fact meet the mandatory performance conditions in Annex B and that the signs of abrasion that were detected during the trials in the field showed that they could not serve their intended functions. However, that is far from certain in light of the evidence that was before the Tribunal. I also note that the Tribunal "questioned" PWGSC's statement that the lining submitted did not hold up given that the members of the military gave the respondent's mukluks a higher rating; however, it did not see fit to elaborate any further on this issue.

[44] The respondent submits that the wear on the outer laminate of the liners was only aesthetic and did not significantly affect the functional properties of the boots. The fact that the members of the military who carried out field trials on those boots gave them the highest score would tend to confirm this claim. The respondent adds that it conducted its own intensive trials of its product after submitting its bid and would be able to improve resistance to abrasion in the liner's outer laminate had the technical authority made an observation in that regard.

[45] It is not up to this Court to rule on the applicant's hypothetical argument. First, the evidence on record is largely insufficient to assess the extent of the signs of wear that were detected on the boots tested. Second, and more fundamentally, that is not the issue that the Tribunal had to determine and it is not the function of a reviewing court to go beyond what was determined by an administrative tribunal. At most, this issue shows that the applicant would not necessarily have been without a remedy if the boots delivered by the respondent had not been of quality.

[46] Therefore, I am of the view that the Tribunal did not err in its interpretation of the RFP. It was reasonably for it to find that PWGSC adopted an undisclosed criterion to reject the respondent's proposal. Since the respondent obtained the highest score during the trials by the members of the military, it was entitled to be recommended for award of the main contract in accordance with article 4.2.2 of the RFP. By deciding to reject its bid and award the contract to AirBoss, the applicant breached article 506(6) of the *Agreement on Internal Trade*.

B. *Did the Tribunal err in declaring that PWGSC was wrong in considering that the respondent wanted to amend its bid during the process and that its boots were not ready for mass production?*

[47] The applicant argued before us that the Tribunal erred in finding that the emails sent by the respondent on November 4, 2015, and April 20, 2016, were not to be interpreted as requests to amend the initial bid and that, as a result, PWGSC had been wrong to not evaluate the respondent's proposal as received. In the first email, the respondent presented an [TRANSLATION] "illustrated explanation for a request to modify the outer liner" stating that [TRANSLATION] "[t]hese changes would be very beneficial for the soldiers when they are in an extremely cold

environment". In the second email, which is reproduced at paragraph 12 of these reasons, the respondent reiterated that it could make a change to the liners to improve the resistance to abrasion of the outer laminate of the liners [TRANSLATION] "in the event that DND's technical authority issues an observation in that regard".

[48] In my view, the Tribunal was completely justified in finding that the applicant was required to evaluate the respondent's original bid and could not consider modifications that the respondent might have wanted to make later on. As the Tribunal highlighted in paragraph 70 of the Reasons, it is well established that the applicant could not allow the respondent (or any other bidder) to amend its proposal after the tendering process had closed. The reason for this is, as noted by the Supreme Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 at para. 52, [2007] 1 S.C.R. 116, a concern for treating all bidders fairly. Consequently, even if we assume that the two emails mentioned earlier were indeed amendments to the bid, PWGSC was required to not consider them and to evaluate the Royer proposal as submitted on August 10, 2015.

[49] I am also of the view that it was reasonable for the Tribunal to find that the applicant was wrong to presume that the respondent wanted to amend its proposal by relying on the correspondence from the respondent. As previously mentioned, Annex F states that the team tasked with the technical evaluation of the samples during Phase 3(a) can make observations that will need to be considered during the production stage. The purpose of the email dated April 20, 2016, was clearly to report to the contracting authority that the respondent had in a way taken the

initiative by conducting its own trials and that it was ready to make improvements in the event that an observation was made.

[50] The applicant cannot infer from two brief emails that the respondent intended to amend its proposal, and certainly cannot read them as being an admission that the boot's liner needed significant changes and that the model of boot proposed by the respondent was not ready for mass production. That is only pure speculation and is in no way supported by the evidence. Under those circumstances, the Tribunal's finding, according to which the improvements proposed by the respondent were only a unilateral and informal proposal that would not incur any costs for the applicant, was entirely reasonable. And in any case, it fell to the applicant to conduct a complete evaluation of the product submitted by the respondent using the process prescribed by the RFP, without considering or inferring anything whatsoever from the correspondence that may have followed the initial proposal.

V. Conclusion

[51] For all of the above reasons, I would therefore dismiss the application for judicial review with costs to the respondent. In accordance with the agreement reached between the parties, costs (including disbursements) are fixed at $4,000.

"Yves de Montigny"
J.A.

"I agree.
Johanne Gauthier, J.A."

"I agree.
Richard Boivin, J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-45-17
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. L.P. ROYER INC.
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	JANUARY 16, 2018
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATED:	JANUARY 30, 2018

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