

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220504

**Dockets: A-285-20 (Lead file)
A-27-21**

Citation: 2022 FCA 76

**CORAM: PELLETIER J.A.
WEBB J.A.
RIVOALEN J.A.**

BETWEEN:

PACIFIC NORTHWEST RAPTORS LTD.

Applicant

and

**ATTORNEY GENERAL OF CANADA and
FALCON ENVIRONMENTAL INC.**

Respondents

Heard by online video conference hosted by the registry on March 8, 2022.

Judgment delivered at Ottawa, Ontario, on May 4, 2022.

PUBLIC REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**PELLETIER J.A.
RIVOALEN J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220504

Dockets: A-285-20 (Lead file)
A-27-21

Citation: 2022 FCA 76

**CORAM: PELLETIER J.A.
WEBB J.A.
RIVOALEN J.A.**

BETWEEN:

PACIFIC NORTHWEST RAPTORS LTD.

Applicant

and

**ATTORNEY GENERAL OF CANADA and
FALCON ENVIRONMENTAL INC.**

Respondents

PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

WEBB J.A.

[1] There are two applications for judicial review of the decisions of the Canadian International Trade Tribunal (CITT) dated October 22, 2020 (File Nos. PR-2020-009 and PR-2020-022) and January 11, 2021 (followed by reasons issued on January 18, 2021) (File No. PR-2020-034).

[2] The first decision addressed two complaints filed by Falcon Environmental Inc. (Falcon). The second decision addressed a third complaint filed by Falcon. All three complaints arose as a result of the Department of Public Works and Government Services (PWGSC) (acting on behalf of the Department of National Defence) awarding a contract to Pacific Northwest Raptors Ltd. (Northwest Raptors) for aerodrome wildlife control services at Canadian Forces Base Trenton and Canadian Forces Detachment Mountain View.

[3] The CITT, in the first decision, found the complaints were valid and recommended that PWGSC terminate the contract with Northwest Raptors and award the contract to Falcon instead.

[4] In its second decision, the CITT noted that, following its earlier decision, the contract that had been awarded to Northwest Raptors was cancelled by PWGSC and a contract was awarded to Falcon. However, since Northwest Raptors had brought an application for judicial review of the first CITT decision, the CITT continued its inquiry in relation to the third complaint. The CITT found that the third complaint was also valid and recommended that PWGSC re-evaluate the bid submitted by Northwest Raptors.

[5] For the reasons that follow, I would dismiss both applications for judicial review.

[6] The Order dated March 4, 2021 consolidated these two applications for judicial review and designated file A-285-20 as the lead file. These reasons will be filed in file A-285-20 and a copy thereof is to be placed in file A-27-21.

I. Background

[7] On September 5, 2019, PWGSC, acting on behalf of the Department of National Defence, issued a Request for Proposal (RFP) for aerodrome wildlife control services at Canadian Forces Base Trenton and Canadian Forces Detachment Mountain View. Only two bids were submitted – one by Northwest Raptors and the other by Falcon. PWGSC evaluated the two bids, and Northwest Raptors was the successful bidder.

[8] On February 18, 2020, PWGSC informed Falcon that it was not the successful bidder. Falcon filed objections with PWGSC to the award of the contract to Northwest Raptors. PWGSC replied to the objections and notified Falcon that it would not disclose various documents that Falcon had requested related to the procurement.

[9] Falcon then filed its first complaint with the CITT. For the purposes of this application, the main issue in this first complaint was whether Northwest Raptors complied with mandatory criterion M2 of the RFP:

#	<u>Mandatory Technical Criteria</u>	Page Number(s) in Bid
M2	The Bidder must demonstrate in their proposal that they have a minimum 750 days experience in the last five (5) years as a contractor for the provision of Wildlife Control services in accordance with the Canadian Aviation Regulations (CARS) Part 3 Airport Wildlife on an airfield with the following characteristics. The bidder will demonstrate this experience by providing references for contracts where they have accumulated these hours, that meet the following:	

<p>(a) No smaller than CFB Trenton (CFB Trenton’s size is 44,000 square meters fenced in area), and</p>	<p>(a) _____</p>
<p>(b) With low level flight movements totaling at least 29,000 movements per year (including a minimum of: fast-moving jet propelled aircraft, helicopters and turbo propelled aircraft), <i>and</i></p>	<p>(b) _____</p>
<p>(c) With a similar habitat (close to a large body of water that causes the flight paths of birds to pass in and around the airport premises) as that of CFB Trenton, <i>and</i></p>	<p>(c) _____</p>
<p>(d) Managing at least 2 full time employees who provided Wildlife Control Services. This includes all aspects of managing personnel, including, but not limited to the recruiting, employing and training.</p>	<p>(d) _____</p>
<p>The Contract must have been performed by the Bidder itself (and does not include the experience of any proposed subcontractor or any affiliate of the Bidder).</p>	
<p>...</p>	

[10] If a particular bidder’s experience exceeded the minimum requirement for mandatory criterion M2, additional points could be awarded under rated criterion R1.

[11] Falcon alleged, in the first complaint, that Northwest Raptors did not have the experience contemplated by mandatory criterion M2. Therefore, not only did Northwest Raptors not satisfy the minimum requirement, it should also not have been awarded additional points under rated criterion R1 for exceeding this requirement. There was no allegation with respect to whether additional points could be awarded under the RFP for rated criterion R1 *following* the receipt of additional submissions from a bidder.

[12] Following the filing of the first complaint, PWGSC filed a Government Institution Report (GIR). Upon reviewing the GIR, Falcon discovered that PWGSC had sent a Compliance Assessment Report to Northwest Raptors in relation to its submissions on mandatory criterion M2 and, following the receipt of additional submissions from Northwest Raptors, PWGSC had awarded additional points to Northwest Raptors for rated criterion R1. The disclosure of this information resulted in a second complaint being filed by Falcon.

[13] For the purpose of this application, the main issue in the second complaint was whether PWGSC had inappropriately awarded additional points to Northwest Raptors as a result of the additional information that was submitted following the issuance of the Compliance Assessment Report. This argument is based on the wording of Article 4.1.1.3(g) of the RFP:

Additional or different information submitted during Phase II permitted by this section will be considered as included in the Bid, but will be considered by Canada in the evaluation of the Bid at Phase II only for the purpose of determining whether the Bid meets the Eligible Mandatory Criteria. It will not be used at any Phase of the evaluation to increase any score that the original Bid would achieve without the benefit of such additional or different information. For instance, an Eligible Mandatory Criterion that requires a mandatory minimum number of points to achieve compliance will be assessed at Phase II to determine whether such mandatory minimum score would be achieved with such additional or different information submitted by the Bidder in response to the CAR. If so, the Bid will be considered responsive in respect of such Eligible Mandatory Criterion, and the additional or different information submitted by the Bidder shall bind the Bidder as part of its Bid, but the Bidder's original score, which was less than the mandatory minimum for such Eligible Mandatory Criterion, will not change, and it will be that original score that is used to calculate any score for the Bid.

[14] The third complaint filed by Falcon related to a different mandatory criterion (M5), which stipulated that the bidder was to identify one senior wildlife control officer and one wildlife control officer who had accumulated a certain minimum number of hours of wildlife

control experience at an airport incorporating the use of birds of prey and applying Transport Canada Wildlife Control Procedures (TP 11500) to wildlife control services. Falcon alleged that the bid submitted by Northwest Raptors did not satisfy this mandatory criterion.

II. Decision of the CITT

[15] The CITT, in its first decision, found that Northwest Raptors' original bid did not comply with mandatory criterion M2. As a result, the CITT found that Northwest Raptors, in its bid, did not demonstrate that it had the higher number of days of experience that would justify the awarding of additional points under rated criterion R1. Therefore, the additional points awarded under rated criterion R1 must have been based on the additional information received from Northwest Raptors following the issuance of the Compliance Assessment Report, contrary to Article 4.1.1.3(g) of the RFP.

[16] The CITT concluded that the evaluation of Northwest Raptors' bid was unreasonable and that the score that it should have received was less than what was awarded by PWGSC. When the revised score was taken into account, the score for Northwest Raptors' bid was less than the score awarded to Falcon. The CITT concluded that Falcon should have been awarded the contract.

[17] As a result, the CITT found that the most appropriate remedy was a recommendation that Falcon be awarded the contract.

[18] The CITT also found that the third complaint filed by Falcon was valid. CITT's recommendation was that PWGSC re-evaluate the bid submitted by Northwest Raptors to determine whether it was responsive to mandatory criterion M5. The CITT noted that this re-evaluation would only take place if this Court set aside the first decision of the Tribunal.

III. Issues and Standard of Review

[19] The issues raised by Northwest Raptors in relation to the first decision of the CITT can be restated as follows:

- (a) was there a breach of procedural fairness by the CITT as a result of the deadlines imposed by the CITT on Northwest Raptors and the limited disclosure by the CITT of the case against Northwest Raptors;
- (b) was the decision of the CITT unreasonable as a result of its stated conclusion, at paragraph 66 of its reasons, without any analysis, that Northwest Raptors' bid was non-compliant with mandatory criterion M2; and
- (c) was the CITT's recommendation that the contract with Northwest Raptors be cancelled and the contract be awarded to Falcon unreasonable.

[20] With respect to the second decision of the CITT, Northwest Raptors raised the issue of whether this decision is unreasonable as a result of the CITT's failure to consider the specific requirements of mandatory criterion M5 and its failure to show deference to expert evaluators. Since, in my view, the application for judicial review of the first decision of the CITT should be dismissed, the application for judicial review of the second decision should be dismissed on the basis that it is moot.

[21] On the issue of procedural fairness, the question for this Court is whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, at para. 54).

[22] For the issues related to the merits of the CITT's decision, the standard of review is reasonableness (*Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26, at para. 61).

IV. Analysis

[23] The first issue that will be addressed is the procedural fairness issue.

A. *Procedural Fairness*

[24] As noted by the majority of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 77, “[t]he duty of procedural fairness in administrative law is ‘eminently variable’, inherently flexible and context-specific ...”. The majority of the Supreme Court then set out five factors that were previously identified by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*):

- (1) the nature of the decision being made and the process followed in making it;
- (2) the nature of the statutory scheme;

- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision; and
- (5) the choices of procedure made by the administrative decision maker itself ...

[25] In *Baker*, after referring to these factors, the Supreme Court noted:

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[emphasis added]

[26] The procedural fairness arguments relate to the timing of the notices provided by the CITT to Northwest Raptors of Falcon's complaints and the limited time provided to Northwest Raptors to respond. Northwest Raptors also submits that there was a breach of procedural fairness as a result of the failure of the CITT to ensure that Northwest Raptors had disclosure of the specific allegations being made against it.

[27] In its memorandum, Northwest Raptors submitted that the procedural fairness issue related to the timing of the notice provided by the CITT to Northwest Raptors and the short time within which it could respond arose "especially" in relation to the second complaint (paragraph 73). Northwest Raptors, in its memorandum, also submitted that the inadequacy of the disclosure "was most acutely the situation in the second complaint" (paragraph 74). At the hearing of this

application, Northwest Raptors acknowledged that it was able to present its case fully in relation to the first complaint, and focused its arguments with respect to procedural fairness on the second complaint that was filed by Falcon.

[28] The issue of procedural fairness, therefore, relates to:

- (a) the timing of the notification provided by the CITT to Northwest Raptors of the second complaint and the amount of time granted to Northwest Raptors to respond to the second complaint; and
- (b) the limited disclosure of information by the CITT to Northwest Raptors in relation to the second complaint.

[29] The timeline related to the second complaint is as follows:

- August 5, 2020 - the second complaint is filed by Falcon;
- August 6, 2020 - the complaint is accepted by the CITT;
- September 1, 2020 - the CITT notifies Northwest Raptors of this complaint;
- September 2, 2020 - Northwest Raptors requests the opportunity to participate;
- September 3, 2020 - the CITT notifies Northwest Raptors that its comments are to be submitted by September 8, 2020;
- September 8, 2020 - Northwest Raptors submits its brief comments.

[30] As noted by the Supreme Court in *Baker*, “[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly”. The question in this application is whether

Northwest Raptors was able to present its case fully and fairly in relation to the second complaint. Were there submissions in relation to the second complaint that Northwest Raptors was unable to make and that it would have made, if it had been given more time to do so or had any additional disclosure of information?

[31] It is important to note that the issue in the first complaint was based on the bid as submitted by Northwest Raptors and, in particular, whether the bid, as submitted, complied with mandatory criterion M2. If Northwest Raptors' bid complied with mandatory criterion M2, the second complaint would have been moot. The second complaint is predicated on a finding that Northwest Raptors had not complied with mandatory criterion M2 in its bid and, as a result, based on the wording of the RFP, it should not have been awarded any additional points under rated criterion R1.

[32] Although the first complaint was based on the documentation submitted by Northwest Raptors, the second complaint was not based on any document submitted by Northwest Raptors or any action taken by Northwest Raptors, but rather on the actions taken by PWGSC in awarding additional points to Northwest Raptors. The second complaint was based on an error allegedly committed by PWGSC and not on any error committed by, or failure of, Northwest Raptors.

[33] Northwest Raptors' submissions in relation to the second complaint were brief:

In regard to this complaint (PR-2020-022), we fully support PWGSC's position in the GIR that this complaint is without merit and should be dismissed. We were surprised to learn of a complaint regarding the Phased Bid Compliance Process

(PBCP); from our perspective it is a reasonable, equitable mechanism for evaluators assessing technical proposals to access clarifying information.

All the information we provided in our compliance assessment report (CAR) was solely further clarification on information already present in our bid. All the information contained in the CAR was provided strictly in relation to the Mandatory Criteria at issue, and did not contain any substantive or additional information, nor any information pertaining to technical criterion R1.

We respectfully suggest that without the opportunity to clarify information in a CAR process, the level of detail any potential bidder would be required to provide would make proposals unnecessarily lengthy and would not contribute to creating a competitive trade environment.

Thank you for the opportunity to contribute, and for your consideration on this matter.

[34] There is nothing in the earlier correspondence submitted by Northwest Raptors to the CITT on September 2, 2020, or in its submissions dated September 8, 2020, indicating that it would need any particular amount of time or that it was not allotted a sufficient amount of time to provide a response to the second complaint. In its submissions dated September 8, 2020, Northwest Raptors indicated that it fully supported PWGSC's position that Falcon's complaint was without merit and should be dismissed. No request for any additional time to make a submission was made nor is there an indication of what additional submissions Northwest Raptors would have made in relation to the second complaint.

[35] Similarly, there is no suggestion in Northwest Raptors' submissions to the CITT that it did not have the information that it needed to respond fully and fairly to the second complaint.

[36] As noted by this Court in *Ahousaht First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 135, at paragraph 39:

...[t]he jurisprudence is well settled that an allegation of a violation of procedural fairness must be raised at the earliest practical opportunity: *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 455 N.R. 115 at para. 67; *Hennessey v. Canada*, 2016 FCA 180, 484 N.R. 77 at para. 20; *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, 32 C.E.L.R. (4th) 18 at paras. 47-48.

[37] By failing to raise any issue of procedural fairness before the CITT, Northwest Raptors cannot succeed by now raising this issue in this application.

[38] In any event, there also would be no basis to find that Northwest Raptors did not have the opportunity to fully and fairly make its submissions to the CITT. Northwest Raptors' case rests, principally, on two arguments - that it was compliant with mandatory criterion M2 and the appropriate remedy (if the complaints were valid) should be a re-solicitation. There is no indication that Northwest Raptors was unable to present its case fully and fairly in relation to these two arguments following the filing of the first complaint. Any limitations imposed by the CITT on:

- (a) the amount of time given to Northwest Raptors; or
- (b) the disclosure of documents

in relation to the second complaint did not prevent Northwest Raptors from providing full submissions on the issues of whether it had complied with mandatory criterion M2 or what remedy would be appropriate if it had not complied with this criterion in its bid.

[39] As noted above, the second complaint was based on PWGSC awarding additional points to Northwest Raptors following the receipt of additional information in response to the Compliance Assessment Report that was issued. This complaint was based on the alleged error committed by PWGSC and not on any error committed by Northwest Raptors. Because the second complaint was based on the alleged error committed by PWGSC, it is logical that Northwest Raptors would look to PWGSC to defend its actions and that Northwest Raptors would, therefore, rely on the submissions made by PWGSC. As noted above, Northwest Raptors has not identified any submissions that it was unable to make in relation to this second complaint.

[40] In *Canadian Pacific*, at paragraph 56, this Court held that “the ultimate question [for procedural fairness] remains whether the applicant knew the case to meet and had a full and fair chance to respond”. There is no basis in this case to find that Northwest Raptors did not know the case to meet and did not have a full and fair chance to respond.

[41] Therefore, Northwest Raptors cannot succeed in relation to its procedural fairness arguments.

B. *Mandatory Criterion M2*

[42] Northwest Raptors submitted that the CITT’s finding that it had not complied with mandatory criterion M2 was unreasonable because the CITT simply accepted, in paragraph 66 of

its decision, that “[t]he evidence on the record demonstrates that [Northwest Raptors’] original bid was non-compliant with mandatory criterion M2”.

[43] In *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16, this Court stated:

[7] After carefully reviewing the record and the applicant's written and oral submissions, we have not been persuaded that the Tribunal committed a reviewable error. The gist of the applicant's submissions is that the Tribunal failed to properly weigh all of the information in the proposal. Yet this was not the Tribunal's task when investigating the complaint. Its role in this type of inquiry is to decide if the evaluation is supported by a reasonable explanation, not to step into the shoes of the evaluators and reassess the unsuccessful proposal. The Tribunal approached the complaint in the correct manner and determined whether the evaluators' conclusions were defensible in light of the published criteria. It gave appropriate deference to the evaluators and its conclusions on each of the complaints fall within the range of acceptable outcomes. While the applicant is clearly dissatisfied with the Tribunal's findings on three of the four grounds of complaints, its task on this application was to show that the decision was unreasonable given the record before the Tribunal. This it has failed to do.

[emphasis added]

[44] It is not the role of the CITT to re-evaluate the proposal and the submissions made by the bidders, but rather to determine whether the finding made by the evaluators was reasonable.

[45] One of the requirements of mandatory criterion M2 was the following experience:

(b) With low level flight movements totaling at least 29,000 movements per year (including a minimum of: fast-moving jet propelled aircraft, helicopters and turbo propelled aircraft),

[46] The document to which the CITT referred as confirming non-compliance was an email dated November 27, 2019 from Major Armstrong of the Canadian Armed Forces stating that Northwest Raptors' bid was non-compliant because it "does not include examples of, nor mention fast-moving Jet propelled aircraft nor Turbo Prop aircraft".

[47] On the following day, November 28, 2019, a Compliance Assessment Report was sent to Northwest Raptors which stated:

It has been determined that your bid does not yet demonstrate compliance with all the eligible mandatory criteria set out in the solicitation document.

[48] The Compliance Assessment Report then specifically referred to mandatory criteria M2 and M4. The reference to M2 only included paragraph (b), which required the bidder to identify the experience related to low-level flight movements.

[49] Northwest Raptors submitted that the CITT should not have simply accepted that it was non-compliant with mandatory criterion M2, but rather that the CITT should have made its own determination with respect to whether Northwest Raptors was compliant with this criterion based on its bid. As noted above, however, it is not the role of the CITT to re-evaluate a bid but rather to determine if the finding of the evaluators was reasonable.

[50] There is nothing in the record that would support a finding that the evaluators' determination was unreasonable. In paragraph 45 of its memorandum, Northwest Raptors

submitted that its bid demonstrated compliance with mandatory criterion M2. As support for this assertion, Northwest Raptors referred to certain pages in the record.

[51] As noted above, the non-compliance related to the identification of certain types of aircraft, specifically “fast-moving Jet propelled aircraft [and] Turbo Prop aircraft”. While Northwest Raptors did describe its experience at the Vancouver International Airport in its bid, the only reference in the documents identified by Northwest Raptors that identifies the type of aircraft at the Vancouver International Airport is in the following excerpt:

Airport stats

...

- >270,00 [*sic*] annual departures and arrivals, and also has almost 40,000 low-level flights annually - this comprises predominantly floatplane (south terminal) and helicopter flights (three helipads), including a lot of MEDEVAC activity; there are also some low level jet flights, such as the NAV Canada instrumentation test flights.

[52] While there is a reference to helicopter flights, floatplanes and some low level jet flights, there is no specific reference to fast-moving jet propelled aircraft or turbo propelled aircraft. The only reference to any jet propelled aircraft is to “some low level jet flights, such as the NAV Canada instrumentation test flights”, which does not indicate whether these NAV Canada flights were fast-moving.

[53] Despite the absence of any specific reference to “fast-moving jet propelled aircraft” or “turbo propelled aircraft”, Northwest Raptors submitted that its bid complied with mandatory criterion M2 because it provided references for contacts at the Vancouver airport and

Shearwater. It should be noted that no information concerning any flight movements at Shearwater was included by Northwest Raptors when it was addressing mandatory criterion M2 in its bid. Northwest Raptors submitted that including the contact references for these two airports was sufficient to comply with mandatory criterion M2.

[54] However, the information that was required to satisfy mandatory criterion M2 is set out in the RFP at the beginning of Annex C - "Mandatory and Point Related Evaluation Criteria":

For each contract reference required in the mandatory and point rated criteria below, the Bidder is required to provide all of the following information:

- a) *Contract Name*
- b) *Client Organization*
- c) *Start Date and duration*
- d) *Description of Scope of Work*
- e) *Description of work performed, skills and technologies involved and responsibilities held during the contract*
- f) *Name, current phone number and title of the client's contract authority or authorized representative who will confirm the bidder's claim*
- g) *Dollar value of each contract*

[55] The instructions provided to the bidders at the beginning of Annex C required the bidders to provide more just a reference. Therefore, there is no basis for Northwest Raptors' argument that it satisfied mandatory criterion M2 by providing contact references, which is only one component of the requirement information listed above.

[56] Northwest Raptors cannot succeed in relation to its submission that the CITT's finding that its bid did not comply with mandatory criterion M2 is unreasonable.

C. *Remedy*

[57] In its first decision, the CITT briefly addressed the issue of the appropriate remedy in two paragraphs:

[81] The [CITT] notes that Falcon submitted that the most appropriate remedy would be a recommendation that it be awarded the contract. PWGSC agreed that in the event that the [CITT] found the complaints valid, the appropriate remedy would be to make a recommendation that the contract with [Northwest Raptors] be terminated and a new contract awarded to Falcon.

[82] In the circumstances, considering the parties' submissions, the fact that [Northwest Raptors] has not yet begun performance of the contract, with Falcon being the incumbent supplier continuing to provide the services until November 5, 2020, and having regard to the factors stipulated in subsection 30.15(3) of the *CITT Act*, the [CITT] recommends that the designated contract in issue, which was awarded to [Northwest Raptors], be terminated and a new contract awarded to Falcon instead.

[58] Northwest Raptors submits that the CITT did not adequately consider the purposes underlying the regulatory scheme in choosing the remedy. Northwest Raptors also submits that, even though the CITT referred to subsection 30.15(3) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (the *CITT Act*), it did not adequately consider all the factors enumerated in subsection 30.15(3) of that Act in determining the appropriate remedy.

[59] The purposes underlying the regulatory regime regarding federal government procurement were reiterated by this Court in *Heiltsuk*:

[69] As this Court has previously held, there are four purposes underlying the regulatory regime regarding federal government procurement. These purposes, which "must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies" (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at para. 23 (*Almon*)), are:

(1) *Fairness to competitors in the procurement system.* A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.

(2) *Ensuring competition among bidders.* When bidders are placed on a level playing field and compete, it is more likely that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. Competition also gives taxpayers value for the taxes they pay.

(3) *Efficiency.* This speaks directly to the government getting good quality goods and services at minimum expense. This also speaks to the need for a procurement system to run in a timely, practical manner without causing unnecessary expense.

(4) *Integrity.* A procurement process with integrity increases participants' confidence in the procurement system and enhance[s] their participation in it. This increases the probability that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. A procurement process with integrity also gives taxpayers value for the taxes they pay.

[60] Subsections 30.15(2) and (3) of the *CITT Act* set out the remedies that the CITT may grant and the factors to be considered:

Subsection 30.15(2):

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

(a) that a new solicitation for the designated contract be issued;

(b) that the bids be re-evaluated;

(c) that the designated contract be terminated;

(d) that the designated contract be awarded to the complainant; or

(e) that the complainant be compensated by an amount specified by the Tribunal.

(2) Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :

a) un nouvel appel d'offres;

b) la réévaluation des soumissions présentées;

c) la résiliation du contrat spécifique;

d) l'attribution du contrat spécifique au plaignant;

e) le versement d'une indemnité, dont il précise le montant, au plaignant.

Subsection 30.15(3):

(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;

(3) Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants :

a) la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;

b) l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;

c) l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;

(d) whether the parties acted in good faith; and d) la bonne foi des parties;

(e) the extent to which the contract was performed. e) le degré d'exécution du contrat.

[61] Northwest Raptors submits that the remedy awarded by the CITT was unreasonable and that the appropriate remedy in this case should have been to recommend that the procurement be re-solicited pursuant to paragraph 30.15(2)(a) of the *CITT Act*. In paragraph 51 of its memorandum, Northwest Raptors states:

In this case, the [CITT] recommended that the designated contract be awarded to [Falcon] pursuant to subsection 30.15(2)(d) of the *CITT Act*. [Northwest Raptors] submits that such remedy is flawed and is unreasonable because it is based on the notion that mandatory criterion M2 and rated criterion R1 required something more than providing references. If M2 and R1 required something more on the basis of the [CITT's] interpretation, there is an inherent unfairness in holding bidders to a standard not expressed in the RFP. ...

[62] However, the information that was required to satisfy these criteria is set out in the RFP at the beginning of Annex C - "Mandatory and Point Related Evaluation Criteria". The required information is listed in paragraph 54 of these reasons.

[63] The instructions provided to the bidders at the beginning of Annex C required the bidders to provide more just a reference. Therefore, there is no basis for Northwest Raptors' argument that the RFP itself did not expressly stipulate that bidders provide detailed information that would satisfy mandatory criterion M2 and rated criterion R1.

[64] Northwest Raptors did not provide any other argument in support of its position that the contract should have been re-solicited, other than its general arguments with respect to the purposes of the regulatory regime and the factors to be considered under subsection 30.15(3) of the *CITT Act*.

[65] With respect to the consideration of the factors and the available remedies, it should be noted that PWGSC agreed that if Falcon's complaints were found to be valid, the appropriate remedy would be the cancellation of the contract with Northwest Raptors and the awarding of a contract to Falcon. Northwest Raptors did not make any submissions concerning any other remedy in relation to the second complaint but simply adopted the submissions of PWGSC in relation to this matter.

[66] Northwest Raptors submitted to the CITT, in relation to the first complaint, that either this complaint should be dismissed, or if the first complaint was valid, that the parties should be permitted to re-submit their bids. However, the remedy that was awarded by the CITT was based, in particular, on the finding that PWGSC erred in awarding the additional points to Northwest Raptors contrary to Article 4.1.1.3(g) of the RFP, which was the basis for the second complaint.

[67] Since no party at the hearing before the CITT, in the event the second complaint was found to be valid, was arguing for any other remedy based on either the purposes of the regulatory regime or the factors to be considered under subsection 30.15(3) of the *CITT Act*, the

CITT can hardly be faulted for only focusing on the one remedy that was proposed by the parties.

[68] There is also no indication that any party made any arguments, in relation to the appropriate remedy, concerning the purpose of the regulatory scheme or how the purpose would be thwarted if the remedy, as submitted by Falcon and agreed upon by PWGSC, would be adopted by the CITT.

[69] There were only two bidders for the proposed contract. The issue of the appropriate remedy only arises once it is determined that the complaints are valid and that PWGSC should not have awarded additional points to Northwest Raptors under rated criterion R1. Northwest Raptors has not submitted any arguments as to why awarding the contract to Falcon was unreasonable in light of the purposes of the regulatory regime or the factors to be considered as set out in subsection 30.15(3) of the *CITT Act* when

- Falcon was the only other bidder; and
- once the revised points are calculated, Falcon was the successful bidder.

[70] As a result, Northwest Raptors cannot succeed in relation to its argument concerning the appropriateness of the remedy that was granted in this case.

V. Conclusion

[71] I would, therefore, dismiss the application for judicial review in file A-285-20 with costs.

I would dismiss the application for judicial review in file A-27-21 without costs.

“Wyman W. Webb”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-285-20 (LEAD FILE) AND
A-27-21

STYLE OF CAUSE: PACIFIC NORTHWEST
RAPTORS LTD. v. ATTORNEY
GENERAL OF CANADA and
FALCON ENVIRONMENTAL
INC.

PLACE OF HEARING: HEARD BY ONLINE VIDEO
CONFERENCE HOSTED BY
THE REGISTRY

DATE OF HEARING: MARCH 8, 2022

PUBLIC REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
RIVOALEN J.A.

DATED: MAY 4, 2022

APPEARANCES:

R. Benjamin Mills FOR THE APPLICANT

Margaret Robbins FOR THE RESPONDENT,
ATTORNEY GENERAL OF
CANADA

Marc McLaren-Caux FOR THE RESPONDENT,
Alexander Hobbs FALCON ENVIRONMENTAL
INC.

SOLICITORS OF RECORD:

Conlin Bedard LLP
Ottawa, Ontario

Lenczner Slaght Royce Smith Griffin LLP
Toronto, Ontario

Cassidy Levy Kent (Canada) LLP
Ottawa, Ontario

FOR THE APPLICANT

FOR THE RESPONDENT,
ATTORNEY GENERAL OF
CANADA

FOR THE RESPONDENT,
FALCON ENVIRONMENTAL
INC.