



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2014-030

4Plan Consulting Corp.

v.

Shared Services Canada

*Determination and reasons issued
Tuesday, February 10, 2015*

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

4PLAN CONSULTING CORP.

Complainant

AND

SHARED SERVICES CANADA

**Government
Institution**

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Shared Services Canada compensate 4Plan Consulting Corp. for its lost opportunity to earn profit in the amount of the reasonable profit that it would have made, had it been awarded the contract. The Canadian International Trade Tribunal recommends that 4Plan Consulting Corp. and Shared Services Canada negotiate the amount of that compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome of the negotiations.

Should the parties be unable to agree on the amount of compensation, 4Plan Consulting Corp. shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. Shared Services Canada will then have 7 working days after the receipt of 4Plan Consulting Corp.'s submission to file a response. 4Plan Consulting Corp. will then have 5 working days after the receipt of Shared Services Canada's reply submission to file any additional comments. Counsel are required to serve each other and file with the Canadian International Trade Tribunal simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal also awards 4Plan Consulting Corp. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Shared Services Canada. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Procurement Costs Guideline*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the cost award and compensation.

Jason W. Downey
Jason W. Downey
Presiding Member

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STATEMENT OF REASONS

INTRODUCTION

1. On September 29, 2014, 4Plan Consulting Corp. (4Plan) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposals (RFP) (Solicitation No. 2B0KB-14-18583) by Shared Services Canada (SSC) for professional consulting services.

2. 4Plan alleged that SSC improperly used references in the evaluation of 4Plan's bid, inconsistently and arbitrarily excluded projects proposed by 4Plan, and used undisclosed criteria to evaluate projects proposed by 4Plan.

3. As a remedy, 4Plan requested that its bid be re-evaluated, that the contract be terminated and that 4Plan be awarded the contract. In the alternative, 4Plan requested damages for lost profit and lost opportunity. In either event, 4Plan requested that it be compensated for its costs of filing the complaint.

BACKGROUND

4. On May 29, 2014, SSC issued an RFP for professional consulting services. The bid closing date was initially June 19, 2014, but was subsequently extended to June 26, 2014.

5. On June 26, 2014, 4Plan submitted its proposal in response to the RFP.

6. On July 30, 2014, SSC e-mailed 4Plan to inform it that 4Plan was not the successful bidder.

7. On August 4, 2014, 4Plan wrote SSC to raise its concerns regarding the bid selection process. Between August 4 and 8, 2014, 4Plan and SSC exchanged additional correspondence in which 4Plan further elaborated its concerns and SSC undertook to provide 4Plan with an in-person debriefing.²

8. On August 13, 2014, 4Plan filed a first complaint with the Tribunal. That complaint was dismissed on the grounds that it was premature, since SSC had not yet conducted a debriefing as promised.³

9. On September 15, 2014, SSC met with 4Plan to provide the above-mentioned debrief.⁴ Following this meeting, 4Plan proceeded to file a second complaint with the Tribunal on September 29, 2014.

10. On October 6, 2014, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁵

11. On November 14, 2014, SSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶

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

2. Exhibit PR-2014-030-01 at 6-7, Vol. 1.

3. *4Plan Consulting Corp.* (15 August 2014), PR-2014-023 (CITT).

4. Exhibit PR-2014-030-09A at para. 15, Vol. 1A.

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

6. S.O.R./91-499.

12. On November 21, 2014, 4Plan filed a request that SSC produce further documents and also requested an extension of time to file its comments on the GIR.
13. On November 21, 2014, the Tribunal granted 4Plan's request for an extension of time to file its comments on the GIR and directed SSC to file its response to the request for the production of documents.
14. On November 25, 2014, SSC filed submissions opposing the request for the production of documents.
15. On November 28, 2014, 4Plan filed reply submissions in support of its request.
16. On November 28, 2014, SSC wrote to the Tribunal to request that it be permitted an opportunity to provide further submissions in response to 4Plan's reply submissions.
17. On December 1, 2014, the Tribunal informed the parties that SSC would not be permitted to file further submissions, as such a sur-reply is not contemplated in the Tribunal's usual procedures. The Tribunal noted that, absent any exceptional circumstances, which were not alleged by SSC, permitting a sur-reply to be filed would contravene the rules of procedural fairness.⁷
18. On December 2, 2014, the Tribunal issued an order granting in part 4Plan's request and directed SSC to provide further submissions regarding the issue of the evaluators' contacting of references.⁸
19. On December 5, 2014, SSC filed additional documentation and submissions as directed by the Tribunal in its order of December 2, 2014.
20. On December 16, 2014, 4Plan filed its comments on the GIR and on the additional documents and submissions filed by SSC.
21. Given that there was sufficient information on the record to decide upon the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

RELEVANT PROVISIONS OF THE RFP

22. As stated in the RFP, bids were evaluated on two elements: a technical bid and a financial bid.⁹ Only the evaluation of the technical bid is at issue in the present complaint.
23. In order to be considered responsive for the technical bid portion, a bid had to comply with all the requirements of the bid solicitation, meet all mandatory technical criteria and obtain a minimum 240 points out of a possible 400 points for the point-rated technical criteria.¹⁰
24. While 4Plan's bid was deemed responsive, it was not granted full points for the point-rated technical criteria.

7. Exhibit PR-2014-030-19, Vol. 1C.

8. Exhibit PR-2014-030-20, Vol. 1C.

9. Exhibit PR-2014-030-09A at para. 16, Vol. 1A.

10. *Ibid.* at para. 17.

25. To this point, 4Plan alleged that its bid was improperly scored with respect to R1, R2 and R6, which provide as follows:

No.	Rated Evaluation Criteria	Points	Referenced Section/Page in Bidder's Proposal
R1	<p>Points will be awarded for experience exceeding the minimum M3 requirement of leading and completing projects involving the following elements:</p> <ul style="list-style-type: none"> • Federal government's fiscal framework • Central funds such as the Canada Pension Plan Account and the Employment Insurance Account; and • Treasury Board Secretariat Policy on Special Revenue Spending Authorities and how revolving funds work. <p>For every project described as a project experience, the bidder must provide the following information:</p> <ul style="list-style-type: none"> • Client name (project authority); • Client department name; • Current email and phone number of the project authority; • Role and responsibility of the bidder's proposed resource; • Details about the work performed by the proposed resource on the project(s); • Start and end date of the project(s) (month and year); and • The results of the work performed. <p>Each project that includes one or more of the listed elements will be awarded 10 points to a maximum of 50 points (5 projects). Projects submitted for M3 will not be accepted.</p>

<p>R2</p>	<p>Points will be awarded for experience within the last ten (10) years, from date of bid closing, exceeding the minimum M4 requirement of leading and completing projects involving the development and implementation of costing frameworks, including methodologies, models and analysis tools, within the federal government aligned with Central Agency requirements.</p> <p>For every project described as a project experience, the bidder must provide the following information:</p> <ul style="list-style-type: none"> • Client name (project authority); • Client department name; • Current email and phone number of the project authority; • Role and responsibility of the bidder’s proposed resource; • Details about the work performed by the proposed resource on the project(s); • Start and end date of the project(s) (month and year); and • The results of the work performed. <p>Each project that exceeds the minimum of three (3) projects will be awarded 10 points to a maximum of 50 points (5 projects).</p>	<p>...</p>	<p>...</p>
<p>...</p>	<p>...</p>	<p>...</p>	<p>...</p>
<p>R6</p>	<p>Points will be awarded for experience exceeding the minimum M13 requirement of working with the responding authorities of a federal department.</p> <p>For every project described as a project experience, the bidder must provide the following information:</p> <ul style="list-style-type: none"> • Client name (project authority); • Client department name; • Current email and phone number of the project authority; • Role and responsibility of the bidder’s proposed resource; • Details about the work performed by the proposed resource on the project(s); • Start and end date of the project(s) (month and year); and • The results of the work performed. <p>Each project that exceeds the minimum of three projects (3) will be awarded 10 points to a maximum of 50 points (5 projects).</p>	<p>...</p>	<p>...</p>

26. While not directly at issue, the following wording of M4 is also relevant in this complaint:

No.	Description	Met/Not Met	Cross Reference to Proposal
...
M4	The bidder must provide three (3) projects within the last ten (10) years, from the date of bid closing, that the proposed resource has lead and completed involving the development and implementation of costing frameworks, including methodologies, models and analysis tools, within the federal government aligned with Central Agency requirements.

PROJECTS IN ISSUE

27. For the purposes of this complaint, the projects in issue and the evaluators' rationale for reducing or not awarding points have been summarized as follows:

R1

Projects	Rationale	Points awarded
10, 19, 20	Deemed to be a single project (reference contacted for projects 19 and 20) ¹¹	Unclear ¹²
17, 18	Deemed to be single project (reference contacted). Project 18 already listed in M3, so no points awarded. ¹³	0 out of 20
Points in issue:		40

11. Exhibit PR-2014-030-09B at 217, Vol. 1A.

12. See discussion at paragraph 40 below.

13. Exhibit PR-2014-030-09B at 210, 217, Vol. 1A.

R2

Projects	Rationale	Points awarded
12, 13	Deemed to be a single project. Project 12 already listed in M4, so no points awarded ¹⁴ (no reference contacted). ¹⁵	0 out of 20
14	Project 14 forecasting is not costing framework ¹⁶ (no reference contacted).	0 out of 10
16	Not a costing framework; it is a business model and performance scoreboard ¹⁷ (no reference contacted).	0 out of 10
20	Not a costing framework ¹⁸	0 out of 10
Points in issue:		50

R6

Project	Rationale	Points awarded
5	Not enough information given to conclude that project worked with re-spending authorities. ¹⁹	0 out of 10
Points in issue:		10

POSITIONS OF PARTIES

4Plan

28. 4Plan alleged that SSC contacted references in an inconsistent and arbitrary manner, with the result that references were used to impeach the content of 4Plan's bid but not to clarify assumptions made by SSC. 4Plan argued that these practices led SSC to erroneously combine distinct projects into single project descriptions and thereby fail to award 4Plan points for projects properly listed in its bid.

29. 4Plan additionally alleged that the definition of a costing framework was applied inconsistently, with some projects being accepted as costing frameworks and others being rejected, without a reasonable explanation. Furthermore, 4Plan submitted that SSC used undisclosed evaluation criteria by requiring that the proposed projects be costing frameworks, rather than simply involving a costing framework as required by the RFP.

14. *Ibid.* at 211, 217.

15. Exhibit PR-2014-030-09A at para. 52, Vol. 1A.

16. Exhibit PR-2014-030-09B at 217, Vol. 1A.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.* at 219.

SSC

30. SSC took the position that the evaluation of 4Plan's bid was reasonable and that 4Plan's complaint is without merit.

31. With respect to combining project 17 with project 18 and project 19 with project 20, SSC maintained that the evaluators identified concerns stemming from similarities between the projects that led them to contact the references. In particular, SSC submitted that the above-listed projects contained the same "tombstone data", ran in consecutive three-month blocs and focused on the same or similar objectives.²⁰

32. According to SSC, the references confirmed that projects 17 and 18, and projects 19 and 20, were to be considered as single projects. As such, SSC submitted that the evaluators acted reasonably in combining these projects, therefore reducing the amount of points awarded.²¹

33. SSC also argued that projects 12 and 13 contained similarities which "... were significant enough that the evaluators reasonably concluded that they did not need to contact 4Plan's reference ... and that no points could be awarded under R2."²² Similarly, SSC contended that the information provided for project 14 was "inconclusive". Thus, SSC stated that the evaluators acted properly in awarding no points for these projects.²³

ANALYSIS

34. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *North American Free Trade Agreement*,²⁴ the *Agreement on Internal Trade*,²⁵ the *Agreement on Government Procurement*,²⁶ the *Canada-Chile Free*

20. Exhibit PR-2014-030-09A at paras. 40-45, Vol. 1A.

21. *Ibid.* at paras. 41, 44.

22. *Ibid.* at para. 52.

23. *Ibid.* at para. 55.

24. *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) [NAFTA].

25. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

26. *Protocol Amending the Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [AGP].

Trade Agreement,²⁷ the *Canada-Peru Free Trade Agreement*,²⁸ the *Canada-Colombia Free Trade Agreement*²⁹ and the *Canada-Panama Free Trade Agreement*.³⁰

35. 4Plan alleged that the evaluation of bids carried out in this case breached the requirements of the *applicable trade agreements* in several ways. Specifically, 4Plan alleged that SSC:

- by improperly relying on references, arbitrarily concluded that certain of 4Plan’s projects were the “same project”;
- subjected 4Plan’s bid to differential treatment by inconsistently contacting those references;
- applied inconsistent standards by accepting language used by 4Plan to describe its experience with respect to certain requirements, while at the same time rejecting that very same language for similar requirements; and
- misapplied the requirements of the RFP or relied on undisclosed criteria when evaluating 4Plan’s bid.

36. *The trade agreements* require that a procuring entity provide potential suppliers with all the information necessary to permit them to submit responsive tenders, including the criteria which will be used for evaluating and, further, awarding the contract.³¹ It also stipulates that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and requires that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.³² Moreover, the *trade agreements* prohibit all forms of discrimination in tendering procedures, either generally or through the use of undisclosed criteria.³³

37. It is well established that a procuring entity will meet these obligations when it conducts a reasonable evaluation consistent with the terms provided for in the RFP. As it has stated in the past, unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information

27. *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). Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.

28. *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).

29. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

30. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

31. For instance, Article 1013(1) of *NAFTA* provides as follows: “Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders . . . The documentation shall also include: . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders”

32. For instance, Articles 1015(4)(a) and (d) of *NAFTA* provide as follows: “An entity shall award contracts in accordance with the following: (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”

33. For instance, Article 1008(1) of *NAFTA* which provides that “[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a non-discriminatory manner; and (b) consistent with this Article and Articles 1009 through 1016.”

provided in a bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria, the Tribunal will generally not substitute its judgment for that of the evaluators.³⁴

38. The Tribunal has examined 4Plan's allegations and, for the reasons that follow, finds that they are valid.

Issue 1: Did SSC Improperly Rely on References and Inconsistently and/or Arbitrarily Determine that Several Projects Listed by 4Plan in its Bid Were in Fact Single Projects?

Reliance on References

39. As set out above, both R1 and R2 called for points to be awarded to a bidder for each listed project which exceeded certain minimum requirements. However, the term "project" was not defined in the solicitation documents. 4Plan alleged that the decision of what constituted an individual project was left to the discretion of evaluators, which constituted an unfair bidding practice.³⁵

40. As a preliminary matter, the Tribunal notes that the evaluation and scoring of projects 10, 19 and 20 seem inconsistent. While the evaluation notes indicate that projects 10, 19 and 20 were all considered the same project at the time of scoring, neither the GIR nor SSC's additional submissions provided any argument or evidence as to why project 10 was considered the same as projects 19 and/or 20. However, despite the evaluation notes to the contrary, it appears that project 10 was in fact scored as a separate project.³⁶

41. With respect to projects 17 and 18, and projects 19 and 20, the evaluators telephoned the listed references and asked if the listed projects were in fact a single project.³⁷ While both references affirmed that the listed projects constituted a single project (17 and 18 being one project, and 19 and 20 being a second project), there is no indication that the evaluators actually specified what was understood as constituting a "project" or otherwise provided either guidance or defining criteria to those contacted references.

42. This becomes even more apparent when the responses given by the references are examined. For instance, when asked whether projects 17 and 18 were in fact one project, the reference answered in the affirmative, but further noted that he could not recall whether there were one or two contracts awarded for the work itself.³⁸ So being, the evaluators seem to have accepted that, despite the fact that work may have been performed under two separate contracts, these contracts could nonetheless have been considered as a single project.

34. See, for example, *Excel Human Resources Inc. (operating as excellTR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) [*Excel Human Resources*] at para. 33; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) [*Marcomm*] at 10.

35. Exhibit PR-2014-030-23 at para. 18, Vol. 1C.

36. See Exhibit PR-2014-030-09B at 217, Vol. 1A. No points were awarded for projects 17 and 18, it appears that no points were awarded for project 14, as it was already included in M3, leaving projects 10, 19 and 20 being awarded the 20 points allocated by the evaluators.

37. Exhibit PR-2014-030-20 at paras. 8-9, Vol. 1C.

38. Exhibit PR-2014-030-21, Affidavit of Helene Meloche at para. 6, Vol. 1C.

43. Whether multiple contracts would be considered a single project, and how they would be deemed separate projects, was not delineated in the RFP; it appears that the evaluators did not delineate any criteria by which to determine this.

44. The Tribunal finds that the evaluators relied on extrinsic criteria, essentially devised by the references themselves, in order to establish what actually constituted a project. They then accepted these outside determinations as a premise for their final evaluation. In doing so, the evaluators improperly abdicated their responsibility to evaluate the bids in favour of the unguided opinions of such references.

45. This is not to say that the references themselves acted inappropriately. Rather, they could not be relied upon as a basis for determinations on matters that were not defined in the RFP and for which no context was supplied for their consideration.

46. The Tribunal has repeatedly held that an evaluation will be considered to have been unreasonable where the evaluators have not applied themselves in evaluating a bidder's proposal.³⁹ In the present case, the evaluators did not apply themselves in determining what constituted a project for the purposes of the RFP, but instead deferred this decision, relying on undisclosed criteria, to the references themselves. As a result, the Tribunal finds that the evaluation of projects 17 and 18, and 19 and 20 was unreasonable and that 4Plan's complaint is valid on this ground.

Inconsistency in Contacting References

47. The solicitation documents do not make any mention of reference checks being conducted, nor do they set out any parameters as to whether or in what circumstances references would be contacted. In fact, the only mention of a reference being contacted is in M5 and M14, *neither of which are in issue*, and which simply state as follows:

The bidder must provide the following details as to how the stated experience was obtained:

- Client name (project authority) and contact information for verification purposes.

48. By contrast, the rated criteria in issue only require that the bidder list the name and current e-mail and telephone number of the project authority for each listed project. This, of course, may be viewed as an implicit indication that SSC somehow intended to contact these references; however, this is not explicitly stated in the solicitation criteria or in the method of evaluation. Moreover, no information was given as to how the information would be used or how it could in fact impact the evaluation itself.

49. More significantly, however, there was no clear rationale as to why evaluators contacted references in some instances and not in others. In particular, the evaluators deemed that the similarities between projects 12 and 13 were "significant enough" for them to determine that they were in fact a single project, without having to contact any references at all.⁴⁰

50. With respect to projects 17 and 18, and projects 19 and 20, however, SSC argued that the similarities between the projects caused the evaluators to call the project authorities for verification. Similarly, the evaluators contacted the reference provided for project 20 to determine whether it involved the development of a costing framework, but determined projects 14 and 16 did not involve the development of costing frameworks, without any apparent need for contacting the references listed.

39. See *Excel Human Resources* at para. 33; *Northern Lights* at para. 51; *Marcomm* at para. 10.

40. Exhibit PR-2014-030-09A at para. 52, Vol. 1A.

51. Similarly, no explanation was provided, either in SSC's submissions or in the evaluation documents, as to how the evaluators reconciled the discrepancy between the reference's statement that project 20 "... did not involve the development of a costing framework",⁴¹ when the project description clearly stated the opposite.⁴² As discussed above, the description of project 20 was similar to that of project 11, yet no explanation or rationale was offered as to why the evaluator chose to contact references in one instance, but not the other.

52. In light of the foregoing, the Tribunal concludes that the evaluators not only used reference checks not listed in the relevant rated criteria but also failed to apply themselves as to their uneven recourse and instead evaluated 4Plan's bid in an inconsistent and arbitrary manner. Therefore, the Tribunal finds this ground of complaint to be valid.

Issue 2: Was SSC Inconsistent in its Evaluation of 4Plan's Bid in Accepting Certain Projects as Containing Costing Frameworks, While Rejecting Others, or by Using Undisclosed Evaluation Criteria to Reject Certain Projects Listed by 4Plan in its Technical Bid?

Inconsistency in Evaluation

53. Both M4 and R2 called for projects "... involving the development and implementation of costing frameworks...", with points being awarded in R2 for experience exceeding the minimum M4 requirements. In their scoring of 4Plan's bid, the evaluators deemed that three projects (Projects 14, 16 and 20) listed in response to R2 were unresponsive, because they were "not a costing framework".⁴³ However, other projects (projects 11, 12 and 22) with similar descriptions to projects 14, 16 and 20 were accepted as complying with M4. This differential treatment of projects with, at times, identical descriptive language,⁴⁴ demonstrates an unexplained inconsistency in the evaluation of what was deemed to involve the development of a costing framework.

54. For instance, project 11 (accepted) stated that the proposed resource, "[I]ed the development and implementation of a *costing framework* and model..."⁴⁵ [emphasis added]. By contrast, project 16 (not accepted) for its part described the proposed resource as having worked "... with the senior management to develop and implement a *costing framework* and model..."⁴⁶ [emphasis added]; these differing conclusions on very similar language are peculiar, at best.

55. In this regard, it is also important to note that there are discrepancies between the evaluation explanations advanced by SSC in its submissions and the notes of the evaluators in both the consensus evaluation and their individual score sheets.

56. Specifically, in its submissions, SSC stated that projects 14 and 16 "... did not contain sufficient information..." to meet the criteria of R2.⁴⁷ Yet, the consensus evaluation unequivocally stated that "[p]roject 14 forecasting *is not* [a] costing framework" [emphasis added] and that "[p]roject 16 *is not* a costing framework it's a business model and performance scorecard"⁴⁸ [emphasis added]. Thus, on the basis

41. Exhibit PR-2014-030-021 at 4, Vol. 1C.

42. Exhibit PR-2014-030-09B at 135, Vol. 1A.

43. See Exhibit PR-2014-030-09B, tab 4, Vol. 1A; Exhibit PR-2014-030-09C (protected), tabs 18, 19, Vol. 2.

44. Exhibit PR-2014-030-23, at paras. 5-11, Vol. 1C.

45. *Ibid.* at para. 6.

46. *Ibid.* at para. 10.

47. Exhibit PR-2014-030-09A at para. 55, Vol. 1A.

48. Exhibit PR-2014-030-09B, tab 4, Vol. 1A.

of the consensus evaluation, it appears that the evaluators somehow concluded that projects 14 and 16 did not *involve* the development of costing frameworks, as required by R2. There is however no explanation as to how or why the evaluators were able to decide between accepting certain projects and rejecting others (such as projects 14 and 16), whereas the language used in all cases does not reasonably allow for sufficient differentiation to be made.

57. Moreover, while the consensus evaluation contains a brief description of projects 14 and 16 (not accepted on the basis that they *were not* costing frameworks),⁴⁹ the individual evaluators' score sheets simply noted that those projects did not meet the requirement for R2, without providing any further explanation.⁵⁰ Since these comments do not appear elsewhere in the evaluation notes, it is not clear who determined this or how these conclusions were arrived at.

58. On the basis of the lack of explanation for such differing treatment and the discrepancies between the evaluation documents themselves, the Tribunal finds that the evaluation was conducted in an arbitrary manner and that undisclosed criteria were used by the evaluators to distinguish between the accepted projects and projects 14 and 16. As such, the Tribunal finds that this ground of complaint is valid.

Undisclosed Criteria

59. 4Plan further alleged that SSC misapplied the requirements of the RFP or relied on undisclosed criteria when evaluating projects 5, 14 and 16.

60. While 4Plan initially alleged that project 5 “clearly met the requirements of . . . R6”,⁵¹ it did not provide any arguments or evidence in support of this position. Moreover, the consensus evaluation noted as follows:

Project 5 does not give enough information to conclude that they worked with re-spending authorities.⁵²

61. Indeed, in examining project 5, it is not apparent whether the project involved work with re-spending authorities of a federal department, as required by R6.⁵³ As the bidder bears the onus of demonstrating compliance with solicitation criteria,⁵⁴ the Tribunal finds that the evaluators acted reasonably in concluding that the description of project 5 did not sufficiently establish that it met the criteria of R6. The Tribunal therefore finds that 4Plan's ground of complaint with regard to this project is not valid.

62. With respect to the evaluators' conclusion that projects 14 and 16 *were not* costing frameworks, the Tribunal notes that the criterion for R2 stated that points would be awarded for projects “. . . *involving* the development and implementation of costing frameworks . . .” [emphasis added].

63. Despite the use of this specific language in the RFP, it appears that the projects were evaluated on the basis of whether or not they *were*, in their entirety, “costing framework” projects (i.e. and not simply projects *involving* costing frameworks).

49. *Ibid.*

50. Exhibit PR-2014-030-09C (protected), tabs 18, 19, Vol. 2.

51. Exhibit PR-2014-030-01 at 6, Vol. 1.

52. Exhibit PR-2014-030-09B at 219, Vol. 1B. This is consistent with the explanation provided in the individual evaluators' score sheets. Exhibit PR-2014-030-09C (protected) at 410-11, 421, Vol. 2.

53. Exhibit PR-2014-030-09B at 149, Vol. 1A.

54. *ADR Education v. Department of Public Works and Government Services* (18 October 2013), PR-2013-011 (CITT).

64. Specifically, the consensus evaluation states as follows:

- Project 14 forecasting *is not* a costing framework;
- Project 16 *is not* a costing framework; it is a business model and performance scoreboard; and
- Project 20 it *is not* a costing framework, called reference July 11, 2014⁵⁵

65. The distinction to be made here is important; the idea of “being” a costing framework as opposed to “involving” a costing framework calls upon two different notions, with different levels of involvement. The first notion is determinative and involves a threshold qualification of what is and what is not. The second does not necessarily require full qualification of the idea, but rather implies that it occupies some role in the costing framework itself.

66. No explanation is given for project 13, other than it is considered the same project as project 12, which was already listed in M4.

67. In the GIR, SSC stated that the reason for which the evaluators rejected projects 14 and 16 was that 4Plan’s bid “. . . did not contain sufficient information to meet the stated requirement . . .”⁵⁶ To that end, SSC argued that, while the projects contained “elements” of a “costing framework”, the information was inconclusive and unclear. That argument is not supported by the information provided in either the consensus evaluation document, in which the evaluators clearly determined that the projects themselves *were* “not a costing framework”,⁵⁷ or the evaluators’ individual score sheets, which simply stated that the requirements were not met.⁵⁸

68. By essentially requiring that the projects *be*, essentially in their entirety, “costing frameworks”, as opposed to projects *involving* costing frameworks, the Tribunal finds that the evaluators relied on undisclosed criteria to evaluate projects 14, 16 and 20. As a result, the Tribunal finds that this ground of complaint is valid.

REMEDY

69. Having found that the complaint is valid, the Tribunal must now address the issue of remedy to recommend a suitable means of redressing the resulting harm to 4Plan. Given that the contract has already been awarded to Raymond Chabot Grant Thornton and partially performed, 4Plan’s request that the contract be cancelled and re-awarded to 4Plan is not feasible. Alternatively, 4Plan submitted that it should be compensated for lost profits.

70. SSC made no submissions with respect to remedy.

71. In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the *CITT Act*. This includes taking into account the seriousness of any deficiency in the procurement process, the degree to which the complainant was prejudiced, the degree to which the integrity and efficiency of the competitive procurement system were prejudiced, and whether the parties acted in good faith.

55. Exhibit PR-2014-030-09B at 217, Vol. 1B.

56. Exhibit PR-2014-030-09A at para. 55, Vol. 1A.

57. Exhibit PR-2014-030-09B, tab 4, Vol. 1A.

58. Exhibit PR-2014-030-09C (protected), tabs 18, 19, Vol. 2.

72. 4Plan argued that, in order to have been the winning bidder, 4Plan's bid needed to receive just 30 additional points.⁵⁹ 4Plan further contended that, had projects 12 and 13, 17 and 18, and 19 and 20 all been deemed to be separate projects, and had projects 5, 14, 16 and 20 been found to have met the criteria in the RFP, 4Plan's bid would have easily exceeded the necessary 30 points.⁶⁰

73. The Tribunal already determined that the ground of complaint in respect of project 5 was not valid. Therefore, no additional points should have been awarded for this project.

74. In the present case, the lack of a definition of what constitutes a "project", together with the evaluators' actions in deferring that decision to the references, was a serious deficiency in the procurement process. However, the Tribunal notes that, absent any definition of what constitutes a project in the context of the RFP, the Tribunal is not able to definitively determine whether projects 12 and 13, 17 and 18, and 19 and 20 should have each been scored as distinct projects.

75. With respect to the undisclosed criteria used to evaluate projects 14 and 16, the Tribunal finds that, were it not for these undisclosed criteria, both projects would have been deemed to have "... involved the development of a costing framework..." and would have been awarded maximum points. Thus, it is clear that 4Plan's bid should have been awarded an additional 20 points.

76. Finally, the Tribunal is not able to determine that project 20 should have been awarded full points. While the Tribunal has serious concerns regarding the manner in which references were contacted and the inconsistency with which projects were evaluated, the fact remains that the reference contacted with respect to project 20 clearly stated that the project "... did not involve the development of a costing framework".⁶¹ Given such an assertion, the Tribunal cannot reasonably conclude that project 20 should have received points in the evaluation.

77. The Tribunal concludes that 4 Plan would have been awarded 20 of the 30 extra points that would have been required to become the winning bidder. However, the Tribunal cannot limit itself to an assessment of where 4Plan should have been based on the scoring/evaluation methodology of the solicitation because it was so fundamentally flawed. Indeed, by using evaluation criteria that had no objective basis, because they were either not defined or undisclosed, SSC effectively conducted a sole-source procurement under the guise of a competitive process.

78. As such, the Tribunal finds that SSC's breaches effectively prevented 4Plan from having the opportunity to meaningfully participate in the procurement process. Consequently, after considering all the relevant circumstances as set out in subsection 30.15(3) of the *CITT Act*, the Tribunal finds that the appropriate remedy is compensation to 4Plan for the lost opportunity to earn profit in the amount of the reasonable profit that it would have made, had it been awarded the contract.

COSTS

79. The Tribunal awards 4Plan its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award in this complaint, the Tribunal has considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings.

59. Exhibit PR-2014-030-01 at 6, Vol. 1.

60. Exhibit PR-2014-030-023 at para. 22, Vol. 1C.

61. Exhibit PR-2014-030-21 at 7, Vol. 1C.

80. The Tribunal's preliminary view is that this complaint case has a complexity that corresponds to the medium level of complexity referred to in Appendix A of the *Guideline*. The subject matter of the procurement was medium. The complexity of the complaint was medium, as it involved extended analysis and comparison of several points. The complexity of the proceedings was medium, since it involved a motion and additional submissions beyond the normal scope of proceedings, and no public hearing was held.

81. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION OF THE TRIBUNAL

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

83. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that SSC compensate 4Plan for its lost opportunity to earn profit in the amount of the reasonable profit that it would have made, had it been awarded the contract. The Tribunal recommends that 4Plan and SSC negotiate the amount of that compensation and, within 30 days of the date of this determination, report back to the Tribunal on the outcome of the negotiations.

84. Should the parties be unable to agree on the amount of compensation, 4Plan shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. SSC will then have 7 working days after the receipt of 4Plan's submission to file a response. 4Plan will then have 5 working days after the receipt of SSC's reply submission to file any additional comments. Counsel are required to serve each other and file with the Tribunal simultaneously.

85. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards 4Plan its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by SSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the cost award and compensation.

Jason W. Downey

Jason W. Downey
Presiding Member