



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2014-048

Pomerleau Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, May 21, 2015*

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IN THE MATTER OF a complaint filed by Pomerleau Inc. 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*;

AND FURTHER TO a motion by the Department of Public Works and Government Services requesting the Canadian International Trade Tribunal to cease the inquiry into the complaint.

BETWEEN

POMERLEAU INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

The Canadian International Trade Tribunal hereby dismisses the motion brought by the Department of Public Works and Government Services to cease the inquiry.

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid, with each party to bear its own costs.

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Peter Burn
Presiding Member

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STATEMENT OF REASONS

COMPLAINT PROCEEDINGS

1. On January 7, 2015, Pomerleau Inc. (Pomerleau) 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 The complaint concerned a Request for Proposal (RFP) (Solicitation No. PWG299610) for construction management (CM) services (the CM RFP).² Pomerleau alleged that the CM RFP was conducted by Brookfield Johnson Controls Canada LP (BJCC) (a private party) on behalf of the Department of Public Works and Government Services (PWGSC).

2. Pomerleau alleged that its bid was improperly found non-compliant because provisions of the CM RFP were misinterpreted and/or misapplied, that undisclosed criteria were used during the evaluation and that unwarranted clarifications were sought. Essentially, the allegation of improper evaluation is as follows: Pomerleau argued that the CM RFP allowed it to include profit and overhead costs in the hourly rates for its proposed resources or that the CM RFP was ambiguous; and PWGSC and BJCC argued that Pomerleau's bid was properly found non-compliant because the CM RFP clearly precluded such inclusions.

3. As a remedy, Pomerleau requested that its bid be re-evaluated and that, if Pomerleau's bid were to be the top-ranked proposal, the contract with the winning bidder be cancelled and awarded to Pomerleau. In the alternative, Pomerleau requested that it be awarded its lost profits and compensation for lost opportunity, or that it be awarded its bid preparation costs. It also requested its costs of preparing and filing the complaint.

4. On January 14, 2015, the Tribunal informed PWGSC that the complaint had been accepted for inquiry pursuant to subsection 30.11(2) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³

5. For 15 days, PWGSC did not acknowledge receipt of the Tribunal's notice of inquiry, that is, until January 29, 2015; at that time, PWGSC informed the Tribunal that the contract had been awarded and confirmed the deadline of February 9, 2015, for the filing the Government Institution Report (GIR) in accordance with subrule 103(1) of the *Canadian International Trade Tribunal Rules*.⁴

6. On February 2, 2015, PWGSC requested an extension of time to file the GIR until February 24, 2015, on the basis that it required extra time to review jurisdictional and factual issues in the matter, as well as to gather all relevant documents and information.⁵ The Tribunal granted this request and informed the parties that the deadline for the issuance of its determination in respect of the complaint would be extended to 135 days after the filing of the complaint, that is, to May 22, 2015, pursuant to paragraph 12(c) of the *Regulations*.

7. PWGSC did not file a GIR by the extended deadline of February 24, 2015, that it had requested. Instead, on that day, PWGSC filed a motion to dismiss on the basis that the Tribunal did not have jurisdiction to inquire into the complaint. It also requested that the deadline to file the GIR be held in abeyance pending resolution of the motion.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. Exhibit PR-2014-048-31A (protected), tab B, Vol. 2E.
3. S.O.R./93-602 [*Regulations*].
4. S.O.R./91-499 [*Rules*].
5. Exhibit PR-2014-048-07, Vol. 1B.

8. On February 26, 2015, Pomerleau raised several procedural and timeline concerns with the Tribunal and specifically took issue with PWGSC's dilatory conduct in the complaint proceedings to that date. As a mediating solution to some of those concerns, Pomerleau submitted that the decision on the motion to dismiss be merged with the decision on the merits of the case. It also requested the opportunity to file a further reply on the motion to dismiss.

9. On February 27, 2015, the Tribunal denied PWGSC's request to hold the deadline for filing the GIR in abeyance and set a new deadline of March 11, 2015. The Tribunal also directed Pomerleau to respond to the motion to dismiss by March 11, 2015 (with which Pomerleau complied) and for PWGSC to reply by March 18, 2015. PWGSC did not reply until March 23, 2015. The Tribunal denied Pomerleau's request to file a further reply, since it would have the opportunity to fully respond to PWGSC's motion in its responding submissions and would be able to reply to the GIR.

10. On March 10, 2015, PWGSC submitted that it was unable to respond to the substantive grounds of the complaint because it was not involved in the procurement process, and because "...it has no information on the specific allegations made by Pomerleau", and would therefore rely on any submissions made by BJCC in that regard. Coordinated with this, in letters dated March 10 and 11, 2015, BJCC requested intervener status in the proceedings and indicated that it would be prepared to file submissions on the substantive issues of the complaint by March 19, 2015. BJCC suggested that the Tribunal ought to have invited it to join these proceedings. On March 11, 2015, Pomerleau submitted that BJCC should not be permitted to file submissions on the substantive issues of the complaint, given the late stage in the proceedings.

11. On March 12, 2015, the Tribunal granted BJCC intervener status and, while acknowledging Pomerleau's objection, allowed BJCC to file submissions by March 20, 2015.

12. On March 13, 2015, Pomerleau filed a motion asking the Tribunal to order the production of documents by PWGSC and/or BJCC. PWGSC and BJCC both objected to the motion on March 19, 2015. Pomerleau provided a reply on March 23, 2015.

13. On March 20, 2015, BJCC filed submissions in support of PWGSC's motion to dismiss and on the merits of the complaint.

14. On March 24, 2015, Pomerleau requested that the Tribunal decide the motion for production prior to deciding the jurisdictional issue and prior to Pomerleau filing its reply to BJCC's submissions. BJCC opposed the request. The Tribunal informed the parties on March 25, 2015, that all filing deadlines would remain in place. In a letter dated March 26, 2015, Pomerleau objected to the Tribunal's direction but indicated that it would comply with the existing filing deadlines.

15. On March 27, 2015, Pomerleau filed its responding submissions on the substantive issues (as addressed in BJCC's submissions) and on the jurisdictional issues (as raised in PWGSC's motion). It continued to maintain that these submissions were incomplete without access to the documents requested in its motion for production.

16. On April 1, 2015, the Tribunal ordered PWGSC to produce certain documents by April 10, 2015. PWGSC complied with the Tribunal's order, with the exception of certain appendices that were not filed until April 15, 2015. As directed by the Tribunal, Pomerleau filed its comments on these documents on April 16, 2015, PWGSC and BJCC filed responses on April 21, 2015, and Pomerleau filed its reply on

April 24, 2015. This left the Tribunal with less than a month to deliberate on the full exchange of pleadings prior to the May 22, 2015, deadline for the issuance of its determination in this matter.

17. Given that there was sufficient information on the record to decide 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.

DIRECTIONS TO COUNSEL

18. In its letter of January 14, 2015, notifying that it had accepted the complaint for inquiry, the Tribunal had specifically directed that the GIR "... address the matter of the alleged agency relationship between BJCC and PWGSC, as well as the substantive grounds of complaint."⁶ The Tribunal also directed PWGSC to the documents that Pomerleau was seeking to have disclosed.

Compliance with Tribunal Filing Instructions

19. By failing to provide a GIR on February 24, 2015 (41 days after the Tribunal's letter of January 14, 2015, and 48 days after the filing of the complaint), PWGSC by that time had already placed the inquiry in a procedurally difficult situation that the Tribunal had precisely sought to avoid from the inception of the inquiry, being mindful of the tight legislative time frames within which its work must be discharged. This effectively precluded the Tribunal from disposing of this matter under the 90-day time frame of paragraph 12(a) of the *Regulations* and thereby forced an extension of these proceedings to the 135-day time frame of paragraph 12(c).

20. PWGSC made matters worse by failing to inform the Tribunal in a timely manner that it would be requiring BJCC's involvement in this case, as a separate party (instead of PWGSC coordinating that intervention itself) and by failing to abide by the requirements of the *Rules* in respect of the production of documents. As a result of PWGSC's actions or inactions, the complaint proceedings became unnecessarily complicated.

21. As officers of the court, counsel for PWGSC must bring all issues of importance to the Tribunal's attention in a prompt and forthright manner. They failed to do so in this matter. The Tribunal trusts that counsel for PWGSC will act differently in the future. The entirety of the evidence in this matter demonstrates that PWGSC and BJCC have a symbiotic relationship. If PWGSC purported this was not the case for tactical reasons (so as to dispel the nature of that relationship), this would have been disingenuous and unacceptable behaviour by counsel.

22. The Tribunal had given explicit instructions that the GIR was to cover both any jurisdictional and substantive complaint issues. PWGSC should have sought permission to file a separate motion to dismiss as soon as possible after the Tribunal first communicated with PWGSC on January 14, 2015, or at the very latest at the moment that it decided that it would be bringing such a motion, particularly so given the fact that PWGSC had asked for, and was granted, an extension of time to file the GIR.

23. In addition, the Tribunal does not accept that, between January 14 and March 10, 2015, that is, for some 55 days since having been notified of the complaint, PWGSC would not have been acutely mindful of (and communicated to BJCC) the need for the coordination of a response between it and BJCC in this matter.

6. Exhibit PR-2014-048-05, Vol. 1B.

24. The time frame within which the Tribunal must render a decision according to paragraph 12(c) of the *Regulations* runs from the date of filing of the complaint (January 7, 2015). Therefore, on March 10, 2015 (day No. 62 of 135), when PWGSC and BJCC notified the Tribunal that their separate involvement was required to answer this complaint, there remained only 73 days to complete the exchange of pleadings (which were complicated by PWGSC's failure to disclose documents) and for the Tribunal to subsequently deliberate and render its determination. Had the Tribunal needed to hold an oral hearing, the procedural delays caused by PWGSC's conduct would have had compounding consequences and may have seriously jeopardized the Tribunal's ability to discharge its mandate within the time frame provided for by Parliament. No government institution should place the Tribunal in that situation again.

25. PWGSC's failure to comply with the requirements of the *Rules* in respect of the production of documents is examined in the section that follows.

Compliance with the Rules Pertaining to the Filing of Documents, Evidence and Information

26. Paragraphs 103(2)(c) and (e) of the *Rules* require a government institution to file "... all other documents relevant to the complaint . . . [and] any additional evidence or information that may be necessary to resolve the complaint." Tribunal case law shows that government institutions routinely fail to comply with this requirement. This failure to comply should cease.

27. The *Rules* impose on government institutions a significant duty of transparency and cooperation to be immediately forthcoming with the provision of documentary evidence. A complainant should be able to count on the proper respect of the *Rules* by government institutions and should not be unnecessarily required to bring a motion for the production of documents.

28. This is so precisely because of the very short legislative time frames for the filing of complaints, the exchange of submissions between the parties, the convening of an oral hearing if necessary and ultimately for the Tribunal to deliberate on a complaint.

29. Procedural fairness must be guaranteed and is provided for by the legislative framework. But this framework was never meant to mimic that of the courts, and neither counsel for a government institution nor private counsel should behave as if it did. The Tribunal's procurement review mechanism does not provide for a court-like discovery process, and there is little time to conduct a *voir dire* on the relevance of documents that are purported to be necessary to inform the Tribunal's inquiry.

30. While fishing expeditions by complainants will not be countenanced by the Tribunal any more than they are by the courts, when a complainant can precisely identify a document in its complaint (for example, because it is specifically referred to by name in another document that is already in its possession), such a document should be disclosed by the government institution. Objections to relevance should only be made for the most compelling of reasons and should therefore be a rarity. And it is not a compelling reason to object to or resist the production of readily obtainable documents merely for tactical reasons.

31. The documents for which the Tribunal ordered production in this case on April 1, 2015, all fell within that class of documents that were identified by name elsewhere in the record. Without exception, each of those documents should have been produced by PWGSC upon request without requiring the complainant to bring a motion for production.

32. For the future, the Tribunal trusts that government institutions will comply fully with the documentary disclosure requirements of the *Rules*.

MOTION TO CEASE INQUIRY FOR LACK OF JURISDICTION

33. The parties made lengthy submissions on the issue of the Tribunal's jurisdiction to inquire into this matter. These submissions were generally off-point.⁷ For the reasons given below, the Tribunal finds that it has jurisdiction and hereby dismisses PWGSC's motion to cease the inquiry.

34. To explain the Tribunal's finding that the CM RFP constitutes primary public procurement of construction services for the Government of Canada (GOC) requires an understanding of how PWGSC delivers property management and project delivery services for the GOC and how BJCC took over PWGSC's role in those regards via the framework created by the Carling and Tunney's Pasture contract (Contract No. EP008-122111/001/GC)⁸ (RP-2 Contract). This is explained below.

PWGSC Provides Property Management and Project Delivery Services

35. In 2010, the GOC purchased a campus-type setting of land and buildings in Ottawa then known as the "Nortel Campus". The GOC's goal for the now-renamed "Carling Campus" is to be able to house, in one place, a number of activities of the Department of National Defence (DND) that now take place in various other locations. DND would therefore be the Carling Campus's main tenant.

36. By its own account "PWGSC manages one of the largest and most diverse portfolios of real estate in the country."⁹ The acquisition of the Carling Campus added to that portfolio. That is so because, "[p]ursuant to the Department of Public Works and Government [Services] Act, and as stated in the Treasury Board Policy on the Management of Real Property, PWGSC acts as a common services provider to the Government of Canada and is the designated custodian of general-purpose office accommodation in Canada, provided on an obligatory basis to departments, and sets the standards for them."¹⁰ In discharging that mandate, PWGSC has "... a responsibility to maintain *property management* and *project delivery* services for all tenants ..." [emphasis added], such as DND in this case.¹¹

37. PWGSC maintains the capacity to deliver those services in-house. It will also out-task them to the private sector. This is done in accordance with PWGSC's Real Property Branch's National Service Management Strategy (NSMS). The NSMS "... advocates leveraging the private sector to build service capacity and agility. ... More specifically, the NSMS identifies services that offer the greatest opportunity for building capacity by leveraging the private sector, and develops delivery mechanisms for identified service priorities to enable effective out-tasking. This effectively represents a shift of focus for in-house [PWGSC] resources away from delivering services directly to managing the services delivered by private sector service providers."¹²

7. Exhibit PR-2014-048-01 at paras. 135-49, Vol. 1; Exhibit PR-2014-048-12 at paras. 38-50, Vol. 1C; Exhibit PR-2014-048-18, Vol. 1G; Exhibit PR-2014-048-31 at paras. 59-223, Vol. 1G; Exhibit PR-2014-048-32 Vol. 1K. Pomerleau was more helpful only very late in the proceedings. See Exhibit PR-2014-048-46 at para. 17, Vol. 1-M.

8. Exhibit PR-2014-048-31, tab A, Vol. 1H.

9. Section 5.1.1.2 of the RP-2 Contract.

10. Section 5.1.1.1 of the RP-2 Contract.

11. Section 5.1.1.6 of the RP-2 Contract.

12. Section 5.1.1.4 of the RP-2 Contract.

38. In September 2012, in accordance with the NSMS, PWGSC decided that it would seek a private-sector partner for the management of certain real property, including for the Carling Campus.¹³ To identify that partner, PWGSC issued an RFP titled “Real Property - 2 Property Management Services, Project Delivery Services and Optional Services”¹⁴ (the RP-2 Solicitation).

The RP-2 Contract: BJCC Steps into PWGSC’s Shoes

39. BJCC was the successful bidder for the RP-2 Solicitation and, as a result, on May 29, 2013, PWGSC and BJCC entered into the RP-2 Contract.¹⁵ Under the terms of the RP-2 Contract, PWGSC executed its decision to out-task part of its management of the Carling Campus to BJCC, instead of doing it entirely in-house.

40. The work provided for in the RP-2 Contract is divided in two distinct categories of work that match those for which PWGSC is responsible for all tenants, that is, “Property Management Services” and “Project Delivery Services”.

41. “Property Management Services” (Work Category 1) comprise 15 subcategories of work that pertain to the day-to-day operations of properties. None of those 15 subcategories of “Property Management Services” pertain however to real property projects.

42. Instead, the section of the RP-2 Contract titled “Project Delivery Services” (Work Category 2) informs the reader as follows:

[PWGSC] undertakes a wide array of *real property projects* including:

- new construction;
- repairs;
- improvements intended to extend the life of the asset and enhance its performance;
- enhancement of existing assets to prevent or delay functional obsolescence;
- base building and fit up alterations to meet tenants’ operational requirements; and
- fit ups and refits including space optimization¹⁶

[Emphasis added]

43. The project delivery services of Work Category 2 are divided into two cost categories: (1) \$5,000 to \$24,999 (Cost Category 1); and (2) \$25,000 to \$999,999 (Cost Category 2). A third category of work lays out an option exercisable by PWGSC for “Optional Project Delivery Related Services – Projects \$1,000,000.00 and Over” (Work Category 3).

44. Work Category 3 is essentially a third cost category (Cost Category 3) for Work Category 2, with any work to be performed under Cost Category 3 to be done within the framework provided for under Cost/Work Category 2 applied *mutatis mutandis*. In contrast, there are differences in the nature of the work (not just the monetary value) provided for under Cost Categories 1 and 2.

13. The RFP was for two government assets—the Carling Campus and the Tunney’s Pasture Campus. See section 1.4.1 of the RP-2 RFP, Exhibit PR-2014-048-01, Vol. 1.

14. Exhibit PR-2014-048-01, “Public Exhibit 2”, Vol. 1.

15. Exhibit PR-2014-048-31, tab A, Vol. 1H.

16. Section 5.4.1.1 of the RP-2 Contract.

45. Work Categories 2 and 3 of the RP-2 Contract specifically provide for the “. . . tender[ing] [of] the *construction* portion of . . . [any] project”¹⁷ [emphasis added] and preclude BJCC from bidding on such opportunities. As a result, BJCC is therefore precluded by section 1.16 of the RP-2 Contract from being a “potential supplier” of construction services acquired via the RP-2 Contract.¹⁸

46. The RP-2 Contract requires BJCC to “. . . deliver a program of projects . . .”¹⁹ However, that “program of projects” is not defined in the RP-2 Contract.²⁰ In fact, the RP-2 Contract contemplates that there may be no projects for BJCC to deliver at all, as it provides that PWGSC “. . . reserves the right to select projects for delivery through its own internal resources [i.e. by using in-house PWGSC traditional methods of project delivery] and/or through third parties, rather than through [BJCC] and will advise [BJCC] in advance of such projects as part of the project planning process”,²¹ in which case BJCC would be relegated to simply “. . . working collaboratively with the other stakeholders, in the execution of their work.”²²

47. In other words, the RP-2 Contract provides PWGSC with recourse to BJCC services on an as-and-when needed basis when PWGSC chooses to out-task a given project for which it is responsible as the mandated GOC-wide project delivery service provider. When and if that decision is made, BJCC takes over PWGSC’s project delivery function as if it were PWGSC (with the exception that BJCC requires PWGSC’s directing mind for various approvals).²³

48. When the delivery of such projects comprises the tendering of the construction portion of any of those projects, as in the case when BJCC conducted the CM RFP, BJCC steps into PWGSC’s shoes as if it were PWGSC.

CM RFP: BJCC Conducts Public Procurement of Construction Services for PWGSC

49. The Carling Campus Project (CCP) is a PWGSC-led project to retrofit the Carling Campus. The CCP is a real property project involving construction, with a budget exceeding \$1 million. PWGSC decided

17. Section 5.4.2.16 of the RP-2 Contract, seventh bullet.

18. See definition of “potential supplier” in section 30.1 of the *CITT Act*. See, also, section 1.16, “Conflict of Interest”, of the RP-2 Contract which provides as follows: “[BJCC] agrees that during the term of the [RP-2] Contract, [BJCC] shall be considered to *not be eligible* to present a bid in response to any other competitive procurement for the performance of any work, such as property management services, project delivery services or optional services as described herein [i.e. in the RP-2 Contract], related to the assets defined in this Solicitation [i.e. the RP-2 Solicitation] and the resulting [RP-2] Contract. This clause does not preclude [BJCC] from bidding on a future replacement contract for RP-2” [emphasis added]. This is logical because BJCC, as PWGSC’s consultant, will have been intimately involved in the preparation of the definition of requirements of any construction services that are to be tendered. It is also logical because the file does not reveal BJCC to be a construction company, but rather a project management company.

19. Section 5.4.1.8 of the RP-2 Contract.

20. The Tribunal notes that it is not surprising that the term “program of projects” is not defined in the RP-2 Contract because the RP-2 Contract specifically calls upon BJCC to (1) help PWGSC define what those projects should be and (2) compete those projects by way of a call for tender. Again, the RP-2 Contract constitutes BJCC as a project manager and a procuring entity in the same role that PWGSC traditionally plays by itself.

21. Section 5.4.1.22 of the RP-2 Contract.

22. Section 5.4.1.22 of the RP-2 Contract.

23. Section 4 RP-2 of the Contract.

that it would involve BJCC in the delivery of that project under the option provided in the RP-2 Contract for Work Category 3. The requisite authorizations were given.²⁴

50. The RP-2 Contract relates to the Carling Campus. It is important to recognize that the RP-2 Contract was *not* for the delivery of the entire CCP. This is ascertained from the fact that the RP-2 Contract did not define the overall requirements of the CCP. Indeed, the RP-2 Contract makes only passing reference to the CCP in less than a handful of instances, and only in reference to a security requirement.

51. Under the RP-2 Contract, BJCC could be involved, and did end up being involved, in assisting PWGSC in determining what the CCP would entail, so as to meet PWGSC's needs for its prospective tenant. However, the solicitation that led to the RP-2 Contract was not for the delivery of a turnkey CCP solution. By being awarded the RP-2 Contract, BJCC did not win the right to deliver a fully operational retrofitted Carling Campus. Rather, PWGSC used the RP-2 Contract in order to pursue its determination (with BJCC's assistance) of what the requirements of the CCP would be. Once those requirements were defined, they had to go to tender (via the CM RFP), as the construction component of the requirements had not been the subject of a prior competitive public procurement process.

52. PWGSC and BJCC argued that the CM RFP constitutes subcontracting.²⁵ That is incorrect.

53. The RP-2 Contract does provide for subcontracting. However, to subcontract construction services, BJCC would have had to have been under contract to provide construction services. It was not.

54. The RP-2 Contract requires BJCC to “deliver a *program of projects*” [emphasis added] by “... *manag[ing]* each project through *the stages of project delivery*” [emphasis added].²⁶ The CM RFP relates to Work Categories 2 and 3 of the RP-2 Contract in the very limited sense that BJCC must deliver a certain procurement process as part of its obligation to “deliver a program of projects.” Again, Work Categories 2 and 3 require BJCC to manage the delivery of a program of projects (that include the delivery of certain procurement processes) but do not require it to retrofit the Carling Campus or, for that matter, to build anything whatsoever. This fact is paramount, underscoring the fact that the RP-2 Contract is not *for* project construction *per se*.

55. The CM RFP provides that construction management services will comprise the following:

- Advice during Design
- Construction
 - Construction in accordance with the construction documents produced during design
 - Commissioning of projects
 - Construction stage report
- Post construction
 - Post construction stage report including lessons learned²⁷

24. Exhibit PR-2014-048-18A (protected), tabs B-E, Vol. 2D.

25. For PWGSC, see Exhibit PR-2014-048-12 at paras. 7, 25, 28, 50, 53, 61-68, 87-90, 96, 98, 112, 116, 119, Vol. 1C. For BJCC, see Exhibit PR-2014-048-31 at paras. 5-7, 22, 69, 75, 82-88, 92, 111-12, 125, 155, 192, 214-17, 280, 282, 287, Vol. 1G.

26. Sections 5.4.1.8 and 5.4.1.9 of the RP-2 Contract.

27. CM RFP at 59-60.

56. While the “advice during design” and “post construction” components could be considered “subcontracting” of part of BJCC’s planning role under the RP-2 Contract,²⁸ “construction” cannot be considered “subcontracting” because construction is not provided as a deliverable under section 5.4.2.16. Therefore, the portion of the CM RFP relating to “construction” constitutes a contracting of PWGSC’s requirements unforeseen by the RP-2 Contract. Under section 5.4.2.16 (sixth and seventh bullets), the contracting of projects that have received both “preliminary project approval” and “effective project approval” is to “*proceed to tender*” for “*the construction portion of the project*” [emphasis added].²⁹

57. Subcontracting of construction services is envisaged in the framework, but only by the successful CM company at the conclusion of the CM RFP (in this case, by EllisDon Corporation, a construction company, when it starts building/construction and retrofitting work).³⁰

58. Subcontracting of other work is also provided for elsewhere in the RP-2 Contract. Work from Work Category 1 would lend itself to subcontracting by BJCC.³¹ For example, it would be expected that “Building Cleaning” (section 5.3.6) or “Grounds Upkeep and Landscaping” (section 5.3.9) be subcontracted by BJCC under section 5.6.5 to cleaning and landscaping companies respectively.

59. BJCC is not under contract to do any construction or retrofitting whatsoever. Therefore, it cannot “subcontract” work for which it does not have a contractual obligation. BJCC’s construction or retrofitting role in respect of prospective “Project Delivery Related Services” is limited to planning, running tendering processes and managing contract performance by the winning bidder, in lieu of PWGSC as and when required. When it issued the CM RFP, BJCC stepped into PWGSC’s shoes to engage in the primary tendering of construction services for the GOC.

Tribunal has Jurisdiction to Inquire

60. The RP-2 Contract creates a structure whereby PWGSC has substituted BJCC for itself to conduct the tendering of various services, including the construction management services in the CM RFP for the CCP. In essence, the RP-2 Contract makes BJCC a private sector arm of PWGSC, allowing PWGSC, in accordance with the NSMS, to direct BJCC to perform work under PWGSC’s direction that it would otherwise perform directly itself—notably the conduct of procurement processes such as the CM RFP.

61. One of the “stages of project delivery” related to the CCP was the tendering of its construction. BJCC became authorized by PWGSC via the RP-2 Contract to manage the *procurement process* for acquiring construction management services and construction services for the CCP.³² Any work done under the RP-2 Contract, including the delivery of procurement processes, and the resultant previously uncompleted construction work become the property of the Government of Canada.³³

28. Section 5.4.2.16 of the RP-2 Contract—first bullet for planning, last bullet for “project completion survey”.

29. The sixth bullet provides as follows: “upon the Technical Authority’s preliminary project approval, for each project conduct a design review and complete a final design, prepare a Class A estimate and tender documents”. The seventh bullet provides as follows: “upon the Technical Authority’s direction to do so, reconfirm the project scope, schedule and cost, through an amended Investment Analysis Report and seek the Technical Authority’s effective project approval to proceed to tender the construction portion of the project”.

30. See section GC 3.7 of the CM RFP.

31. Sections 5.3.1-5.3.15 of the RP-2 Contract.

32. Exhibit PR-2014-048-18A (protected), tabs B-E, Vol. 2D.

33. Sections 2.1 and 2.19 of the RP-2 Contract.

62. The framework described above constitutes public procurement; and public procurement conducted via a private party is public procurement nonetheless.

63. It follows that the Tribunal has jurisdiction to inquire, because the CM RFP constitutes a “designated contract” pursuant to the *Regulations*, as if it had been conducted by PWGSC itself. As the procuring government institution, PWGSC is accountable to ensure that the procurement (as delegated contractually under the RP-2 Contract to be conducted by BJCC) is carried out in conformity with the obligations of the trade agreements.³⁴ It was PWGSC’s responsibility to decide how it involved BJCC in responding to the complaint.

MERITS OF THE COMPLAINT

Relevant Provisions of the CM RFP

64. The CM RFP was issued on August 15, 2014, to three pre-qualified parties, EllisDon Corporation, PCL Construction Canada Inc. and Pomerleau.

65. Regarding the ability to seek clarifications or confirmations, section A.1.7 of the CM RFP provides as follows:

BJCC may verify or seek clarification or confirmation of any information submitted in a Proposal. Proponents agree to assist BJCC in this regard by making themselves, their facilities, and all reasonably requested information available to BJCC upon request within the timeframe requested. Additional information obtained by BJCC through these means shall, in its sole discretion, be determined to constitute part of a Proposal. If BJCC determines, in its sole discretion, a Proposal to contain false or misleading information, it may reject the Proposal.

Each Proponent acknowledges that BJCC had the right to verify any information in respect of a Proposal after contract award and that any false, erroneous, or misleading information is sufficient grounds for cancellation of a contract at the sole expense of the Proponent and at the sole discretion of BJCC.

66. Section A.3.8 of the CM RFP confirms the right to seek clarifications and/or confirmations as follows:

BJCC reserves the right to request clarifications and/or confirmations from any or all Proponents regarding any aspect of a Proposal. In the event such clarifications and/or confirmations are requested, the Contracting Officer will make the request. The request for clarification and/or confirmation will be directed to the person identified by each Proponent as the prime contact of the Proponent. A written response to BJCC for each such communication is required from the Proponent within the timeframe specified in such communication.

67. Regarding compensation, section C.1.1 of the CM RFP provides as follows:

It is the intention of BJCC to compensate the [construction manager] in accordance with the contract documents, as follows:

- a. Construction Manager’s Fee based on the percentage of actual construction cost where such percentage shall be identified by each Proponent in the Financial Proposal.

34. See sections 2-4 of the *Regulations*. The value of the CM RFP is greater than the minimum threshold for construction services under all applicable trade agreements.

- b. Hourly Rate Structure applicable to Construction Manager labour costs. Proponent to provide hourly rate for each team member described in the Team Structure organization chart provided in the Proposal.

68. Section C.1.3 of the CM RFP provides for the “Calculation of Construction Costs for Purposes of [construction manager] Fee” as follows:

For the purposes of calculating the construction cost for this RFP, Proponents must use the figures shown for Phase 1 Total in the table in “B.3 Project Construction Budget (excluding taxes)” LESS the amount of the anticipated cost of the [construction manager’s] labour as calculated in Section “E.4 Evaluation Process”, and Non-Reimbursable Costs. For example, if the Construction Cost shown in the table is \$101.8 M, and the Proponent proposes \$5M of [construction manager] direct labour, then the construction cost would be reduced to \$96.8M. For greater certainty, services provided by those employed by the [construction manager] shall not be included in the calculation of Construction costs, and shall not attract a Construction Manager’s Fee.

69. Section C.1.4 of the CM RFP sets out “Reimbursable and Non-Reimbursable Costs” as follows:

The costs reimbursed to the [construction manager] will be the sum of the Reimbursable Costs which are reasonable and properly incurred in the performance of the work, less any applicable credits, rebates, and/or recoverable costs. These costs must be determined in accordance with the [construction manager’s] cost accounting practices as accepted by BJCC during contract initiation and applied consistently over time. It is the responsibility of the [construction manager] to demonstrate the actual Reimbursable Costs that have been incurred in the performance of the Statement of Work.

Only those Reimbursable Costs which the [construction manager] can demonstrate as having been incurred will be reimbursed to the [construction manager]. Reimbursable Costs will be reimbursed to the [construction manager] *without mark-up for overhead or profit*. Reimbursable Costs incurred between the date of the Contract Award and the contract completion date will be reimbursed to the [construction manager].

Costs not specifically identified as Reimbursable Costs will not be reimbursed to the [construction manager] and are *included in the [construction manager’s] fee*. Only Costs of direct services work will be reimbursed to the [construction manager]. Reimbursement of Reimbursable Costs will be subject to audits by BJCC. Should the results of the audits by BJCC show that there has been an overpayment, it must be promptly refunded to BJCC.

[Emphasis added]

70. Section C.1.5 of the CM RFP deals with “Reimbursable Costs” and provides as follows:

The following costs, unless identified as Non-Reimbursable Costs, where authorized and demonstrated as having been incurred, are Reimbursable Costs and are reimbursable to the [construction manager] *at cost and without mark-up, overhead, profit, or Construction Manager’s Fee*:

- a. Direct Labour Costs – meaning the costs of the portion of gross wages or salaries, benefits and the [construction manager’s] contributions to benefit plans and legislated programs such as Employment Insurance and Canada Pension Plan, incurred in the direct performance of the work.

71. In respect of “Non-Reimbursable Costs”, section C.1.6 of the CM RFP provides as follows:

Despite that the following costs may have been reasonable and properly incurred by the [construction manager] in the performance of the work, they are considered Non-Reimbursable

Costs and are not reimbursable to the [construction manager]. **Non-Reimbursable Costs shall be included in the [construction manager's] Fee.** The following are Non-Reimbursable Costs:

All costs, including direct labour and subcontract costs, related to performance of work which is overhead in nature and is required to facilitate the delivery of direct services. These include but are not limited to:

- a. Costs related to human resources functions such as recruitment, hiring, training, employee support and compensation;
- b. Costs related to financial and accounting functions; . . .
- c. Costs related to development and maintenance of IM/IT systems;
- d. Costs related to operation of IM/IT systems;
- . . .
- u. Any other costs, related to any or all work, not specifically identified as an Allowable Cost;
- v. Cost of labour and material bonds and performance bonds.

[Bold in original]

Grounds of Complaint are Unfounded

72. Under section C.1.5 of CM RFP, direct labour costs (DLCs) were one of a series of “Reimbursable Costs” that “. . . are reimbursable to the [construction manager] *at cost and without mark-up, overhead, profit or Construction Manager’s Fee*” [emphasis added]. DLCs were defined as “. . . the costs of the portion of gross wages or salaries, benefits and the [construction manager’s] contributions to benefit plans and legislated programs such as the Employment Insurance and Canada Pension Plan, incurred in the direct performance of the work.”

73. Pomerleau was the only bidder that included amounts for both profit and overhead in its proposed DLCs. Pomerleau’s bid was found to be non-compliant on that basis. BJCC discovered the basis of this non-compliance at the time of bid evaluation after having posed a series of questions asking for confirmation of aspects of bidders’ proposals, including with respect to what overhead and profit had been included in their respective DLCs.³⁵

74. Pomerleau alleges that BJCC should not have posed the questions that it did that led to the revealing of these facts. That argument is without basis. The CM RFP gave BJCC the right to seek clarifications and confirmation of any information submitted in a proposal and provided that the answers given by a proponent would form part of its proposal.³⁶ This is standard in most every procurement process.

75. Pomerleau argues that its avowed inclusion of profit and overhead in its DLCs is “. . . not material as PWGSC would be obtaining the required services at the lowest cost”³⁷ if Pomerleau’s bid was priced lower than competing bids. That argument too is without merit, because it asks the Tribunal to ignore the fundamental tenet of procurement law to the effect that a bid must comply with all stated requirements to be considered responsive.³⁸ Bids are either compliant or they are not. A shortcoming of a non-compliant bid

35. Exhibit PR-2014-048-01 at para. 23, Vol. 1. See, also, Exhibit PR-2014-048-31 at paras. 46-50, 302-326, Vol. 1G.

36. Sections A.1.7 and A.3.8 of the CM RFP.

37. Exhibit PR-2014-048-01 at para. 176, Vol. 1.

38. *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619, 1999 CanLII 677 (SCC).

cannot be ignored because that would be tantamount to allowing bid repair for convenience sake; the acceptance of any such practice would cause serious prejudice to the integrity of the competitive procurement system and therefore cannot be condoned.

76. Pomerleau further argues that any prohibition of profit and overhead inclusions in the DLCs is commercially unreasonable because it would mean that proponents would be providing their resources for free.³⁹ That proposition is not for the Tribunal to judge *a priori*: a solicitation may contain seemingly commercially unattractive conditions without creating a violation of the trade agreements; it is up to potential suppliers to evaluate how commercially attractive, or unattractive, an opportunity may be, and decide accordingly on whether to bid or not. Pomerleau had to evaluate its commercial interest in bidding on the CM RFP in accordance with the terms that it contains and in light of the revenue generating structure for which it provides, not according to what Pomerleau would have liked that structure to be (nor according to how it misunderstood it to be).

77. The Tribunal finds that the revenue generating structure of the CM RFP was clear—there was to be no mark-up of the direct labour cost and overhead costs related to supplying this direct labour were to be met indirectly through the construction manager’s fee. BJCC described this properly as follows: “. . . the RFP does not deny Proponents the ability to include profit in their pricing. Rather, the RFP requires that profit (and overhead) be included in the Construction Manager’s Fee only and not in the hourly labour rates. It is a common practice in the construction industry for contracting authorities to expressly prescribe which portions of a financial proposal can include profit and overhead and which cannot. Profits and overhead are routinely reserved solely for the Construction Manager’s Fee.”⁴⁰

78. Finally, Pomerleau argues that the inclusion of the word “invoiced” in section D.2.4 of the CM RFP would have both prohibited the inclusion of profit and overhead for labour costs at the time of *invoicing* but also allowed them at the time of *bidding* (“. . . by necessity these items were required to figure internally within the [DLC] Rates”).⁴¹ The Tribunal finds no merit in the logic of that proposition nor support for it in the terms of the CM RFP which are clear and devoid of any ambiguity whatsoever.

79. Section C.1.5 of the CM RFP provides that DLCs are “. . . are reimbursable to the [construction manager] *at cost and without mark-up, overhead, [or] profit . . .*” To accept Pomerleau’s position would be to accept that the provision stopped after the words “at cost”. The Tribunal cannot selectively read the requirement by ignoring words that it contains. The ordinary grammatical meaning of all the words of that requirement, read in context, provides that the DLCs that are bid will be a direct pass-through reimbursement without mark-up, overhead or profit (i.e. the DLCs cannot contain such components). As such, the use of the verb “invoiced” in section D.2.4 can only be read as a reminder to abide by such conditions when billing for payment. Because Pomerleau’s bid contained those components, it was properly found to be non-compliant by BJCC.

80. The complaint does not disclose a violation of the trade agreements.

39. Exhibit PR-2014-048-38 at para. 93, Vol. 1K.

40. Exhibit PR-2014-048-31A (protected) at para. 317, Vol. 2E.

41. Exhibit PR-2014-048-01 at paras. 169-72, Vol. 1. The Tribunal notes that BJCC correctly indicates that section D.3 of the CM RFP instructed proponents to refer to section C.1 for details concerning, *inter alia*, labour rates that apply to bidders’ financial proposals. Exhibit PR-2014-048-31 at paras. 317, 306-307, Vol. 1H.

COSTS

81. Success in these proceedings was divided. Pomerleau was successful in countering PWGSC's motion to cease the inquiry, but ultimately PWGSC was successful in defending the integrity of the procurement process vis-à-vis its obligations in respect of the trade agreements. Accordingly, each party will bear its own costs.

DETERMINATION

82. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid, with each party to bear its own costs.

Peter Burn

Peter Burn
Presiding Member