



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2014-055

Deloitte Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, June 10, 2015*

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IN THE MATTER OF a complaint filed by Deloitte 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*.

BETWEEN

DELOITTE INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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 in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Deloitte Inc. for its lost profits. The Canadian International Trade Tribunal recommends that Deloitte Inc. and the Department of Public Works and Government Services 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, Deloitte Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have seven working days after the receipt of Deloitte Inc.'s submission to file a response. Deloitte Inc. will then have five working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments. Counsel are required to serve each other and file with the Canadian International Trade Tribunal simultaneously.

Further, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Deloitte Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Procurement Costs Guideline*, 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 article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Stephen A. Leach
Stephen A. Leach
Presiding Member

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STATEMENT OF REASONS

SUMMARY

1. On February 12, 2015, Deloitte Inc. (Deloitte) 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 proposal (Solicitation No. W8484-14P2KP/B) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND). The request for proposal (RFP) was for change management services.

2. Deloitte alleged that PWGSC improperly evaluated its bid, used undisclosed criteria to evaluate its bid and failed to provide a meaningful debriefing.

3. As a remedy, Deloitte requested that the contract be set aside and that it be awarded the contract or, in the alternative, that PWGSC compensate Deloitte for the profit that it would have realized had the contract been awarded to it. In addition, Deloitte requested that it be awarded its reasonable costs associated with filing the complaint.

PROCEDURAL HISTORY

4. On June 18, 2014, PWGSC issued the RFP for change management services on behalf of DND. The initial bid closing date was extended to July 31, 2014.

5. On or around July 31, 2014, Deloitte submitted its bid in response to the RFP.

6. On October 10, 2014, PWGSC advised Deloitte that the contract had been awarded to KPMG LLP (KPMG). In its email, PWGSC provided a breakdown of the relative financial and technical scores for both Deloitte and KPMG, in addition to the Technical Evaluation Panel's commentary on Deloitte's technical bid and scores. PWGSC also informed Deloitte that, in accordance with the terms of the RFP, it did not intend to hold an in-person debriefing.

7. On October 23, 2014, Deloitte wrote to PWGSC objecting to the evaluation of its bid. In particular, Deloitte contended that PWGSC failed to award points for projects listed in its bid and that the evaluators used undisclosed criteria to evaluate its bid. Deloitte also maintained that PWGSC failed to provide a proper debriefing as required by the applicable trade agreements.

8. On October 23 and November 10, 2014, PWGSC wrote to inform Deloitte that it was reviewing the objections it submitted and that it would advise Deloitte of the outcome of that review in due course.

9. On December 8, 2014, Deloitte wrote to PWGSC to request an update on the review and to inquire when it could expect a response.

10. On December 10, 2014, PWGSC responded that the review was ongoing and that a response was forthcoming.

11. On January 12, 2015, Deloitte once again wrote to PWGSC to request an update on the review and to inquire when it could expect a response. PWGSC replied that same day indicating that a response should be provided by the following week.

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

12. On January 29, 2015, PWGSC wrote to inform Deloitte that its review was completed and that the results of the evaluation process remained unchanged.
13. On February 12, 2015, Deloitte filed a complaint with the Tribunal.
14. On February 18, 2015, the Tribunal informed the parties that the complaint had been accepted for inquiry on February 16, 2015, 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*.²
15. On March 16, 2015, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³
16. On March 20, 2015, Deloitte filed a request that PWGSC produce further documents and also requested an extension of time to file its comments on the GIR.
17. On March 23, 2015, the Tribunal granted Deloitte's request for an extension of time to file its comments on the GIR and directed PWGSC to file its response to the production request.
18. On March 26, 2015, PWGSC filed submissions opposing the production request on several grounds and provided additional information regarding the websites consulted by the evaluators in conducting their evaluation.
19. On March 31, 2015, Deloitte filed reply submissions in support of its production request.
20. On April 2, 2015, the Tribunal issued an order granting Deloitte's production request and directed PWGSC to file the evaluation guidelines, matrices or other methodology used by the evaluators to evaluate proposals, all materials relating to the evaluation of Deloitte's proposal, and any documents and information relating to the websites relied upon by the evaluators with respect to their evaluation of the "size of the organization" requirements at issue in the complaint.⁴
21. On April 10, 2015, PWGSC filed additional documentation as directed by the Tribunal in its production order.
22. On April 21, 2015, Deloitte filed its comments on the GIR and on the additional documents filed by PWGSC.
23. Given that there was sufficient information on the record to fully deliberate and decide upon the complaint, the Tribunal concluded 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

24. The complaint relates to the evaluation of three point-rated criteria listed in the RFP. Those three criteria, RT4, RT5 and RT6, each contained the following evaluation information:

2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.
4. Exhibit PR-2014-055-15, Vol. 1A.

Size of Organization

2 points: The project was for an organization with a minimum of 5,000 employees.⁵

In addition, criteria RT4 and RT5 contained the following:

Scope of Project

3 points: The project includes expenditure and personnel reduction exercises.⁶

25. The RFP set out the expected process for debriefings as follows:

At contract award, the Contracting Authority will notify all bidders of the name of the Contractor who has been awarded the contract as well as its total estimated value and as to why their bid was not selected. We do not intend to conduct in-person debriefs for this solicitation. Instead, the information set out in the regret letter will include the reason the bidder's proposal was not accepted.⁷

PROJECTS AT ISSUE

26. The four projects at issue in this complaint are as follows:⁸

Project	PWGSC Rationale	Score
RT4 Project 2: Real Property Business and Systems Transformation for PWGSC (Real Property Project)	“scope focused on developing a process and system for modernization and therefore did not demonstrate a [<i>sic</i>] expenditure and personnel reduction exercise”	0/3
RT5 Project 2: au critère technique coté for the U.S. Department of Defense (DoD) (DoD Project)	“performed for US DoD DCMO which is an organization of less than 5,000 employees . . .”	0/2
RT5 Project 3: Supply Chain Performance Improvements for Finning Canada (Finning Project)	“scope focused on re-design of supply chain as opposed to an expenditure and personnel reduction exercise”	0/3
RT6 Project 3: Transformation Program and Change Management for the Royal Australian Navy (RAN) (RAN Project)	“project was for a subset of the Royal Australian Navy which was less than 5,000 employees”	0/2

27. Deloitte submitted that it would have won the contract if it had been awarded four additional points.

POSITION OF THE PARTIES

Deloitte

28. Deloitte submitted that, in evaluating its bid, the evaluators breached the applicable trade agreements by either ignoring vital information or using undisclosed evaluation criteria and by failing to

5. Exhibit PR-2014-055-01, Tab E at 23-34, Vol. 1.

6. Exhibit PR-2014-055-01, Tab E at 23-24, Vol. 1.

7. Exhibit PR-2014-055-01, Tab E at 5, Vol. 1; Exhibit PR-2014-055-09 at para. 15, Vol. 1A.

8. Exhibit PR-2014-055-01, Tab A at 2, Vol. 1.

provide a sufficient debriefing. Had its bid been properly evaluated, Deloitte argued that it would have been the successful bidder.

29. To begin, Deloitte submitted that PWGSC failed to provide a sufficient debriefing, in contravention of the applicable trade agreements. In this respect, Deloitte pointed to the “absence of a meaningful response by PWGSC” to its letter of objection, in addition to PWGSC’s failure to provide all relevant information pertaining to the manner in which Deloitte’s bid was evaluated.⁹ As a result of this alleged breach, Deloitte argued that the procurement was not conducted in a transparent manner.¹⁰

30. In regard to the substance of its bid, Deloitte argued that the evaluators’ conclusion that neither the DoD Project nor the RAN Project were performed for organizations of over 5,000 employees was “factually incorrect”.¹¹ With respect to the DoD Project, Deloitte contended that its bid clearly demonstrated that the project was “a process driven by DCMO for the entire DoD” and that the DoD undoubtedly is an organization of more than 5,000 employees.¹² Similarly, Deloitte maintained that its bid unambiguously specified that the RAN Project was delivered to an organization with significantly more employees than the minimum requirement of 5,000.

31. Deloitte alleged that, in reaching its determination that the DoD and RAN Projects did not satisfy the Size of Organization criteria, the evaluators relied on undisclosed criteria. Specifically, Deloitte stated that “the evaluators assigned points for the ‘Size of Organization’ criteria by considering whether the project was delivered to a ‘sub-set’ of the Organization, and if so, the size of that ‘sub-set’.”¹³ Since the RFP only required the organization to consist of a minimum of 5,000 employees, by instead examining the “sub-set” of the organization, Deloitte argued that the evaluators introduced undisclosed criteria.

32. In addition, Deloitte asserted that the evaluators were inconsistent in their treatment of the DoD Project, which was accepted by the evaluators as satisfying the requirements of mandatory technical criterion MT4. In order to comply with MT4, the listed project was required to have been performed for an organization with a minimum of 20,000 employees.¹⁴ Since its bid was found to be compliant with MT4, Deloitte argued that the evaluators directly contradicted themselves by accepting that the DoD Project was performed for a minimum of 20,000 employees for the purposes of MT4, but then finding that same project was performed for less than 5,000 employees for the purposes of RT5.

33. Finally, Deloitte also maintained that the evaluators used undisclosed criteria to evaluate the Scope of Project requirements. While both RT4 and RT5 stated that points would be awarded if projects *included* expenditure and personnel reductions, Deloitte contended that the evaluators in fact assessed the actual *achievement* of expenditure and personnel reduction exercises.¹⁵ In doing so, Deloitte submitted that the evaluators used new criteria, which were not required by the RFP, to conclude that the Real Property and Finning Projects did not meet the Scope of Project criteria.

9. Exhibit PR-2014-055-01 at paras. 14, 19, Vol. 1.

10. Exhibit PR-2014-055-01 at para. 21, Vol. 1.

11. Exhibit PR-2014-055-01 at para. 47, Vol. 1.

12. Exhibit PR-2014-055-01 at paras. 61, 63, Vol. 1.

13. Exhibit PR-2014-055-17 at para. 14, Vol. 1A.

14. Exhibit PR-2014-055-01, Tab E at 19-20, Vol. 1.

15. Exhibit PR-2014-055-17 at para. 23, Vol. 1A.

PWGSC

34. PWGSC noted that the manner in which debriefings would take place was clearly specified in the RFP and that Deloitte did not object to this provision.¹⁶ In addition, PWGSC contended that it fully satisfied the debriefing obligations contained in the applicable trade agreements by providing Deloitte with:

- the identity of the winning bidder;
- the value of the winning bid;
- the total evaluation scores of the winning bid and of Deloitte's bid broken down into their technical and financial components;
- confirmation that Deloitte's bid was compliant with all of the mandatory requirements; and
- a detailed summary of the evaluation scores awarded in respect of Deloitte's bid for each of the point-rated criteria (RT1 to RT8), along with explanations for each point deduction made by the evaluators in respect of each criterion.¹⁷

In addition, PWGSC reiterated the statement in the RFP indicating that it did not intend to conduct an in-person debriefing.

35. With respect to the Size of Organization criteria, PWGSC noted that subsection 16(f) of the *Standard Instructions*, as incorporated into the RFP, explicitly states that "Canada may . . . verify any information provided by bidders through independent research, use of any government resources or by contacting third parties."¹⁸ Thus, after examining the contents of Deloitte's bid, PWGSC argued that the evaluators acted properly by consulting U.S. and Australian government websites and "applying their professional knowledge and expertise" in order to determine that neither the DoD Project nor the RAN Project were performed for organizations with a minimum of 5,000 employees.¹⁹

36. In response to Deloitte's contention that the DoD Project was treated inconsistently by the evaluators, PWGSC argued that, while the project may have been submitted in response to both MT4 and RT5, the actual project descriptions listed at those points in Deloitte's bid were very different. On the basis of the distinct descriptions provided in Deloitte's bid, PWGSC asserted that "the evaluation team had no basis to assume that the two project descriptions concerned the same project, as opposed to two parallel but different projects, one directed to the ODCMO and the other to the US DOD, as a whole."²⁰ Thus, PWGSC insisted that there was no inconsistency on the part of the evaluators, since the evaluation was conducted on the basis of the two different descriptions of the project provided for MT4 and RT5 respectively.

37. Finally, in evaluating the Scope of Project criteria for the Real Property and Finning Projects, PWGSC maintained that Deloitte's bid failed to demonstrate that either project included expenditure and personnel reduction exercises. Specifically, PWGSC contended that the description of the Real Property Project did not link the work completed with the achievement of expenditure and personnel reductions.²¹ Similarly, PWGSC argued that the text describing the Finning Project "did not include any quantifiable personnel reductions".²² As such, PWGSC submitted that the evaluators properly concluded that neither the Real Property nor the Finning Project satisfied the Scope of Project criteria.

16. Exhibit PR-2014-055-09 at 24, Vol. 1A.

17. Exhibit PR-2014-055-09 at 24-25, Vol. 1A.

18. Exhibit PR-2014-055-09 at 3, Vol. 1A.

19. Exhibit PR-2014-055-09 at 3, Vol. 1A.

20. Exhibit PR-2014-055-09 at 18, Vol. 1A.

21. Exhibit PR-2014-055-09A (protected) at 22, Vol. 2A.

22. Exhibit PR-2014-055-09 at 23, Vol. 1A.

ANALYSIS

38. 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*,²³ the *Agreement on Internal Trade*,²⁴ the *Agreement on Government Procurement*,²⁵ the *Canada-Chile Free Trade Agreement*,²⁶ the *Canada-Peru Free Trade Agreement*,²⁷ the *Canada-Colombia Free Trade Agreement*²⁸ and the *Canada-Panama Free Trade Agreement*.²⁹

39. 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.³⁰ 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.³¹ Moreover, the trade agreements prohibit all forms of discrimination in tendering procedures, either generally or through the use of undisclosed criteria.³²

23. *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].

24. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

25. *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].

26. *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.

27. *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).

28. *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).

29. *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).

30. 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 . . .”

31. 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 . . .”

32. For instance, Article 1008(1) of *NAFTA* 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.”

40. 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 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.³³

41. The Tribunal has examined the submissions of the parties and, for the reasons that follow, finds that the complaint is valid in part.

Preliminary Issue

42. At the outset, the Tribunal acknowledges that there were some inconsistencies between the scoring in the individual evaluators' score sheets, but notes that such discrepancies were resolved through the consensus scoring process. As set out in the "Evaluation Team Basic Guidelines" filed by PWGSC, each evaluator first conducted an independent evaluation of the bid before meeting with the entire evaluation team to "agree on a final rating for each rated criterion through consensus."³⁴

43. Since PWGSC's rationale for the scoring was set out in the consensus evaluation grid, and the methodology for the consensus evaluation was set out in the Evaluation Guidelines, the Tribunal finds that the inconsistencies between the individual evaluators' score sheets and the consensus evaluation is not indicative of a breach of the applicable trade agreements.

Debriefing Obligation

44. In its letter of objection, Deloitte asserted that the information provided by PWGSC "does not meet the minimum [debriefing] requirements required by the applicable trade agreements . . ."³⁵ However, Deloitte did not specify how it considered the information to be insufficient nor did it request any specific information, such as the evaluation of the winning bid.

45. The applicable trade agreements do not explicitly state what information should be provided to bidders. For instance, article 1015(6) of *NAFTA* states as follows:

An entity shall:

- (a) on request, promptly inform suppliers participating in tendering procedures of decisions on contract awards and, if so requested, inform them in writing; and
- (b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

Similarly, Article XVIII of the *AGP* states that:

2. Each entity shall, on request from a supplier of a Party, promptly provide:
 - (a) an explanation of its procurement practices and procedures;

33. 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) at para. 30; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10.

34. Exhibit PR-2014-055-16A, Attachment 1, Vol. 1A.

35. Exhibit PR-2014-055-01A (protected), Tab B, Vol. 2.

- (b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and
- (c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

46. The Tribunal has previously stated that there is no concrete list of what information or documents must be given to an unsuccessful bidder. Rather, the information that should be released will be dependent on the circumstances of each case.³⁶ Furthermore, the information provided should accomplish the primary purpose of Articles 1015(6) and XVIII, which is to "provide transparency as to the reasons for not selecting the proposal, while respecting the confidential nature of the content of all the bidders' proposals."³⁷ In keeping with the language of these trade agreements, generally such information should include a description of the evaluation criteria and how they were applied, as well as sufficient information for the bidders to determine their rights under the applicable trade agreements.

47. In the present scenario, the information provided to Deloitte clearly indicated the scoring of each point-rated criteria, the scoring of each of the projects within a criterion and the evaluators' rationale for deducting points from specific projects. While it may have been preferable for PWGSC to release the actual evaluation sheets themselves, the Tribunal notes that no such information was requested by Deloitte³⁸ nor was that information necessary in the context of this particular case.

48. The Tribunal has repeatedly held that the adequacy of a debriefing requires an evaluation of substance over form.³⁹ In this case, the information clearly set out the evaluators' conclusion that certain projects were for sub-sets of organizations and, therefore, did not meet the Size of Organization requirements, while others were found not to demonstrate expenditure and personnel reduction exercises.⁴⁰ In other words, the information provided by PWGSC in its debriefing transparently set out the reasons for not selecting Deloitte's bid and afforded Deloitte the information necessary to initiate this complaint. As such, the Tribunal finds that the debriefing provided by PWGSC met the minimum threshold required by the trade agreements.

49. In any event, the Tribunal observes that there is no specific obligation in the trade agreements requiring debriefings to be conducted in person. PWGSC's position, that it did not intend to conduct in-person debriefings, was clearly stated in the RFP. If Deloitte wished to object to the lack of an in-person debriefing, the appropriate time to do so would have been when the RFP was published.

50. Deloitte also argued that, by failing to provide a detailed response to its letter of objection, PWGSC failed to properly fulfill its debriefing obligations. In this respect, Deloitte seems to imply that the initial letter sent by PWGSC created an expectation that it would provide a fulsome response to Deloitte's objections. After a delay of over two months, however, PWGSC simply confirmed that its initial evaluation was correct.

36. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) [*CGI*] at para. 49.

37. *Ecosfera Inc. v. Department of the Environment* (11 July 2007), PR-2007-004 (CITT) [*Ecosfera*] at para. 32.

38. This is in direct contrast with the circumstances of *CGI*, where the Tribunal found that Canada Post breached its obligation under *NAFTA* by failing to provide such information after it was specifically requested by the complainant.

39. See, for instance, *CGI* at para. 52 and *Ecosfera* at para. 55.

40. Exhibit PR-2014-055-01, Tab A, Vol. 1.

51. While the brevity of PWGSC's response may have been unsatisfactory to Deloitte, it nonetheless appears that Deloitte may be conflating the requirements of a debriefing with a response to a letter of objection. While the trade agreements require that certain standards are met when conducting a debriefing, there are no prerequisites for the manner in which a government institution ought to reply to a letter of objection. Therefore, while the Tribunal strongly encourages government institutions to provide timely responses in order to maintain the efficient functioning of the procurement system, it finds there was nothing improper in PWGSC's response affirming the original results of the evaluation.

52. Thus, on the basis of the information included in the initial contract award letter, the Tribunal finds that PWGSC provided a sufficient debriefing in accordance with the requirements of the applicable trade agreements.

Size of Organization

Undisclosed Criteria

53. In its comments on the GIR, Deloitte argued that the evaluators used undisclosed criteria in their evaluation of its bid. In particular, Deloitte contended that by determining that both the DoD Project and the RAN Project were for a sub-set of an organization, rather than the organization in its entirety, the evaluators introduced undisclosed evaluation criteria, which resulted in an improper evaluation.

54. The Tribunal does not agree. In determining that these projects were performed for sub-sets of the DoD and the RAN, the evaluators were not requiring Deloitte to meet an additional condition or inserting a new criterion. Rather, in finding that the projects were performed for a sub-set of an organization, the evaluators seemingly concluded that the information provided by Deloitte was not accurate. In doing so, the Tribunal finds that the evaluators were simply exercising their discretion to verify information provided in Deloitte's bid, as permitted by subsection 16(f) of the 2003 (2014-03-01) *Standard Instructions – Goods or Services – Competitive Requirements*, which are incorporated by reference into the RFP.

55. Furthermore, to conclude otherwise would require evaluators to assess this aspect of the bid based on how the bidder labels a project rather than exercising their discretion to verify the project parameters. For instance, a bidder could submit that a project was completed for the Government of Canada as a whole, when, upon verification, it is clear that it was performed for a particular department or branch within a department with far fewer employees.

56. In light of the above, the Tribunal finds that the evaluators did not use undisclosed criteria when evaluating the Size of Organization requirements, and the complaint is not valid on this ground.

DoD Project

57. In considering the manner in which the evaluation of the Size of Organization requirement was performed, the Tribunal limited its considerations to the information and documentation that was before the evaluators. In other words, the Tribunal considered whether it was reasonable for the evaluators to conclude that the DoD Project was for an organization with less than 5,000 employees in light of the content of Deloitte's bid and the additional information examined by the evaluators to verify information in the bid. The Tribunal did not consider the additional information about the scope of the DoD Project that was provided in Deloitte's confidential notice of complaint, as such supplementary information was not before the evaluators at the time of their determination.⁴¹

41. Exhibit PR-2014-055-01A (protected) at paras. 48-52, Vol. 2.

58. In support of this ground of complaint, Deloitte initially asserted that the evaluators treated the DoD Project inconsistently by accepting it as having been performed for an organization with more than 20,000 employees for the purposes of MT4, but determining it had been performed for an organization with less than 5,000 employees when scored under RT5. In response, PWGSC argued that it was justified in evaluating the DoD Project differently under MT4 and RT5 because the two project descriptions that were submitted in response to each of these criteria were themselves quite different.⁴²

59. The Tribunal finds that the evaluators acted reasonably in scoring the DoD Project differently for MT4 versus RT5 since the project descriptions for the two criteria were not identical. The descriptions provided had differing project scopes and included a number of additional details when submitted in response to MT4 as opposed to RT5. Nevertheless, as discussed below, the Tribunal finds that the evaluators' conclusion in RT5 with respect to the Size of Organization requirement was unreasonable.

60. In evaluating the size of the organization with respect to the DoD Project, the evaluators referred to several websites which described the scope and function of the DoD, the Office of the Secretary of Defense and that of the Deputy Chief Management Officer (DCMO). This verification of information was permitted by subsection 16(f) of the 2003 (2014-03-01) *Standard Instructions – Goods or Services – Competitive Requirements*, which are incorporated by reference into the RFP. However, as noted above, once the evaluators chose to verify information provided by Deloitte, they were obligated to do so in a reasonable manner.

61. As Deloitte listed the client organization as “United States Department of Defense, *Deputy Chief Management Office (DCMO)*”⁴³ [emphasis added], it may have been reasonable for the evaluators to conclude that the services provided were for the DCMO in particular, as opposed to the DoD as a whole. However, there is no information regarding the size of the DCMO in any of the websites consulted by the evaluators.⁴⁴ In fact, the only mention of the number of employees located at the DCMO is PWGSC's own statement that the DCMO is:

a headquarters-level staff within a headquarters-level staff. As such, the scope of this project demonstrated objectives in support of a rather small organization (the Office of the DCMO) that does not contain a minimum of 5,000 employees.⁴⁵

62. However, having carefully reviewed all of the materials submitted by PWGSC, the Tribunal finds that there is simply no evidence on the record to support this assertion.⁴⁶ If the evaluators choose to reject information contained in a bid as being incorrect, there must be some cogent evidence to support their decision. Thus, the Tribunal finds that the evaluators acted unreasonably in rejecting stated information in Deloitte's bid when the websites they allegedly relied on to make this decision did not contain any evidence to support their position that the DoD Project was performed for an organization with fewer than 5,000 employees.

63. Accordingly, the Tribunal finds this ground of complaint to be valid and that Deloitte's DoD Project, therefore, should have been awarded an additional two points.

42. Exhibit PR-2014-055-09A (protected) at 17, Vol. 2A.

43. Exhibit PR-2014-055-09 at 3, Vol. 1A.

44. Exhibit PR-2014-055-16A, Attachment 3, Vol. 1A.

45. Exhibit PR-2014-055-16A, Attachment 3, Vol. 1A.

46. In the GIR, PWGSC states that “the evaluators verified on the basis of U.S. Government information available on the internet that ODCMO was an organization with less than the required 5,000 employees.” However, the websites provided by PWGSC in response to the Tribunal's order do not include any such information.

RAN Project

64. In assessing whether the size of the organization for which the RAN Project was performed was at least 5,000 employees, the Tribunal again limited its considerations to the information and documentation that was before the evaluators. Based on a review of these records, the Tribunal finds that the evaluators' conclusion with respect to the overall size of the organization for which the RAN Project was performed to be unreasonable.

65. In conducting their assessment of the Size of Organization requirement for the RAN Project, the evaluators referred to several websites which described the organizational and management structure of the Australian DoD and included general information about the Defence Materiel Organisation (DMO) and Collins Class Submarines. The evaluators noted that the DMO, which Deloitte listed as the contact organization, employs approximately 5,000 people. The evaluators also noted that the DMO is further divided into four business groups, one of which is the "Submarines Group". The DMO's website describes the Submarines Group as follows:

The Submarines Group is responsible for all materiel-related aspects of submarine support across Defence, and works closely with the Chief of Navy, other Government departments, and industry to get the job done.⁴⁷

66. Based on a section of Deloitte's description of the RAN Project, which portrayed its work as providing support to a certain "Transformation Program",⁴⁸ the evaluators determined that the relevant organization for which the project was performed was actually the "Collins Class Submarine program division" and, therefore, that it was comprised of less than 5,000 employees.⁴⁹

67. The Tribunal finds that this conclusion is unreasonable. There is no information in Deloitte's bid or on the websites produced by PWGSC to suggest that the RAN Project was performed for a "sub-set" of the DMO.⁵⁰ Deloitte explicitly stated in its bid that it was selected to provide transformation program and change management for the DMO, which managed the relevant Transformation Program.⁵¹ While the description of the RAN Project did make reference to the Collins Class Submarine Program, it also included examples of Deloitte's engagement with the DMO throughout the project, the support offered to the DMO and changes at the DMO that resulted from Deloitte's work on this project.⁵² Thus, in reaching their conclusion the evaluators appear to have focused only on one aspect of the description of the RAN Project provided by Deloitte and ignored other pivotal information.

68. As such, the Tribunal finds that the evaluators acted unreasonably in rejecting stated information in Deloitte's bid based on information from public websites, which, on their face, do not support the conclusion that the RAN Project was performed for a "sub-set" of the DMO rather than the DMO itself.

69. Accordingly, the Tribunal finds this ground of complaint to be valid and that Deloitte's RAN Project should have been awarded an additional two points.

47. Exhibit PR-2014-055-16A, Attachment 4, Vol. 1A.

48. Exhibit PR-2014-055-01A (protected), Tab F at 167, Vol. 2.

49. Exhibit PR-2014-055-09 at 3, Vol. 1A.

50. Exhibit PR-2014-055-01A (protected), Tab F, Vol. 2; Exhibit PR-2014-055-16A, Attachment 4, Vol. 1A.

51. Exhibit PR-2014-055-01 at para. 65, Vol. 1; Exhibit PR-2014-055-01A (protected), Tab F at 167, Vol. 2; Exhibit PR-2014-055-17A (protected), Tab B, Vol. 2B.

52. Exhibit PR-2014-055-01A (protected), Tab F at 167, Vol. 2.

Scope of Project

Real Property Project

70. The scoring criteria for RT4 indicated that three points would be awarded in relation to the Scope of Project if that project included expenditure and personnel reduction exercises.⁵³ In its bid, Deloitte provided a description of the scope of the Real Property Project that included a reference to expenditure reductions and the means through which the project was committed to delivering those reductions. Deloitte also described the identification of opportunities related to personnel reductions.⁵⁴

71. In deciding not to award any points for the Scope of Project requirements, the evaluators stated that the project did not “demonstrate an expenditure in personnel reduction exercise.”⁵⁵ Further, in the GIR, PWGSC contended that the description of the Real Property Project did not link the work completed with the achievement of expenditure and personnel reductions.⁵⁶

72. The explanation provided by PWGSC implies that the project was being evaluated on the basis of whether, and to what extent, the project resulted in expenditure and personnel reductions. The Tribunal finds that by assessing whether or not the Real Property Project *achieved* expenditure and personnel reductions, the evaluators were requiring more than simply a demonstration that the project *included* expenditure and personnel reduction exercises. In doing so, the evaluators were thus assessing the project on the basis of an entirely new requirement, which was not stated in the RFP (i.e. whether or not the project achieved reductions).

73. The Tribunal finds that the Real Property Project description makes it clear that expenditure and personnel reductions were included in the project mandate and thus should have been evaluated as meeting the requirements listed in the RFP. Accordingly, the Tribunal finds that, in evaluating the Real Property Project as part of Deloitte’s bid, the evaluators improperly used undisclosed criteria.

74. The Tribunal, therefore, finds this ground of complaint to be valid. Accordingly, Deloitte’s Real Property Project should have been awarded an additional three points.

Finning Project

75. The scoring criteria for RT5 also indicated that three points would be awarded in relation to the Scope of Project if that project included expenditure and personnel reduction exercises.⁵⁷ PWGSC did not award any points to Deloitte for the scope of the Finning Project submitted in response to RT5 because it found that the project “focused on re-design of supply chain as opposed to an expenditure and personnel reduction exercise.”⁵⁸ While the Tribunal notes that it would have been sufficient for the project to *include* expenditure and personnel reduction exercises and need not have *focused* on such exercises as stated by the evaluators, it nonetheless concludes that the Finning Project did not meet this requirement.

76. The description of the Finning Project submitted by Deloitte does not clearly indicate that expenditure and personnel reduction exercises were included as part of the project. The only aspects of the

53. Exhibit PR-2014-055-01, Tab E, Vol. 1.

54. Exhibit PR-2014-055-01A (protected), Tab F at 155, Vol. 2.

55. Exhibit PR-2014-055-01, Tab A, Vol. 1.

56. Exhibit PR-2014-055-09 at 21, Vol. 1A.

57. Exhibit PR-2014-055-01, Tab E, Vol. 1.

58. Exhibit PR-2014-055-01, Tab A, Vol. 1.

project descriptions which could arguably be said to describe such functions was a reference to a rationalization project that impacted certain related personnel and a reference to assessing organizational and governance structures.⁵⁹

77. The Tribunal has repeatedly stated that the bidder bears the onus of demonstrating compliance with the solicitation criteria.⁶⁰ Therefore, the descriptions provided must be sufficiently clear to allow the evaluators to conclude that the requirements of the RFP have been met.

78. Given the lack of information in the description of the Finning Project, the Tribunal finds that Deloitte did not satisfy its onus of clearly demonstrating that the project included personnel and expenditure reduction exercises. As such, the Tribunal is satisfied that the evaluators acted reasonably in concluding that the Finning Project did not meet the requirements on this point.

79. Accordingly, the Tribunal finds that this ground of complaint is not valid and that Deloitte's score for the Finning Project should remain unchanged.

Remedy

80. As the complaint is valid in part, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) and (3) of the *CITT Act*. In recommending an appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including (1) the seriousness of the deficiencies found by the Tribunal, (2) the degree to which Deloitte was prejudiced, (3) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, (4) whether the parties acted in good faith and (5) the extent to which the contract was performed.

81. Deloitte requested that the contract awarded to KPMG be terminated, that it be awarded the contract and that it be awarded its lost profit for any work completed by KPMG under the contract. In the alternative, Deloitte requested compensation for lost profit. Deloitte also requested costs associated with the preparation and carriage of its complaint.

82. The complaint is valid in part because PWGSC did not act reasonably in verifying information with respect to the size of the organization for which certain projects were performed and used undisclosed criteria in assessing whether another project achieved expenditure and personnel reductions. In this regard, the complaint reveals a deficiency in the procurement process at hand. Also, as noted above, the Tribunal has determined that Deloitte's technical score should have received seven additional points.⁶¹ In accordance with the RFP, these additional points would have given Deloitte the highest overall score and, therefore, it would have been the winning bidder.⁶²

83. The Tribunal finds that deficiencies in the manner in which proposals are evaluated are serious and prejudice the integrity and efficiency of the competitive procurement system. The Tribunal also finds that PWGSC's actions greatly prejudiced Deloitte, because it resulted in Deloitte losing the bid.

59. Exhibit PR-2014-055-01A (protected), Tab F at 161-62, Vol. 2.

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

61. The additional points are as follows: two points for the DoD Project, two points for the RAN Project and three points for the Real Property Project.

62. As set out in section 2.1 of the RFP, the formula for calculating Deloitte's total score is as follows: technical score: 241.5 (Deloitte's technical score) + 7 (points awarded by the Tribunal) / 304 (maximum number of points available) = $0.8174 \times 70 = 57.22 + 30$ (Deloitte's financial score) = 87.22 . As the winning bidder, KPMG had a score of 86.46 . Deloitte's revised score would therefore have been higher than KPMG's.

84. The Tribunal notes that there is no evidence on the record that PWGSC was not acting in good faith. There is also no evidence as to the extent to which this contract has already been performed. However, because the contract was awarded in October 2014, the Tribunal finds it likely that at least some of the work under the resulting contract has already been performed. Thus, at this point, the Tribunal does not have all the facts to determine whether it should recommend cancelling the contract with KPMG.

85. On the basis of its analysis of the facts before it, the Tribunal finds that Deloitte should have been the successful bidder and, therefore, that compensation for lost profit is the appropriate remedy in this case.

86. The Tribunal is aware of the statements by Deloitte that another unsuccessful bidder brought a complaint against PWGSC with respect to this RFP and that PWGSC entered into an undisclosed settlement with that party.⁶³ However, based on the information available to the Tribunal at this time, it has no reason to believe that this settlement impacts the compensation that should be awarded to Deloitte in this complaint.

COSTS

87. The Tribunal awards Deloitte 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 based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings.

88. The Tribunal's preliminary view is that this complaint case has a level of 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 as it involved a defined service project. 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 no public hearing was held.

89. 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

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

91. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Deloitte for its lost profits. The Tribunal recommends that Deloitte and PWGSC 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.

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

63. Exhibit PR-2014-055-17 at paras. 28-30, Vol. 1A.

93. Further, pursuant to subsection 30.16 of the *CITT Act*, the Tribunal awards Deloitte its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's 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 article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Stephen A. Leach

Stephen A. Leach
Presiding Member