



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-012

Space2place Design Inc.

v.

Parks Canada Agency

*Determination and reasons issued
Friday, October 30, 2015*

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IN THE MATTER OF a complaint filed by Space2place Design 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

SPACE2PLACE DESIGN INC.

Complainant

AND

THE PARKS CANADA AGENCY

**Government
Institution**

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Parks Canada Agency re-evaluate all proposals submitted in response to Solicitation No. 5P301-15-0005 in accordance with the terms and requirements set out in the Request for a Standing Offer.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Space2place Design Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Parks Canada Agency. 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 cost award.

Jean Bédard

Jean Bédard

Presiding Member

Tribunal Member: Jean Bédard, Presiding Member

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STATEMENT OF REASONS

SUMMARY

1. This complaint relates to a Request for a Standing Offer (RFSO) for architectural and engineering services (Solicitation No. 5P301-15-0005) by the Parks Canada Agency (Parks Canada). Parks Canada declared the bid submitted by Space2place Design Inc. (Space2place) non-compliant, on the basis that its landscape architects were not licensed to practise in both British Columbia and Alberta and that its proposal did not indicate how it intended its landscape architects to become licensed.

2. Space2place alleged that Parks Canada improperly evaluated or used undisclosed criteria to evaluate its proposal. Space2place contended that the RFSO does not require landscape architects to be licensed in both British Columbia and Alberta. Rather, Space2place contended that it was sufficient for the proposed landscape architects to be *eligible* for licensing. As a remedy, Space2place requested that its bid be found compliant with the requirements of the RFSO and that it be awarded a standing offer.

3. Given that there was sufficient information on the record to determine the validity of the complaint, the Canadian International Trade Tribunal (the Tribunal) decided that a hearing was not required and disposed of the complaint on the basis of the written information in the record.

4. Having examined the submissions of the parties and the evidence on the record, for the reasons that follow, the Tribunal finds that the complaint is valid.

PROCEDURAL HISTORY

5. Parks Canada issued the RFSO on February 17, 2015 with a submission deadline of March 31, 2015.¹ On March 27, 2015, Space2place submitted its proposal.

6. On May 5, 2015, Parks Canada informed Space2place that its bid was unsuccessful because it had not met the mandatory requirements of the RFSO.² It also informed Space2place that standing offers had been awarded to AECOM Canada Ltd., Stantec Consulting Ltd., McElhanney Consulting Services Ltd. (McElhanney), O2 Planning + Design Inc., EXP Services Inc. and MMM Group Ltd.

7. On May 6, 2015, Space2place contacted Parks Canada by telephone to seek clarification regarding the reasons for which Parks Canada deemed its bid non-compliant.³

8. On May 14, 2015, Space2place filed a first complaint with the Tribunal. The complaint was not accepted for inquiry on the grounds that it was premature, since Parks Canada had not provided a denial of relief.⁴

9. On June 2, 2015, Space2place wrote to Parks Canada to reiterate its objections to the results of the evaluation and to request that Parks Canada provide a response in order to resolve Space2place's objection.⁵

1. Exhibit PR-2015-012-11, tab B, Vol. 1A.

2. *Ibid.*, tab C.

3. *Ibid.*, tab C.

4. *Space2place Design Inc.* (20 May 2015), PR-2015-007 (CITT).

5. Exhibit PR-2015-012-11, tab C, Vol. 1A.

10. On June 3, 2015, Parks Canada wrote to inform Space2place that it would not provide the requested relief.⁶
11. On June 17, 2015, Space2place filed the current complaint with the Tribunal. The Tribunal issued a notice of inquiry into the complaint on June 24, 2015. McElhanney requested intervener status on July 8, 2015, which the Tribunal granted on July 15, 2015.⁷
12. On July 20, 2015, Parks Canada submitted the Government Institution Report. On July 28, 2015, McElhanney filed its submissions with the Tribunal.
13. On August 5, 2015, Space2place informed the Tribunal that it would let the case be decided on the existing records and, accordingly, would not be submitting additional documents.⁸
14. On August 20, 2015, the Tribunal asked Parks Canada to provide the responses of all successful bidders to Submission Requirements and Evaluation (SRE) 3.1.2 and 3.1.4 of the RFSO.⁹ The Tribunal also informed the parties that, pursuant to paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,¹⁰ it had extended the deadline to issue its determination to 135 days from the filing of the complaint, that is, October 30, 2015.
15. On August 21, 2015, Parks Canada filed the confidential responses of all successful bidders to SRE 3.1.2 and 3.1.4.¹¹ This included the responses of the six bidders listed in its letter of May 5, 2015, and also the responses of Golder and Associates and IBI Group. While the latter two bidders do not appear to have been awarded standing offers, Parks Canada stated that their responses were provided because they had nevertheless been assessed at the technical evaluation stage of the procurement process.¹²
16. On August 28, 2015, the Tribunal requested that Parks Canada provide all evaluation notes and materials relating to the evaluation of SRE 3.1.2 and 3.1.4 for each bid received in response to the RFSO.¹³ On August 31, 2015, Parks Canada filed this additional information with the Tribunal.¹⁴
17. Although McElhanney was provided with an opportunity to comment on the additional information, it did not file any comments with the Tribunal.¹⁵

6. *Ibid.*

7. Exhibit PR-2015-012-09, Vol. 1A.

8. Exhibit PR-2015-012-15, Vol. 1B.

9. Exhibit PR-2015-012-16, Vol. 1B.

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

11. Exhibit PR-2015-012-17, Vol. 1B; Exhibit PR-2015-012-17A (protected), Vol. 2.

12. Exhibit PR-2015-012-17, Vol. 1B.

13. Exhibit PR-2015-012-19, Vol. 1B.

14. Exhibit PR-2015-012-20, Vol. 1B ; Exhibit PR-2015-012-20A (protected), Vol. 2.

15. Space2place was not provided with copies of the additional information as it was designated as confidential by Parks Canada, and the Tribunal's *Confidentiality Guideline* states that only parties represented by counsel for have signed a Notice of Participation, Notice of Representation, and Declaration and Undertaking of Confidentiality may have access to confidential information. In the present case, Space2place was not represented by counsel.

RELEVANT PROVISIONS OF THE RFSO

18. This complaint relates to the evaluation of the mandatory criteria listed in SRE 3.1.2, which provides as follows:

The *proponent* shall be an architect, *licensed*, certified or otherwise authorized to provide the necessary professional services to the full extent that may be required by provincial or territorial law *in the province indicated* in the Required Services (RS 1).¹⁶

[Emphasis added]

19. SRE 3.1.2 refers to the “proponent”, which General Instructions (GI) 20 of the RFSO defines as follows:

... the person or entity (or, in the case of a joint venture, the persons or entities) submitting a proposal to provide services under a call-up resulting from a standing offer. . . . The Proponent must have the legal capacity to contract.¹⁷

20. SRE 3.1.2 also cited to RS 1 of the RFSO, which refers to both provinces. It provides that “[t]he selected consultants shall provide a range of landscape architecture services . . . for projects in the *province of Alberta and British Colombia*”¹⁸ [emphasis added].

21. While not directly at issue in this complaint, McElhanney also referred to SRE 3.1.4, which states as follows:

The proponent must identify the name of the Proponent firm, key Sub-Consultant firms, key Specialists and key personnel to be assigned to this assignment, along with their licensing and/or professional affiliation(s). An example of an acceptable format for submission of the team identification information is provided in Appendix “D” attached.

1. The Consultant team must have expertise in landscape architecture, licensed to provide the necessary professional architecture services to the full extent that may be required by provincial law.
2. In addition the proponent must have extensive expertise and relevant recent experience in planning, traditional design and construction or design-build, and in providing resident and non-resident services for landscape architecture projects.
3. In addition the proponent must meet the minimum experience shown below:

#	Description	Minimum Experience
1	Project Manager	P. Arch, P. Lan Arch or P. Eng. with a minimum. of 15 years of directly related experience
2	Senior Landscape Architect	P. Land Arch with a minimum of 15 years of directly related experience

16. Exhibit PR-2015-012-11, tab B, Vol. 1A. Both Space2place and Parks Canada agree that “architect” in SRE 3.1.2 should be interpreted as referring to “landscape architect”. Exhibit PR-2015-012-11, tab D at note 2, Vol. 1A. For the purposes of the Tribunal’s analysis in this case, the Tribunal has decided to accept this interpretation, as doing so does not alter the Tribunal’s ultimate finding that the complaint is valid.

17. Exhibit PR-2015-012-11, tab B, Vol. 1A.

18. *Ibid.*

#	Description	Minimum Experience
3	Intermediate Landscape Architect	P. Land Arch with a minimum of 10 years of directly related experience
4	Architect	P. Arch with a minimum of 10 years of directly related experience
5	Senior Environmental Scientist	P. Biologist or Bachelor of Science in Environmental Science with a minimum of 10 years of directly related experience
6	Senior Civil Engineer	P. Eng. With a minimum of 8 years of directly related experience
7	Senior Geotechnical Engineer	P. Eng. With a minimum of 8 years of directly related experience
8	Senior Archeologist	Bachelor of Archaeology with 8 years of directly related experience
9	Drafting – Auto Cad Technologist	Technologist with a minimum of 5 years of directly related experience
10	Surveyor	Minimum of 5 years of directly related experience

POSITIONS OF PARTIES

Space2place

22. Space2place submitted that there were no reasonable grounds for declaring its proposal non-compliant. It asserted that Parks Canada's reasons for disqualifying its proposal were not supported by the terms of the RFSO.¹⁹

23. In particular, Space2place contended that all the resources proposed in its bid were properly licensed and, therefore, met the criteria of the RFSO. Moreover, Space2place objected to Parks Canada's statement that its bid was non-compliant since it did not "... include an engineer licensed, or eligible to be licensed... to provide the necessary professional services to the full extent... required by provincial... law in the province indicated in the Required Services...".²⁰

19. Exhibit PR-2015-012-01, Vol. 1.

20. Exhibit PR-2015-012-11, tab C, Vol. 1A.

24. Space2place submitted that, although this language was not actually included in the RFSO, it nevertheless met this alleged requirement, as its proposal included a civil engineer licensed in British Columbia and eligible to be licensed in Alberta.²¹

Parks Canada

25. Parks Canada acknowledged that it had incorrectly stated the mandatory requirements of the RFSO in its initial letter setting out the reasons for disqualifying Space2place's proposal.²² Nonetheless, it maintained that Space2place's bid did not meet the requirements of SRE 3.1.2, as the resources that Space2place put forward as project manager and senior landscape architect were licensed in British Columbia, but only *eligible* to be licensed in Alberta.²³

26. Parks Canada also conceded that, while some of the language in the RFSO differed from the wording of SRE 3.1.2,²⁴ it nonetheless argued that the language of the mandatory criteria must prevail over other non-mandatory provisions in the RFSO.²⁵ As Space2place's bid was deemed not to have met the mandatory criteria in SRE 3.1.2, Parks Canada submitted that it was not required to continue to the technical evaluation of that bid.²⁶

McElhanney

27. McElhanney contended that the mandatory requirements of the RFSO, and particularly SRE 3.1.2 and 3.1.4, were clear, unambiguous and not capable of more than one reasonable meaning.²⁷ It interpreted these requirements as necessitating that proponents and their key personnel possess a licence to practice landscape architecture in both provinces at the time of submitting the bids.²⁸ It argued that such an interpretation is in keeping with Parks Canada's needs, which requires a company "called-up" to immediately deploy its services in either province without delay caused by the provincial regulatory body that governs landscape architects.²⁹

ANALYSIS

28. Subsection 30.14(1) of the *Canadian International Trade Tribunal Act*³⁰ 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

21. Exhibit PR-2015-012-01, Vol. 1.

22. Exhibit PR-2015-012-11, tab D, Vol. 1A.

23. *Ibid.*

24. In particular, Parks Canada noted that GI 1(2) stated that proponents "shall be licensed or eligible to be licensed" to practice in the required provinces, SRE 3.1.2. simply states the proponent must be licensed, and makes no reference to eligibility; see Exhibit RR-2015-012-11 at para. 5.

25. Exhibit RR-2015-012-11 at para. 5, Vol. 1A.

26. *Ibid.* at para. 1.

27. Exhibit PR-2015-012-13, Vol. 1B.

28. *Ibid.*

29. *Ibid.*

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

North American Free Trade Agreement,³¹ the *Agreement on Internal Trade*,³² the *Agreement on Government Procurement*,³³ the *Canada-Chile Free Trade Agreement*,³⁴ the *Canada-Peru Free Trade Agreement*,³⁵ the *Canada-Colombia Free Trade Agreement*³⁶ and the *Canada-Panama Free Trade Agreement*.³⁷

29. 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.³⁸ It also stipulates that, to be considered for a 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.³⁹ Moreover, the trade agreements prohibit all forms of discrimination in tendering procedures, either generally or with undisclosed criteria.⁴⁰

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

31. *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, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA].

32. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

33. *Revised 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).

34. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en>> (entered into force 5 July 1997). Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

35. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng>> (entered into force 1 August 2009).

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

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

38. 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 . . ."

39. 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 . . ."

40. 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."

information provided in a bid or have based their evaluation on undisclosed criteria, the Tribunal will generally not substitute its judgment for that of the evaluators.⁴¹

31. In the present case, the Tribunal finds that the evaluators did not apply themselves in determining whether a proposal complied with the mandatory requirements of SRE 3.1.2 and 3.1.4 of the RFSO and that they applied different criteria to Space2place's bid than were used for other competing bids. For the reasons that follow, the Tribunal finds that Parks Canada's evaluation for SRE 3.1.2 and 3.1.4 was improper and indicative of systemic problems with its procurement process.

32. In finding so, the Tribunal also wishes to note that the manner in which the RFSO was drafted was, in itself, problematic. Several passages appeared to conflict one another and, in other instances, it was difficult to determine what precise information the RFSO sought to elicit. While there were numerous issues with the drafting of the RFSO, the Tribunal finds that the mandatory criteria set out in SRE 3.1.2 and 3.1.4 were nonetheless clear and capable of being fulfilled. However, after reviewing the evidence on the record, the Tribunal concludes that Parks Canada's evaluation of the specific mandatory requirements was unreasonable.

SRE 3.1.2

33. To begin, the Tribunal notes that in Parks Canada's initial letter informing Space2place that its bid was deemed non-compliant, Parks Canada did not merely "make an editing error" in quoting the provision that Space2place's bid was alleged not to have met. Rather, in stating that Space2place's bid was not compliant with the mandatory criteria, Parks Canada provided an excerpt of a mandatory provision which did not exist in the RFSO.⁴² This oversight was significant, as it meant the bidder did not properly know the grounds on which its bid was deemed non-compliant.

34. As the Tribunal has previously found, the primary purpose of a debriefing or of the correspondence informing unsuccessful bidders of the contract award is to enable them to determine the nature of their rights in view of the requirements set out in the applicable trade agreements.⁴³ A proponent must know the grounds on which its bid was unsuccessful in order to ascertain whether or not it feels that a complaint to the Tribunal is warranted. By citing a non-existent provision in its rejection letter, Parks Canada did not give Space2place the necessary information to understand how or why its bid was deemed non-compliant. While Parks Canada rectified this error in its letter setting out its denial of relief, the Tribunal urges parties to be vigilant in this respect, so that bidders can understand the evaluation rationale in a timely manner.

35. Turning to the evaluator's assessment of the proposals, the Tribunal finds that Parks Canada used undisclosed criteria in evaluating whether Space2place's bid was compliant with SRE 3.1.2, which required that the *proponent* be an architect, licensed, certified or otherwise authorized to provide the necessary professional services in Alberta and British Columbia. As noted above, the RFSO defined the proponent as

41. 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.

42. Specifically, Parks Canada quoted "M2", which referred to the need for civil engineering services to be provided by "... an engineer licensed, or eligible to be licensed, certified or otherwise authorized..." to provide professional services. Exhibit PR-2015-012-11, tab C, Vol. 1A.

43. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) at paras. 35, 48; *Ecosfera Inc. v. Department of the Environment* (11 July 2007), PR-2007-004 (CITT) at para. 33.

the “person or entity” submitting a proposal. In the case of Space2place, that proponent, as listed in its bid response, was Space2place as a corporate entity.⁴⁴

36. However, both Parks Canada’s denial of relief letter of June 3, 2015, and its submissions in its GIR make it clear that, in evaluating Space2place’s bid, Parks Canada in fact used the names of team members provided in response to SRE 3.1.4 to evaluate whether SRE 3.1.2 was met. In particular, Parks Canada stated that Space2place’s bid “. . . gave four names associated with Space2place . . .”, but none of the individuals listed were licensed to practice in both Alberta and British Columbia.⁴⁵

37. Similarly, in its denial of relief letter, Parks Canada stated that Space2place’s bid had not met SRE 3.1.2 and pointed to the “Team Identification form” in Space2place’s bid as evidence of this.⁴⁶ Parks Canada stated as follows:

. . . the Landscape Architects identified are only eligible for license in AB and one has their license application pending.⁴⁷

This is consistent with the evaluators’ score sheets for Space2place’s bid, which list as the notes for SRE 3.1.2, “only licenced in BC and only eligible for license in AB,” and “no liscence (sic) in AB.”⁴⁸ Therefore, instead of evaluating whether the *proponent* (i.e. Space2place as a corporate entity) was licensed, as required by the wording of SRE 3.1.2, Parks Canada instead applied the requirements of SRE 3.1.2 to the individual team resources listed in SRE 3.1.4.

38. In doing so, Parks Canada breached the trade agreements by failing to evaluate Space2place’s bid in accordance with the criteria published in the RFSO. Once the mandatory criteria were published in the RFSO, Parks Canada was required to evaluate each of the criteria individually as written. By using the proposed personnel provided in response to SRE 3.1.4 as a proxy to evaluate compliance with SRE 3.1.2, Parks Canada effectively deprived SRE 3.1.2 of its intended meaning, which was to ensure that the *proponent* was duly licensed. As “proponent” was a defined term in the RFSO, it was not open to Parks Canada to ignore or use a revised definition of that term during its evaluation of the bid responses received.

39. Had Parks Canada come to the conclusion that SRE 3.1.2 was ineffectual and should apply to the proposed personnel of each bidder as opposed to the proponent, it could have issued an amendment to that effect. By instead choosing to disregard certain portions of the mandatory criteria, or apply them in a way that was inconsistent with the explicit wording of the RFSO, Parks Canada essentially robbed SRE 3.1.2 of its meaning.

40. While the method by which Parks Canada conducted its evaluation was improper, it does not follow that Space2place necessarily met the requirements of SRE 3.1.2. In fact, there is no mention in Space2place’s bid of whether Space2place, as the proponent, is licensed to provide landscape architecture

44. Exhibit PR-2015-012-011, tab C, Vol. 1A.

45. *Ibid.*, tab D at para. 12.

46. *Ibid.*, tab C.

47. *Ibid.*

48. *Ibid.* The Tribunal notes that there is a discrepancy between the scoring of M2 on the evaluation form completed by the second evaluator filed in Exhibit PR-2015-012-11, Vol. 1A and the same evaluation form filed in Exhibit PR-2015-012-20A (protected), Vol. 2. Parks Canada has not provided any explanation for this discrepancy. While it does not alter the outcome of this inquiry, the Tribunal is nonetheless troubled.

services in both British Columbia and Alberta, though Space2place's "Firm Profile" does provide examples of several projects that it completed in both Alberta and British Columbia.⁴⁹

41. However, a review of the eight bids which Parks Canada deemed to have met SRE 3.1.2 reveals that only three contained a reference to the *proponent* being licensed to provide the required services. The remaining five bids contained no such information and, therefore, appear not to have addressed SRE 3.1.2 at all.⁵⁰ In fact, the remaining five proponents did not provide any information on where the firm had provided services or contain any equivalent to the "Firm Profile" included in Space2place's bid. Thus, despite the fact that these bids contained even *less* information than Space2place's proposal, Parks Canada nonetheless found them to be compliant with SRE 3.1.2.

42. By doing so, the evaluators essentially waived the requirement of SRE 3.1.2 of being licensed in both provinces for these remaining five proponents, but did not waive this requirement for Space2place. In other words, the evaluators subjected Space2place's bid to a different treatment than what was afforded to the remaining five proponents. Moreover, a review of the bids that were deemed successful shows that three of those bids did provide a clear response to SRE 3.1.2 which indicated how the proponent, in and of itself, was licensed to provide the required services British Columbia and Alberta.⁵¹ Therefore, it seems that Parks Canada created three distinct categories of bid responses:

1. bids which provided responses to SRE 3.1.2 and were therefore deemed compliant;
2. bids which did *not* provide a response to SRE 3.1.2, but for which that requirement was waived; and
3. bids (such as that of Space2place) which did not appear to provide a complete response to SRE 3.1.2 and for which that requirement was not waived.

43. The Tribunal finds that this inconsistency in the way in which bids were treated is evidence that evaluators breached the applicable trade agreements by either not applying themselves to evaluate the bids properly, failing to apply criteria equally to all bidders or applying undisclosed criteria to determine whether the requirement for SRE 3.1.2 was or was not waived for each bidder.

44. For the foregoing reasons, the Tribunal finds that Space2place's complaint is valid on this ground.

SRE 3.1.4

45. Although not at issue in this complaint, McElhanney nonetheless called attention to certain language in SRE 3.1.4 to support its position that Parks Canada was correct in declaring Space2place's bid non-compliant. In particular, McElhanney stated that SRE 3.1.4 required both "... proponents and their key personnel to possess a license to practice landscape architecture in both British Columbia and Alberta."⁵² While not explicitly stated, McElhanney appears to be arguing that, in addition to not being compliant with SRE 3.1.2, Space2place did not meet SRE 3.1.4, since its personnel was not licensed to practice in Alberta.

46. Notwithstanding that the evaluators found Space2place to have met SRE 3.1.4,⁵³ the Tribunal finds that there are systemic concerns with the way in which SRE 3.1.4 was evaluated. The Tribunal is of the

49. Exhibit PR-2015-012-01, Vol. 1.

50. Exhibit PR-2015-012-017A (protected), Vol. 2.

51. *Ibid.*

52. Exhibit PR-2015-012-13, Vol. 1B.

53. Exhibit PR-2015-012-11, tab C, Vol. 1A.

view that, as this has important implications for the transparency and fairness of the process as a whole, it must be addressed.

47. Upon reviewing both the responses submitted by the proponents that were deemed to have met all the mandatory criteria, and the related evaluation notes for those responses, the Tribunal observes that several of the allegedly successful bids did not include information required by the RFSO. For instance, one bid does not contain information on the years of experience obtained by some proposed personnel, despite the RFSO requiring minimum standards to be met for those positions.⁵⁴ Two other bids failed to provide any proposed personnel for several of the positions listed in SRE 3.1.4.⁵⁵ Despite these significant omissions, all these bids were nonetheless found to have met SRE 3.1.4.⁵⁶

48. Given the omissions described above, the Tribunal finds that the evaluators acted unreasonably in their evaluation of SRE 3.1.4. by not applying the criteria as listed in the RFSO to several of the bids that it deemed compliant. Absent any explanation for several aspects of SRE 3.1.4 being apparently ignored or waived by the evaluators, the Tribunal is not able to determine the criteria that were actually used to evaluate bidders' responses to SRE 3.1.4.

49. As the Tribunal has previously stated, the trade agreements which regulate procurement are intended to establish a framework to ensure the transparency and efficiency of government procurement.⁵⁷ An essential aspect of this transparency is that any and all evaluation methods and criteria be clearly stated so that bidders know the requirements to be met. The Tribunal finds that, by either using undisclosed criteria in its evaluation of SRE 3.1.4 or by inconsistently applying the criteria set out in the RFSO, Parks Canada did not allow for transparency and, thereby, breached the applicable trade agreements.

Additional Concerns

50. While not the subject of the present inquiry, the Tribunal would nonetheless like to highlight an additional area of concern in how Parks Canada has handled both this procurement and this complaint.

51. As described above, at the Tribunal's request, Parks Canada provided copies of the evaluation sheets for all the bids received in response to the RFSO (including the evaluation sheet for Space2place's bid).⁵⁸ When compared, the evaluation sheet for Space2place's bid provided with the GIR and the copy later filed in response to the Tribunal's request are not identical. Specifically, in the columns tracking compliance with SRE 3.1.2 (labelled M2) in the evaluation sheet provided with the GIR, the second evaluator had included marks in both the "YES" column and the "NO" column.⁵⁹ In the copy of the evaluation sheet later filed with the Tribunal, there is no corresponding mark under the "YES" column, although all other text, including the evaluator's signature and comments, appears the same.

52. Parks Canada did not provide any explanation for this discrepancy. However, the Tribunal is troubled by this inconsistency. It is made all the more concerning since it appears in the evaluation notes of the specific criteria at issue in this inquiry. Whether through inadvertence or some other mode, an important piece of evidence appears to have been altered from its original state upon resubmission.

54. Exhibit PR-2015-012-17A (protected), Vol. 2. See the fourth bid contained in this exhibit.

55. *Ibid.* See the fifth and six bids contained in this exhibit.

56. Exhibit PR-2015-012-20A (protected), Vol. 2.

57. *The Access Information Agency Inc. v. Department of Transport* (16 March 2007), PR-2006-031 (CITT) at para. 37.

58. Exhibit PR-2015-012-20A (protected), Vol. 2.

59. Exhibit PR-2015-012-11, tab C, Vol. 1A.

53. While the discrepancy did not impact the outcome of this inquiry, any alteration of evidence, whether intentional or not, poses serious concerns for the administration of justice. The Tribunal therefore strongly reminds parties to take all possible care to ensure that the submitted evidence is complete and unaltered.

REMEDY

54. Having determined that Space2place's complaint is valid, the Tribunal must now recommend the appropriate remedy.

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

56. In its complaint, Space2place requested that its proposal be declared compliant and that it be awarded a standing offer.⁶⁰ The Tribunal does not believe this to be the appropriate remedy in the circumstances of this case, as it would require the Tribunal to substitute its own judgment for that of the evaluators.

57. Rather, the Tribunal finds that the most appropriate remedy is to direct Parks Canada to re-evaluate all bids in accordance with the published criteria in the RFSO. As noted above, Parks Canada used widely divergent standards to evaluate the bids by not only waiving certain mandatory criteria for some bidders but also applying undisclosed criteria to determine in what instances they would or would not be waived. Given that the inconsistent application of the mandatory criteria in the RFSO is at the crux of this complaint, a fair and consistent re-evaluation of all bids is the only meaningful way to redress this breach of the trade agreements.

58. For its part, Parks Canada agrees that, if the complaint is found to be valid, then this would be the appropriate relief to the extent that Space2place would be taken as having met the mandatory requirements.⁶¹

59. The lack of consistent licensing requirements in the RFSO, together with the improper evaluation conducted by Parks Canada was a serious deficiency in the procurement process. In particular, Parks Canada did not conduct a fair evaluation of a proposal's compliance with SRE 3.1.2 and 3.1.4. Furthermore, it subjected Space2place to a different treatment by choosing to waive certain requirements for some bidders while enforcing them for Space2place. In so doing, Space2place was seriously prejudiced, in that its bid was not given a fair or objective evaluation.

60. While there is no evidence that Parks Canada acted in bad faith, in recommending a remedy, the Tribunal is mindful of Parks Canada's apparently careless conduct in responding to Space2place's complaint. In particular, the Tribunal notes Parks Canada's error in responding to Space2place's initial letter of objection by referring to a mandatory provision which did not exist in the RFSO and the discrepancy between the evaluation sheets filed by Parks Canada, as discussed above. The Tribunal finds that this

60. Exhibit PR-2015-012-01, Vol. 1.

61. Exhibit PR-2015-012-11, tab D at para. 15, Vol. 1A.

behaviour, together with Parks Canada's failure to evaluate proposals in accordance with the published criteria, seriously jeopardizes the integrity and efficiency of the entire procurement system.

61. Consequently, after considering all the relevant circumstances as set out in subsection 30.15(3) of the *CITT Act*, the Tribunal is of the view that the appropriate remedy is to recommend that Parks Canada re-evaluate all proposals received in accordance with the mandatory requirements of SRE 3.1.2 and 3.1.4 of the RFSO. While the Tribunal understands that some call-ups have already been made under the RFSO, it notes that Parks Canada acknowledged that this potential remedy was nonetheless feasible.⁶²

COSTS

62. The Tribunal awards Space2place 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.

63. 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.

64. 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

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

66. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that the Parks Canada re-evaluate all proposals submitted in response to Solicitation No. 5P301-15-0005 in accordance with the terms and requirements set out in the RFSO.

67. Pursuant to subsection 30.16 of the *CITT Act*, the Tribunal awards Space2place its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Parks Canada. 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.

Jean Bédard

Jean Bédard
Presiding Member

62. *Ibid.*