



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-021

Méridien Maritime Réparation

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, November 23, 2015*

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IN THE MATTER OF a complaint filed by Méridien Maritime Réparation 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

MÉRIDIEN MARITIME RÉPARATION

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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Méridien Maritime Réparation. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint 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 by article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Peter Burn

Peter Burn

Presiding Member

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|---|--|
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STATEMENT OF REASONS

BACKGROUND

1. On July 22, 2015, Méridien Maritime Réparation (Méridien) 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 alleging that the Department of Public Works and Government Services (PWGSC) breached its obligations under the *Agreement on Internal Trade* in relation to a Request for Proposal (RFP), Solicitation No. F7047-141000/C, for the procurement of search and rescue lifeboats for the Canadian Coast Guard.

2. Specifically, Méridien alleged that PWGSC's evaluation with respect to two mandatory technical criteria, MTC2 and MTC6, was unreasonable because the evaluators did not apply themselves to the evaluation of the bid, ignored vital information in the bid and/or wrongly interpreted these mandatory evaluation criteria.

PROCUREMENT PROCESS

3. The RFP was issued on November 25, 2014, with a bid closing date of March 12, 2015. Méridien submitted a bid prior to this deadline.

4. On April 2, 2015, PWGSC requested clarification from Méridien on where the evidence of its production design capability and experience, as required by MTC2, was demonstrated in its bid. On the same day, Méridien responded that, in addition to Tabs 26-28 of its bid, which were listed as relevant to this requirement, relevant information could also be found at Tabs 18, 29 and 35. Méridien also submitted additional information as evidence of its capability and experience in production design.

5. PWGSC informed Méridien that it had not been awarded a contract on July 8, 2015, due to its failure to meet MTC2 and MTC6. Méridien filed an objection with PWGSC the same day, stating that its bid was compliant with these two criteria. On July 15, 2015, PWGSC provided a written debrief to Méridien, in which it informed Méridien that it would not reconsider its decision to disqualify Méridien's bid.

6. Méridien filed a complaint with the Tribunal on July 22, 2015. The complaint was accepted for inquiry on July 27, 2015.

7. On August 28, 2015, PWGSC filed its Government Institution Report (GIR).

8. On September 3, 2015, Méridien filed a motion for production of certain documents, on the grounds that PWGSC had failed to include all relevant documents in the GIR as required by Rule 103 of the *Canadian International Trade Tribunal Rules*.² In its comments on Méridien's motion, PWGSC submitted that the information sought by Méridien is irrelevant. On October 1, 2015, the Tribunal denied Méridien's motion for production on the grounds that the documents were irrelevant to the complaint.³

9. On October 16, 2015, Méridien filed its comments on the GIR.

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

2. SOR/91-499.

3. *Méridien Maritime Réparation v. Department of Public Works and Government Services* (1 October 2015), PR-2015-021 (CITT).

10. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

POSITIONS OF THE PARTIES

MTC2

11. MTC2 provided as follows:

MTC2 Design Check, Initial Design and Production Design Capability and Experience (*This requirement is also subject to the RT2 point-rated criteria*)

The Bidder must provide objective evidence that it has a proven capability and experience in the conduct of design checks, initial design and production design for boats of similar *size and complexity* to the subject RFP. The Bidder must provide a detailed list of projects, for boats of similar *size and complexity to the subject RFP*, that it has completed in the last ten (10) years where the Bidder conducted or managed Design Checks, Initial Design and Production Design.

The Bidder shall provide objective evidence in the form of a statement, signed by an authorized representative, that it has either: a) In-house design check, initial design and production design capabilities and experience for boats similar in size and complexity to the SAR Lifeboats; or

b) a written commitment for the duration of the Contract from a supplier(s) to provide design checks, initial design and production design services, where the supplier has In-house design check, initial design and production design capabilities and experience for boats similar in size and complexity to the SAR Lifeboat.

12. In finding Méridien's bid non-responsive to MTC2, PWGSC indicated that, while Méridien had provided objective evidence that it (or its supplier) has proven capability and experience in the conduct of *design checks and initial design*, the evaluators could not identify any information in the bid that demonstrated compliance with the requirement to provide objective evidence that Méridien has proven capability and experience in *production design*.⁴ The evaluators further stated that it was not clear which elements of production design would be accomplished by which intended provider(s), nor was there sufficient evidence of the provider(s) capability and experience.

13. In its complaint, Méridien argued that PWGSC failed to properly evaluate its bid as well as the information provided by Méridien in response to the clarification request. Méridien argued that evidence of its internal production design capability and experience was contained in its bid at:

- Tab 29 – 3D modelling of a vessel currently under construction using Ship Constructor software;
- Tab 35 – further evidence of Méridien's strength in 3D modelling (submitted for MTC3 and RTC3);
- Tab 34 – sets out Méridien's past construction experience and ability to build similar and more complex vessels (submitted for MTC3 and RTC3).

14. In addition, Méridien argued that evidence of the production design capability and experience of its suppliers was included in its bid at:

4. Tribunal Exhibit PR-2014-021-01, Tab 1, Exhibit E.

- Tab 26 – document prepared by Concept Naval detailing how Concept Naval will perform design checks and initial design on this project;
- Tab 27 – examples of projects where Concept Naval carried out work on design checks and initial design;
- Tab 28 – Concept Naval commitment letter indicating responsibility for design checks and initial design phase;
- Tab 18 – indicates that Méridien has partnered with Fleetway, who will provide specialists for ILS (Integrated Logistics Support – MTC4);
- Tab 39 – commitment letter from Fleetway for support in initial design and production design phases of the contract.

15. Méridien claimed that PWGSC failed in its obligation to cross-reference all of the documents contained within the bid to find evidence that supported Méridien's compliance with MTC2, despite the fact that cross-referencing within the bid was specifically permitted in Part 3, Section 3.1, Bid Preparation Instructions, of the RFP.

16. Further, Méridien argued that, since design check, initial design and production design capability and experience was also one of the point-rated technical criteria (RTC2), if PWGSC was dissatisfied with the degree of objective evidence in Méridien's bid, the appropriate course of action should have been to award Méridien a lower rating under RTC2 instead of disqualifying its bid.

17. In short, Méridien argued that PWGSC's evaluation of its bid with respect to MTC2 was unreasonable because the evaluators did not apply themselves, ignored vital information contained in the bid and/or wrongly interpreted the mandatory evaluation criteria by interpreting them in "an isolated and disjunctive manner", rather than considering the submission as a whole.⁵

18. In the GIR, PWGSC maintained its position that Méridien had not provided sufficient objective evidence of its proven capability and experience, or that of its supplier(s), in production design. PWGSC argued that the evaluators had considered all of the information identified by Méridien as relevant to this criterion in the bid (Tabs 26-28), in its response to the clarification request (Tabs 18, 35 and 29), as well as other material first identified as relevant in the complaint (Tabs 34 and 39).

19. With respect to the material set out at Tabs 26-28, PWGSC noted that Concept Naval (a supplier) only committed to, and provided evidence of its capability and experience in, design checks and initial design, but not in production design.

20. With respect to the material set out at Tabs 18 and 39, PWGSC noted that Fleetway (another supplier) only committed to providing integrated logistics support, which it submitted is not relevant to MTC2, and only mentioned its willingness to provide assistance and work cooperatively with Méridien in the initial design and production design phases, not to be responsible for those phases. Further, Fleetway did not attest to having capability and experience, or provide any evidence of experience, in production design.

21. With respect to the material found at Tabs 29 and 35, PWGSC argued that the diagrams and drawings, which Méridien submitted showed its experience in 3D modelling, did not include sufficient detail to demonstrate the requisite capability and experience in production design, and at best can only be

5. Tribunal Exhibit PR-2015-021-01 at paras. 43, 44.

considered evidence of 3D modelling capability. PWGSC submitted that this printing and modelling capability is neither essential to, nor constitutes a substantial aspect of, production design. According to PWGSC, production design drawings require a high level of engineering detail and fidelity, evidence of system integration, or details of production or assembly requirements, which these drawings are lacking.

22. With respect to the material found at Tab 34, which Méridien submitted as proof of its capability and experience in *ship construction* as per the requirements in MTC3 and RTC3, PWGSC argued that there is no evidence that Méridien or any of its identified suppliers was responsible for conducting the *production design* for these vessels.

23. Méridien submitted material along with its response to PWGSC's clarification request on April 2, 2015. PWGSC noted that the evaluators could not consider this material as it was submitted after the closing date for bid submission. In addition, PWGSC stated that the evaluators had "reviewed, but not considered" this information and found that it did not contain any information that could demonstrate that Méridien had proven capability and experience in production design.

24. Méridien claimed that any deficiencies in its submissions should only have resulted in a lower score under RTC2 and not a disqualification under MTC2. PWGSC argued that MTC2 was clearly identified as a mandatory criterion in the RFP and PWGSC was entirely within its rights to find Méridien's bid non-responsive, rather than simply lower its score for the corresponding point-rated criterion. Nevertheless, PWGSC noted that Méridien's bid was evaluated against RTC2 and given a mark of 10/50 (the passing grade was 20/50) for the same reason that it failed MTC2, i.e. that there was sufficient evidence of proven capability and experience in design checks and initial design, but not for production design.

25. Finally, PWGSC noted that Méridien's reply to PWGSC's request for clarification acknowledged the deficiencies in its bid, noting that it did not provide a list of past projects under Tab 29 (labelled as Production Design in the bid's table of contents) and that they had not emphasized the level of production engineering involved in a recent project.

26. In its comments on the GIR, Méridien argued it should have been found compliant with MTC2 because it met two of the three requirements. Referring to the fact that it only scored 10 out of a possible 50 points under RTC2, it argued that there was no indication in the RFP that the three elements of MTC2 would not be weighted equally.

27. Méridien also reiterated that sufficient information was available in its Technical Proposal to demonstrate compliance with MTC2, and that PWGSC had failed to review the proposal diligently and read it in its entirety. In particular, Méridien argued that the information provided in support of MTC3 (including Tabs 34 and 35, as noted above) demonstrated its experience and capability in production design, "since production engineering is a combination of manufacturing technology with management science."⁶ In short, it is Méridien's view that, as its proposal was compliant with MTC3, it must also be compliant with MTC2.

28. Finally, Méridien argued that the evaluators' failure to give sufficient consideration to Méridien's past construction experience demonstrates that they did not have enough experience to understand the technical content of Méridien's bid. Méridien submitted that this is evident from the fact that the evaluators found that the additional drawings submitted by Méridien on April 2, 2015, which were "detailed assembly hierarchy drawings and pure production design",⁷ did not contain any information that could demonstrate that Méridien had proven capability and experience in the conduct of production design.

6. Tribunal Exhibit PR-2015-021-21 at 2.

7. Tribunal Exhibit PR-2015-021-21 at 3.

MTC6

29. MTC6 provided as follows:

MTC6 Proposed Personnel – Project Management Organization

The Bidder must submit its proposed Project Management Organization. The Project Management Organization must consist of, at minimum, the following roles:

...

c) One (1) Lead Marine Engineer: The Lead Marine Engineer must have a minimum of 60 months experience in a lead marine engineering role within the last 120 months for ship construction projects.

...

For each role in the Project Management Organization above, the Bidder must provide detailed resumes that include detailed information to clearly indicate that the proposed individual possesses the required experience. An individual may be proposed for more than one (1) Project Management Organization role and will be evaluated based on experience in each category separately.

For each resume submitted, the Bidder must ensure that:

- the applicable Project Management Organization Role and the individual's name are clearly indicated;
- the starting and finishing date of the experience are clearly indicated;
- the name of the employer/institution as well as the position/title held by the individual during the period of the experience are clearly indicated;
- name of the organization/project the service was provided for (if outside of the employer/institution) are clearly indicated; and
- a brief summary description of the experience(s) and project(s) including activities performed and the responsibilities assigned to the individual during this period.

Listing experience without providing any supporting data to describe where and how such experience was obtained will result in the experience not being included for evaluation purposes.

Bidders should calculate the number of months and insert the total number of months in brackets; example: January 2004 to March 2004 (3 months).

Bidders are advised that the month(s) of experience listed for a project whose time frame overlaps that of another referenced project will only be counted once. For example: Project 1 time frame is July 2001 to December 2001; Project 2 time frame is October 2001 to January 2002; the total months of experience for these two project references is seven (7) months.

30. In finding Méridien's bid non-responsive to MTC6, PWGSC indicated that the résumé provided for Méridien's candidate for lead marine engineer did not contain sufficient information to demonstrate that the qualification requirements set out above were met. The evaluators found that there was no evidence in the résumé that the candidate was involved in any ship construction project, as lead marine engineer, during the requisite period. In particular, no ship construction projects or vessels were specifically listed in the résumé, and the résumé did not elaborate on the candidate's duties and experience while holding the positions identified that would fall within the requisite period.

31. In its complaint, Méridien argued that, due to the complexity and diversity of tasks performed by a lead marine engineer, there might be more than one reasonable interpretation of that term. Méridien argued that its candidate's experience as technical superintendent for Vships Canada, as set out in the résumé, should have been considered sufficient to meet the requirements. Méridien submitted that "technical superintendent" is the title recognized industry-wide as applicable to lead engineers, and that PWGSC should have understood it as such without additional particulars. Further, Méridien submitted that PWGSC should know that Vships is one of the largest ship management companies in the world, and that a technical superintendent employed by that company would have extensive involvement in ship construction projects. Finally, Méridien noted that, in addition to the candidate's résumé, it provided PWGSC with several certificates and diplomas supporting the candidate's expertise, including a certificate of competency as a First Class Engineer, and two Seafarer certificates, which also served to demonstrate that the candidate had the mandatory qualifications.

32. Méridien also submitted that there have been few new ship construction contracts in Eastern Canada within the last 120 months and it is very unlikely that certified and trained marine engineers would occupy positions in organizations that would allow them to meet the qualification requirements set out above.

33. In sum, Méridien argued that PWGSC's evaluation of its bid with respect to MTC6 was unreasonable because the evaluators relied on their false assumptions regarding its candidate's qualifications instead of seeking clarification from Méridien. Méridien cited the Tribunal's decisions in *Tritech Group Ltd.* and *Legacy Products Corporation* to support its argument that PWGSC had an obligation to seek clarification and not rely on false assumptions in its evaluation.⁸

34. In the GIR, PWGSC maintained its position that Méridien's candidate's résumé did not contain "detailed information to clearly indicate" that the candidate had the requisite experience to meet the qualification requirements for the position of Lead Marine Engineer, i.e. that he had any experience in "ship construction projects". Of the only two items on the résumé that fell within the requisite 120-month period, the first was listed simply as "Own company", and did not provide the "brief summary description of the experience(s) and project(s) including activities performed and the responsibilities assigned to the individual during this period" required by MTC6.

35. With respect to the candidate's experience with Vships, PWGSC argued that the résumé similarly did not provide any information on "the experience(s) and project(s) including activities performed and responsibilities assigned to the individual during this period." Further, PWGSC argued that, instead of assuming that PWGSC evaluators would know that "technical superintendent" was equivalent to "lead marine engineer", by providing the required information regarding the projects undertaken as "technical superintendent", Méridien could have ensured that the evaluators could have counted this experience toward the requisite 60 months. Finally, PWGSC noted that the additional information submitted by Méridien in its complaint was not included in the bid and cannot now be considered by the Tribunal as this would amount to allowing bid repair.

36. With respect to the other experience detailed in the candidate's résumé, PWGSC noted that it falls outside the 120-month time frame and cannot be considered.

8. *Tritech Group Ltd. v. Department of Public Works and Government Services* (31 March 2014), PR-2013-035 (CITT), application for judicial review dismissed by the Federal Court of Appeal, 4 February 2014 (*Canada (Attorney General) v. Tritech Group Ltd.*, 2015 FCA 39); *Legacy Products Corporation v. Department of Public Works and Government Services* (2 April 2014), PR-2013-031 (CITT).

37. In response to Méridien's contention that few personnel would have been able to gain the requisite experience over the identified 120-month period due to lack of ship construction projects in Eastern Canada during that period, PWGSC indicated that four other bidders had been successful in meeting this requirement.⁹

38. In response to Méridien's argument that PWGSC should have sought clarification regarding the candidate's credentials, PWGSC argued that the candidate's résumé was so lacking in the required elements that no amount of clarification, short of providing new information, would have made it compliant with MTC6. Allowing Méridien to provide such additional information, after the date for bid closing, would have been unfair to the other bidders and amounted to impermissible bid repair. PWGSC also noted that, although Méridien argued that PWGSC had made erroneous assumptions regarding the candidate's qualifications, it did not identify these allegedly erroneous assumptions.

39. Finally, PWGSC submitted that the technical evaluation team that evaluated the bids was made up of eight experienced and well-qualified evaluators.

40. In its comments on the GIR, Méridien largely repeated the arguments outlined above. In addition, it argued that the evaluators' decision was unreasonable because it was based on the evaluators' lack of knowledge of commonly held positions within the marine industry, i.e. that a "technical superintendent" would be performing the same tasks as a "lead marine engineer". According to Méridien, PWGSC breached its duty to assemble a qualified evaluation team with the required degree of knowledge to properly assess its candidate's qualifications.

ANALYSIS

41. Pursuant to subsection 30.14(1) of the *CITT Act*, the Tribunal must limit its considerations to the subject matter of the complaint when conducting an inquiry. Furthermore, pursuant to section 11 of the *Regulations*, the Tribunal must determine whether the procurement was conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,¹⁰ Chapter Five of the *Agreement on Internal Trade*,¹¹ the World Trade Organization (WTO) *Agreement on Government Procurement*,¹² Chapter Kbis of the *Canada-Chile Free Trade Agreement*,¹³ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,¹⁴ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,¹⁵ Chapter Sixteen

9. This was the basis for Méridien's request for production of documents, as it wanted access to the information filed by these four successful bidders. As noted above, the Tribunal denied the production request on the grounds that these documents could not be relevant to PWGSC's evaluation of Méridien's bid.

10. *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).

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [AIT].

12. *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).

13. *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.

14. *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).

of the *Canada-Panama Free Trade Agreement*,¹⁶ Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*¹⁷ or Chapter Fourteen of the *Canada-Korea Free Trade Agreement*¹⁸ applies. According to the solicitation documents, the *AIT* applies to this procurement.¹⁹

42. The question before the Tribunal, then, is whether Méridien's complaint is valid in terms of how PWGSC did, or did not, breach any of the relevant trade agreements when it determined Méridien's bid to be non-compliant with MTC2 and MTC6.

43. The Tribunal will consider the validity of Méridien's allegations in the context of Article 506(6) of the *AIT*.

44. Article 506(6) of the *AIT* provides that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

Standard of Review

45. When considering the validity of a complaint in the context of the applicable trade agreements, the Tribunal employs the standard of reasonableness. To that end, the Tribunal has accorded a large measure of deference to evaluators in their evaluation of proposals. It has stated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.²⁰

46. Conversely, the Tribunal has been clear that it will find an evaluation to be unreasonable and will substitute its judgment for that of the evaluators when 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, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.²¹

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15. *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).
 16. *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).
 17. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014).
 18. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).
 19. Tribunal Exhibit PR-2015-021-01, Tab 1, Exhibit A.
 20. *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 52; *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) [*SIAST*] at para. 58.
 21. *Northern Lights* at para. 52; *SIAST* at para. 58; *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at paras. 26-28; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel*] at para. 33; *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT).

47. Furthermore, the Tribunal has also consistently held that bidders bear the onus of demonstrating how their bids meet the mandatory criteria published in the solicitation documents.²² Accordingly, the Tribunal has stated that it is incumbent upon bidders to exercise due diligence in the preparation of their bids to make sure that they are compliant with all mandatory requirements.²³ In this respect, the Tribunal has generally refused to impose an obligation on government institutions to seek clarification from bidders.²⁴ While bidders can and should ask questions to clarify mandatory and technical requirements before bids are submitted, government institutions are not required to do likewise when bids are received.²⁵

48. Related to the last point above, as argued by Méridien, Tribunal jurisprudence does establish that, in exceptional circumstances, government institutions' evaluations may be found unreasonable if they rely on false assumptions regarding the interpretation of terms in a bidder's submission, instead of exercising their option to request clarification of the intended meaning of those terms from the bidder. However, the Federal Court of Appeal has found that the failure to seek clarification does not in and of itself render the evaluation unreasonable, only that it increases the risk that the interpretation, if based on a false assumption, may be found to be unreasonable:

[11] The Applicant contends that the CITT erred in imposing a duty on PWGSC to seek a clarification in respect of the Respondent's insertion of the Impugned Sentences into Annex B of its Standing Offer. In our view, the CITT did not base its decision on PWGSC's decision not to seek such a clarification. Rather, we interpret the CITT as saying that where a bid contains language that is susceptible of more than one meaning, PWGSC is free to form its own opinion with respect to the meaning of that language. However, in doing so, it runs the risk of making an incorrect or unreasonable interpretation that may have adverse consequences to it – a risk that may be avoided by requesting a clarification with respect to the unclear language.²⁶

49. Méridien is also correct that the jurisprudence places an obligation on government institutions to review proposals with diligence and thoroughness,²⁷ and to “look beyond the direct response to a rated criterion to consider relevant information contained elsewhere in the submission.”²⁸

Did PWGSC Fail to Properly Evaluate Méridien's Bid with Respect to MTC2?

50. Applying the above standard, the Tribunal finds that PWGSC's evaluation of Méridien's bid with respect to MTC2 was reasonable. The explanations offered by PWGSC for disqualifying Méridien's bid were tenable, and PWGSC discharged its duty to thoroughly and diligently review Méridien's bid.

51. With respect to the latter point, the uncontested evidence before the Tribunal is that, after an initial review, PWGSC sought clarification from Méridien regarding where evidence of production design capability and experience was located in its bid. The evidence also establishes that PWGSC reviewed the additional sections of the bid that Méridien identified in response to the request, and took them into

22. *Info-Electronics H P Systems Inc. v. Department of Public Works and Government Services* (2 August 2006), PR-2006-012 (CITT); *SIAST* at para. 59; *Excel* at para. 34.

23. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) [*Integrated Procurement*] at para. 13.

24. *Accipiter Radar Technologies Inc. v. Department of Fisheries and Oceans* (17 February 2011), PR-2010-078 (CITT) at para. 52; *Integrated Procurement* at para. 13.

25. *SIAST* at para. 59.

26. *Canada (Attorney General) v. Trittech Group Ltd.*, 2015 FCA 39 at para. 11.

27. *Canadian Computer Rentals* (3 August 2000), PR-2000-003 (CITT) at 3, 5.

28. *Star Group International Trading Corporation v. Defence Construction (1951) Limited* (7 April 2014), PR-2013-032 (CITT) [*Star Group*] at para. 66.

consideration in arriving at its decision. In other words, PWGSC made an effort to ensure that it had considered potentially relevant information located elsewhere in Méridien's bid but not explicitly listed as a response to MTC2.

52. In addition, previous Tribunal jurisprudence supports PWGSC's conclusion that it could not consider the additional information submitted by Méridien on April 2, 2015, because this would have been unfair to the other bidders and would have amounted to impermissible bid repair.²⁹

53. Instead, the evidence before the Tribunal suggests that Méridien did not discharge its onus to demonstrate how its bid met this mandatory criterion. Méridien's bid only identified the drawings and schematics under Tab 29 specifically in reference to production design, and did not cross-reference to other sections of its bid, as Méridien itself has pointed out was permitted by the RFP.

54. Further, Méridien in fact acknowledged that its response to MTC2 with respect to production design may have been lacking, as it was "probably missing [a] list of past projects".³⁰ This list was a required element of MTC2, which provided that "[t]he Bidder must provide a detailed list of projects, for boats of similar size and complexity to the subject RFP, that it has completed in the last ten (10) years." This fact, along with the fact that Méridien attempted to supplement its response to MTC2 on April 2, 2015, is tantamount to Méridien acknowledging that it did not exercise due diligence in preparing its bid.

55. Turning to the issue of whether the explanations offered by PWGSC for its decision that the materials identified by Méridien did not demonstrate its proven capability and experience in production design were tenable, the Tribunal will address each of the claims made by Méridien and PWGSC's responses in turn.

56. Méridien argued that its response to MTC3 and RTC3, which dealt with the construction phase of the project, should be considered as responsive to MTC2. However, the RFP itself draws a distinction between the production design and construction phases, and PWGSC is correct that the information submitted in response to MTC3 and RTC3 makes no reference to "production design". The information submitted by Méridien's suppliers, Concept Naval and Fleetway, also suggests that they did not commit to providing production design services on Méridien's behalf. At most, Fleetway offered to support Méridien in the latter's provision of production design services. The reasoning behind PWGSC's decision that this information did not demonstrate experience in production design is therefore upheld.

57. With respect to the documents demonstrating Méridien's capability in 3D modelling, PWGSC's position is that this ability is not relevant to production design, and Méridien has not provided a clear explanation as to why this ability is indeed relevant. In addition, PWGSC is correct in noting that these drawings do not identify which projects they were for. On balance, PWGSC's explanation that these documents do not clearly establish Méridien's experience in production design is plausible.

58. With respect to Méridien's claim that it should not have been completely disqualified under MTC2, but rather should only have received a lower score for providing insufficient evidence of production design capability and experience, the RFP clearly stated that MTC2 was a mandatory criterion and that the consequence of failing to meet a mandatory criterion "to the satisfaction of Canada" was disqualification

29. For a recent example, see *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CIIT) at para. 45.

30. Tribunal Exhibit PR-2015-021-01, Tab 1, Exhibit D.

(see Part 4, Section 4.1, Evaluation Procedures, Section II – Technical Bid). PWGSC’s explanation that it was within its rights, as set out in the RFP, to disqualify Méridien’s bid on the basis that it did not meet MTC2 is therefore also upheld.

59. Méridien did not make any argument about the scoring methodology under RTC2 in its complaint. In accordance with subsection 30.14(1) of the *CITT Act*, in conducting an inquiry, the Tribunal must limit its considerations to the subject matter of the complaint. The Tribunal cannot consider new grounds of complaint raised in the comments to the GIR during its inquiry. Accordingly, to the extent that Méridien’s arguments raise a new ground of complaint relating to the scoring methodology under RTC2, they have not been considered.

60. Finally, Méridien did nothing more than make the unsupported claim that the evaluators lacked the requisite experience: essentially, Méridien simply alleged that since the evaluators disqualified its bid, they must not have understood its contents. Consequently, the Tribunal gives no credence to that allegation.

Did PWGSC Fail to Properly Evaluate Méridien’s Bid with Respect to MTC6?

61. As noted above, Méridien has relied on the Tribunal’s recent decisions in *Tritech Group Ltd.* and *Legacy Products Corporation* to establish that, in certain circumstances, the government institution should be required to request clarification from bidders, and should not simply assume that it understands the meaning of terms used in the bid. The facts of this case do not concur with the situations that led to the Tribunal’s findings in those matters.

62. Méridien has framed this ground of complaint as an interpretation dispute, and argued that PWGSC had an obligation to seek clarification rather than rely on its assumptions regarding its candidate’s qualifications. This argument is based on a mischaracterization of PWGSC’s evaluation, and its reasons for finding Méridien’s bid non-responsive. As set out above, Méridien’s bid was declared non-responsive because the candidate’s résumé did not include the level of detail required by MTC6. More specifically, PWGSC found that the candidate’s résumé did not provide any of the required information regarding his involvement in ship construction projects over the requisite 120-month period.

63. Further, Méridien’s arguments do not clearly identify which term – “lead marine engineer” or “technical superintendent” – PWGSC has misinterpreted, how those terms were misinterpreted or what false assumptions PWGSC relied upon in arriving at this misinterpretation.

64. Instead, the thrust of Méridien’s argument is that the evaluators should have sought information or applied personal knowledge outside of what was contained in the bid in order to conclude that “technical superintendent” was equivalent to “lead marine engineer”. Such actions are not permissible. It is well established in law that evaluators must base their evaluations on the content of the proposals before them without recourse to information or knowledge extraneous thereto.³¹

65. Méridien’s bid lacked essential information. The candidate’s résumé did not include the level of detail required by MTC6. Accordingly, it was reasonable for Méridien’s bid to be declared non-responsive by the evaluators. Further, PWGSC could not allow the bid to be supplemented by information that it did not contain; and evaluators could not apply personal knowledge outside of what was contained in the bid in order to conclude that “technical superintendent” was equivalent to “lead marine engineer”. Allowing Méridien to supplement the level of detail provided in the résumé after bid closing would have constituted impermissible bid repair.

31. *Star Group* at para. 41.

COSTS

66. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

67. In this instance, the complexity of the procurement itself was relatively high, as it concerned the construction of complex marine vessels and included criteria relating to initial design up to the actual production of the vessels. The complaint itself, however, was not complex, as the main issue was whether or not PWGSC correctly determined that Méridien's proposal was non-compliant with the mandatory requirements of the RFP, which entailed rather straightforward issues of interpretation of the solicitation requirements and factual determinations.

68. With regard to the complexity of the proceedings, these were complicated somewhat as a result of the motion for production of documents filed by Méridien. This required additional rounds of submissions by the parties and the use of a 135-day time frame. Moreover, Méridien was unsuccessful in this motion. The complexity of the proceedings, therefore, was slightly higher.

69. Therefore, in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the level of complexity of the complaint is Level 2, and the preliminary indication of the amount of the cost award is \$2,750.

DETERMINATION

70. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

71. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Méridien. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity of the complaint 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.

Peter Burn

Peter Burn

Presiding Member