



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-064

MasterBedroom Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, May 26, 2016*

*Corrigendum issued
Wednesday, June 8, 2016*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 PROCUREMENT PROCESS AND PRIOR COMPLAINTS 1

 RELEVANT PROVISIONS OF THE RFSO 3

 POSITIONS OF PARTIES..... 5

 MASTERBEDROOM..... 5

 PWGSC..... 6

ANALYSIS..... 6

 Trade Agreements 6

 Checkmark Requirement..... 7

REMEDY 9

COSTS..... 10

DETERMINATION OF THE TRIBUNAL..... 10

IN THE MATTER OF a complaint filed by MasterBedroom 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

MASTERBEDROOM 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.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services terminate the contract awarded to 4461789 Canada Inc. for the Toronto area and award it to MasterBedroom Inc. The Canadian International Trade Tribunal also recommends that MasterBedroom Inc. be compensated by an amount equal to the profit that it would have earned from the date of the contract award to 4461789 Canada Inc. to the date of the subsequent award to MasterBedroom Inc.

If, for operational reasons, the Department of Public Works and Government Services considers that it is not feasible to terminate the contract already awarded, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate MasterBedroom Inc. for the profit that it would have earned had it been awarded the contract for the Toronto area for its entire duration. The basis for calculating the profit will be the prices contained in the proposal submitted by MasterBedroom Inc. For further certainty, should the Department of Public Works and Government Services choose to exercise the option to extend the contract for the Toronto area to 4461789 Canada Inc. beyond the contract's expiry date of July 31, 2016, the Canadian International Trade Tribunal recommends that it continue to compensate MasterBedroom Inc. for the duration of any extensions.

The Canadian International Trade Tribunal recommends that MasterBedroom Inc. and the Department of Public Works and Government Services negotiate the quantum of compensation and, within 30 days of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, MasterBedroom Inc. shall file with the Canadian International Trade Tribunal, within 20 days of the afore-noted report to the Canadian International Trade Tribunal, a submission on the issue of compensation. The Department of Public Works and Government Services shall then have 7 working days after the receipt of MasterBedroom Inc.'s submission to file a response. MasterBedroom Inc. shall then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

Subsequent to these submissions, the Canadian International Trade Tribunal will issue an order regarding the quantum of compensation.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards MasterBedroom 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 1, and its preliminary indication of the amount of the cost award is \$1,150. 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.

Rose Ritcey

Rose Ritcey

Presiding Member

IN THE MATTER OF a complaint filed by MasterBedroom 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

MASTERBEDROOM INC.

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

CORRIGENDUM

The second sentence in note 26 should read as follows: “However, in the face of a mandated checkmark list, geographic indications contained in the statement of work, or in the cover letter, cannot be deemed relevant and used in the evaluation of bids.”

By order of the Tribunal,

Rose Ritcey
Rose Ritcey
Presiding Member

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STATEMENT OF REASONS

1. This is the fourth complaint filed with the Canadian International Trade Tribunal (the Tribunal) by MasterBedroom Inc. (MasterBedroom) relating to a Request for a Standing Offer (RFSO) (Solicitation No. B3275-150511/A), issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Citizenship and Immigration (CIC), for the provision of basic household furniture to individuals or families in Toronto, Hamilton, Kitchener, London, Windsor and Ottawa, Ontario. MasterBedroom alleged that the offer of the bidder awarded the contract for Toronto was improperly evaluated and should not have resulted in contract award.

2. As a remedy, MasterBedroom requested that it be awarded the contract. In addition, MasterBedroom requested a detailed accounting of all orders placed by PWGSC to date with the bidder awarded the contract for Toronto, 4461789 Canada Inc., operating as Charley's Furniture, and compensation for lost profits with regard to those orders. In the alternative, MasterBedroom requested full indemnification for lost profits from the time of contract award to the expiry of the contract period. MasterBedroom also requested that it be awarded costs incurred in the preparation of its complaint.¹

PROCUREMENT PROCESS AND PRIOR COMPLAINTS

3. On May 11, 2015, PWGSC issued the RFSO with a bid closing date of June 22, 2015.² The proposed period of the intended contract was one year, commencing on August 1, 2015, and ending on July 31, 2016. In addition, PWGSC reserved the right to request an extension for two additional periods of one year.

4. On June 18, 2015, MasterBedroom submitted its proposal.

5. On July 29, 2015, PWGSC awarded the standing offer for Toronto to MasterBedroom.

6. On July 31, 2015, PWGSC wrote to MasterBedroom to inform it that the standing offer awarded to it had been set aside due to an evaluation error. PWGSC indicated that this retraction was undertaken pursuant to articles 2 and 4.2.e. of the General Conditions of the Standard Acquisition Clauses and Conditions (SACC) Manual.³ Further, PWGSC indicated that, although MasterBedroom's offer was responsive, it was not the lowest evaluated bidder for the Toronto area.⁴ The standing offer for the Toronto area was awarded instead to Charley's Furniture.

7. On August 6, 2015, MasterBedroom filed its first complaint with the Tribunal.⁵ MasterBedroom alleged that, by initially awarding the standing offer to MasterBedroom and then later retracting that award, PWGSC had acted improperly in the evaluation of its bid. The Tribunal found that, in correcting an error in evaluation, PWGSC had taken material steps to ensure that its obligations under the trade agreements were fulfilled. The Tribunal additionally found that PWGSC had acted consistently with articles 2 and 4.2.e of the General Conditions of the SACC Manual in retracting the standing offer and concluded, therefore, that

1. Exhibit PR-2015-064-12 at para. 28, Vol. 1C.

2. On June 16, 2015, PWGSC issued an amendment to the RFSO, changing the bid closing date from June 22 to June 29, 2015.

3. *MasterBedroom Inc.* (12 January 2016), PR-2015-052 (CITT) [*MasterBedroom III*] at para. 8.

4. Exhibit PR-2015-064-10A (protected) at 209, Vol. 2; *MasterBedroom Inc.* (14 August 2015), PR-2015-023 (CITT) [*MasterBedroom I*] at para. 11.

5. *MasterBedroom I*.

MasterBedroom's complaint did not disclose a reasonable indication that the procurement had not been conducted in accordance with the trade agreements.

8. On August 24, 2015, MasterBedroom filed its second complaint with the Tribunal.⁶ MasterBedroom alleged that Charley's Furniture could not have met the technical criteria because of the large distance between Ottawa, the location of that bidder, and Toronto. Further, MasterBedroom alleged that, even if the other bidder did meet the technical criteria, the irregularities with the bid process give reason to suspect PWGSC's quick conclusion that Charley's Furniture's proposal was compliant in all respects and offered the lowest price. The Tribunal found that there was no reason to be more suspect of an Ottawa company's capacity to carry out the terms of the contract than any other company and that it was reasonable to consider that human error had led to an initial failure to properly consider Charley's Furniture's bid. Accordingly, the Tribunal found that the submissions before it did not disclose a reasonable indication of a breach of the trade agreements by PWGSC and, thus, did not accept the complaint for inquiry.

9. On January 9, 2016, MasterBedroom forwarded an objection premised on a new ground of complaint to PWGSC. MasterBedroom asserted that Charley's Furniture's bid, which it had obtained on January 5, 2016, pursuant to an Access to Information and Privacy request, did not meet a mandatory requirement of the solicitation, as Charley's Furniture did not checkmark Toronto as an area to which its bid applied.

10. On January 11, 2016, prior to receiving a response or denial of relief from PWGSC, MasterBedroom filed a third complaint with the Tribunal.⁷

11. On January 18, 2016, the Tribunal determined that MasterBedroom's third complaint was premature. The Tribunal indicated that the new information provided by MasterBedroom disclosed a reasonable indication of a breach of the trade agreements. However, the Tribunal noted that MasterBedroom had made an objection to PWGSC and had yet to receive a response or denial of relief. The Tribunal indicated that, in the event that MasterBedroom did not receive, within 40 days of the issuance of its reasons, a response from PWGSC that conclusively addressed its concerns, the Tribunal would construe PWGSC's silence as a constructive denial of relief and that MasterBedroom would then be able to file a new complaint with the Tribunal.

12. On February 29, 2016, at the end of the 40-day period stipulated by the Tribunal, MasterBedroom filed the present complaint.

13. The Tribunal issued a notice of inquiry with regard to the complaint on March 4, 2016. On the same day the Tribunal informed parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *Canadian International Trade Tribunal Act*⁸ and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁹

14. On April 1, 2016, PWGSC filed its Government Institution Report (GIR).

15. On April 14, 2016, MasterBedroom filed a reply to the GIR.

6. *MasterBedroom Inc.* (26 August 2015), PR-2015-024 (CITT).

7. *MasterBedroom III*.

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

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

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

RELEVANT PROVISIONS OF THE RFSO

17. The relevant provisions of the RFSO are as follows:

PART 1 – GENERAL INFORMATION

...

1.2 Summary

- (i) This requirement is for the supply, delivery, and assembly, on an “as and when requested” basis, of basic household furniture items, to the identified individuals or families on behalf of Citizenship and Immigration Canada throughout Ontario in accordance with Annex A - Statement of Work (SOW) and Annex B - Furniture Description and Specification, attached hereto.

...

PART 3 – OFFER PREPARATION INSTRUCTIONS

3.1 Offer Preparation Instructions

...

Section I: Technical Offer

In their technical offer, offerors should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.

Section II: Financial Offer

Offerors must submit their financial offer in accordance with Annex C – Basis of Payment and Annex F – Price Evaluation. The total amount of Applicable Taxes must be shown separately.

...

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

...

4.1.1 Technical Evaluation

4.1.1.1 Mandatory Technical Criteria

Any offer which fails to meet the following mandatory requirements will be deemed non-responsive and will receive no further consideration.

	Mandatory Technical Criteria
1	<p>Offerors must fill-out and submit for each of the items on Annex B - Furniture Description and Specifications as follows:</p> <ul style="list-style-type: none"> - the proposed make and model of each item; - pictures of the actual proposed items; and - descriptive literature or specifications for each proposed item from the manufacturer to demonstrate that they meet the requirement. <p>Offerors must provide the documentations stated above. Should it not be submitted with the offer, the Offerors will have 3 days to submit upon request from the Contracting Officer or the Offer will be deemed noncompliant.</p>
2	<p>Offerors must checkmark the area they are offering:</p> <ul style="list-style-type: none"> () Toronto Area; () Hamilton Area; () Kitchener Area; () London Area; () Windsor Area; and () Ottawa Area.

4.1.2 Financial Evaluation

4.1.2.1 Mandatory Financial Criteria

a) Offerors must provide pricing for all line items in accordance with Annex C - Basis of Payment in Canadian dollars, for each area they are offering

...

4.1.2.2 Evaluation of Price

...

b) The pricing proposed at Annex C – Basis of Payment will be used for price evaluation at Annex F – Price Evaluation;

c) Offers for each geographic area will be evaluated individually; . . .

...

4.2 Basis of Selection

4.2.1 Basis of Selection – Mandatory Technical Criteria Only

An offer must comply with the requirements of the Request for Standing Offers and meet all mandatory technical evaluation criteria to be declared responsive. The responsive offer with the lowest evaluated price for each geographic area will be recommended for issuance of a standing offer.

...

PART 6 – STANDING OFFER AND RESULTING CONTRACT CLAUSES

A. STANDING OFFER

6.1 Offer

6.1.1 The Offeror offers to supply, deliver, and assemble, on an as and when requested basis, household furniture in accordance with Annex A – Statement of Work and Annex B – Furniture Description and Specifications, for ____ (*Toronto Area; Hamilton Area; Kitchener Area; London*

Area; Windsor Area; or Ottawa Area, area or areas that applies to the Offeror will be inserted at the time of standing offer issuance)____.

...

ANNEX A

STATEMENT OF WORK

1. The Contractor must deliver basic household furniture as detailed herein and as per the call-up against the standing offer form, in the _____ area(s) (*6 areas - Toronto, Hamilton, Kitchener, London, Windsor or Ottawa. Area or areas that applies to the Offeror will be inserted at the time of standing offer issuance*), to the address on the date stipulated, or within a maximum of 72 hours of the Call-up against the Standing Offer.

...

ANNEX C

BASIS OF PAYMENT

NOTE: Offeror must check mark the area(s) they are offering:

- Toronto Area;*
- Hamilton Area;*
- Kitchener Area;*
- London Area;*
- Windsor Area; and*
- Ottawa Area.*

...

ANNEX F

PRICE EVALUATION

1. The Offeror's proposed pricing on Annex C, Basis of Payment will be used herein for price evaluation. . . .

[Underlining added for emphasis]

POSITIONS OF PARTIES

MASTERBEDROOM

18. MasterBedroom submitted that the checkmark list included in section 4.1.1.1 of the RFSO was a mandatory requirement of the technical portion of the solicitation, while the checkmark list included in Annex C was a mandatory requirement of the financial portion of the solicitation. In support of its position, MasterBedroom noted that PWGSC gave the CIC evaluators, who were responsible for the technical evaluation of bids, a copy of section 4.1.1.1 as part of an "evaluation grid".¹⁰ According to MasterBedroom, this is indicative of an evaluation process in which the checkmark list was not limited to the financial portion of submitted bids.

19. MasterBedroom further submitted that it is clear from the technical portion of Charley's Furniture's bid that it did not provide, in that portion, a checkmark list with "Toronto" selected. Thus, according to

10. Exhibit PR-2015-064-12 at para. 18, Vol. 1C. The evaluation process was bifurcated, with CIC responsible for the technical evaluation and PWGSC responsible for the financial evaluation. Exhibit PR-2015-064-10 at para. 22, Vol. 1B.

MasterBedroom, Charley's Furniture's bid did not meet the mandatory requirement set out in section 4.1.1.1, with the result that its bid was not compliant and that it should not have been awarded a standing offer.¹¹

PWGSC

20. PWGSC acknowledged that errors were made in the evaluation of the offers received in response to the RFSO for the Toronto area. However, PWGSC submitted that the evidence indicates that it corrected these errors and awarded the resulting contract in accordance with the terms of the RFSO.

21. PWGSC explained that, following the initial contract award to MasterBedroom, its evaluator realized that Charley's Furniture had submitted two sets of Annex C, one for Ottawa and one for Toronto, Hamilton, Kitchener and London. PWGSC explained that its evaluator had initially only seen the annex for Ottawa, which was placed on top of the annex for the other areas. Upon further review, the evaluator determined that Charley's Furniture was in fact financially compliant for all areas and, further, was the lowest compliant offeror for Toronto, Hamilton, Kitchener, London and Ottawa. Thus, PWGSC rescinded the standing offer initially awarded to MasterBedroom in favour of Charley's Furniture.¹²

22. In response to MasterBedroom's allegation that Charley's Furniture's bid was not compliant because it did not provide a checkmark list with "Toronto" selected within the technical portion of its bid, PWGSC argued that a "reasonable" interpretation of the "... specific Mandatory Technical Criteria [did not] ... require Offerors [to] check mark the areas they were offering under Mandatory Technical Criteria."¹³ PWGSC noted that MasterBedroom had submitted the checkmark list twice, once with the technical portion and then again with the financial portion of its bid, while Charley's Furniture had submitted the list once, with the financial portion of its bid. PWGSC asserted that both approaches were compliant.¹⁴

ANALYSIS

Trade Agreements

23. 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

11. Exhibit PR-2015-064-12 at paras. 14, 22, Vol. 1C. MasterBedroom asserted that the technical portion of Charley's Furniture's bid contained a checkmark list with only "Ottawa" selected. In fact, the Tribunal is unable to find any checkmark list in the technical portion of Charley's Furniture's bid. The two checkmark lists to which MasterBedroom refers are in fact the work product of CIC's evaluators, demonstrative of their putative conclusion that Charley's Furniture had submitted a bid for Ottawa only. Exhibit PR-2015-064-12, exhibits C and D, Vol. 1C. However, this error does not negate the fact at the core of MasterBedroom's assertion—that the technical portion of Charley's Furniture's bid did not contain a checkmark list with "Toronto" selected.

12. At the same time, PWCSC rescinded the standing offer for the Hamilton, Kitchener and London areas that had been awarded to another offeror in favour of Charley's Furniture.

13. Exhibit PR-2015-064-10 at para. 56, Vol. 1B.

14. *Ibid.* at para. 60.

applicable trade agreements, which in this case include the *North American Free Trade Agreement*,¹⁵ the *Agreement on Internal Trade*,¹⁶ the *Agreement on Government Procurement*,¹⁷ the *Canada-Peru Free Trade Agreement*¹⁸ and the *Canada-Colombia Free Trade Agreement*.¹⁹

24. 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 that will be used for evaluating and, further, awarding the contract.²⁰

25. The trade agreements also provide that, to be considered for contract award, a proposal must conform to the essential requirements set out in the tender documentation and require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.²¹

26. 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 solicitation documents. As the Tribunal 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, have based their evaluation on undisclosed criteria or have otherwise failed to conduct the evaluation in a procedurally fair manner, it will not substitute its judgment for that of the evaluators.²²

Checkmark Requirement

27. In light of the construction of section 4.1.1.1 of the RFSO, the Tribunal concludes that it undoubtedly contains a mandatory requirement that bidders indicate the cities to which their bids pertain as

15. *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].

16. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

17. *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).

18. *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).

19. *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).

20. 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 . . ."

21. 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 . . ."

22. 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.

part of their technical bids. In fact, the section starts with the unequivocal indication that “[a]ny offer which fails to meet the following mandatory requirements will be deemed non-responsive”

28. By way of Annex C to the RFSO, the same requirement is repeated for the purposes of the financial portion of the solicitation process.

29. Thus, a mandatory requirement of the solicitation process was clearly stipulated twice—once within the technical portion and then again within the financial portion of the solicitation documents. It is not for the Tribunal to second-guess the intentions at work in the construction of these mandatory requirements.²³

30. Further, it is not for bidders to select which mandatory requirements to meet and which to ignore. Rather, bidders bear the onus of ensuring that their bids meet all mandatory requirements, and the procuring entity’s onus, once it has set down mandatory requirements, is to evaluate bids with regard to those requirements thoroughly and strictly.²⁴

31. After stipulating a mandatory requirement in duplicate, with each relevant to a distinct portion of the solicitation process, it was not open to PWGSC to indicate, without an amendment to the RFSO, that bidders could be compliant by fulfilling just one instance of the requirement. In advancing such an argument, PWGSC is effectively asserting that the clear mandatory requirements that it had set down were actually latently ambiguous and could thus accommodate more than one reasonable interpretation. That assertion, however, requires that the Tribunal ignore the clear construction of both section 4.1.1.1 of the RFSO and Annex C. It also requires that the Tribunal ignore the fact, as noted by MasterBedroom, that CIC’s technical evaluators were provided with section 4.1.1.1 for the purposes of their evaluation and were thus supposed to evaluate the section 4.1.1.1 version of the checkmark requirement separately from the evaluation of the Annex C version of that requirement by PWGSC’s financial evaluator.²⁵

32. In addition, it was not open to PWGSC or to CIC to subject one instance of the doubly stipulated requirement to a less than thorough evaluation or to entirely and summarily exempt that instance from evaluation. CIC’s evaluators erred in arriving at the initial conclusion that Charley’s Furniture’s technical bid was limited to Ottawa despite the fact that its technical bid did not contain a checkmark list.²⁶

23. It is plausible that PWGSC intended the doubly stipulated requirement for two sets of evaluators—one set responsible for technical requirements and the other for financial requirements.

24. *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 28; *IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT).

25. Exhibit PR-2015-064-12, Exhibits E, F, G, Vol. 1C. The evaluation process undertaken required CIC’s evaluators to assess the technical criteria and indicate whether an offer had “met” or “not met” each requirement, including the checkmark list in section 4.1.1.1 of the RFSO. The fact that CIC’s evaluators were given copies of the checkmark list, and evaluated and returned it, runs counter to PWGSC’s assertion that the list was only to be evaluated in the context of the financial evaluation, such that a bidder could include the checkmark list only in the financial portion of its bid and be compliant.

26. Since Charley’s Furniture’s technical bid did not include the checkmark list, the only geographic indications given by it to which CIC’s evaluators would have had access were in its statement of work, in which it indicated the supply of furniture from Ottawa, and in the cover letter that accompanied its bid, in which it limited its bid submission to Ottawa. However, in the face of a mandated checkmark list, geographic indications contained in the statement of work, or in the cover letter, can be deemed relevant and used in the evaluation of bids. Thus, the evidence on the record supports the conclusion that CIC’s evaluators used irrelevant documentation in reaching the initial conclusion concerning Charley’s Furniture’s bid.

33. Thus, while one error was corrected, in that Charley's Furniture's financial bid for Toronto was identified and evaluated, another error was ignored, in that its conformity to section 4.1.1.1 of the RFSO was not properly evaluated.²⁷

34. Further to the applicable trade agreements, a procurement contract must be awarded in accordance with the criteria and selection methodology set out in the solicitation documents. In this case, the solicitation documents were clear—bidders were to complete the checkmark list both in their technical bids and in their financial bids. Charley's Furniture's technical bid was incomplete, in that it did not include the checkmark list; thus, the entire bid should have been deemed non-compliant. As a result, the Tribunal finds that the contract award to Charley's Furniture for Toronto was not in conformity with the criteria and selection methodology set out in the solicitation documents and constituted a breach of the applicable trade agreements.

35. In light of the foregoing, and pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that MasterBedroom's complaint is valid.

REMEDY

36. Having found the complaint to be valid, the Tribunal must now recommend the appropriate remedy.

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

38. The Tribunal considers that not evaluating a proposal in accordance with the criteria provided in the RFSO represents a serious deficiency in the procurement process. Bidders need to rely on the prescribed evaluation criteria to formulate their proposals. The Tribunal believes that such a serious deficiency in evaluation prejudices the integrity and efficiency of the competitive procurement system.

39. As a result, the Tribunal recommends that PWGSC terminate the contract awarded to Charley's Furniture for the Toronto area and award it to MasterBedroom. The Tribunal also recommends that MasterBedroom be compensated by an amount equal to the profit that it would have earned from the date of the contract award to Charley's Furniture to the date of the subsequent award to MasterBedroom.

40. If, for operational reasons, PWGSC considers that it is not feasible to terminate the contract already awarded, the Tribunal recommends that PWGSC compensate MasterBedroom for the profit that it would have earned had it been awarded the contract for the Toronto area for its entire duration. The basis for calculating the profit will be the prices contained in the proposal submitted by MasterBedroom. For further certainty, should PWGSC choose to exercise its option to extend the contract for the Toronto area to Charley's Furniture, beyond the contract's expiry date of July 31, 2016, the Tribunal recommends that it continue to compensate MasterBedroom for the duration of any extensions.

27. In the GIR, PWGSC refers to an internal review conducted by its Departmental Oversight Branch, which examined the various grounds of MasterBedroom's complaints. However, the review appears not to have examined the issue of whether Charley's Furniture's technical bid was non-compliant. Exhibit PR 2015-064-10 at para. 39, Vol. 1B.

41. The Tribunal recommends that MasterBedroom and PWGSC negotiate the quantum of compensation and, within 30 days of this determination, report back to the Tribunal on the outcome.

42. Should the parties be unable to agree on the amount of compensation, MasterBedroom shall file with the Tribunal, within 20 days of the afore-noted report to the Tribunal, a submission on the issue of compensation. PWGSC shall then have 7 working days after the receipt of MasterBedroom's submission to file a response. MasterBedroom shall then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. Subsequent to these submissions, the Tribunal will issue an order regarding the quantum of compensation.

COSTS

43. The Tribunal awards MasterBedroom its reasonable costs incurred in responding to 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.

44. In this instance, the complexity of the procurement was medium, as it involved several types of furniture and delivery. The complexity of the complaint was low, as it dealt with the single question of whether PWGSC had properly executed the solicitation process. Finally, even though this was the fourth complaint on the same solicitation, the complexity of the proceedings was low, as the issues were resolved by the parties through documentary evidence and written representations, and a hearing was not necessary.

45. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,150.

DETERMINATION OF THE TRIBUNAL

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

47. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC terminate the contract awarded to Charley's Furniture for the Toronto area and award it to MasterBedroom. The Tribunal also recommends that MasterBedroom be compensated by an amount equal to the profit that it would have earned from the date of the contract award to Charley's Furniture to the date of the subsequent award to MasterBedroom.

48. If, for operational reasons, PWGSC considers that it is not feasible to terminate the contract already awarded, the Tribunal recommends that PWGSC compensate MasterBedroom for the profit that it would have earned had it been awarded the contract for the Toronto area for its entire duration. The basis for calculating the profit will be the prices contained in the proposal submitted by MasterBedroom. For further certainty, should PWGSC choose to exercise the option to extend the contract for the Toronto area to Charley's Furniture beyond the contract's expiry date of July 31, 2016, the Tribunal recommends that it continue to compensate MasterBedroom for the duration of any extensions.

49. The Tribunal recommends that MasterBedroom and PWGSC negotiate the quantum of compensation and, within 30 days of this determination, report back to the Tribunal on the outcome.

50. Should the parties be unable to agree on the amount of compensation, MasterBedroom shall file with the Tribunal, within 20 days of the afore-noted report to the Tribunal, a submission on the issue of

compensation. PWGSC shall then have 7 working days after the receipt of MasterBedroom's submission to file a response. MasterBedroom shall then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. Subsequent to these submissions, the Tribunal will issue an order regarding the quantum of compensation.

51. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MasterBedroom 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 1, and its preliminary indication of the amount of the cost award is \$1,150. 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.

Rose Ritcey
Rose Ritcey
Presiding Member