Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-001

The Access Information Agency Inc.

v.

Department of Global Affairs

Determination issued
Friday, August 19 ,2016

Reasons issued
Wednesday, August 24, 2016

Canada

TABLE OF CONTENTS

IN THE MATTER OF a complaint filed by The Access Information Agency 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

THE ACCESS INFORMATION AGENCY INC. **Complainant**

AND

THE DEPARTMENT OF GLOBAL AFFAIRS **Government Institution**

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Global Affairs Canada take the necessary steps to ensure, in the future, that it complies with the process for the award of call-ups under the Standing Offer for temporary help services in the National Capital Area, including as regards the statement of criteria, the evaluation of bids, the maintenance of complete documentation regarding the procurement file and the award of contracts.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards The Access Information Agency Inc. its reasonable costs incurred in preparing its bid in response to the request for availability titled "DCP Advanced Privacy ATIP Officer – May 2, 2016". The Canadian International Trade Tribunal recommends that The Access Information Agency Inc. and Global Affairs Canada negotiate the amount of the costs awarded pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act* and report the outcome within 30 days of the issuance of this determination.

Should the parties be unable to agree on the amount of the costs awarded pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, The Access Information Agency Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the issuance of this determination, a submission on the issue of the costs it incurred in preparing its bid. Global Affairs Canada will then have 20 days after the receipt of the submission by The Access Information Agency Inc. to file a response. Unless it requires additional information, the Canadian International Trade Tribunal will inform the parties of the nature and amount of costs as soon as practicable after the receipt of the response by Global Affairs Canada.

Each party will bear its own costs in relation to the proceedings.

Jean Bédard
Jean Bédard
Presiding Member

The statement of reasons will be issued at a later date.

Tribunal Member:	Jean Bédard, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Senior Registrar Officer:	Julie Lescom
Registrar Support Officer:	Jennifer Gribbon
Complainant:	The Access Information Agency Inc.
Counsel for the Complainant:	Thomas Dastous
Government Institution:	Global Affairs Canada
Counsel for the Government Institution:	Alexandre Kaufman Daniel Caron

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. On April 6, 2016, The Access Information Agency Inc. (AIA) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning a request for availability issued by Global Affairs Canada (GAC)[2] referenced as "DCP Advanced Privacy ATIP Officer – May 2, 2016" (hereinafter, the RFA). The RFA was issued pursuant to a standing offer for temporary help services in the National Capital Region for the purpose of issuing a call-up to one of the companies holding a standing offer. The request was for advanced-level services in the professional category relating to access to information and privacy.

2. AIA alleged that its bid was not evaluated in accordance with the criteria stated in the RFA and that GAC neglected to provide AIA with explanations regarding the evaluation of its proposal and the relative advantages of the winning bid. AIA is also challenging GAC's decision to cancel the RFA and issue a new one.

3. As a remedy, AIA requested that the bids be re-evaluated and that it be awarded the standing offer. In the alternative, AIA sought compensation for lost of profit and for injury to the integrity and efficiency of the competitive procurement process. It also sought costs related to this inquiry.

4. On April 11, 2016, the Tribunal decided to conduct an inquiry into AIA's complaint, having determined that it met the requirements under subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations.*[3]

5. The parties filed substantial documentation with the Tribunal, including a Government Institution Report (GIR) and AIA's submissions on the GIR, submitted pursuant to rules 103 and 104 of the *Canadian International Trade Tribunal Rules*.[4]

6. The Tribunal held a public hearing on August 10, 2016, in Ottawa, Ontario. The purpose of the hearing was to hear the testimony of Mr. Warren Mucci, Director, GAC, on the issue of whether a contract awarded to AIA on June 3, 2016, involved reissuing the same contract that is the subject of this complaint. The Tribunal also heard brief oral arguments on this point.

STANDING OFFER FOR TEMPORARY HELP SERVICES

7. To understand the RFA, it is useful to briefly describe the standing offer under which it was issued.[5]

---

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. On November 4, 2015, the Government of Canada announced that the name of the Department of Foreign Affairs, Trade and Development would become Global Affairs Canada. As of this statement of reasons, the legal name of GAC remains the Department of Foreign Affairs, Trade and Development.
3. S.O.R./93-602 [*Regulations*].
4. S.O.R./91-499 [*Rules*].
5. The Tribunal notes that, for a large part of this inquiry, there was confusion surrounding the version of the standing offer document in force when the RFA was issued and, therefore, which clauses were incorporated by reference into the RFA. Somewhat conflicting versions were submitted by AIA, whereas no standing offer document was submitted by GAC in its GIR. The Tribunal had to ask the parties to clarify which standing offer document applied to the RFA. Further to the parties' submissions, the Tribunal concluded that the relevant clauses of the standing offer in force can be found in Exhibit A, enclosed with GAC's June 23, 2016, letter (Exhibit PR-2016-001-27, Exhibit A, Vol. 1D). The Tribunal notes the comments made by AIA (Exhibit PR-2016-001-32, Vol. 1E) that this document does not contain Part B, namely, the resulting contract clauses.

8. The standing offer, the clauses of which were incorporated by reference into the RFA, provided the framework for the call-up issuance process.

9. The standing offer, managed by the Department of Public Works and Government Services (PWGSC), allows designated users such as GAC to acquire temporary help services in various professional areas through call-ups with suppliers who have standing offers. These call-ups are generally limited to contracts with a maximum value of $400,000 and/or a duration of 48 consecutive weeks.[6]

10. According to the standing offer procedure, designated users have access to an online system for temporary help services, maintained by PWGSC, the "Temporary Help Services Online System" (THS Online System) in which they conduct searches to establish lists of qualified offerors that could potentially meet the identified need and their prices.

11. Under the standing offer, offerors are able to determine their firm hourly rates once a week, every week, indicating them in the THS Online System. This firm hourly rate establishes the ranking of qualified offerors available for the type of service being sought, from the lowest to the highest rate.[7]

12. Moreover, the current standing offer states that, subject to certain exceptions, the allocation of call-ups is done using the "right of first refusal" method. This requires the identified user to issue a call-up to the qualified offeror with the lowest price that meets all the mandatory requirements outlined by the identified user.[8]

13. To obtain all the information required to issue a call-up—namely, to identify the offeror that meets all the mandatory criteria of the identified user and offers the lowest price—the standing offer provides that identified users must proceed by issuing an RFA form. This form specifies the identified user's requirements, such as the duration of the call-up, the qualifications the resource must have and a statement of duties. This form may be sent to the qualified offeror with the lowest price or to a number of offerors with the lowest prices as indicated in the search results list obtained on the THS Online System.[9] The replies will then be evaluated and the call-up issued according to the "right of first refusal" method.

PROCUREMENT PROCESS UNDER REVIEW

14. On March 9, 2016, GAC invited 32 potential suppliers to respond to the RFA. The deadline for submission of bids was March 11, 2016, at 3:00 p.m. GAC identified potential suppliers invited to participate in the RFA through a search carried out on the THS Online System on March 9, 2016.[10]

15. AIA ranked 19th according to the prices in force on March 9, 2016, and proposed a candidate in response to the invitation. GAC received a total of seven bids.

16. On March 21, 2016, AIA was informed that a call-up was awarded to LOR Staffing, the supplier ranked 24th. In the same email, GAC advised AIA that it had determined that its proposal did not meet all the mandatory criteria of the RFA.

---

6. Exhibit PR-2016-001-27, Exhibit A, sections 11, 11.1, Vol. 1D.
7. *Ibid.*, Exhibit A, section 8.
8. *Ibid.*, Exhibit A, section 9.
9. *Ibid.*, Exhibit A, section 9.4.
10. Exhibit PR-2016-001-11, tabs 1, 2, 4, Vol. 1A.

17. AIA filed objections with GAC, in particular contesting the evaluation of its proposal and GAC's failure to provide explanations regarding the evaluation and the relative advantages of the winning proposal.

18. On April 6, 2016, at 8:41 a.m., AIA filed the present complaint with the Tribunal.

19. On April 10, 2016, AIA submitted additional exhibits to the record. These included an email time-stamped April 6, 2016, 1:36 p.m., sent by GAC to the bidders announcing that the bid solicitation was cancelled. The message stated:

> NOTE TO BIDDERS: This bid solicitation for an ATIP Officer-Advanced (see enclosed RFA) is hereby cancelled. GAC intends to re-issue the solicitation in order to correct inadvertent errors and omissions contained in the RFA and to make other changes in order to address certain deficiencies in Canada's description of the requirements.[11]

20. Moreover, AIA submitted an email dated April 7, 2016, in which it objected to GAC concerning its decision to cancel the RFA and issue a new request for availability. GAC sent the following response, dated April 8, 2016:

> Global Affairs Canada received your email dated April 7, 2016. Please note that on April 6, 2016, Global Affairs Canada provided a notice stating that the solicitation for an advanced ATIP Officer was cancelled (see enclosed), and we consider that this notice entirely meets the concerns raised in your email.[12].
>
> [Translation]

21. On April 11, 2016, the Tribunal decided to conduct an inquiry into AIA's complaint.

PRELIMINARY ISSUES

Reasons for Tribunal's Order Dated May 10, 2016, Dismissing the April 21, 2016, Motion by GAC Requesting that the Tribunal Cease the Inquiry

22. On April 21, 2016, GAC submitted a motion under rule 24 requesting that the Tribunal dismiss the complaint on the grounds that it did not have jurisdiction to conduct an inquiry. According to GAC, the complaint does not relate to a "designated contract" because GAC cancelled the procurement process before the Tribunal began its inquiry. In the alternative, GAC argued that the Tribunal should cease the inquiry under subsection 30.13(5) of the *CITT Act*, on the grounds that it is trivial, frivolous or vexatious because the RFA was cancelled.

23. AIA challenged the motion, arguing that all the conditions for the Tribunal's jurisdiction were met. According to AIA, the March 21, 2016, email from GAC indicates that a contract was awarded and this contract meets the definition of a "designated contract" within the meaning of the *CITT Act*.

24. The Tribunal dismissed GAC's motion on May 10, 2016, and noted that it would provide reasons in support of the order at the same time as those on the substance of the complaint. These reasons are as follows.

---

11. *Ibid.*, tab 12.
12. Exhibit PR-2016-001-01B at 1, Vol. 1.

The Tribunal Has Jurisdiction to Conduct an Inquiry

25. To determine whether it has jurisdiction to conduct an inquiry into AIA's complaint despite the fact that GAC cancelled the procurement process before the inquiry was initiated, the Tribunal applied the modern rule of statutory interpretation, according to which "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[13] In particular, in interpreting the enabling legislation and applying it to the facts, the Tribunal takes into consideration the purposes of the procurement regime under the *CITT Act* and the trade agreements.[14] The Federal Court of Appeal identified these purposes as fairness to competitors in the procurement system, ensuring competition among bidders, efficiency and the integrity of the procurement process.

26. Under subsection 30.11(1) of the *CITT Act*, "[s]ubject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint."

27. The expression "designated contract" is defined in section 30.1 of the *CITT Act* as follows: "contract for the supply of goods or services *that has been or is proposed to be awarded by a government institution* and that is designated or of a class of contracts designated by the regulations"[15] [emphasis added].

28. Under subsection 30.13(1) of the *CITT Act*, "[s]ubject to the regulations . . . the Tribunal . . . shall decide whether to conduct an inquiry into the complaint . . . ." Subsection 7(1) of the *Regulations* identifies the conditions that must be met before the Tribunal may conduct an inquiry into a complaint. In particular, this provision states that "[t]he Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint: . . . (b) the complaint is in respect of a designated contract . . . ."

29. Finally, under subsection 30.13(5) of the *CITT Act*, "[t]he Tribunal may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith . . . ."

30. Having reviewed GAC's motion and the parties' submissions, the Tribunal determined that the complaint met the conditions established in the regulations, in particular, that it related to a designated contract.

31. Sections 30.1 and 30.11 of the *CITT Act* and subsection 7(1) of the *Regulations* indicate that the Tribunal has jurisdiction, subject to other applicable conditions, over procurements that relate to a contract "that has been or is proposed to be awarded". In this case, the evidence on the record indicates that GAC *awarded a contract* following the RFA. The Tribunal notes, in particular, that the email GAC sent to AIA on March 21, 2016, indicated that GAC had awarded a call-up to a specific supplier, for a specific amount, as follows:

> A call-up has been awarded to the successful proposal submitted by LRO Staffing. The total value of the awarded call-up is $158 095.19 (GST/HST included).[16]

13. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para. 21; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 300, 2015 SCC 47 (CanLII) at para. 18.
14. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) [*Almon*] at paras. 21-23.
15. A contract prescribed by regulation or that is in a prescribed class is, by and large, a contract under one of the trade agreements listed at subsection 3(1) of the *Regulations*, a condition that is met in this case.
16. Exhibit PR-2016-001-01, Vol. 1.

The Tribunal concludes from this evidence that a contract "has been . . . awarded by a government institution".

32. In the Tribunal's opinion, from that point on, the first element in the definition of "designated contract" pursuant to section 30.1 of the *CITT Act* was met: the complaint concerns a procurement process that relates to a contract "that has been . . . awarded",[17] in other words, a designated contract. The Tribunal's jurisdiction crystallized with the awarding of the contract.

33. Neither the subsequent cancellation of the procurement process that resulted in the contract being awarded nor the potential cancellation of the awarded contract changes the fact that a contract *was awarded* or removes the Tribunal's jurisdiction to review the procurement process with respect to the award of this contract. In fact, the definition of "designated contract" does not provide for the extinguishing of the Tribunal's jurisdiction if such circumstances arise after a contract is awarded. If Parliament had wanted such circumstances to deprive the Tribunal of its jurisdiction, it would have clearly indicated it.

34. Additionally, the interpretation proposed by GAC is not in accordance with the purposes of the regulatory procurement regime under the *CITT Act* and the trade agreements. As noted above, this regime specifically aims to ensure that the *procurement process* is fair, competitive, efficient and conducted with integrity.[18] In the past, the Tribunal has also noted the important role transparency plays throughout the procurement process in furthering these objectives.[19]

35. The cancellation of a procurement process does not necessarily answer the fundamental question of whether the process was conducted in accordance with the trade agreements. Moreover, the cancellation of a procurement process, in particular after a contract is awarded, does not automatically erase the obligations that may arise under the trade agreements.[20] It also does not necessarily take into consideration all of the consequences of alleged violations of the trade agreements nor does it, where applicable, necessarily

---

17. Since the facts in this case involve a contract that was awarded, the Tribunal will not discuss the interpretation of the second element in the definition of "designated contract", which relates to a contract that has not been awarded but "is proposed to be awarded".
18. *Almon* at para. 23. In *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) at para. 22, the Federal Court of Appeal stated the following: "Legislation has been enacted to ensure that procurements are conducted openly and fairly, and the CITT is responsible for overseeing all of this activity."
19. *Saskatchewan Institute of Applied Science and Technology* (9 January 2014), PR-2013-013 (CITT) at para. 112; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) [*CGI*] at para. 47; *The Access Information Agency Inc. v. Department of Transport* (16 March 2007), PR-2006-031 (CITT) [*Access Information Agency*] at para. 37.
20. In fact, certain trade agreements set out the circumstances in which a federal institution may terminate a procurement process. For example, paragraph 1015(4)(c) of the *North American Free Trade Agreement between the Government of Canada, the Government of the United States of America, and the Government of the United Mexican States*, 17 December 1992, Can. T. S. 1994, No. 2, online: Global Affairs Canada <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*], states that "unless the entity decides in the public interest not to award the contract", the entity shall award the contract to the supplier that has been determined to have the lowest-priced tender or the tender determined to be the most advantageous in terms of the criteria set out in the solicitation. This is another indication that, by empowering the Tribunal to conduct an inquiry into complaints concerning any aspect of a procurement process that relates to a designated contract that has been awarded, Parliament did not intend for the Tribunal to be deprived of this jurisdiction because of a federal institution's decision to terminate the process.

adequately replace the recommendations the Tribunal could make when exercising its regulatory role in order to maintain confidence in the integrity of the procurement process.[21]

36. In this context, nothing in the *CITT Act* or the *Regulations* indicates that Parliament intended that a decision from the federal institution to cancel the procurement process could extinguish the Tribunal's *jurisdiction* to commence or continue an inquiry under the legislation.

37. This does not mean that the Tribunal will commence or continue an inquiry in cases where a procurement process has been cancelled and the circumstances indicate that it would be useless to conduct an inquiry. In such cases, the Tribunal will be able to exercise its discretion to refuse to conduct an inquiry into a complaint or to cease an inquiry, in accordance with subsection 30.13(5) of the *CITT Act* and the objectives of the regulatory regime. The issue of whether a complaint is trivial, frivolous or vexatious and whether the Tribunal should exercise its discretion to cease an inquiry is distinguishable from that of whether the Tribunal has *jurisdiction* to conduct an inquiry into a complaint.

38. The Tribunal also wishes to clarify an issue that was raised by the motion. The motion was premised on the fact that GAC had cancelled the procurement process before the Tribunal commenced its inquiry. The Tribunal finds that this circumstance has no impact on its jurisdiction to conduct an inquiry into a complaint about a procurement process with respect to a contract that has been awarded. The decisions in *Adélard Soucy* and *R.P.M. Tech*, on which GAC relies, must be read in context. Neither of these cases dealt with a procurement process where a contract *had been* awarded. Moreover, in these cases, the Tribunal commenced inquiries after having found that all the conditions in respect of the complaint were met, including the fact that the complaint filed concerned an aspect of the procurement process that related to a designated contract. The federal institution then cancelled the procurement process as the Tribunal was conducting an inquiry. It is in this context that the Tribunal indicated that the cancellation of a procurement process did not affect its jurisdiction to conduct an inquiry into a complaint that met the statutory requirements at the time it was filed and was commenced in accordance with the governing legislation. The Tribunal does not interpret these decisions as establishing a time limit to its jurisdiction to conduct an inquiry into a procurement process with respect to a contract that has been awarded.

39. In fact, the Tribunal concludes that, for cases where a contract has been awarded, the question of the effects the passage of time has on the Tribunal's jurisdiction is settled by section 6 of the *Regulations*, which provides that the Tribunal's jurisdiction depends normally on whether the complaint was filed within 10 working days of the day on which the basis of the complaint became known or should have become known to the complainant, or on which the complainant had knowledge of the denial of relief relating to an objection to the federal institution. Insofar as the complaint is filed within the regulatory time limits, the Tribunal's jurisdiction does not depend on when the federal institution decides to cancel a procurement

---

21. The consequences of alleged violations of the trade agreements could include their impact on the integrity of the system or possible prejudice to the bidders in certain circumstances. Moreover, the Federal Court of Appeal has confirmed that the Tribunal plays a regulatory role within the procurement system, which aims to, in particular, make recommendations for the purpose of maintaining potential bidders' confidence in the integrity of the procurement system. *Canada (Attorney General) v. Envoy Relocation Services*, [2008] 1 FCR 291, 2007 FCA 176 (CanLII) at paras. 3, 21, 22, 26, 27. The Tribunal could be prevented from exercising this role in certain cases if the cancellation of a procurement process by a federal institution after a contract is awarded could deprive it of jurisdiction. See also *Adélard Soucy (1975) Inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) [*Adélard Soucy*] at para. 25; *R.P.M Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) [*R.P.M Tech*] at para. 9; *Lanthier Bakery Ltd. v. Department of Public Works and Government Services* (24 June 2009), PR-2014-047 (CITT) [*Lanthier Bakery*] at para. 25.

process with respect to a contract that has been awarded or on when the Tribunal decides to conduct an inquiry into the complaint.

40. In this case, GAC informed the bidders that it had awarded a contract. This contract also crystallized the jurisdiction of the Tribunal, subject to the other prerequisites with respect to a complaint stipulated in the legislation, including those concerning the time limits in section 6 of the *Regulations*.

41. Finally, GAC also referred to a decision of the Federal Court of Appeal[22] to support its position that subsection 30.11(1) of the *CITT Act* does not authorize the Tribunal to conduct an inquiry into the procurement processes of the government in the absence of a designated contract. As the Tribunal already indicated in *Adélard Soucy*, this decision must be understood on its own facts. The Federal Court of Appeal had to rule on an application for judicial review requesting a remand of the Tribunal's decision not to conduct an inquiry into certain allegations of a complaint. This application for judicial review was made after the Tribunal completed its inquiry and recommended the cancellation of a contract awarded by the federal institution and the issuance of a new procurement. Moreover, it was not disputed that the federal institution had already indicated it would not be implementing the recommendation of the Tribunal as it had no further need for the services in question and had disposed of the licences it had previously acquired. It is in this context that the Federal Court of Appeal indicated that the Tribunal did not have the jurisdiction to conduct an at-large inquiry into the procurement processes of the government in the absence of a designated contract. Given the factual differences, this decision does not support GAC's claims.

42. For these reasons, the Tribunal has jurisdiction to conduct an inquiry into the complaint despite the fact that GAC cancelled the RFA.

The Complaint Is Not Trivial, Frivolous or Vexatious

43. GAC submitted in the alternative that the complaint was trivial, frivolous or vexatious and that the Tribunal should cease the inquiry under subsection 30.13(5) of the *CITT Act*.

44. The Tribunal found at this stage that the facts relevant to the issues in dispute were unclear, including those relating to the evaluation of AIA's bid, the circumstances surrounding the cancellation of the procurement process, the consequences of the cancellation and whether cancelling the RFA essentially provided AIA with the remedy it sought. In these circumstances, and taking into account the fact that GAC had expressed its intention to launch the process again, that the process and other similar processes could be undertaken under the same standing offer, the Tribunal found that there was reason to clarify the issues in the complaint.

45. For these reasons, the Tribunal decided to reject GAC's motion and to continue the inquiry.

The Complaint Is Not Premature

46. In its GIR, GAC claimed that the complaint is premature as AIA failed to wait for a definite response from GAC before filing its complaint on April 6, 2016. GAC requested that the Tribunal "sanction this approach . . . in order to encourage the reasonable resolution of complaints before they are filed and to ensure the fair use of public resources"[23] [translation].

22. *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15324 (FCA).
23. Exhibit PR-2016-001-11 at para. 42, Vol.1A.

47. The Tribunal agrees that subsections 6(1) and 6(2) of the *Regulations* set out an objection process that serves to resolve complaints informally between parties and without the intervention of the Tribunal.[24] In order for the mechanism to be effective, an objection must allow the federal institution to deal with it in a considered manner.

48. However, in the Tribunal's experience, there is often a very fine line between premature complaints, the behaviour of a proactive complainant that respects time limits, and complaints filed outside the strict time limits established by the law. Both the Tribunal and the Federal Court of Appeal have reiterated on numerous occasions that the procurement review process under the *CITT Act* obligates potential complainants to be proactive and to raise objections and file complaints with the utmost vigilance, without which their concerns could be rejected on the basis that they were raised late.[25]

49. In this case, the facts before the Tribunal rather reflect the behaviour of a proactive complainant, mindful of the time limits imposed by the law. On two occasions, AIA provided GAC with specific time limits and clearly announced its intention to file a complaint with the Tribunal, if required.[26] Contrary to what it had done before, GAC failed to provide AIA with a response before the second deadline indicated by AIA, that is, April 5, 2016. In these circumstances, AIA could have reasonably estimated, through deduction, that it had received a denial from GAC and that the 10-day time limit to file a complaint had just begun, in accordance with subsection 6(2) of the *Regulations*. Nothing kept AIA from filing a complaint at the first opportunity, which it did on April 6, 2016.

50. Also, even if AIA still had not received a denial of relief from GAC at the time the complaint was filed on April 6, 2016, the denial of relief was made clear later that same day and was reiterated on April 8, 2016, as indicated in additional documents submitted to the Tribunal by AIA on April 10, 2016.[27] For all intents and purposes, AIA then perfected the file by submitting these additional documents and adding a ground of complaint, before the Tribunal made the decision to conduct an inquiry on April 11, 2016.

51. The Tribunal therefore finds that the complaint was filed within the regulatory lime limit.

New Argument from GAC that the Complaint Is Trivial, Frivolous or Vexatious in View of the Fact that AIA Was Awarded a Contract on June 3, 2016

52. On June 15, 2016, GAC informed the Tribunal that, further to the issuance of a new request for availability (Solicitation No. DCP-2016-002) to replace the RFA, a contract was awarded to AIA on June 3, 2016. GAC therefore reiterated the argument that the complaint became trivial, frivolous or vexatious, and requested that the Tribunal cease the inquiry.

53. AIA argued that the two procurement processes are completely different. AIA also reiterated its remedy request, including that it be awarded a contract under the RFA and, in the alternative, that it be compensated with an amount taking into account its lost profits and degree of injury to the integrity of the procurement process.

---

24. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA) at para. 74; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 (TCCE) at para. 47.
25. *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*, 2005 FCA 177 (CanLII) at para. 3; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18-20.
26. See emails from AIA dated March 24 and 29, 2016, Exhibit PR-2016-001-01, Vol.1.
27. Exhibit PR-2016-001-01B, Vol.1.

54. At the parties' initiative, the Tribunal held a public hearing to hear the testimony of Mr. Mucci on whether the contract awarded to AIA on June 3, 2016, is a reissuance of the contract that should have been awarded following the RFA and to which AIA believes it is entitled. The parties made brief submissions on this issue, and the Tribunal reserved judgment.

55. With regard to the preliminary issue, the Tribunal finds that owing to the particular circumstances of this complaint, the fact that AIA obtained a contract on June 3, 2016, (and the significance of this contract will be addressed in more detail later) does not make the complaint trivial, frivolous or vexatious. The Tribunal takes into account the fact that the remedy requested by AIA did not deal solely with the cancellation of the RFA and that the issues argued throughout the inquiry remain pending and deserve, at this stage, to be addressed. In this regard, the decisions on which GAC[28] relies are distinguishable on the facts.

56. Therefore, the Tribunal will not cease the inquiry on the basis that the complaint has become trivial. However, the fact that AIA obtained a contract on June 3, 2016, will be significant with regard to the appropriate remedy.

BASIS OF THE COMPLAINT

57. Subsection 30.14(1) of the *CITT Act* requires that, in its inquiry, the Tribunal limit its considerations to the subject-matter of the complaint. Moreover, 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 were observed. Section 11 of the *Regulations* also sets out that the Tribunal must decide whether the procurement process was followed in accordance with the relevant trade agreements, that is, in this case, the *Agreement on Internal Trade*.[29]

58. The grounds of complaint accepted for inquiry are as follows:

- AIA's bid was not evaluated correctly, notably because GAC used undisclosed evaluation criteria;
- GAC failed to provide AIA with an explanation regarding the evaluation of its proposal and regarding the characteristics and advantages of the successful bid; and
- GAC was not entitled to cancel the RFA and issue a new one.

28. Exhibit PR-2016-001-47, Vol.1E.

29. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/agreement-on-internal-trade/?lang=en> [*AIT*]. The parties both agreed that the *AIT* is the only agreement that applies in this case. Exhibit PR-2016-001-16 at para. 17, Vol. 1C; Exhibit PR-2016-001-27, Vol. 1D. The Tribunal agrees. The services in the call-ups under the standing offer for temporary help essentially fall under category R201 "Civilian Personnel Recruitment" (including services of employment agencies), a service category that is excluded from *NAFTA* and other potentially applicable agreements that contain the same exclusion. With regard to the *Revised Agreement on Government Procurement*, online: World Trade Organization: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (effective 6 April 2014), annex 5 of Appendix I of Canada, which identifies the services covered by the agreement, does not include the type of services in question. The contract in question is therefore excluded from these trade agreements.

AIA's Proposal Was Not Evaluated in Accordance with the Criteria Set Out in the RFA

59. Subsection 506(6) of the *AIT* sets out in part that "the 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".

60. It is well established that a procuring entity will satisfy these obligations when it conducts a reasonable evaluation in accordance with the evaluation criteria and terms and conditions set out in the solicitation documents. As it indicated in the past, the Tribunal will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have wrongly interpreted the scope of a requirement, have ignored vital information provided in a bid or have based their evaluation on undisclosed criteria.[30]

61. The RFA set out a number of mandatory criteria, that is, qualifications that candidates "had" to have. Moreover, it identified asset qualifications.

62. As mentioned, according to the terms and conditions of the standing offer, the evaluation was to be carried out using the "right of first refusal" method, according to which the call-up would be issued to the offeror with the lowest price that meets all the mandatory requirements outlined in the RFA.[31]

63. In this case, in the GIR, GAC admitted that it did not evaluate the proposals in accordance with the criteria set out in the RFA. Specifically, GAC admitted that it wrongly applied a qualification as a mandatory criterion when it had been identified as an asset in the RFA, and it disqualified, on these grounds, the two lowest proposals: those of MaxSys and AIA.[32]

64. Consequently, AIA correctly alleged that its proposal had not been evaluated in accordance with the criteria set out in the RFA. The first ground of complaint is therefore valid.

65. However, other irregularities also seem to have affected the procurement process. They are not part of the grounds of AIA's complaint and are not in themselves relevant to determining its validity. However, as these irregularities were highlighted during the inquiry, the Tribunal cannot ignore them; in some cases, they are shortcomings that could in some circumstances amount to breaches of the trade agreements and, in this case, they form part of the context to the breach of the *AIT* identified by the Tribunal.

66. Besides GAC's apparent confusion about the application of the evaluation criteria, there also seems to have been confusion about other aspects of the process. For example, GAC also admitted, in view of the fact that the contract awarded to LRO Staffing corresponds to a period of 48 weeks, that "the request for availability indicated that the call-up would be for a period of 7 weeks with possibility of an extension when it should have read 48 weeks"[33] [translation]. Moreover, the statement of criteria in the RFA was in contravention of the methodology used to allocate call-ups under the standing offer in place; the use of asset criteria was *not* included in the terms and conditions described in the standing offer as call-ups were to be

30. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *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 9.
31. The invitation email of March 9, 2016, informed potential bidders that the "right of first refusal" method would apply. This methodology was set out and described in the standing offer. Exhibit PR-2016-001-27, Exhibit A, section 9.3, Vol. 1D.
32. Exhibit PR-2016-001-11 at paras. 18, 19, 45-48, Vol. 1A.
33. *Ibid* at para. 48.

allocated based solely on price and mandatory criteria.[34] Furthermore, GAC seems to have failed to properly maintain the procurement file. Some documents were apparently missing from the file, while others relating to another procurement process were in the file. Also, GAC seems to have completely failed to inform one of the bidders that the contract was awarded to LRO Staffing under the RFA.[35] Finally, and this issue will be addressed later, it also seems, from the file submitted, that GAC considered a bid that should have been set aside from the onset as it had not been submitted in accordance with the time limits and the terms and conditions set out in the RFA.

The AIT Does Not Contain Any Obligation Concerning the Communication of Information to Unsuccessful Bidders

67. AIA contends that GAC failed to provide it with information on the evaluation of its bid and the relative advantages of the winning bid, which is information that AIA claims it was entitled to receive under subsection 511(7) of the *AIT*. AIA believes that this information should have included all documentation relating to the evaluation of its bid and the evaluation of more highly ranked bids.

68. Subsection 511(7) of the *AIT* provides as follows:

> **Article 511: Information and Reporting**
>
> 7. Where, in the context of a procurement by another Party, a Party considers that its rights under this Chapter may have been adversely affected, that Party may request, with the intent of avoiding a dispute, any relevant bid information concerning that procurement from the Party whose entity is responsible for the procurement. On receipt of such a request, that Party shall promptly provide such information.

69. On June 17, 2016, the Tribunal asked AIA to make submissions on whether or not subsection 511(7) of the *AIT* effectively imposes an obligation on federal entities to provide such information to suppliers, given that this subsection provides for the right of a "Party" to request information from another "Party" about a procurement, and the term "Party" is defined in article 200 as "party to this Agreement". The parties to the *AIT* are the federal government and the provincial and territorial governments (except Nunavut).

70. AIA acknowledged that the suppliers or the complainants before the Tribunal are not "parties to this Agreement". It nevertheless claimed that they are included within the meaning of this term as used in subsection 511(7) of the *AIT*. It contends that subsection 511(7) of the *AIT* should be read together with a number of other provisions of the *AIT* and in conjunction with the *CITT Act* and related regulations, with the *Interpretation Act*[36] and Canada's various procurement policies and manuals. AIA also contended that a narrow interpretation of subsection 511(7) of the *AIT* would have an adverse effect on government procurement.

---

34. Exhibit PR-2016-001-27, Exhibit A, section 9.3, Vol. 1D; Exhibit PR-2016-001-01, Vol.1 (email from PWGSC dated April 4, 2016); *Transcript of Public Hearing*, 10 August 2016, at 84.
35. For example, GAC was not able to produce, following the order of the Tribunal dated June 8, 2016, the communications sent to MaxSys, the bidder with the lowest price. GAC explained that it could not find any emails sent to MaxSys to notify it of the result of the RFA. However, an erroneous document seems to have been sent to MaxSys as part of another procurement process that GAC was carrying out at the same time. Moreover, emails relating to the RFA were sent to two firms that did not submit bids in response to the RFA. Exhibit PR-2016-001-23, Vol. 1C; Exhibit PR-2016-001-11, tab 8, Vol. 1A.
36. R.S.C., 1985, c. I-21.

71. GAC contends that subsection 511(7) of the *AIT* cannot be interpreted the way AIA has proposed. Furthermore, GAC alleges that AIA had access to the information to which it was entitled under the trade agreements. It also states that it would not have been useful to provide information on a process that included errors and that has been cancelled.[37]

72. In light of AIA's arguments, the Tribunal is not convinced that the intended meaning of subsection 511(7) of the *AIT* was to guarantee the right of suppliers or complainants to receive the type of information requested by AIA. Article 511 as a whole focuses on the rights and obligations that the parties to the *AIT* have to each other. Seen in this context and in light of the definitions in article 200, subsection 511(7) also unambiguously focuses on the rights and obligations that the parties to the *AIT* have to each other. This subsection does not provide for suppliers' rights.

73. While the purposes of the *AIT* include promoting government procurement that is fair, transparent and conducted with integrity, the various provisions mentioned by AIA mostly state general principles that cannot be used to give subsection 511(7) a meaning at odds with its text and specific context. Therefore, based on a textual and contextual interpretation, there is nothing to support AIA's contention that the word "Party" as used in subsection 511(7) includes suppliers or complainants before the Tribunal. Therefore, no right can be directly invoked by a supplier under this subsection.

74. The Tribunal notes that the information AIA claims it was entitled to receive is generally the type of information that may, depending on the circumstances and with some exceptions, be requested by unsuccessful suppliers under the provisions of trade agreements like *NAFTA*.[38] This information refers mainly to the reasons why the unsuccessful supplier's bid was not selected and to the characteristics and advantages of the winning bid. However, as the Tribunal has stated, the *AIT* does not contain any similar specific obligation.[39]

75. In the absence of evidence showing a contrary intention of the parties to the *AIT*, the Tribunal finds once again that the parties did not intend to include in this agreement a free-standing obligation to provide the type of information requested by AIA to potential suppliers. Indeed, the absence of such an obligation in the text of the *AIT* is in contrast to its express inclusion in other trade agreements to which Canada is a party, and with the rights that the parties to the *AIT* have reserved among themselves under subsection 511(7) of that agreement. These contextual elements are significant and support the Tribunal's finding. The *AIT* is a negotiated agreement based on the mutual lowering of trade barriers between the parties to the agreement and necessarily reflects compromises reached by the negotiating parties.[40] In this regard, the Tribunal notes that the *AIT* came into effect on July 1, 1995; the *NAFTA* text, which contains this type of obligation, was

---

37. The Tribunal will not comment on this alternative argument in light of its decision on the interpretation of subsection 511(7) of the *AIT*. That being said, the Tribunal would not necessarily have agreed with GAC if there had actually been an obligation to provide information.
38. For example, Article 1015(6) of *NAFTA* states that "[a]n entity shall . . . (b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier." Article 1015(8) stipulates limits to this duty to disclose.
39. *Ecosfera Inc. v. Department of the Environment* (11 July 2007), PR-2007-004 (CITT) at para. 20; *Med-Emerg International Inc. v. Department of Public Works and Government Services* (15 June 2005), PR-2004-050 (CITT) at para. 39; *Giamac Inc. DBA Autorail Forwarders v. Department of Public Works and Government Services* (25 November 2009), PR-2009-037 (CITT) at para. 28; *Krista Dunlop & Associates Inc. v. Department of Canadian Heritage* (14 April 2010), PR-2009-064 (CITT) at para. 30; *Access Information Agency* at para. 30.
40. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 SCR 309, 2009 SCC 50 (CanLII) at paras. 18, 31.

available at that time to the parties negotiating the *AIT*, as it came into effect more than one year earlier on January 1, 1994. The Tribunal cannot impose obligations on the federal government that it did not enter into under the agreement negotiated with the provincial and territorial governments.

76. That being said, even though disclosure of such information does not amount to an obligation of the government under the *AIT* that could be directly invoked by a supplier, the Tribunal notes that the disclosure of relevant information to unsuccessful bidders is a practice that helps enhance transparency and thus fairness, competition, and the efficiency and integrity of the government procurement system. In this way, the disclosure of relevant information promotes compliance with the specific obligations under the *AIT* and the achievement of its general objectives.[41] In this regard, the disclosure of relevant information enabling the bidder to understand the evaluation of its bid and the outcome of a government procurement process, while not required under the *AIT*, must nevertheless be encouraged, within legitimate limits, including those relating to the confidential nature of certain information.

77. Unlike other government procurements, in this case GAC did not commit to provide information in government procurement documents to the successful bidders because the RFA did not contain, either directly or by inference, a clause creating such an obligation.[42] Therefore, GAC's alleged refusal to provide the requested information does not infringe any provision of the *AIT*. The Tribunal would also like to point out, however, that in the specific context of the RFA, AIA had access to certain relevant information concerning the reasons why its bid was set aside and concerning the successful bid. It is also clear that this information allowed it to file its complaint with the Tribunal.

78. In conclusion, as it is not linked to any specific obligation of the government under the *AIT*, this ground of complaint is not valid.

GAC Was Entitled to Cancel the Procurement Process

79. AIA contends that GAC could not cancel the RFA and had to award the contract to the lowest responsive bidder. Relying mainly on the decisions of the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*[43] and *Martel Building Ltd. v. Canada*,[44] it claims that "Contract A" could not be unilaterally cancelled by GAC. AIA also stressed the principle according to which, in case of doubt, a contract is interpreted against the person who stipulated the obligation.

80. GAC asserts that it had the authority to cancel the RFA and any contract issued under the RFA. Its position is based on a number of provisions in the RFA. Furthermore, GAC also argues that it could cancel the RFA for reasons of public interest, in this case, to correct errors in the criteria used, and cites paragraph 1015(4)(c) of *NAFTA* in support of its position.[45]

---

41. See, for example, Article 501 of the *AIT*, which states that the purpose of Chapter Five "is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs . . . in a context of transparency and efficiency"; *Almon* at para. 23; *CGI* at para. 47.
42. In its submissions, AIA referred to section "5– Compte rendu" of the document identified as AIA Exhibit 13. Exhibit PR-2016-001-12A, Vol. 1A. However, this section did not concern the RFA, which related to the award of a call-up against the standing offer, but rather concerned the possibility of requesting a debriefing on the *request for standing offer* process within 15 days of receiving the results of this process. In addition, in the Tribunal's opinion, this specific provision was not included in the RFA.
43. [1999] 1 SCR 619, 1999 CanLII 677 (SCC).
44. [2000] 2 SCR 860, 2000 SCC 60 (CanLII).
45. The Tribunal will not address this argument because the *AIT* is the only applicable agreement, which was also acknowledged by GAC.

81. The question of whether GAC could cancel the RFA and issue a new one raises the question of how to interpret the clauses incorporated into the RFA, namely, the relevant clauses of the standing offer and the call-up procedure set out therein. AIA correctly pointed out that principles of contract interpretation apply here. However, AIA did not present any specific arguments based on an interpretation of the applicable provisions to support its position.[46]

82. Furthermore, based on a review of the provisions applicable to the standing offer, the clauses in force gave GAC the right not to award a contract following the issuance of a request for availability. The Tribunal notes, in particular, the following clause according to which offerors with a standing offer acknowledged that issuing a standing offer did not oblige Canada to enter into a contract for services covered by the standing offer:

> **2005 02 (2006-08-15) General**
>
> The Offeror acknowledges that a standing offer is not a contract and that the issuance of a Standing Offer and Call-up Authority does not oblige or commit Canada to procure or contract for any goods, services or both listed in the Standing Offer. The Offeror understands and agrees that Canada has the right to procure the goods, services or both specified in the Standing Offer by means of any other contract, standing offer or contracting method.[47]

83. The Tribunal finds that the scope of this clause is sufficiently broad to cover a situation in which the identified user issued a request for availability and is obligated to cancel it for any reason. Indeed, nothing in the RFA indicated that GAC had waived its discretion to not award a contract under the standing offer once the RFA had been issued or was obliged through the mere issuance of the RFA to enter into a contract under the RFA.[48]

84. Furthermore, when GAC announced to the bidders on April 6, 2016, that the "request for proposals for an Advanced ATIP Officer . . . is hereby cancelled"[49] [translation], according to the evidence, the bids were no longer valid in any case. Indeed, as mentioned previously, under the standing offer, the offerors had the opportunity to amend their bids each week. The standing offer also stated that these bids determined the ranking of the offerors for the week in question, and that the amended bid, "which is indicated . . . on the Identified User search result sheet, is valid for up to 10 working days from the date that the search sheet is printed."[50] In this case, in order to launch the RFA, GAC had done a price search on March 9, 2016.[51]

---

46. AIA relied on a passage from section "2. Summary" in the document entitled "Revision to a Request for a Standing Offer" dated October 25, 2013, that provides that when a call-up is made it "constitutes an unconditional acceptance by Canada of the Offeror's Offer for the provision . . . of the services described in the [Standing Offer] . . ." (Exhibit PR-2016-001-12A, Vol. 1A). The Tribunal is not convinced that this provision is among the clauses in the standing offer included in the RFA. Be that as it may, the Tribunal finds that this sentence, read in its immediate context and in light of the clauses in the standing offer included in the RFA, does not have the scope that AIA contends it has and does not oblige GAC to issue a call-up.
47. Under sections 3.1 and 13(c) of the standing offer (Exhibit PR-2016-001-27, Exhibit A, vol. 1D), the "2005 (2015-07-03) General Conditions – Standing Offers – Goods or Services" document applied to the standing offer and formed part of it. This document is available online at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2005/11>.
48. See also the Tribunal's finding in *MGIS Inc. and iGeoSpy Inc. in Joint Venture* (10 April 2014), PR-2014-001 (CITT) at paras. 7-10.
49. Exhibit PR-2016-001-11, tab 12, Vol. 1A.
50. Exhibit PR-2016-001-27, Exhibit A, section 8, Vol. 1D. See also article 8.1, which, according to the evidence, is not applicable in this case, but which confirms by analogy that the expiration of the bid validity period automatically leads to the cancellation of the RFA.
51. Exhibit PR-2016-001-11, tab 4, Vol. 1A.

Those prices were therefore no longer valid on April 6, 2016, and GAC could no longer, in any event, accept any of the bids.

85. Consequently, this ground of complaint is not valid in and of itself; GAC could cancel the RFA process, and it was not obliged to award the contract under the RFA, and could not award a contract any more as of April 6, 2016.

86. That being said, the Tribunal finds that the cancellation of the RFA cannot be considered independently from the violations of the trade agreements that occurred in this case. Indeed, before receiving AIA's objections, instead of exercising its discretion to not award a contract under the RFA, GAC proceeded to award a contract by selecting the LRO Staffing bid, albeit in an irregular way. The fact that the RFA process was subsequently cancelled or expired and that the contract awarded to LRO Staffing was never implemented is, on the preponderance of the evidence, due to evaluation errors by GAC and due to AIA's resulting complaint.[52] In the circumstances, the Tribunal finds that, on a balance of probabilities, had it not been for GAC's breaches of the evaluation criteria and of the *AIT*, a contract would have in fact been awarded to the responsive bidder with the lowest bid.

87. Therefore, the cancellation or expiration of the RFA still leaves the unresolved question of whether or not there is prejudice arising from this situation meriting redress. The answer to this question must take into consideration all the circumstances surrounding the irregular choice of LRO Staffing, including the fact that following the RFA, no supplier provided services to GAC, that AIA had the opportunity to submit a bid under a new request for availability (Solicitation No. DCP-2016-002), and that AIA was awarded a contract under a different request for availability.

REMEDY

88. The Tribunal has determined that AIA's complaint is valid in part. Therefore, the Tribunal must determine the appropriate remedy, in accordance with subsections 30.15(2) to 30.15(4) of the *CITT Act*.

89. AIA requests that the Tribunal recommend that GAC issue a 48-week call-up to the lowest responsive bidder, namely, AIA. In this regard, AIA claims that the bid from MaxSys, the potential supplier with the lowest bid, was non-responsive because it was not submitted in time and in accordance with the terms and conditions of the RFA. AIA also claims that MaxSys' proposal does not meet a mandatory education criterion.

90. In the alternative, AIA requests that it be compensated for lost profits and that this should include compensation for prejudice to the integrity and efficiency of the competitive procurement process as well as for prejudice to AIA and all the other interested parties, and to the "scope of the good faith of the parties" [translation]. In its complaint form, AIA also requested reimbursement for its bid preparation costs.

91. GAC maintains that no corrective measure is justified. First, it claims that AIA did not sustain any harm because, if the evaluation had complied with the stated criteria, MaxSys' bid would have been selected because it was the lowest. Furthermore, GAC contends that it tried to correct errors committed in good faith as soon as they were discovered by cancelling the RFA and publishing a new request for availability, Solicitation No. DCP-2016-002. Therefore, AIA did not sustain lost profits because no work was done following the RFA and, in addition, AIA received a call-up as a result of Solicitation No. DCP-2016-002, and is currently benefiting from this contract.

52. Exhibit PR-2016-001-38 at para. 6, Vol. 1E; *Transcript of Public Hearing*, 10 August 2016, at 31-32, 67, 74, 75.

92. To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question including the following: (1) the seriousness of the deficiencies found; (2) the degree to which the complainant and all other interested parties were prejudiced; (3) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced; (4) whether the parties acted in good faith; and (5) the extent to which the contract was performed.

Seriousness of the Deficiencies Found in the Procurement Process

93. In this case, the *AIT* was breached when GAC evaluated AIA's proposal in a way that did not comply with the criteria set out in the RFA. This breach is a serious deficiency because the evaluation of proposals in accordance with the criteria stated in a bid solicitation is a key principle of the scheme established under the *CITT Act* and the applicable trade agreements.

94. Moreover, as indicated above, this inquiry sheds light on certain other irregular aspects of this procurement process, starting with the drafting of the RFA, which turned out to be faulty and at odds with the applicable rules under the standing offer, a poorly maintained procurement file, the acceptance of a non-responsive bid and the awarding of a contract whose terms were not strictly in compliance with what had been published in the RFA. Although these irregularities do not form part of the grounds of complaint, they are part of the context of the breach of the *AIT* relating to the evaluation that was found in this case and underscore its serious nature.

Prejudice to AIA or Any Other Interested Party

95. A contentious issue in this investigation was to determine whether the evaluation errors committed by GAC caused prejudice to AIA. After reviewing all the evidence and the submissions of the parties, the Tribunal finds that if GAC had complied with the criteria and the terms and conditions of the RFA, AIA would have obtained the call-up. However, the evidence also shows that AIA effectively obtained a contract on June 3, 2016, following the issuance of a new corrected request for availability for the requirement that GAC was seeking to fulfill under the RFA.

96. In sum, the Tribunal finds that AIA suffered prejudice because it was deprived of a contract on account of evaluation errors by GAC in the context of the RFA, but that the contract that it obtained subsequently when a corrected request for availability was issued is adequate compensation for this prejudice, except for the duplicate bid preparation costs it had to incur.

MaxSys' Proposal Should Have Been Set Aside

97. The RFA stated that bid responses were required by March 11, 2016, at 3 p.m. Moreover, in its bid solicitation email, GAC indicated that all the proposals had to be submitted by email to two specific email addresses and that "[a]ll other methods of submission will not be accepted."[53]

98. The evidence indicates that MaxSys' submission was received by GAC by fax on March 11, 2016, between 3:25 p.m. and 3:35 p.m., i.e. about 25 to 35 minutes after the deadline. The Tribunal takes note of Ms. Arlene Cade's statement that a MaxSys representative advised her that "they had problems with their email"[54] and that MaxSys had tried three times before 3 p.m. to email the submission. The documentary evidence is to a similar effect.[55]

53. Exhibit PR-2016-001-11, tab 4, Vol. 1A; Exhibit PR-2016-001-01, Vol. 1.
54. Exhibit PR-2016-001-39, Vol. 1E.
55. *Ibid.*; Exhibit PR-2016-001-48, Vol. 1E.

99. In these circumstances, the Tribunal finds that, under the rules set out in the standing offer, GAC should have rejected MaxSys' bid as it was submitted late and not as prescribed. These rules stated unequivocally that the responsibility for providing a response in accordance with the stated requirements *rested solely with the supplier*. The Tribunal refers specifically to section 9.5 of the standing offer, which sets out the requirements for responses to requests for availability. The section states as follows: "Timely receipt and correct direction of responses are the sole responsibility of the Offeror"[56] [translation] and further specifies that "failure to provide a response within the specified time frame of the Request for Availability Form will be interpreted as being unable to perform the services(s)"[57] [translation]. Section 9.3(A) of the standing offer otherwise indicates that "[t]he call-up must be issued to the Qualified Offeror (by price) who proposes a resource *within the specific time limitation* and meeting all the mandatory criteria of the RFA requirement . . ."[58] [emphasis added, translation]. Furthermore, there was no provision in the RFA giving GAC the discretion to accept a submission that was late or delivered by means other than the ones indicated.

100. In addition, the Tribunal notes that, despite all of the submissions it filed with the Tribunal, GAC at no time suggested that AIA had not filed a bid compliant with the criteria of the RFA correctly applied. Therefore, the Tribunal concludes that if the bids had been processed and evaluated in accordance with the requirements of the RFA, GAC would have likely found that AIA had filed the lowest-priced compliant bid and awarded it the contract.

101. Therefore, AIA was deprived of a contract because of errors made by GAC in evaluating the bid.

The Contract Awarded to AIA on June 3, 2016, Adequately Compensates It for the Harm It Suffered when Deprived of a Contract that Should Have Been Awarded to It

102. GAC also submits that AIA has already received the remedy it sought by way of its complaint, since it was awarded a contract by GAC on June 3, 2016, further to Solicitation No. DCP-2016-002, and is currently benefiting from this contract. GAC submits that despite the differences on paper between the wording of the RFA and that of Solicitation No. DCP-2016-002, the latter represents a reissuance of the initial RFA. It argues that the purpose of both requests was to hire a single temporary help resource to fill the same position at GAC and that the contract awarded to AIA on June 3, 2016, is basically the same contract it intended to award further to the RFA.

103. AIA takes the opposing view, claiming that the two procurement processes are not related in any way. It points out "eight significant differences"[59] [translation] between the two procurement processes, namely, that the contract awarded to AIA on June 3, 2016, is for a term of 17 weeks and a value of $59,325.75 (taxes not included), while the contract awarded to LRO Staffing is for a term of 48 weeks and a value of $158,059.19 (taxes included);[60] Solicitation No. DCP-2016-002 did not include a clause indicating it was replacing the RFA, which is what, according to AIA, should have been done in this situation; the typical duties of the desired resource are described differently in the two requests; the number of resources that a bidder could propose was not the same; the resources proposed by AIA are not the same because the expertise required was not the same; the rates in effect and the vendor rank were not the same at the time the two requests were issued; and the RFA is under the Tribunal's jurisdiction, contrary to Solicitation

56. Exhibit PR-2016-001-27, Exhibit A, Vol. 1D.
57. *Ibid.*
58. *Ibid.*
59. *Transcript of Public Hearing,* 10 August 2016, at 98.
60. Exhibit PR-2016-001-11 at 196, Vol. 1A; Exhibit PR-2016-001-16 at 38.4, Vol. 1C.

No. DCP-2016-002. Therefore, it argues that the contract for the services covered by the RFA has not been awarded and that it is still deprived of the contract and the benefit thereof.

104. The question of whether the contract awarded to AIA on June 3, 2016, is the same contract that was to be awarded further to the RFA was the subject of the testimony provided by Mr. Mucci, Director of GAC's Access to Information and Privacy Protection Division.

105. In sum, the Tribunal notes from Mr. Mucci's testimony that, through both the RFA and Solicitation No. DCP-2016-002, GAC wanted to procure the services of an in-house privacy advisor for GAC and was looking to fill the same position in both cases.[61] It also notes that the AIA resource is currently working in the GAC Privacy Protection Division as a substitute for the temporary help resource that GAC initially hoped to replace by issuing the RFA.[62] Mr. Mucci provided credible explanations in support of these conclusions.

106. Mr. Mucci explained that his division is divided into three units, including one that focuses on processing access to information requests from the public, and another, the Privacy Protection Division, which mainly provides advice to GAC on privacy protection, including for its various programs and missions abroad.[63] Mr. Mucci stated that by issuing the RFA on March 9, 2016, GAC wanted to replace a temporary help resource who was working in the Privacy Protection Division at the time and whose contract was ending in April 2016.[64]

107. He also confirmed that GAC had cancelled the RFA after the complaint from AIA about the evaluation of the bids and had used the opportunity to correct errors in the RFA. Among other things, Mr. Mucci testified that one of the problems with the RFA stemmed from the fact that GAC thought it had to use a standard PWGSC description of the typical duties to be performed by the desired resource. However, the standard description focused mainly on the processing of access to information requests from the public and did not go into detail about the duties of a privacy advisor.

108. However, Mr. Mucci also stated that GAC had indicated in the RFA that it was looking for a resource for its Privacy Protection Division and had added the word "privacy" in two other places[65] to alert potential suppliers to the fact that it was actually looking for a privacy protection resource.[66] Mr. Mucci also testified that, in his opinion, the limited community of suppliers working in the access to information and privacy field would have known what type of services GAC wanted to acquire.[67]

109. Mr. Mucci testified that Solicitation No. DCP-2016-002 replaced the RFA. He acknowledged that this solicitation was drafted differently from the RFA and explained this was because, after AIA's complaint, GAC requested advice from PWGSC experts and its own public procurement experts and learned that the description of typical duties in the request for availability form could be amended and that use of asset criteria was not allowed. Therefore, when preparing Solicitation No. DCP-2016-002, GAC dropped the asset criteria and improved the wording of the mandatory criteria and typical duties in order to

61. *Transcript of Public Hearing*, 10 August 2016, at 54; Exhibit PR-2016-001-38 at para. 14, Vol. 1E.
62. *Transcript of Public Hearing*, 10 August 2016, at 32-34.
63. *Ibid.* at 12, 45.
64. *Ibid.* at 23-24.
65. *Ibid.* at 22-23, 30, 88-90.
66. Exhibit PR-2016-001-38 at paras. 8-9, Vol. 1E.
67. *Transcript of Public Hearing*, 10 August 2016, at 89-90.

align them more closely with GAC's actual requirement.[68] He testified that, in substance, the two solicitations targeted exactly the same requirement.[69]

110. Finally, Mr. Mucci explained the apparent differences in the duration and the value of the contract awarded to LRO Staffing in March and the contract awarded to AIA on June 3, 2016. He explained that when the contract was awarded to LRO Staffing, GAC anticipated needing the desired resource for 48 weeks. Mr. Mucci added that GAC had wanted to create a new position in the Privacy Protection Division for a few years, but since it was not possible given the fiscal environment at the time, it had turned to a temporary help resource to perform these functions. Mr. Mucci explained that the process of creating a new position, however, came to fruition in the months following the contract award to LRO Staffing, that is, at the same time it was correcting errors in the RFA and preparing the replacement request for availability.[70] Mr. Mucci also explained that this new position, for which the required authorization was obtained on June 5, 2016, essentially pertains to the work done to date by the temporary help resource that GAC was seeking to replace by issuing the RFA, and the same work currently being done by the AIA resource under the contract of June 3, 2016.[71] According to Mr. Mucci's testimony, once a candidate is hired for the new position, which is expected to be in September or October,[72] GAC might not need a temporary help resource for much longer.

111. Mr. Mucci testified that these operational concerns had also figured in the discussions GAC had with the public procurement experts when preparing Solicitation No. DCP-2016-002, which indicated that the subsequent offer would be for a maximum of 48 weeks, without pre-determining its duration. Moreover, these anticipated changes in operational requirements at GAC, along with the fact that, according to Mr. Mucci, it is more convenient to extend a shorter contract, if warranted by client need and satisfaction, than to terminate a longer contract, explain why, on June 3, 2016, GAC decided to award AIA a contract for an initial term of 17 weeks, with the possibility of an extension.[73]

112. Based on the evidence, the Tribunal finds that the contract awarded to AIA on June 3, 2016, replaces the contract that GAC wanted to award further to the RFA. Although the evidence indicated some differences in the description of typical tasks for the desired resource between both requests for availability, Mr. Mucci provided a reasonable explanation for these differences. They clearly relate to the fact that GAC's initial preparation of the RFA had been faulty and that it wanted to correct that in Solicitation No. DCP-2016-002. Lastly, the Tribunal accepts that the work descriptions in the two solicitations were not intended to provide a comprehensive description of the services required and that, despite the shortcomings of the RFA statement of criteria, the services required by GAC were likely known to the community of potential suppliers.

113. Accordingly, the Tribunal finds that the two requests for availability were basically intended to fill the same requirement: a resource capable of providing professional services at an advanced level in GAC's Privacy Protection Division. The Tribunal also finds, on the basis of the evidence, that the AIA resource currently providing services under the contract of June 3, 2016, is performing the duties previously carried out by the temporary help resource that GAC was trying to replace through the RFA.

---

68. Exhibit PR-2016-001-38 at para. 13, Vol. 1E; *Transcript of Public Hearing*, 10 August 2016, at 28-31, 75-76, 79-85.
69. *Transcript of Public Hearing*, 10 August 2016, at 90-91.
70. *Ibid.* at 69-71.
71. *Ibid.* at 71-72.
72. *Ibid.* at 72-73.
73. *Ibid.* at 75-79.

114. The Tribunal does not find it relevant, for the question of whether or not the two contracts covered the same requirement, that Solicitation No. DCP-2016-002 did not include the reissue clause referred to by AIA. Even accepting that the absence of this clause is a technical deficiency in the drafting of Solicitation No. DCP-2016-002, that in no way detracts from the fact that the AIA resource is currently performing, under the contract of June 3, 2016, the services that GAC wanted to acquire from the start. Also, the Tribunal considers the question of whether or not it has jurisdiction over Solicitation No. DCP-2016-002 irrelevant for the purposes of this discussion.

115. This leaves the matter of the value and the duration of the contracts. The Tribunal finds that they are equivalent. The contract awarded to LRO Staffing was for a period of 48 weeks. However, as Mr. Mucci pointed out, this contract could be terminated at any time, on short notice. The contract awarded to AIA on June 3, 2016, was for a period of around 17 weeks, with the possibility of an extension up to 48 weeks.[74] In sum, based on the evidence and considering the relative value of the contracts and the imponderables, including changing operational requirements at GAC, which could have affected the contract that would have been awarded to AIA if the RFA criteria had been correctly applied, the Tribunal finds that the contract awarded on June 3, 2016, to AIA adequately covers the loss of any profit it might have incurred, had the contract resulting from the RFA been awarded to it.

116. It remains, however, that AIA needlessly incurred costs to prepare its response to the initial RFA and had to incur additional costs to prepare a second bid in response to Solicitation No. DCP-2016-002.

Prejudice to the Integrity and Efficiency of the Procurement System

117. As noted above, non-compliance with the contract award criteria and procedures of a bid solicitation process represents a serious irregularity that affects the integrity and efficiency of the procurement system, because it has an impact, for instance, on the fairness of the process, on the bidders' confidence in the system, and therefore, on any opportunity for the government to obtain the most advantageous proposal for the services it wants to acquire.

118. However, the Tribunal also notes that GAC tried to minimize the impact of the identified errors by cancelling the RFA and relaunching the procurement process after issuing a new request for availability, corrected after consultation with PWGSC and its own procurement experts.[75] The Tribunal therefore finds that the negative impact of the identified violation was relatively minimized.

Whether the Parties Acted in Good Faith

119. Despite AIA's numerous allegations of bad faith, the Tribunal is satisfied that the parties all acted in good faith. The parties' good faith is one of the factors that the Tribunal must take into consideration when recommending appropriate corrective action.[76] However, allegations of bad faith are serious accusations that go well beyond procedural irregularities or failures. Good faith is assumed, and the Tribunal does not expect to have to consider the lack of good faith by one of the parties, except in very rare and exceptional cases. In particular, the Tribunal reaffirms that unfounded allegations of bad faith are unfortunate, are not productive and do not pave the way for any greater remedy.

120. The Tribunal specifically noted AIA's allegations that GAC did not fully comply with the order to produce certain documents, which was issued by the Tribunal on June 8, 2016. As mentioned above, the

74. *Ibid.* at 68-69.
75. *Ibid.* at 31-32.
76. Paragraph 30.15(3)(d) of the *CITT Act*.

Tribunal found that there seemed to be some confusion in the GAC file on this procurement process. In this case, the Tribunal is of the opinion that the apparent confusion in the file was at the root of a good portion of the apparent inconsistences in the file and that this explains why some documents were not, or could not be, produced by GAC in response to the Tribunal's order. However, the Tribunal points out that, given that GAC was dealing with a party that was not represented by independent legal counsel and that AIA therefore did not have access to the documents GAC designated as confidential in its GIR of May 25, 2016, it would have been desirable—and the Tribunal would have expected—that GAC disclose the documents supporting its position in this case in a more direct and proactive manner, in particular, as regards the circumstances in which MaxSys' bid was received.[77]

Extent to Which the Contract was Performed

121. No service was provided to GAC under the contract awarded further to the RFA.

Finding Regarding Appropriate Remedy

122. Under the circumstances, the Tribunal finds that the appropriate remedy would be one that ensures that the irregularities identified in this procurement procedure do not happen again. In this regard, given its conclusions that the contract awarded on June 3, 2016, adequately compensates AIA for any lost profit it might have suffered from being deprived of a contract further to the RFA, the Tribunal finds that to award compensation to AIA for the prejudice caused to the integrity of the procurement system would be a windfall for AIA, rather than a remedy to correct the wrongs done to the integrity of the system.

123. Therefore, noting that GAC seems to have already taken measures in this regard, the Tribunal recommends that GAC take the necessary steps to ensure, in the future, that it strictly complies with the process for the award of call-ups under the standing offer for temporary help services in the National Capital Region, including as regards the statement of merit criteria, the evaluation of bids, the maintenance of complete documentation regarding the procurement file and the award of contracts.

124. Moreover, assuming that the Tribunal is trying to put the complainant in the position where it would have been had trade agreement violations not occurred, the Tribunal finds it appropriate to award AIA, pursuant to subsection 30.15(4) of the *CITT Act*, the reimbursement by GAC of the reasonable costs incurred in the preparation of its response to the RFA.

COSTS

125. Both parties requested costs in relation to the proceeding. Given the divided success in this case, each party shall bear its own costs.

---

77. The Tribunal further finds that there are some discrepancies between MaxSys' bid documents produced by GAC on 15 June and 10 August 2016 (Exhibit PR-2016-001-21, Vol. 1C; Exhibit PR-2016-001-48A (protected), Vol. 2; PR-2016-001-48, Vol. 1E), and the version submitted in the confidential version of the GIR on 25 May 2016 (Exhibit PR-2016-001-11A (protected), tab 6, Vol. 2). These discrepancies concern namely the crucial notation indicating the time at which the bid was received by GAC; as this notation does not appear on the copy submitted in the confidential GIR. In this regard, the Tribunal refers to its decision in *Space2Place Design Inc. v. Parks Canada Agency* (30 October 2015), PR-2015-012 (CITT) at paras. 50-53. The Tribunal reaffirms that any alteration of evidence, whether intentional or not, poses serious concerns. The Tribunal pointedly reminds the parties and their legal counsel that it is their responsibility to ensure that the evidence is complete and has not been altered.

DETERMINATION

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

127. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that GAC take the necessary steps to ensure, in the future, that it complies with the process for the award of call-ups under the standing offer for temporary help services in the National Capital Region, including as regards the statement of merit criteria, the evaluation of bids, the maintenance of complete documentation regarding the procurement file and the award of contracts.

128. Pursuant to subsection 30.15(4) of the *CITT Act*, the Tribunal awards AIA its reasonable costs incurred in preparing its bid in response to the RFA entitled "DCP Advanced Privacy ATIP Officer – May 2, 2016". The Tribunal recommends that AIA and GAC negotiate the amount of the costs awarded pursuant to subsection 30.15(4) of the *CITT Act* and report the outcome within 30 days of the issuance of this determination.

129. Should the parties be unable to agree on the amount of the costs awarded pursuant to subsection 30.15(4) of the *CITT Act*, AIA shall file with the Tribunal, within 40 days of the issuance of this determination, a submission on the issue of the costs it incurred in preparing its bid. GAC will then have 20 days after the receipt of the submission by AIA to file a response. Unless it requires additional information, the Tribunal will inform the parties of the nature and amount of costs as soon as practicable after the receipt of the response by GAC.

130. Each party shall bear its own costs in relation to the proceedings.

Jean Bédard

Jean Bédard
Presiding Member