



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-004

Solutions Moerae Inc. o/a MSi

v.

Industry Canada

*Determination issued
Monday, September 12, 2016*

*Reasons issued
Thursday, September 15, 2016*

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IN THE MATTER OF a complaint filed by Solutions Moerae Inc. o/a MSi 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

SOLUTIONS MOERAE INC. O/A MSI

Complainant

AND

INDUSTRY CANADA

**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. Each party will bear its own costs.

Ann Penner

Ann Penner

Presiding Member

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

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STATEMENT OF REASONS

1. On April 29, 2016, Solutions Moerae Inc. o/a MSi (MSi) 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 procurement (Solicitation No. IC401541) by Industry Canada² on behalf of the Canadian Intellectual Property Office (CIPO) for the provision of task-based informatics professional services (TBIPS).

2. The Tribunal accepted the complaint for inquiry on May 2, 2016, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³

3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *CITT Act*.

4. For the reasons set out below, the Tribunal finds that the complaint is valid in part. The Tribunal will not recommend a remedy and each party shall bear its own costs.

SUMMARY OF COMPLAINT

5. MSi put forward four grounds of complaint, all of which alleged that Industry Canada improperly evaluated its proposal by adopting an inconsistent and subjective approach to the evaluation of its proposed resources. The four grounds of complaint set out that the evaluation team improperly and unreasonably:

- halved the durations of projects for two resources due to its determination that the resources played dual roles, resulting in a substantial loss of points;
- halved the duration of a project for one resource due to its determination that the nature of the role the resource played on that project was not suitable;
- deducted points due to its determination that certain technical tools did not meet the specified criteria; and
- deducted points for one resource for determining that MSi did not provide a satisfactory copy of a required document.

6. As a remedy, MSi requested that the designated contract be terminated, that the submitted bids be re-evaluated and that it receive compensation. MSi also requested reimbursement of the costs of preparing its complaint.

PROCEDURAL HISTORY

7. On March 31, 2015, Industry Canada issued a solicitation for the procurement of three Level 3 business analyst resources under the supply arrangement for the provision of TBIPS on behalf of CIPO (Solicitation No. 180344). MSi was successful in this process and was awarded a contract on September 4, 2015. However, this contract was terminated on October 2, 2015, due to a series of

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

2. On November 4, 2015, the Government of Canada gave notice that the name of Industry Canada will be changed to Innovation, Science and Economic Development Canada.

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

administrative errors. MSi received a debriefing, during which it was told that it would be invited to submit a bid in response to the new Request for Proposal (RFP). MSi was also offered compensation in accordance with the terms of the first RFP.

8. On January 25, 2016, Industry Canada issued a second RFP, which is the RFP at issue in this complaint, for three Level 3 business analysts under the supply arrangement for the provision of TBIPS. The closing date for this RFP was February 11, 2016. MSi was not specifically invited to submit a bid, but was informed, upon contacting the contracting authority, that the RFP was available on Buyandsell.gc.ca, the Government of Canada's public tendering Web site.

9. In accordance with the terms of the RFP, on February 2 and 5, 2016, Industry Canada published two sets of responses to bidders' questions (Q&A responses).

10. On February 11, 2016, MSi submitted its bid.

11. On April 15, 2016, MSi was informed that, while its bid was responsive to the RFP, it was not accepted and that the contract had been awarded to Emerion. MSi was also provided with a summary of the evaluation team's consensus report on its bid, including the evaluation team's consensus scores (hereafter, the consensus scores).⁴

12. On April 15, 2016, MSi wrote to Industry Canada to request an in-person debriefing.

13. On April 18, 2016, Industry Canada provided MSi with an updated evaluation summary, which provided corrections to the consensus scores.

14. The debriefing was held on April 20, 2016. According to MSi, the contracting authorities explained the reasons for their evaluation of MSi's bid but were not prepared to change the consensus scores.

15. On April 29, 2016, MSi filed its complaint with the Tribunal.

16. On May 2, 2016, the Tribunal accepted the complaint for inquiry.

17. On May 30, 2016, Industry Canada filed a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵

18. On June 6, 2016, MSi filed a motion for the production of certain documents and requested an extension to the deadline to file its comments on the GIR.

4. As stipulated by the RFP, bids were to contain a technical section and a financial section. The bid with the highest combined rating of technical merit and price, based on a ratio of 70 percent for technical merit and 30 percent for price, was to be selected for contract award. Only the evaluation of the technical section is at issue in the present complaint. In order to be considered responsive for the technical section, a bid had to meet all six mandatory criteria (two for each of the three proposed resources) and obtain a minimum overall score of 70 percent for the 30 point-rated technical evaluation criteria (10 for each resource). Although MSi's bid was deemed responsive to the RFP, it was not granted full points for some of the point-rated technical criteria. Two other responsive bidders (including the successful bidder) both received higher scores.

5. S.O.R./91-499.

19. On June 14, 2016, Industry Canada filed a response to MSi's motion for the production of documents, which included the material requested by MSi (the additional documents).⁶ On June 17, 2016, MSi indicated that it had no comments on Industry Canada's response to the motion.

20. On June 20, 2016, the Tribunal informed the parties that the additional documents filed by Industry Canada fully responded to MSi's motion and that it therefore would not issue an order directing Industry Canada to file any further material.

21. MSi filed comments on the GIR on July 4, 2016. Because MSi raised new arguments and/or evidence relating to the additional documents, the Tribunal accepted the filing, on July 11, 2016, of Industry Canada's reply to MSi's comments on the GIR. MSi submitted a final reply on July 18, 2016.

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

RELEVANT PROVISIONS OF THE RFP

23. MSi's complaint centers on the manner in which the technical section of its bid was evaluated. Specifically, the complaint focused on the evaluation of its bid against Attachment 4.2, "Point-Rated Bid Evaluation Criteria", and point-rated requirements R8, R9, R18, R19, R28 and R29,⁷ which provide as follows:

Attachment 4.2 Point-Rated Bid Evaluation Criteria

...

Notes: For evaluation purposes, the Project Management specific deliverables will NOT be accepted as business analysis specific deliverables. Example of Project Management deliverables are Project Plan, Project Charter, etc.

On the other hand, project specific business analysis deliverables that will be accepted are, as example, Business Proposal, High Level Business Requirements Document, and Detailed Business Requirements Document.

Business analysis outputs and products are also accepted as proper work products of a business analyst such as Context Diagram, Use Case Diagrams, Business Process Diagram, Conceptual Data Model Diagram, User Profiles, Use Case Descriptions, Workflow Models, Logical Data Models, Reports, Wireframes, User Stories, Prototypes, State Diagram, Business Requirements, Stakeholder Requirements, Functional Requirements, Non-Functional Requirements, Transition Requirements, Business Rules Catalogues, Traceability Matrices, Coverage Matrices, etc.

Projects [where] the resource has had *more than one title* should be taken into consideration *for the time spent on the project*. Example is *if a resource had a [project management] and [business analysis] role during one project and where deliverables were as much [project management] and [business analysis] outputs, project will be counted accordingly to as much as 1/2 instead of full credit for the project*.

6. Except where that material was already on the record.

7. The terms of R18 and R28 are, in all relevant ways, the same as those of R8, and the terms of R19 and R29 are the same as those of R9; as a result, R18, R19, R28 and R29 are not reproduced here.

- | | | |
|------------|--|---|
| R8 | The proposed consultant possesses significant experience as a Senior Business Analyst at capturing, tracing, analyzing and managing changes to requirements using requirements management tools such as IBM Rational DOORS. | ... |
| | ... | |
| R9 | The proposed consultant possesses significant experience as a Senior Business Analyst at visualizing, analyzing, and communicating enterprise architecture and business process analysis using enterprise architecture tools such as IBM Rational System Architect. | ... |
| | ... | |
| R10 | The proposed Consultant possesses Certification(s) or professional designation(s) in the industry recognized organizations such as International Institute of Business Analysis (IIBA), the Project Management Institute (PMI), or any IIBA or PMI Endorsed Education Providers. | <ul style="list-style-type: none"> • No certifications = 0 points • Completion of a minimum of 3 courses in business analysis from an Endorsed Education Provider (courses certificates required) = 10 points • IIBA / PMI Endorsed Education Provider Certificate of Completion in Business Analysis = 20 points • <i>Proof of pre-qualification to attend examination to one of the Business Analysis certifications</i> = 30 points • IIBA-CCBA = 40 points • IIBA-CBAP or PMI-PBA = 50 points |
| | ... | ... |

[Emphasis added]

TRIBUNAL ANALYSIS

24. At issue in this complaint is the reasonableness of Industry Canada's evaluation of the bid from MSi (i.e. the manner in which the evaluation team scored its proposed resources against the relevant terms of the RFP). If the Tribunal determines that Industry Canada's evaluation was reasonable, and in keeping with the applicable trade agreements,⁸ it must then find that the complaint is not valid. Conversely, if the Tribunal finds that the evaluation was not reasonable, it must then find the complaint to be valid (or valid in part).

25. When considering the reasonableness of bid evaluations, the Tribunal has consistently accorded a large measure of deference to evaluators. It has stated that a government entity's determination will be considered reasonable:

... if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.

8. In this case, all of the trade agreements listed in section 11 of the *Regulations* apply.

31. Conversely, the Tribunal has been clear that it will find an evaluation to be unreasonable and will substitute its judgment for that of the evaluators when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.⁹

[Footnotes omitted]

26. In order to determine the validity of MSi's complaint, the Tribunal will consider the manner in which the evaluation team scored the proposed resources according to the terms of the RFP to determine the reasonableness of the consensus scores. It will do so by examining the evidence in relation to each of the four grounds of the complaint in turn.

Ground 1: Was it Reasonable for the Evaluators to Halve the Durations of Certain Projects Because the Resources Played Dual Roles?

Positions of Parties

27. With respect to the first ground of complaint, MSi argued that Industry Canada wrongly interpreted the scope of the "dual role" provision in Attachment 4.2 to the RFP and relied on unpublished evaluation criteria to determine whether a resource had played a dual role during a project. MSi's position was that, if the resource had only identified one *title* on his or her résumé, the RFP did not permit the evaluators to look beyond those titles to examine the deliverables produced by each resource on each project in order to determine whether a resource had played a dual role. Further, MSi interpreted this section of the RFP to allow the evaluators to discount the duration of the project only where 50 percent *or more* of the identified outputs corresponded to the non-business analysis role played by the resource.

28. MSi argued that only one of its proposed resources listed two titles for two projects on his résumé and that MSi had appropriately reduced the time spent on non-business analysis activities for those projects. MSi also submitted that none of its resources listed deliverables associated with any other role, apart from those that were required for the management-related requirements of the project in the point-rated criteria.

29. MSi also submitted that any non-business analysis activities would have made up an extremely small proportion of all activities on a project and that, accordingly, none of the resources would have spent anything approaching half of their time on non-business analysis tasks during the duration of a project. As a result, in MSi's opinion, it was unreasonable for the evaluators to reduce the time credited for business analysis activities by half.

30. MSi submitted that permitting the evaluators to decide whether or not a consultant played a dual role on a project introduced an inappropriate degree of subjectivity into the evaluation, which resulted in an inconsistent standard of comparison between bidders. Thus, MSi alleged that the evaluation was not conducted in a procedurally fair way.

31. Further, MSi alleged that the determination of whether resources played dual roles was inconsistent as between its proposed resources and between the point-rated requirements. For example, MSi submitted that its second proposed resource had far more activities listed on her résumé that could be considered extraneous to a business analysis role, but no duration of the projects was halved and no points were

9. *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) at paras. 30-31.

deducted from her score. With respect to the other two resources, MSi alleged that points appeared to have been deducted only from projects with the longest durations, not those with the most additional activities.

32. Industry Canada submitted that this ground of complaint was not timely because it related directly to the terms of the RFP. Industry Canada submitted that previous Tribunal and Federal Court of Appeal jurisprudence establishes that any complaint grounded in the interpretation of the terms of an RFP should be made within 10 days of the moment the alleged ambiguity or lack of clarity becomes or normally ought to have become apparent. Industry Canada also noted that MSi had the opportunity to request clarification of the dual roles provision during the question and answer period provided for in the RFP, but did not do so.

33. Above and beyond the timeliness of this ground of MSi's complaint, Industry Canada argued that the evaluation team applied the criteria reasonably when determining whether the duration of a project should be halved because the proposed resource had been performing dual roles.

34. Industry Canada submitted that the RFP allowed the evaluators to take into consideration not only the title identified in the proposed resource's résumé but also the roles and deliverables described therein. The evaluation team therefore examined the roles and responsibilities of each resource as described for each project to assess whether the resource performed a dual role on that project.

35. As the RFP did not provide an exhaustive list of work products, Industry Canada maintained that the evaluation team adopted a broad interpretation of the types of tasks that could constitute "business analysis outputs and work products". The duration of a project was only reduced where the evaluation team determined that the tasks performed deviated from business analysis activities as broadly defined by the evaluation team and only where the bidder did not provide details on the relative amount of time spent in each role. In these cases, the evaluation team applied a consistent 50 percent reduction, which was the most generous amount allowed by the RFP. Further, the reductions were only noted in the evaluation summary where they impacted the number of points awarded.

36. In reply, MSi submitted that Industry Canada's response did not account for all the discrepancies in the scoring and that the fact that the marking of MSi's proposal was incorrect demonstrated that the evaluators did not apply themselves in evaluating MSi's bid.

37. MSi also submitted that the list of the types of activities that Industry Canada provided as falling within the evaluators' broad interpretation of the term "business analysis outputs and work products" constituted undisclosed evaluation criteria. MSi submitted these criteria were never made available to bidders and that they were not considered business analysis activities according to the industry standard for the business analysis profession.

Tribunal Analysis

38. The Tribunal considers that MSi has raised the following two questions with respect to the halving of the duration of projects under the "dual role" provision: (1) whether the terms of the RFP permitted the evaluation team to go behind the titles or roles identified by the resources and make their own assessment of whether deliverables listed for projects on the resources' résumés constituted business analysis activities (i.e. did the evaluators wrongly interpret the terms of the RFP?); and (2) whether the evaluators conducted their assessment in accordance with the terms of the RFP (i.e. did the evaluators apply undisclosed evaluation criteria or conduct the evaluation in a procedurally unfair way?).

Did the Evaluators Wrongly Interpret the Terms of the RFP?

39. The Tribunal will first address Industry Canada's argument regarding the timeliness of MSi's argument regarding the interpretation of the dual roles provision.

40. As noted by Industry Canada, the Tribunal has consistently held that any complaint grounded in the interpretation of the terms of an RFP should be made within 10 days of the moment the alleged ambiguity or lack of clarity becomes or normally ought to have become apparent.¹⁰ The *Regulations* require that a complaint be filed with the Tribunal or that an objection be made to the relevant government institution within 10 days of the date on which the bidder knew or reasonably ought to have known the grounds of its complaint. The Tribunal's jurisprudence is clear that bidders cannot wait until a contract is awarded to file a complaint, but instead must raise any issues with the RFP as soon as they become aware or reasonably should have become aware of those issues. Bidders are "... expected to keep a constant vigil and to react as soon as they become aware ... of a flaw in the process."¹¹

41. At issue, then, is whether the terms of the RFP dealing with the "dual role" of proposed resources were unclear (or ambiguous) and, if so, whether they were ambiguous when the RFP was issued or whether such ambiguity only emerged during the evaluation of the bids.

42. MSi's complaint can only be timely if the ambiguity came to light during the evaluation process; if the terms of the RFP were unclear at the time of publication, then MSi should have requested clarification or filed an objection at that time.

43. As set out above, Attachment 4.2 to the RFP provides as follows:

Projects [where] the resource has had *more than one title* should be taken into consideration *for the time spent on the project*. Example is if a resource had a [project management] and [business analysis] role during one project and where deliverables were as much [project management] and [business analysis] outputs, project will be counted accordingly to as much as 1/2 instead of full credit for the project.

[Emphasis added]

44. As the Tribunal has held before, the terms of an RFP are to be interpreted in accordance with their ordinary meaning and in light of their context and purpose.¹²

45. In this case, the first sentence of the relevant paragraph of Attachment 4.2 to the RFP refers to projects where the resource has had more than one "title" and provides that these should account "... for the

10. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) [IBM] at para. 21; *Raytheon Canada Limited v. Department of Public Works and Government Services* (19 January 2016), PR-2015-026 (CITT) at paras. 37-38; *Global Upholstery Co. Inc. v. Department of Public Works and Government Services* (6 July 2009), PR-2008-052 (CITT) at para. 14.

11. *IBM* at para. 20.

12. *Microsoft Canada Co, Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation v. Department of Public Works and Government Services* (12 March 2010), PR-2009-056 (CITT) at para. 50; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA); *Ready John Inc. v. Canada (Public Works and Government Services)*, 2004 FCA 222 (CanLII) at para. 35; *Bergevin v. Canada (International Development Agency)*, 2009 FCA 18 (CanLII) at paras. 17-22; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, 2010 SCC 4 (CanLII) at paras. 64-65; *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53 (CanLII) at paras. 47-48, 56-58.

time spent on the project” (presumably in the business analysis role). The second sentence offers an example that refers to resources having two different “roles”, a business analysis role and a project management role, and producing deliverables that were “as much” non-business analysis outputs as business analysis outputs. In this example, the time that can be credited as the time spent in a business analysis role can be counted as “up to half” of the total duration of the project.

46. For the Tribunal, these sentences do not lead to the conclusion that the term “title” would or should have restricted the evaluators from looking at the types of functions performed by each resource during each project. The second sentence of the dual role provision, read in conjunction with the preceding paragraphs of Attachment 4.2 to the RFP, makes it clear that the evaluators would look at the deliverables listed by the resources to determine whether they could be considered business analysis outputs, as opposed to project management outputs. Read in context, the Tribunal finds that the purpose of the “dual role” provision was to explain how the evaluators would differentiate between project management and business analysis deliverables and ensure that time spent in a project management role would not be counted as time spent in a business analysis role for the business analysis-specific point-rated criteria.

47. Moreover, nothing in the terms of the RFP indicates that the title listed in the resource’s résumé would be the “trigger” for this to take place or that the evaluators would restrict this examination only to projects where the resources had listed two titles or roles on their résumés.

48. As such, the Tribunal finds that the use of both “title” and “role” in Attachment 4.2 to the RFP renders the wording ambiguous. Indeed, the Tribunal can appreciate that MSi may have been confused by the interchangeability of “title” and “role” and may have mistakenly interpreted “title” as meaning “job title”. However, this ambiguity was plain on the face of the RFP. Accordingly, MSi should have requested clarification, raised an objection or filed a complaint within 10 days of the issuance of the RFP. As it did not, the Tribunal has no choice but to find this aspect of MSi’s complaint time-barred.

49. Even if this aspect of the complaint were not time-barred, however, the Tribunal finds that the evaluators’ interpretation of MSi’s bid is indeed supported by the terms of the RFP and is therefore reasonable. As a result, the Tribunal finds that the evaluators did not wrongly interpret the terms of the RFP.

Did the Evaluators Apply Undisclosed Evaluation Criteria or Conduct the Evaluation in a Procedurally Unfair Way?

50. The Tribunal will now consider whether the evaluators conducted their assessment in accordance with the terms of the RFP, i.e. whether the evaluators applied undisclosed evaluation criteria or conducted the evaluation in a procedurally unfair way.

51. As noted above, MSi claimed that the evaluation of its proposed resources was “subjective” and that the evaluation team applied its approach inconsistently. The Tribunal disagrees.

52. As the Federal Court of Appeal has affirmed, there can (and will) be a measure of subjectivity as evaluators apply the mandatory criteria of an RFP to a given bid.¹³

53. Certainly, a purely subjective analysis could become problematic in a competitive bidding process. Unless evaluation criteria are fully disclosed and/or enumerated and evaluations quantified in some way, problems can arise. Nevertheless, when a subjective analysis is grounded on the explicit terms of an RFP,

13. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA) at para. 36.

bidders can be confident that evaluators have acted in good faith and conducted the procurement as fairly, transparently and objectively as possible.

54. In this case, although there was a certain degree of subjectivity in the application of the evaluation criteria, the Tribunal is satisfied that this analysis was reasonable and grounded in the terms of the RFP. The approach taken by the evaluators to determine whether proposed resources had played dual roles on a project, and to decide whether to reduce the amount of time sent on a project accordingly, mirrors the evaluation criteria set out in Attachment 4.2 to the RFP.¹⁴

55. As noted above, the evaluators consistently reduced the duration of a project where the evaluation team determined that the tasks performed deviated from business analysis activities.¹⁵ Where it was not clear how much time was spent in a non-business analysis role, the duration of the project was halved; where the time spent in each role was identified, the duration of the project was reduced in accordance with what was set out in the proposed resource's résumé.¹⁶

56. For example, all three evaluators noted that MSi's first proposed resource acted not only as a business analyst but also as project manager over the course of projects 11, 12 and 13. This is reflected in their individual notes and scores, as well as in the consensus scores.¹⁷ Accordingly, the duration of those projects was halved, as the résumé did not disclose how much time was spent in each role.

57. The Tribunal finds this reasonable, especially in light of the description of some of the proposed resources' activities on those projects.¹⁸ These descriptions necessarily imply that the proposed resource was doing more than just business analysis; MSi itself conceded that "... some activities were carried out that could be claimed to be not strictly related to Business Analysis..."¹⁹ The proposed resource, therefore, had multiple *roles* in this project (even if the resource only had a single official job title).

58. Furthermore, the Tribunal finds that the evaluators' application of an expanded definition of "business analysis outputs and work products" was grounded in the terms of the RFP and was not therefore based on undisclosed evaluation criteria. As noted by Industry Canada, the list of "business analysis outputs and work products" provided in the RFP was not an exhaustive list, as indicated by the use of the introductory phrase "such as". It was open to the evaluators to consider that tasks not listed in the RFP were also "business analysis outputs and work products".

59. The Tribunal also notes that this approach was favourable to MSi, as it resulted in the duration of some projects being counted at their full length rather than being halved. Further, as there is no evidence that this approach was applied inconsistently with respect to the other bidders, the Tribunal cannot establish that the evaluation team acted unfairly during the evaluation process.

60. Instead, the evidence shows that the approach was applied in a consistent manner by all the evaluators. While the evaluators reached different scores in their individual analyses, and particularly in regard to their scores for MSi's first proposed resource,²⁰ they reconciled those differences by collectively

14. Exhibit PR-2016-004-09, tab 13 at para. 5, Vol. 1A.

15. Exhibit PR-2016-004-13A (protected) at tab 2, Vol. 2A.

16. Exhibit PR-2016-004-09, tab 13 at para. 5c), Vol. 1A.

17. Exhibit PR-2016-004-13A (protected), tab 2 at 13-15, 30-31, 53-55, Vol. 2A; Exhibit PR-2016-004-09, tab 9, Vol. 1A.

18. Exhibit PR-2016-004-09A (protected), tab 18, Vol. 2.

19. Exhibit PR-2016-004-16 at para. 1.1.2, Vol. 1B.

20. Exhibit PR-2016-004-13A (protected), tab 2 at 8-9, 28-29, 57, 62, 67, Vol. 2A.

developing the consensus scores for MSi's bid.²¹ As the Tribunal has found before,²² this is a reasonable (and even expected) outcome of any thorough evaluation process—there is no reason to expect that individuals would necessarily assign the same scores on their own, especially given the volume of material that they had to assess for each of MSi's three proposed resources, who each provided lengthy résumés detailing 13 or more projects.

61. The Tribunal's analysis also shows that the evaluators did make some errors in calculating MSi's score, not all of which were addressed by Industry Canada. For example, the evaluators did not reduce the duration of projects 12 and 13 for point-rated requirement R1, although the duration was halved for all the other point-rated criteria for MSi's first proposed resource. Consequently, MSi's score was 4 points *higher* than it should have been. The other errors noted by the Tribunal either had no impact on or also increased MSi's score.

62. Finally, with respect to MSi's claim regarding inconsistencies in the evaluation of its second proposed resource, the evidence shows that the evaluators determined that she played dual roles on some projects;²³ however, any reduction applied was not noted in the evaluation summary and did not therefore impact the number of points awarded.²⁴

63. In light of the above, the Tribunal finds that this ground of MSi's complaint is not valid.

Ground 2: Was it Reasonable for the Evaluators to Halve the Duration of one Project due to the “Nature of the Project”?

Positions of Parties

64. MSi submitted that the evaluators applied a 50 percent reduction to the duration of one project for its third resource due to the “nature of the project”. MSi argued that this project was in fact highly relevant to the requirement and that no reduction should have been applied.

65. Industry Canada conceded that the 50 percent reduction should not have been applied, as there was no provision in the RFP for the length of the project to be reduced based on the “nature of the project”. However, Industry Canada submitted that, even if this project had been counted at its full duration, MSi's score would only have increased by 4 points; an increase that would not have had any material impact on the outcome of the procurement process.

Tribunal Analysis

66. In light of Industry Canada's concession that the 50 percent reduction should not have been applied, the Tribunal finds that the evaluators applied undisclosed evaluation criteria in making this reduction. As a result, this aspect of the evaluation was unreasonable, and this ground of MSi's complaint is valid.

21. Exhibit PR-2016-004-09, tab 9, Vol. 1A.

22. *Avalon Controls Ltd. v. Department of Public Works and Government Services* (28 April 2010), PR-2009-077 (CIIT) at para. 25.

23. Exhibit PR-2016-004-09A (protected), tab 1A at 2-3, Vol. 2.

24. Exhibit PR-2016-004-09, tab 8 at 2, Vol. 1A.

Ground 3: Was it Reasonable for the Evaluators to Reject the Tools Identified in MSi's Bid?Positions of Parties

67. MSi submitted that Industry Canada improperly rejected the tools that it identified in response to point-rated criteria R8, R18 and R28 (which required that resources demonstrate experience using "... requirements management tools such as IBM Rational DOORS") and in response to point-rated criteria R9, R19 and R29, (which required that resources demonstrate experience using "... enterprise architecture tools such as IBM Rational System Architect").

68. MSi submitted that the World Trade Organization *Agreement on Government Procurement*²⁵ provides that "[t]echnical specifications prescribed by procuring entities shall, where appropriate . . . be in terms of performance rather than design or descriptive characteristics . . ."²⁶ MSi also submitted that no list of acceptable alternative tools was provided and that, therefore, the determination of which tools were similar to those listed in the requirements was completely subjective.

69. Industry Canada submitted that MSi's complaint with respect to this ground was not timely, as it relates to issues that were apparent from the terms of the RFP when it was issued.

70. In addition, Industry Canada submitted that the technical specifications were not defined as to require experience with one specific tool, but rather provided examples of acceptable tools for illustrative purposes. Further, Industry Canada highlighted its responses to two questions from potential bidders (questions 4 and 9) as a more detailed description of the criteria that evaluators would use to determine equivalency. According to Industry Canada, this was sufficient to comply with the obligations of the trade agreements, and it was not required to provide a list of alternative acceptable tools.

71. Finally, Industry Canada argued that the evaluation team's decision was reasonable when it determined that MSi's proposed tools were non-responsive to the requirements of the RFP. Industry Canada submitted that the tools proposed by MSi either were generic, as opposed to tools that are specific to requirements management or enterprise management, or lacked the breadth of capability for requirements management or enterprise architecture as described in the Q&A responses.

Tribunal Analysis

72. As discussed above, the *Regulations* require that a complaint be filed with the Tribunal or that an objection be made to the relevant government institution within 10 days of the date on which the bidder knew or reasonably should have known the grounds of its complaint.

73. The fact that the RFP defined the technical requirements by reference to brand-name products and did not provide a list of acceptable alternatives was apparent on the face of the RFP when it was issued. There is no evidence on the record that MSi requested clarification or made an objection to Industry Canada regarding these criteria within 10 days of the issuance of the RFP.

74. Furthermore, MSi had a second chance to raise this issue after the publication of the Q&A responses on February 2 and 5, 2016, as the responses to questions 4 and 9 offered further details on the

25. *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).

26. Exhibit PR-2016-004-01 at 28, Vol. 1.

types of tools with which resources should have experience to qualify under the point-rated requirements at issue. Again, there is no evidence that MSi made an objection at that time.

75. In light of the above, MSi did not raise this ground of complaint within 10 days of the date on which it became known or should have become known. As a result, the Tribunal finds that MSi's complaint with respect to this ground is not timely. Consequently, the Tribunal will not assess the validity of this ground of complaint.

Ground 4: Was it Reasonable for the Evaluators to Reject the Receipt Provided by MSi as Proof of Pre-qualification to Attend an Examination for a Business Analysis Certification?

Positions of Parties

76. MSi submitted that the evaluators improperly rejected the receipt provided as "[p]roof of pre-qualification to attend examination to one of the Business Analysis certifications" by one of its resources in response to point-rated requirement R10. As a result, 10 points were deducted from MSi's score. MSi submitted that Industry Canada should have requested further details before rejecting the receipt as proof of pre-qualification.

77. Industry Canada submitted that it was reasonable for the evaluation team not to accept the receipt submitted by MSi as proof of pre-qualification, as it contained no evidence of the purpose of the payment. Further, Industry Canada submitted that the evaluators were under no obligation to seek clarification from MSi with respect to this document.

Tribunal Analysis

78. The Tribunal has consistently held that bidders bear the onus of demonstrating how their bids meet the mandatory criteria published in solicitation documents.²⁷ Accordingly, the Tribunal has stated that it is incumbent upon bidders to exercise due diligence in the preparation of their bids to make sure that they are compliant with all mandatory requirements.²⁸ In this respect, the Tribunal has generally refused to impose an obligation on government institutions to seek clarification from bidders.²⁹ While bidders can and should ask questions to clarify mandatory and technical requirements before bids are submitted, government institutions are not required to do likewise when bids are received.³⁰

79. In this case, the evaluation team was under no obligation to seek clarification from MSi regarding the receipt submitted as proof of pre-qualification to attend one of the business analysis examinations. Even more, as MSi conceded that the receipt did not indicate that the payment was for registration for the

27. *Info-Electronics H P Systems Inc. v. Department of Public Works and Government Services* (2 August 2006), PR-2006-012 (CITT); *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) [SIAS] at para. 59; *Excel Human Resources Inc. (operating as excellTR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 34.

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

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

30. *SIAS* at para. 59.

examination, or give any other indication as to what the payment was for,³¹ the evaluators reasonably concluded that the receipt did not constitute “proof” of pre-qualification to attend the examination.

80. This ground of MSi’s complaint is therefore not valid.

Conclusion

81. In light of the foregoing, the Tribunal finds that MSi’s complaint is valid in part. The evidence indicates that the evaluation team acted in an unreasonable manner with regard to one of the four grounds of MSi’s complaint, but reasonably with regard to the other three.

REMEDY

82. The Tribunal has previously held that it will generally only recommend a remedy where errors in a procurement process affected its outcome.³²

83. In this case, Industry Canada conceded that it erred by applying a 50 percent reduction to the duration of one project for MSi’s third resource due to the “nature of the project” as discussed above. However, Industry Canada submitted, and the Tribunal accepts, that the reduction would not have had any material impact on the outcome of the procurement process.

84. Indeed, the Tribunal notes that the overall impact of the errors made in the evaluation of MSi’s bid would have actually *increased* MSi’s score. However, given that MSi could not have been successful in the solicitation process even with such a higher score, the Tribunal finds that MSi has suffered no prejudice from the evaluation team’s errors. As a result, the Tribunal will not recommend a remedy.

COSTS

85. In most cases, the Tribunal generally awards costs to the successful party in keeping with the *Procurement Costs Guideline*. In this case, both parties were partially successful: Industry Canada in regard to three of the four grounds of complaint and MSi in regard to one. Each party would therefore normally be entitled to partial costs, with any imbalance of success being offset.

86. However, as Industry Canada waived its right to costs in light of the errors made in the evaluation process, and in light of the fact that the errors would not have impacted the outcome for MSi, the Tribunal exercises its discretion as a court of record to decide that each party will bear its own costs in these proceedings.

31. Exhibit PR-2016-004-01 at 29, Vol. 1.

32. *Beals, Lalonde & Associates v. Department of Justice* (27 July 2004), PR-2004-009 (CITT) at para. 36; *TireeRankinJV v. Department of Public Works and Government Services* (27 January 2005), PR-2004-038 (CITT) at para. 32; *Navatar Ltd.* (30 May 2000), PR-99-043 and PR-99-044 (CITT) at 8.

DETERMINATION

87. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part. Each party will bear its own costs.

Ann Penner

Ann Penner

Presiding Member