



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-031

Medi+Sure Canada Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Thursday, January 19, 2017*

*Reasons issued
Friday, January 27, 2017*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 REASONS FOR TRIBUNAL’S DENIAL OF PWGSC’S MOTION 1

 Existence of a Designated Contract 2

 Expiry of Bidding Period 4

EVALUATION OF PROPOSALS 5

POSITIONS OF PARTIES..... 6

TRIBUNAL ANALYSIS..... 7

 Trade Agreements 7

 Felix’s Proposal Did not Demonstrate Compliance with the Requirement That the Test Strips
 Container Be Tamper-Resistant 7

REMEDY 11

COSTS..... 13

DETERMINATION OF THE TRIBUNAL..... 13

IN THE MATTER OF a complaint filed by Medi+Sure Canada 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

MEDI+SURE CANADA INC.

Complainant

AND

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

**Government
Institution**

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services offer the supply contract under the Request for Proposal to Medi+Sure Canada Inc. at the price bid by Medi+Sure Canada Inc. in its proposal. If Medi+Sure Canada Inc. refuses to accept the contract at the price it bid, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services re-tender the requirement expeditiously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Medi+Sure Canada Inc. its reasonable costs incurred in preparing and proceeding with this complaint. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication for the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Serge Fréchette
Serge Fréchette
Presiding Member

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

Tribunal Panel: Serge Fréchette, Presiding Member

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Dustin Kenall, Counsel

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STATEMENT OF REASONS

BACKGROUND

1. On September 6, 2016,¹ Medi+Sure Canada Inc. (Medi+Sure) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*² concerning a Request for Proposal (RFP) (Solicitation No. 21120-161512/A) issued on March 29, 2016, by the Department of Public Works and Government Services (PWGSC) on behalf of the Correctional Service of Canada (CSC) for the supply of diabetic test strips and glucometers.³

2. The RFP contained only mandatory criteria and a bid price submission—thus, the resulting supply contract was to be awarded to the bidder who submitted the lowest-priced, compliant proposal. PWGSC received ten proposals, of which CSC (the technical authority reviewing the mandatory criteria) found six, including those of Medi+Sure and Felix Technology Inc. (Felix), to be compliant.⁴ PWGSC awarded the resulting contract to Felix as the lowest-priced, compliant bidder on July 20, 2016.⁵ However, PWGSC and Felix terminated the contract by mutual consent on August 30, 2016, due to Felix’s inability to secure the product it proposed.⁶

3. Medi+Sure argued that CSC improperly determined that Felix’s proposal was compliant with the requirement that the container holding the diabetic test strips be tamper-resistant in order to prevent removal of the desiccant. PWGSC proposed to re-tender the contract, but Medi+Sure requested that the Tribunal award the contract to it as the lowest-priced, compliant bidder remaining.

4. The Tribunal accepted the complaint for inquiry on September 8, 2016, 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*.⁷ On September 28, 2016, PWGSC moved for the Tribunal to dismiss the complaint, arguing that there was no “designated contract” and that, thus, the Tribunal lacked jurisdiction, and that the complaint was trivial given the cancellation of the contract and expiration of the bid price offer period for all proposals. On November 7, 2016, the Tribunal denied the motion, with reasons to be issued with the Tribunal’s final determination on the complaint.

5. For the reasons that follow, the Tribunal finds that Medi+Sure’s complaint is valid and that Medi+Sure should be awarded the contract at the price it bid in the RFP.

REASONS FOR TRIBUNAL’S DENIAL OF PWGSC’S MOTION

6. PWGSC argued that the Tribunal lacked jurisdiction to inquire into Medi+Sure’s complaint because at the time the complaint was filed, the contract with Felix had already been cancelled and, accordingly,

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1. The complaint was filed on a non-working day (Saturday, September 3, 2016) and is, thus, deemed to have been filed on the next working day (Tuesday, September 6, 2016).
 2. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 3. This is the department’s legal title. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.
 4. Exhibit PR-2016-031-23 at p. 8, para. 11, and pp. 11-12, para. 21, Vol. 1.
 5. *Ibid.* at p. 12, para. 23.
 6. *Ibid.* at p. 15, para. 39.
 7. S.O.R./93-602 [*Regulations*].

there was no “designated contract” as required by section 30.1 of the *CITT Act*. In the alternative, PWGSC argued that the Tribunal should cease its inquiry pursuant to subsection 30.13(5) of the *CITT Act*. On this point, PWGSC insisted that it had provided Medi+Sure with the essential remedy it sought, namely, the cancellation of the contract with Felix and the re-tendering of the contract. Furthermore, although Medi+Sure had requested that it be awarded the contract, PWGSC argued that it was prevented from so doing as a result of article 2.1 of the RFP which imposed a 90-day expiration period on bids.

Existence of a Designated Contract

7. In support of its first argument, PWGSC relied on section 30.11 of the *CITT Act*, which provides as follows:

Subject 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.

[Emphasis added]

8. The term “designated contract” is defined by section 30.1 of the *CITT Act*, which provides as follows:

designated contract means a 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;

[Emphasis added]

9. In essence, PWGSC submitted that, following the cancellation of the contract with Felix, there is no longer any contract that “has been or is proposed to be awarded”. It relied on the Tribunal’s decision in File No. PR-2014-047⁸ for the proposition that the existence of a designated contract is a “precondition . . . that must exist” when a complaint is filed for the Tribunal to have jurisdiction.

10. Medi+Sure responded that the precondition that the complaint relate to a designated contract that “has been or is proposed to be awarded” was met here because PWGSC did in fact award a contract to Felix and should have, instead, proposed a contract to Medi+Sure during the procurement process (and before the expiration of the bidding period). Medi+Sure pointed out that adopting PWGSC’s position would lead to absurd results, namely, that the Tribunal’s jurisdiction would turn on whether a complaint was filed one day before or after the cancellation of a contract by a government institution (something which a complainant has no control over nor necessarily knowledge of), and would preclude inquiries where evidence came to light only after a designated contract was completed or cancelled.

11. The Tribunal finds that the cancellation of the contract with Felix does not deprive it of jurisdiction to inquire into Medi+Sure’s complaint. The purpose of sections 30.1 and 30.11 of the *CITT Act* is to ensure that the Tribunal does not conduct investigations at large into government institutions’ procurement processes.⁹ Their purpose is not to restrict the Tribunal’s jurisdiction to inquire into complaints that disclose a reasonable indication that a procurement has not been conducted in accordance with a trade agreement.

8. *Lanthier Bakery Ltd. v. Department of Public Works and Government Services* (6 May 2015), PR-2014-047 (CITT) [*Lanthier Bakery*] at para. 22.

9. *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15324 (FCA) at para. 5.

12. Interpreting the legislation otherwise would result in situations in which a potential supplier, having suffered injury in the form of a breach of trade agreements, would have no remedy. Such an interpretation would also conflict with the time limits for filing a complaint under section 6 of the *Regulations*, which are calculated based on the day “on which the basis of the complaint became known or reasonably should have been known to the potential supplier”.¹⁰ Such consequences are inconsistent with views expressed by the Federal Court of Appeal: namely, that the values of fairness to competitors, ensuring competition among bidders, and promoting the efficiency and integrity of the procurement system “must be at the front of the Tribunal’s mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies.”¹¹

13. The Tribunal’s decisions reflect this understanding. In *Lanthier Bakery*, the Tribunal held that:¹²

... as this precondition was met when the inquiry was commenced, the cancellation of the standing offer awarded pursuant to RFSO/B does not affect the Tribunal’s jurisdiction to continue with its inquiry. *As long as the review of the grounds of complaint remains relevant, the purpose of the inquiry, which is to determine whether the procurement process was conducted in accordance with the relevant provisions of the applicable trade agreements, is not affected.*

[Emphasis added]

14. Here, the grounds of complaint remain relevant. PWGSC represented that CSC still has a requirement for these same goods on a long-term supply basis and that it intends to re-tender the requirement. Notably, PWGSC did not allege that the requirements in the RFP were improperly drafted or otherwise no longer reflect CSC’s needs, requiring a wholly new tendering process.¹³ Medi+Sure alleged that PWGSC breached the trade agreements by awarding a contract to a non-compliant bidder rather than to Medi+Sure, who, it argued, is the lowest-priced, compliant bidder. Pursuant to Article XV(5) of the *Agreement on Government Procurement*¹⁴ and Article 1015(4)(c) of the *North American Free Trade Agreement*,¹⁵ Medi+Sure submitted that PWGSC must award it the contract absent an invocation of those trade agreements’ “public interest” exception—which PWGSC never asserted in this proceeding nor during the procurement process. Both the Tribunal and the Federal Court have held that such provisions should be interpreted to mean that, in situations where there is a compliant bidder, the government institution is obligated to award a contract unless there is a sound public policy reason to cancel the solicitation.¹⁶

10. *Regulations*, subsection 6(1).

11. *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) at para. 23.

12. *Lanthier Bakery* at para. 23.

13. Exhibit PR-2016-031-23 at p. 3, para. 10, Vol. 1; Exhibit PR-2016-031-09 at p. 3, Vol. 1.

14. *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) [AGP].

15. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA].

16. *Lincoln Landscaping Inc. v. Department of Public Works and Government Services* (16 September 2016), PR-2016-018 (CITT) at para. 20; *Wang Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [1999] 1 FCR 3, 1998 CanLII 9093 (FC); *Conair Aviation, A division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CITT); *Carsen Group Inc.* (22 March 1995), 94N66W-021-0019 (CITT).

15. PWGSC also cited the Tribunal's decisions in File Nos. PR-2008-062¹⁷ and PR-2013-028¹⁸ in support of a requirement that the awarded contract must not have been cancelled by the date of filing of a complaint. However, these decisions too, when read in full, disclose that the Tribunal's jurisdiction turns on whether a complaint, as required by section 7 of the *Regulations*, is by a potential supplier, in respect of a designated contract, and discloses a reasonable indication of a breach of a trade agreement. Its jurisdiction does not turn on the measures the government institution or winning bidder have taken with regards to contract administration, such as cancellation, after a contract has already been awarded.

Expiry of Bidding Period

16. The Tribunal also concludes that the complaint is not rendered trivial on the basis of the contract's cancellation and the expiration of the 90-day open-offer period for bid prices required by the 2003 (2015-07-03) Standard Instructions, as incorporated by article 2.1 of the RFP.

17. PWGSC referenced the Tribunal's decision in File No. PR-2015-043¹⁹ for the proposition that all bids expire at the end of the bidding period specified by section 05(4) of the 2003 (2015-07-03) Standard Instructions found in PWGSC's Standard Acquisition Clauses and Conditions (SACC) Manual. However, that clause, which was incorporated by reference in the RFP by PWGSC, only operates to limit PWGSC's discretion to award a contract after bids have expired when no award has yet been made. The clause does not prevent PWGSC from, when it has already made an award within the bidding period, remedying a breach of the trade agreements brought to its attention. This can be done even after the expiration of the bidding period, as long as it is accomplished consistent with the bidders' rights as they had crystallized before the expiration of the bidding period.

18. The clause also does not impair the Tribunal's jurisdiction under the *CITT Act* and *Regulations* to recommend an appropriate remedy, including a contract award, when a breach has been found. This conclusion follows necessarily from the fact that the SACC Manual is simply a collection of policies and procedures issued by PWGSC—the SACC Manual and its constitutive clauses do not have the binding legal force either of regulations or legislation or the trade agreements as incorporated in such legislation, regulation and their implementing acts. It also flows from the fact that such an interpretation would, as discussed above, leave the Tribunal's jurisdiction dependent on the discretion of PWGSC in the timing of its

17. *Adélarde Soucy (1975) Inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) [*Adélarde Soucy*] at para. 22 (“The grounds for initiating the inquiry remain intact despite the cancellation of the tendering process. That cancellation in no way changes the Tribunal's initial findings regarding the existence of the grounds of complaint for which the inquiry was initiated, namely, the existence of reasonable grounds that the procurement was not conducted in accordance with the provisions of the applicable trade agreements. As such, cancelling the tendering process in no way changes the existence of the reasons for which the inquiry was initiated and, as such, the complaint is not trivial, as claimed by PWGSC.”).

18. *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. 8 (“Contrary to PWGSC's arguments, as explained in previous jurisprudence, the Tribunal is of the view that nothing in the *CITT Act* or its regulations suggests that Parliament contemplated that a decision by the government institution to cancel a procurement process could terminate the Tribunal's jurisdiction to continue an inquiry that was commenced in accordance with the law. In particular, the Tribunal is of the view that the wording of sections 30.11 and 30.1 of the *CITT Act* and of subsection 7(1) of the *Regulations* indicates that the existence of a contract ‘... that has been ...’ or ‘... is proposed to be ...’ awarded is a precondition of the Tribunal's jurisdiction that must exist when the complaint is filed. These provisions do not specify that this situation must necessarily persist at all times during the inquiry.”).

19. *Stenotran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (15 April 2016), PR-2015-043 (CITT).

award decisions, as well as preclude claims based on evidence discovered after the closing of the relatively narrow window of time of the bidding period (often between 60 and 90 days).

19. Finally, with regard to PWGSC's argument that Medi+Sure's complaint is trivial, the same considerations articulated above apply. Medi+Sure has requested that it be awarded the contract under the RFP, pursuant to Article XV(5) of the *AGP* and Article 1015(4)(c) of *NAFTA*.²⁰ Objectively, this remedy is superior to the mere opportunity to bid again in a re-tender of the contract, which involves additional time, expense and uncertainty. The Tribunal decisions relied on by PWGSC are inapplicable as they involve complainants who did not request a remedy of contract award.²¹

EVALUATION OF PROPOSALS

20. Having determined that it has jurisdiction to inquire into the complaint and that the complaint is not trivial, the Tribunal will now examine whether PWGSC has, as alleged, breached the provisions of the relevant trade agreements. In order to do so, it is first necessary to examine the requirements of the RFP.

21. Appendix A to the RFP sets out 12 mandatory technical requirements for proposals. It provides, in relevant part, as follows:²²

ANNEX A REQUIREMENT DIABETIC TEST STRIPS

Vendors must cross reference the mandatory technical criteria in a concise format by using page, paragraph(s) & sub-paragraphs as applicable to their supporting technical documentation.

The DIABETIC TEST STRIPS AND GLUCOMETERS must meet all of the following criteria:

...

12. The container holding the test strips must be tamper resistant in order to prevent removal of the desiccant.

Reference in Contractors Proposal: _____

[Italics added, bold in original]

22. Part 3 of the RFP (Bid Preparation Instructions) explains how technical bids should be drafted to ensure compliance with the technical requirements. It provides, in relevant part, as follows:²³

Section I: Technical Bid

In their technical bid, Bidders *must demonstrate their understanding* of the requirements contained in the bid solicitation *and explain how they will meet* these requirements.

20. *Lincoln Landscaping Inc. v. Department of Public Works and Government Services* (16 September 2016), PR-2016-018 (CITT) at paras. 20-22.

21. *Gear Up Motors v. Department of Public Works and Government Services* (26 November 2012), PR-2012-024 (CITT) at para. 6 (complainant submitting that inquiry should be continued merely "to determine who was responsible" for flawed evaluation and contract award); *Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (8 November 2010), PR-2010-068 (CITT) at para. 2 (requesting that award be cancelled and re-tendered); *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) at para. 3 (requesting that requirement in RFP be revised).

22. Exhibit PR-2016-031-01, Exhibit 1 at p. 14, Vol. 1.

23. *Ibid.* at pp. 3-4.

The technical bid *should address clearly and in sufficient depth the points* that are subject to the evaluation criteria against which the bid will be evaluated. *Simply repeating the statement contained in the bid solicitation is not sufficient.* . . .

[Italics added, bold in original]

23. Part 4 of the RFP (Evaluation Procedures and Basis of Selection) explains how CSC will evaluate proposals. It provides, in relevant part, as follows:²⁴

4.1.1 Technical Evaluation

All proposals submitted must be completed in full and provide all of the information requested in the Request for Proposal (RFP) package to enable a full and complete evaluation. If the requirement is not addressed in the Bidder's proposal, the proposal will be considered incomplete or non-responsive and will be rejected. *The onus is on the Bidder to provide all the information necessary to ensure a complete and accurate assessment.*

Factors for Evaluation

1. **PRICING BASIS (MANDATORY):** Prices must be firm, DDP Delivered Duty Paid.

2. **ABILITY TO MEET THE TECHNICAL REQUIREMENT (MANDATORY):**

a) **For Items Defined by Specifications:**

The bidder is requested to cross reference the mandatory technical criteria contained herein to their supporting technical documentation.

b) **Provision of Supporting Technical Documentation:**

Supporting technical documentation for the stores offered *must be provided* with the bid at time of bid closing.

Technical brochures or technical data **MUST** be provided to verify compliancy to the technical mandatory specifications.

[Italics added, bold in original]

POSITIONS OF PARTIES

24. Medi+Sure argued that Felix's proposal's failure to meaningfully describe or substantiate with evidence how it met the requirement that the test strip containers be tamper-resistant rendered its bid non-compliant. Accordingly, it submitted that CSC's determination otherwise was unreasonable and in violation of, *inter alia*, Article 506(6) of the *Agreement on Internal Trade*;²⁵ Articles 1015(4)(a) and (d) of *NAFTA*; and Articles IV.4, X.7(c), XV.1 and XV.4 of the *AGP*.

25. PWGSC submitted that the evaluators acted reasonably in relying on the confirmation letter from the manufacturer in determining that the vials were tamper-resistant.²⁶

24. *Ibid.* at p. 5.

25. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [AIT].

26. Exhibit PR-2016-031-23A (protected) at p. 21, paras. 13-14, Vol. 2.

TRIBUNAL ANALYSIS

Trade Agreements

26. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements and their provisions.

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

28. For instance, Articles 1015(4)(a) and (d) of *NAFTA* provide as follows: “An entity shall award contracts in accordance with the following: (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . .” Article 506(6) of the *AIT* provides as follows: “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” [emphasis added].

29. When considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. As the Supreme Court of Canada has repeatedly underlined, “. . . reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”²⁷ As a result, the Tribunal does not generally substitute its judgments for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.²⁸ In addition, the Tribunal is of the view that the responsibility for ensuring that a proposal is compliant with all essential criteria of a solicitation ultimately resides with the bidder.²⁹

Felix’s Proposal Did not Demonstrate Compliance with the Requirement That the Test Strips Container Be Tamper-Resistant

30. Felix’s proposal responds to the mandatory requirements at fax page numbers 8 and 9 of its proposal. In response to Requirement No. 12, Felix’s proposal provides as follows:³⁰

Page 12 of technical sheets

Confirmation letter from the manufacturer:

The test strip vials are designed to prevent the removal of the desiccant.

27. *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (CanLII) at para. 11 (citing *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)).

28. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) [*MTS Allstream*] at para. 26.

29. *Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CITT).

30. Exhibit PR-2016-031-23A (protected), Exhibit 6 at p. 9, Vol. 2.

31. The “technical sheets” referenced are a collection of the product brochures, data sheets, medical device licences and other documentation submitted by Felix in support of its proposal to demonstrate it met the technical requirements. Page 12 refers to a portion of a letter from the manufacturer responding to Requirement No. 12.

32. The letter of the manufacturer (All Medicus Co., Ltd.) provides, in relevant part, as follows:³¹

We, Allmedicus here by confirm that the below information provided is officially true and correct.

...

12. The container holding the test strips must be tamper resistant in order to prevent removal of the desiccant.

→Yes, please refer to the test strips data sheet. The test strip vials are designed to prevent the removal of the desiccant.

33. The “test strips data sheet” referenced in this letter is the one-page sheet titled “GlucoDr. Auto AGM-4000S, Test Strip” found at fax page 14 of Felix’s proposal. This document does not contain any information confirming that or describing how the vial is tamper-resistant; it merely provides as follows:³²

Warning: Keep the test strip vial away from the reach of children. The vial contains drying agents that may be harmful if inhaled or swallowed and may cause skin or eye irritation.

34. CSC’s determination that Felix’s response to Requirement No. 12 was compliant is unreasonable for three reasons:

- CSC’s reasons for why it ultimately found Felix’s proposal compliant are the same reasons it gave for initially finding Felix’s proposal non-compliant;
- Felix did not explain how it met Requirement No. 12; and
- Felix did not provide any evidence to substantiate that it met Requirement No. 12.

35. The evaluation team’s apparent confusion is clear from a review of its record. The RFP evaluation was to be conducted first by individual and then by consensus scoring. In the individual evaluation forms dated May 26 and 27, 2016, CSC’s two evaluators (Mr. Boudreau and Ms. Wright) found that Felix’s response above had not demonstrated compliance with Requirement No. 12.³³ In a jointly signed form, they wrote the following:³⁴

COMMENTS: The bidder states that “test strip vials are designed to prevent the removal of the desiccant” and referenced page 12 of the technical sheets. Page 12 was a picture of the box and outside of the test strip bottle but it was not evident in the pictures that the container was tamper resistant. Additionally, on page 14 of the technical sheets (test strip information), there is instruction stating that “the vial contains drying agents that may be harmful if inhaled or swallowed and may cause skin or eye irritation”. Evidence to support this claim was not submitted with the bid.

36. The evaluators asked PWGSC to seek clarification from Felix as to the location in its bid of supporting evidence for tamper resistance. Felix wrote back the following: “Page 23 of the bid document,

31. *Ibid.* at p. 23.

32. *Ibid.* at p. 14.

33. *Ibid.*, Exhibit 8.

34. *Ibid.*

confirmation letter from the manufacturer, item 12: Yes, please refer to test strips data sheet. The test strip vials are designed to prevent the removal of the desiccant.”³⁵

37. Mr. Boudreau e-mailed the PWGSC contracting officer on June 30, 2016, that he was still “unsure which document is the test strip data sheet”,³⁶ and that he, therefore, “need[ed] more information to agree to [Requirement] #12.”³⁷

38. Felix responded, in an e-mail dated July 11, 2016, as follows: “Page 23 of the bid is the 3rd page of attached confirmation letter, I have highlighted the text showing confirmation from the manufacturer. Referring to the attached leaflet for test strips (page 11 of the bid), test strip vials have tamper resistant packaging.”

39. PWGSC forwarded the response to Ms. Wright and Mr. Boudreau. Ms. Wright sent an e-mail dated July 14, 2016, stating the following: “Based on this, we will change our response to #12 from ‘no’ to ‘yes’”.³⁸

40. However, on August 10, 2016, Mr. Boudreau e-mailed Ms. Martins of PWGSC and expressed continuing confusion, writing the following:³⁹

[Ms. Wright] and I met this morning to discuss the evaluation sheet for Felix and based on the supporting information from Felix we are not clear where the “test strip data sheet” is. We scanned and attached the two pages from the bid (see attached) which we think may be what [the Felix representative] is referring to but we could not find any wording related to tamper resistance.

When we reversed our decision that Felix met requirement #12, we were being consistent with our review of the other bids that we accepted a statement in the documentation that the product was tamper resistant. Upon reflection, we feel it is appropriate that we ask for clarification where exactly in the submission the statement is (other than in the confirmation letter from Felix). On the page we think is being referenced (see attached), it states that “The vial contains drying agents that may be harmful if inhaled or swallowed and may cause skin or eye irritation”. This does not specify any tamper resistance. The Medisure bid in contrast is very clear how the vial is tamper resistant.

41. However, two days later, on August 12, 2016, Ms. Wong (an intermediary between the evaluators and PWGSC) wrote to Ms. Martins asking her to “please disregard our request for clarification (highlighted in yellow) in [Mr. Boudreau’s] previous email”, and attaching a final evaluation form dated August 12, 2016, changing Felix’s score on Requirement No. 12 to “compliant”, which provided as follows:⁴⁰

COMMENTS: Bidder states that the vials are designed to prevent the removal of the desiccant. Also, desiccant (drying agent) is stated as being harmful if inhaled or swallowed and may cause eye irritation (test strip fact sheet – P014 fact sheet)

35. *Ibid.*, Exhibit 9.

36. *Ibid.*, Exhibit 10.

37. *Ibid.*, Exhibit 11.

38. *Ibid.*

39. *Ibid.*, Exhibit 21.

40. *Ibid.*

42. The above record discloses problems with the evaluators' reasoning process by which they decided to change their initial determination from non-compliant to compliant. First, the reasons given for the change in the final evaluation form are the same reasons originally given for the non-compliant score, i.e. that the bidder stated that the vials were tamper-resistant and that the data sheet contained a health warning. Second, the only evidence in the manufacturer's letter to support its claim that the vials are tamper-resistant is the data sheet, which was originally rejected by the team, and then later observed to be non-responsive to the issue of tamper resistance by Mr. Boudreau in his e-mail of August 10, 2016. Third, nowhere in Felix's proposal does it explain how the vials are tamper-resistant – this was required by the RFP instructions, and Mr. Boudreau noted the deficiency explicitly with comparison to how Medi+Sure explained its compliance.

43. These reasons do not meet the minimal requirements for reasonableness: justification, transparency and intelligibility. Because the initial and final reasons are the same, they do not justify how the evaluators reached their decision. And because the final determination of compliance rests on evidence (a mere repetition of the requirement's wording in Felix's proposal and the manufacturer's letter) that the RFP did not permit, the evaluators' reasons are not transparently nor intelligibly tied to the RFP's requirements and instructions. This case is, thus, distinguishable from those in which a complainant challenges the evaluators' scoring on a criterion, the evaluation of which entails an element of discretion or judgment.

44. It is uncontested by PWGSC that Felix's proposal fails to describe how its product is tamper-resistant. Indeed, originally, the evaluators (correctly) found that Felix's mere assertion in its proposal that the vials were tamper-resistant and its reference to the data sheets were non-compliant. On clarification, Felix pointed them to the manufacturer's letter.

45. PWGSC admits that the only new information the evaluators considered when they changed their determination was the representation in the manufacturer's letter. But the manufacturer's letter, after citing to the irrelevant data sheets, merely repeats the RFP requirement, i.e. the type of response that section 1 of Part 3 of the RFP explicitly prohibits.

46. This instruction was not a vagary of this RFP. To the contrary, it is a common instruction found in many RFPs, requiring that proposals not merely reiterate the wording of the requirements but must demonstrate how the bidder meets them and provide documentation to support those representations. This instruction is included to ensure that all bidders are treated fairly—by preventing unscrupulous bidders from gaining an unfair advantage from mere puffery—and that the evaluation process is transparent and objective (rather than a simple exercise in rubber stamping).

47. In this regard, the Tribunal observes that the only evidentiary support Felix cites (the test strips data sheet) contains no relevant information confirming or showing how the test strip container is tamper-resistant. It merely contains a health warning about physical contact with the desiccant. Thus, the answer does not contain the supporting evidence required by article 4.1.1 of Part 4 of the RFP. Moreover, PWGSC has confirmed that, unlike Medi+Sure, Felix did not provide a sample of the product that CSC could have physically examined to assess whether it was tamper-resistant.⁴¹

41. Exhibit PR-2016-031-31, Vol. 1A.

48. The inadequacy of Felix's response can be viewed in contrast with Medi+Sure's, which provides as follows:⁴²

As the incumbent for this contract, the issue of patients removing the desiccant arose. We then moved to a new, reinforced vial which made removal of the desiccant virtually impossible without destroying the vial. We have, on our own initiative, also added tamper proof seals to each vial of test strips which:

- Allows medical staff to understand which vials of test strips have been opened
- makes it easier to manage inventory in addition
- Prevents any kind of tampering

49. This response describes, as the RFP requires (in Part 3, section 1), at least generally, how the vials are tamper-resistant. Additionally, as required by the RFP, Medi+Sure's proposal substantiated this response by including a sample of its product with its bid. Though the RFP did not require *per se* that bidders provide a sample, by doing so, Medi+Sure ensured that CSC could itself evaluate its product to test its tamper resistance directly. Another option that the RFP contemplated was providing technical documentation (charts, graphs, diagrams, data sheets, etc.) that would have substantiated that the product was tamper-resistant. Felix's proposal is non-compliant because it provided no evidence at all in this regard.

50. Accordingly, in evaluating Felix's proposal in a way that did not comply with the criteria set out in the RFP, CSC breached the relevant trade agreements. Thus, Medi+Sure's complaint is valid.

REMEDY

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

52. Medi+Sure requested that the Tribunal recommend that PWGSC award it the contract under the RFP or, alternatively, that PWGSC award Medi+Sure the profits it would have earned over the life of the contract. It also sought its costs for bringing this complaint and compensation reflecting the prejudice inflicted by PWGSC on the integrity and efficiency of the procurement process.

53. PWGSC contended, in its motion to dismiss, that Medi+Sure has already obtained a sufficient remedy in the form of the cancellation and planned re-tendering of the contract.

54. 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.

55. In this case, trade agreements were breached when CSC evaluated Felix's proposal in a way that did not comply with the criteria set out in the RFP. 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.

56. The Tribunal also finds that Medi+Sure was seriously prejudiced, as the Tribunal has found that, but for CSC's error, Medi+Sure would have been awarded the contract. The contract was to be awarded to

42. Exhibit PR-2016-031-01A (protected), Exhibit 2, technical bid at p. 22, Vol. 2.

the lowest-priced proposal compliant with all of the mandatory requirements. CSC found Medi+Sure's proposal compliant. PWGSC confirmed that Medi+Sure submitted the lowest-priced proposal among those deemed compliant (other than Felix's), and it did not challenge in these proceedings that Medi+Sure's proposal was in fact compliant.⁴³

57. 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.

58. However, the Tribunal also notes that by cancelling the contract with Felix and intending to re-launch the procurement process by issuing a new RFP, PWGSC has significantly (but not fully) ameliorated the prejudice. The Tribunal, therefore, finds that the negative impact of the identified violation has been substantially reduced, though not so much as to eliminate the need for a remedy.

59. Medi+Sure did not allege that PWGSC or CSC acted in bad faith. The Tribunal assumes the good faith of government entities running procurements absent evidence to the contrary. Regardless, here the Tribunal is independently satisfied that all the parties acted in good faith. As explained above, the CSC evaluators' initial conclusion that Felix was non-compliant was reasonable but so was their request for clarification. Their error arose in deeming Felix's answer to have responsively identified relevant supporting information in its proposal when, in fact, its answer merely referred them to evidence they had already reviewed and rejected. This was a breakdown in the evaluation team's reasoning process (as opposed to a debatable exercise in their discretion or judgment), but there is no evidence that it was intentional or negligent. Indeed, the record shows that a considerable source of confusion for the evaluators was Felix's failure to internally, consecutively paginate its proposal and provide clear cross-references to its supporting documentation.

60. Finally, the Tribunal observes that no product was supplied under the contract with Felix, which was cancelled expeditiously in favour of a new tendering process.

61. Under these circumstances, the Tribunal finds that the appropriate remedy would be to award Medi+Sure the contract resulting from the RFP at the bid price it submitted. The Tribunal understands that, as the period for submitting bid prices has expired, Medi+Sure is not contractually obligated to supply the product at the price it bid. However, the Tribunal finds that the prejudice Medi+Sure has suffered would be fully ameliorated if Medi+Sure were awarded the contract at the price it bid. This would put it in the same position it would have held but for CSC's error in evaluating Felix's proposal as compliant, as the law requires.⁴⁴

62. A mere re-tendering would not result in the past RFP having been awarded to the lowest-priced, compliant bidder, and would impose on the parties greater delay and expense. Moreover, the errors identified in the procurement were discrete not systemic and, thus, are not so grave as to require the

43. Exhibit PR-2016-031-01, Exhibit 3, Vol. 1; Exhibit PR-2016-031-31, Vol. 1A.

44. See, for example, *Canada (Attorney General) v. Envoy Relocation Services*, 2006 FCA 13 (CanLII) (setting aside CITT recommendation for re-evaluation of bids and limited remedy to monetary relief where re-evaluation would not have changed ultimate ranking); *Wang Canada Limited* (11 March 1998), PR-97-034 (CITT) (awarding contract rather than re-tendering where but for procurement entity error complainant would have won), affirmed by *Wang Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [1999] 1 FCR 3, 1998 CanLII 9093 (FC).

procurement to be re-tendered out of fairness to Felix or any other bidders. Finally, the Tribunal does not find that compensation for lost profits would be appropriate in these circumstances where the contract has not been irrevocably awarded to another bidder.

63. Re-tendering would only be appropriate in this case if Medi+Sure did not want to enter into a supply contract at the price it bid—in that circumstance, PWGSC would be free to re-tender and Medi+Sure would be free to re-bid at another price.

COSTS

64. Both parties requested costs in relation to the proceeding. Medi+Sure requested that costs be awarded at Level 2 of complexity, which entails an all-inclusive, flat-rate award of \$2,750 under the Tribunal's *Procurement Costs Guideline* (the *Guideline*).

65. The Tribunal has preliminarily determined that Level 1 is appropriate, because the complaint involved only one product and the (successful) ground of complaint involved a simple review of the reasonableness of the evaluators' determination regarding one (relatively simple) mandatory criteria.

66. Therefore, the Tribunal has preliminarily decided to award \$1,150 in costs to Medi+Sure, payable by PWGSC. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. Should either party make such submissions, the other party will then have five working days to provide a response. After considering the submissions, if any, concerning the preliminary indication of the level of complexity of the complaint and the preliminary indication of the amount of the cost award, the Tribunal will issue a final cost order.

DETERMINATION OF THE TRIBUNAL

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

68. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC offer the supply contract under the RFP to Medi+Sure at the price bid by Medi+Sure in its proposal. If Medi+Sure refuses to accept the contract at the price it bid, the Tribunal recommends that PWGSC re-tender the requirement expeditiously.

69. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Medi+Sure its reasonable costs incurred in preparing and proceeding with this complaint. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Serge Fréchette
Serge Fréchette
Presiding Member