



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-042

Colliers Project Leaders Inc., Tiree
Facility Solutions Inc. in Joint
Venture

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, March 2, 2017*

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IN THE MATTER OF a complaint filed by Colliers Project Leaders Inc., Tiree Facility Solutions Inc. in Joint Venture 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

**COLLIERS PROJECT LEADERS INC., TIREE FACILITY
SOLUTIONS INC. IN JOINT VENTURE**

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. No costs shall be awarded to either party.

Ann Penner

Ann Penner

Presiding Member

Tribunal Panel: Ann Penner, Presiding Member

Support Staff: Laura Little, Counsel

Complainant: Colliers Project Leaders Inc., Tiree Facility Solutions Inc.
in Joint Venture

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

SUMMARY OF COMPLAINT

1. Colliers Project Leaders Inc., Tiree Facility Solutions Inc. in Joint Venture (Colliers-Tiree) 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 Proposal (RFP) (Solicitation No. EP863-170787/A) issued by the Department of Public Works and Government Services² (PWGSC) for the supply of project management support services for the Major Crown Projects (MCP) sector.
2. Colliers-Tiree alleged that PWGSC did not calculate its price per point score in accordance with the financial bid evaluation instructions provided in the RFP.
3. As a remedy, Colliers-Tiree requested the termination of the contract and the issuance of a new solicitation. Colliers-Tiree did not request the reimbursement of its complaint costs or bid preparation costs.
4. On November 21, 2016, the Tribunal accepted the complaint for inquiry 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
5. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *CITT Act*.
6. For the reasons set out below, the Tribunal finds that the complaint is valid; however, it will not award a remedy in this case given that the deficiency in the evaluation of Colliers-Tiree's bid was inconsequential to the outcome of the evaluation and, therefore, there was no prejudice to Colliers-Tiree.

PROCUREMENT PROCESS

7. On August 15, 2016, PWGSC invited 15 prequalified supply arrangement holders under the Task and Solutions Professional Services supply arrangement to submit bids in response to the RFP by the bid closing date of September 9, 2016. Between August 22 and September 8, 2016, the RFP was amended three times. None of these amendments are relevant to the complaint.
8. The RFP required invited supply arrangement holders to submit bids covering five categories of professional services, as well as a pricing schedule for each.⁴
9. During the bidding process, one of the invited supply arrangement holders inquired into what it considered to be the erroneous inclusion of a sixth category—Senior Project Manager—in the Optional

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 the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.

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

4. The five categories of professional services to be supplied to the MCP include the following: 1) Senior Project Manager for Real Property; 2) Intermediate Project Manager for Real Property; 3) Intermediate Project Leader for Real Property; 4) Senior Project Administrator for Real Property; and 5) Senior Project Monitor. Exhibit PR-2016-042-09, tab 1 at 4 of 62, Vol. 1A. These five categories are referred to in the following sections of the RFP: Title; Attachment 1 to Part 3, Pricing Schedule; Annex A, Statement of Work; Appendix 1 to Annex A, Evaluation of Resources; and Annex B, Basis of Payment. Exhibit PR-2016-042-09, tab 1, Vol. 1A.

Period 6 section of the pricing schedule of the RFP.⁵ According to PWGSC, the contracting authority assigned by PWGSC to the RFP (hereafter “the contracting authority”) was absent at the time, and the supply arrangement holder that submitted the question did not follow up with the replacement officer who was handling supplier inquiries during her absence. As such, PWGSC did not take any steps to address the inquiry and the RFP was not amended to correct the alleged error.

10. Four bids were received by the bid closing date of September 9, 2016, including Colliers-Tiree’s bid. All four bids were evaluated as technically compliant and were ranked in terms of their financial proposals so that PWGSC could deem the one with the most competitive price as the winner.⁶

11. During the evaluation of the financial bids, the contracting authority confirmed that the inclusion of the Senior Project Manager category in the Optional Period 6 section of the pricing schedule in the RFP was indeed an error. The contracting authority thereby decided to exclude the per diem rates bid for the Senior Project Manager category when calculating the total evaluated bid price and the resulting price per point of all four bids. According to the Government Institution Report (GIR), she proceeded in this manner for the following reason:⁷

As she knew that the “Senior Project Manager” category was inadvertently included and could not be ordered or paid for under the resulting contract, she made the decision not to include “Senior Project Manager” prices bid in the calculation of the total evaluated bid price and the resulting price per point calculation of all bids.

12. On October 26, 2016, PWGSC advised Colliers-Tiree by letter (hereafter “PWGSC’s regret letter”) that it was not the successful bidder, and that it did not intend to conduct in-person debriefings regarding the outcome of the solicitation. Instead, PWGSC’s regret letter simply provided the following information: the successful bidder’s total price, technical score and evaluated price per point as well as Colliers-Tiree’s own technical score and its evaluated price per point.⁸

13. On October 28, 2016, Colliers-Tiree examined its bid against the information provided in PWGSC’s regret letter. On November 10, 2016, Colliers-Tiree filed its complaint with the Tribunal.

14. Finding the complaint to be incomplete, the Tribunal requested a copy of Colliers-Tiree’s financial bid and other missing information. Colliers-Tiree filed the requested additional information on November 14, 2016, thus making its complaint complete.

15. On November 16, 2016, the Tribunal acknowledged receipt of Colliers-Tiree’s complaint. At the same time, it requested a more detailed explanation of Colliers-Tiree’s allegations that PWGSC had made a calculation error in the evaluated price per point score. As will be discussed in more detail below, neither PWGSC’s calculations as per the regret letter nor Colliers-Tiree’s alleged price per point score were apparent to the Tribunal on the face of the complaint.

5. Exhibit PR-2016-042-09 at para. 12, Vol. 1A.

6. The RFP provides, at sections 4.2.3 and 4.2.4, that the compliant bid with the lowest evaluated price per point would be recommended for contract award, with the price per point calculated by dividing the total evaluated bid price by the overall score obtained for all the point-rated technical criteria of the RFP (Exhibit PR-2016-042-09, tab 1 at 15 of 62, Vol. 1A).

7. Exhibit PR-2016-042-09 at para. 16, Vol. 1A.

8. Exhibit PR-2016-042-01C at 79 of 80, Vol. 1.

16. On November 17, 2016, Colliers-Tiree provided its own calculation of the evaluated price per point for its bid, which differed from the price per point score in PWGSC's regret letter. Colliers-Tiree was still unable to explain PWGSC's calculations.

17. On November 21, 2016, the Tribunal accepted the complaint for inquiry because it found the complaint (1) was filed within the prescribed time limits; (2) was filed by a potential supplier; (3) was in respect of a designated contract; and (4) disclosed a reasonable indication that the procurement had not been carried out in accordance with the applicable trade agreements.⁹

18. On December 19, 2016, PWGSC filed its GIR.

19. On January 13, 2017, Colliers-Tiree filed its reply to the GIR, having been granted two extensions to the filing deadline.¹⁰

20. 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

21. The relevant provisions of the RFP at issue in this complaint provide as follows:

TITLE

Bid solicitation # EP863-170787/A issued under the framework of the Task and Solutions Professional Services Supply Arrangement (TSPS SA) E60ZN-15TSPS, is for the provision of the following services:

Category	Estimate for Future Requirements	CV's required with bid
Senior Project Manager for Real Property (4.2)	2	1
Intermediate Project Manager for Real Property (4.2)	2	1
Intermediate Project Leader for Real Property (4.3)	1	0
Senior Project Administrator for Real Property (4.1)	1	0
Senior Project Monitor (3.9)	1	0

PART I – GENERAL INFORMATION

...

1.3 Debriefings

At contract award, the Contracting Authority will notify all bidders of the name of the Contractor who has been awarded the contract as well as its total estimated value and as to why their bid was not selected. We do not intend to conduct in-person debriefs to this solicitation. Instead, the information set out in the regret letter will include the reason the bidder's proposal was not accepted.

...

9. Section 6 and subsection 7(1) of the *Regulations*.

10. Exhibit PR-2016-042-11, Vol. 1A; Exhibit PR-2016-042-12, Vol. 1A; Exhibit PR-2016-042-13, Vol. 1A; Exhibit PR-2016-042-14, Vol. 1A; Exhibit PR-2016-042-15, Vol. 1A; Exhibit PR-2016-042-16, Vol. 1A.

PART 3 – BID PREPARATION INSTRUCTIONS

3.1 Bid Preparation Instructions

...

SECTION II: Financial Bid

- A. Bidders must submit their financial bid in Canadian funds and in accordance with the pricing schedule detailed in Attachment 1 to Part 3. The total amount of Applicable Taxes must be shown separately.

...

ATTACHMENT 1 TO PART 3, PRICING SCHEDULE

The Bidder should complete this pricing schedule and include it in its financial bid once completed. As a minimum, the Bidder must respond to this pricing schedule by including in its financial bid for each of the periods specified below its quoted firm all-inclusive per diem rates (in Can \$) for each of the resource categories identified.

...

Category and Level	Firm All-Inclusive Per Diem Rates (in Cdn \$)	Estimated Number of Days	Total (in Cdn \$)
	A	B	C = A X B
Contract Period 1 – from Contract award to March 31, 2018			
Senior Project Manager for Real Property	\$	360	\$
Intermediate Project Manager for Real Property	\$	360	\$
Intermediate Project Leader for Real Property	\$	10	\$
Senior Project Monitor for Real Property	\$	10	\$
Senior Project Administrator	\$	10	\$
TOTAL CONTRACT PERIOD			\$
Optional Period 1 – from April 1, 2018 to March 31, 2019			
Senior Project Manager for Real Property	\$	220	\$
Intermediate Project Manager for Real Property	\$	440	\$
Intermediate Project Leader for Real Property	\$	200	\$
Senior Project Monitor for Real Property	\$	200	\$
Senior Project Administrator	\$	200	\$
TOTAL OPTIONAL PERIOD 1			\$
Optional Period 2 – from April 1, 2019 to March 31, 2020			
Senior Project Manager for Real Property	\$	440	\$
Intermediate Project Manager for Real Property	\$	440	\$
Intermediate Project Leader for Real Property	\$	200	\$
Senior Project Monitor for Real Property	\$	200	\$
Senior Project Administrator	\$	200	\$

TOTAL OPTIONAL PERIOD 2			\$
...			
Optional Period 6 – from April 1, 2023 to March 31, 2024			
Senior Project Manager for Real Property	\$	440	\$
Intermediate Project Manager for Real Property	\$	440	\$
Intermediate Project Leader for Real Property	\$	200	\$
Senior Project Monitor for Real Property	\$	200	\$
Senior Project Administrator	\$	200	\$
Senior Project Manager	\$	400	\$
TOTAL OPTIONAL PERIOD 5 [sic]			\$
Total Evaluated Price (taxes excluded): (Sum of 1 Total Contract Period and 6 Total Optional Periods)			\$
Applicable Taxes	Insert the amount, as applicable:		GST: HST: PST:

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

...

4.1.2 Financial Evaluation

For bid evaluation and Contractor selection purposes only, the evaluated price of a bid will be determined in accordance with the Pricing Schedule detailed in Attachment 1 to Part 3.

4.2 Basis of Selection – Lowest Evaluated Price per Point

4.2.1 To be declared responsive, a bid must:

- a) comply with all the requirements of the bid solicitation;
- b) meet all mandatory evaluation criteria; and
- c) obtain the required minimum number of points specified in Attachment 1 to Part 4 for the point rated technical criteria.

4.2.2 Bids not meeting 4.2.1 (a) or (b) or (c) will be declared non-responsive. Neither the responsive bid obtaining the highest number of points nor the one with the lowest evaluated price will necessarily be accepted.

4.2.3 The evaluated price per point of a responsive bid will be determined by dividing its evaluated price by the overall score it obtained for all the point rated technical criteria detailed in Attachment 1 to Part 4.

4.2.4 The responsive bid with the lowest evaluated price per point will be recommended for award of a contract. In the event two or more responsive bids have the same lowest evaluated price per point, the responsive bid with the lowest evaluated price will be recommended for award of a contract.

...

ANNEX A, STATEMENT OF WORK

Project Management Support Services For Real Property Major Crown Projects

...

3. TASKS

The services to be provided include, but are not limited to:

4.1 – Project Manager for Real Property

...

4.2 – Project Leader for Real Property

...

4.1 – Project Administrator for Real Property

...

3.9 – Project Monitor

...

APPENDIX 1 TO ANNEX A, EVALUATION OF RESOURCES

Resources must meet the minimum number of points required to be declared responsive.

CATEGORY AND LEVEL	Total Score
4.2 Senior Project Manager for Real Property Minimum 100 pts Name: _____				
4.2 Intermediate Project Manager for Real Property Minimum 80 pts Name: _____				
4.3 Intermediate Project Leader for Real Property Minimum 95 pts Name: _____				
4.1 Senior Project Administrator for Real Property Minimum 95 pts Name: _____				
3.9 Senior Project Monitor Minimum 60 pts Name: _____				

...

ANNEX B, BASIS OF PAYMENT

A- Contract Period (From contract award to March 31, 2018)

During the period of the Contract, for Work performed in accordance with the Contract, the Contractor will be paid as specified below.

1.0 Professional Fees

The Contractor will be paid all inclusive fixed time rates as follows:

Category and Level	Resource Name	Firm All-Inclusive Per Diem Rates (in Cdn \$)
Contract Period – from Contract award to March 31, 2018		
Senior Project Manager for Real Property		\$
Intermediate Project Manager for Real Property		\$
Intermediate Project Leader for Real Property		\$
Senior Project Monitor		\$
Senior Project Administrator for Real Property		\$

POSITIONS OF PARTIES

22. As stated above, Colliers-Tiree alleged that PWGSC did not calculate its price per point score in accordance with the financial bid evaluation instructions provided in the RFP.

23. In the GIR, PWGSC argued that Colliers-Tiree filed its complaint outside of the time limits prescribed by subsection 6(1) of the *Regulations* and, as such, the Tribunal should have found it to be time-barred. In the alternative, if the Tribunal were to maintain its finding that the complaint was filed on time, PWGSC submitted that the financial evaluation was conducted properly and in good faith by the contracting authority.

24. PWGSC admitted that the Senior Project Manager category was erroneously included in the pricing schedule under Optional Period 6. Consequently, instead of amending the RFP to remove that category, the contracting authority decided not to include the per diem rates bid for that category when calculating the evaluated price per point as part of the financial evaluation.

25. However, PWGSC also claimed that even if the contracting authority had included the per diem rates bid for the Senior Project Manager category for Optional Period 6 in calculating the evaluated price per point, it would have made no difference to the overall results of the evaluation—i.e., Colliers-Tiree's bid would have remained ranked third. PWGSC supported its claim by conducting, for the purposes of the GIR, a re-evaluation of each of the financial bids received; this time it included the Senior Project Manager per diem rates in the price per point calculation of all four bids. Furthermore, it ensured that its re-evaluation was peer-reviewed and confirmed that the results of the re-evaluation remained the same.¹¹

26. In reply, Colliers-Tiree submitted that the complaint was filed within the prescribed time limits. In the alternative, it submitted that the Tribunal should exercise its discretion under rules 6 and 9 of the *Canadian International Trade Tribunal Rules*¹² or subsection 6(3) of the *Regulations* to accept the filing of the complaint beyond the 10-working-day time frame set out in subsection 6(1) of the *Regulations* as any delay was due to circumstances beyond its control.

27. Colliers-Tiree also argued that PWGSC's failure to evaluate the bids in accordance with the criteria published in the RFP violated the provisions of the applicable trade agreements, which require a government entity to clearly identify the criteria to be used in evaluating bids and to conduct a fair

11. Exhibit PR-2016-042-09A (protected), Vol. 2A

12. S.O.R./91-499 [*CITT Rules*].

competition. According to Colliers-Tiree, the application of different financial bid evaluation criteria than those stated in the RFP prejudiced all bidders in general and Colliers-Tiree in particular. Had the removal of the Senior Project Manager category been known to bidders, Colliers-Tiree would have proposed alternative pricing to make its bid the most competitive and, as a result, the most highly ranked of the four.

ANALYSIS

28. When conducting an inquiry into a complaint of this nature, the Tribunal must determine its validity. In this case, the Tribunal will do that in two parts to address the parties' positions: (1) was the complaint submitted in a timely manner; and (2) is there a reasonable indication that PWGSC breached the applicable trade agreements when it conducted the financial evaluation of Colliers-Tiree's bid.

Was the Complaint Submitted in a Timely Manner?

29. As noted above, on November 21, 2016, the Tribunal accepted Colliers-Tiree's bid for inquiry because, among other things, it found that the complaint was submitted in a timely manner. For the reasons that follow, the Tribunal sees no basis to alter its conclusion, notwithstanding PWGSC's arguments to the contrary.

30. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier."

31. Subsection 6(2) of the *Regulations* states that a potential supplier who has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal "... within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

32. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

33. In the present case, Colliers-Tiree did not make an objection to PWGSC concerning its ground of complaint. Accordingly, in order to determine if Colliers-Tiree filed its complaint in a timely manner, the Tribunal must determine whether the complaint was filed within 10 working days of the day on which Colliers-Tiree knew or reasonably should have known its ground of complaint.

34. The parties agreed, and the evidence shows, that Colliers-Tiree received PWGSC's regret letter on October 26, 2016.

35. Colliers-Tiree submitted, however, that it did not review its bid against PWGSC's evaluated price per point until October 28, 2016. The Tribunal has no reason or evidence to doubt that this was indeed the case.

36. As such, the Tribunal finds it reasonable to conclude that Colliers-Tiree only knew of its ground of complaint on October 28, 2016, after it had conducted a detailed review of its proposal and pricing information against the financial evaluation procedures set out in the RFP. Given that both the RFP and the

regret letter clearly indicated that there would be no in-person debriefings for this solicitation, the information provided in the regret letter was all Colliers-Tiree had to go on in trying to ascertain how its price per point had been calculated by PWGSC.

37. As stated above, Colliers-Tiree initially filed its complaint on November 10, 2016, and provided additional information upon request on November 14, 2016. The Tribunal, thereby, considers November 14, 2016, to be the date on which the complaint was properly filed. As per the *Regulations*, November 14, 2016, is 10 working days from the date on which Colliers-Tiree knew its ground of complaint (i.e., October 28, 2016).

38. The fact that the Tribunal, in its acknowledgement letter of November 16, 2016, asked for more information about how Colliers-Tiree's evaluated price per point was calculated goes directly to the issue of PWGSC's undisclosed application of financial evaluation criteria that differed from those set out in the RFP, a point that will be discussed more fully below. Contrary to PWGSC's submission, the Tribunal did not consider the complaint to be deficient at that stage. It was obvious that something did not add up in the price per point calculation. As it turned out, however, this was not something that Colliers-Tiree could have explained since it had no way of knowing that the contracting authority had removed the per diem rates that were bid for the Senior Project Manager category from the pricing schedule of all bids for the purposes of its financial evaluation. This information only came to light *after* the complaint was accepted for inquiry and the GIR filed by PWGSC.

39. Accordingly, the Tribunal maintains its finding that Colliers-Tiree's complaint was filed within the time limits prescribed by subsection 6(2) of the *Regulations*.

40. The Tribunal will now turn to the alleged breach of the applicable trade agreements.

Is There a Reasonable Indication That PWGSC Breached the Applicable Trade Agreements?

41. 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, which, in this instance, are the World Trade Organization *Agreement on Government Procurement*,¹³ the *North American Free Trade Agreement*¹⁴ and the *Agreement on Internal Trade*.¹⁵

42. The trade agreements require that a procuring entity provide potential suppliers with all the information necessary to permit them to submit responsive tenders, including the criteria which will be used for evaluating and, further, awarding the contract. For instance, Article 1013(1) of *NAFTA* provides as

13. *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).

14. *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*].

15. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

follows: “Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders The documentation shall also include: . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders” Similarly, Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

43. The applicable international trade agreements further 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. 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”

44. In the GIR, PWGSC confirmed that the discrepancy between Colliers-Tiree’s total bid price and its evaluated price per point was solely due to the contracting authority’s decision to remove the Senior Project Manager category from the Optional Period 6 pricing schedule when it conducted the financial evaluation of all bids.¹⁶

45. Given that, by its own admission, PWGSC did not conduct the financial evaluation on the basis of the published categories set out in the pricing schedule in the RFP, it thus failed to clearly identify the criteria that were used in the financial evaluation of bids and the methods of evaluating the criteria.

46. Therefore, the Tribunal finds that PWGSC did not evaluate the proposals or award the contract in full accordance with the mandatory criteria set out in the RFP, contrary to Articles 1013(1) and 1015(4) of *NAFTA* and Article 506(6) of the *AIT*. As such, it finds that the complaint is valid.

47. Nevertheless, the evidence on the record indicates that the outcome of a proper evaluation would have been the same regardless of the deviation from the evaluation criteria and pricing schedule set out in the RFP.¹⁷ Specifically, when PWGSC re-evaluated the bids by including the per diem rate for the Senior Project Manager category for Optional Period 6, the ranking of the successful bidder and the other three bidders remained the same as in the original financial evaluation.¹⁸ Neither Colliers-Tiree’s financial score nor its overall score would have been more competitive than those of the successful bidder. Accordingly, the Tribunal is satisfied that there was no prejudice to Colliers-Tiree, despite the validity of its complaint. Furthermore, there is no indication that PWGSC acted in a manner other than in good faith during the initial evaluation or the re-evaluation, as all four bids were evaluated in exactly the same way.

48. The results of the re-evaluation also showed that the price of the Senior Project Manager bid by Colliers-Tiree for the Optional Period 6 accounted for the difference between its evaluated price per point identified in PWGSC’s regret letter and its evaluated price per point calculated in the re-evaluation.¹⁹ In other words, this sole factor explains the discrepancy in Colliers-Tiree’s price per point stated in PWGSC’s regret letter.

16. Exhibit PR-2016-042-09 at para. 13, Vol. 1A.

17. Exhibit PR-2016-042-09A (protected), tab 11, Vol. 2A.

18. *Ibid.*, tabs 7 and 11.

19. *Ibid.*

49. In regard to Colliers-Tiree's claim that it would have altered its pricing strategy had it known that the per diem rates for the Senior Project Manager category would not be used in the evaluation, the Tribunal has no basis on which to conclude that this would have made a difference in its bid. As indicated in the financial bid preparation instructions cited above, bidders were required to complete the pricing schedule by providing their proposed per diem rates for each of the resource categories identified for the contract period and each of the six optional periods. While bidders are certainly entitled to rely on the prescribed evaluation criteria to formulate their proposals, in this case Colliers-Tiree has not established how its pricing would have differed in light of the removal of the Senior Project Manager category, which only appeared under Optional Period 6. Thus, the Tribunal has no evidence to find that this would have made a difference in Colliers-Tiree's bid pricing, its price per point score or, ultimately, the outcome of the procurement process.

50. As a result, the Tribunal will not recommend a remedy in this case.

51. The Tribunal would note, however, that it finds the outcome of this inquiry to be unfortunate and troubling. While finding the complaint to be valid, it cannot recommend a remedy for Colliers-Tiree because the evidence shows that the outcome would have been the same following PWGSC's re-evaluation: Colliers-Tiree remained ranked third.

52. Nevertheless, the Tribunal would urge PWGSC to be more transparent and forthcoming in the future when communicating with bidders that are not successful in a competitive bidding process. Had PWGSC been more transparent and forthcoming in its regret letter and/or had it offered a more fulsome debriefing to all bidders including Colliers-Tiree, this complaint might have been unnecessary. At the very least, all bidders, including Colliers-Tiree, would have had a better understanding of the rationale behind the outcome of the solicitation, including those steps that the contracting authority undertook in good faith during the financial evaluation to correct an error in the RFP.

53. As neither party filed a claim for costs associated with these proceedings, none shall be awarded by the Tribunal.²⁰

DETERMINATION OF THE TRIBUNAL

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

55. No costs shall be awarded to either party.

Ann Penner
Ann Penner
Presiding Member

20. *Foundry Networks* (16 November 2001), PR-2000-060 (CITT).