



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2017-040

Atlantic Catch Data Ltd.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Thursday, March 29, 2018*

**TABLE OF CONTENTS**

DETERMINATION..... i

STATEMENT OF REASONS ..... 1

    SUMMARY OF THE COMPLAINT ..... 1

    PROCEDURAL BACKGROUND ..... 1

    RELEVANT PROVISION OF THE RFP ..... 2

    ANALYSIS..... 3

        Evaluation of AECOM’s Bid Submission ..... 4

        Post-Bid Submission Changes to AECOM’s Proposed Resources..... 7

COSTS..... 9

DETERMINATION OF THE TRIBUNAL..... 9

APPENDIX ..... 10

    Relevant RFP Provisions..... 10

IN THE MATTER OF a complaint filed by Atlantic Catch Data Ltd. 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**

**ATLANTIC CATCH DATA LTD.**

**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 not valid.

The Canadian International Trade Tribunal determines, as a preliminary indication, that it will not award costs in this matter. If the Department of Public Works and Government Services disagrees with the preliminary indication regarding costs, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award, if any.

Ann Penner

Ann Penner

Presiding Member

Tribunal Panel: Ann Penner, Presiding Member

Support Staff: Laura Little, Counsel  
Rebecca Marshall-Pritchard, Counsel

Complainant: Atlantic Catch Data Ltd.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Roy Chamoun  
Kathryn Hamill  
Ian McLeod

Intervener: AECOM Canada Ltd.

Please address all communications to:

The Registrar  
Secretariat to the Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario K1A 0G7  
Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [citt-tcce@tribunal.gc.ca](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

1. On November 20, 2017, Atlantic Catch Data Ltd. (Atlantic Catch) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a Request for Proposals (RFP) (Solicitation No. K4B20-180218/A) by the Department of Public Works and Government Services (PWGSC) for the provision of marine water quality monitoring services for Environment and Climate Change Canada (ECCC).
2. The Tribunal accepted the complaint for inquiry on November 23, 2017, 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*.<sup>2</sup>
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 following reasons, the Tribunal finds that the complaint is not valid.

## SUMMARY OF THE COMPLAINT

5. Atlantic Catch alleged that PWGSC erred in awarding a contract to AECOM Canada Ltd. (AECOM), as AECOM was incapable of satisfying a certification requirement in the RFP concerning the status and availability of the personnel resources proposed in its bid. In particular, Atlantic Catch submitted that AECOM was actively recruiting personnel to fill two positions within its proposed project team *after* it was awarded the contract, as demonstrated by job postings that were filed with the complaint.
6. As a remedy, Atlantic Catch requested that the contract awarded to AECOM be terminated and that a new contract be awarded to the bidder that met the minimum requirements and had the next highest combined technical and financial score.

## PROCEDURAL BACKGROUND

7. On August 17, 2017, PWGSC issued an RFP for the provision of marine water quality monitoring services. The closing date for the RFP was September 25, 2017. Three bids were submitted, including those of AECOM and Atlantic Catch.
8. On October 25, 2017, PWGSC awarded the resulting contract to AECOM and informed Atlantic Catch that it was not the successful bidder. That same day, Atlantic Catch requested a debriefing to discuss the evaluation of its technical bid.
9. On November 7, 2017, ECCC and PWGSC held a debriefing meeting with Atlantic Catch.
10. On November 16, 2017, Atlantic Catch wrote to PWGSC objecting to the contract award to AECOM. On November 17, 2017, PWGSC responded to Atlantic Catch and affirmed the contract award.
11. On November 20, 2017, Atlantic Catch filed its complaint with the Tribunal.

---

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].  
2. S.O.R./93-602 [*Regulations*].

12. On November 23, 2017, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Regulations*.
13. On December 19, 2017, PWGSC filed the Government Institution Report (GIR).
14. On January 3, 2018, Atlantic Catch filed its comments on the GIR.
15. On January 17, 2018, the Tribunal received a request from AECOM for intervener status. As the contract awardee, AECOM's request was made on the basis of its direct economic interest in the inquiry, which it did not believe would be adequately represented by either Atlantic Catch or PWGSC. In addition, AECOM submitted that it had information that would assist the Tribunal in resolving the matter.
16. The next day, the Tribunal granted AECOM the status of intervener and set down a timetable for the intervener to file comments on both the complaint and the GIR, and for Atlantic Catch to reply. As a result, the proceedings were extended to a 135-day calendar, pursuant to paragraph 12(c) of the *Regulations*.
17. On January 24, 2018, AECOM filed its comments. Atlantic Catch did not file a reply.
18. On March 8, 2018, the Tribunal requested additional information from PWGSC with respect to the conclusions it made during the evaluation process, i.e. that AECOM's bid met the certification requirement concerning the status and availability of resources. The Tribunal also requested confirmation of the date on which AECOM notified PWGSC or ECCC of certain changes to the proposed resources identified in its bid.
19. On March 15, 2018, PWGSC filed its response to the Tribunal's questions. On the same date, AECOM filed its own comments in relation to the Tribunal's questions. Atlantic Catch had the opportunity to file a reply by no later than March 20, 2018, but it declined to make additional comments.
20. Given that the information on the record was sufficient to determine the merits of the complaint, the Tribunal decided that an oral hearing was not necessary and made its decision based on the written record.

### **RELEVANT PROVISION OF THE RFP<sup>3</sup>**

21. The RFP provided, under section 4.2, that the resulting contract would be awarded to the bid with the highest responsive combined rating of technical merit (60%) and price (40%).
22. The technical evaluation of bids was to be conducted against the mandatory and point-rated technical criteria set out in Annex D of the RFP. The point rating was to be performed on an overall scale of 300 points, with a mandatory minimum of 210 points.
23. For Point-Rated Technical Criteria II, Staff Experience and Stability, bids were rated for up to a maximum of 60 points (with a mandatory minimum of 42 points) on the basis of the demonstrated qualifications and experience of the proposed resources for the following work team positions: a Project Manager, a Field Leader and an Assistant Technician. For example, for the Assistant Technician position, experience in marine water quality sampling was worth 5 points (the maximum score for this position) and field work experience in the marine environment was worth 3.5 points (the mandatory minimum score for this position). Bids were also required to provide "details on field personnel back-up capability", worth

---

3. The relevant provisions of the RFP are reproduced in the Appendix to the present reasons.

5 points towards Point-Rated Criteria III, Company Capability & Experience (worth a maximum of 50 points, with a mandatory minimum of 35 points).

24. Section 5.2.3.1 of the RFP (the “certification requirement”) indicated that a bidder must certify that the personnel resources proposed in its bid would be available to perform the work from the outset of the contract, subject to certain exceptions. This certification was required to be awarded a contract. Section 5.2 stated that while bidders were encouraged to submit it with their bid, it could be submitted afterwards in accordance with a time frame to be set down by the contracting authority so long as it was completed prior to an award of contract. If no such certification was provided, the bid would be deemed non-responsive. Section 5.2 provides as follows:

## 5.2 Certifications Precedent to Contract Award and Additional Information

The certifications and additional information listed below should be submitted with the bid but may be submitted afterwards. If any of these required certifications or additional information is not completed and submitted as requested, the Contracting Authority will inform the Bidder of a time frame within which to provide the information. Failure to provide the certifications or the additional information listed below within the time frame provided will render the bid non-responsive.

25. Section 4.1 of the statement of work in Annex A of the RFP provided that the proposed personnel would be expected to remain in their positions for the whole term of the contract, with any changes in the working team composition subject to approval by the ECCC Contracting Authority as the contract is being administered.

## ANALYSIS

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* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which in this case are the World Trade Organization *Revised Agreement on Government Procurement*,<sup>4</sup> the *North American Free Trade Agreement*,<sup>5</sup> the *Canadian Free Trade Agreement*,<sup>6</sup> the *Canada-Colombia Free Trade Agreement*,<sup>7</sup> the *Canada-Peru Free Trade Agreement*<sup>8</sup> and the *Canada-Panama Free Trade Agreement*.<sup>9</sup>

---

4. *Revised Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014).

5. *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: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

6. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

7. *Canada-Colombia Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng>> (entered into force 15 August 2011).

8. *Canada-Peru Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009).

9. *Canada-Panama Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>> (entered into force 1 April 2013).

27. The applicable trade agreements provide that a bid must, at the time of opening, comply with the essential requirements set out in the tender documentation to be considered for an award.<sup>10</sup>

28. As indicated above, Atlantic Catch alleged that AECOM did not have the required personnel available from the outset of the contract, contrary to the certification requirement of the RFP. Atlantic Catch further alleged that AECOM lacked the required resources, at the time of contract award, to satisfy section 4.1 of the statement of work in Annex A of the RFP. In support of its allegations, Atlantic Catch relied on recruitment advertisements for personnel that were issued by AECOM after the award of contract; advertisements, which, in its view, were presumably related to the RFP.

29. In response, both PWGSC and AECOM submitted that the resources proposed in AECOM's bid were confirmed and available to perform the contract at the time of bid closing. According to PWGSC, any changes in the composition of AECOM's team after the award of contract pertain to contract administration and, as such, fall beyond the scope of the Tribunal's jurisdiction.

30. The Tribunal will focus its analysis on the allegation pertaining to the certification requirement and will not address the statement of work requirements related to the availability of resources, as the latter clearly falls outside the procurement process and is, therefore, a question of contract administration. As discussed further below, matters of contract administration are beyond the scope of the Tribunal's jurisdiction.

### **Evaluation of AECOM's Bid Submission**

31. A copy of AECOM's bid was filed with the Tribunal.<sup>11</sup> It shows that AECOM proposed a personnel resource for each of the three main positions set out in the RFP (i.e., Project Manager, Field Leader and Assistant Technician), as well as a support team of five field team personnel and three "back-up" personnel. AECOM's technical bid included detailed information (in the form of resumes) on the qualifications and experience of the proposed resources. It also confirmed the availability of the proposed team resources, and their back-ups, to perform the work under the resulting contract, in response to the "Adequacy of Team" criterion (c) under Point-Rated Criteria III of Annex D of the RFP.

32. The technical evaluators determined that each of the three main proposed resources in AECOM's bid met the minimum scoring standards for the qualification set out in Point-Rated Criteria II of the RFP. In addition, the evaluators determined that AECOM's bid met the minimum scoring standards set out in Point-Rated Criterion III(c) in relation to the availability of the proposed resources and their back-ups. Copies of the evaluators' notes and scoring sheets from the evaluation of AECOM's bid were filed with the GIR.<sup>12</sup> This (confidential) information confirmed the results of the evaluation, namely, that AECOM received full scores for its resource proposals. The contract was thus awarded to AECOM on the basis that it received the highest responsive combined rating of technical merit (60%) and price (40%).

---

10. For example, Article 515(4) of the *CFTA* ("To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation . . ."), and Article 1015(4) of *NAFTA* ("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").

11. Exhibit PR-2017-040-08A (protected) at tab 3, Vol. 2.

12. *Ibid.* at tabs 4, 5, 6, Vol. 2.



33. The Tribunal typically accords a large measure of deference to evaluators in their evaluations of proposals. In general, the Tribunal will only interfere with an evaluation that is unreasonable<sup>13</sup> and will substitute its judgment for that of the evaluators only when they 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.<sup>14</sup>

34. In light of the documentary evidence provided with the GIR, there is no indication that PWGSC conducted an unreasonable evaluation of AECOM's technical bid against the mandatory technical criteria of the RFP.

35. The complaint specifically alleged, however, that AECOM's bid was non-compliant with the certification requirement regarding the status and availability of resources in section 5.2.3.1 of the RFP, which was a separate requirement from the mandatory technical evaluation criteria. In particular, Atlantic Catch alleged that AECOM could not have met the certification requirement prior to the award of contract based on the fact that it had subsequently published two job postings on its website for positions related to the project on or about November 8, 2017.<sup>15</sup>

36. As indicated above, the Tribunal asked PWGSC to provide further information regarding its determination that AECOM's bid had satisfied the certification requirement. In particular, the Tribunal asked PWGSC to confirm "when AECOM provided the required certification to the Contracting Authority pursuant to section 5.2.3.1" and, furthermore, to provide "a copy of the certification submitted by AECOM and any related modifications or other information regarding the status and availability of the resources proposed in AECOM's bid".<sup>16</sup>

37. In response to the Tribunal's request, PWGSC submitted that when a bidder tenders a bid in response to the RFP, the bidder has expressly accepted all terms and conditions set out in the RFP, including the certification requirement, pursuant to the following statement on the cover page of the RFP:<sup>17</sup>

**Proposal To: Public Works and Government Services Canada**

We hereby offer to sell to Her Majesty the Queen in right of Canada, in accordance with the terms and conditions set out herein, referred to herein or attached hereto, the goods, services and construction listed herein and on any attached sheets at the price(s) set out therefor.

38. PWGSC also referred to the terms of the certification requirement under section 5.2.3.1 as being covered and automatically satisfied by virtue of a bidder submitting a bid pursuant to the statement "the

---

13. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25, the government institution's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling."

14. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 52.

15. Exhibit PR-2017-040-01, attachment 6, Vol. 1.

16. Exhibit PR-2017-040-16, Vol. 1A.

17. *Ibid.*

bidder certifies that . . .” PWGSC further argued that when a responsive bid is submitted to the procuring entity, a contract “A” is formed that includes all the terms of the tendering document.<sup>18</sup>

39. PWGSC did not, however, address the first paragraph of section 5.2 of the RFP, which the Tribunal considers to be relevant in that it sets out *when* bidders were to submit certifications. Although PWGSC argued that simply submitting a bid was sufficient to satisfy the certification requirement, this was not expressly stated in section 5.2 or, for that matter, anywhere else in the RFP. Furthermore, the wording of section 5.2 indicates that specific certifications were to be completed and “submitted” either “with the bid” or afterwards.

40. As such, the Tribunal is not entirely satisfied by PWGSC’s response. Nevertheless, there is no evidence to suggest that PWGSC acted unreasonably in accepting AECOM’s bid as having met the certification requirement of section 5.2.3.1 given that the RFP did not specify a format for providing such certification. By contrast, section 5.2.2 of the RFP set out a separate bid certification requirement regarding the Federal Contractors Program for Employment Equity. Section 5.2.2 required the bidder to complete a certification form template as included in Annex E to Part 5 of the RFP. No such instructions or form template were explicitly provided in relation to the certification under section 5.2.3.1. In the Tribunal’s view, this leaves open a question as to the manner in which bidders were to certify the status and availability of their resources for the purposes of section 5.2.3.1.

41. While the RFP could (or indeed should) have been more explicit in this respect, the issue before the Tribunal in this particular inquiry is whether PWGSC erred in its determination that AECOM’s bid met the certification requirement as it was stated in the RFP.<sup>19</sup> As such, the Tribunal accepts PWGSC’s explanation as reasonable; in other words, the Tribunal finds that PWGSC’s interpretation that the general affirmation on the cover page of the tender submitted by AECOM satisfied the certification requirement, given the lack of any explicit instructions to bidders as to a specific format in the RFP. To find otherwise would require the Tribunal to insert a requirement into the RFP that was not explicitly there.

42. In addition, as discussed above, AECOM provided assurance as to the availability of its proposed resources for the performance of the resulting contract elsewhere in its bid, namely, in response to Point-Rated Criteria III(c), for which it received full points in the evaluation. There is no evidence to suggest that the evaluation team acted unreasonably by taking AECOM at its word by virtue of its bid.

43. With respect to the allegation that AECOM was recruiting personnel for the project after the award of contract, AECOM submitted that the job postings in question were solely for the purpose of formalizing its contractual relations with individuals who were not AECOM employees but had consented to their names being put forward by AECOM and had confirmed their availability for the project.<sup>20</sup> The Tribunal accepts this explanation and notes that the terms of section 5.2.3.1 of the RFP allowed for a bidder to propose a non-employee in its bid, so long as the bidder certified that it had that individual’s permission. A bidder was only required to submit written confirmation of such permission, signed by the proposed individual upon request from the contract authority, and PWGSC did not request such confirmation here.

---

18. *Ibid.*

19. Atlantic Catch did not allege in its complaint that the terms of the RFP in relation to the certification requirement were unclear or ambiguous, and even if it had, such allegations would have likely been time-barred, in accordance with the time limits prescribed by section 6 of the *Regulations*. Furthermore, Atlantic Catch did not file any comments on PWGSC’s reply to the Tribunal’s request for additional information regarding the compliance of AECOM’s bid with the certification requirement.

20. Exhibit PR-2017-040-14 at para. 8, Vol. 1A.

44. In light of the above, the Tribunal is satisfied that it was not unreasonable for PWGSC to accept AECOM's bid as meeting the certification requirement regarding the availability of resources, as per section 5.2.3.1 of the RFP, at the time of bid closing. Although changes were subsequently made to AECOM's working team personnel, the Tribunal finds that those changes occurred after the award of contract to AECOM. As such, there is no indication that PWGSC acted unreasonably in accepting AECOM's bid certification with respect to the availability of its proposed resources at bid closing.

### **Post-Bid Submission Changes to AECOM's Proposed Resources**

45. Both PWGSC and AECOM, in their respective submissions, acknowledged the fact that two of the resources proposed in AECOM's bid as part of its working team were subsequently changed, with the consent of PWGSC and ECCC. They further submitted that AECOM first notified ECCC officials of the need to replace those resources at a meeting held on October 31, 2017.<sup>21</sup> Since that meeting occurred after the award of contract to AECOM on October 25, 2017, PWGSC argued that the personnel changes were a matter of contract administration beyond the Tribunal's jurisdiction. The Tribunal agrees.

46. The first resource change involved the redeployment of an AECOM employee (hereinafter "proposed resource no. 1") who was replaced with one of the back-up resources identified in AECOM's bid.<sup>22</sup> At the October 31<sup>st</sup> meeting, ECCC agreed to this change of personnel for the execution of the project contract.<sup>23</sup>

47. The second resource change involved the replacement of one of AECOM's proposed resources because she was no longer available.<sup>24</sup> This individual (hereinafter "proposed resource no. 2") was not an AECOM employee, but she had conditionally agreed to accept a contract position with AECOM should it win the resulting contract and she had also consented to the inclusion of her name and the confirmation of her availability in its bid.<sup>25</sup> The GIR states that ECCC had no issue with AECOM's course of action (i.e. it consented to the replacement of proposed resource no. 2).<sup>26</sup>

48. While PWGSC referred to proposed resource no. 2 as a "backup support resource",<sup>27</sup> AECOM's bid indicated that she was proposed as a member of the field team, and not as a back-up resource.<sup>28</sup> The evidence filed by AECOM further indicates that proposed resource no. 2 notified AECOM that she was no longer available for the assignment on September 26, 2017,<sup>29</sup> i.e. one day after bid closing.

49. While AECOM admittedly knew that proposed resource no. 2 was no longer available as of September 26, 2017, which was well before the contract award date of October 25, 2017, it only notified

---

21. Exhibit PR-2017-040-08A (protected) at paras. 19, 36, Vol. 2; Exhibit PR-2017-040-014A (protected) at attachment B, Vol. 2; Exhibit PR-2017-040-17A (protected) at paras. 5-6, Vol. 2; Exhibit PR-2017-040-18 at para. 18, Vol. 1A.

22. Exhibit PR-2017-040-08 at paras. 19, 36, Vol. 1; Exhibit PR-2017-040-08A (protected) at paras. 19, 36, Vol. 2.

23. Exhibit PR-2017-040-08 at para. 19, Vol. 1.

24. Exhibit PR-2017-040-014 at para. 5, Vol. 1A.

25. Exhibit PR-2017-040-014 at para. 2, Vol. 1A; Exhibit PR-2017-040-014A (protected) at para. 2 and attachment B, Vol. 2.

26. Exhibit PR-2017-040-08 at para. 20, Vol. 1.

27. Exhibit PR-2017-040-08 at para. 37, Vol. 1.

28. Exhibit PR-2017-040-08A (protected) at tab 3, Vol. 2.

29. Exhibit PR-2017-040-014 at para. 2, Vol. 1A; Exhibit PR-2017-040-014A (protected) at para. 2 and attachment B, Vol. 2.

ECCC of this change in the availability of its proposed resource after the award of contract, during the meeting held on October 31, 2017.<sup>30</sup>

50. In the Tribunal's view, AECOM could have been more forthcoming in notifying PWGSC of the need to replace proposed resource no. 2 prior to the award of contract. However, AECOM was not expressly required to do so pursuant to the terms of the RFP, as there was no requirement for providing notice of changes in its resource personnel within any particular time frame following certification pursuant to section 5.2.3.1. Moreover, nothing in the RFP required PWGSC, after it determined that the certification requirement was satisfied by AECOM's bid submission at the time of bid closing, to subsequently verify whether there had been any change in the validity of the certification prior to awarding a contract. Given that AECOM only notified PWGSC of the need to replace its resources after contract award, there is no basis for the Tribunal to conclude that PWGSC conducted the procurement process in a manner that violated the trade agreements.

51. The Tribunal's authority to inquire into complaints from potential suppliers is limited to "any aspect of the procurement process" that relates to a designated contract.<sup>31</sup> A "designated contract" is defined in the *CITT Act* as "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."<sup>32</sup> The Tribunal has consistently taken the view that the procurement process commences after an entity has decided on its requirements and continues up to and including contract award.<sup>33</sup> This is consistent with Article 1017(1)(a) of *NAFTA*, which provides that the procurement process "begins after an entity has decided on its procurement requirement and continues through the contract award."

52. Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed. Matters of contract administration are beyond the scope of the Tribunal's jurisdiction.<sup>34</sup>

53. In the present case, the Tribunal finds that it was clearly only after the award of contract to AECOM that ECCC received notice of and agreed to the changes in the working team resources that had been proposed in AECOM's bid. As indicated above, the Tribunal finds that it was not unreasonable for PWGSC, during the evaluation process, to rely on the assurances provided in AECOM's bid with respect to the availability of its proposed working team resources. As a result of the timing of AECOM's notice to ECCC regarding the personnel changes, any questions of whether those changes were made in accordance with the conditions set out in section 5.2.3.1 became a matter of contract administration between the parties to the resulting contract, which is beyond the scope of the Tribunal's jurisdiction.

---

30. Exhibit PR-2017-040-08 at paras. 19-20, 37, Vol. 1; Exhibit PR-2017-040-08A (protected) at paras. 19-20, 37, Vol. 2; Exhibit PR-2017-040-014A (protected) at para. 6 and attachment B, Vol. 2.

31. *CITT Act*, s. 30.11(1).

32. *CITT Act*, s. 30.1, "designated contract".

33. *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 32; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36; *Siva & Associates Inc.* (30 March 2009), PR-2008-060 (CITT) at para. 8; *Novell Canada Ltd.* (17 August 2000), PR-98-047R (CITT) at 6-7.

34. *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 32; *HDP Group Inc.* (28 December 2016), PR-2016-047 (CITT) at para. 10; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36; *Re Complaint Filed by Flag Connection Inc.* (9 January 2013), PR-2012-038 (CITT) at paras. 35-36; *Re Complaint Filed by Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at paras. 13-16; *Auto Light Atlantic Limited* (20 January 2010), PR-2009-073 (CITT) at para. 17; *Solartech Inc.* (16 October 2007), PR-2007-058 (CITT).

54. In light of the foregoing, the Tribunal finds that the complaint is not valid.

### **COSTS**

55. In these proceedings, PWGSC requested its reasonable costs incurred in responding to the complaint. However, as stated above, the GIR failed to directly address the certification requirement that was central to Atlantic Catch's complaint and instead focused on the evaluation of AECOM's bid against the mandatory technical criteria of the RFP. A further round of submissions was required to address the certification issue, which added to the complexity of the proceedings to an extent that would have been, in the Tribunal's view, unnecessary had the matter been addressed directly in the GIR.

56. Accordingly, the Tribunal's preliminary indication is that each party should bear its own costs and, therefore, no costs will be awarded in this matter.

### **DETERMINATION OF THE TRIBUNAL**

57. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

58. The Tribunal determines, as a preliminary indication, that it will not award costs in this matter. If PWGSC disagrees with the preliminary indication regarding costs, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Tribunal reserves jurisdiction to establish the final amount of the cost award, if any.

Ann Penner

Ann Penner

Presiding Member

## APPENDIX

### Relevant RFP Provisions<sup>35</sup>

#### PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

##### 4.1 Evaluation Procedures

- (a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.

...

##### 4.1.1 Technical Evaluation

Mandatory and point rated technical evaluation criteria are included in Annex D.

...

##### 4.2 Basis of Selection

1. To be declared responsive, a bid must:
  - a. comply with all the requirements of the bid solicitation; and
  - b. meet all mandatory criteria; and
  - c. obtain the required minimum of 210 points overall for the technical evaluation criteria which are subject to point rating.  
The rating is performed on a scale of 300 points.
- ...
3. The selection will be based on the highest responsive combined rating of technical merit and price. The ratio will be 60% for the technical merit and 40% for the price.

...

#### PART 5 – CERTIFICATIONS AND ADDITIONAL INFORMATION

Bidders must provide the required certifications and additional information to be awarded a contract.

...

##### 5.1 Certifications Required with the Bid

Bidders must submit the following duly completed certifications as part of their bid.

...

##### 5.2 Certifications Precedent to Contract Award and Additional Information

The certifications and additional information listed below should be submitted with the bid but may be submitted afterwards. If any of these required certifications or additional information is not completed and submitted as requested, the Contracting Authority will inform the Bidder of a time frame within which to provide the information. Failure to provide the certifications or the additional information listed below within the time frame provided will render the bid non-responsive.

...

##### 5.2.3 Additional Certifications Precedent to Contract Award

##### 5.2.3.1 Status and Availability of Resources

---

35. Exhibit PR-2017-040-08 at tab 1, Vol. 1.

The Bidder certifies that, should it be awarded a contract as a result of the bid solicitation, every individual proposed in its bid will be available to perform the Work as required by Canada’s representatives and at the time specified in the bid solicitation or agreed to with Canada’s representatives. If for reasons beyond its control, the Bidder is unable to provide the services of an individual named in its bid, the Bidder may propose a substitute with similar qualifications and experience. The Bidder must advise the Contracting Authority of the reason for the substitution and name, qualifications and experience of the proposed replacement. For the purposes of this clause, only the following reasons will be considered as beyond the control of the Bidder: death, sickness, maternity and parental leave, retirement, resignation, dismissal for cause or termination of an agreement for default.

If the Bidder has proposed any individual who is not an employee of the Bidder, the Bidder certifies that it has the permission from that individual to propose his/her services in relation to the Work to be performed and to submit his/her name to Canada. The Bidder must, upon request from the Contracting Authority, provide a written confirmation, signed by the individual, of the permission given to the Bidder and of his/her availability. Failure to comply with the request may result in the bid being declared non-responsive.

...

**Annex A – STATEMENT OF WORK**

...

**4. Statement of work**

**4.1 Working Team**

...

The members of the working team (i.e. project manager) proposed by the contractor are expected to remain in their positions for the whole term of the contract. Any change in project leader must be approved by the ECCC Contracting Authority. All modifications in the team composition must also be approved by the ECCC Contracting Authority.

...

**Annex D – Technical Evaluation Criteria Nova Scotia**

...

**Point-Rated Evaluation Criteria**

1. In addition to meeting all of the mandatory requirements, the proposal will be evaluated and scored in accordance with specific evaluation criteria as detailed in this section.

...

3. Personnel resumes used within the context of the proposal should provide detail regarding the qualifications, relevant experience, and expertise of the proposed team member(s), including a summary/description of their past projects. Note that contact information for any reference cited should include contact name, title, and current e-mail address and telephone number.

...

Point Rated Evaluation Criteria ( max 300 points/ min 210 points overall )	...	Max Value
<b>II – STAFF EXPERIENCE AND STABILITY ( 60 points/ Min 42)</b>		
a) <b>Project manager ( 30 points / 21 min)</b>		
1. Project manager education & qualifications		

- University degree (6 points )		<b>6.0</b>
- University degree in science field with recognized knowledge of biology ( 4 point )		<b>4.0</b>
- Experience coordinating & managing projects of comparable scope within the last 5 years ( 6 points)		<b>6.0</b>
- Experience in supervising work teams within the last 5 years (5 points )		<b>5.0</b>
- Experience in supervising work teams in the marine environment within the last 5 years ( 5 points)		<b>5.0</b>
2. Length of time within the organization		<b>4.0</b>
- > 3 Years ( Full points)		
- 2 – 3 Years ( 2 points)		
- 1 – 2 Years ( 1 point)		
- < 1 Year ( 0 points)		
<b>b) Field personnel capability ( 30 points / 21 min)</b>		
3. Field leader ( field technician) ( <b>25 points / 17.5 min</b> )		
a) Qualifications & experience		<b>5.0</b>
- Collegial diploma ( or higher) (5.0 points )		<b>5.0</b>
- Experience handling motor boats in the marine environment within the last 5 years		<b>5.0</b>
- Experience in supervision of field teams within the last 5 years		<b>5.0</b>
- Experience in material and sampling management within the last 5 years		<b>3.0</b>
- Experience in water quality sampling within the last 5 years		<b>2.0</b>
b) Length of time within the organization		
- > 3 Years ( Full points)		
- 2 – 3 Years ( 1 point)		
- 1 – 2 Years ( 0.5 points)		
- < 1 Year (0 points)		<b>5.0</b>
<b>2. Assistant technician ( 5 points / 3.5 min)</b>		
- Experience in marine water quality sampling (full points)		
- Experience of field work in the marine environment (3.5 points)		



