



Ottawa, Wednesday, July 30, 2003

File No. PR-2002-069

IN THE MATTER OF a complaint filed by EDS Canada Ltd.
under subsection 30.11(1) of the *Canadian International Trade
Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the
complaint under subsection 30.13(1) of the *Canadian
International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

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.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Patricia M. Close
Patricia M. Close
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: July 30, 2003

Tribunal Members: James A. Ogilvy, Presiding Member
Pierre Gosselin, Member
Patricia M. Close, Member

Senior Investigation Officer: Cathy Turner

Counsel for the Tribunal: Roger Nassrallah

Complainant: EDS Canada Ltd.

Counsel for the Complainant: Randall J. Hofley
Justine Whitehead

Interveners: ADGA Group Consultants Inc.
Sirius Consulting Group Inc.

Counsel for the Interveners: Richard A. Wagner and Kerri Knudsen for ADGA Group
Consultants Inc.
John D. Peart for Sirius Consulting Group Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



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under subsection 30.11(1) of the *Canadian International Trade
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complaint under subsection 30.13(1) of the *Canadian
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STATEMENT OF REASONS

COMPLAINT

On March 17, 2003, EDS Canada Ltd. (EDS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. W8484-020004/A) by the Department of Public Works and Government Services (PWGSC) for the provision of informatics professional services for the Department of National Defence (DND).

EDS alleged that PWGSC conducted an improper evaluation, contrary to the provisions of the applicable trade agreements.

EDS submitted that its bid for Miscellaneous In-Service Support (Stream 4) was improperly disqualified and that the bid of ADGA Group Consultants Inc. (ADGA) was improperly qualified. For Technical Server and Data Base In Service Support (Stream 2), EDS alleged that evaluation errors provide a reasonable basis to conclude that the entire procurement process was severely flawed and that it is reasonable to conclude that the bid from Sirius Consulting Group Inc. (Sirius) for this stream was improperly qualified. For Technical Custom Application Software In Service Support (Stream 3), EDS alleged that there were many unreasonable assessments made of its bid and that it is reasonable to conclude that Sirius's bid for this stream was improperly qualified.

EDS requested, as a remedy, that the Tribunal recommend, for Stream 4, that the bids be re-evaluated and that the contract be terminated and awarded to it instead or, in the alternative, that it be compensated for its lost opportunity. With respect to the other two streams, EDS requested, as a remedy, that the Tribunal recommend that a new solicitation be issued and that EDS be compensated for the costs that it incurred in preparing its bids. In addition, EDS requested that it be awarded its costs for preparing and proceeding with the complaint.

On March 25, 2003, 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On

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

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

March 28, 2003, PWGSC informed the Tribunal that contracts had been awarded to Sirius in the amounts of \$2,907,746.40 and \$4,441,323.90 and to ADGA in the amount of \$2,887,549.08. On April 8 and 9, 2003, the Tribunal granted intervener status to ADGA and Sirius respectively. On April 22, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³

On April 28, 2003, EDS filed a motion with the Tribunal requesting that the Tribunal order PWGSC to produce additional documents. On May 5, 2003, the parties provided their comments on the motion and, on May 7, 2003, EDS submitted its response to those comments. As part of its May 5, 2003, response to EDS's motion, ADGA filed a motion with the Tribunal requesting that the Tribunal dismiss the portion of EDS's complaint that alleges that ADGA's bid was non-compliant; it submitted that this portion of the complaint is late. On May 12, 2003, the parties filed their comments on ADGA's motion with the Tribunal and, on May 14, 2003, ADGA provided its response to those comments. As part of its May 12, 2003, response to ADGA's motion, Sirius filed a motion with the Tribunal requesting that the Tribunal dismiss the portion of EDS's complaint pertaining to the work awarded to Sirius; it submitted that this portion of the complaint is late. On May 20, 2003, EDS filed its comments on Sirius's motion with the Tribunal and, on May 21, 2003, Sirius filed its response.

On May 27, 2003, the Tribunal granted EDS's motion in part and ordered PWGSC to produce additional documents that the Tribunal determined were relevant to its inquiry; it also granted ADGA's motion, on the basis that the portion of EDS's complaint that alleged the non-compliance of ADGA's bid was not filed within the time limit prescribed under section 6 of the *Regulations*; therefore, it would no longer continue its inquiry into that ground of complaint. Finally, the Tribunal dismissed Sirius's motion, as there was insufficient evidence to support the motion. No costs for filing a motion were awarded to any party, as, in the view of the Tribunal, the costs of each motion were roughly offset by the costs of the other motions brought forward in this case. The Tribunal also extended the date for filing comments on the GIR to June 5, 2003. On May 29, 2003, PWGSC filed the requested documentation with the Tribunal. EDS and Sirius filed their comments on the GIR with the Tribunal on June 5, 2003.

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

PROCUREMENT PROCESS

A Request for Proposal (RFP) was published on MERX, Canada's electronic tendering service, on August 29, 2002, for the provision of informatics professional services for DND.

The RFP reads, in part, as follows:

13.5 Technical Proposal

Bidder's Technical Proposal shall provide the following:

- c) Detailed résumés for each person proposed stating the individual's education, work history and other relevant details, which clearly indicate that the individual meets the qualifications. Failure to provide sufficient details may result in your bid being evaluated as non-responsive;

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

d) For each resource proposed, a list of relevant projects, including a brief description of the project, the responsibilities of each of the personnel proposed, the project duration, the dollar value and the client [for] whom the work was done.

14.0 BID EVALUATION

14.2 Evaluation process

b) The Crown will next evaluate all bids against the mandatory requirements of the five (5) service areas detailed in Appendices A and B of the model contract. Mandatory requirements are identified by the use of “must”, “shall” or “will”. Bids not meeting ALL mandatory requirements as detailed in Appendices A and B of the model contract in each of the five (5) service areas being bid will be eliminated from further consideration.

c) The Crown will next evaluate all bids which have not been found to be non-compliant against the rated criteria set out in Appendices B-1 to B-5 of the model contract and a total Score assigned to the Bid.

d) Any proposal which does not achieve 60% of the total points available for the rated requirements in each of the areas of in service support as stated below will be rejected as non-compliant:

TECHNICAL SERVER AND DATA BASE IN SERVICE SUPPORT [Stream 2]

- | | |
|---|-------------------|
| 1. Team Criteria | - must obtain 60% |
| 2. Project Management | - must obtain 60% |
| 3. Systems Engineer | - must obtain 60% |
| 4. Technical Server Support | - must obtain 60% |
| 5. Deployed MIMS Technical Administration | - must obtain 60% |
| 6. Orical/Access Support | - must obtain 60% |

TECHNICAL CUSTOM APPLICATION SOFTWARE IN SERVICE SUPPORT [Stream 3]

- | | |
|--------------------------------|-------------------|
| 1. Team Criteria | - must obtain 60% |
| 2. Project Management | - must obtain 60% |
| 3. MIMS Application Experience | - must obtain 60% |

MISCELLANEOUS IN SERVICE SUPPORT [Stream 4]

- | | |
|--|-------------------|
| 1. Team Criteria | - must obtain 60% |
| 2. Project Management | - must obtain 60% |
| 3. Release Management Services | - must obtain 60% |
| 4. CM and Control Coordination Services | - must obtain 60% |
| 5. CM and Control Services | - must obtain 60% |
| 6. Quality Assurance Services | - must obtain 60% |
| 7. Integration and Testing Coordination Services | - must obtain 60% |
| 8. Integrating and Testing | - must obtain 60% |

Any proposal not meeting the minimum points required on each of the rated sections will not be considered any further in the evaluation process.

Appendices B-2, B-3 and B-4 read, in part, as follows:

This Statement of Qualifications (SOQ) provides the qualifications required for each labour category detailed in the Statement of Work (SOW), Appendix A. In this SOQ, the requirements will be divided into two categories, mandatory and rated. All resources provided by the contractor must meet the mandatory requirements applicable to the area they are to bill against. The rated requirements will be used by DMMD [Director of Materiel Management and Distribution] to allow for refinement of the selection of resources that meet the mandatory requirements.

The rated requirements are defined in this document with key words that quantify the expected work experience for each item. The key words are defined as follows:

- Basic (1 to 2 years)
- Comprehensive (2 to 5 years)
- Extensive (5 to 8 years)

Suppliers must provide written documentation that clearly demonstrates compliance with the following for each resource provided by the contractor:

1. Team Qualifications

1.1 Mandatory Criteria

- 1.1.1. Must clearly demonstrate the required work experience within the past 10 years.

DND-DMMD Annex B-2, B-3 and B-4 to RFP W8484-020004/A read, in part, as follows:

Rating Factors:

Basic (= 1 to 2 years):	Score
1 to 6 months =	10
6 to 12 months =	20
12 to 18 months =	30
18 to 24 months =	40
> 24 months =	50

Comprehensive (= 2 to 5 years):	
2 years =	10
3 years =	20
4 years =	30
5 years =	40
> 5 years =	50

Extensive (= 5 to 8 years):	
5 years =	10
6 years =	20
7 years =	30
8 years =	40
> 8 years =	50

The closing date for the submission of proposals was October 9, 2002. According to PWGSC, 12 bids were received from 4 different bidders for the 5 RFP streams. On November 1, 2002, the evaluations of the proposals were completed. On January 9, 2003, the contract for Stream 4 was awarded to ADGA, and the unsuccessful bidders for that stream were notified on January 10, 2003. On February 17, 2003, contracts for Streams 2 and 3 were awarded to Sirius, and the unsuccessful bidders for those streams were notified on February 19, 2003.

On March 3, 2003, EDS received a debriefing from PWGSC on its proposal for Stream 4, and received a debriefing on its proposals for Streams 2 and 3 on March 6, 2003. On March 17, 2003, EDS filed its complaint with the Tribunal.

POSITIONS OF PARTIES

PWGSC's Position

PWGSC submitted that, included in EDS's complaint, is "an analysis of the language submitted in the [résumés of the resources proposed by EDS], in order to assist the Tribunal in reviewing this matter."⁴ It submitted that these "analyses" constitute new information not included in EDS's proposals and that they were therefore not available to evaluators. It contended that EDS's proposals were evaluated solely on the contents of the proposals and that the Tribunal must limit its consideration to the contents of EDS's proposals as presented. Further, it contended that to do otherwise would turn the bid challenge process into a re-evaluation of EDS's proposals after providing it with an opportunity to supplement, amend, clarify and otherwise repair its proposals. It submitted that relying on the analyses provided in the complaint during a review of the procurement is tantamount to bid repair by the Tribunal.

PWGSC submitted that the subject-matter experts who evaluated the proposals fully understood the requirements of the RFP and evaluated all proposals according to the criteria and methodology set out therein. It further submitted that all competing proposals within a technical area were evaluated by the same evaluators, exercising the same professional judgement. PWGSC submitted that both the Tribunal and the Federal Court of Appeal recognize that evaluating proposals involves a subjective assessment of the merits of a proposal by reference to objective criteria and cited several examples to support its position.⁵ It argued that it is improper for the Tribunal to second-guess the evaluation of a single bidder's proposal by a team of subject-matter experts. It submitted that the Tribunal has stated, on several occasions, that it will defer to the evaluators where it is satisfied that they evaluated a proposal in a procedurally fair manner and cited several examples to support its position.⁶

PWGSC argued that the RFP placed the onus on bidders to clearly demonstrate compliance with the requirements of the RFP. It submitted that in *Noël Import/Export*,⁷ the Tribunal stated that demonstrating proven capacity requires more than a mere assertion of compliance by a bidder; rather, it requires supporting information to demonstrate actual use of the capacity. It submitted that EDS's proposals did not score full points, or any points at all, for some requirements because it failed to "clearly demonstrate" compliance with the requirements. It submitted that, on occasion, evaluators were required to evaluate mere assertions of compliance and mere lists of alleged skills and experience against the requirement to clearly demonstrate compliance. It further submitted that evaluators were looking for details, including where, when and how individuals used the alleged skills and acquired the alleged experience, and that simply listing alleged skills and experience that mirrored the particular requirements of the RFP did not clearly demonstrate compliance with the requirements to the satisfaction of the evaluators.

4. EDS's comments on GIR at para. 116.

5. *Re Complaint Filed by AmeriData Canada Ltd.* (9 February 1996), PR-95-011 (CITT); *Re Complaint Filed by Frontec Corporation* (6 May 1998), PR-97-035 (CITT); *Cougar Aviation v. Canada (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.) at para. 36; *Re Complaint Filed by Canadian Computer Rentals* (3 August 2000), PR-2000-003 (CITT).

6. *Re Complaint Filed by Mirtech International Security Inc.* (3 June 1997), PR-96-036 (CITT); *Re Complaint Filed by Crain-Drummond Inc.* (18 August 2000), PR-2000-009 (CITT); *Re Complaint Filed by DRS Technologies Inc.* (2 May 2002), PR-2001-051 (CITT).

7. *Re Complaint Filed by Noël Import/Export* (6 February 2003), PR-2002-036 (CITT).

With regard to the evaluation results for one of EDS's proposed candidates for Stream 4, PWGSC submitted that, although some of the candidate's position descriptions refer to Configuration Management (CM), no mention is made of the candidate actually using a CM tool and, thus, acquiring experience using a CM tool. Additionally, while the candidate's position descriptions refer to management activities, they do not clearly demonstrate that the candidate actually engaged in software analysis or software development through coding, for example. Regarding another of EDS's proposed candidates for Stream 4, PWGSC submitted that the descriptions of work experience are considered vague and that evaluators were not satisfied that the references provided clearly demonstrated the necessary experience in actual software development.

For reasons unrelated to the grounds of complaint, PWGSC submitted, it is assembling a new team to re-evaluate all proposals in Stream 4. It submitted that re-evaluations will be conducted as soon as practicable and that measures will be implemented to ensure the independence and impartiality of the new evaluation team. It further submitted that the grounds of complaint raised by EDS regarding this stream, and the relief requested, are moot.

With respect to the evaluation results for EDS's proposed candidate for the position of Systems Engineer in Stream 2, PWGSC submitted that EDS's proposal did not clearly demonstrate that the candidate had the required experience. It also submitted that, regarding the requirement to have experience with Citrix products, EDS's proposal did not elaborate on or explain the tasks performed by its proposed candidates and that, further, the references were not clear as to how the tasks are connected to the position description and to the actual time committed to the tasks. It argued that, to clearly demonstrate compliance, the evaluation team required more than bald statements mirroring the language of the requirements.

Regarding the evaluation results for EDS's proposed candidates in Stream 3, PWGSC submitted that the evaluation team was not satisfied that EDS clearly demonstrated compliance with the mandatory requirements.

With respect to EDS's allegations concerning the Sirius contracts, PWGSC submitted that the complaint is late and not properly documented and that the allegations are without merit. It submitted that EDS was advised on February 19, 2003, of the contract awards to Sirius. It submitted that, if EDS is "a leader in its field, [with] indepth knowledge of the Canadian marketplace,"⁸ it possessed this status and knowledge on February 19, 2003, and that EDS knew the basis of its complaint on February 19, 2003. It argued that EDS bears the onus to prove that errors were committed in the evaluation of Sirius's proposals.

Regarding remedies, PWGSC submitted that, in the event that any of EDS's grounds of complaint are upheld, the Tribunal should make a recommendation only if satisfied that a specific breach of a trade agreement has a consequential impact on the evaluation results. It further submitted that the Tribunal should not make a recommendation with respect to Stream 4, as proposals will be re-evaluated as soon as practicable.

In the event that the Tribunal determines that PWGSC breached the applicable trade agreements and recommends a re-evaluation, PWGSC submitted, all proposals with a technical area should be re-evaluated. In the event that the Tribunal recommends a re-evaluation and that a bidder other than the existing contractor is found to be the lowest compliant bidder, PWGSC requests the option of either terminating the contract and awarding it to the lowest compliant bidder or maintaining the existing

8. Complaint, para. 80.

contractor and paying monetary compensation to the lowest compliant bidder. It also submitted that any award of monetary compensation should be based on net profit and not gross profit. Finally, in the event that the complaint is dismissed, PWGSC requests its complaint costs.

Sirius's Position

Sirius submitted that it agrees with the position taken by PWGSC at paragraph 7 of the GIR that the reason that EDS's proposal did not score sufficient points, or any points at all, for some requirements was that it failed to clearly demonstrate compliance with the requirements. It further submitted that EDS should not be allowed to present additional information or an explanation that is not contained in its original bid or provide a different "spin" to its bid in an attempt to expand on the contents of its own bid or to put its own bid in a different or better context.

Sirius submitted that it diligently assembled its resources in preparation for its successful bid for Streams 2 and 3 of the RFP and that it compiled extensive résumés for each of these resources and presented them in its bid in a complete and full manner.

EDS's Position

EDS submitted that the Tribunal's decision not to allow the disclosure of all the confidential information that it had requested meant that it could not properly respond to the GIR. Its position is that it was disqualified from the evaluation process for Stream 4 because two of the four persons included in its bid in the "CM and control services" category failed to score 60 percent of the available points for the rated requirements. It submitted that one of its candidates has more than 18 years of information technology experience and that the individual was deemed to have met the mandatory requirements; however, in the rated requirements, the individual was given several completely unjustified zeros. For example, it submitted that, for rated criterion R-CM-8 (basic experience in software analysis and development), its candidate was given a zero and, for rated criterion R-CM-6 (comprehensive experience using a CM tool, e.g. Product Version Control System), its candidate was given 19 out of 50 points. It argued that the candidate's résumé indicated a total of 7 years and 10 months' experience with respect to rated criterion R-CM-8 and a total of 8 years and 11 months' experience with respect to rated criterion R-CM-6. It further argued that the experience detailed in the résumé was clearly sufficient to meet the requirements.

EDS submitted that another of its proposed candidates for Stream 4 was deemed to have met the mandatory requirements; however, for the rated requirements, the individual was given several zeros. In particular, the individual was given a zero for rated criterion R-CM-1 (comprehensive experience with software development and life cycle) and rated criterion R-CM-8. Furthermore, the candidate was given 13 out of 50 points for rated criterion R-CM-6, which, it submitted, was completely unjustified. It argued that the individual's résumé indicated a total of 12 years and 8 months' experience with respect to both rated criteria R-CM-1 and R-CM-8.

Regarding Stream 2, EDS submitted that, while it is not claiming that it should have been awarded the contract, it believes that the evaluation errors that it has been able to identify provide a reasonable basis upon which the Tribunal may properly conclude that the entire procurement process was severely flawed and, further, that such flaws make it reasonable to conclude that Sirius's bid for this stream was improperly qualified. It submitted that its bid for Stream 2 was deemed non-compliant because its candidate for the position of Systems Engineer was found to have failed to meet several mandatory requirements. In addition, it submitted that six of its nine candidates for Technical Server Support were found to have failed to meet

several mandatory requirements. Despite EDS's claims and details in the candidate's résumé that its candidate for Systems Engineer has 27 years' experience in the information technology industry, the evaluation team found that the candidate did not comply with mandatory criterion M-SA-1 (3 years' experience as a systems engineer), mandatory criterion M-SA-4 (3 years in TCP/IP network management), mandatory criterion M-SA-5 (3 years with NT server platforms, fault/performance analysis/resolution) or mandatory criterion M-SA-7 (5 years' experience with impact/trend analysis). It argued that the candidate's résumé clearly outlined the tasks undertaken with the Canadian Forces Supply System Upgrade (CFSSU) and that, in addition, as the candidate has held the position of Manager/Chief Engineer of the Systems Engineering Team for the CFSSU for over five years, this experience alone was enough to meet the mandatory requirements.

In considering the disqualification of several of the other personnel proposed in its bid, EDS submitted that mandatory criterion M-SS-10 (3 years' experience with Citrix products) appears to have posed a problem for several of its candidates. It argued that the pool of persons in Canada with the relevant experience with Citrix products is extremely small. It submitted that, when preparing this bid, it contacted Citrix and was clearly advised that there were few people in Canada who could meet the requirements of the RFP. It further submitted that it advised PWGSC of this problem, but was assured that if no one could meet the requirements of the RFP, then the evaluators would take a broader view of the criterion. EDS contended that, if its proposed candidates could not meet that criterion, EDS firmly believed that it would be almost impossible for Sirius to provide nine candidates to meet this requirement. It argued that its contention is based on its position as a leader in its field and its in-depth knowledge of the Canadian marketplace.

With respect to Stream 3, EDS submitted that its position is similar to its position on Stream 2. It submitted that there were many unreasonable assessments made of its bid in Stream 3. It submitted that its bid had been deemed non-compliant on three grounds: (1) three of the four candidates that it proposed for the COBOL custom code programming service area did not meet the mandatory criteria; (2) one of its candidates for the C++ custom code programming service area did not meet the mandatory criteria; and (3) its candidate for the web development and support programmer/analyst service area was also disqualified on mandatory requirements. It further submitted that the résumés more than demonstrated the experience required. EDS argued that, if the candidates that it proposed could not meet the various mandatory criteria, EDS firmly believed, for the reasons previously stated for Stream 2, that it would be almost impossible for Sirius's candidates to do so.

EDS submitted that it is untenable for PWGSC to suggest, as it did in the GIR, that EDS attempted in its complaint to repair deficiencies in its bid. It submitted that it is clear that the analyses provided with its complaint are not meant to supplement, enhance or replace its bids; rather, they are intended to save the Tribunal time in reviewing the complaint, by clearly pointing out the most egregious examples of errors in the evaluation process.

Regarding the evaluation structure in the RFP, EDS submitted, in its comments on the GIR, that the evaluation criteria leave no room for subjective judgement. It submitted that both the mandatory and rated criteria were expressed in terms of the number of years of experience that a person had with respect to the relevant skill set. It submitted that bidders were to be awarded a certain number of points based on the amount of time that a resource spent in a job that required the skills set out in the RFP. It further submitted that there is no provision in the evaluation criteria for reviewing a reference in order to try to evaluate how much time a candidate would spend on the various tasks or jobs required of that position. Moreover, it contended, subjectivity in evaluation was limited in this RFP because, unlike other procurement processes,

the RFP did not allow for PWGSC to reserve the right to verify the information set forth in the various bids. Therefore, it argued, PWGSC was required to accept the veracity of the information in a bidder's proposal and to evaluate the information as provided.

EDS argued that it complied with the requirements of Article 13.5 of the RFP in submitting its technical proposal and that nothing in the GIR points to any failure with respect to these requirements. It further submitted that it included, in its technical proposal, an overview profile for each person proposed in its bid, together with a summary sheet which listed the various mandatory and rated criteria, and pointed DND to the exact references which fulfilled such criteria. EDS contended that it is not at all clear what more would have been required to highlight "details, including where, when and how individuals" obtained experience and used the skills highlighted in their résumés.

TRIBUNAL'S DECISION

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. Furthermore, 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* further 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 *Agreement on Government Procurement*,⁹ the *North American Free Trade Agreement*¹⁰ and the *Agreement on Internal Trade*.¹¹

Article VII (1) of the *AGP* provides that "[e]ach party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI."

Article XIII (4)(c) of the *AGP* provides that "[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."

Article 1008(1)(a) of *NAFTA* provides that "[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a non-discriminatory manner".

Article 1015(4)(d) of *NAFTA* provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

Article 506(6) of the *AIT* provides, in part, 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."

The Tribunal must determine, in this case, whether, in evaluating the proposals, PWGSC properly applied the evaluation criteria set out in the RFP and followed the relevant provisions of the applicable trade agreements.

9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

10. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

On April 28, 2003, EDS requested that the Tribunal order PWGSC to produce additional documents. On May 27, 2003, the Tribunal, having determined that some of the requested documents were germane to the complaint, ordered PWGSC to produce certain requested documents. The Tribunal did not order the production of materials relating to bids by Sirius or ADGA (with the exception of the limited disclosure of Sirius's bid as it related to an individual proposed by both Sirius and EDS). With respect to the allegation by EDS that the Tribunal did not order PWGSC to produce all the information that it had requested, the Tribunal notes that it ordered the disclosure of that information that it thought was necessary for its determination. It did not order the production of information on the portion of EDS's complaint that it ruled out of time. As for the information on Sirius, the Tribunal is of the opinion that the disclosure that it ordered was sufficient. The Tribunal will generally not allow complainants to have access to documents when, in the Tribunal's opinion, the sole objective is to find new evidence to use in its complaint.

With respect to the ground of complaint regarding Stream 4, given that PWGSC has stated that it is assembling a new team to re-evaluate all proposals in Stream 4, the Tribunal will not further consider this ground of complaint.

With respect to Streams 2 and 3, the Tribunal, having reviewed the additional documentation provided by PWGSC, is satisfied that the evaluators sufficiently applied themselves in evaluating EDS's proposals. The Tribunal notes that the qualifications and experience relating to an individual proposed by both bidders were presented differently in the respective proposals. The presentation in EDS's proposal was in summary form, whereas the presentation in Sirius's proposal was more descriptive. The Tribunal notes that, in accordance with Appendices B-2, B-3 and B-4 of the RFP, "[s]uppliers must provide written documentation that *clearly* demonstrates compliance with the following for each resource provided by the contractor" [emphasis added].

In the Tribunal's view, EDS's bid was not always clear as to the amount of time that each of its proposed personnel had spent in each of the required tasks in each job. While the Tribunal might, in some instances, have come to a different conclusion from that of the evaluators, it sees no merit in trying to second-guess the evaluators, given that it could find no systemic error in the evaluation process.

In this context, in *Polaris*,¹² the Tribunal stated:

In its complaint, Polaris submitted, among other things, that it was not awarded sufficient points in respect of several aspects of its proposal. After having reviewed the evidence on the file, the Tribunal sees no reason to conclude that Polaris's proposal was not evaluated in accordance with the criteria and methodology set out in the solicitation documents or that the evaluators did not apply their minds to these items at the time of the evaluation. *In the absence of evidence that the evaluation was not conducted in a procedurally fair manner, the Tribunal normally defers to the judgement of the evaluation team as to the assignment of points for the rated technical requirements. . . .* The Tribunal will, therefore, not second-guess the evaluation team with regard to its conclusion that Polaris's proposal failed to demonstrate "full compliance" with some of the technical requirements.¹³

[Emphasis added]

As to EDS's view that the RFP provided no room for subjective judgement by the evaluators, who were merely to add up the time of each position held by the proposed personnel, the Tribunal is of the view

12. *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT)

13. *Ibid.* at 6.

that, had EDS's bids been entirely clear, it would have been more feasible for the evaluators to follow such a path. However, given the vagueness of this aspect of EDS's bids, the evaluators had to apply their expertise in attempting to determine just how long each person spent doing each required task.

For the above reasons, the Tribunal finds that PWGSC conducted its evaluation in accordance with the requirements of the RFP and did not violate any relevant provisions of the applicable trade agreements.

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

Notwithstanding the above determination, the Tribunal is of the opinion that, while not "flawed" in a legal sense, the design of the RFP could have been significantly clearer in providing bidders with the expectations of PWGSC and DND as to how the experience and qualifications of proposed resources were to be presented. Since PWGSC and DND are the authors of the RFP, they must bear their own costs in defending against this complaint. As such, the Tribunal will award no costs in respect of this complaint.

DETERMINATION OF THE TRIBUNAL

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

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Patricia M. Close
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Member