



Ottawa, Wednesday, July 30, 2003

File No. PR-2002-070

IN THE MATTER OF a complaint filed by Prudential Relocation 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 valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services re-evaluate, by September 10, 2003, the proposals for section 2.1.1.5 (Information Systems) of Parts C2-1, C2-2 and C2-3 of Annex C to the Request for Proposal (RFP), without taking into account whether the information systems proposed by the bidders are compatible with existing Government of Canada technology.

The Canadian International Trade Tribunal further recommends that the Department of Public Works and Government Services re-evaluate, by September 10, 2003, the proposals for the remaining sections of Parts C2-1, C2-2 and C2-3 of Annex C to the RFP, which are subject to point ratings, in all cases where no bidder has been awarded points at the "Exceeds Criteria" level and on the basis that it should be possible for bidders to obtain the "Exceeds Criteria" level in all such sections of the RFP.

If, after the re-evaluations, the successful bidder for the Canadian Forces Integrated Relocation Program (IRP), the Government of Canada IRP or the Royal Canadian Mounted Police IRP is determined to be a party other than Royal LePage Inc., the Canadian International Trade Tribunal further recommends that the Department of Public Works and Government Services award a new contract to the successful bidder no later than January 1, 2004.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V.M. Bradford
Meriel V.M. Bradford
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	July 30, 2003
Date of Reasons:	September 18, 2003
Tribunal Members:	Ellen Fry, Presiding Member Zdenek Kvarda, Member Meriel V. M. Bradford, Member
Investigation Officer:	Peter Rakowski
Counsel for the Tribunal:	Dominique Laporte
Complainant:	Prudential Relocation Canada Ltd.
Counsel for the Complainant:	David J. Lowdon
Intervener:	Royal LePage Relocation Services Limited
Counsel for Royal LePage Relocation Services Limited:	Donald S. Affleck
Intervener:	Envoy Relocation Services Inc.
Counsel for Envoy Relocation Services Inc.:	Ronald D. Lunau
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Christianne M. Laizner Ian McLeod



Ottawa, Thursday, September 18, 2003

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IN THE MATTER OF a complaint filed by Prudential Relocation 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*.

STATEMENT OF REASONS

COMPLAINT

On March 17, 2003, Prudential Relocation Canada Ltd. (Prudential) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. 24062-020006/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP), the Canadian Forces (CF) and the Government of Canada (GOC). Prudential alleged that, contrary to the provisions of the trade agreements, PWGSC improperly evaluated the proposals submitted in response to the Request for Proposal (RFP).

Prudential alleged that its proposals were not evaluated properly because the evaluators failed to follow the methodology, criteria and procedures set out in the RFP, interpreted the criteria in the RFP inconsistently and incorrectly, and were unable to give the proper number of points for certain evaluation criteria because it was impossible to exceed the “Meets Criteria” level. Prudential’s allegations included claims that the proposals had to achieve 70 percent in each evaluation category rather than 70 percent overall, that the evaluators wrongly took into account compatibility with the existing government technology platform and that the samples of actual relocation files were assessed to a standard different from that which was published in the RFP. Prudential also alleged that the evaluation favoured the incumbent contractor. Finally, Prudential alleged that the use of an evaluator who had taken legal action against Prudential created the potential for bias in the evaluation of Prudential’s bids.

On March 26, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On April 4, 2003, the Tribunal granted Envoy Relocation Services Inc. (Envoy) intervener status. On April 22, 2003, the Tribunal granted Royal LePage Relocation Services Limited (Royal LePage) intervener status. On May 5, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ Prudential and Envoy filed their comments on the GIR on May 16, 2003.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. S.O.R./91-499.

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.

MOTION TO STRIKE ENVOY'S COMMENTS

On May 28, 2003, PWGSC filed a motion requesting an order from the Tribunal striking Envoy's comments on the GIR, on the basis that they constituted an untimely complaint. In the alternative, PWGSC requested an order striking some specific paragraphs of these comments, on the ground that they constituted untimely new grounds of complaint or contained submissions that were outside the scope of the Tribunal's inquiry and not proper reply comments. On June 6, 2003, Envoy filed its comments in reply to the motion and, on June 11, 2003, PWGSC filed its reply to Envoy's comments. On June 27, 2003, the Tribunal informed the parties that PWGSC's motion was dismissed. On July 4, 2003, PWGSC filed its comments with respect to Envoy's comments on the GIR.

In dismissing PWGSC's motion, the Tribunal noted that subsection 30.14(1) of the *CITT Act* states that, in conducting its inquiry, the Tribunal shall limit its consideration to the subject matter of the complaint and that Envoy had indicated that it did not intend to file a new complaint. The Tribunal also indicated that, in coming to its decision, it would give Envoy's comments the weight that they deserve in accordance with its normal practice in dealing with evidence and other submissions.

PROCUREMENT PROCESS

On May 10, 2002, a Letter of Interest (LOI) was posted on MERX, Canada's Electronic Tendering Service. The LOI contained a draft of the proposed terms and conditions of the RFP for a variety of relocation assistance services and drafts of the statements of work (SOWs) for the CF, RCMP and GOC. On August 15, 2002, the Notice of Proposed Procurement and the RFP, containing three separate sections within Annex C (CF, GOC and RCMP), were posted on MERX.

To be considered responsive, bidders had to submit bids for all three clients (CF, GOC and RCMP) or bids for the RCMP and GOC. In addition, for each client proposed, bidders had to obtain the required minimum of 70 percent of the points for the criteria which were subject to point rating as specified. The maximum points available for each client totaled 15,000. The portions of the SOWs relevant to this case were the same for all three clients. In response to an enquiry about the points available for the four point rating categories, amendment No. 2 to the RFP dated September 19, 2002, stated: "[p]oints will be awarded based on the criteria stated [i.e. Unsatisfactory - 0%; Meets Most of Criteria - 50%; Meets Criteria - 70%; Exceeds Criteria - 100%]. Evaluators will not use different percentages."

The closing date for the submission of proposals was September 30, 2002. According to PWGSC, five bidders submitted proposals. Prudential submitted proposals for all three PWGSC clients. The evaluation of technical proposals was completed on October 8, 2002. On December 18, 2002, Prudential was advised that its proposals had been deemed non-compliant and that a contract had been awarded to Royal LePage for all three PWGSC clients. PWGSC held a debriefing meeting with Prudential on January 8, 2003. On January 22, 2003, Prudential forwarded a letter of objection to PWGSC. On March 4, 2003, Prudential received a denial of relief from PWGSC. On March 17, 2003, Prudential filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Prudential's Position

Prudential submitted that its grounds of complaint concerning the evaluation of "Exceeds Criteria" and the alleged bias in evaluating the sample client files relate to the manner in which the evaluation was carried out and that this manner was not made known to Prudential until its debriefing, on January 8, 2003. Accordingly, Prudential submitted that these grounds of complaint were filed within the time limit set by section 6 of the *Regulations*.

Prudential submitted that the evaluators introduced a material change in the evaluation criteria and methodology from those communicated in the solicitation documents. According to Prudential, this change was made without notice and was not transparent to the bidders. Prudential submitted that this change negated the technical evaluation criteria at Part C2 of Annex C to the RFP, in particular, that a maximum of 15,000 points were available, introduced a "pass/fail" test at the "Meets Criteria" level of each area of evaluation (i.e. it made it mandatory for bidders to achieve the standard of "Meets Criteria" in each area of evaluation, contrary to the evaluation criteria set out in the RFP) and favoured the incumbent contractor under the Integrated Relocation Program (IRP) in that the incumbent was presumably operating at the "Meets Criteria" level under the IRP.

Prudential submitted that its complaint does not centre on whether Prudential's bid should be deemed compliant, but rather on whether points theoretically held out to be available in the RFP were not in fact available under the evaluation process as carried out by the evaluators. According to Prudential, the effect of the lack of availability of these points is illustrated by the fact that the incumbent contractor under the IRP was the only bidder evaluated as compliant for this RFP. Thus, Prudential submitted that the lack of availability of points made a "price per point" calculation meaningless, since Prudential, and possibly other bidders, were unable to attain the points that their bids deserved.

Finally, Prudential submitted that the fact that one of the evaluators has been involved in a legal dispute with Prudential implies that there was a reasonable apprehension of bias in the evaluation of its proposals.

Prudential submitted that the evaluation of its proposals under the RFP was contrary to Articles 501 and 506(6) of the *Agreement on Internal Trade*⁴ and that the contract should be terminated and the requirement re-tendered in a proper manner. Prudential submitted that the fundamental flaws in the RFP evaluation process could not be repaired by simply arranging the scores of bids. Prudential also submitted that, while there is an ongoing requirement to relocate employees, the termination of an unfairly awarded contract and its replacement by a properly awarded contract could be done in a manner that would accommodate PWGSC's clients. Prudential argued that a fundamentally flawed procurement process should not be allowed to stand for five years and two option years simply because it is deemed "essential". Prudential also requested its complaint costs.

PWGSC's Position

PWGSC submitted that the evaluators did not conduct the evaluation of proposals on the basis alleged by Prudential and that bidders were required to score 70 percent overall on technical requirements to

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

be considered responsive. According to PWGSC, Prudential's technical proposals were evaluated as non-responsive because the overall scores for each of its three bids did not meet the threshold requirement of 70 percent of the possible overall score of 15,000 points for each bid. PWGSC submitted that Annex C to the RFP sets out the evaluation procedures and criteria and that the 70 percent threshold score is 10,500 points out of a total of 15,000 points overall.

PWGSC submitted that the IRP bid evaluation summary that it prepared after the evaluation of technical and financial bids correctly set out the basis upon which the point-rated evaluation had been conducted, as stated in the following sentence:

Evaluation was based on point rated criteria only and each client evaluation is based on 15000 points with an overall pass mark of 70% (10500 points).⁵

PWGSC submitted that, following the debriefing of Prudential, PWGSC's letter of February 28, 2003,⁶ clearly advised Prudential that the overall score for each of its three bids did not meet the threshold scoring requirement of 70 percent. The letter referred specifically to the overall score awarded to Prudential in each of its three bids as compared to the maximum possible overall score of 15,000 points for each bid, in the following words:

As explained at the debriefing session, Prudential achieved 10442 out of a possible 15000 points for the bid submitted for Canadian Forces, 10320 out of a possible 15000 points for the bid submitted for RCMP and 10320 out of a possible 15000 points for the bid submitted for Government of Canada.

PWGSC further submitted that this letter provided Prudential with an example of one of the key weak areas of its proposals, which was the category of "File Management", for which the bidder was required to provide sample client files. This was a point-rated requirement for which Prudential was awarded scores that were lower than the 70 percent "Meets Criteria" score. PWGSC submitted that Prudential's bid was not declared non-responsive because of its score in the "File Management" category. According to PWGSC, it was the aggregate score for all criteria that determined whether its bid was technically responsive or non-responsive.

PWGSC submitted that Prudential knew or ought to have known about the evaluation methodology set out in the RFP, including the rating scale, percentages and marks available for each criterion, and should have identified its concerns about the evaluation of "Exceeds Criteria", some time after the issuance of the RFP (August 15, 2002) and before bid closing (September 30, 2002). Instead Prudential waited until after contract award on December 18, 2002, before raising its concerns. PWGSC submitted that it did not receive any questions or requests for clarification on the "Exceeds Criteria" evaluation methodology during the bidding period. PWGSC also submitted that there is no evidence presented of latent ambiguity with respect to the requirements for the "Exceeds Criteria" scoring set out in the RFP. Rather, PWGSC stated that the objection is that the "Exceeds Criteria" scoring was undefined in the RFP and that, consequently, points to be awarded for "Exceeds Criteria" scoring were unattainable. PWGSC submitted that such objections ought to have been raised during the bidding period. Accordingly, PWGSC submitted that the complaint regarding the evaluation of "Exceeds Criteria" was not made within the time frame specified by the *Regulations*.

5. GIR at 10, para. 4.

6. GIR, Exhibit 7.

In the alternative, PWGSC submitted that there is no merit to Prudential's allegation that points for "Exceeds Criteria" scoring were unattainable. According to PWGSC, all bidders, including Prudential, achieved points because aspects of their proposals exceeded the requirements of certain criteria.

PWGSC also submitted that, even if it were the case that certain points for "Exceeds Criteria" were more difficult to attain, all bidders were affected equally and were scored in the same manner. However, PWGSC submitted that, if the Tribunal determined that there is merit to the complaint that certain points in the evaluation were more difficult to attain, this should not change the results of the evaluation, because a re-evaluation of Prudential's bid as compliant by eliminating the effects of "Exceeds Criteria" from the evaluation would still not result in the award of the contract to Prudential.

PWGSC submitted that the evaluation team did not misapply the evaluation criteria for "Information Systems". PWGSC submitted that comments made at the debriefing meeting which took place on January 8, 2003, approximately three months after the completion of the evaluation, were taken out of context by Prudential and that Prudential's proposal with respect to the criteria for "Information Systems" was evaluated as achieving the "Meets Criteria" score.

PWGSC submitted that Prudential did not raise any questions regarding the interpretation of the sample client relocation files requirement nor did it express any concern that the criteria used to assess this requirement were biased in favour of a particular supplier upon receipt of the RFP or at any time prior to bid closing. PWGSC submitted that, therefore, the time for filing a complaint with respect to the interpretation of this requirement, or to whether the criteria are inherently biased in favour of a particular supplier, has long expired.

PWGSC submitted that there is no basis for Prudential's contention that the evaluators misinterpreted the criteria as a requirement to submit sample files that "emulate every aspect of an IRP client file" or made a "current IRP client file the standard which all other sample files must meet."⁷

PWGSC submitted that there is no basis for a finding of apprehension of bias in the evaluation of Prudential's proposals as a result of the participation of one of the evaluators in the evaluation of proposals. PWGSC submitted that, in support of the allegation of reasonable apprehension of bias, Prudential relies upon the fact that, in an action filed six years ago, a default judgement was obtained against it in an amount that is insignificant in comparison to the value of the contract at issue. PWGSC submitted that a reasonable person with all these facts and who has thought the matter through, knowing that Prudential has specifically declined to impugn the motives of the particular individual in question or any of the other evaluators, would inevitably conclude that there is no basis for a finding of reasonable apprehension of bias.

In its response to the Tribunal's request for comments concerning Envoy's submission, PWGSC submitted that Envoy's comments contained untimely allegations pertaining to its own debriefing, its own evaluation, the time afforded in the process for the evaluation of the proposals, the bidding period and the scoring methodology set out in the solicitation documents. PWGSC submitted that there is no merit to any of these allegations and that they are based on issues for which the time for complaint has long expired.

According to PWGSC, there is no merit to Envoy's allegation that Royal LePage's proposal was improperly awarded points in the "Exceeds Criteria" range for proposing additions or service enhancements that should have been presented and priced as a separate section of its proposal under article 5.0 of the RFP.

7. Complaint at 11.

PWGSC submitted that this allegation should not be given any weight in the Tribunal's decision making because it constitutes a new complaint and, consequently, is outside the scope of the Tribunal's inquiry.

PWGSC requested its costs in defending this complaint.

Envoy's Position

Envoy supported Prudential's submissions and submitted that the flaws in the procurement process require the procurement to be re-tendered in fairness to all bidders. Envoy also submitted that major problems have also been identified with the evaluation of bids against the "Exceeds Criteria" requirements. Envoy submitted that the acknowledgement by PWGSC that there are, in fact, criteria with respect to which it is not possible to score in the "Exceeds Criteria" category means that the evaluation cannot be conducted without deviating from the evaluation scheme that was set out in the RFP. According to Envoy, there is no way to allow bidders to increase their overall scores by getting a higher score in their particular area of expertise, as the scoring scheme set out in the RFP contemplated.

Envoy submitted that it is possible to ensure that there is no inconvenience or interruption of service to the Crown during a re-bidding of the contract.

Envoy also requested its cost of intervening in this proceeding.

Royal LePage's Position

Royal LePage submitted that it fully supports and adopts the position outlined in the GIR. Royal LePage submitted that the complaint has been filed outside the time frame allowed by the *Regulations*. In particular, Royal LePage submitted that the complaint was filed 7 months after the RFP was posted on MERX, 6 months after the bidding period closed, 3 months after Prudential was advised that it had not been awarded the contract, over 2 months after its debriefing session and over 10 working days after PWGSC had provided a response to the objection raised by Prudential.

Royal LePage submitted that Prudential's contention that the criteria for the sample "relocation file" were biased in favour of the incumbent contractor is without factual merit. According to Royal LePage, as the incumbent contractor, it submitted sample relocation files as per the RFP, three of which were from non-governmental moves, and all sample files submitted were evaluated as meeting the requirements.

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, of which only the *AIT* applies in this case.

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."

Prudential advanced the following five grounds of complaint, each of which is discussed in detail below:

- PWGSC required a pass mark of 70 percent in each category of the RFP rather than an overall pass mark of 70 percent.
- During the evaluation, points for the “Exceeds Criteria” level of scoring were not available under some evaluation categories.
- The evaluation of the “Information Systems” requirements wrongly took into account compatibility with existing government technology.
- The evaluation of the client sample files was biased in favour of the incumbent contractor.
- The use of an evaluator who had taken legal action against Prudential created a reasonable apprehension of bias in the evaluation of Prudential’s bids.

Requirement to Attain 70 Percent

Paragraph 1(a) of Part C1 of Annex C to the RFP provides that, in order for a bid to be considered responsive, it must attain a minimum of 70 percent overall of the points for the criteria that are subject to point rating (i.e. 10,500 points out of a possible 15,000 points). The parties agree that this is the case and that there is no requirement to attain a “pass mark” of 70 percent of the available points for any individual requirement of the RFP.

However, in a letter dated February 28, 2003,⁸ to Prudential, PWGSC stated as follows: “One of the key weak areas of the proposals submitted by Prudential was the sample files provided. . . . Prudential was awarded 389 points out of a possible 777 points for the files submitted for each of CF, RCMP and GOC, *155 points less than the 544 points necessary to meet the pass mark for this criteria* for each client.” [Emphasis added]

Although this statement is incorrect and confusing, the evidence does not indicate that the evaluation was actually conducted on the basis of requiring a pass mark for each evaluation category. On each of its three bids, Prudential attained less than 70 percent overall of the points for the criteria that are subject to point rating. Overall scores at this level were a proper basis to consider bids non-responsive.

Accordingly, the Tribunal finds that this ground of complaint is not valid.

Availability of “Exceeds Criteria” Points

Parts C2-1, C2-2 and C2-3 of Annex C to the RFP⁹ state, in part, as follows:

There is a maximum of 15,000 points available under the criteria subject to point rating.

<u>Points will be awarded as follows:</u>	<u>Percentage of Points Available</u>
Unsatisfactory	0%
Meets Most of Criteria	50%
Meets Criteria	70%
Exceeds Criteria	100%

8. GIR, Exhibit 7.

9. These sections were the same for the RCMP, CF and GOC.

The marking grids that follow show “Exceeds Criteria” as a rating that is available for all the point-rated requirements, a rating that would receive 100 percent of the available points for each requirement. When the points allocated for “Exceeds Criteria” are added up for all the requirements, they total 15,000 points.¹⁰

Thus, the RFP indicates clearly that the evaluation should make it possible for a bidder to attain “Exceeds Criteria” for each of the point-rated requirements and, hence, receive 100 percent of the 15,000 available points. The Tribunal notes that PWGSC does not appear to dispute that the RFP requires “Exceeds Criteria” to be available in all areas. The issue is whether PWGSC complied with this requirement in performing the evaluation.

The evaluation grids used by the evaluators to assess point-rated requirements indicate that a rating of “Exceeds Criteria” and accordingly 100 percent of the points available was given for some, but not all, areas.¹¹ The question is whether the reason why “Exceeds Criteria” was not awarded in the other areas was that no bid deserved such a high rating or that the evaluators did not make “Exceeds Criteria” available in those areas.

The evaluation grids used by the evaluators did not form part of the RFP. The directions on the front page of the evaluation grids read as follows:

The following Scoring Guide has been prepared to assist the Bid Evaluation Team. The following descriptions are to be used as a guide to assist in the assignment of scores for a particular bid. In some cases there is no guidance provided, most notably in the “exceeds” category. It is not possible to anticipate what constitutes a performance which is considered to “exceed” the requirement. *In other cases it is not considered possible to “exceed” expectations.* However as a guiding principle, in order to score under the “exceeds” column a particular bid must add overall measurable benefit to the crown as a result of the proposal submitted for that requirement.¹² [Emphasis added]

In other words, the evaluators were given clear direction that, in carrying out the evaluation of bids in some areas (which were not identified), it was impossible to evaluate the bids at the “Exceeds Criteria” level. This is supported by Prudential’s evidence concerning the information that it received at its debriefing meeting.¹³ Prudential filed an affidavit sworn by an employee present at the meeting held on January 8, 2003, indicating that the evaluators were unable to give examples of how a bid could have been awarded “Exceeds Criteria” in some areas. PWGSC did not provide any evidence by its evaluators in this regard. In addition, Prudential raised this point in its letter of January 22, 2003, to PWGSC, but it was not addressed specifically in PWGSC’s response of February 28, 2003.

Consequently, the Tribunal is convinced by the evidence that points for “Exceeds Criteria” were not available in all areas, as specified in the RFP. Accordingly, the Tribunal finds this ground of complaint to be valid, in that the criteria that were to be used in the evaluation of the bids and the methods of weighting and evaluating the criteria to be used to assess the proposals were not clearly identified in the tender documents, as required by Article 506(6) of the *AIT*.

10. These sections were the same for the RCMP, CF and GOC.

11. GIR, Exhibit 9.

12. *Ibid.*

13. Affidavit of Ms. Debbie Allan, Complaint, Tab 2.

PWGSC has argued that the ground of complaint related to the evaluation methodology set out in the RFP should have been known to Prudential upon a review of the RFP, and that, therefore, Prudential's complaint was not filed within the time frame set by section 6 of the *Regulations*. Royal LePage has also argued that all grounds of complaint were filed outside the required timeframe. Prudential has argued that it was not raising a concern about the methodology described in the RFP, but rather questioning how that methodology had been applied in the evaluation of its proposals.

As discussed above, the Tribunal does not consider that this ground of complaint concerns the evaluation methodology, as set out in the RFP. Rather, it concerns the way in which that methodology was applied in evaluating the bids. The Tribunal notes that the evaluation grids and the information received from the evaluators at the debriefing meeting, as outlined above, did not form part of the RFP. The Tribunal also notes that the debriefing meeting was held on January 8, 2003, and that on January 22, 2003, Prudential forwarded a letter of objection to PWGSC. Prudential received its denial of relief on March 4, 2003 and filed its complaint with the Tribunal on March 17, 2003. Consequently, the Tribunal considers that this ground of complaint was filed within the time frame required by section 6 of the *Regulations*.

Prudential also argued that the service enhancements/options clause found in Part 2, section 5.0 of the RFP was incorrectly interpreted, resulting in Prudential being wrongly deprived of "Exceeds Criteria" ratings. Section 5.0 reads as follows:

5.0 OPTIONAL SERVICES or SERVICE ENHANCEMENTS

Bidders are reminded that their proposal will be evaluated in accordance with the Statements of Work (Annex A-1, A-2, and A-3) and the evaluation criteria set out in Annex C.

Should a Bidder feel they can offer optional services or service enhancements in addition to the services called for in the SOW's, the Bidder should provide a detailed description of any such optional service or enhancement ensuring that any such options are presented as a separate section of any proposal presented and identified as such. Option/enhancement pricing must also be shown as a separate item in the Financial Proposal presented.

During the evaluation period, the Bidder's proposal will only be assessed in accordance with Annex C. Once the lowest cost per point proposal is determined, any optional services or enhancements offered by the selected Bidder(s) will be evaluated for relevance and applicability to the program and the Crown reserves the right to negotiate with the selected Bidder(s) any or all offered options or enhancements. *Regulations*.

Specifically, Prudential alleged that PWGSC interpreted this section to mean that all service enhancements and options are excluded from consideration in the "Exceeds Criteria" category, that it is difficult to see how a bid could be considered to exceed criteria in any evaluation category unless it enhances the services beyond the criteria required by the RFP, and that the effective removal of the points theoretically available in the "Exceeds Criteria" category through the evaluation process completely changed the nature of the evaluation methodology from that set out in the RFP. However, while it is true that the RFP does not indicate how the "Exceeds Criteria" rating is supposed to mesh with the clause on enhancements/options, the Tribunal agrees with PWGSC's interpretation that to be evaluated at the "Exceeds Criteria" level, a feature must be relevant to the requirements being scored and add real value.

Evaluation of “Information Systems” Requirements

Prudential alleged that the “Information Systems” requirements of the RFP (section 2.1.1.5 of Part C2-1 of Annex C) were improperly evaluated, in that compatibility with the existing government technology platform was taken into account.

As submitted by both Prudential and PWGSC, the RFP does not require compatibility with the government technology platform. The question is whether, nonetheless, this factor was taken into account in the evaluation.

Prudential filed an affidavit from an employee who was present at the debriefing meeting held on January 8, 2003, which made the following statement concerning the discussion of this issue:

At this meeting, the Evaluators stated that the technology associated with information systems in Prudential’s bid proposals was not compatible with the government technology platform. Specifically, the Evaluators expressed their concern with respect to Prudential’s WAN [wide area network] technology, Prudential’s use of Lotus Notes in back office programming and Prudential’s proposed use of video conferencing technology.¹⁴

PWGSC did not provide any evidence by its evaluators in this regard.

Prudential raised this issue in its letter of January 22, 2003, to PWGSC, outlining comments from two evaluators who allegedly expressed concerns. However, this issue was not addressed specifically in PWGSC’s response of February 28, 2003.¹⁵

Comments on the individual evaluation grids¹⁶ of the two evaluators referred to by Prudential appear to support the contention that they were concerned about compatibility with government technology. The sheets that record the consensus results of the evaluation by the evaluation team as a whole (Consensus Evaluation Sheets) assess Prudential at “Meets Criteria” in this area and do not record any comments.¹⁷

The Tribunal does not accept PWGSC’s contention that the Consensus Evaluation Sheets show that any query by the evaluators on this issue was resolved appropriately. An examination of the Consensus Evaluation Sheets for Prudential, for the RFP as a whole, shows that they do not record comments for any area that was rated as “Meets Criteria”. Hence, the absence of comments in this particular area, in the Tribunal’s view, does not indicate whether the issue remained outstanding at the consensus evaluation stage. In addition, the Tribunal does not consider that the fact that Prudential was assessed at the “Meets Criteria” level indicates whether or not the evaluation was done appropriately. For example, it is possible that an appropriate evaluation would have yielded an assessment at the “Exceeds Criteria” level. Prudential received 70 percent for “Meets Criteria” instead of the 100 percent which would have been awarded in the event Prudential’s proposal was judged as “Exceeds Criteria”.

Based on the evidence, the Tribunal concludes that, in evaluating the “Information Systems” area, PWGSC did take into account compatibility with the existing government technology platform. Given that

14. Complaint, Tab 2 at 2, para. 8.

15. GIR, Exhibit 7.

16. GIR, Exhibit 3.

17. GIR, Exhibit 4.

this is a criterion not clearly identified in the tender documents, as required by Article 506(6) of the *AIT*, the Tribunal finds this ground of complaint to be valid.

Evaluation of Client Sample Files

Prudential has alleged that there is a bias in favour of the incumbent contractor with respect to the evaluation of actual relocation files. The Tribunal notes that Prudential did not give specifics as to how it considered the evaluation to be biased in favour of Royal LePage.

Prudential filed an affidavit from an employee who was present at the debriefing meeting held on January 8, 2003, which stated: "The Evaluators stated that the sample files submitted pursuant to the RFP were not complete and did not meet the "IRP Method" required by the Evaluators."¹⁸ Prudential raised the issue of client sample files in its letter to PWGSC dated January 22, 2003.

In its letter dated February 28, 2003, PWGSC responded as follows:

One of the key weak areas of the proposals submitted by Prudential was the sample files provided. Bidders were asked to provide sample files that represented a relocation from start to finish. The Crown is asking for services to include all facets of relocation, not just the sale and purchase of a property. In addition, the Statement of Work detailed at length the range of services the Crown is expecting to receive under this contract.¹⁹

The Consensus Evaluation Sheets contain comments concerning competitiveness, relevance and clarity in awarding Prudential only a "Meets Most of Criteria" score.²⁰

The comments on the worksheets of the individual evaluators were generally consistent with the comments on the Consensus Evaluation Sheets. PWGSC submitted that these comments on alleged shortcomings are based on standards that apply to the relocation industry in general and not merely to the IRP program.

Prudential did not allege that the comments by PWGSC were inaccurate or that they did not reflect industry standards. Rather, Prudential submitted that this requirement of the RSP should take into account the needs of the actual clients for which the sample files were created.

The Tribunal does not accept Prudential's submission that its client sample files should be assessed relative to the needs of Prudential's clients. The government is entitled to assess the sample files relative to government needs, as stipulated in the RFP.

The Tribunal also notes that the submission by Royal LePage that it submitted only sample files from non-government moves (i.e. non-IRP moves) and that all of its sample files received a score of "Meets Criteria" (rather than "Exceeds Criteria").

Based on the foregoing, the Tribunal is not convinced that there was a bias in favour of Royal LePage in evaluating the requirement for client sample files. Accordingly, the Tribunal finds this ground of complaint to be invalid.

18. Affidavit of Ms. Debbie Allan, Complaint, Tab 2.

19. GIR, Exhibit 7.

20. GIR at 22.

Reasonable Apprehension of Bias

Prudential submitted that the involvement of one of the evaluators in a legal dispute with Prudential implies that there was a reasonable apprehension of bias in the evaluation of its proposals. The facts, which were not in dispute, can be summarized as follows. One of the evaluators was involved in a lawsuit against Prudential in September 1997. The lawsuit arose as a result of this evaluator and his wife's participation in a former Guaranteed Home Sale Pilot program for members of the CF. Prudential managed the evaluator's relocation and found his home in need of repairs before he and his wife could be offered the full equity in the property. The dispute eventually resulted in a holdback of funds, and the evaluator and his wife took their claim to small claims court. A default judgement was awarded on November 14, 1997, in the amount of \$1,596 plus costs and interest. This judgement was paid on January 20, 1998, and on March 6, 1998, Prudential invoiced DND for the amount that it had paid under the default judgement. Subsequently, DND reimbursed Prudential for the amount. The Tribunal notes that Prudential did not allege that the situation gave rise to actual bias, but limited its allegation to reasonable apprehension of bias.

In *Cougar Aviation Ltd. v. Canada*,²¹ the Federal Court of Appeal found that, under the *AIT*, the Tribunal's jurisdiction was not limited to complaints of actual bias, but also included the adjudication of allegations of reasonable apprehension of bias. The test applied by the Tribunal in order to determine if the circumstances of this case give rise to a reasonable apprehension of bias is the one set out by de Grandpré, J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*, as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,²² which reads as follows:

[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly.²³

The Tribunal is of the view that the circumstances of this case do not disclose a reasonable apprehension of bias on the part of PWGSC. A significant amount of time has elapsed since the events that led to the dispute. Indeed, the matter took place in 1997. The Tribunal also considered the fact that the monetary amount involved was relatively small and, given that DND eventually paid the judgement, neither party to the dispute was ultimately out of pocket. Moreover, PWGSC submitted that the evaluator has had a good working relation with Prudential over the past six years. This was not contradicted by Prudential. In the Tribunal's view, these facts support a conclusion that any animosity that could have existed between the evaluator and Prudential has disappeared over time. Furthermore, any such animosity affected only one evaluator out of the seven members of the evaluation team.

In light of these considerations, the Tribunal, applying the test of an informed person viewing the matter realistically and practically, and having thought the matter through, does not consider it more likely than not that the evaluation would be conducted unfairly as a result of this situation. This ground of complaint is therefore not valid.

In recommending a remedy, the Tribunal is directed by subsection 30.15(3) of the *CITT Act*, which requires the Tribunal to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates. The Tribunal finds that the breach of Article 506(6) of the *AIT* is a serious deficiency in the procurement process and that the potential degree of prejudice to Prudential, other bidders and the integrity and efficiency of the competitive procurement system is sufficient to warrant a re-evaluation of the relevant portions of the proposals submitted. The Tribunal notes that this contract could be

21. *Cougar Aviation (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.).

22. *Bell Canada*, 2003 SCC 36.

23. [1978] 1 S.C.R. 369 at 394.

in effect for a total of seven years if the rights for its two option years are exercised. However, the evidence does not indicate that the parties did not act in good faith during the procurement process. Since the performance of the contract has already begun, the Tribunal will not recommend a termination of the contract to Royal LePage unless, as outlined below, the re-evaluation determines that the contract should have been awarded to another company.

As the complaint has been found to be valid in part and, therefore, success is divided, each party shall bear its own costs in these proceedings.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing and pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC re-evaluate, by September 10, 2003, the proposals for section 2.1.1.5 (Information Systems) of Parts C2-1, C2-2 and C2-3 of Annex C to the RFP, without taking into account whether the information systems proposed by the bidders are compatible with existing GOC technology.

The Tribunal further recommends that PWGSC re-evaluate, by September 10, 2003, the proposals for the remaining sections of Parts C2-1, C2-2 and C2-3 of Annex C to the RFP, which are subject to point ratings, in all cases where no bidder has been awarded points at the "Exceeds Criteria" level and on the basis that it should be possible for bidders to obtain the "Exceeds Criteria" level in all such sections of the RFP.

If, after the re-evaluations, the successful bidder for the CF IRP, the GOC IRP or the RCMP IRP is determined to be a party other than Royal LePage, the Tribunal further recommends that PWGSC award a new contract to the successful bidder no later than January 1, 2004.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V.M. Bradford
Meriel V.M. Bradford
Member