



Ottawa, Thursday, December 11, 2003

File No. PR-2003-037

IN THE MATTER OF a complaint filed by IT/net Ottawa Inc.
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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian
International Trade Tribunal awards the Department of Public Works and Government Services its
reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by IT/net
Ottawa Inc.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will be issued a later date.

Date of Determination: December 11, 2003
Date of Reasons: December 16, 2003

Tribunal Members: Richard Lafontaine, Presiding Member
Zdenek Kvarda, Member
Ellen Fry, Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: John Dodsworth

Complainant: IT/net Ottawa Inc.

Counsel for the Complainant: Gerry Stobo

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke
Ian McLeod



Ottawa, Tuesday, December 16, 2003

File No. PR-2003-037

IN THE MATTER OF a complaint filed by IT/net Ottawa Inc. 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 July 29, 2003, IT/net Ottawa Inc. (IT/net) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. V9750-020020/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Human Resources Development (HRDC). IT/net alleges that, contrary to the trade agreements, the specifications in the solicitation are overly restrictive and that the time allowed for submitting a proposal was too short.

Specifically, IT/net alleged that the requirement that bidders demonstrate an ability to access global expertise is contrary to both the *North American Free Trade Agreement*² and the *Agreement on Internal Trade*³ since these agreements require that a procurement not create unnecessary barriers to trade. IT/net further alleged that the unusually short time frame to respond to the Request for Proposal (RFP) made it impossible for bidders other than large firms with international affiliations to provide responsive bids. IT/net also submitted that the requirement that the bidder's experience and expertise with respect to large-scale business transformations include clients with over 10,000 employees is unnecessarily restrictive and unfairly discriminates against potential suppliers that can perform the work.

IT/net submitted that the appropriate remedy is to cancel the solicitation and issue a new one in a manner that is consistent with the trade agreements. According to IT/net, the effect of the breach of the trade agreements has prevented it and possibly other potential suppliers from submitting bids. IT/net further submitted that these facts amount to significant prejudice to the integrity and efficiency of the procurement system. Alternatively, IT/net requested that it be awarded compensation for lost opportunity. IT/net also requested its complaint costs associated with this matter.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 2. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
 3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

On August 1, 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*.⁴ On August 1, 2003, the Tribunal issued a postponement of award order, which was rescinded on August 26, 2003. Having been granted an extension of time by the Tribunal, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*⁵ on September 2, 2003. After having been granted an extension of time, IT/net filed its comments on the GIR on September 18, 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

On February 2, 2001, PWGSC issued four competitive requests for supply arrangements (RFSAs). In order to permit additional suppliers to qualify for supply arrangements (SAs), the four RFSAs were to be re-issued on an annual basis. The SAs were required as a procurement vehicle for the acquisition of Government On-Line (GOL) services and solutions for various departments and agencies of the federal government. The RFSAs were intended as a vehicle for government entities to obtain delivery of services required on an “as and when requested” basis for the implementation of the GOL initiative.⁶

The RFSAs had two stages. In stage 1, bidders were invited to submit proposals under any one or all of the three streams of services required to perform the work. These streams were Business Process and Content, Human Resources Management, and Informatics and Professional Services. If a bidder met the mandatory requirements of stage 1, it would be issued SAs that would allow it to perform the work in the streams for which it was qualified. For requirements valued at \$80,900 or less, government entities could simply select a qualified bidder or SA holder of their choice and issue a task authorization. For requirements over \$80,900, a competitive process had to be undertaken to select the required service providers. Only the SA holders qualified under the RFSAs would be eligible to compete for stage 2 contracts.

IT/net was one of the 56 firms that were issued SAs under the combination of the three streams. Accordingly, under the umbrella of the GOL SAs, an RFP was issued by PWGSC on behalf of HRDC for the conceptual development and detailed design of new business concepts for its Modernizing Services for Canadians (MSC) initiative.

On June 4, 2003, in advance of the issuance of the RFP, PWGSC issued a notice on the GOL procurement Web site regarding this procurement. This notice was also published on MERX⁷ one day later. On June 11, 2003, a Notice of Proposed Procurement (NPP) and an RFP were published on the GOL procurement Web site and on MERX. The initial closing date of June 30, 2003, was subsequently extended to July 14, 2003.

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

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

6. Complaint at 7, paras. 7, 8.

7. Canada's Electronic Tendering Service.

The RFP indicated that up to five contracts might be awarded and that no contract issued would exceed \$5 million. It contained a number of rated criteria and no mandatory criteria. In this regard, section 15 of the RFP, "Basis of Selection", reads as follows:

To be considered responsive, a bid must obtain a minimum of 70% in each of the following point rated criteria: 16.1, 16.2 and 16.3. Bids that do not obtain the minimum 70% as specified in this paragraph will not be given further consideration.

Points were to be awarded for each of the criteria as follows:

Experience and Expertise of the Firm	maximum	250 points
Understanding of the Requirement	maximum	200 points
Ability to Access Global Expertise	maximum	400 points
Financial Evaluation	maximum	<u>150 points</u>
Total	maximum	1,000 points

Relevant portions of sections 16.1 and 16.3 of the RFP, the criteria that are being challenged, read, in part, as follows:

16.1. Experience and Expertise of the Firm

Elements of Firm's experience in large scale business transformation (i.e. projects for a public and/or private sector clients providing large scale transactions and services in an integrated multi-channel network, dealing with a large and diverse clientele with a workforce of over 10,000 employees and a multitude of stakeholders from various jurisdictions and the private sector) projects in government and the private sector should be demonstrated.

16.3. Ability to Access Global Expertise

Elements of global expertise should be demonstrated by **providing sufficient details of the firm's current capability to access global expertise and the relationships that have been established to date with global experts.**

A bidders' conference, which was attended by 25 firms, including IT/net, was held on June 16, 2003. On June 24, 2003, IT/net wrote to PWGSC objecting to the requirements of the RFP at issue. Proposals from eight suppliers were received by the bid closing date. IT/net did not submit a proposal. PWGSC responded to IT/net's objection on July 15, 2003.

On July 29, 2003, IT/net filed its complaint with the Tribunal.

POSITIONS OF PARTIES

PWGSC's Position

PWGSC submitted that the RFP was and is for the conceptual development and detailed design of new business concepts for the MSC initiative and that it is not for code writing, information technology solutions or Web design. PWGSC further submitted that the relevant RFSA contemplated the award of numerous SAs to a wide variety of firms that provide a wide spectrum of services. PWGSC submitted that the RFSA contained minimum qualification requirements to permit as many firms as possible to meet the threshold requirements and was not designed to ensure that all SA holders would be qualified for all future work, regardless of scope. PWGSC submitted that this was the reason for which bidders that met the

minimum mandatory requirements for the award of an SA could be asked to satisfy additional rated evaluation criteria under an RFP issued against the RFSA.

PWGSC submitted that the additional rated criteria that could be included in RFPs issued against the RFSA were identified in the RFSA as follows:

- Approach and Methodology
- Project Plan
- Experience and Expertise of the Firm
- Experience and Expertise of Proposed Resources⁸

PWGSC further submitted that, once the specific requirements of this stage of the MSC initiative were known, the RFP properly included rated evaluation criteria for experience and expertise that were more exigent and which expanded upon the threshold requirements set out in the RFSA. PWGSC argued that the requirements of the RFP are consistent with the evaluation criteria identified in the RFSA, are unbiased, are clearly relevant to the purpose and scope of services under the RFP, and legitimately express HRDC's requirements that are essential to the fulfillment of the contract.

Referring to section 3.1 of the RFP,⁹ PWGSC submitted that the RFP makes it clear to bidders that the procurement is about further conceptual development of the MSC initiative and the design of business concepts that build upon the business plan under development and the proof of concepts conducted in the first year of the MSC initiative. PWGSC also submitted that section 4.1¹⁰ clearly sets out how the scope of services pertained to a continuation of the initial conceptual development and design of new business concepts.

According to PWGSC, IT/net mischaracterizes the nature and scope of the services required under this RFP and takes isolated provisions of the RFP out of context in support of its argument that the experience requirements of the RFP are more onerous than necessary to achieve the objectives of the RFP. PWGSC argued that, when these same provisions are read as a whole, it is clear that the scope of services most definitely relates to conceptual development and detailed design of business concepts and not to information technology programming or Web page design.

PWGSC submitted that the requirement for past experience outlined in paragraph 16.1a) of the RFP is relevant, reasonable, unbiased and consistent with the evaluation criteria provided in the RFSA. PWGSC further submitted that this requirement is a rated evaluation requirement for bidders to detail their past experience, within the last five years, as prime or one of the lead contractors in large-scale business transformation. PWGSC submitted that the RFP defines large-scale business transformation as projects for public- or private-sector organizations as follows:¹¹

8. GIR, Exhibit 10.

9. GIR, Exhibit 4 at 7.

10. *Ibid.* at 11.

11. *Ibid.* at 31.

- Provide large-scale transactions and services in an integrated multi-channel network
- Deal with a large and diverse clientele
- Have a work force of over 10,000 employees
- Have a multitude of stakeholders from various jurisdictions and the private sector

PWGSC argued that the definition of large-scale business transformation is reflective of the operational requirements of HRDC and that HRDC has a larger volume of transactions than any other government department and the greatest expenditures on programs and services of any department. PWGSC also argued that HRDC deals with a large and diverse clientele, including, but not limited to, pensioners, widows and widowers, unemployed persons, large and small employers, students and disabled persons, and that HRDC communicates with individuals living in Canada and around the world and provides benefits to them.

PWGSC submitted that HRDC's work force of more than 25,000 is almost three times higher than the requirement of the RFP for projects involving organizations with a work force of 10,000. PWGSC argued that the larger an organization, the more complex its operations. According to PWGSC, successfully achieving a business transformation in an organization of 5,000 employees does not demonstrate that such a transformation can be achieved with an organization the size and complexity of HRDC. PWGSC also submitted that the experience requirement found in paragraph 16.1a) of the RFP is essential to the fulfillment of HRDC's objectives under the MSC initiative generally and, specifically, under the scope of services of this RFP.

PWGSC submitted that the requirement found in section 16.3 of the RFP¹² to demonstrate a current ability to access global expertise is relevant, reasonable, unbiased and consistent with the evaluation criteria provided in the RFSA and that this requirement is a rated evaluation criterion for experience and expertise of the firm and proposed resources. PWGSC further submitted that the RFSA clearly contemplated that the rated evaluation criteria in an RFP issued against the RFSA would include requirements for experience and expertise with respect to both the firm and the proposed resources of the firm. According to PWGSC, a careful reading of the evaluation criteria in section 16.3, in the context of the RFP as a whole, demonstrates that the ability to access global expertise means the ability to access leading-edge thinking around the world, based upon tried and true experience of large-scale transformations that provide relevance to the MSC initiative.

PWGSC also submitted that section 16.3 of the RFP does not restrict the pool of bidders to large international firms and that the expertise may be within Canada and within the bidder's own firm. According to PWGSC, this was made clear at the bidders' conference, which was attended by IT/net and held approximately one month prior to bid closing. PWGSC argued that IT/net had ample opportunity to access global expertise or establish relationships with global experts, if such expertise did not exist within its own firm.

12. GIR, Exhibit 10 at 84-85.

Moreover, PWGSC submitted that any allegation by IT/net that the meaning of the rated requirement is “impenetrable” or otherwise unclear is untimely because no such allegation was contained in IT/net’s letter of objection dated June 24, 2003.¹³ PWGSC argued that the RFP was issued on June 11, 2003, the minutes of the bidders’ conference were published on June 20, 2003, and therefore, the time for filing an objection with respect to the clarity of the requirement in section 16.3 had long expired, pursuant to section 6 of the *Regulations*.

According to PWGSC, the requirement in section 16.3 of the RFP is expansive and not restrictive and does not contravene Article 1003(2) of *NAFTA*. PWGSC further argued that there is no requirement for Canadian ownership, foreign ownership or foreign affiliation, but rather that the requirement is for knowledge of a global nature and the capability to access this type of knowledge. Furthermore, PWGSC submitted that this knowledge may be demonstrated within the firm, locally or internationally.

PWGSC submitted that the time period for bidding complied with the RFSAs and the trade agreements. In support of this statement, PWGSC indicated that the RFSAs for which IT/net was awarded SAs was issued on February 2, 2003, and closed on April 17, 2003, and thus, that bidders were given a 74-day bidding period. In addition, PWGSC submitted that IT/net made no objection during the RFSAs procurement process with respect to the time frames prescribed in the RFSAs for RFP tendering. Thus, according to IT/net, the time period for filing a complaint with respect to the RFP bidding period prescribed in the RFSAs had expired, pursuant to section 6 of the *Regulations*.

According to PWGSC, the requirements of the RFP that are at issue are not of high complexity, and there is no requirement that bidders submit a proposal containing a business transformation plan for HRDC or a solution to a problem, requirement or objective. PWGSC submitted that the requirements of the RFP at issue are in respect of a bidder’s past experience and the expertise of proposed resources and that, therefore, the 33-day time period for bidding on this RFP was not only in complete conformity with the RFSAs but also exceeded the requirements of the RFSAs.

PWGSC also argued that the obligation is on the bidder to demonstrate compliance with the requirements of an RFP and that there is no obligation on the procuring entity to structure a procurement to provide a non-responsive bidder with the time to gain the requisite experience prior to bid closing. PWGSC further submitted that Article 1009(2)(d) of *NAFTA* and Article 504(3) of the *AIT* do not apply in the circumstances of this case.

PWGSC submitted that the point rating is fair and reasonable, and reflects the importance of the requirement. PWGSC further submitted that the Tribunal ought not to interfere with the expertise of PWGSC and HRDC with respect to the point rating assigned to a legitimate evaluation criterion, arguing that HRDC has the best perspective on the work. PWGSC also submitted that the Tribunal ought not to substitute the needs of a complainant for the expertise and legitimate requirements of a procuring entity.

PWGSC submitted that section 4 of the RFP, “Scope of Work”, does not represent a series of unrelated and isolated projects, but is part of a comprehensive business transformation plan intended to address the lack of integration, coherence and duplication of effort that underlie many of the increasing pressures faced by HRDC. PWGSC further argued that large-scale business transformations cannot be conceptualized and designed in a vacuum or in a piecemeal fashion, or by splitting requirements, as

13. GIR, Exhibit 6.

suggested by IT/net. According to PWGSC, all different aspects of the conceptual development and design services are interconnected and must be tied together as a whole.

PWGSC submitted that HRDC is under no obligation to compromise its legitimate operational requirements in order to accommodate IT/net's particular circumstances. PWGSC argued that IT/net's position that the requirements of the RFP ought to be split to enable it to bid on work that may not require the capability to access global expertise or relationships with global experts has no merit and should be dismissed.

PWGSC submitted that IT/net's complaint should be dismissed and requested that the Crown be awarded its costs.

IT/net's Position

IT/net submitted that the government was bound by the rules for procurement set out in the RFSA for all stage 2 procurement processes, including the rule that no new evaluation criteria be added in any stage 2 procurement process. IT/net further submitted that, despite this rule, the government added a new evaluation criterion, as found at section 16.3 of the RFP, "Ability to Access Global Expertise".

IT/net submitted that the government had the option to conduct a tendering process outside the framework of the RFSA and include whatever evaluation criteria that it felt appropriate and relevant. According to IT/net, by introducing an unauthorized evaluation criterion, the government has acted unfairly and in a manner inconsistent with both *NAFTA* and the *AIT*. IT/net also submitted that, if the Tribunal finds that the criterion found in section 16.3 of the RFP is permissible, the RFP still contravenes the trade agreements because the criterion is either not essential to ensure the fulfillment of the contract or biased, given that the weight that it was given in the evaluation grid is disproportionate to its relevance.

IT/net submitted that the RFSA defines "Experience and Expertise of the Proposed Resources" very similarly to paragraph 16.1b) of the RFP, where bidders were directed to provide "details of overall expertise and quality of proposed team . . . (including resumes)". According to IT/net, not requiring résumés under section 16.3 directly conflicts with the mandatory requirement of the RFSA that they be included in the criterion "Experience and Expertise of the Proposed Resources".

IT/net further submitted that, despite claims to the contrary, it is very clear that the criterion "Ability to Access Global Expertise" is not part of the "proposed resources" criterion and is, therefore, not authorized under the RFSA. IT/net also stated that, in addition to contravening the articles of the trade agreements referred to in the complaint, this unauthorized evaluation criterion also contravenes Article 506(6) of the *AIT*, which provides that a procuring entity may take into account "the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504." According to IT/net, section 16.3 of the RFP is inconsistent with the non-discrimination provisions in Article 504 of the *AIT* because it is not directly related to the procurement or is so disproportionate in weight (given its relevance) that it unfairly discriminates against suppliers, such as IT/net, that are able to perform the work. IT/net submitted that this criterion will favour incumbents that are now performing the work, since they are all large internationally affiliated consulting firms that have, by virtue of their affiliations, an unfair advantage of SA holders that are domestically centered. IT/net pointed out that the maximum points allocated for the individuals who will actually be performing services (paragraph 16.1b)) are 90 compared with 400 for the global expertise criterion. IT/net submitted that it is difficult to understand how the requirements and weighting of the criterion outlined in section 16.3 of the

RFP are not substantially more onerous than necessary and the extraordinary weighting given to this criterion can only be explained on the basis that it is biased towards large firms that have international relationships in place.

IT/net further submitted that the RFP requires the services of a number of “skill sets” or job positions, which include applications analysts, programmer analysts, senior Web developers and Web graphics content consultants, and that there is no other way to read the RFP other than to conclude that it is the workers, and not just the firms that win contracts under the RFP, who will be required to communicate with the global experts whenever necessary. Consequently, it will be the code writers or Web designers who will be communicating from time to time with the experts. IT/net submitted that requiring all those workers to have access to global expertise is not essential to the fulfillment of the contract. IT/net also submitted that any firm other than large internationally affiliated firms will simply not be able to meet the 70 percent minimum score for section 16.3 of the RFP.

IT/net further submitted that the requirement that the bidders have experience in transformation in organizations with a work force exceeding 10,000 is arbitrary and improper, and that setting this threshold unfairly discriminates against bidders that can demonstrate an ability to do large-scale transformations by reference to experience that they have gained in organizations with less than 10,000 employees.

IT/net further submitted that there is nothing in the trade agreements that prevents the government from giving the appropriate weight in the evaluation criteria for bidders with successful experience in business transformations in larger organizations. According to IT/net, the trade agreements do not permit criteria that exclude bidders that may be able to perform the work, by establishing requirements that create trade restrictive obstacles. IT/net submitted that what is important is whether the bidders have the ability to perform the services required, not the number of employees of its clients. IT/net submitted that defining “large-scale business transformations” as organizations with a work force exceeding 10,000 unfairly discriminates against bidders that have identified the necessary skill set and experience to address the eight areas identified in the RFP.

IT/net also submitted that it had been retained by various departments within the Government of Canada on several significant projects, including projects with the Department of National Defence and HRDC, and that its experience was directly relevant to the services required by the RFP. But for the requirements and qualifications of sections 16.1 and 16.3 of the RFP, IT/net submitted that it could have competed for this contract.

IT/net submitted that the trade agreements require that government entities provide potential suppliers with reasonable time to submit a bid and that to offer a time frame that is unrealistically short unfairly discriminates against some potential suppliers. According to IT/net, the fact that there were 56 SA holders that could have bid for all or part of the contracts, with only 8 that provided a response, is indicative of the short time frames allowed for submitting a bid. IT/net closed by stating that, should the Tribunal rule that this complaint is not valid, it should still be awarded its costs.

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.

Article 1003 of *NAFTA* provides, in part, as follows:

2. With respect to measures covered by this Chapter, no Party may:
 - (a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership.

Article 1008 of *NAFTA* provides, in part, as follows:

1. Each Party shall ensure that the tendering procedures of its entities are:
 - (a) applied in a non-discriminatory manner.

Article 1009 of *NAFTA* provides, in part, as follows:

2. The qualification procedures followed by an entity shall be consistent with the following:
 - (b) conditions for participation by suppliers in tendering procedures . . . shall be limited to those that are essential to ensure the fulfillment of the contract in question;
 - (d) an entity shall not misuse the process of, including the time required for, qualification in order to exclude suppliers of another Party from a suppliers' list or being considered for a particular procurement.

Article 504 of the *AIT* provides, in part, as follows:

2. With respect to the Federal Government, . . . it shall not discriminate:
 - (a) between the goods or services of a particular Province or region . . . and those of any other province or region; or
 - (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.
3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:
 - (c) the timing of events in the tender process so as to prevent suppliers from submitting bids.

Article 506 of the *AIT* provides, in part, as follows:

6. In evaluating tenders, a Party may take into account . . . any . . . criteria directly related to the procurement that are consistent with Article 504.

IT/net claims that the requirements set out in sections 16.1, "Experience and Expertise of the Firm", and 16.3, "Ability to Access Global Expertise", of the RFP were not justified and that the time frame to submit a bid under the RFP was too short.

IT/net submits that the criterion found in section 16.1 of the RFP, stipulating that bidders have experience in business transformation with organizations having a work force of over 10,000 employees and a multitude of stakeholders from various jurisdictions and the private sector, is not justified by any legitimate operational requirement. IT/net claims that the definition of a large-scale business transformation is overly restrictive and that the size of the organization contemplated by section 16.1 is an irrelevant

requirement for the services to be performed. According to IT/net, an employee, such as a programmer analyst, who has worked in an organization of 100 people will have the same skill set as someone who has worked for an organization of 10,000 people. The Tribunal understands IT/net's argument to mean that there is no difference in experience gained when providing a service to a small or very large organization.

The Tribunal does not agree. The Tribunal observes that HRDC is a large department with complex operations, a large volume of transactions, a wide scope of programs, and a large and diverse clientele in Canada and around the world. Based on the evidence before it with respect to the criterion outlined in section 16.1, the Tribunal is not satisfied that this criterion is irrelevant, unreasonable or biased in favour of large internationally affiliated companies, as alleged by IT/net. The Tribunal also notes that, although HRDC is an organization of over 25,000 employees,¹⁴ it required experience relating to organizations having a significantly smaller number (10,000 or more) employees. Therefore, the Tribunal finds that this ground of complaint is not valid.

IT/net further submits that PWGSC added a new evaluation criterion in section 16.3 of the RFP, contrary to the provisions of the RFSA that stipulated that no new evaluation criteria would be added in any stage 2 procurement process. In the alternative, IT/net submits that this criterion is not essential to ensure the fulfillment of the contract or, if essential, that it is biased in favour of large internationally affiliated firms because the weight accorded to it is out of proportion to its relevance. Moreover, IT/net submits that the time frames provided in the RFP were so short that no company other than large firms that are already internationally affiliated could possibly have been responsive to the qualification.

IT/net claims that the criterion relating to the ability to access global expertise outlined in section 16.3 of the RFP is a new criterion not authorized by the RFSA. IT/net submits that, at paragraph 21 of the introduction and summary of the GIR, PWGSC claims that the capability to access global expertise is part of the "Experience and Expertise of the Proposed Resources" criterion contemplated by the RFSA. IT/net further submits that to meet this criterion the RFSA requires bidders to provide the résumés of the proposed resources. IT/net contends that answer C11¹⁵ indicates that, under section 16.3, bidders are not requested to provide résumés at the RFP stage. Accordingly, IT/net argues, the criterion outlined in section 16.3 is fundamentally different from that which was contemplated for the "Experience and Expertise of the Proposed Resources" criterion and is therefore not authorized pursuant to the RFSA.

The RFSA sets out procedures required to be followed in RFPs for contracts issued against the SAs at stage 2, such as the one at issue. Subparagraph D.2.iii of Annex "A" to Part "B" of the RFSA provides, in part, that:

Combinations of the following point rated evaluation criteria . . . can be used.

Experience and Expertise of the Firm

In this section, details should be provided regarding the relevant experience and expertise of the firm in relation to the requirement.

The above experience must be clearly identified by providing a summary/description of the previous projects worked on, and indicating when the work was carried out, the dollar value and the client.

Experience in excess of the mandatory requirements will also be point rated.

14. As at the date of the GIR.

15. Amendment No. 001 to the RFP, 20 June 2003.

Experience and Expertise of the Proposed Resources

In this section, details should be provided regarding the qualifications, relevant experience and expertise, and linguistic capabilities, if applicable, of the proposed personnel.

The experience of the proposed resources must be clearly identified by providing a summary/description of the previous projects worked on, and indicating when the work was carried out, the dollar value and the client.

Curriculum vitae of the proposed resources must be provided. Experience in excess of the mandatory requirements will also be point rated.

Question 49 found in amendment No. 5 to the RFSA¹⁶ reads as follows:

At Stage 2, can additional evaluation criteria can be added to the one already specified in the RFSA.

Answer 49 found in amendment No. 5 to the RFSA provided that:

At Stage 2, no additional evaluation criteria can be added to the one already specified in the RFSA.

The issue is whether the “Ability to Access Global Expertise” evaluation criterion in the RFP constitutes part of either the “Experience and Expertise of the Proposed Resources” (i.e. the individuals to be assigned to the contracts) or part of the “Experience and Expertise of the Firm” as a whole, as described in subparagraph D.2.iii of Annex “A” to Part “B” of the RFSA, or whether it is a new evaluation criterion.

The Tribunal observes that, while IT/net mentioned paragraph 21 of the introduction and summary of the GIR, which claims that the capability to access global expertise is part of the experience and expertise of the proposed resources, it failed to also mention paragraph 17 of the same section of the GIR, which states that the requirement outlined in section 16.3 of the RFP “is to detail a **firm**’s capability ‘to access’ global expertise” [emphasis added] and that the “requirement is necessary to demonstrate a bidder’s capability to access the type of knowledge and leading edge thinking from around the world”. The Tribunal notes, in this regard, that section 4.2 of the RFP, “Services required”, stipulates that the work under the resulting contracts will require the contractor (i.e. the firm) to provide certain types of expertise, including the ability to access and leverage global expertise and practices. In light of section 4.2 of the RFP and the plain meaning of the phrase “experience and expertise of the firm” referred to in subparagraph D.2.iii of Annex “A” to Part “B” of the RFSA, the Tribunal is of the view that the phrase can be reasonably interpreted to encompass this type of expertise (the ability to access global expertise).

As to whether the “Ability to Access Global Expertise” criterion is meant to be part of the “Experience and Expertise of the Firm” criterion or part of the “Experience and Expertise of the Proposed Resources” criterion, the Tribunal considers that the wording of the RFP indicates clearly that this is a criterion that is intended to be part of the former requirement. For example, the RFP indicates, in part, as follows:

Elements of global expertise should be demonstrated by **providing sufficient details of *the firm’s current capability to access global expertise and the relationships that have been established to date with global experts*** in the following areas of expertise. [Emphasis in italics added]¹⁷

16. 21 March 2001.

17. RFP at 34

Maximum of 50 points will be awarded for each area of expertise demonstrating *the firm's* access to global reach in leading edge thinking and design. The evaluation will be based on the following grid:

- 36 to 50 points – Firm demonstrated extensive capacity to access resources with global reach, representing leading edge thinking and design.
- 26 to 35 points – Firm demonstrated a very good capacity to access resources with global expertise.
- 13 to 25 points – Firm demonstrated access to global resources in some major areas.
- 1 to 12 points – Firm lack access to global resources in major areas.
- 0 points – Proposal fails to demonstrate any access to global reach.¹⁸

[Emphasis added]

Consequently, no résumé would be required in order to meet the RFSA criterion, as résumés are only required by the RFSA for “Experience and Expertise of the Proposed Resources”.

Therefore, the Tribunal considers that the criterion outlined in section 16.3 of the RFP is part of “Experience and Expertise of the Firm” as contemplated by the RFSA and, hence, is a criterion that is permissible under the RFSA.

IT/net claims that the criterion outlined in section 16.3 of the RFP is not essential to ensure the fulfillment of the contract. In this respect, IT/net has not convinced the Tribunal that the ability to access global expertise is not relevant to HRDC's requirement. When describing a client department's need, PWGSC is entitled to stipulate legitimate operational requirements in any manner that is consistent with the applicable trade agreements. The Tribunal further notes that IT/net does not disagree with the requirement that bidders demonstrate an ability to provide first-class, leading-edge services. IT/net also submitted that this could include a requirement that bidders be able to tap into ideas and solutions from around the globe.

IT/net alleges that the weighting accorded to the criterion outlined in section 16.3 of the RFP, which, in its view, is substantially more onerous than necessary, is evidence that PWGSC intended a bias towards large internationally affiliated firms such as those that were awarded contracts under phase 1 of the MSC initiative. The Tribunal accepts PWGSC's contention that the required “ability to access global expertise” may exist through mechanisms such as liaisons with academic institutions or industry associations, or may be incorporated through informal consulting networks or through more formal subcontracting arrangements. The Tribunal also notes that, by way of answer C18,¹⁹ PWGSC indicated that the expertise may well be available within the firm itself. In other words, although it is probable that large internationally affiliated firms would be well positioned to respond to this criterion, other types of firms could be equally well placed. In light of the foregoing and based on the evidence before it, the Tribunal is not satisfied that IT/net has demonstrated that PWGSC created a bias in the RFP in favour of large, internationally affiliated firms by weighting the criterion outlined in section 16.3 in the manner that it did.

Moreover, the Tribunal is of the opinion that Article 1003(2) of *NAFTA* does not apply, as it is intended to avoid the preferential treatment of certain locally established suppliers based on degree of foreign affiliation or ownership. In this instance, neither foreign ownership nor affiliation is necessarily required to satisfy the criterion.

18. *Ibid.* at 35.

19. Amendment No. 001 to the RFP, 20 June 2003.

IT/net further claims that the time allotted to submit a bid was too short and that the time extension granted midway through the bidding process was a meaningless gesture. The Tribunal notes that the time frames for submitting proposals are included in Section D of Annex "A" to Part "B" of the RFSA, were to be determined according to complexity level, and were allowed to be extended. This information reads, in part, as follows:

As indicated in the RFP, the SA Holder shall submit a proposal within a time frame detailed below, determined in accordance with the following criteria

Complexity Level	Time Period Bids Open
Low complexity (supply of resources only no methodology required; simple evaluation process)	15 calendar days
Medium to high complexity (suppliers are invited to propose a solution to a problem, requirement or objective, detailed proposals are required with complex evaluation)	20 calendar days-medium 25 calendar days-complex

The above time limits for bidding may be extended based on the complexity of the requirement.

The Tribunal is of the view that IT/net failed to demonstrate that PWGSC did not comply with these time frames in establishing the bidding period. The Tribunal notes that IT/net claims that PWGSC refused a time extension on June 20, 2003;²⁰ however, it also notes that PWGSC revised its position on June 27, 2003,²¹ thus extending the closing date by an additional two weeks. Taking this extension into account, the bidding period, in total, significantly exceeded the requirements of the RFSA for any complexity level. Furthermore, while the trade agreements establish general rules respecting the time to submit a bid, the Tribunal notes that, in this case, the specific time frames established in the RFSA govern the RFP. Had those time frames been a concern to those competing for an SA, in light of the relevant provisions of the trade agreements, that concern should have been raised at that time. Consequently, the Tribunal is of the view that PWGSC has not contravened Article 1009(2)(d) of *NAFTA* or Article 504(3)(c) of the *AIT*.

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

Pursuant to its request, the Tribunal awards PWGSC its reasonable costs incurred in preparing its response to the complaint.

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 not valid.

20. Amendment No. 001 to the RFP, 20 June 2003.

21. Amendment No. 004 to the RFP, 20 June 2003.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by IT/net.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member