



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-014

J. Molson & Associates

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, August 24, 2004*

*Corrigendum issued
Wednesday, November 17, 2004*

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IN THE MATTER OF a complaint filed by J. Molson & Associates 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*.

BETWEEN

J. MOLSON & ASSOCIATES

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

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.

The Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services complete the actions proposed as a result of its internal investigation, namely, to terminate the contract awarded to SSG Southside Solutions Group Inc. and to re-tender the requirement, using an independent fairness monitor to ensure that the results are impartially determined.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards J. Molson & Associates \$2,000 as reasonable costs incurred in preparing and submitting its proposal in response to the solicitation, which costs are to be paid by the Department of Public Works and Government Services.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards J. Molson & Associates its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Member:	Richard Lafontaine, Presiding Member
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Complainant:	J. Molson & Associates
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STATEMENT OF REASONS

COMPLAINT

1. On June 1, 2004, J. Molson & Associates (Molson) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. EN608-033148/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Compensation Sector of PWGSC, for professional services.

2. Molson alleged that an evaluator who assisted PWGSC with the evaluation of the bids improperly evaluated its proposal. Specifically, it alleged that the evaluator: (1) improperly applied the evaluation criteria; (2) improperly rejected the qualifications of Molson's proposed resource; and (3) was a contract employee of the company that won the contract for which Molson was bidding. Molson also alleged that the winning company, SSG Southside Solutions Group Inc. (SSG), was afforded preferential treatment because its owner is the spouse of an assistant deputy minister (ADM) within PWGSC whose organization would have to work with the winner of the contract in question.

3. Molson requested, as a remedy, that PWGSC cancel the contract awarded to SSG and re-tender the requirement or award Molson a contract in the same dollar amount as the SSG contract. It further requested that PWGSC provide it with a written apology for incorrectly accusing it, through statements and innuendo in the evaluation report, of providing false information in its proposal.

4. On June 7, 2004, 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 June 23, 2004, Molson submitted two editorial corrections to the complaint, which were sent to PWGSC on the same day. On June 29, 2004, SSG requested, and was granted, intervener status by the Tribunal. On July 5, 2004, PWGSC submitted a letter in lieu of a Government Institution Report (GIR) to the Tribunal. On July 15, 2004, SSG submitted its comments on the letter in lieu of the GIR. On July 16, 2004, Molson submitted confidential comments on the letter in lieu of the GIR. On July 19, 2004, Molson submitted a public version of its comments on the letter in lieu of the GIR. On July 21, 2004, Molson submitted its comments on SSG's submission. On July 27, 2004, PWGSC requested permission to submit a response to Molson's comments of July 16, 2004, and did so. On August 2, 2004, Molson submitted its comments on PWGSC's response.

5. 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

6. The Request for Proposal (RFP) was published on MERX³ on December 24, 2004, with a closing date for the receipt of bids of February 4, 2004.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Canada's electronic tendering service.

7. The RFP identified six resource categories of required services. Bidders were permitted to bid on one or more of the categories. Molson submitted a proposal with respect to the “Project Manager” category only.

8. According to PWGSC, 24 proposals were received, which covered 68 proposed resources for all 6 categories. On February 9, 2004, the proposals were submitted to PWGSC’s Compensation Sector for its technical review. The final results of the review were provided to the contracting officer of PWGSC’s Acquisitions Branch on April 4, 2004.

9. On May 6, 2004, PWGSC notified Molson that it had not won the contract, as a more favourable offer had been received in the “Project Manager” resource category. On May 11, 2004, PWGSC faxed a copy of its evaluation report of Molson’s bid to Molson. The report indicated that Molson’s proposal had failed to meet three of the mandatory criteria, specifically, criteria 2.1.1.2, 2.1.1.3 and 2.1.1.4.

10. Annex D to the RFP identified the mandatory criteria for each resource category. It read in part as follows:

2.1 Project Manager

2.1.1 Mandatory Criteria

Mandatory Requirements PROJECT MANAGER		Met	Not Met
2.1.1.1	A minimum of five (5) years experience in pay and pension systems and processes used by government departments or government agencies.		
2.1.1.2	A minimum of five (5) years experience in supervising and managing business, functional and testing team members.		
2.1.1.3	A minimum of five (5) years experience in managing a project through all phases of the project life cycle.		
2.1.1.4	A minimum of five (5) years experience in the development and maintenance of project plans, covering all phases such as implementation, testing strategies and resource plans.		
2.1.1.5	A minimum of five (5) years experience in using and applying system development life cycle processes, such as Systems Development Methodology DMR’s Productivity Plus (+).		
2.1.1.6	A minimum of three (3) years experience in preparing reports for management, such as status reports and project monitoring reports.		

11. On May 11, 2004, after receipt of the evaluation report, Molson spoke with the PWSGC contracting officer and determined that one of PWGSC’s evaluators had been the only person to review its submission. A debriefing was held on May 26, 2004, at which time the evaluator confirmed that she was working with SSG.

12. Molson submitted its complaint to the Tribunal on June 1, 2004.

POSITIONS OF THE PARTIES

PWGSC’s Position

13. PWGSC submitted that, as a result of its investigation into the circumstances of this solicitation, the “Project Manager” contract would be terminated and re-tendered. It submitted that the new tendering

process will use a new evaluation panel and an independent fairness monitor. It submitted that none of the records or results of the previous evaluation process will be available to the new evaluation team or play any role in the re-tendering process.

14. PWGSC submitted that, until the debriefing of May 26, 2004, the contracting officer was not aware that the Compensation Sector's evaluation team included a contractor who worked for SSG. It submitted that the contracting officer was aware that the individual was a contracted resource, but believed her to be independent and not affiliated with any specific company.

15. PWGSC submitted that, once this discovery was made, it immediately launched an investigation and that senior procurement officials issued directions that no further task authorizations were to be issued under the subject contract or either of the other two contracts that SSG was awarded under the solicitation. PWGSC submitted that, on June 3, 2004, four days before receiving notice from the Tribunal that it was going to conduct an inquiry, the ADM of the Acquisitions Branch of PWGSC provided direction to initiate the process of terminating the three contracts awarded to SSG, including the one that is the subject of this complaint.

16. PWGSC submitted that the principal of SSG is the spouse of the ADM of PWGSC's Information Technology Services Branch (ITSB); however, the services in question were being contracted by the Acquisitions Branch on behalf of the Compensation Sector. It submitted that the ITSB was not involved in the drafting of the solicitation documents or the evaluation of Molson's proposal and that the ADM played no role and had no influence in the conduct of the subject procurement.

17. PWGSC submitted that it is important for the Tribunal to note that, upon being alerted to the facts and investigating them, senior PWGSC procurement officials acted swiftly to initiate the process of termination and to commence the re-tendering process for the three contracts awarded to SSG. It therefore submitted that the Tribunal should recommend that it complete the termination process and implement the above described re-evaluation process.

SSG's Position

18. SSG submitted that the evaluator in question is a self-employed independent consultant and not an employee of SSG. It submitted that she is a subcontractor with SSG currently providing services to PWGSC through a contract held by SSG. It further submitted that the statement of work under which she is working does not allow her to participate in any aspect of the procurement process for contract resources. SSG submitted that PWGSC's Compensation Sector and the evaluator acted independently of SSG in undertaking activities relating to this solicitation. It submitted that it was never, at any time, privy to any information relating to this solicitation other than information that was made available to all potential bidders.

19. SSG submitted that the relationship between the principal owner of SSG and the ADM of the ITSB was formally disclosed to PWGSC prior to the ADM's appointment in December 2003. It submitted that it has ensured that no conflict of interest exists in its business dealings with PWGSC. SSG also requested that the Tribunal strike from its record any inference that influence by senior departmental management played any part in the success of the SSG bid.

20. SSG submitted that its participation in the subject solicitation was done in good faith without knowledge of its subcontractor's participation. SSG submitted that it won the three contracts based on the qualifications and experience of the resources that it proposed. It submitted that it agreed with PWGSC's

proposed remedy, as it has a responsibility for the conduct and actions of its subcontractors, even though the evaluator in question and PWGSC's Compensation Sector were acting on their own.

Molson's Position

21. Molson submitted that it was pleased that PWGSC would be re-tendering the requirement under the direction of a fairness monitor. It reiterated that it be compensated for the costs that it incurred in preparing its proposal, as well as in proceeding with the complaint case before the Tribunal. It submitted that these costs total \$12,149.51. In addition, it requested any damages that the Tribunal might deem appropriate.

TRIBUNAL'S DECISION

22. 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 case are the *Agreement on Internal Trade*,⁴ the *North American Free Trade Agreement*⁵ and the *Agreement on Government Procurement*.⁶

23. Notably, Article 1008(1) of *NAFTA* reads in part as follows:

Each Party shall ensure that the tendering procedures of its entities are:

(a) applied in a non-discriminatory manner.

24. Molson alleges that PWGSC improperly evaluated its proposal and demonstrated preferential treatment towards another bidder.

25. The Tribunal agrees with PWGSC's view that the participation, on the technical evaluation team, of a person associated with one of the bidders was not appropriate. The Tribunal therefore finds that PWGSC did not ensure that the tendering procedures were applied in a non-discriminatory manner, as required by Articles 501 and 504 of the *AIT*, Article 1008(1) of *NAFTA* and Article VII of the *AGP*. On this basis alone, the Tribunal determines that the complaint is valid.

26. The Tribunal accepts PWGSC's uncontested statement that the ADM of the ITSB, the spouse of SSG's principal, had no involvement in this procurement. The Tribunal will not strike from the record any allegation with respect to the ADM as, in the Tribunal's view, these were not made in bad faith and were properly addressed by PWGSC.

27. In addition, the Tribunal accepts SSG's uncontested statement that the participation of its subcontractor as an evaluator for the subject procurement was done without its knowledge or consent.

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

5. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

28. The Tribunal further notes PWGSC's statement that, following the debriefing of May 26, 2004, its procurement officials acted swiftly to initiate the process of terminating and re-tendering the subject contract. In this connection, a note to file⁷ by the evaluator indicates that, on April 26, 2004, she had called and advised the contracting officer that she was a contractor with SSG and that, while she had not evaluated any bids from SSG, she had evaluated other bids for the RFP. However, the contracting officer was unable to recall, confirm or deny the telephone discussion in question. In any event, the Compensation Sector ought to have known that the evaluator was working with SSG when it appointed her to the evaluation team and that she should not have been so appointed for this reason. Had PWGSC's Acquisitions Branch been reasonably diligent in the circumstances, this very real conflict of interest would have likely been discovered.

29. In light of the foregoing, the Tribunal recommends that PWGSC complete the course of action initiated with respect to the subject contract.

30. The Tribunal awards Molson the reasonable costs that it incurred in preparing a response to the solicitation for the contract. The Tribunal notes that Molson has submitted a breakdown of the costs that it incurred in preparing its proposal.⁸ However, the Tribunal notes that the rates listed are the rates that it charges its clients. The Tribunal's *Procurement Cost Guidelines* list, in Appendix B, allowable in-house fees for a representative in a complaint case at \$400 per day. The Tribunal is of the view that such an amount would be reasonable in this case as well and therefore awards Molson its bid preparation costs for five days' work in the amount of \$2,000.

31. The Tribunal awards Molson its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*. The Tribunal's preliminary view is that this complaint case has a level of complexity that corresponds to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The *Guideline* contemplates classification of the level of complexity of complaint cases based on the following three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. The complexity of the procurement itself was medium, as it involved a defined service project. The complexity of the complaint was low, in that the basic facts were simple. Finally, the complexity of the proceedings was also low, as the respondent effectively acknowledged the validity of the complaint, there was only a single intervener, there were no motions, and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

32. Molson requested, as part of the remedy, a written apology from PWGSC for disparaging its abilities. The Tribunal did not see any evidence to support such disparagement and therefore will not make this recommendation.

DETERMINATION OF THE TRIBUNAL

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

34. The Tribunal recommends, as a remedy, that PWGSC complete the actions proposed as a result of its internal investigation, namely, to terminate the contract awarded to SSG and to re-tender the requirement, using an independent fairness monitor to ensure that the results are impartially determined.

7. Letter in lieu of the GIR, Exhibit 4.

8. Molson facsimile dated July 16, 2004, at 3.

35. Pursuant to subsection 30.15(4) of the *CITT Act*, the Tribunal awards Molson \$2,000 as reasonable costs incurred in preparing and submitting its proposal in response to the solicitation, which costs are to be paid by PWGSC.

36. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Molson its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal as contemplated by its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Richard Lafontaine
Richard Lafontaine
Presiding Member

IN THE MATTER OF a complaint filed by J. Molson & Associates 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*.

BETWEEN

J. MOLSON & ASSOCIATES

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

STATEMENT OF REASONS

CORRIGENDUM

Paragraph 6 of the Statement of Reasons issued on Tuesday, August 24, 2004, should read: "The Request for Proposal (RFP) was published on MERX on December 24, 2003, with a closing date for the receipt of bids of February 4, 2004."

By order of the Tribunal,

Hélène Nadeau
Secretary