



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-038

TireeRankinJV

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, January 27, 2005*

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IN THE MATTER OF a complaint filed by TireeRankinJV 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

TIREERANKINJV

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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards TireeRankinJV 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On October 29, 2004, TireeRankinJV 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. EN309-03C012/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Real Property Branch of PWGSC, of real property consulting, advisory and project delivery services.

2. TireeRankinJV alleged that PWGSC improperly rejected its proposal. Specifically, it alleged that PWGSC: (1) did not provide it with pertinent information concerning the reasons for not selecting its proposal nor with the relevant characteristics and advantages of the winning tenders, including the total amount or scores of the winning tenders; (2) improperly awarded a standing offer to a bidder whose price was abnormally low and did not ensure that the winning bidders were capable of fulfilling the terms of the contract; and (3) did not provide adequate tender documentation, as the criteria published in the Request for a Standing Offer (RFSO) were not used in the evaluation, nor were they sufficiently developed to ensure complete and fair consideration of the bids.

3. TireeRankinJV requested, as a remedy, that PWGSC issue a new solicitation and that it follow a more rigorous bid evaluation process during this new solicitation. It further requested the reimbursement of \$40,000 to cover the costs that it had incurred in preparing its bid and of \$7,500 to cover the costs that it had incurred in preparing its complaint to the Tribunal.

4. On November 8, 2004, the Tribunal informed the parties that the complaint had been accepted, 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 The complaint was accepted on only the first ground noted above, that is, PWGSC's purportedly inadequate debriefing and the non-disclosure of the relevant characteristics and advantages of the successful tenders. With respect to the other grounds of complaint, the Tribunal determined first, that the complaint did not contain any evidence that PWGSC had improperly awarded a standing offer and, second, that it did not have jurisdiction to consider the ground of the complaint relating to the tender documentation, as it had been submitted beyond the 10-working-day time limit established by subsection 6(1) of the *Regulations*. On December 3, 2004, PWGSC submitted a Government Institution Report (GIR) to the Tribunal. On December 16, 2004, TireeRankinJV submitted its comments on the GIR.

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 RFSO was published on MERX³ on May 7, 2004, with a closing date for the receipt of bids of June 21, 2004, which was subsequently extended to July 5, 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 RFSO required that the successful bidder be able to provide the project management directorate of PWGSC's Real Property Branch with consulting, advisory and project management services. Tiree and X.G. Rankin Project Management Inc., as a joint venture, submitted a proposal to PWGSC on July 5, 2004.

8. According to PWGSC, 14 proposals were received, 1 of which did not meet the mandatory requirements and received no consideration by the evaluation team. On September 21, 2004, following the completion of the evaluations, PWGSC awarded five standing offers, one to each of the five top-ranked proponents.

9. On September 23, 2004, PWGSC notified TireeRankinJV that it had not been issued a standing offer and that PWGSC would provide a debriefing to TireeRankinJV if it so requested. On September 27, 2004, TireeRankinJV requested the debriefing, which took place on October 5, 2004. On October 6, 2004, TireeRankinJV submitted a written request to PWGSC for information that PWGSC had not revealed about the proposals of the other bidders during the debriefing. On October 19, 2004, PWGSC responded to this request, citing commercial confidentiality reasons for being unable to provide the information that TireeRankinJV sought.

10. TireeRankinJV submitted its complaint to the Tribunal on October 29, 2004.

11. With respect to the debriefing, the RFSO provided the following:

2.47 DEBRIEFING

1. A debriefing will be provided, on request, only following entry by PWGSC into a Standing Offer arrangement with the successful Offeror(s). Should an Offeror desire a debriefing, the Offeror should contact the person identified on the front page of the Request for Standing Offer. The debriefing will include an outline of the reasons the offer was not successful, making reference to the evaluation criteria. The confidentiality of information relating to other offers will be protected.

12. In addition, the RFSO contained the following provisions relating to this complaint:

SUBMISSION REQUIREMENTS AND EVALUATION (SRE)

SRE 1 GENERAL INFORMATION

1.2 Calculation of the Total Score

For this Standing Offer the Total Score will be established as follows:

Technical Rating x 90%	=	Technical Score (Points)
<u>Price Rating x 10%</u>	=	<u>Price Score (Points)</u>
Total Score		Max. 100 Points

SRE 3 SUBMISSION REQUIREMENTS AND EVALUATION

3.1 Mandatory Requirements

Failure to meet the mandatory requirements will render the offer as non-responsive and no further evaluation will be carried out.

3.3 EVALUATION AND RATING

Offers that are responsive (i.e. which meet all the mandatory requirements set out in the Request For Standing Offer) will be reviewed, evaluated and rated by a PWGSC Evaluation Board. In the first instance, price envelopes will remain sealed and only the technical components of the offer will be evaluated in accordance with the following to establish Technical Ratings:

Criterion	Weight Factor	Rating	Weighted Rating
Comprehension of the Scope of Services	1.0	0-10	10
Approach and Methodology	4.0	0-10	40
Personnel Experience	2.0	0-10	20
Personnel Expertise	2.0	0-10	20
Offerors Team Presentation	1.0	0-10	10
Total	10.0		0-100

To be considered further, proponents must achieve a minimum weighted rating of sixty (60) out of the hundred (100) points available for the rated technical criteria specified above.

No further consideration will be given to proponents not achieving the pass mark of sixty (60) points.

13. During the debriefing of October 5, 2004, PWGSC provided TireeRankinJV with an Evaluation Board Procedures sheet,⁴ which read:

Evaluation Board Procedures

Each board member is to personally evaluate the technical portion of the submissions, making notes to support discussion at the formal board meeting and any follow-up consultant debriefing(s), and to assign an initial score for each criterion based on the comparison of each submission against an absolute scale rating of 0 to 10 (10 points for exceptional to 0 points for 'did not submit information'). In order for each board member to share a common understanding of the evaluation scale, the following table is to be considered:

NON RESPONSIVE	POOR	WEAK	JUST ACCEPTABLE
0 points	1-2 points	3-4 points	5-6 points
<ul style="list-style-type: none"> · Did not submit information which could be evaluated 	<ul style="list-style-type: none"> · Does not meet the requirement · Weaknesses can't be corrected · Proponent lacks qualifications and experience · Team proposed is not likely able to meet requirements 	<ul style="list-style-type: none"> · Generally doesn't satisfy requirement · Lacks detail · Generally doubtful that weaknesses can be corrected · Proponent generally lacks qualifications and experience · Team is weak – either missing components or overall experience is weak 	<ul style="list-style-type: none"> · Barely meets requirement · Weaknesses can be corrected · Proponent has minimum qualifications and experience · Team capable of just fulfilling requirements

4. Complaint, Annex C, Part 6, Reference 5.

	<ul style="list-style-type: none"> · Sample projects not related to this project's needs · Extremely poor, insufficient to meet performance requirements 	<ul style="list-style-type: none"> · Sample projects generally not related to this project's needs · Little capability to meet performance requirements 	<ul style="list-style-type: none"> · Sample projects somewhat related to this project's needs · Minimum acceptable capability, should meet minimum performance
AVERAGE	ABOVE AVERAGE	SUPERIOR	EXCEPTIONAL
7 points	8 points	9 points	10 points
<ul style="list-style-type: none"> · Meets requirement · Weaknesses easy to correct · Proponent is qualified and experienced · Team covers all components and will likely meet requirements · Sample projects generally related to this project's needs · Average capability, should be adequate for effective results 	<ul style="list-style-type: none"> · Satisfies requirement · No significant weaknesses · Proponent is well qualified and experienced · Team covers all components and more than likely will meet requirements · Sample projects are related to this project's needs · Above average capability 	<ul style="list-style-type: none"> · More than satisfies requirement · No apparent weaknesses · Proponent is highly qualified and experienced · Strong team – some members have previously worked together · Sample projects directly related to this project's needs · Superior capability, should ensure effective results 	<ul style="list-style-type: none"> · Exceptionally strong proposal · No weakness · Proponent is exceptionally qualified and experienced · Exceptional team – has worked well together before on comparable work · Took the lead in projects directly related to this project's needs · Exceptional capability, should ensure extremely effective results

POSITIONS OF THE PARTIES

PWGSC's Position

14. PWGSC submitted that the complaint in respect of the request for detailed information regarding TireeRankinJV's competitors' proposals and their evaluation is untimely and without merit. It submitted that, in its letter of September 23, 2004, it had advised TireeRankinJV that the debriefing would be solely with respect to its submission and that "[n]o details of other proponent's submissions would be made available."⁵ Consequently, the complaint was filed after the 10-day deadline for filing a complaint with respect to PWGSC's stated position.

15. PWGSC submitted that, in the alternative, the relevant trade agreements provide for general reference to other bidders' proposals when giving specific information to unsuccessful bidders on the shortcomings of their bids. PWGSC submitted that this requirement cannot reasonably be interpreted as

5. GIR, Exhibit 2.

directing the lifting of the confidentiality of bids or that debriefing sessions will provide unsuccessful bidders with specific information contained in competitors' bids or specific information with respect to a successful bidder's evaluation.

16. PWGSC submitted that, during the debriefing of October 5, 2004, its officials made a careful effort and devoted significant time to explaining the shortcomings of TireeRankinJV's technical offer, on a point-by-point basis, and provided a detailed explanation as to why a higher score had not been achieved. It noted that its officials had also provided TireeRankinJV with the above-mentioned Evaluation Board Procedures sheet, as well as the evaluation summary of its own proposal, which included TireeRankinJV's ranking relative to the other proposals, on both the technical and price components.

17. PWGSC submitted that its detailed debriefing, combined with its letter of September 23, 2004, which provided the names and overall placement of the five winning proponents, and the fact that award notices published on MERX provided the names and estimated values of the awarded standing offers mean that PWGSC has fulfilled the requirements of the trade agreements relative to debriefings. Consequently, it submitted that the complaint ought to be dismissed and that it should be awarded its costs in this matter.

TireeRankinJV's Position

18. TireeRankinJV submitted that its complaint filed on October 29, 2004, was timely, as it was filed within 10 working days of when it discovered that the debriefing was inadequate and not in accordance with the trade agreements. It argued that it did not find out about the breach until PWGSC's letter of October 19, 2004, when PWGSC refused to provide TireeRankinJV with the requested information regarding the relative advantages and characteristics of the successful proposals.

19. TireeRankinJV submitted that the information regarding the successful proposals was necessary because the debriefing that it received regarding its own proposal was incomplete and inadequate. Regarding the Evaluation Board Procedures sheet, TireeRankinJV submitted that it is generic and, therefore, not specific to the solicitation in question, and that it contained no standard or list of prepared answers that the evaluation committee would have been able to reference in its evaluations. It contended that, without a standard set of prepared answers, the evaluators did not have a common reference point and that their evaluations were therefore highly subjective.

20. TireeRankinJV submitted that, when it noted the rating differences within one category—one evaluator had rated⁶ an element of its proposal as "Just Acceptable," whereas another had rated⁷ it "Above Average"—PWGSC responded that the score provided by each board member was based on his or her own respective subjective assessment. TireeRankinJV submitted that PWGSC's letter of October 19, 2004, stated "[t]hese scores are discussed at the board meeting, where a consensus is arrived at and an overall technical board score is calculated for each bidder". TireeRankinJV submitted that its final scores were merely the averages of four board members' evaluation scores and not the result of a consensus.

21. TireeRankinJV submitted that, as a result of these perceived discrepancies in the evaluation procedures, it had to seek information about the successful bidders' proposals because the PWGSC debriefing did not provide it with sufficient information to support the scores that it was awarded, did not explain why the scores were so low, and did not assist it in understanding why it was not successful.

6. Using the scale provided in the Evaluation Board Procedures sheet.

7. *Ibid.*

22. TireeRankinJV submitted that its request for information was in accordance with the requirements of the trade agreements and that PWGSC failed to live up to its obligations under those agreements when it did not provide the requested information.

TRIBUNAL'S DECISION

23. 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*,⁸ the *North American Free Trade Agreement*⁹ and the *Agreement on Government Procurement*.¹⁰

24. Article 1015 of *NAFTA* reads in part as follows:

6. An entity shall:

(b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

25. Article XVIII of the *AGP* reads in part as follows:

2. Each Entity shall . . . promptly provide:

(c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

26. Although this procurement is also subject to the *AIT*, there is no relevant section in that agreement that provides for the provision of pertinent information to non-successful bidders.

27. TireeRankinJV alleges that PWGSC did not provide it with a proper debriefing when it did not reveal the relative characteristics and advantages of the successful proposals.

28. It is uncontested that PWGSC did provide TireeRankinJV with a debriefing on October 5, 2004. What the Tribunal has to determine is whether that debriefing met the requirements of the above listed articles of *NAFTA* and the *AGP*.

29. The Tribunal notes that PWGSC included the names and ranking of the top five bidders in its letter of September 23, 2004, to all unsuccessful bidders. The Tribunal also finds that the debriefing of October 5, 2004, was thorough and complete, as it pertained to the review and discussion of the TireeRankinJV proposal. However, the Tribunal finds that, with respect to the disclosure of the relative advantages and characteristics of the winning tenders, PWGSC did not fulfill its obligations under the trade agreements.

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

9. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

10. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

30. PWGSC argued that it must maintain confidentiality regarding the contents of all bidders' proposals. In this regard, the Tribunal agrees with PWGSC's stance and believes that the intent of Article 1015(6)(b) of *NAFTA* and Article XVIII(2)(c) of the *AGP* is not to reveal confidential commercial information, but rather to allow unsuccessful bidders insight into how they can better respond to future procurement opportunities, thereby assisting the procuring entity, in that it will have superior proposals to review in future solicitations.

31. In this case, the Tribunal is of the view that PWGSC could have discussed the relative merits of the successful bidders' proposals with TireeRankinJV without breaching confidentiality. PWGSC had five successful proposals to draw upon to provide examples of relative merit to TireeRankinJV, and nothing on the record indicates that this was impossible to do without breaching the confidentiality of the other proposals. For example, regarding criterion 3.2.3—Personnel Experience—PWGSC could have stated that other proposals included resources with more experience or higher educational levels, etc. These comments would have assisted TireeRankinJV in recognizing that its own resources' experience or education needed to be improved and would have allowed it to understand the reason for which the other bidders' resources were rated higher than its own.

32. While the Tribunal is of the view that the foregoing constitutes a breach of *NAFTA* and the *AGP* by PWGSC, it is of the view that the breach was technical and, therefore, minor, and that neither TireeRankinJV nor the overall procurement process were prejudiced. Save the omission of the relative characteristics of the other bidders, the Tribunal is satisfied that TireeRankinJV received an adequate debriefing, one that will assist it in any future procurement opportunities in which it chooses to participate.

33. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal may award costs of, and incidentals to, any proceedings before it in relation to a complaint. Typically, when awarding costs, the Tribunal uses the judicial model in which costs are awarded to the complainant if the complaint is found valid or to the government if the complaint is found not valid. To assist in determining the amount of the award, the Tribunal published the *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*. The Tribunal however maintains discretion on how the *Guideline* is applied on a case-by-case basis and, if appropriate, will deviate from the *Guideline*.

34. Regarding TireeRankinJV's requested relief of \$40,000, the Tribunal believes that costs relating to the time and effort in preparing its proposal should be borne by TireeRankinJV, as these costs are incurred in the normal course of business. In other words, TireeRankinJV would have incurred these costs even if it had received a debriefing that conformed to the requirements of the trade agreements.

35. A deficiency like the one found in this case, if repeated or more extensive, could prejudice the integrity and efficiency of the competitive procurement system. However, in this case, the Tribunal's analysis indicates that the end result would have been the same, regardless of the violation, and that, therefore, the prejudice to the integrity and efficiency of the competitive procurement system, if any, was minimal. The evidence does not indicate that PWGSC was acting in bad faith. Consequently, the Tribunal will not recommend a remedy in this case.

36. The Tribunal will award TireeRankinJV its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered the *Guideline* and is of the view that this complaint case has a complexity level corresponding 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 three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it

involved services relating to a defined scope of work. The complexity of the complaint was low, in that it involved a single issue and a single aspect of the trade agreements. Finally, the complexity of the complaint proceedings was low, as there were no interveners and no motions, no public hearing was held, and the 90-day time frame was respected. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

38. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards TireeRankinJV 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 either 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
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Presiding Member