



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-046

Veritaaq Technology House Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, March 23, 2005*

*Reasons issued
Thursday, April 14, 2005*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....	i
STATEMENT OF REASONS	1
COMPLAINT	1
PROCUREMENT PROCESS.....	1
POSITIONS OF THE PARTIES	3
Veritaaq's Position.....	3
PWGSC's Position	4
S&S's Position	5
AJJA's position.....	6
TRIBUNAL'S DECISION.....	6
DETERMINATION OF THE TRIBUNAL	8

IN THE MATTER OF a complaint filed by Veritaaq Technology House 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*.

BETWEEN

VERITAAQ TECHNOLOGY HOUSE INC.

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 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 the proposals and that the re-evaluation be restricted to the determination of an “unreasonably low per diem rate”, on a per category basis, as defined in Article D.6 of the Request for Proposal and amended by Section 7 of Solicitation Amendment No. 3.

The Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services: (1) terminate existing contracts that were awarded to bidders whose proposals are found to be non-compliant as a result of the re-evaluation; and (2) award new contracts, as warranted.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Veritaaq Technology House Inc. 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 is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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 in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Patricia M. Close
Patricia M. Close
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

Tribunal Members:	Patricia M. Close, Presiding Member Pierre Gosselin, Member Zdenek Kvarda, Member
Investigation Officer:	Peter Rakowski
Counsel for the Tribunal:	Nick Covelli
Complainant:	Veritaaq Technology House Inc.
Counsel for the complainant:	Martin G. Masse Yasir A. Naqvi
Interveners:	S&S Software Ltd AJJA Information Technology Consultants Inc. Coradix Technology Consulting Ltd.
Counsel for S&S Software Ltd.:	Gerry Stobo
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Christianne M. Laizner Susan D. Clarke Ian McLeod

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On December 23, 2004, Veritaaq Technology House Inc. (Veritaaq) 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. EN798-03P001/A) by the Department of Public Works and Government Services (PWGSC) for the provision of informatics professional services.

2. Veritaaq alleged that PWGSC failed to properly evaluate a mandatory requirement in Article D.6 of the Request for Proposal (RFP), as amended by section 7 of Solicitation Amendment No. 3 (section 7) issued on March 22, 2004, namely evaluating the proposals on a per category basis to ensure that they did not contain unreasonably low per diem rates and, by so doing, awarded the contract to bidders whose proposals were non-compliant. Veritaaq also alleged that the weight attributed to certain categories of per diem rates was flawed because it magnified any advantage gained by submitting non-compliant rates.

3. Veritaaq requested, as a remedy, that the solicitation be re-tendered.

4. On December 31, 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 *Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On January 24, 2005, the Tribunal granted intervener status to S&S Software Ltd. (S&S). On January 25, 2005, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ Also on January 25, 2005, the Tribunal granted intervener status to AJJA Information Technology Consultants Inc. (AJJA). On February 1, 2005, the Tribunal granted intervener status to Coradix Technology Consulting Ltd. On February 7, 2005, the Tribunal received comments on the GIR from Veritaaq as well as submissions from AJJA and S&S.

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. On March 9, 2004, PWGSC published a Notice of Proposed Procurement and issued the RFP with a closing date of April 19, 2004. The RFP provided that up to three contracts could be awarded for the required services, which contracts were intended to replace three existing contracts that had been awarded in 2002. According to PWGSC, the three incumbent contractors were:

- Veritaaq
- AJJA
- Ajilon Canada Inc. (Ajilon)

7. Section 7 reads as follows:

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

7. At ANNEX D, EVALUATION PROCEDURES & CRITERIA, add the following at D.6 FINANCIAL EVALUATION:

Unreasonable Low Per Diem Rates:

- (i) Bidders providing unreasonably low per diem rates for any year within the Contract period including the option years will be deemed non-compliant under the following conditions: The definition of any “unreasonably low per diem rate” for the purpose of this Request for Proposal would be any rate(s) applicable which decreases more than 20% from the per diem rates applicable to the performance of the work during the first year of the Contract over the four option years, or any per diem rate which decreases more than 20% from the per diem rate(s) applicable to the performance of the Work in the year immediately preceding the year of the Contract. Upon request, the Bidder must demonstrate, by providing previous billing records, the rate(s) it charges for the first year of the Contract have not decreased more than 20%. This formula shall be applied to per diem rates on a per category basis.
- (ii) Following the financial evaluation of all proposed rates, the Crown reserves the right to question the validity of any rate found to be unreasonably lower than previous rates charged by the Contractor. Should the Bidder be unable to substantiate unreasonable low per diem rates, the Bidder’s proposal shall be rejected.

8. According to PWGSC, 10 proposals were received in response to the solicitation, including proposals from Veritaaq and the other two incumbents.

9. Also according to PWGSC, the proposals were examined with respect to the requirements of section 7 and, specifically, with respect to whether any of the proposals contained “unreasonably low rates” based on whether any proposed rate “decrease(d) more than 20% from per diem rates applicable to the performance of the work during the first year of the Contract over the four option years”. Only one proposal was found to be non-compliant with this requirement and it was set aside from further consideration. PWGSC determined that AJJA, Coradix and S&S had submitted the top three compliant proposals and they were therefore awarded contracts.

10. On October 26, 2004, PWGSC debriefed Veritaaq. At which time, Veritaaq alleged that certain of its competitors’ bids were not consistent with the requirements of section 7.

11. On October 27, 2004, PWGSC asked Veritaaq to confirm the particular categories of work with which it had concerns. That same day, Veritaaq identified four categories of work with which it had concerns with respect to the AJJA proposal.

12. On November 5, 2004, Veritaaq sent a letter of objection to PWGSC detailing its concerns.

13. On December 9, 2004, PWGSC replied to Veritaaq, by a letter dated December 7, 2004, denying Veritaaq’s objection and indicating that it believed the rates submitted by AJJA and the two other successful bidders to be consistent with section 7.

14. On December 23, 2004, Veritaaq filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Veritaaq's Position

15. Veritaaq submitted that section 7 clearly requires a mandatory per category analysis of the per diem rates. It submitted that, instead, PWGSC analysed the bids on the basis of total costs. According to Veritaaq, this constitutes a valid basis for upholding its complaint.

16. Veritaaq submitted that the definition portion of section 7 does not outline “two different and alternative tests”, which PWGSC can apply randomly and at its discretion, but rather puts forward a definition that contains an enumeration of two elements, separated by “or.” According to Veritaaq, it is well known in law that, where a definition includes enumerated elements separated by “or”, each of the elements will be found to meet the definition. Veritaaq submitted that, in the law relating to the construction of statutes and contracts, there is no single unambiguous meaning of the term “or.” Veritaaq submitted that this is made clear even by the authority cited by PWGSC where, at paragraph 9 of the section of the GIR entitled “Argument and Response to the Complaint”, PWGSC has reproduced only a portion of the definition of “or” from *Black's Law Dictionary*.⁴ It submitted that the same definition continues with the following: “In some usages, the word ‘or’ creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, ‘or’ may be construed to mean ‘and’.” Thus, Veritaaq submitted the function of “or” must be considered in its contextual framework.

17. Veritaaq submitted that, in this case, section 7 mandates that “[b]idders providing unreasonably low per diem rates for any year within the Contract period including the option years will be deemed non-compliant”. According to Veritaaq, in order to give full meaning to the plain wording of section 7, PWGSC must ensure that all bids are free of unreasonably low per diem rates, however defined, so that non-compliant bidders are not awarded contracts. Thus, each of the elements of the definition of the term “unreasonably low per diem rates” separated by “or” will meet the definition and each element of the definition separated by “or” must be investigated to ensure that no prohibited rates have been submitted.

18. Veritaaq submitted that its position that PWGSC was required to verify for both prospective and retrospective unreasonably low per diem rates is also in keeping with the general requirement that procuring authorities thoroughly and strictly evaluate mandatory requirements.

19. According to Veritaaq, PWGSC failed to demonstrate any language in the section that would support the premise that it has discretion in its application of section 7. Veritaaq submitted that it is incumbent on PWGSC to verify proposals against both aspects of the definition. Veritaaq submitted that, by its own admission, PWGSC did not do this, choosing instead to arbitrarily limit its inquiry to the first part of the definition. By ending its inquiry after having only verified for prospective unreasonably low per diem rates, PWGSC has therefore failed to properly evaluate the mandatory requirement contained in section 7.

20. According to Veritaaq, PWGSC's interpretation does not even achieve the purpose that it itself affords to section 7. In several instances in the GIR, PWGSC noted that the purpose of section 7 is to prevent a bidder from exploiting “a selective low-rate bidding strategy.” If, as PWGSC suggests, it is proper to only check bids for prospective unreasonably low per diem rates, then this purpose is not achieved, since it would still be open for a bidder to exploit a selective low-rate bidding strategy by submitting a bid that contains retrospective unreasonably low per diem rates for certain categories and then refusing to provide any services in those categories.

4. Fifth ed. (St. Paul, Minn.: West Publishing Co., 1979) at 987.

21. Veritaaq further submitted that PWGSC's failure to evaluate the bids to determine whether they contain unreasonably low per diem rates is compounded because the weighting formula used in the "Financial Evaluation" section of the RFP permits bidders to unfairly take advantage of the use of unreasonably low per diem rates.⁵

22. Veritaaq maintained that the failure to evaluate a mandatory criteria is one of the most fundamental errors that can occur in the procurement process. Not only does it prejudice Veritaaq and all the other bidders, it prejudices the integrity and the efficiency of the competitive procurement system. Therefore, as a remedy, Veritaaq maintained that the Tribunal should recommend a new solicitation.

PWGSC's Position

23. PWGSC submitted that subsections 7(i) and (ii) should be read together to afford the intended meaning of section 7. It further submitted that any interpretation of a part of section 7 must be reasonably consistent with the other parts.

24. PWGSC submitted that, for clarification, the use of the term "shall" in subsection 7(i) directs that the formula must be applied to per diem rates "on a per category" basis and that subsection 7(i) clearly sets out two different and alternative tests for the calculation of an "unreasonably low per diem rate".

25. PWGSC submitted that subsection 7(i) uses the drafting word "or" to indicate that there are two alternative tests or "conditions" for its determination of an unreasonably low per diem rate.

26. PWGSC submitted that subsection 7(i) dictates alternative tests for determining whether a bidder has proposed unreasonably low per diem rates, while subsection 7(ii) reserves its discretionary right to question the validity of any rate found to be unreasonably lower than previous rates charged by the contractor/bidder (pursuant to the second test). It further submitted that subsection 7(ii) reserves its discretion with respect to whether it ought to question the validity of contractor/bidder rates, and seeks an explanation regarding a bidder's unreasonably low per diem rates in the context of a comparison with rates charged by the contractor under the previous contract, or previous work by a non-incumbent bidder.

27. According to PWGSC, in its evaluation of the bidders' financial proposals, it applied the first test for any unreasonably low per diem rate as found in subsection 7(i).⁶

28. PWGSC submitted that this first test applies to the new contract and compares the rates for the proposed option years to the rates proposed for the first year on the new contract.

29. PWGSC submitted that it was proper for the fair and consistent evaluation of all bids to apply one test (i.e. the first test) to all proposals, with the result that all bidders' proposals were evaluated on the basis of comparing the per diem rates for the proposed option years with the proposed per diem rates for the first year of the new contract.

5. In addition, the Tribunal notes that one of Veritaaq's objections to PWGSC was that section 7 of the RFP was discriminatory to incumbent suppliers. However, Veritaaq did not raise this as a ground of complaint to the Tribunal. PWGSC correctly pointed out in the GIR that this objection should have been raised during the bidding period and, therefore, the time limit prescribed in section 6 of the *Regulations* to file a complaint with the Tribunal on this basis had passed before the complaint was actually filed.

6. GIR at 12.

30. PWGSC submitted that its interpretation and application of section 7 is reasonable, accords with the common usage of the word “or”, is consistent with its practice and gives proper meaning to all parts of the provision.

31. PWGSC also submitted that any objections to the weighting formula used in the “Financial Evaluation” section of the RFP should have been raised during the bidding period. PWGSC submitted that the time to file a complaint with the Tribunal that takes issue with this has passed and, therefore, that this aspect of the complaint should be dismissed.

32. Finally, PWGSC submitted that, if the Tribunal determines that PWGSC erred in not applying both tests enumerated in section 7 to all proposals, the appropriate remedy in these circumstances would be a re-evaluation.

S&S’s Position

33. S&S submitted that Veritaaq’s allegation that PWGSC conducted a post-award evaluation of the bids is not supported by evidence and that PWGSC’s review of the evaluations in response to concerns raised by Veritaaq in the post-award period does not constitute improper post-award activity.

34. In response to Veritaaq’s allegation that the solicitation is inconsistent with the trade agreements because the weighting formula used in the “Financial Evaluation” section of the RFP permits some suppliers to unfairly take advantage of the use of low per diem bid rates, S&S submitted that these grounds are clearly out of time and that Veritaaq ought to have complained about those matters when the RFP was issued in March 2004.

35. S&S further submitted that, if the complaint is valid, the most that Veritaaq should receive is its bid preparation and partial complaint costs.

36. S&S accepted the facts as outlined in paragraphs 1 through 21 of the GIR and submitted that it would also like the Tribunal to consider that, within the information technology community, unreasonably low per diem rate provisions, such as that found in section 7, are commonplace. According to S&S, companies who respond to RFPs involving professional information technology services know that, in practice, the only test applied by PWGSC in determining whether a bid contains unreasonably low per diem rates is the first of the two tests found in section 7. Accordingly, S&S submitted that the approach taken by PWGSC in this evaluation is consistent with this practice.

37. S&S submitted that the wording of section 7 and its context support a disjunctive interpretation of the word “or” and, thus, by separating the two possible tests for unreasonably low per diem rates using the word “or”, PWGSC had the discretion to select whichever test was appropriate in the circumstances. According to S&S, as long as PWGSC applied the same tests to all bids and assessed the test fairly, it committed no breach of a trade agreement.

38. S&S further submitted that the Tribunal should defer to PWGSC’s interpretation and that its interpretation should only be interfered with if it was shown to be clearly unreasonable. S&S submitted that the first test for unreasonably low per diem rates is the only test that could have been applied in a fair and equitable manner to all bidders in this solicitation and that the evaluators were entitled to read section 7 in a way that allowed them the option to select the most appropriate test.

39. With respect to remedy, S&S submitted that a new solicitation would not be appropriate, since termination of the contract would have disproportionately severe consequences on those successful bidders, such as S&S, whose bids were compliant with all the mandatory requirements. S&S submitted that, if the Tribunal feels that some remedy other than awarding partial complaint costs is appropriate, Veritaaq should receive its bid preparation costs, since it is clear that Veritaaq would not have been successful in this procurement given its ranking with respect to those bids that were found to be compliant.

AJJA's position

40. AJJA agreed with the GIR, with one point of clarification: the second test to assess if the proposed per diem rates are unreasonably low "or any per diem rate which decreases more than 20% from the per diem rate(s) applicable to the performance of the Work in the year immediately preceding the year of the Contract" does not reference incumbent rates, but rather requires the bidder to be able to support and certify its rates based on contract rates for the performance of work in the year preceding this contract.

41. AJJA submitted that Veritaaq erroneously assumed that the rates to be used for comparison were the existing PowerBuilder Support Services (PowerBuilder) contract rates in place for the three incumbents at the time of the RFP process. According to AJJA, this would prejudice the assessment against the incumbent companies if it were true; however, the rates for the existing PowerBuilder contract were established in 2002 and, based on the significant decrease in information technology per diem rates over this period, these rates, by definition, are much higher than current market rates and do not represent industry pricing.

42. AJJA also submitted that re-tendering the RFP would give Veritaaq an unfair advantage over all the other bidders because it has somehow obtained the confidential and proprietary rate information for all the winning companies in the new contract. AJJA submitted that Veritaaq used AJJA's ceiling rates from the previous PowerBuilder contract to establish its own pricing structure and that it erroneously set its rates based on "old" pricing that AJJA was able to charge two years ago. AJJA submitted that, if Veritaaq believed the unreasonably low rates calculation to be flawed because it created a disadvantage to the incumbent bidders, it was Veritaaq's responsibility to ask clarifying questions or request an improvement to the Statement of Work in the RFP, which it did not do.

43. AJJA also submitted that Veritaaq suggested to PWGSC that AJJA's rates were unreasonably low; however, PWGSC verified AJJA's price certification information and found its bid rates to be within the 20 percent limit.

TRIBUNAL'S ANALYSIS

44. Subsection 30.14 of the *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 requires the Tribunal to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *North American Free Trade Agreement*,⁷ the *Agreement on Internal Trade*⁸ and the *Agreement on Government Procurement*.⁹

7. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

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

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

45. In its complaint, Veritaaq claimed that PWGSC failed to properly follow Article 506(6) of the *AIT* and Articles 1015(4)(c) and (d) of *NAFTA*.

46. Article 506(6) of the *AIT* reads in part as follows:

The 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.

47. Articles 1015(4)(c) and (d) of *NAFTA* read as follows:

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

48. It is undisputed that the tender documents at issue in this case identified a mandatory requirement that bids not have unreasonably low per diem rates. What the dispute turns on is whether section 7 of the RFP enumerates two tests for uncovering unreasonably low per diem rates, both of which apply, or a choice of two alternative tests, of which only one applies. The two tests relate prospectively to unreasonably low per diem rates and retrospectively to unreasonably low per diem rates. PWGSC argued that it used its discretion correctly and applied only the first test.

49. In the Tribunal's view, PWGSC's position that the "or" separating the two tests is disjunctive and that it could therefore limit its evaluation of the bids to the first, i.e. prospective, test is incorrect. Although the word "or" is typically used as a disjunctive particle to express an alternative or to give a choice of one of two or more things, it may also be conjunctive if the context so dictates. *Black's Law Dictionary* recognizes that, "[i]n some usages, the word 'or' creates a multiple rather than an alternative obligation" and, therefore, "where necessary in interpreting an instrument, 'or' may be construed to mean 'and'." Where, as here, a definition includes enumerated tests separated by "or", it is a well-settled law that each test will be found to apply.¹⁰ Thus, if the evaluated subject matter does not meet both tests, it does not meet the mandatory requirement set out in section 7.

50. Furthermore, in the Tribunal's view, PWGSC's interpretation ignores the plain meaning of section 7, which, as written, provides that bidders will be deemed non-compliant if their proposed per diem rates are unreasonably low prospectively *or* retrospectively. In other words, in order to determine whether the per diem rates are unreasonably low, the evaluator of the bids must apply both the first and second tests and evaluate the bids accordingly. As such, the word "or" in subsection 7(i) is not disjunctive, but conjunctive.

51. Accordingly, when evaluating the bids, it was incumbent upon PWGSC to apply both tests enumerated in subsection 7(i) to ensure that none of the bids proposed unreasonably low per diem rates, as defined by the first *and* second tests. Given that, by its own admission, PWGSC did not apply the second, i.e. retrospective, test, it thus failed to evaluate the bids in a manner that was consistent with the mandatory requirement of the tender documents that bids be free of unreasonably low per diem rates.

10. *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2004 FCA 214 at paras. 4-9; and *Re Stelco Inc.*, 2004 Can LII 24933 (ON S.C.) at paras. 22-23, 28.

52. With respect to Veritaaq's allegation that PWGSC failed to properly evaluate the per diem rates on a per category basis, the Tribunal notes that, in paragraph 7 of the section Argument and Response to the Complaint in the GIR, PWGSC acknowledges that subsection 7(i) requires an evaluation of the per diem rates on a per category basis. Nonetheless, the preponderance of the evidence indicates that PWGSC evaluated the per diem rates on a total cost basis rather than a per category basis. Most notably, Veritaaq submitted that a PWGSC official indicated that he did not validate the per diem rates on a per category basis and that PWGSC felt the total costs of all the bids to be relatively competitive. Although PWGSC denies this, it did not provide an alternative version of events or any other evidence that it evaluated the per diem rates on a per category basis.

53. For the above reasons, the Tribunal finds that PWGSC did not evaluate the proposals in full accordance with the mandatory requirements of the tender documents, contrary to Article 506(6) of the *AIT* and Articles 1015(4)(c) and (d) of *NAFTA*.

54. Turning to Veritaaq's allegation that the weighting formula used in the "Financial Evaluation" section of the RFP permits suppliers to unfairly take advantage of the use of low per diem rates, the Tribunal notes that the time period for raising this issue started once Veritaaq had read the RFP and the solicitation amendments. However, Veritaaq did not raise this until the time of its complaint to the Tribunal, which was well past the time limit prescribed by section 6 of the *Regulations*. Therefore, the Tribunal dismisses this ground of complaint.

55. In recommending an appropriate remedy, subsection 30.15(3) of the *Act* requires the Tribunal to consider all the circumstances relevant to the procurement. In this regard, the Tribunal notes that PWGSC's failure to properly evaluate the proposals constitutes a serious deficiency in the procurement process. In particular, by misapplying the test for determining "unreasonably low per diem rates", the successful bidders may have had their proposals declared non-compliant. However, it is uncertain that this deficiency prejudiced the complainant or other bidders. In fact, the successful bidders — that have already begun work under the contract — may have been successful even had the test been applied correctly. Therefore, in the circumstances, the Tribunal recommends that the proposals be re-evaluated applying both elements of the definition of unreasonably low per diem rate found in section 7 on a per category basis.

56. The Tribunal awards Veritaaq its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the award, the Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates the classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

DETERMINATION OF THE TRIBUNAL

57. Pursuant to subsection 30.14(2) of the *Act*, the Tribunal determines that the complaint is valid in part.

58. Pursuant to subsections 30.15(2) and (3) of the *Act*, the Tribunal recommends, as a remedy, that PWGSC re-evaluate the proposals and that the re-evaluation be restricted to the determination of an "unreasonably low per diem rate", on a per category basis, as defined in Article D.6 of the RFP and amended by section 7.

59. The Tribunal recommends that PWGSC terminate existing contracts that were awarded to bidders whose proposals are found to be non-compliant as a result of the re-evaluation, and award new contracts, as warranted.

60. Pursuant to section 30.16 of the *Act*, the Tribunal awards Veritaaq 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 is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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 in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Patricia M. Close
Patricia M. Close
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member