



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2004-050

Med-Emerg International Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, June 15, 2005*

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IN THE MATTER OF a complaint filed by Med-Emerg International 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*;

AND FURTHER TO an order issued by the Canadian International Trade Tribunal on March 11, 2005, which dismissed a motion filed by the Department of Public Works and Government Services for an order to strike the complaint filed by Med-Emerg International Inc. on the basis that the complaint is not in respect of a designated contract, as defined by subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, and, hence, does not fall within the jurisdiction of the Canadian International Trade Tribunal pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**MED-EMERG INTERNATIONAL 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 section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Med-Emerg International 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 case is Level 3, and its preliminary indication of the amount of the cost award is \$4,100. 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.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

Patricia M. Close

Patricia M. Close  
Member

Hélène Nadeau

Hélène Nadeau  
Secretary

|   |  |
|---|--|
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| Research Director:                      | Marie-France Dagenais  |
| Investigation Officer:                  | Michael W. Morden  |
| Counsel for the Tribunal:               | Dominique Laporte<br>Eric Wildhaber  |
| Complainant:                            | Med-Emerg International Inc.   |
| Counsel for the Complainant:            | Gregory O. Somers<br>Paul D. Conlin<br>Sally A. Gomery<br>Tina Hill                          |
| Intervener:                             | Calian Ltd.  |
| Counsel for the Intervener:             | Justine Whitehead<br>Alan D'Silva<br>Nicholas McHaffie                                       |
| Government Institution:                 | Department of Public Works and Government Services   |
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## STATEMENT OF REASONS

### COMPLAINT

1. On January 31, 2005, Med-Emerg International Inc (Med-Emerg) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned the procurement (Solicitation No. W3931-030182/B) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the provision and management of a workforce of qualified health service providers.

2. Med-Emerg alleged that PWGSC improperly evaluated its proposal and improperly awarded the contract to another bidder. 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 highest-rated proposal; (2) introduced unpublished evaluation criteria to the evaluation process; (3) failed to properly apply the published evaluation criteria; (4) in the alternative to (2) and (3), applied ambiguous criteria; (5) awarded the contract to a bidder that did not meet the mandatory requirements of the Request for Proposal (RFP); and (6) failed to follow the prescribed evaluation procedures.

3. Med-Emerg requested, as a remedy, that the contract awarded to Calian Ltd. (Calian) be terminated and awarded to Med-Emerg or that a new solicitation be conducted. In the alternative, it requested that it be compensated for lost profit and for the costs associated with the preparation and filing of its complaint, and be granted such other relief that it may request<sup>2</sup> and that the Tribunal may deem appropriate.

4. On February 8, 2005, 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*.<sup>3</sup> On February 15, 2005, the Tribunal granted Calian intervener status.

5. On February 11, 2005, Med-Emerg submitted a motion requesting that the Tribunal direct PWGSC to produce, by February 21, 2005, a number of documents relating to the solicitation. In the alternative, Med-Emerg's motion requested that the Tribunal order PWGSC to produce, at a later date, all the documents listed in the motion. Med-Emerg submitted that the documents requested were directly relevant to the issues before the Tribunal and, therefore, would have to be provided by PWGSC in its Government Institution Report (GIR), which was due to be filed by March 4, 2005. Med-Emerg argued that, due to the time constraints of the case, it would not be able to review all the documents in the seven working days allotted to complainants by rule 104 of the *Canadian International Trade Tribunal Rules*<sup>4</sup> to provide the Tribunal with any comments on the GIR. The Tribunal solicited comments from all parties on the motion and, on February 22, 2005, advised the participants that it would not order the production of the documents in advance of the submission of the GIR. The Tribunal informed the parties that, pending the filing of the GIR, it was holding in abeyance the part of the motion requesting the production of the documents at a later date, and advised that, if necessary, it would then rule on that part of the motion.

6. On February 23, 2005, PWGSC filed a motion requesting that the Tribunal strike the complaint on the basis that the services being procured relate to health services, which are not covered by the trade agreements, and that the complaint was therefore not in respect of a designated contract, as defined by subsection 3(1) of the *Regulations* and, hence, did not fall within the Tribunal's jurisdiction pursuant to subsection 30.11(1) of the *CITT Act*. The Tribunal solicited comments from all parties and, on

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. On June 6, 2005, Med-Emerg requested its bid production costs.

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

4. S.O.R./91-499 [*Rules*].

March 11, 2005, dismissed the motion. The reasons for the dismissal are set out below. The Tribunal also extended the date for the filing of the GIR to March 29, 2005.

7. PWGSC submitted the GIR on March 29, 2005, and, on April 1, 2005, provided certain documents requested by Med-Emerg. On April 15, 2005, Med-Emerg submitted its comments on the GIR and filed the individual evaluators' score sheets of the other two bidders—Calian and Bayshore Healthservices (Bayshore)—that it had obtained through an access to information request. Calian did not submit any comments on the GIR. On April 26, 2005, PWGSC and Calian both submitted responses to Med-Emerg's comments on the GIR, as they both claimed that the comments on the GIR included new information relating to the complaint. Med-Emerg submitted its reply to these responses on April 29, 2005, and, at the same time, provided its consent to the Tribunal to place its own individual score sheets on the public record.

8. 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, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the written information on the record.

## PROCUREMENT PROCESS

9. The RFP was published on MERX<sup>5</sup> on May 19, 2004, with a closing date for the receipt of bids of July 13, 2004, which was subsequently extended to August 25, 2004.

10. The RFP stated that DND required the provision and management of a workforce of health service providers to supplement DND resources in Canada. Services were required during a transition phase from the date of contract to March 31, 2005, and during the operations phase for a five-year period from April 1, 2005, with options to extend the contract period for up to five additional years.<sup>6</sup> Med-Emerg submitted its proposal to PWGSC on August 25, 2004.

11. According to PWGSC, Med-Emerg, Calian and Bayshore submitted proposals. Between August 26 and September 8, 2004, the Technical Evaluation Committee (the Committee), which included PWGSC's contracting authority as an observer, evaluated the bids and agreed upon consensus scores. On September 9, 2004, the contracting authority calculated the total evaluated price for each of the three bidders. On September 14, 2004, the Committee chair provided PWGSC with the technical evaluation report. A financial capability opinion was requested from PWGSC's Financial Analyst Group on September 16, 2004, which was provided to the contracting authority on October 4, 2004. On December 13, 2004, Treasury Board approval was obtained to enter into a contract with Calian.

12. On December 15, 2004, PWGSC notified Med-Emerg that it was not the successful bidder and provided Med-Emerg with information about its technical scores, total evaluated price and its price per point. Med-Emerg was also provided with the price per point of Calian's proposal. On December 30, 2004, Med-Emerg filed an objection with PWGSC, on the ground of "irregularities in the evaluation process."<sup>7</sup> A debriefing took place on January 13, 2005, after which Med-Emerg filed a second objection with PWGSC, citing the ambiguity and improper application of the evaluation criteria, as well as the award of the contract to an unqualified bidder. On January 24, 2005, PWGSC responded by declining to provide additional information and denying the objection. On January 26, 2005, Med-Emerg made a third objection, again regarding the evaluation criteria, this time in relation to the application of ambiguous criteria. On January 28, 2005, PWGSC denied this third objection.

13. Med-Emerg submitted its complaint to the Tribunal on January 31, 2005.

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5. Canada's electronic tendering service.

6. RFP, para. 1.0.

7. December 30, 2004, letter from Med-Emerg to PWGSC, para. 3.

## JURISDICTIONAL ISSUE

14. On February 23, 2005, PWGSC filed a notice of motion pursuant to rule 24 of the *Rules* requesting that the Tribunal issue an order to strike the complaint on the basis that it was not in respect of a designated contract, as defined by subsection 3(1) of the *Regulations*, and that the complaint was therefore not within the Tribunal's jurisdiction pursuant to subsection 30.11(1) of the *CITT Act*.

15. On February 28, 2005, Calian notified the Tribunal that it would not comment on the motion. On March 3, 2005, Med-Emerg filed comments on the motion. On March 9, 2005, PWGSC filed reply submissions to Med-Emerg's comments. On March 11, 2005, the Tribunal issued an order dismissing the motion. The Tribunal's reasons for doing so are provided below.

### PWGSC's Position on Jurisdiction

16. PWGSC argued that this solicitation was for the procurement of health services, an excluded category pursuant to the trade agreements, and was therefore not a designated contract pursuant to subsection 3(1) of the *Regulations* and subsection 30.11(1) of the *CITT Act*.

17. In support of its view, PWGSC relied on various statements in the Notice of Proposed Procurement (NPP) and the RFP and on the purported acknowledgement by Med-Emerg that the procurement was for "health services" rather than "management services". PWGSC added that "health services" comprise "health care management", that a Goods and Services Identification Number (GSIN) for "program management" had been included in the solicitation abstract on MERX for the sole purpose of enhancing competition and that PWGSC officials had incorrectly indicated that the procurement was covered by the trade agreements.

### Med-Emerg's Position on Jurisdiction

18. Med-Emerg submitted that the economic incentives, Statement of Work (SOW) and evaluation criteria set out in the tender documents all demonstrate that the direct purpose of the solicitation was to procure program management services that are subject to the trade agreements. It argued that they were properly identified as applicable, be it only by virtue of the inclusion of program management services in the solicitation.

### Tribunal's Decision on Jurisdiction

19. The Tribunal notes that the trade agreements provide for both the inclusion of program management services<sup>8</sup> and the exclusion of health services.<sup>9</sup> They do not specifically address, let alone exclude, the management of health services or management services that are directed at health services. The Tribunal believes that it must be mindful of giving meaning to the term "program management services".

20. The Tribunal is of the view that program management services do not exist independently from the program or object that is to be managed. Put otherwise, the Tribunal believes that it is axiomatic that program management services are not services in and of themselves—necessarily, they are directed at managing a particular program or another.

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8. See Appendix I—Canada—Annex 4, *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [AGP]; Section A, Annex 1001.1b-2, *North American Free Trade Agreement*, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA]; and Article 1, Annex 502.1B, *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

9. See para. G, Section B, Annex 1001.1b-2 of NAFTA and Article 1(e), Annex 502.1B of the AIT. Canada did not offer to include health services in its AGP commitments: see Appendix I—Canada—Annex 4 of the AGP.



21. In the Tribunal's view, the facts in this matter show that the services being procured are program management services. This designation is not lost by the mere fact that the program being managed relates to health care. Also, the Tribunal is not persuaded that program management services become health services *per se* by mere association. Had it been intended that program management services *related* to health services were to be excluded from the ambit of the trade agreements, this could have been done explicitly, yet it was not.

22. Fundamentally, the pith and substance of this solicitation are not the provision of health services, but rather the provision of program management services, albeit *directed* at "health service providers". Indeed, the solicitation documents clearly state that it is the "health service providers", independent contractors or subcontractors, who provide the "health services", not the contractor. Rather, the contractor's role is to recruit, hire and manage "health service providers".<sup>10</sup>

23. Moreover, the solicitation was specifically and knowingly opened to parties outside of the health services field and awarded to Calian, one such entity.<sup>11</sup> In addition, the rated criteria and performance incentive fee criteria are all based on program administration or management considerations, few, if any, of which explicitly relate to health care or health services.<sup>12</sup>

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10. See, *inter alia*, para. 1.0 of the RFP: "Department of National Defence (DND) requires the provision and management of a workforce of health service providers to supplement DND resources in Canada"; para. 1.C.1 of the SOW: "The role of the Health Service Support Contractor is to provide health services through recruiting, hiring and managing qualified health service providers to supplement DND/CF resources"; para. 2.A.1.b(1) of the SOW: "**Transition Phase.** The Contractor will find health service providers for each facility; put in place its management team and systems to control, coordinate and manage human resources and invoicing"; para. 2.A.1.b(2) of the SOW: "**Operations Phase.** The Contractor will provide the on-going Management, Operation and Support of all health service providers"; para. 2.A.1.c(1) of the SOW: "DND/CF requires a Contractor to provide and manage health service providers in support of the CF health services. The Contractor must respond quickly and effectively to the needs of Clinic Managers (CMs) by obtaining and providing specific health service providers to support the CF health care services team. This Contract will be used to provide on-Base contracted health [service] providers in support of CF health resources"; para. 2.A.1.c(2) of the SOW: "The Contractor shall work closely with the Technical Authority (TA) in Ottawa and Clinic Managers (CMs) located at DND/CF locations across Canada. The Contractor will provide specific health services in support of on-site health care clinics. The Contractor will be requested to provide health service providers to DND/CF by relying on its own workforce or by subcontracting for these health service providers. In either case, the source of employment must be completely transparent to DND/CF and the Contractor must retain at all times employer's responsibility over the personnel provided; keeping in mind the Employer-Employee Relationship clause, section 2.A.2.b(7)"; and para. 2.A.2.b(7) of the SOW: "**Employer-Employee Relationship.** Arms-length employer-employee relationship is important to meeting the objectives of this Contract. The Contractor's health service providers are engaged as independent contractors for the sole purpose of performing health services". See also paras. 2.A.1.c(5) to 2.A.1.c(9) of the SOW.

11. See "Annex B—Risk Assessment" to a memorandum dated February 13, 2004, relative to the "Procurement plan for the provision and management of health service support to Canadian Forces health care clinics": "This contract LOI [letter of interest] and SOW allow for contractors having resource management and project management expertise to bid. Not only restricted to the health community." See also core of memorandum at 2: "Sourcing: . . . The G SIN for this requirement is being changed from Health Services to Project Management Services because the work required of the Contractor is to recruit and manage health care professionals."

12. Para. 10.0 and Annex B to the RFP, and section D.2.1, "Point Rated Criteria", Annex D to the RFP.

24. In addition, the link that this solicitation has with “health services” proper is so incidental that, with few changes, the structure and content of the solicitation documents could essentially be used as a template for the procurement of program management services in any field. In short, despite some appearances, PWGSC was not attempting to procure “health services” proper, but the *management* of part of DND’s program needs in that area. Project management is therefore the essential object of the solicitation.

25. Finally, the Tribunal notes that PWGSC had determined that the management of a program that did not involve health care professionals could be cited as an example of experience in the first two evaluation criteria.<sup>13</sup> The Tribunal questions how the solicitation could be construed as being for “health services” when bidders are not required to demonstrate experience in that field in order to qualify. The Tribunal further notes that the notice of award of contract<sup>14</sup> and the NPP indicate that the procurement<sup>15</sup> is covered by the *AIT*, *NAFTA* and the *AGP*. Later, in its motion, PWGSC argued that the Tribunal did not have jurisdiction in this case and indicated that the trade agreement coverage had been a mistake.

26. For the foregoing reasons, the Tribunal finds that the solicitation is with respect to a designated contract and that it has jurisdiction to inquire into this complaint.

### **MOTION FOR THE PRODUCTION OF DOCUMENTS**

27. On February 11, 2005, Med-Emerg filed a notice of motion pursuant to rule 24 of the *Rules* requesting: (1) that PWGSC produce a number of documents; and (2) that these documents be produced in advance of the GIR. The Tribunal dismissed the second part of the motion on February 22, 2005, and held the first part in abeyance pending the receipt of the GIR.

28. In considering the motion, the Tribunal determined that the inquiry process, as described in rules 103 and 104 of the *Rules*, was established by taking into account the appropriate time frames required by the respective parties to produce and/or review relevant documentation. In this case, it did not believe that Med-Emerg provided justification as to why the timelines established by rules 103 and 104 would not be adequate. Accordingly, on February 22, 2005, it dismissed the portion of the motion dealing with the pre-GIR production of the documents. The Tribunal noted that PWGSC, in the comments that it filed with the Tribunal in response to the motion, stated that it agreed to provide five of the eight types of requested documents when filing the GIR and needed additional information on another document. The Tribunal held in abeyance the part of the motion dealing with the actual production of the documents until after it had received the GIR, and advised that, at that time, it would revisit the issue if necessary.

29. Upon receipt and review of the GIR and further to Med-Emerg’s letter of April 4, 2005, the Tribunal, on April 7, 2005, directed PWGSC to produce one additional document requested by Med-Emerg but not filed along with the GIR. PWGSC did not produce the document in question, stating that the purported document did not exist. Med-Emerg made no further comment.

### **POSITIONS OF THE PARTIES AND ANALYSES OF THE TRIBUNAL**

30. 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

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13. Amendment No. 003, question and answer 76, Tab C of Tab 12 to the complaint.

14. Tab 1 to the complaint.

15. Tab 11 to the complaint.

*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 *AIT*, *NAFTA* and the *AGP*.

**Ground 1: PWGSC did not provide Med-Emerg with pertinent information concerning the reasons for not selecting its proposal nor with the relevant characteristics and advantages of the highest-rated proposal.**

PWGSC

31. PWGSC submitted that the time for Med-Emerg to file this ground of complaint had expired, as Med-Emerg had received a debriefing on January 13, 2005, and, on January 14, 2005, had requested information regarding its individual score sheets and Calian's score on the technical evaluation. It submitted that the request had been simply to obtain additional information rather than to object to that information not being provided at the debriefing. It submitted that the complaint had been filed with the Tribunal 12 working days after the debriefing and that Med-Emerg had therefore missed the deadline for filing this ground of complaint.

32. PWGSC submitted that, during the debriefing of January 13, 2005, it provided Med-Emerg with detailed information on the procurement and evaluation processes, as well as the evaluation results, which included its total evaluated price, its technical evaluation score and its price per point. It submitted that it had reviewed each sub-criterion of the point-rated criteria where Med-Emerg did not score full marks. PWGSC submitted that Med-Emerg was fully informed as to why its proposal was not selected.

33. PWGSC submitted that the trade agreements do not require the disclosure of individual scores and comments to a losing bidder nor do they require it to reveal a successful bidder's technical score. It submitted that *NAFTA* and the *AGP* do not require the disclosure of such detailed, qualitative information and that Calian's technical score is in a different class of information than the "relevant characteristics and relative advantages" required by the trade agreements to be released. It also submitted that, in the event of a re-tendering of the requirement, this knowledge could create an unfair advantage for Med-Emerg.

Med-Emerg

34. Med-Emerg submitted that it filed its complaint regarding PWGSC's failure to provide relevant information in a timely manner. Med-Emerg submitted that it was not until January 24, 2005, when PWGSC informed it that the documents that it had requested were not going to be provided, that the basis of the complaint arose. Med-Emerg submitted that, since the complaint was filed with the Tribunal on January 31, 2005, only five working days after the document request was denied, it was filed on time.

35. Med-Emerg claimed that PWGSC's failure to provide it with the evaluators' individual score sheets for its own proposal is inconsistent with *NAFTA* and the *AGP*, which require that the contracting authority provide a supplier whose tender was not accepted with information as to why its bid was not selected. It submitted that the individual evaluators' scores and comments are necessary to understand how its proposal was evaluated. Although Med-Emerg eventually obtained the individual score sheets at the time of the filing of the GIR, it requested that the Tribunal render a determination on this issue.

36. Med-Emerg submitted that, although it was provided with Calian's price per point, that information was not sufficient to determine the relative merits and advantages of Calian's proposal, as is required by *NAFTA* and the *AGP*. It submitted that, by knowing only the price per point, and not Calian's technical

score, it was not able to determine whether it lost on price or on technical merit. It also submitted that, as it had been able to obtain the individual score sheets for Calian and Bayshore through an access to information request, the information was not confidential, as claimed by PWGSC. Despite having obtained Calian's score sheets and technical score subsequent to the filing of the complaint, Med-Emerg requested that the Tribunal render a determination on this issue.

#### Tribunal's Analysis

37. 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.

38. 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.

39. 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.

40. PWGSC's position as to timeliness is that the delays for filing a complaint started running from the date of the debriefing and that Med-Emerg should have filed an objection with PWGSC prior to filing its complaint with the Tribunal. Med-Emerg submitted that it requested the documents at the debriefing, but was not given a definitive response until PWGSC formally declined to provide the requested information. This refusal was 5 working days prior to filing its complaint with the Tribunal. The Tribunal is of the view that, upon being formally refused the requested information, Med-Emerg was entitled to file a complaint directly with the Tribunal. Given that it was submitted within 10 days of that refusal, the Tribunal finds that this ground of complaint is timely.

41. As to the ground of complaint itself, the Tribunal is of the view that, in accordance with the provisions of the above trade agreements, PWGSC should have provided all relevant information pertaining to the complainant's own bid, including individual scoring sheets. While consensus scoring sheets provide an overall assessment of the bidder's proposal, the individual scoring sheets provide more assurance that the evaluation process was carried out in a transparent and fair manner. As to information relative to other bidders, the Tribunal is of the view that, in addition to the contract price published on MERX on December 17, 2004, it was reasonable, in this case, that only Calian's price per point be provided. Disclosure of the particulars of the other bidders' evaluations should be such as to preserve their competitive advantage for similar or related solicitations in the future.

42. Accordingly, the Tribunal is of the view that PWGSC should have promptly provided Med-Emerg, on its request and without the need for a motion, with the information pertinent to the evaluation of its own proposal. To that extent, the Tribunal finds this ground of complaint to be valid. It will not rule on matters relating to the confidentiality of information obtained by way of an access to information request, as it considers that process to be unrelated to this proceeding.

**Ground 2: PWGSC introduced unpublished evaluation criteria to the evaluation process.**PWGSC

43. PWGSC submitted that, in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*,<sup>16</sup> the Federal Court of Appeal stated that the tender documents need not identify all aspects of each evaluation criterion that may be taken into account by evaluators. It submitted that the evaluation criteria applied by the evaluators in this case relate to, and are fully encompassed by, the criteria specified in Annex “D” to the RFP and could have been anticipated by a reasonably diligent bidder.

44. PWGSC submitted that part of Med-Emerg’s allegation regarding this ground of complaint is premised on its mistaken interpretation of criterion RC-1 that bidders were to be evaluated based on experiences similar to, or relating to, the provision of health care services and that the evaluation plan removed any requirement for the geographic sites to be relevant to the delivery sites of the health service support contract (HSSC). PWGSC submitted that criterion RC-1 only requires the delivery sites of a bidder to be relevant to HSSC sites, not to be present on them. It also submitted that the wording of the criterion clearly implies that health care services are but one type of program that would satisfy the necessary corporate experience and that it was seeking a contractor that understands the health community at large and is capable of recruiting health service providers. PWGSC submitted that amendment No. 003 to the RFP, dated June 16, 2004, specifically addressed this issue as follows:

Question 76

It would appear that management of a program that does NOT involve health care professionals can also be cited as an example of experience in the first 2 evaluation [criteria]- is this correct?

Would experience managing a health care workforce have a higher ranking than experience managing another professional workforce e.g. IT Professionals?

Answer 76

Yes, management of a program that does not involve health care professionals can be cited as an example of experience in the first 2 evaluation criteria.

Point allocation in RC-1 refers to relevance to HSSC regarding category types and multiple delivery sites.

45. PWGSC submitted that the wording of Part 2 of the RFP, which follows, expressly advised bidders that they must demonstrate an understanding of, and would be evaluated against, the total requirement of the RFP and the SOW:

**SECTION I: PREPARATION OF TECHNICAL PROPOSAL**

In the Technical Proposal, the Bidder should demonstrate its understanding of the requirements of the Statement of Work **Annex “A”**, as well as demonstrate how the bidder will meet the requirements of **Annex “D”**.

46. PWGSC also submitted that there were several items of the SOW, including paragraphs 1.E.1.b and 1.F.1, which reveal the importance of program reforms and improvements in health care delivery. PWGSC submitted that the RFP clearly signalled that DND was seeking improvements in the delivery of health services and that it was reasonable to expect that bidders would include these elements in their proposals.

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16. [2002] 1 F.C. 292 (C.A.), para. 43.

47. PWGSC submitted that references could be found throughout the SOW that relate to the risks that needed to be addressed as part of criterion RC-4. It submitted that the six examples of relevant major risks were provided in the evaluation plan and that bidders should reasonably have been able to determine them. PWGSC submitted that the criterion allowed bidders to provide as many risks as they could identify and that it was reasonable to expect bidders to understand that the identification of a greater number of risks would carry more points.

#### Med-Emerg

48. Med-Emerg provided examples of where the evaluation criteria were poorly defined (RC-1), where they included additional elements for the evaluators to consider (RC-3) and where they set unreasonable benchmarks (RC-4), all of which were included in the evaluation plan provided to the Committee, but not made available to bidders until after the proposals had been submitted.<sup>17</sup> It submitted that the Tribunal, in *MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.*,<sup>18</sup> determined that such use of unpublished criteria is inconsistent with the requirement of the trade agreements that tender documents clearly identify the criteria that will be used in the evaluation of bids.

49. Med-Emerg submitted that the plain meaning of criterion RC-1 was that the bidder's corporate experience had to be similar or related to health services and include delivery of those services in HSSC delivery sites. It submitted however that the evaluation plan allowed a company with no health service experience or no appropriate delivery sites to be successful, a circumstance which occurred when Calian was awarded the contract.

50. Regarding criterion RC-3(h)—Transition Phase Risk Assessment—Med-Emerg submitted that the evaluation plan set out additional critical elements that are not evident from a reading of the RFP, including having a functional invoicing system in place by April 1, 2005. Med-Emerg submitted that, although there are references in the SOW to invoicing in paragraphs 2.A.1.b(1), 2.A.1.b(a) and 2.C.3(a), as well as in the Performance Incentive Fee, those references did not appear in criterion RC-3(h) and that PWGSC inappropriately cross-referenced and applied previously unrelated sections of the RFP to the rated criteria. Med-Emerg submitted that criterion RC-6(vi) required that the bidder be capable of meeting the requirement of paragraph 2.C.3(a) of the SOW of having a fully operational invoicing system in place by April 1, 2005. It also noted that its proposal had received full marks for criterion RC-6. Med-Emerg submitted that the lack of an invoicing system would not impact the delivery of clinical services, which was the focus of criterion RC-3 and that, hence, it did not include it as a risk, for which PWGSC deducted points.

51. Regarding criterion RC-4(g)—Management Plan Risk Assessment—Med-Emerg submitted that the list of six risks provided in the evaluation plan could not reasonably be anticipated by the bidders and should only be considered as examples of risks and not as an exclusive list. It submitted that the evaluators obviously understood that the list provided in the evaluation guide contained the only risks to be considered, as evidenced by their comments on the score sheets. Med-Emerg submitted that the RFP did not direct bidders to identify a minimum number of risks and that bidders had no way of knowing that PWGSC had, through its evaluation plan, established a minimum number of risks to be identified to obtain full marks. Med-Emerg submitted that the same argument that applied to criterion RC-3(h) applies to PWGSC's evaluation of this criterion, namely, that references to articles in the SOW and the RFP that were not mentioned in criterion RC-4(g) in the RFP cannot be considered.

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17. The evaluation plan was provided to Med-Emerg at its debriefing.

18. (6 March 2000), PR-99-034 (CITT).

52. Regarding criterion RC-4(k)—Management Information System (MIS)—Med-Emerg submitted that it could not be anticipated from the wording of the criterion in the RFP that evaluators, based on requirements of the evaluation guide, were to consider whether the bidders had demonstrated how the MIS would improve the program service delivery. Med-Emerg submitted that the RFP required a description of the MIS that was to be used and that, accordingly, the system did not need to be fully developed at the time of bid closing. It submitted that the deduction of marks from the score of its proposal for the MIS being “only partly developed” was another example of the application of unpublished criteria. Med-Emerg also submitted that it lost marks for not describing the available management reports, even though it had provided a list of the reports that it was going to use in fulfilling the requirements of the contract. As in the above circumstances, Med-Emerg submitted that the cross-references to the SOW that were not included in the description of criterion RC-4 cannot be taken into account by evaluators.

#### Tribunal’s Analysis

53. 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.

54. Article 1013 of *NAFTA* reads in part as follows:

1. Where an entity provides tender documentation to suppliers, the document shall contain all information necessary to permit suppliers to submit responsive tenders. . . The documentation shall also include:

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders.

55. Article XII of the *AGP* reads in part as follows:

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders.

56. This allegation pertained to four elements of the rated criteria for which Med-Emerg alleged that unpublished criteria were used to evaluate Med-Emerg’s proposal, specifically:

- (a) RC-1—Corporate Experience Proven by Similar or Related Work;
- (b) RC-3(h)— Transition Phase Risk Assessment;
- (c) RC-4(g)— Management Plan Risk Assessment; and,
- (d) RC-4(k)— Management Information System.

57. Regarding criterion RC-1, the Tribunal shall address this issue fully in its examination of ground 5 below.

58. Regarding criterion RC-3(h), and criterion RC-4(g), the Tribunal is of the view that it was not apparent that the bidders had to identify a minimum number of risks or, indeed, identify any particular risks. For example, the Tribunal notes that invoicing- and payment-related issues were specifically addressed in criterion RC-6—Invoicing—and that Med-Emerg received full marks for its response to that criterion. As such, it appears reasonable to the Tribunal that Med-Emerg would not have included invoicing as a risk.

59. The Tribunal is of the view that referring to other sections of the RFP or the SOW for the purposes of evaluation where these other sections are not mentioned in the published point-rated evaluation criteria is a practice inconsistent with the objectives of the trade agreements, which are transparency, efficiency and clarity. In light of these objectives, the Tribunal is of the view that, should PWGSC use unpublished evaluator guidelines, these guidelines should be obvious from the published point-rated criteria. The sections of the RFP or the SOW on which PWGSC wishes bidders to focus should be stated in the published point-rated criteria. Bidders should not be expected to divine the needs of the procuring entity for the purposes of its evaluation criteria. In the Tribunal's view, there is a difference between understanding the client's needs and the specific evaluation criteria against which the bidders will be rated. The trade agreements require the entities or parties to be clear.

60. Regarding criterion RC-4(k), the questions of improvements in the delivery of health services and the level of development of the MIS, the Tribunal is of the view that these matters could not reasonably have been anticipated from a reading of the published point-rated criteria. Moreover, as stated earlier, any referencing to sections of the RFP, for purposes of evaluation, should be expressly stated in the published evaluation criteria. However, with respect to the description of the available management reports listed by Med-Emerg in its proposal, the Tribunal is of the view that the sufficiency or insufficiency of their description is a matter for the evaluators, not the Tribunal, to assess.

### **Ground 3: PWGSC failed to properly apply the published evaluation criteria.**

#### PWGSC

61. PWGSC submitted that the evaluators had performed their function properly and that it is improper for the Tribunal to second-guess the evaluation of a single bidder's proposal by a team of subject-matter experts. It submitted that to do so sanctions the use of a "different yardstick" to measure different proposals, which runs counter to the Tribunal's reasoning in *Canadian Computer Rentals*,<sup>19</sup> where it stated that, "because professional judgement is applied in evaluating rated requirements, it is important for fairness and equity reasons that all proposals be evaluated by the same evaluators".<sup>20</sup> PWGSC submitted that the evaluators appropriately recognized deficiencies in Med-Emerg's proposal that related to:

- (a) Criterion RC-4(d)—Management Plan Organizational Structure—PWGSC submitted that the evaluators recognized deficiencies in Med-Emerg's organizational structure and that the roles and responsibilities of key personnel with regard to ensuring central control were not satisfactorily described;
- (b) Criterion RC-4(i)—Management Plan - Retention of Personnel—PWGSC submitted that, while Med-Emerg described certain benefits and programs, it did not describe how they and other arrangements would encourage the retention of health service providers or project personnel throughout the life of the project; and
- (c) Criterion RC-4(j)—Management Plan - Management Controls and Financial Procedures—PWGSC submitted that the evaluators were not convinced that Med-Emerg provided a satisfactory description of controls and procedures relating to some of the required financial processes.

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19. (3 August 2000), PR-2000-003 (CITT).

20. *Ibid.* at 6.



Med-Emerg

62. Med-Emerg submitted that there were instances in the evaluation process where the evaluators disregarded relevant information in its proposal. It submitted that there were also instances where it claims to have included the information that, according to the consensus scoring sheets that it obtained, was “missing” or that it provided an adequate level of information in accordance with the requirements of the RFP, only to learn that the evaluators had determined that not enough detail was provided.

63. Med-Emerg submits that evaluators either introduced criteria not contained in the RFP or failed to apply the published criteria by disregarding information in its proposal, as follows:

(a) RC-4(d)—Management Plan Organizational Structure—Med-Emerg submitted that it provided the necessary information, including a flow chart to describe various activities. It submitted that the evaluators either disregarded the information in its proposal or required a level of detail implied from the evaluation plan that was not apparent from the RFP;

(b) RC-4(i)—Management Plan - Retention of Personnel—Med-Emerg submitted that neither the RFP nor the evaluation plan required the bidder to explain how its programs would encourage retention, only that it describe the programs, which it claims its proposal did. Med-Emerg submitted that it was inherently obvious how such programs would work as incentives and that the evaluators took an unsubstantiated view that it did not address incentives necessary for retention of project personnel and health service providers for all phases. Med-Emerg submitted that the evaluators either applied unpublished criteria or disregarded information in its proposal; and

(c) RC-4(j)—Management Plan - Management Controls and Financial Procedures—Med-Emerg submitted that the RFP did not list the requirement for which it lost a portion of the marks available to be awarded for this criterion and that its proposal clearly described its management controls and financial procedures. It submitted that the evaluators either applied unpublished criteria or disregarded information contained in its proposal.

Tribunal’s Analysis

64. This allegation pertained to three elements of the rated criteria for which Med-Emerg alleged that PWGSC had violated Article 506 of the *AIT*, Article 1013 of *NAFTA* and Article XII of the *AGP* by not applying the published evaluation criteria when it evaluated its proposal, specifically:

(a) RC-4(d)—Management Plan Organizational Structure;

(b) RC-4(i)—Management Plan - Retention of Personnel; and

(c) RC-4(j)—Management Plan - Management Controls and Financial Procedures.

65. The Tribunal is of the view that it need not substitute its judgement for that of the evaluators when it is satisfied that they have applied the appropriate criteria and put their minds to the factual questions before them. It is satisfied that the evaluators have done so with respect to these items and that this element of the complaint is therefore not valid.

**Ground 4: PWGSC applied ambiguous criteria.**PWGSC

66. PWGSC submitted that there were no latent ambiguities in the evaluation criteria specified in the RFP. It submitted that the evaluation criteria applied by evaluators reasonably related to, and were fully encompassed by, the criteria specified in the RFP. It submitted that the RFP expressly advised bidders that their proposals had to demonstrate an understanding of, and would be evaluated against, the total requirement of the RFP and the SOW. It submitted that any bidder, acting reasonably, would properly understand the scope of the evaluation criteria specified in the RFP.

67. PWGSC further submitted, in response to Med-Emerg's allegation below, that there are many reasons why a bidder may receive a different score from different evaluators, none of which are the result of ambiguous criteria.

Med-Emerg

68. Med-Emerg submitted that, if the Tribunal finds that the criteria introduced in the technical evaluation guideline reasonably relates to the same criteria in the RFP and that the evaluators' interpretation of that criteria was reasonable, then it should also find that the published criteria were ambiguous and lent themselves to more than one reasonable interpretation. Med-Emerg also submitted that these ambiguities are latent and only came to light when it was provided with the evaluation plan on January 12, 2005, long after the proposals had been submitted. It argued that, in *IBM Canada Ltd.*,<sup>21</sup> the Tribunal found that bidders that construe specifications reasonably, but differently from PWGSC, should not be penalized for a latent ambiguity in the RFP.

69. Med-Emerg does not dispute PWGSC's claim that the wording of the RFP advised bidders that their proposals had to demonstrate an understanding of, and would be evaluated against, the total requirement of the RFP and the SOW; however, it submitted that this does not allow PWGSC to import requirements from one section of the RFP or the SOW to have them apply to other sections.

70. Med-Emerg also submitted that the wide variations in scores awarded by the individual evaluators demonstrated that the evaluators themselves were unable to clearly understand and apply the evaluation criteria.

Tribunal's Analysis

71. The Tribunal notes that Part 2 of the RFP, under "Preparation of Technical Proposal", states in part: "In the Technical Proposal, the Bidder should demonstrate its understanding of the requirements of the Statement of Work **Annex 'A'**, as well as demonstrate how the Bidder will meet the requirements of **Annex 'D'**." The Tribunal also notes that Part 2, under "Evaluation Procedures", states: "Proposals will be evaluated in accordance with the Evaluation Procedures and Criteria specified in **Annex 'D'**". Proposals received will be assessed against the evaluation criteria identified therein for the total requirement of this Request for Proposal (RFP) and in conjunction with the accompanying Statement of Work, **Annex 'A'**."

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21. (24 April 1998), PR-97-033 (CITT).

72. A number of cross-references cited by PWGSC in the GIR for purposes of supporting the unpublished evaluation criteria are not included anywhere in Annex “D”. As stated above, the Tribunal does not accept the argument that reference to a given aspect of the work described anywhere in the tender documents makes it relevant for evaluation purposes.

73. The Tribunal is of the view that, in accordance with Article 506 of the *AIT*, Article 1013 of *NAFTA* and Article XII of the *AGP*, it is incumbent upon the purchasing entity to clearly define its requirements and clearly set out the evaluation criteria and their weighting. Accordingly, the Tribunal is of the view that, in this case, sections of the RFP should not have been applied to other sections unless expressly referenced in Annex “D” and, more particularly, in section D.2.1 under the relevant applicable criteria.

74. In light of the above and given its analysis under grounds 2, 3 and 5, the Tribunal need not address the question of latent ambiguities. However, the Tribunal wishes to add that it is not convinced that the variations in the scores assigned by individual evaluators to different bidders in this case indicate that the criteria are ambiguous. In the Tribunal’s view, there generally is a subjective element in evaluating bids and scoring variations are a normal occurrence in the evaluation process. Such variations are typically addressed by using consensus scoring.

**Ground 5: PWGSC awarded the contract to a bidder that did not meet the mandatory requirements of the RFP.**

PWGSC

75. PWGSC submitted that Calian was fully compliant with the mandatory requirements and was properly awarded the contract. It submitted that Med-Emerg based this allegation on the mistaken interpretation that criterion RC-1 related exclusively to having experience in work relating or similar to health care services. PWGSC noted that bidders were advised, as part of amendment No. 003 to the RFP, specifically answer 76, that the “management of a program that does not involve health care professionals can be cited as an example of experience in the first 2 evaluation criteria [RC-1 and RC-2].” It submitted that “being in relation to HSSC” was broader than just the delivery of health care services and included program management activities, which was evident from the wording used in the RFP.

76. Regarding delivery sites, PWGSC submitted that the evaluation plan based the scoring on the number of regions within Canada in which a bidder’s proposal indicated that it had delivery sites and whether any of those sites were in remote locations. There was no requirement that a bidder’s proposal include a delivery site at an HSSC site. PWGSC submitted that Calian provided services at major Canadian Forces Bases (CFBs) across Canada. It also submitted that Calian’s proposal indicated that the company could deploy delivery capability to other sites across the country.

Med-Emerg

77. Med-Emerg submitted that a reasonable interpretation of criterion RC-1 was that bidders had to have experience managing a program that involved health occupations. It submitted that, as Calian was a technology services company with no previous experience in the provision of health care services, Calian could not have received the required 50 percent of the 90 points that were available for criterion RC-1 and, therefore, was not eligible to be awarded the contract. It submitted that, at most, Calian could have received 40 points for RC-1, 5 points fewer than required.

78. Regarding delivery sites, Med-Emerg claimed that, while it has representatives at 33 of the 36 DND locations across Canada, Calian has only 3 offices, none west of Mississauga, Ontario, and that Calian had never been involved in a program that had delivered services to all HSSC sites in Canada. It submitted that geographic dispersion, in and of itself, was not relevant and that a program that involved a number of sites or remote locations could not reasonably meet the requirements of the RFP unless those sites were directly connected to HSSC sites (i.e. geographically proximate to HSSC sites).

79. Med-Emerg argued that, although Calian did not have any experience in remote locations, it received credit from three of the evaluators for an upcoming project in Nunavut, as well as having provided services to CFB Petawawa and CFB Valcartier. It noted that the term “remote location” was not defined in the RFP, but that neither CFB Petawawa nor CFB Valcartier is a remote location. According to Med-Emerg, to give Calian credit for “previous” experience for a project that has yet to take place shows a flaw in the procurement process.

#### Tribunal’s Analysis

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

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation.

81. Article XIII of the *AGP* reads in part as follows:

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation.

82. Med-Emerg claimed that criterion RC-1 required that bidders have previous experience in the delivery of health services and that Calian, which did not have such experience, could not have obtained the necessary number of points for that criterion and, hence, could not have been awarded the contract.

83. Regarding paragraph 2(b) of criterion RC-1 in which consideration was to be given to the “[t]ypes of categories involved in the Program (i.e. Health occupations, other professional occupations)”, the Tribunal does not agree with Med-Emerg that Calian needed previous experience in health care services in order to qualify, particularly in view of answer 76 in amendment No. 003 to the RFP (see above in ground 2 under PWGSC position) which indicated that health care services were only one type of program that satisfied the necessary corporate experience for this project.

84. Regarding paragraph 2(c) of criterion RC-1 in which consideration was to be given to the “[d]egree of geographic dispersion of delivery sites in the Program and relevance to HSSC delivery sites”, the Tribunal finds a discrepancy between the published point-rated criteria and the unpublished evaluators’ guidelines. The Tribunal is of the view that there was no minimum number of locations to be considered and that “remote locations” could not have been anticipated as a specific criterion. In any event, Calian should not be penalized for not meeting this unpublished criterion. Moreover, the Tribunal does not believe that the bidder had to be involved in a program that delivered a service to each and every HSSC site in Canada in order to receive a satisfactory rating.

85. Regarding paragraph 2(d) of criterion RC-1 in which consideration was to be given to the “[r]elevance of Bidder’s role(s) and responsibilities in relation to HSSC”, the Tribunal is satisfied that the evaluators reasonably interpreted this requirement.

86. To the extent that criterion RC-1 was ambiguous, the Tribunal is of the view that the ambiguity was apparent from the time the answer was given to question 76 in amendment No. 003 to the RFP and that this ground of complaint was therefore not filed on time. Moreover, the Tribunal reiterates that previous health care services experience was not, in its view, a prerequisite to qualify for this project. It therefore determines that PWGSC complied with Article 1015 of *NAFTA* and Article XIII of the *AGP* and that this ground of complaint is not valid.

**Ground 6: PWGSC failed to follow the prescribed evaluation procedures.**

PWGSC

87. PWGSC submitted that part of Med-Emerg’s allegation regarding this ground stemmed from its refusal to inform Med-Emerg of whether or not other bidders had been contacted during the evaluation process to obtain financial information. Med-Emerg interpreted this refusal as “suggest[ing] that the financial capability of the bidder selected for contract award was not verified as required by the RFP.”<sup>22</sup> PWGSC submitted that this view was incorrect. It also submitted that amendment No. 009 to the RFP, at answer 107, states in part that “PWGSC may require the Bidder to submit some or all of the financial information detailed . . . below”, which makes the requirement discretionary. PWGSC also provided evidence with the GIR<sup>23</sup> that a financial capability opinion was provided by its Contractual Costing Services Directorate on October 4, 2005.

88. In response to Med-Emerg’s allegation that the financial and technical evaluations of the bidders’ proposals were not conducted independently because the contracting authority was an observer on the Committee, PWGSC submitted that, as an observer, the contracting authority was present to answer procedural questions and to act as a scribe and that the contracting authority did not contribute to, nor influence, the Committee’s technical evaluation. It submitted that, prior to the technical evaluation, the contracting authority and an assistant viewed proposals to ensure that certain mandatory requirements were met (e.g. signature by a bidder’s representative, inclusion of certain certifications and pricing for all services requested), but that the contracting authority did not calculate a bidder’s total evaluated price until after the completion of the consensus meetings and did not, at any time prior to the completion of the technical evaluation, provide pricing information to any of the Committee members.

Med-Emerg

89. Med-Emerg submitted that the RFP and subsequent amendments required the review of financial information pertaining to the bidders and their proposals, including whether or not a bidder was financially capable of performing the contract. This verification was to be done after the bids were submitted, but before the contract was awarded. Med-Emerg argued that it had asked, at its debriefing, whether or not this financial verification took place and that PWGSC had refused to answer. It interpreted this refusal as suggesting that the verification had not taken place. It submitted that this amounted to a failure to apply the published evaluation procedures. It also submitted that the financial capability opinion included with the

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22. Complaint, para. 107.

23. Confidential Exhibit 2 to the GIR.

GIR did not make reference to either the cash flow or the project cash flow statement described in section D.3.1 of the RFP.

90. Med-Emerg submitted that it was told, at its debriefing, that the contracting authority opened and examined its bid price upon receipt of the proposal in August 2004. It submitted that section D.3 of Annex “D” to the RFP required that the financial evaluation be conducted independently of the technical proposals, but because the Committee included the contracting authority, the government did not properly apply section D.3 and the strict segregation of financial and technical information required by the RFP was thereby compromised. It claimed that this knowledge of the bid prices by a participant of the Committee raises a reasonable apprehension that the Committee was predisposed in favour of the lowest-priced proposal.

#### Calian

91. Calian submitted that Med-Emerg was simply dissatisfied with the results of the evaluation and was now seeking to have its proposal re-evaluated in accordance with criteria that Med-Emerg now deems, after the fact, most relevant to the RFP process. It submitted that, because there was no procedural unfairness and no breach of evaluation procedures occurred, the Tribunal should, in accordance with its past practice, defer to the judgment of the evaluators.

92. Calian submitted that Med-Emerg’s requested remedy—to be awarded the contract—is not appropriate. Calian submitted that the appropriate remedy, if any, would be for the Tribunal to recommend a re-evaluation of all proposals in accordance with the criteria that it deemed were affected by PWGSC’s breaches. It submitted that, if any breaches occurred, then all bidders were similarly affected and that the relative finishing position of Med-Emerg’s proposal would not be affected.

93. Calian submitted that Med-Emerg’s public release of Calian’s and Bayshore’s individual score sheets had been irreparably prejudicial and had irrevocably altered the competitive landscape. It submitted that the release of this information made the option of recommending a new solicitation unfair to all potential bidders except Med-Emerg.<sup>24</sup>

#### Tribunal’s Analysis

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

4. An entity shall award contracts in accordance with the following:

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

95. Article XIII of the *AGP* reads in part as follows:

4. (c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

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24. Subsequent to Calian’s submission, Med-Emerg consented to placing its own individual score sheets on the public record. Accordingly, the Tribunal has placed these score sheets on the public record.

96. Article 501 of the *AIT* reads in part as follows:

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

97. Regarding the allegation that PWGSC failed to properly evaluate Calian's financial capability, the Tribunal is of the view that this ground is not valid. It notes that amendment No. 009 to the RFP (question and answer 107) made the requirement discretionary and that information such as cash flow statements was not mandatory.

98. Regarding the allegation that PWGSC failed to independently evaluate the financial proposals, the Tribunal is of the view that the contracting authority was a titular member of the Committee only. The contracting authority was an observer at the Committee kick-off meeting and at the two consensus meetings that followed the individual evaluations. The contracting authority's role was to respond to procedural questions and to act as "scribe". There is no evidence that information relating to the financial proposals was passed on to the technical evaluators prior to or during their evaluations. Evidence shows that the contracting authority calculated the total evaluated prices only after the two consensus meetings. Moreover, without such a calculation, the Tribunal is not convinced that the contracting authority could have estimated, even on the basis of a rough order of magnitude, the financial value of each proposal. Therefore, it is unlikely that the contracting authority had the necessary financial information to influence the technical evaluators and to support an allegation of a reasonable apprehension of bias. The Tribunal is of the view that a reasonable and informed person, viewing the matter realistically and practically, and having thought it through, would not conclude that there was sufficient evidence to support an allegation of reasonable apprehension of bias. Therefore, it is not convinced that the requirement that the financial proposals be evaluated independently of the technical proposals was not followed and that this element of the complaint is not valid.

## REMEDY

99. The Tribunal is of the view that there were several breaches of the trade agreements in conducting this procurement. However, in recommending an appropriate remedy, it must consider all the circumstances relevant to the procurement in question, including: (1) the seriousness of any deficiency found by the Tribunal; (2) the degree to which Med-Emerg and other interested parties were prejudiced; (3) the degree to which the integrity and efficiency of the competitive procurement system were prejudiced; (4) whether the parties acted in good faith; and (5) the extent to which the contract was performed.

100. The Tribunal is of the view that the more potentially serious breaches in this case were those that would have had an impact on the scores achieved by the bidders. These breaches consisted principally in developing unpublished point-rated evaluation guidelines that took into account sections of the RFP that were not directly referenced in the published point-rated criteria. Their seriousness is directly proportional to the degree of prejudice to Med-Emerg and to the integrity and efficiency of the competitive process.

101. The Tribunal is convinced that, regardless of these breaches, Med-Emerg would still have been unable to overcome Calian's price-per-point advantage. From that perspective, the Tribunal is of the view that Med-Emerg was not seriously prejudiced, in that it would not have been awarded the contract in any event, as distinct from what would have been the case had Calian not met the mandatory requirements of criterion RC-1. In this connection, the Tribunal notes that this criterion was the object of some clarification

during the procurement process. However, the Tribunal also notes that Med-Emerg chose not to seek additional clarification or object to the clarification provided. Given that Calian met the mandatory criteria and Med-Emerg could not overcome Calian's price-per-point advantage, the Tribunal is not convinced that the interests of fairness and efficiency and the general public interest require it to make any remedy recommendations in this case.

102. As for the integrity and efficiency of the competitive system, the Tribunal is of the view that, in this case, restarting the procurement process or re-evaluating the proposals would have a greater negative impact on the system than the prejudice that it may already have suffered. However, having said that, the Tribunal believes that greater attention must be devoted to providing evaluators with clear evaluation guidelines that are fully consistent with the published evaluation criteria to which the bidders must respond.

103. The Tribunal has consistently tried, through its determinations, to impress upon the government that the lack of attention paid to this fundamental aspect of the procurement process impacts on the bidder, as the Tribunal stated in *Brookfield LePage Johnson Controls Facility Management Services*:<sup>25</sup>

As well, by not being informed of all the "rules of the game", bidders are unable to maximize their efforts in order to be the successful bidder. Not giving the rating and weighting methodology is like a teacher giving students a test comprising different questions, each being worth different point values, but not disclosing those point values. A student would not know where to focus his or her energies in responding. Such an approach is simply unfair.

It also adversely impacts on the government itself. Not only does the government incur costs in defending itself at court or Tribunal proceedings, but it also suffers delays in the acquisition of goods and services affected by these proceedings. In addition, the very real possibility exists that proposals, which might otherwise have prevailed, are unfairly excluded.

104. The Tribunal finally notes that no allegations of bad faith were made by Med-Emerg.

## COSTS

105. In light of the above, and given the Tribunal's discretion and the particular circumstances of this case, the Tribunal awards Med-Emerg its reasonable costs incurred in preparing and proceeding with this complaint, recognizing that the complaint is only valid in part. In this connection, the Tribunal notes the additional burden on Med-Emerg resulting from the two motions that were filed in these proceedings and the overall importance of the issues in respect of which Med-Emerg prevailed. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (Level 3). 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 and the complexity of the complaint were high, in that they involved many elements and the evaluation was based on a significant evaluation grid involving a combination of requirements. Finally, the complexity of the complaint proceedings was high, as there was one intervener, two motions and the time frame for the proceedings was extended to 135-days. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$4,100.

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25. (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) at 17.



**DETERMINATION OF THE TRIBUNAL**

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

107. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Med-Emerg 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 3, and its preliminary indication of the amount of the cost award is \$4,100. 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

Patricia M. Close

Patricia M. Close  
Member