



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-044

Deloitte & Touche LLP

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, May 11, 2006*

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IN THE MATTER OF a complaint filed by Deloitte & Touche LLP 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

DELOITTE & TOUCHE LLP

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Deloitte & Touche LLP for its lost opportunity by an amount equal to one quarter of the profit that Deloitte & Touche LLP would reasonably have earned, had it been the successful bidder in the procurement (Solicitation No. 24062-050061/A) by the Department of Public Works and Government Services on behalf of the Treasury Board Secretariat for the provision of professional audit services. The Canadian International Trade Tribunal recommends that Deloitte & Touche LLP and the Department of Public Works and Government Services negotiate the amount of that compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome of the negotiations.

Should the parties be unable to agree on the amount of compensation, Deloitte & Touche LLP shall file with the Canadian International Trade Tribunal, within 30 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of Deloitte & Touche LLP's submission to file a response. Deloitte & Touche LLP will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments. Counsel are required to serve each other and file with the Canadian International Trade Tribunal simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Deloitte & Touche LLP its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary

indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated 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.

Ellen Fry _____
Ellen Fry
Presiding Member

Hélène Nadeau _____
Hélène Nadeau
Secretary

Tribunal Member:	Ellen Fry, Presiding Member
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STATEMENT OF REASONS

COMPLAINT

1. On January 5, 2006, Deloitte & Touche LLP (Deloitte) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. 24062-050061/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Treasury Board Secretariat for the provision of professional audit services.
2. Deloitte alleged that PWGSC did not fully disclose the evaluation criteria in the solicitation document. This was the only ground of complaint that was accepted for inquiry. Deloitte requested, as a remedy, that the Tribunal recommend that PWGSC compensate it for its lost opportunity. In the alternative, it requested that the Tribunal recommend that PWGSC compensate it for its bid preparation costs. Deloitte also requested its costs incurred in preparing and proceeding with the complaint.
3. On January 11, 2006, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
4. On, January 13, 2006, PWGSC informed the Tribunal that a contract had been issued to the Centre for Public Management Inc. On February 14, 2006, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On February 24, 2006, Deloitte filed its comments on the GIR.
5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. According to PWGSC, on August 2, 2005, it sent a Request for Proposal (RFP) to suppliers qualified under “Supply Arrangement V9205-01004 for Audit Services, Work Stream II, Program/Compliance/Operational services”. The original closing date of August 31, 2005, was subsequently amended to September 14, 2005.
7. On August 18, 2005, PWGSC issued amendment No. 001. This amendment replaced rated criterion R-4, “Experience of the Proposed Audit Team”, with a new R-4 and added Table R-4, which required bidders to specify the experience of their proposed resources under each of the categories listed in Table R-4.⁴ Also, Table R-4 required bidders to indicate the number of days each proposed individual resource would be dedicated to the project.

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

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

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

4. GIR, Exhibit 2. A proposed resource in the context of this procurement means an individual working on the project.

8. The relevant part of amended evaluation criterion R-4 reads as follows:

The Bidder should clearly demonstrate that the collective work experience and expertise of the proposed audit team will meet or exceed the requirements outlined in the Statement of Work by providing project description(s) in which the resources have experience in the following knowledge areas:

...

Points will be allocated as follows:

- Coverage of all knowledge areas assessed as a collective team (6 points);
- Sufficient capacity in terms of number of resources proposed for each of the knowledge areas (6 points);
- Assessment of experience of the proposed resources to each of the knowledge areas and each proposed [resource] allocation to the project (18 points).

9. The relevant part of annex “D” of the RFP reads as follows:

The Bidder’s responses to the rated criteria will be rated by the evaluators on a scale of 0 to 10 by judging whether the response addresses the requirement in a complete, logical, practical and applicable fashion. The rating scheme of 0 to 10 will be assigned to the Bidder’s written response as follows:

Rating	Description
0 =	Unsatisfactory response, information not provided, rated area not addressed, the Bidder receives 0% of the available points for this element;
...	
3 =	unsatisfactory response, rated area is partially addressed, the Bidder receives 30% of the available points for this element;
...	
7 =	rated area is satisfactorily addressed, the Bidder receives 70% of the available points for this element;
...	
10 =	outstanding response, rated area is dealt with in depth, requirement is exceeded, response is exceptional, the Bidder receives 100% of the available points for this element;

10. PWGSC submitted that, in response to the RFP, six proposals were received.

11. The scoring direction in Table 2, “Rating Guide”,⁵ which was used by PWGSC to evaluate rated criterion R-4, but not provided to the bidders before bid closing, reads as follows:

5. GIR, Exhibit 13.

	Description	Resource 1	Resource 2	Resource 3
...				
G.	TOTAL points for experience (Max 12)			
H.	Number of days person has been allocated to project (Max 120*)			
I.	Based on data in row H above, assign the following scale If 0 -14 days, enter 0 If 15-39 days, enter 2 If 40-79 days, enter 4 If 80-120 days, enter 6			
J.	Total Points for experience & allocation (Max 36) Add row G + row I			
K.	The total score out of 18 is the total score of the team from column J divided by the No. of Resources offered as the team (i.e. 18 + 14 + 12) = 44 collective points divided by 3 resource members for a total of 14.7 out of 18			

12. According to PWGSC, the technical evaluation of bids was completed on October 20, 2005. Two of the six proposals submitted did not achieve the minimum overall technical point rating as required and were therefore not considered in the financial evaluation. Deloitte's bid was the top-ranked technical bid. On October 21, 2005, PWGSC conducted the financial evaluation. On November 8, 2005, PWGSC advised Deloitte that the Centre for Public Management Inc. had won the contract.

13. On November 9, 2005, Deloitte requested, and PWGSC provided, a breakdown of its evaluated score. Later that day, Deloitte requested a more detailed explanation of the scoring. PWGSC indicated that, as a result of a scoring grid that it developed,⁶ any personnel proposed in a bid who were not assigned to the project for more than 14 days received a score of zero on the technical evaluation for that resource.

14. On November 22, 2005, Deloitte filed an objection with PWGSC regarding the evaluation of its proposal and the evaluation process in general. On December 22, 2005, Deloitte received a response from PWGSC in which it dismissed Deloitte's concerns and maintained that Deloitte's bid was properly and fairly evaluated. On January 5, 2006, Deloitte filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Deloitte's Position

15. Deloitte submitted that, before the scoring grid was revealed by PWGSC, it had no idea that such a grid existed for rated criterion R-4. Moreover, it submitted that this scoring methodology was not the methodology of which bidders were informed in the RFP. It submitted that the lack of knowledge of this grid and the grid's impact on its bid resulted in Deloitte being seriously prejudiced.

6. This is the grid shown in part at paragraph 11.

16. Deloitte submitted that the original RFP explained the scoring methodology and grid for all rated criteria by noting the following: “. . . The Bidder’s responses to the rated criteria will be rated by the evaluators on a scale of 0 to 10 by judging whether the response addresses the requirements in a complete, logical, practical and applicable fashion . . .” Deloitte submitted that, not only was this scoring methodology and grid never removed from the RFP, they were ultimately applied as written with respect to rated criteria R-1, R-2, R-3 and two of the three sub-criteria in R-4, but not with respect to the resource allocation sub-criterion.⁷ Deloitte further submitted that, contrary to the express provisions of the RFP, the allocation of resources was not evaluated on whether it addressed the requirements in a “. . . complete, logical, practical and applicable fashion . . .”, instead, the resource allocation was evaluated solely on the basis of how many days an individual team member was scheduled to work on the project.

17. Deloitte referred to a previous decision by the Tribunal in which it stated the following: “. . . Bidders should not be expected to divine the needs of the procuring entity for the purposes of its evaluation criteria . . .”⁸ Deloitte submitted that none of the mandatory or rated criteria contained in the RFP indicated a clear and specific requirement, or in any way a preference, for individuals submitted as part of the proposal to work a minimum of 15 days, or that employees who were allocated for a greater number of days would receive more points. It also submitted that it was not clear from the RFP that a minimum 15-day threshold would be imposed, nor was it reasonably possible for any bidder to “divine” such an evaluation criterion.

18. Deloitte contended that, had the underlying purpose of rated criterion R-4 and the detailed scoring grid been disclosed to potential bidders, it would have structured its bid very differently. It submitted that, without question, at the very least, it would have proposed a different project team structure to ensure that individual team members were allocated for the days necessary to perform the work and receive full or nearly full marks.

19. In support of its position, Deloitte referenced the Tribunal’s decision in *Brookfield Lepage Johnson Controls Facility Management Services*⁹ wherein the Tribunal stated the following:

. . .

. . . the Tribunal is of the view that Article 1013(1)(h) of NAFTA requires that entities provide, in the solicitation documents, not only the information necessary to permit suppliers to submit responsive tenders but also the criteria that will be used in the evaluation of tenders. In the Tribunal’s opinion, this includes the method of weighting and evaluating the criteria, as well as a clear statement of the methodology and criteria to be used to determine the most advantageous proposal and to award a contract.¹⁰

. . .

7. The “resource allocation sub-criterion” referred to by Deloitte is that part of rated criterion R-4 which states as follows: “Assessment of experience of the proposed [resource] to each of the knowledge areas and each proposed [resource] allocation to the project (18 points).”

8. *Re Complaint Filed by Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT) at 11.

9. *Re Complaint Filed by Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) [*Brookfield*].

10. *Brookfield* at 16.

PWGSC's Position

20. PWGSC submitted that Table R-4 clearly indicated that "allocation of resources" meant the number of days for which a resource was allocated to the project. It also submitted that the Statement of Work (SOW) clearly and consistently stated the importance of significant partner-level involvement in the project and that the assistance of a lead senior-level audit professional on an ongoing basis would be required. It submitted that the R-4 evaluation grid did not introduce criteria that could not reasonably be anticipated by bidders.

21. PWGSC submitted that a commitment of less than 15 days to a project by a resource out of a total of 120 days cannot be regarded as significant and, for this reason, Deloitte's proposed resources scored low when its proposal indicated that those resources would be committed to the project for such a limited time.

22. PWGSC submitted that the point scoring of Deloitte's proposal with respect to rated criterion R-4 had no bearing on the results of the competitive process and that, consequently, Deloitte was not prejudiced by the scoring of its proposal. It submitted that, had Deloitte's proposal received the full marks for the criterion at issue, six points, the original ranking of the bids would not have been affected.

TRIBUNAL'S ANALYSIS

23. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *Agreement on Internal Trade*,¹¹ the *North American Free Trade Agreement*¹² and the *Agreement on Government Procurement*.¹³

Jurisdictional Issue

24. PWGSC submitted that the procurement is subject to *NAFTA* and the *AGP*, but is not covered by the *AIT* by virtue of an exclusion under paragraph 1(a) of Annex 502.1B.¹⁴ However, PWGSC has not submitted an argument explaining why it considers this to be the case, and it is not evident to the Tribunal that there is any basis for exclusion under this paragraph. The Tribunal is therefore of the view that the *AIT* applies to the procurement.

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11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].
 12. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
 13. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
 14. Annex 502.1B reads in part as follows: "1. All services are covered except the following: (a) services that . . . may, by legislation or regulation, be provided only by any of the following licensed professionals: medical doctors, dentists, . . . chartered accountants, lawyers and notaries . . ."

Substance of the Complaint

25. Article 506(6) of the *AIT* provides in part that “. . . [t]he 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.”

26. With respect to the tender documentation, Article 1013(1) of *NAFTA* reads in part as follows:

1. . . . 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

27. Article XII(2) 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 . . .

. . .

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

28. It is clear from rated criterion R-4 that the allocation of resources to the project is to be part of the assessment (“each proposed [resource] allocation to the project”). The SOW also states the following: “The following tasks . . . will require the assistance of a lead senior level audit professional . . .” and “. . . [a] significant commitment is required at the partner level . . .” However, the documentation provided to bidders prior to bid closing gives only very general guidance on how the proposed resource allocation is to be scored. This guidance is expressed in the parameters referred to in paragraph 9 of these reasons (0 = unsatisfactory response, 10 = outstanding response, etc.) and the overall direction to address requirements “in a complete, logical, practical and applicable fashion”

29. Based on the normal usage of language, the amount of resources allocated to a project is a combination of the number of people allocated and the amount of time allocated for each person. Therefore, a high time allocation (and hence a high score) could logically result from either a large number of resources, each allocated for a short period of time (for example, hypothetically, 24 people for 10 days each = 240 days), or a small number of resources, each allocated for a long period of time (for example, hypothetically, 3 people for 80 days each, also = 240 days). Either of these two approaches could result in significant partner involvement in the project as contemplated by the SOW and could address the requirement in a complete, logical, practical and applicable fashion.

30. The RFP does not indicate to bidders whether these two approaches are equally desirable, or whether one is preferred over the other. However, the rating guide used by PWGSC for rated criterion R-4 has clearly chosen to give a higher score to the second approach. This is reflected in both the objective stated at the beginning of the rating guide¹⁵ and the allocation of points (e.g. 0 points given for less than 15 days). Using the rating guide, the first hypothetical resource allocation described above would receive 0 points (despite the allocation of 24 people to the project), whereas the second would receive maximum points. Therefore, it is clear that the evaluation used an evaluation criterion not previously disclosed to bidders, or reasonably predictable from the RFP. Accordingly, the Tribunal finds that PWGSC breached Article 506(6) of the *AIT*, Article 1013(1) of *NAFTA* and Article XII(2) of the *AGP*.

15. Confidential version of the complaint, Tab 5.

31. In light of the foregoing, the Tribunal determines that Deloitte's complaint is valid.

Remedy

32. In recommending a remedy, the Tribunal is required by subsection 30.15(3) of the *CITT Act* to consider all the circumstances relevant to the procurement of the services to which the designated contract relates, including:

...

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

33. This is not a case where a minor technical error was made in interpreting the evaluation criteria provided for in the RFP. A rating scheme was put in place that was clearly a significant departure from that provided in the RFP. The Tribunal considers this to be a serious deficiency in the procurement process and the type of action that significantly prejudices the integrity of the procurement system as a whole. The Tribunal notes that, if PWGSC considered it important to apply this rating scheme, it could simply have included the scheme in the RFP so that the bidders would have had an opportunity to structure their bids accordingly.

34. It is not clear what the results of the procurement would have been, had the rating scheme been disclosed in advance to the bidders. Under the rating scheme applied by PWGSC, Deloitte received fewer points for a significant number of its resources than would reasonably have been expected based on the provisions of the RFP.¹⁶ In the Tribunal's view, no bidder would reasonably have structured its resources as Deloitte did, if it had known the rating approach that would be applied. Accordingly, the Tribunal accepts the evidence that, had Deloitte known about the scoring methodology, it would have structured its bid differently. Deloitte submitted that its restructured bid would have resulted in a lower bid price because it charges higher rates for partners and fewer partners would have been submitted as resources. The Tribunal is of the view that, although a restructured bid would not necessarily have resulted in a lower-priced bid, this is certainly a possibility, which, if it materialized, could have resulted in Deloitte becoming the winning bidder.

35. The evidence before the Tribunal does not establish that PWGSC acted in bad faith. The Tribunal also notes that the contract period ended March 31, 2006, and, therefore, the contract is most likely completed.

36. In view of the foregoing factors, the Tribunal considers that Deloitte should be compensated for its lost opportunity to be awarded the contract and to profit therefrom. Given that there were four responsive proposals, the Tribunal considers that Deloitte should be compensated by an amount equal to one quarter of the profit that it would reasonably have earned, had it been the successful bidder.

16. The actual points received and the number of resources proposed by Deloitte are confidential and can be found in the confidential version of the complaint, Tab 3.

37. The Tribunal also awards Deloitte its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates 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. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline* (Level 1). The procurement was of medium complexity, as it involved the provision of the services of a team of resources to support the launch of an internal audit policy. The complaint was of low complexity, as it dealt with a single issue regarding applicability of evaluation criteria. The complaint proceedings were of low complexity and involved no motions and no interveners. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

39. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Deloitte for its lost opportunity by an amount equal to one quarter of the profit that Deloitte would reasonably have earned, had it been the successful bidder in the procurement (Solicitation No. 24062-050061/A) by PWGSC on behalf of the Treasury Board Secretariat for the provision of professional audit services. The Tribunal recommends that Deloitte and PWGSC negotiate the amount of that compensation and, within 30 days of the date of the determination, report back to the Tribunal on the outcome of the negotiations.

40. Should the parties be unable to agree as to the amount of compensation, Deloitte shall file with the Tribunal, within 30 days of the date of the determination, a submission on the issue of compensation. PWGSC will then have 7 working days after receipt of Deloitte's submission to file a response. Deloitte will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments. Counsel are required to serve each other and file with the Tribunal simultaneously.

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

Ellen Fry
Ellen Fry
Presiding Member