



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-015

Partnering & Procurement Inc.

v.

Department of the Environment

*Determination issued
Tuesday, August 22, 2006*

*Reasons issued
Thursday, August 24, 2006*

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IN THE MATTER OF a complaint filed by Partnering & Procurement Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

PARTNERING & PROCUREMENT INC.

Complainant

AND

THE DEPARTMENT OF THE ENVIRONMENT

**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, as a remedy, that the Department of the Environment modify its procurement and contracting policies or the application of those policies to ensure that all potential suppliers participating in procurement processes by the Department of the Environment are provided with access to all pertinent information in respect of the requirements of its solicitations. In particular, this access is to include any question and answer exchanges that take place between the Department of the Environment personnel and bidders in respect of the interpretation and application of procurement or contracting requirements.

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

of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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

Tribunal Member: Serge Fréchette, Presiding Member

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STATEMENT OF REASONS

COMPLAINT

1. On May 24, 2006, Partnering & Procurement Inc (PPI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. K0365-05-0018) by the Department of the Environment (Environment Canada) for the provision of a project manager to assist Environment Canada in managing its Information Technology Service Management (ITSM) Project.
2. PPI alleged that it was deprived of some parts of the Request for Proposal (RFP) and, consequently, that the full evaluation criteria used to evaluate its proposal were only disclosed to it after all bidders' proposals had been submitted and scored.
3. On May 30, 2006, the Tribunal informed the parties that it had accepted the complaint for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On June 20, 2006, Environment Canada submitted the Government Institution Report (GIR). On June 29, 2006, PPI submitted its comments on the GIR.
4. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

5. The RFP in issue was for project management services to provide assistance in managing Environment Canada's ITSM Project from April 1 to July 31, 2006. It was made available through MERX³ on January 26, 2006, with a due date for the receipt of bids of March 9, 2006. In order to be considered for contract award, bidders had to meet all the mandatory requirements of the RFP, and their technical proposals had to receive a score of at least 142.5 points out of the 190.0 points available for 16 rated criteria. The contract was to be awarded to the bidder whose proposal obtained the lowest cost per point.
6. On March 7, 2006, PPI e-mailed Environment Canada to inquire as to whether there had been any questions and answers submitted during the solicitation period. On March 8, 2006, Environment Canada advised PPI that questions and answers were not circulated to all prospective bidders, but only to the originators of the questions. On March 9, 2006, PPI submitted its proposal. On March 29, 2006, Environment Canada awarded a contract to IMP Solutions and advised PPI that it would not be awarded a contract.
7. On April 6, 2006, PPI e-mailed a copy of a letter (subsequently couriered to Environment Canada on April 7, 2006), objecting to Environment Canada's actions regarding its decision not to distribute all the questions and answers relating to the subject RFP. On April 25, 2006, Environment Canada advised PPI that it intended to reply to PPI's letter of April 7, 2006. On May 11, 2006, Environment Canada informed PPI by e-mail that inquiries made by prospective bidders were shared with all prospective bidders in instances

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

where they relate to a substantive component that would affect the fairness of the competition. In this case, however, Environment Canada informed PPI that the questions and answers that had been exchanged did not relate to a substantive component of the competition and had therefore not been shared with all prospective bidders. It also provided PPI with a copy of all the questions and answers that had been provided to the various prospective bidders.

8. On May 24, 2006, PPI filed its complaint with the Tribunal.
9. Page 11 of the RFP contained the following rated criteria germane to this complaint:

	Selection Criteria	Rated (R)	Points
[1]	The bidder was responsible for all aspects of the overall procurement process from the development of initial requirements to the detailed vendor response evaluation.	R	/ 10 points
[2]	The bidder was responsible for proposing the ITSM software products.	R	/ 10 points
[3]	The bidder was responsible for analyzing the suitability of an initial set of process definitions and assisting the client to operationalize them.	R	/ 10 points
[4]	The bidder was responsible for providing mentoring and coaching.	R	/ 10 points
[5]	The solution addressed ITIL [Information Technology Infrastructure Library] Incident Management.	R	/ 10 points
[6]	The solution addressed ITIL Problem Management.	R	/ 10 points
[7]	The solution addressed ITIL Change Management.	R	/ 10 points
[8]	The solution addressed ITIL Configuration Management.	R	/ 10 points
[9]	The proposal must include a résumé for the individual proposed as the Bidder's Project Manager.	R	/ 10 points
[10]	The proposal should include specific elements that will reflect the implementation of ITIL IT Service Management approaches within the framework (i.e. the use of ITIL processes and definitions)	R	/ 10 points
[11]	The proposal should include evidence to substantiate that the Bidder has a minimum of two (2) years experience in the last three (3) years, assisting clients with similar requirements to establish and implement ITIL-based processes. Statements with no substantiating evidence will be regarded as indicating no experience.	R	Up to 3 years, 5 points per year /15 points
[12]	The proposal should identify the means by which the Bidder's experience on similar projects would be applied to the ITSM project (i.e. through the use of people, processes or technologies used in previous, successful projects)	R	/ 10 points

[13]	The proposal should demonstrate experience in Project Management in the Federal Government.	R	(Up to 3 projects, 5 points per project) /15 points
[14]	The proposal should include the Project Manager's level of certification in ITIL.	R	One or more Practitioner Level Certification / 10 points
[15]			One or more Management Level Certification / 20 points
[16]	The résumé for the individual proposed as the Bidder's Project Manager will be rated on the extent to which it substantiates his/her experience to fulfill this role.	R	/ 20 points

NOTE: The criteria were not numbered in the RFP; the numbers have been added to the above table and elsewhere in the Tribunal's determination for reference purposes.

10. The e-mail that Environment Canada sent to PPI on May 11, 2006, contained the following questions and answers:

...

[Question] 2. On page 11 of 12, the Rated Selection Criteria: please clarify if you are looking for experience of the firm or experience of our proposed Project Manager for the following criteria:

[1] The bidder was responsible for all aspects of the overall procurement process from the development of initial requirements to the detailed vendor response evaluation.

[2] The bidder was responsible for proposing the ITSM software products

[3] The bidder was responsible for analyzing the suitability of an initial set of process definitions and assisting the client to operationalize them.

[4] The bidder was responsible for providing mentoring and coaching.

[5] The solution addressed ITIL Incident Management.

[6] The solution addressed ITIL Problem Management.

[7] The solution addressed ITIL Change Management.

[8] The solution addressed ITIL Configuration Management.

[10] The proposal should include specific elements that will reflect the implementation of ITIL IT Service Management approaches within the framework (i.e. the use of ITIL processes and definitions)

[11] The proposal should include evidence to substantiate that the Bidder has a minimum of two (2) years experience in the last three (3) years, assisting clients with similar requirements to establish and implement ITIL-based processes. Statements with no substantiating evidence will be regarded as indicating no experience.

[12] The proposal should identify the means by which the Bidder's experience on similar projects would be applied to the ITSM project (i.e. through the use of people, processes or technologies used in previous, successful projects)

[13] The proposal should demonstrate experience in Project Management in the Federal Government.

...

Answer 2: The references should apply to the proposed Project Manager.

Based on our initial reading of the RFP document, we have the following question on the Rated Criteria on Page 11:

1) Several of the rated criteria indicate that the “bidder” needs to have been responsible for the identified tasks . . . It is therefore our view that it [is] the prime responsibility of the Bidder to ensure that the proposed resource(s) are available and supported by adequate backup resources throughout the course of the project. Since this RFP is primarily for a Senior PM resource with ITIL/ITSM experience, can the qualifications of the proposed resource be used to satisfy the “bidder” rated requirements even though the resource did not work directly for the “bidder” during the delivery of tasks that are needed to satisfy the “bidder” rated requirements?

Response: The references should apply to the proposed Project Manager.

...

POSITIONS OF THE PARTIES

PPI's Position

11. PPI submitted that the questions and answers that Environment Canada failed to provide to all bidders were significant, dealt with ambiguities in the selection criteria and had a material impact on the PPI's opportunity to craft its proposal accordingly. PPI submitted that, by not disclosing significant questions and answers, Environment Canada acted contrary to its obligations under the applicable trade agreements and to fundamental principles of Canadian tendering law and government policy.

12. PPI submitted that the fact that Environment Canada engaged in a question and answer dialogue to which only the originator of the questions and Environment Canada were privy is a violation of the transparency obligations contained in the *Agreement on Internal Trade*⁴ and the *North American Free Trade Agreement*.⁵ PPI submitted that, in *Brookfield LePage*, the Tribunal concluded that, “. . . 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 . . .”⁶ In this regard, PPI submitted that it suffered discrimination by reason of Environment Canada's non-transparent conduct in providing only the originators of questions with responses.

13. PPI submitted that Environment Canada's conduct violated the applicable trade agreements because many of the questions and answers were such that they changed several of the evaluation criteria from applying to the “bidder” to applying to the “proposed resources”. It submitted that Environment Canada's clarifications contradicted the language used in the selection criteria in the RFP. It submitted that, more appropriately, Environment Canada should have issued an amendment to the RFP to all bidders or, at the very least, distributed all questions and answers to all bidders. PPI submitted that, in the GIR,

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

5. *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].

6. *Re Complaint Filed by Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) at 17.

Environment Canada acknowledged that it failed to circulate to all bidders any of the questions posed by prospective bidders and the answers that it provided to those questions. By not doing so, it submitted that Environment Canada breached the non-discrimination provisions of the applicable trade agreements. PPI submitted that, in *Huron Consulting*,⁷ in which the Government issued a last-minute amendment, the Tribunal found that the Government afforded preferential treatment to some bidders by releasing an amendment at a late stage of the procurement process and that this did not allow all bidders the opportunity to receive the amendment and prepare and submit their bids before the closing date.

14. PPI noted that, in the GIR, Environment Canada made no reference to the trade agreements, but decided to rely on an Environment Canada policy decision to act according to clause A0012T of the Standard Acquisition Clauses and Conditions (SACC) Manual⁸ of the Department of Public Works and Government Services' (PWGSC) to justify its lack of transparency. PPI submitted that the SACC Manual: (a) is not law; (b) is only a guide containing commonly used practices and procedures by PWGSC; and (c) does not condone the actions of Environment Canada in this case.

15. In response to Environment Canada's argument that PPI was not impacted by not being informed of the questions and answers, PPI submitted that it was under no obligation to prove that it would necessarily have revised its bid, had it been provided with the questions and answers. It submitted that it needed only to demonstrate that it was denied the opportunity to do so. It submitted that it lost an opportunity to arm itself with crucial knowledge and prepare its bid differently by potentially devoting more resources to obtain a more qualified project manager.

16. In response to Environment Canada's argument that its complaint was filed outside the time limit established by section 6 of the *Regulations*, PPI submitted that it could not have known the nature of its complaint before seeing the questions and answers. It submitted that it received that information on May 11, 2006, and filed its complaint on May 24, 2006, within the 10-working-day time limit allowed by the *Regulations*.

17. As a remedy, PPI requested that the Tribunal order that the contract awarded to IMP Solutions be cancelled and awarded to PPI. In the alternative, it requested that it be awarded its lost profits. In the further alternative, it requested that Environment Canada be ordered to repeat the solicitation in process. PPI also requested its costs for bringing the complaint to the Tribunal, the complexity level of which, without providing an explanation, it estimated to be Level 2, in accordance with the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*).

Environment Canada's Position

18. Environment Canada submitted that the complaint was received outside of the 10-working-day period provided by the *Regulations* and that the Tribunal must therefore dismiss the complaint. It submitted that PPI was aware on March 8, 2006, when it responded to PPI's question about whether or not there had been any questions or answers during the solicitation period, that not all questions and answers had been shared with all prospective bidders. Environment Canada submitted that PPI therefore had until March 22, 2006, to file its complaint with the Tribunal. Environment Canada also submitted that, even if the March 8, 2006, date was ignored, PPI provided its letter of objection to Environment Canada on April 6, 2006. It submitted that, as the grounds of complaint to the Tribunal are identical to those in the objection, the basis of complaint—that not all questions and answers were sent to all prospective bidders—was therefore known to

7. (10 February 2003), PR-2002-037 (CITT).

8. <http://sacc.pwgsc.gc.ca/sacc/query.do?lang=en&id=A0012T&date=2006/08/15&eid=1>.

PPI on this date. Environment Canada submitted that, given this date, PPI had until April 20, 2006, to file its complaint with the Tribunal. It submitted that, in either circumstance, the complaint was not filed until May 24, 2006, which was outside of the time limit allowed by the *Regulations*.

19. According to Environment Canada, PPI did not advance any other complaint on the substance of the questions and answers and provided no explanation as to what questions or answers caused it to receive a lesser score or favoured another bidder.

20. Regarding the dissemination of information during the solicitation period, Environment Canada submitted that it has adopted a practice that is identical to that contained in clause A0012T of the SACC Manual, which reads as follows:

...

To ensure consistency and quality of information provided to bidders, significant enquiries received and the replies to such enquiries will be provided simultaneously to bidders to which the bid solicitation has been sent, without revealing the sources of the enquiries.⁹

21. Environment Canada submitted that this practice allows its procurement officers to use their judgement to assess whether the information contained in the questions and answers relates to a substantive component of the RFP and whether or not it would have affected the fairness of the competition. In instances where the information is of a substantive nature that affects the fairness of the competition, the questions and answers are shared with all potential bidders. In this case, Environment Canada submitted that the questions and answers did not meet this condition and were therefore not disseminated to all prospective bidders.

22. Environment Canada submitted that, while PPI may have advanced the complaint on the perceived unfairness of not sharing all questions and answers with all potential bidders, it failed to realize that the information had nothing to do with the only bid criterion for which PPI did not receive full marks. Environment Canada submitted that PPI received maximum marks for all but one of the evaluation criteria, i.e. criterion 15, which awarded 20 points if the proposed project manager had ITIL Management Certification.¹⁰ Environment Canada submitted that criterion 15 had not been affected by any of the questions and answers and, therefore, remained the same throughout the procurement process. It submitted that none of the personnel proposed by PPI, including the project manager, had the requisite ITIL Management Certification and, therefore, its proposal was not awarded any points for this criterion.

23. Environment Canada asked that the complaint be dismissed.

TRIBUNAL'S ANALYSIS

24. 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 *AIT* and *NAFTA*.

9. *Ibid.*

10. This certification is awarded to persons who successfully complete the Institute for Information Science's examinations in ITIL.

Timeliness of PPI's Complaint

25. The Tribunal will first address whether the complaint was filed in a timely manner. Environment Canada has submitted that PPI's complaint was filed late, as PPI was aware on March 8, 2006, that the questions and answers were not being divulged to all bidders. It also argued that PPI's e-mail and letter of April 6, 2006, were identical to the complaint filed with the Tribunal on May 24, 2006, thus indicating that PPI was aware of its ground of complaint on this date. On the other hand, PPI argued that it could not have known the nature of its complaint before actually seeing the questions and answers, which it only received on May 11, 2006.

26. The requirements regarding the time to file a complaint are found in section 6 of the *Regulations*, which reads as follows:

6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

27. In other words, subsection 6(1) of the *Regulations* provides that, once a potential supplier has discovered, or reasonably should have discovered, its grounds of complaint, it has 10 working days to file a complaint with the Tribunal. If the supplier chooses instead, as described in subsection 6(2), to object to the "relevant government institution", it has 10 working days to make that objection. If the objection is subsequently denied (or the potential supplier can construe denial of relief), the complainant then has 10 working days from the day on which denial of relief was given (or could be construed) to file its complaint with the Tribunal.

28. Taking into account the above provisions, the Tribunal is of the opinion that the complaint was filed in a timely manner. The Tribunal considers that PPI discovered its ground of complaint on May 11, 2006, when it was provided with the text of the questions and answers that were exchanged during the procurement process. It notes that Environment Canada's initial response to PPI's query regarding whether or not there had been any questions and answers did not provide any indication about the existence (or not) of such questions, it merely stated the following:

Response: Currently, this office does not post all questions and answers. We respond only to the originator.

Thank you for the interest that you have shown in this proposal.¹¹

29. The Tribunal does not believe that, at that juncture, PPI knew, or reasonably could have known, that there were questions and answers, and it certainly did not know if those questions and answers were significant. It believes that this only became clear on May 11, 2006, when Environment Canada provided the text of the questions and answers to PPI. As the complaint was filed on May 24, 2006, eight working days after May 11, 2006, the Tribunal considers the complaint to have been filed within the time limit established by the *Regulations*.

11. GIR, Tab D.

Merits of PPI's Complaint

30. Article 504(2) of the *AIT* reads as follows:

With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

- (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
- (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

31. Article 506(6) of the *AIT* reads 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.

32. Article 1008 of *NAFTA* reads as follows:

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

- (a) applied in a nondiscriminatory manner; and
- (b) consistent with this Article and Articles 1009 through 1016.

2. In this regard, each Party shall ensure that its entities:

- (a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and
- (b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.

33. Article 1010(7) of *NAFTA* reads as follows:

Where, after publication of an invitation to participate, but before the time set for the opening or receipt of tenders as specified in the notices or the tender documentation, an entity finds that it has become necessary to amend or reissue the notice or tender documentation, the entity shall ensure that the amended or reissued notice or tender documentation is given the same circulation as the original. Any significant information given by an entity to a supplier with respect to a particular procurement shall be given simultaneously to all other interested suppliers and sufficiently in advance so as to provide all suppliers concerned adequate time to consider the information and to respond.

34. Article 1015(4)(d) of *NAFTA* reads as follows:

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

35. The Tribunal finds that page 11 of the RFP, which deals with the rated criteria, clearly indicated, through the inclusion of the word "bidder" in the text of the criteria, that evaluation criteria 1, 2, 3, 4, 11 and 12 are to be addressed in bidders' proposals through the demonstration of the bidder's experience. The Tribunal therefore finds it reasonable for PPI to have understood that these requirements were to be addressed from the bidder's corporate experience point of view. However, in responding to questions from unknown bidders, Environment Canada advised that those requirements should be addressed by references to the "proposed project manager" or the "proposed resource".¹² This response indicates to the Tribunal that there was a clear shift in the focus of the original requirements.

12. GIR, attachment J at 2, 3.

36. What is left for the Tribunal to determine is whether Environment Canada's failure to make all bidders aware of the new requirements concerning the proposed project manager's experience constitutes a violation of Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*. In the Tribunal's opinion, it clearly does. The Tribunal believes that the consideration of the project manager's experience for rated criteria 1, 2, 3, 4, 11 and 12 constituted a significant change to what could be contemplated by a simple reading of the original RFP. Had Environment Canada wished to use those criteria to assess the project manager's experience, which was its right as the originator of the requirement, it should have indicated so in the original RFP or, alternatively, posted an amendment to the RFP on MERX in the same manner in which the original RFP was circulated. The Tribunal notes that the government procurement process allows for the issuance of amendments to RFPs in cases where a requirement has changed or needs to be updated; however, Environment Canada chose not to avail itself of this option. Accordingly, the Tribunal finds that Environment Canada failed to follow the procedures set out in Article 506(6) of the *AIT* and Articles 1010(7) and 1015(4)(d) of *NAFTA*.

37. The Tribunal therefore finds that the complaint is valid.

38. Regarding whether or not discrimination took place, the Tribunal believes that Environment Canada's practice of not providing all questions and answers has, in this case, led to it treating PPI, and perhaps other potential suppliers, in a discriminatory manner; those who were not provided with the questions and answers received a treatment that was less favourable in respect to having access to information that was relevant to the preparation of their proposals, when compared with the treatment of those that did have access to the questions and answers.

39. The Tribunal notes that, regarding rated criteria 1, 2, 3, 4, 11 and 12, PPI's proposal (reflecting the wording of the RFP) addressed these criteria from a "bidder's" perspective. It appears that two bidders were advised by Environment Canada that these criteria applied to the proposed project manager.¹³ Another bidder was advised that criteria 1, 2, 3, 4 and 11 were "for the proposed resource", but that criterion 12 was "for the bidder".¹⁴

40. The Tribunal believes that one of the cornerstones of the fair and transparent procurement process envisioned by the trade agreements is the equal sharing of significant information with all potential suppliers. Not only does this allow the bidders to know exactly what is expected of them, but it also ensures that the procuring entity obtain the most appropriate goods and services at the best price, under the best circumstances. In conducting the procurement in such a haphazard fashion, Environment Canada has not only discriminated against and inconvenienced PPI and, potentially, other bidders, but also it could have affected its own ability to obtain the best possible solution for its requirement.

REMEDY

41. Subsection 30.15(3) of the *CITT Act* requires the Tribunal, in recommending an appropriate remedy, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

...

(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;

13. *Ibid.* at 1, 2.

14. *Ibid.* at 2, 3.

- (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.

42. The Tribunal considers that using criteria not found in the RFP is a serious deficiency in the procurement process. This is not simply a case of Environment Canada misinterpreting criteria in the RFP. It is clear that Environment Canada changed relevant evaluation criteria without informing all potential suppliers of these significant changes. The Tribunal believes that such a serious deficiency prejudices the integrity and efficiency of the competitive procurement system. However, the evidence does not suggest that Environment Canada was acting in bad faith in these circumstances.

43. Regarding the degree of prejudice suffered by PPI, it is not clear to the Tribunal whether PPI would have won the contract in question, but for Environment Canada's breaches. The Tribunal notes that the sole criterion for which PPI lost marks (criterion 15) was not affected by any of the changes made by Environment Canada that were not communicated to PPI. Indeed, PPI received full marks for all criteria that were affected by the questions and answers. Although PPI has argued that knowing the questions and answers might have affected the way in which it bid, the Tribunal does not accept this argument, since PPI knew in advance the criterion that caused it to lose marks. That criterion was unaffected by the questions and answers. As such, the Tribunal will not recommend any form of compensation to PPI.

44. Accordingly, the Tribunal recommends that Environment Canada modify its procurement and contracting policies or the application of those policies to ensure that all potential suppliers participating in procurement processes by Environment Canada are provided with access to all pertinent information in respect of the requirements of its solicitations. In particular, this access is to include any question and answer exchanges that take place between Environment Canada and bidders in respect of the interpretation and application of the procurement and contracting requirements.

Costs

45. The Tribunal will award PPI its reasonable costs incurred in preparing and proceeding with the complaint. It has considered its *Guideline* and is of the view that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, as it involved the procurement of services involving a defined service project. The complexity of the complaint was low, in that the issue was straightforward even though the evaluation contained both mandatory and rated requirements. Finally, the complexity of the complaint proceedings was low, as there were no interveners and no motions, a public hearing was not held, and the 90-day time frame was respected. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000. The Tribunal reserves jurisdiction to establish the final amount of the award.

DETERMINATION OF THE TRIBUNAL

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

47. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Environment Canada modify its procurement and contracting policies or the application of those policies to ensure that all potential suppliers participating in procurement processes by Environment Canada are provided with access to all pertinent information in respect of the requirements of its solicitations. In particular, this access is to include any question and answer exchanges that take place between Environment Canada personnel and bidders in respect of the interpretation and application of procurement or contracting requirements.

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

Serge Fréchette
Serge Fréchette
Presiding Member