



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2007-004

Ecosfera Inc.

v.

Department of the Environment

*Determination issued  
Wednesday, July 11, 2007*

*Reasons issued  
Friday, July 27, 2007*



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IN THE MATTER OF a complaint filed by Ecosfera 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**

**ECOSFERA 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 re-evaluate Ecosfera Inc.'s proposal using the "knowledge" criterion, without taking into account the "experience" factor, within 30 days following the publication of the statement of reasons for this determination. The Canadian International Trade Tribunal recommends that, if Ecosfera Inc.'s proposal obtains the necessary pass mark and proves to be the lowest-priced responsive bid, Ecosfera Inc. be compensated by an amount equal to the profit that it would have earned, had it been awarded the contract.

In that event, the Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Canadian International Trade Tribunal within 60 days of the date of the publication of the statement of reasons for this determination. Should the parties be unable to agree on the amount of compensation, each party shall file a report with the Canadian International Trade Tribunal within the same 60-day period, after which the Canadian International Trade Tribunal will make its recommendation on the matter.

If, following the re-evaluation, Ecosfera Inc.'s proposal does not obtain the necessary pass mark, the Canadian International Trade Tribunal also recommends that, upon request, the Department of the Environment provide Ecosfera Inc. with pertinent information concerning the reasons for not selecting its tender and the relative characteristics and advantages of the tender selected, in accordance with Article 1015(6)(b) of the *North American Free Trade Agreement*.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Ecosfera 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

Hélène Nadeau  
Hélène Nadeau  
Secretary

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



Tribunal Member:	Serge Fréchette, Presiding Member
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Senior Investigator:	Paul Berlinguette
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## STATEMENT OF REASONS

### COMPLAINT

1. On April 10, 2007, Ecosfera Inc. (Ecosfera) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. K2A87-06-0015) by the Department of the Environment (EC) for the provision of consulting services for the development of an environmental scan of the environmental risks and regulatory gaps associated with the Federal House and Aboriginal Lands. Ecosfera also filed a motion for an extension of time to allow the Tribunal to reconsider certain allegations concerning the fact that EC and one of the bidders were in conflict of interest and that the latter benefited from information to which the other bidders were not privy.

2. Ecosfera alleged as follows: (1) the explanations provided by EC about its proposal were not detailed and were incomplete; (2) EC did not provide it with sufficient explanations by not disclosing to it the relative characteristics and advantages of the tender selected, namely, those of Stratos Inc. (Stratos); (3) the scoring system had taken into account rating factors that were not described in the Request for Proposal (RFP); (4) the explanations provided by the evaluators constituted a rationalization after the contract award was announced and were not intended to provide information about the marks lost by Ecosfera. As a remedy, Ecosfera sought compensation for lost opportunity to participate in the procurement and for lost profits because it was deprived of the standing offer in question, and its costs incurred in preparing the tender and in preparing and proceeding with the complaint. Ecosfera also asked the Tribunal to recommend that EC postpone the award of the contract.

3. On April 20, 2007, the Tribunal notified the parties of its decision to inquire into the first three grounds of complaint, since the complaint 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>2</sup> In the Tribunal's opinion, the fourth ground of complaint was intrinsically related to the third ground and did not, in itself, constitute a separate ground.

4. Regarding the first two grounds of complaint, the Tribunal asked that the parties, when filing their submissions, state their positions specifically on the issue of the scope of EC's obligation to provide certain information, the nature of the information to be provided by EC and the documents to be produced by EC in the context of the debriefing contemplated by the relevant agreements. Regarding the third ground, the Tribunal asked that the allegations contained in the submissions be supported, as much as possible, by substantiating documentation.

5. On that same date, pursuant to subsection 17(2) of the *CITT Act*, the Tribunal decided to issue an order for the filing of certain documents, if these documents had not already been filed. The Tribunal also asked Ecosfera to inform it of the nature of the relationship between counsel and the president of the complainant. The Tribunal dismissed Ecosfera's motion for an extension of time regarding certain allegations, since it does not have jurisdiction, in this case, to review its determination (Meriel V. M. Bradford, Presiding Member) in the matter of the complaint in File No. PR-2006-048.<sup>3</sup>

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

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

3. *Re Complaint Filed by Ecosfera Inc.* (8 March 2007) (CITT).



6. Regarding the request to postpone the award of the contract, the Tribunal informed Ecosfera that, according to the evidence on the record, when Ecosfera filed its complaint, Stratos had already been awarded a contract. However, under subsection 30.13(3) of the *CITT Act*, the Tribunal only has jurisdiction to postpone the award of a contract and, therefore, cannot postpone the performance of a contract already awarded.

7. On May 17, 2007, EC filed a Government Institution Report (GIR) with the Tribunal pursuant to section 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> In a letter of that same date that accompanied the GIR, EC stated that all the documents that the Tribunal had ordered it to produce on April 20, 2007, were annexed to the GIR. On May 30, 2007, Ecosfera filed its comments on the GIR and asked the Tribunal to order EC to provide certain information and/or documents relating to its proposal and the tender selected. On June 4, 2007, EC requested an opportunity to file an additional reply concerning new facts and misunderstandings relating to this complaint. In a letter received on that same date, Ecosfera objected to EC's request. On that date, the Tribunal authorized EC and Ecosfera to file supplementary information regarding this case. On June 7 and 13, 2007, EC and Ecosfera filed their respective submissions.

8. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal determined that a hearing was not necessary and, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

9. The RFP was published through MERX<sup>5</sup> on December 1, 2006 (revised December 27, 2006). The bid closing date was January 12, 2007.

10. The RFP was for the provision of consulting services for the development of an environmental scan of the environmental risks and regulatory gaps associated with the Federal House and Aboriginal Lands. The total anticipated value of the services to be provided was estimated to be \$165,000 (excluding GST).

11. Three proposals were received and evaluated by a committee of three EC officials. According to EC, two of the proposals did not obtain the necessary pass mark (75 percent) for the "experience" and "knowledge" criteria and, therefore, were not considered at the financial evaluation step.

12. On January 26, 2007, EC informed Ecosfera of the name of the winning bidder and sent Ecosfera a scoring summary relating to its proposal. On February 6, 2007, Ecosfera made an oral request for the relative characteristics and advantages of the tender selected. On February 7 and 12, 2007, Ecosfera submitted an objection to EC requesting a debriefing and documents concerning the bids received and the evaluation process. On February 26, 2007, Ecosfera submitted another objection and again asked for the documents in question. On that same date, EC informed Ecosfera that a debriefing could not be held on February 28 as requested by Ecosfera, but instead during the week of March 5, 2007. On March 13, 2007, Ecosfera submitted a fourth objection to EC, complaining that the latter had not provided it with the documents and had not followed through on its promise to set a date for a debriefing and informing EC that it was available to meet on March 23, 2007. On March 21, 2007, Ecosfera submitted a fifth objection to EC in which it raised essentially the same points and informed EC of its availability for a debriefing on March 29, 2007. On April 2, 2007, EC informed Ecosfera of its availability for a debriefing on April 4 or 5, 2007, and sent

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

5. Canada's electronic tendering service.



Ecosfera each evaluator's scoring sheets for Ecosfera's proposal, as well as the point rating of the winning bidder. On April 3 and 4, 2007, Ecosfera again submitted an objection to EC, informing it of its dissatisfaction with EC's reply of April 2, 2007, asking it to review the evaluation of its proposal, and confirming its availability for a meeting on April 5, 2007. On April 5, 2007, Ecosfera submitted a final objection to EC, complaining that the latter had not provided it with sufficient explanations in its letter of April 5, 2007, or at the debriefing held on that same date.

13. On April 10, 2007, Ecosfera filed its complaint with the Tribunal.

## ANALYSIS OF THE TRIBUNAL

14. Pursuant to subsection 30.14(1) of the *CITT Act*, in conducting its inquiry, the Tribunal must limit its considerations to the subject matter of the complaint. Moreover, 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 must determine whether the procurement was conducted in accordance with the applicable trade agreements which, in the present case, are the *Agreement on Internal Trade*<sup>6</sup> and the *North American Free Trade Agreement*.<sup>7</sup>

15. As was stated earlier, the Tribunal will examine the three allegations for which the inquiry was initiated.

### Preliminary Issue

16. Regarding the evaluation process, EC claimed that the affidavits filed in support of the GIR are of significant probative value. Also, Ecosfera argued that these affidavits were not received in accordance with sections 219 and 221 of the *Quebec Courts of Justice Act*, and are therefore invalid. According to Ecosfera, EC's documents, therefore, have no probative force.

17. The Tribunal is of the view that the provisions of the *Quebec Courts of Justice Act* cited by Ecosfera do not apply in this case because they concern affidavits filed in Quebec courts rather than in a quasi-judicial body having federal jurisdiction, such as the Tribunal. There is no similar provision applicable to the Tribunal. In any event, section 34 of the *CITT Act* very clearly states that the Tribunal can consider and accord probative value to unsworn information or documents. This provision reads as follows: "For the purpose of any inquiry under this Act . . . , the Tribunal may obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act on the information."

18. In light of this provision, the Tribunal is not bound by strict rules regarding admissibility of evidence and has jurisdiction to accord probative value to documents or information, including assertions of facts, obtained otherwise than under the sanction of an oath or affirmation. Thus, the claims of Ecosfera notwithstanding, the Tribunal will accord the testimonies contained in the statements produced by EC the credibility and probative value that they deserve.

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6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

7. *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].



**Reasons provided by EC for not selecting Ecosfera's bid**

19. Article 1015(6)(b) of *NAFTA* is relevant to Ecosfera's first ground of complaint and reads as follows:

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.

20. The *AIT* contains no provision similar to that just cited.

21. The relevant part of Article 1015(6)(b) of *NAFTA* for the purposes of this ground concerns the provision of pertinent information concerning the reasons for not selecting the bid.

22. EC argued that it informed Ecosfera on January 26, 2007, that it could not be awarded the contract because its proposal had not obtained the necessary pass mark in the technical evaluation since, contrary to the requirements of the RFP, Ecosfera had obtained 73 percent, whereas the necessary pass mark was 75 percent. On that same date, EC sent Ecosfera a scoring summary of its proposal, namely, the evaluators' consensus scoring sheet. EC also argued that, on April 2, 2007, Ecosfera received the evaluators' individual scoring sheets, which included specific comments about the bid and its compliance with the evaluation criteria.

23. EC explained that, at the debriefing on April 5, 2007, one of the three members of the committee evaluating Ecosfera's bid reviewed each evaluation criterion of the RFP, the individual score given to each of these criteria and the reasons for this individual score. EC added that it also explained the methodology used by the members of the evaluation committee to reach a consensus as to the score to give to each evaluation criterion and how the committee had decided to assign a mark of 73 percent.

24. EC argued that it had indeed provided all the pertinent information concerning Ecosfera's bid, including the evaluators' preliminary notes, the individual scoring sheets referred to in *Med-Emerg International Inc.*<sup>8</sup> and the consensus scoring sheet, and had provided oral explanations at a debriefing. EC argued that, by virtue of the Tribunal's determination in *Southern California Safety Institute, Inc.*,<sup>9</sup> in which the Tribunal found that the government institution had discharged the burden of proof under Article 1015(6)(b) of *NAFTA* by having informed a bidder of the content of the scoring summary relating to its proposal, it had largely met and even exceeded its statutory requirements as interpreted by the Tribunal in its recent decisions.

25. EC argued that the purpose of the information exercise stipulated in Article 1015(6)(b) of *NAFTA* is to allow unsuccessful bidders to understand how they can better respond to future procurement opportunities and, at the same time, to help the procuring entity, since the proposals that it receives in future solicitations will be of a higher quality.<sup>10</sup> EC therefore claimed that it had discharged its burden of informing Ecosfera of the reasons for not selecting its bid.

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8. *Re Complaint Filed by Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT), para. 41 [*Med-Emerg*].

9. *Re Complaint Filed by Southern California Safety Institute, Inc.* (22 December 2003), PR-2003-047 (CITT) at 7.

10. *Re Complaint Filed by TireeRankinJV* (27 January 2005), PR-2004-038 (CITT) [*TireeRankinJV*].



26. EC also denied Ecosfera's allegations that the financial portion of its proposal had been evaluated and that one of Ecosfera's references had been checked.

27. For its part, Ecosfera maintained that EC had provided no pertinent information as to the reasons for its bid not being selected. For example, the consensus scoring sheet contained no explanation of the differences between the marks assigned by each evaluator or the marks assigned by consensus. According to Ecosfera, EC had not prepared a plan or handbook for the evaluation of bids.

28. Regarding the allegation that EC did not evaluate its financial bid because its technical bid had not obtained an overall mark of 75 percent, Ecosfera argued that the evidence cited by EC shows the opposite.<sup>11</sup> According to Ecosfera, clearly it was decided that its bid should not achieve the required minimum threshold for determining the successful bidder. Ecosfera also maintained that the fact that one of its references had been checked<sup>12</sup> contradicts the claim that its technical bid had not achieved the required minimum threshold.

29. Ecosfera argued that certain members of the evaluation committee did not follow the bid evaluation instructions requiring the evaluators to sign the consensus scoring sheet. In this regard, Ecosfera asserted that one of the evaluators had signed his scoring sheet after the consensus scoring but had failed to sign the consensus scoring sheet at that time. Also, certain handwritten comments of one member of the evaluation team are contradictory and inconsistent with those of Exhibit LS-2. According to Ecosfera, all documents concerning this aspect of the case are a rationalization done after the communications from Ecosfera.

30. Ecosfera also argued that there were no comments about certain criteria and sub-criteria and that, in some cases, there were no details about points deducted in the evaluation of its proposal. In addition, some comments made by the chair of the selection committee seem contradictory and inconsistent. According to Ecosfera, all of this indicates that the evaluators did not have a common reference point and that their evaluations were therefore highly subjective.

31. Ecosfera pointed out that the Tribunal was given no description of the methods of weighting and evaluating the criteria set out in the scoring system.

32. The Tribunal is of the opinion that EC's arguments in this regard are reductionist. EC's arguments seem to be inspired by a narrow view of the object and purpose of the requirement. Contrary to EC's suggestion, the requirement set out in Article 1015(6)(b) of *NAFTA* is intended to do much more than simply allow unsuccessful bidders to understand how they can better respond to future procurement opportunities. The Tribunal notes that it would be wrong to conclude that, by virtue of its statement in *TireeRankin JV*, it intended to give such a reductive interpretation of the purpose of the requirement. While the Tribunal has stated in the past that the purpose of Article 1015(6)(b) of *NAFTA* is to allow unsuccessful bidders to understand how they can better respond to future procurement opportunities, it is unlikely that the latter meant for the provision to be applied so narrowly. Although the objective suggested by EC is among the practical objectives of the requirement, its primary purpose, according to the Tribunal, is to provide transparency as to the reasons for not selecting the proposal, while respecting the confidential nature of the content of all the bidders' proposals. This requirement enables the unsuccessful bidder to determine, if need be, the nature of its rights in view of the requirements set out in *NAFTA*. The Tribunal is of the view that it is more from this perspective that Article 1015(6) ought to be interpreted and ultimately applied.

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11. Affidavit of Mr. Lief Stephenson, comment "Cheapest by 80k", which appears in document LS-1.

12. Affidavit of Mr. Paul-André Dastous, GIR, Tab 17, paras. 35-39.



33. While it is not possible to predict readily the precise nature of the information to be provided in each case, it seems rather clear that, pursuant to Article 1015(6)(b) of *NAFTA*, when considered in light of the purpose described in the preceding paragraph, the information should focus on the considerations of those who were involved in making the decision that resulted in the proposal of the unsuccessful bidder not being selected. This includes, obviously, the communication of the reasons why the proposal was not selected, the communication of the justification for taking those reasons into account and the approach used to examine them. In fact, the entity concerned ought to provide any information that could reasonably be expected to reveal the reasons for which the proposal was not selected. However, the precise nature of the information that can reasonably be expected to explain the rejection in a given case can be determined only in light of the particular circumstances of each case, and the notion of “pertinence” becomes important for the purposes of making this determination.

34. The Tribunal is of the view that the requirement to provide pertinent information about the reasons for rejecting the bid takes for granted that the government institution has means, if necessary, of actually providing the pertinent information concerning the reasons for not selecting the bidder concerned and that it is up to the government institution to determine how it should organize itself in order to meet this requirement.

35. In this case, the Tribunal is of the view that the information provided in the letters of January 26 and April 2, 2007, as well as at the debriefing on April 5, 2007, is not sufficient to fulfil the requirement stated in Article 1015(6)(b) of *NAFTA*. It is clear that the evidence regarding the information provided shows that the information does not give a clear indication of the reasons for which Ecosfera did not obtain the maximum points needed for certain evaluation criteria. The evidence shows that only partial information was provided. Although information was provided in documentary and oral form, this information could not reveal the considerations of each individual who contributed to building the consensus regarding each of the applicable criteria.

36. Notwithstanding the information provided, the Tribunal believes that nothing in the documentary evidence explains why points were deducted for certain evaluation criteria. The Tribunal notes that, except for the additional information provided by one member of the evaluation team during the debriefing, no additional information was provided about the lack of comments for two members of the evaluation team. The evidence clearly shows that EC did not document the reasons for which points were deducted for certain evaluation criteria and therefore could not provide them in documentary form. Also, the Tribunal is of the view that EC does not seem to have tried to make up for this oversight during the debriefing by providing oral explanations, except for the additional information provided by one member of the evaluation team. In the Tribunal’s opinion, this information was pertinent to the rejection of Ecosfera’s bid.

37. In light of the foregoing, the Tribunal finds that Article 1015(6)(b) of *NAFTA* was breached regarding the provision of reasons for not selecting Ecosfera’s bid.

38. Although the wording of the provision mentions no specific time period, the Tribunal is also of the view that the requirement to provide the information outlined in Article 1015(6)(b) of *NAFTA* also implicitly requires this to be done within a reasonable period of time so as not to compromise the exercise of recourse or restrict the range of remedies available in the event of a breach.<sup>13</sup>

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13. *Re Complaint Filed by Discover Training Inc.* (17 May 1999), PR-98-042 (CITT).



39. In this case, Ecosfera, in an oral request made on February 6, 2007, and in eight written requests, asked that pertinent information be provided concerning the reasons for which its bid was not selected. It was not until April 2, 2007, that the individual scoring sheets were provided. The debriefing did not take place until April 5, 2007. The Tribunal cannot understand why EC was unable to provide sooner the information given April 2 and 5, 2007. Obviously, this information was already available when the results were made known and could have been provided soon after the first request. EC should most certainly have provided this information much sooner.

40. While the Tribunal need not determine whether there was compliance with the time periods for providing information in order to determine the validity of the first ground of complaint,<sup>14</sup> it cannot disregard the rather cavalier approach adopted by EC regarding the speed with which it replied to Ecosfera's request. It is also important to mention in this regard that Ecosfera still has not received some of the information requested.

41. The Tribunal allows this ground of complaint regarding the extent of the information provided concerning the reasons for not selecting Ecosfera's bid.

#### **Explanations provided by EC concerning the relative characteristics and advantages of the tender selected**

42. As with the previous ground of complaint, this allegation concerns the requirements set out in Article 1015(6)(b) of *NAFTA*. According to Article 1015(6)(b), the entity must "... provide pertinent information to [a] supplier concerning ... the relevant characteristics and advantages of the tender selected and the name of the winning supplier." Also, this requirement must take into account the limitations imposed by Article 1015(8), which reads as follows:

Notwithstanding paragraphs 1 through 7, an entity may withhold certain information on the award of a contract where disclosure of the information:

- (a) would impede law enforcement or otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interest of a particular person; or
- (c) might prejudice fair competition between suppliers.

43. These limitations are not absolute. The reasons for withholding information are restricted. The issue is whether, in fact, these limitations apply.

44. EC argued that the requirement to provide to a supplier whose bid was not selected for award with information concerning the relative characteristics and advantages of the tender selected must be fulfilled while respecting the confidential nature of the bidders' proposals and within the scope of the requirements of Article 1015(8) of *NAFTA*. In this regard, EC argued that Ecosfera was clearly informed of the name of the successful bidder, the value of the contract and the point rating from which Ecosfera could have calculated the score out of 100, which fulfils the requirements set out in Article 1015(6)(b) of *NAFTA*. According to EC, this approach is consistent with the position adopted by the Tribunal in *Med-Emerg*,<sup>15</sup> although, in certain circumstances, the Tribunal concluded that it was appropriate to disclose more.

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14. In the previous paragraphs, the Tribunal has already found that EC failed to comply with the principal requirement set out in Article 1015(6)(b) of *NAFTA*.

15. At para. 41 of that determination, the Tribunal writes as follows: "... 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."



45. EC argued that, in this case, in view of the major deficiencies of Ecosfera's bid and the lack of understanding of the desired objectives, the provision of additional information about Stratos's bid would have been of little use to it. It claimed that the disclosure of detailed information about the evaluation of each criterion could negatively affect the confidential nature of the tender selected.

46. Ecosfera, for its part, argued that no information had actually been provided concerning the relative characteristics and advantages of the tender selected. Ecosfera alleges that EC cannot rely on the notion of "confidentiality" to refuse to fulfil its obligations deriving from *NAFTA*, from the positions expressed publicly by Canada, from Canadian laws of general application, from jurisprudence and from contractual clauses that apply by reference to the *Department of Public Works and Government Services Act*.<sup>16</sup>

47. As with the analysis of the preceding ground of complaint, it is difficult to determine from the relevant wording of Article 1015(6)(b) of *NAFTA* what the precise nature of the information to be provided concerning the tender selected should be. The relevant wording is as follows: "...provide pertinent information to [a] supplier concerning ... the relevant characteristics and advantages of the tender selected and the name of the winning supplier."

48. It is understood by all that this requirement to provide information must be contrasted with the requirement stipulated in Article 1015(8) of *NAFTA*, which sets limits on what can be disclosed. However, these limits are not absolute and cannot be used to justify a refusal to provide the minimum information to be disclosed under the principal requirement.

49. The relative characteristics and advantages of the tender selected constitute the subject matter of the information to be provided. One must look to the words used by the drafters of the provision to understand the potential scope of the requirement. The word "characteristic" (*caractéristique*) generally refers to a feature or quality of a thing,<sup>17</sup> in this case, Stratos's bid. The word "advantage" (*avantage*) generally means that a thing or person is better than another;<sup>18</sup> in this context, it refers to the advantages of Stratos's bid when compared to that of Ecosfera. Clearly, the particularities of each case determine the information that is to be provided. It is in this context that the Tribunal must determine whether EC has, given the facts of this case, provided the required information concerning the relative characteristics and advantages of Stratos's bid.

50. In fact, nothing was provided other than Stratos's identity, the value of its bid and some scoring for each evaluation criterion.<sup>19</sup> In its analysis of the second ground of complaint, the Tribunal is of the view that, in this case, EC was required and should have been able to provide a minimum of information about the characteristics and advantages that set Stratos apart from Ecosfera. EC should have been able, without providing confidential commercial information, to describe generally the criteria for which Stratos received higher scores. Moreover, there is nothing on the record to indicate that it was impossible to do so without breaching the confidential nature of documents or information. For example, on the consensus scoring sheet, comments or explanations could have been provided concerning the advantages of Stratos's bid based on its experience organizing similar projects. The same holds true for the quality of the proposal. In fact, EC merely provided some scoring for each evaluation criterion. The Tribunal feels that EC could have done more.

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16. S.C. 1996, c. 16.

17. *Le Petit Robert* 2006 s.v. « caractéristique » : *trait, particularité* (characteristic feature or quality).

18. *Ibid.* s.v. « avantage » : *atout, avance, gain* (better position ; superiority in a particular respect).

19. Complaint, Tab 2 at 3, 4.



51. In light of the foregoing, the Tribunal finds that EC also did not fulfill its requirements concerning disclosure with regard to the second ground of complaint.

**Order sought by Ecosfera concerning the provision of information and documents**

52. Regarding the grounds of complaint relating to Article 1015(6)(b) of *NAFTA*, Ecosfera asked the Tribunal, by way of conclusions sought, to order EC to produce the following documents listed in paragraph 25 of Ecosfera's reply to the Tribunal's request for comments and EC's report.

53. The information concerning Ecosfera's bid was the following:

- all written instructions sent to the evaluators;
- any evaluation plan developed or used by EC;
- any evaluation handbook developed or used by EC;
- any scoring documentation, including the scoring tables developed or used by EC;
- any scoring supplements, guidelines or explanations developed or used by EC;
- the scoring resulting from the evaluation, including the raw-scoring sheets of each evaluator, and the scoring notes of each evaluator with regard to the evaluation of Ecosfera's bid;
- all the minutes, memoranda and other written notes produced following the meetings of the technical evaluators as they relate to the evaluation of Ecosfera's bid.

54. The information concerning the tender selected was the following:

- the scoring resulting from the evaluation, including the raw-scoring sheets of each evaluator, and the scoring notes of each evaluator with regard to the evaluation of Stratos's bid;
- all the minutes, memoranda and other written notes produced following the meetings of the technical evaluators as they relate to the evaluation of Stratos's bid;
- a copy of Stratos's bid, without breaching the confidentiality (if applicable) of this document, in accordance with the provisions of the *Access to Information Act*.<sup>20</sup>

55. After considering the matter, the Tribunal has decided not to issue such an order. First, sections 30.15 and 30.18 of the *CITT Act* stipulate that the Tribunal's jurisdiction at this stage of the proceedings is limited to making recommendations. The Tribunal believes that this power does not allow it to issue an order of the type sought by Ecosfera. Moreover, it is not certain that the requirement of Article 1015(6)(b) of *NAFTA* calls for the entity to provide the information described in a particular form. The provision merely describes the kind of information, without specifying the form. In addition, the issue of whether, for the purposes of proceedings before the Tribunal, the Tribunal should issue an order of the type referred to earlier depends on the specific facts considered at the Tribunal's initiative or as a result of a request to this effect during an inquiry. This kind of order enables the Tribunal to obtain and examine exhibits or documents in the context of exercising its jurisdiction. Ecosfera's request by way of conclusions sought does not fit into this type of scenario.

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20. R.S.C. 1985, c. A-1.



**Scoring factors not outlined in the RFP but considered in the scoring system**

56. Subsection 506(6) of the *AIT* and Article 1013 of *NAFTA* are relevant to Ecosfera's third ground of complaint.

57. Subsection 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.

58. Article 1013 of *NAFTA* reads as follows:

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h). 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 ... ;

...

59. These requirements are very clear and the Tribunal has commented many times on their scope. The government institution simply cannot apply an evaluation criterion other than the ones stipulated in the tender documentation.

60. In this case, it is a matter of determining whether EC applied an evaluation criterion that was not reasonably predictable from the RFP. In this regard, the Tribunal notes that the parties did not disagree about the fact that the bidder's experience was not to be part of the analysis when considering the evaluation factor concerning "Knowledge of the various ways of approaching the environmental risks and regulatory gaps associated with the Federal House and Aboriginal Lands" [translation].<sup>21</sup> The issue is therefore whether experience was considered when applying the knowledge criterion.

61. EC argued that the third ground of complaint is not valid and stems mainly from a comment on the individual scoring sheet of a member of the evaluation team.

62. EC argued that the evaluation sub-factor "Knowledge of the various ways of approaching the environmental risks" was not to evaluate the bidders' experience, but rather their knowledge of the various ways of approaching the environmental risks and regulatory gaps of the Federal House. EC argued that the comment "No experience of the regulatory gap" [translation] on the individual scoring sheet of a member of the evaluation team was a wrong choice of words on his part and that he meant to say "Does not show an understanding of the regulatory gaps" [translation]. EC further argued that this interpretation is consistent with another comment made by a member of the evaluation team about the sixth point of the individual evaluation when he wrote "No indication that they understand the regulatory gap between provincial and federal lands" [translation].

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21. Comments on the GIR, para. 81; affidavit of Mr. Leif Stephanson, GIR, Tab B, para. 12.



63. Also, Ecosfera argued that, on the balance of probabilities, the scoring system provides additional information that was not evident from the content of the RFP. Ecosfera alleges that had it known that the “experience” criterion was to be developed under the “Knowledge” heading, the bid that it submitted to EC would have been structured differently. According to Ecosfera, the evaluation committee applied an evaluation criterion that had not been disclosed to the bidders or was not reasonably predictable from the RFP.

64. The Tribunal must decide between these two conflicting versions of what is revealed by the expression “No experience of the regulatory gap” on the individual scoring sheet of one of the members of the evaluation team. The Tribunal has little evidence to allow it to differentiate between these two versions.

65. In the past, the Tribunal has ruled that it is reasonable to conclude that a comment made on a scoring sheet is apt to show the evaluator’s approach or attitude to the subject matter of his comment. In this case, the comment of one of the members of the evaluation team seems to indicate that the existence or non-existence of relevant experience was considered in determining the degree of “Knowledge of the various ways of approaching the environmental risks”.

66. Like Ecosfera, the Tribunal had difficulty reconciling the existence of the comment in question and the author’s explanation of it. It is relevant to note that the member of the evaluation team whose comment the Tribunal is examining demonstrates, in several other places in his notes, a mastery of French that leaves no room for doubt as to his ability to grasp the difference in meaning between the words “experience” and “knowledge”. The discrepancy between the content of the comment made on the individual scoring sheet and what this member claims to have meant is such that it seems difficult to believe that he could have so wrongly conveyed what he meant to say. In short, his mastery of French seems too good for the Tribunal to accept the explanation offered by EC about the comment.

67. In light of the foregoing, the Tribunal is rather of the opinion that one of the members of the evaluation team took the “experience” factor into account when applying the “knowledge” factor and, in so doing, used an evaluation criterion not specified in the bid documentation. This being the case, the Tribunal believes that EC did not fulfil the aforementioned requirements of the relevant trade agreements regarding the use of evaluation criteria.

68. In view of the foregoing, the Tribunal finds that the third ground of complaint is valid.

## REMEDY

69. In recommending a remedy, the Tribunal must, pursuant to subsection 30.15(3) of the *CITT Act*, 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.



70. In order to determine the remedy to be recommended in this instance, the Tribunal examined the circumstances relevant to the procurement, including those mentioned above.

71. This case concerns, *inter alia*, an error made in applying one of the evaluation criteria set out in the RFP. According to the Tribunal, this constitutes a rather serious irregularity in the procurement process and a type of action that prejudices the integrity and efficiency of the overall competitive procurement system.

72. It is impossible to know for certain what the results of the procurement would have been had the evaluation criteria been applied without taking the “experience” factor into account. One thing is certain, the facts show that Ecosfera was unable to meet the expectations of EC as the latter understood them and, therefore, could not submit a proposal that would have received the maximum points. According to the Tribunal, it is reasonable to think that, had Ecosfera known that the “experience” factor would be taken into account when applying the evaluation criteria, it could have modified its bid accordingly.

73. The Tribunal notes however that there is no evidence that EC acted in bad faith.

74. In view of the foregoing, the Tribunal recommends that EC re-examine Ecosfera’s proposal using the “knowledge” criterion, without taking the “experience” factor into account. If Ecosfera’s bid obtains the necessary pass mark and proves to be the lowest-priced responsive bid, the Tribunal recommends that Ecosfera be compensated by an amount equal to the profit that it would have earned had it been awarded the contract.

75. The Tribunal further recommends that EC fulfil the requirement to disclose information in terms of the degree of detail of the explanations provided to Ecosfera concerning its proposal and the relative characteristics and advantages of the proposals selected.

### **Costs**

76. Ecosfera requested its costs incurred in preparing its bid and in preparing and proceeding with the complaint.

77. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Ecosfera its reasonable costs incurred in preparing and proceeding with the complaint.

78. The *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) bases the level of complexity of a complaint on three criteria: the complexity of the procurement, the complexity of the complaint, and the complexity of the proceedings. According to the Tribunal’s preliminary indication, the level of complexity of the complaint is Level 1. The level of complexity of the procurement itself was low, since it concerned the provision of consulting services, the subject matter of which was not in dispute. The level of complexity of the complaint was low, since the essential facts were relatively straightforward. The level of complexity of the proceedings was moderate, since there was a motion to produce documents. Therefore, in accordance with the *Guideline*, the Tribunal’s preliminary indication of the amount of the award is \$1,000.

### **DETERMINATION OF THE TRIBUNAL**

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



80. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that EC re-evaluate Ecosfera's proposal using the "knowledge" criterion, without taking into account the "experience" factor, within 30 days following the publication of the statement of reasons for this determination. The Tribunal recommends that, if Ecosfera's proposal obtains the necessary pass mark and proves to be the lowest-priced responsive bid, Ecosfera be compensated by an amount equal to the profit that it would have earned, had it been awarded the contract.

81. In that event, the Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Tribunal within 60 days of the date of the publication of the statement of reasons for this determination. Should the parties be unable to agree on the amount of compensation, each party shall file a report with the Tribunal within the same 60-day period, after which the Tribunal will make its recommendation on the matter.

82. If, following the re-evaluation, Ecosfera's proposal does not obtain the necessary pass mark, the Tribunal also recommends that, upon request, EC provide Ecosfera with pertinent information concerning the reasons for not selecting its tender and the relative characteristics and advantages of the tender selected, in accordance with Article 1015(6)(b) of *NAFTA*.

83. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Ecosfera its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by EC. 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 for Fixing Costs in Procurement Complaint Proceedings*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member