Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2007-010 and PR-2007-012

Bureau d'études stratégiques et techniques en économique

v.

Canadian International Development Agency

Determination and reasons issued Wednesday, September 5, 2007

Canada

TABLE OF CONTENTS

IN THE MATTER OF two complaints filed by Bureau d'études stratégiques et techniques en économique 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 complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act.*

BETWEEN

BUREAU D'ÉTUDES STRATÉGIQUES ET TECHNIQUES EN ÉCONOMIQUE **Complainant**

AND

THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY **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 complaints are 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 Canadian International Development Agency re-evaluate all the technical proposals that were submitted by the potential suppliers and that were given a score equal to or greater than 60 percent in the first evaluation, so as to eliminate, as much as possible, all the consequences of breaches of the *Agreement on Internal Trade* noted by the Canadian International Trade Tribunal.

To carry this out, the Canadian International Trade Tribunal recommends that the Canadian International Development Agency form an evaluation team composed of new evaluators who have not been involved in any way in the procurement at issue or in a related procurement to re-evaluate the bids. All bidders whose technical proposals have been re-evaluated must be informed of the outcome of this re-evaluation.

During the re-evaluation, to ensure that no bidder has an advantage, the evaluators must eliminate Requirements 10 and 11 of the Request for a Summary Proposal, namely, an understanding of the key governance and management issues that the project will face and an understanding of project risks and mitigation measures, and adjust the maximum number of points allotted to the technical proposal and the financial part accordingly.

Regarding Requirement 4 of the Request for a Summary Proposal, the Canadian International Trade Tribunal recommends that the evaluators take into account its relevant elements, including demonstrated experience in facilitating reform, preferably in the public sector and at the level of municipal management or local governance. Finally, the re-evaluation must disregard the factor relating to "recent experience over the last 5 to 10 years" [translation], which is not expressly stated in the Request for a Summary Proposal for Requirement 7, but is found in the Detailed Grid – Evaluation Guidelines.

Following the re-evaluation, if it is determined that the proposal of Bureau d'études stratégiques et techniques en économique receives the highest number of points, the Canadian International Trade Tribunal recommends as follows:

- that the Canadian International Development Agency cancel the contract awarded to Mr. Stéphane Courtemanche, that the contract be awarded to Bureau d'études stratégiques et techniques en économique and that the Canadian International Development Agency compensate Bureau d'études stratégiques et techniques en économique for lost profits incurred for the portion of the contract already performed by Mr. Courtemanche;
- alternatively, if the Canadian International Development Agency decides not to cancel the contract with Mr. Courtemanche, that it compensate Bureau d'études stratégiques et techniques en économique by an amount equal to the profit that it would have earned had it been awarded the full contract;
- that the parties develop a joint proposal for compensation to be presented to the Canadian International Trade Tribunal within 45 days of the publication of this determination. Should the parties be unable to agree on the amount of compensation, Bureau d'études stratégiques et techniques en économique shall file with the Canadian International Trade Tribunal, within 60 days of the publication of this determination, a submission on the issue of compensation. The Canadian International Development Agency shall have 7 working days after receiving the submission of Bureau d'études stratégiques et techniques en économique to file a reply. Bureau d'études stratégiques et techniques en économique shall then have 5 working days after receiving the Canadian International Development Agency's reply submission to file any further submissions.

If it is determined after the re-evaluation, however, that the proposal of Bureau d'études stratégiques et techniques en économique does not obtain the highest number of points, the Canadian International Trade Tribunal recommends that Bureau d'études stratégiques et techniques en économique be awarded $7,500 for its costs incurred to prepare the bid. The Canadian International Trade Tribunal also recommends that, upon request, the Canadian International Development Agency promptly provide Bureau d'études stratégiques et techniques en économique with relevant information about the reasons for the rejection and disclose to it the relative characteristics and advantages of the selected bid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bureau d'études stratégiques et techniques en économique its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by the Canadian International Development Agency. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If any party disagrees with the preliminary indication of the level of complexity or with 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.

Meriel V. M. Bradford
Meriel V. M. Bradford
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Member:	Meriel V. M. Bradford, Presiding Member
Director:	Marie-France Dagenais
Senior Investigator:	Josée St-Amand
Counsel for the Tribunal:	Dominique Laporte
Complainant:	Bureau d'études stratégiques et techniques en économique
Counsel for the Complainant:	Jean-Marc Bergevin
Intervener:	Stéphane A. V. J. Courtemanche
Government Institution:	Canadian International Development Agency
Counsel for the Government Institution:	Kathleen McGrath Bernard Letarte Andréane Joanette-Laflamme

Please address all communications to:

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

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

STATEMENT OF REASONS

COMPLAINTS

1. On April 24, 2007, Bureau d'études stratégiques et techniques en économique (B.E.S.T.E.) filed a complaint (PR-2007-010) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning a procurement (Solicitation No. SEL-2007-A-032436-1) by the Canadian International Development Agency (CIDA) for consulting services of a monitor/advisor for the Local Governance Morocco (LGM) project.

2. B.E.S.T.E. alleged as follows: (1) CIDA did not comply with clause 2.3 of the Request for a Summary Proposal (RFSP), which means that there is an appearance of conflict of interest; (2) there is an apparent lack of expertise in local governance on the part of the contract winner, Mr. Stéphane Courtemanche, and the contract winner does not have the necessary expertise to act as consultant. As a remedy, B.E.S.T.E. claimed lost profits of $40,000 and punitive damages of $20,000. It also sought the cancellation of the contract awarded to Mr. Courtemanche until the Tribunal determined the validity of the complaint and the issuance of a new solicitation with revised criteria. Finally, it sought its costs incurred in preparing the proposal ($7,500) and the complaint ($7,500).

3. On May 2, 2007, the Tribunal notified the parties that it had accepted the complaint at issue, 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 May 4, 2007, B.E.S.T.E. filed a second complaint (PR-2007-012) with the Tribunal concerning the same RFSP, based on information that it did not have at the time of filing the first complaint. In its second complaint, B.E.S.T.E. alleged that CIDA had breached the contract award rules with regard to the detailed proposal evaluation grid, more specifically, the sub-requirements and their relative weighting, and the absence of explanations supporting the scores given.

5. On May 15, 2007, further to the Tribunal's letter of May 11, 2007, in which it accepted the second complaint, and as proposed by the Tribunal, CIDA requested an extension of the deadline for filing the Government Institution Report (GIR) in respect of File No. PR-2007-010, in order to file a single GIR for the two complaints, since the Tribunal intended to hear them concurrently. On May 16, 2007, the Tribunal granted the extension, and on June 12, 2007, a single GIR was filed for these two complaints. On May 8, 2007, B.E.S.T.E. filed a motion for CIDA to produce documents. After the parties filed submissions, the Tribunal allowed B.E.S.T.E.'s motion in part and, on May 29, 2007, it issued an order for the production of certain documents.

6. On June 8, 2007, at the request of Mr. Courtemanche, the Tribunal granted him intervener status. On June 9, 2007, Mr. Courtemanche requested an extension until June 29, 2007, to file his comments in respect of all the documents on the record. On June 12, 2007, CIDA filed its GIR with the Tribunal, pursuant to section 103 of the *Canadian International Trade Tribunal Rules*,[3] as well as the requested documents that the Tribunal had ordered it to produce. On June 13, 2007, the Tribunal sent the GIR to B.E.S.T.E. and to Mr. Courtemanche and gave the latter until June 28, 2007, to file his comments in respect of all the documents on the record.

---

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*].

7. On June 19, 2007, B.E.S.T.E. asked for additional information from CIDA, including the public version of Appendices O (Proposal Evaluation Report) and P (Mr. Courtemanche's technical proposal) of the GIR. The Tribunal asked CIDA to file the public versions of these documents on June 22, 2007. On that date, CIDA sent the public version of Appendix O, but refused do so for Appendix P, claiming that the information about work experience contained in Appendix P was confidential. On June 25, 2007, relying on paragraph 46(1)(*b*) of the *CITT Act*, the Tribunal again asked CIDA to provide a public version or a public summary of the information contained in this appendix. As a result, the Tribunal postponed to a later date the deadline for filing comments on the GIR by B.E.S.T.E. and Mr. Courtemanche. On June 27, 2007, CIDA filed the public version of Mr. Courtemanche's technical proposal.

8. On July 3, 2007, the Tribunal received Mr. Courtemanche's comments, and on July 9, 2007, it received B.E.S.T.E.'s. On July 12, 2007, CIDA asked permission to respond to B.E.S.T.E.'s comments, alleging that they raised new arguments and contained factual errors. The Tribunal allowed CIDA and Mr. Courtemanche to respond only to a new argument raised by B.E.S.T.E., namely, the one regarding "work experience going back more than 5 years and more than 10 years". On July 19, 2007, CIDA filed its comments on this issue and B.E.S.T.E filed its reply submissions on July 23, 2007. On August 10, 2007, B.E.S.T.E. filed a public copy of Mr. Courtemanche's technical proposal, which CIDA had provided to it on July 26, 2007, pursuant to the *Access to Information Act*.[4]

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

PROCUREMENT PROCESS

10. According to the information contained in the GIR, the RFSP was published through MERX[5] on October 10, 2006, and the closing date for the submission of bids was October 27, 2006.

11. The RFSP was for the services of a consultant acting as monitor/advisor for the LGM project. The value of this contract was estimated at $465,000, excluding GST, and the anticipated term of the contract was five years.[6]

12. CIDA received seven proposals in response to the RFSP and a committee of three evaluators, consisting of two permanent CIDA employees and one consultant, evaluated them. In the evaluation of the proposals, Mr. Courtemanche's scored the most points while B.E.S.T.E.'s ranked third.[7] In a letter dated November 23, 2006, CIDA informed B.E.S.T.E. that its proposal had not been accepted, and on November 29, 2006, Mr. Courtemanche signed with CIDA the monitor/advisor contract for the LGM project, which he has been performing since that date.[8]

13. On December 5, 2006, B.E.S.T.E. learned, through a telephone message left by a CIDA employee, that the contract winner was Mr. Courtemanche. The next day, B.E.S.T.E. happened to learn, through another consultant acting in the same capacity as B.E.S.T.E., that Mr. Courtemanche had been involved in the evaluation of the proposals and the process for selecting the Canadian support agency (CSA) for the

4. R.S.C. 1985, c. A-1.
5. Canada's electronic tendering service.
6. GIR, para. 15; RFSP, Appendix A at 50.
7. GIR, paras. 16, 17, 125.
8. GIR, paras. 18, 19.

LGM project, information that was confirmed in a letter from CIDA dated March 14, 2007, sent in response to an access to information request.[9]

14. Following several exchanges of correspondence beginning on December 8, 2006, at different administrative levels of CIDA, on April 11, 2007, B.E.S.T.E. received a final reply from Mr. Robert Greenhill, President of CIDA, in which he dismissed B.E.S.T.E.'s complaint within the context of CIDA's internal process.

15. On April 24, 2007, B.E.S.T.E. filed its first complaint with the Tribunal, and on May 4, 2007, its second complaint.

PRELIMINARY ISSUE—TRIBUNAL'S JURISDICTION

16. In its GIR, CIDA argued that the LGM project is an international development assistance project excluded from the Tribunal's jurisdiction. CIDA relies mainly on the following two arguments: (1) the *Agreement on Internal Trade*,[10] the *North American Free Trade Agreement*[11] and the *Agreement on Government Procurement*[12] exclude government assistance from their application; (2) *NAFTA* and the *AGP* specify that CIDA is a government entity contemplated by these agreements only insofar as it enters into contracts "on its own account", which is not the case for the procurement at issue, which concerns an international development assistance contract within the LGM project.

17. In its comments on the GIR, B.E.S.T.E. noted that CIDA had previously used these arguments without success in File No. PR-2002-074.[13]

18. Article 518 of the *AIT* defines "procurement" as follows:

> . . . the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:
>
> (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
>
> (b) government provision of goods and services to persons or other government organizations.

19. Regarding CIDA's argument to the effect that the *AIT* excludes government assistance from its application, the Tribunal reiterates its reasoning in *Genivar* in which it stated the following:

> . . .
>
> The Tribunal does not agree with CIDA's claim that the *AIT* covers only CIDA's contracts that are financed by its operating budget and not those that constitute international government development assistance. This claim is erroneous because it includes this latter form of assistance with those in Article 518 of the *AIT*. However, international government development assistance is not the same as "any form of government assistance" contemplated in this article. *In fact, the Tribunal is of the view that Article 518, as the name of the agreement indicates, contemplates only those forms of*

9. B.E.S.T.E.'s complaint, section 5F, "Detailed Statement of Facts and Arguments" [translation] at 1, 2; "Correspondence" tab.
10. Online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
11. *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*].
12. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
13. *Re Complaint Filed by Consortium Genivar – M3E – Université d'Ottawa* (11 August 2003) (CITT) [*Genivar*].

> *government assistance relating to internal or domestic trade, i.e. given by a government somewhere in Canada in order to provide assistance in the form of a grant, loan, equity infusion, guarantees or fiscal incentives. In the Tribunal's view, without explicitly stating such, international government development assistance cannot be included with the forms of government assistance contemplated in Article 518.* The fact that CIDA is included in Annexe 502.1A, without explicit mention of inclusion "on its own account" only, such as is the case in the *AGP* and *NAFTA*, satisfies the Tribunal that the contracting parties to the *AIT* wanted to subject CIDA to its rules.
>
> . . .
>
> [Emphasis added]

20. In addition, CIDA claimed that the *AIT* did not apply to government assistance since the term "procurement", in Article 518(b), excludes government provision of goods and services to persons or other government organizations. The Tribunal does not agree with CIDA's claims on this point. Since Article 518(b) contemplates *government* provision of goods and services to persons or other government organizations, one of the pre-conditions of this exemption is the *direct* government provision of goods and services, which, of course, is not the case here, since the services are not provided directly by CIDA but rather through a consultant. The purpose of Article 518(b) is to exclude from the definition of "procurement" services that are provided directly by a government to its citizens or to other government organizations.

21. As already stated in *Genivar*, ". . . [t]he fact that CIDA is included in Annexe 502.1A, without explicit mention of inclusion 'on its own account' only, such as is the case in the *AGP* and *NAFTA*, satisfies the Tribunal that the contracting parties to the *AIT* wanted to subject CIDA to its rules . . . ." This interpretation is consistent with the purpose of Chapter Five of the *AIT*, which stipulates at Article 501 that ". . . the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

22. Thus, under the *AIT*, the Tribunal has jurisdiction to deal with the validity of the complaints at issue. Regarding *NAFTA* and the *AGP*, the Tribunal notes that CIDA put forward some convincing arguments to support its position that the Tribunal did not have the necessary jurisdiction under these two agreements. However, since the Tribunal has determined that the *AIT* applied in this case, it need not examine this issue at length.

POSITIONS OF PARTIES AND 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. As stated earlier, the *AIT* applies in this case. As stipulated in Article 501, the purpose of Chapter Five of the *AIT* on Procurement ". . . is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

24. Article 506(6) of the *AIT* provides as follows:

> In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. *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.*
>
> [Emphasis added]

25. B.E.S.T.E.'s complaints contain various allegations that will be considered by the Tribunal. They are the following: (1) non-compliance with clause 2.3 of the RFSP; (2) the fact that B.E.S.T.E. was deprived of relevant information for the preparation of its bid of which the contract winner had knowledge; (3) bias of the contract award process (favouritism); (4) appearance of conflict of interest on the part of the contract winner; (5) the apparent lack of expertise in local governance on the part of the contract winner; (6) the breach arising from the detailed evaluation grid for proposals, more specifically, the sub-requirements and their relative weighting, and the absence of explanations in support of the points awarded. This last allegation includes, *inter alia*, the ground of complaint concerning the detailed evaluation grid with regard to "work experience going back more than 5 years and more than 10 years".

Non-compliance with clause 2.3 of the RFSP

26. In its complaints, B.E.S.T.E. alleged that the choice of Mr. Courtemanche as the contract winner was a breach of clause 2.3 of the RFSP, because Mr. Courtemanche was involved in the selection of the CSA, a step in the project implementation phase and not the planning phase, as alleged by CIDA.[14]

27. In order to properly understand this allegation, it is necessary to mention the steps in the LGM project. In fact, in one of the preliminary phases of this project, a solicitation was published through MERX, on January 19, 2006, to select a CSA to implement the LGM project.[15] "The purpose of CIDA's LGM project is the modernization of the operational procedures of the territorial government and local communities targeted by the project, the capacity building of local communities to promote sustainable and participatory development, to improve coordination between the central government and the local communities and subsequently to generalize the results of this project at the national level"[16] [translation]. "The CSA must implement the LGM project and manage all activities funded by the project. To this end, the CSA must produce an implementation plan, prepare an annual work plan, participate in the committees which bring together the various participants in this project, provide technical support to the Moroccan partners and produce reports"[17] [translation]. On February 3, 2006, CIDA hired Mr. Courtemanche to assist it in the selection and contracting of the CSA for the LGM project.[18] CIDA chose the consortium CRC SOGEMA/COWATER International Inc. as the CSA and, on November 3, 2006, signed a five-year contract valued at $13,197,000, which is currently being executed.[19]

14. B.E.S.T.E.'s complaint, section 5F, "Detailed Statement of Facts and Arguments" at 4.
15. GIR, para. 10.
16. GIR, para. 11.
17. GIR, para. 12.
18. GIR, Appendix D. B.E.S.T.E.'s complaint, "Correspondence" tab, letter dated March 14, 2007, from CIDA in response to an access to information request.
19. GIR, para. 14.

28. Clause 2.3 of the RFSP provides as follows:

> Where this RFSP relates to the implementation of the first or only phase of a project, the Consultant, including EACH member of a consortium, joint venture or association, and all personnel and subcontractors must not have been involved, individually, jointly, or severally, in the planning (i.e. conceptualization, feasibility studies, specifications or design) of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the planning of this project.
>
> Where this RFSP relates to the *evaluation*, monitoring or *audit* of a project, the Consultant, including EACH member of the consortium, joint venture or association, and all personnel and subcontractors must not have been involved, jointly or severally, in the *implementation of this project*, nor have been assisted in the preparation of the proposal by any party who has been involved in the *implementation of the project* to be evaluated, monitored or audited.
>
> [Emphasis added]

29. B.E.S.T.E. argued that the choice of the contract winner, Mr. Courtemanche, for the procurement at issue is a breach of clause 2.3 of the RFSP because he was involved in the selection of the CSA, a step which, in its view, is part of the *implementation* phase.

30. According to CIDA, under clause 2.3 of the RFSP, any consultant hired to execute a part or all of the planning of a project cannot submit a bid for the implementation of the project in question. However, it can be involved in the evaluation, monitoring or audit of the project. Moreover, a party submitting a bid for a contract to monitor or evaluate a project cannot have been involved in preparing the proposal of the party implementing the project. In its GIR, CIDA contended that the selection of the CSA is part of the *planning* of the project. CIDA further claimed that Mr. Courtemanche had been involved in the *selection* process for the CSA, whereas his hiring as monitor/advisor for the LGM project concerns the evaluation, monitoring and audit of the project.

31. B.E.S.T.E. also argued that it is common practice for a CIDA consultant who is involved in the selection of the CSA to draft the selection criteria for the monitor/advisor, a position which, implicitly or explicitly, had probably been assigned to Mr. Courtemanche through the contract for the selection of the CSA.[20]

32. CIDA replied that Mr. Courtemanche had not been involved in the preparation of the RFSP for the mandate of monitor/advisor. Mr. Courtemanche argued that B.E.S.T.E.'s allegation regarding the drafting of the selection criteria for the monitor is offensive, without factual basis and damaging to his professional integrity, reputation and honour.

33. The parties agree that the RFSP was for the evaluation, monitoring and audit of a project and that only the second paragraph of clause 2.3 is relevant. Although B.E.S.T.E. claimed that the selection of the CSA was part of the project *implementation* phase, CIDA vigorously maintained that, on the contrary, the selection of the CSA was part of the project *planning* phase. If the Tribunal finds that the selection of the CSA was part of the *implementation* phase, then clause 2.3 has indeed been breached.

34. The Tribunal has closely examined the scope of clause 2.3 of the RFSP and the arguments submitted by the parties. The Tribunal is of the view that it is very difficult, if not impossible, to place the step of choosing the CSA into one of these two closed categories. The selection process for the CSA is a step that links the planning phase to the implementation phase. In other words, at the point of choosing the CSA, the project has usually already been planned and its implementation has not yet begun. In the Tribunal's view, there has therefore been no breach of clause 2.3 as worded in the RFSP.

---

20. B.E.S.T.E.'s complaint, section 5F, "Detailed Statement of Facts and Arguments" at 6.

35. Regarding the allegation that the contract winner was involved in drafting the selection criteria of the RFSP for the monitor/advisor, the Tribunal points out that no evidence has been adduced in this regard, and it therefore determines that this allegation is unfounded.

B.E.S.T.E. was deprived of relevant information for the preparation of its bid of which the contract winner had knowledge

36. B.E.S.T.E. alleged that the score of 95 percent (124.1 points out of 130) that Mr. Courtemanche received for the methodological requirements of the RFSP[21] is not surprising, since during his mandate relating to the selection of the CSA, he had the opportunity to familiarize himself with all facets of the LGM project during exchanges with CIDA employees, including the head of the evaluation team. B.E.S.T.E. further maintains that Mr. Courtemanche had access not only to the marking scheme, but also to the expected answers, which he himself probably helped draft. Therefore, B.E.S.T.E. argued that Mr. Courtemanche was in a position to know everything that was useful to know about the project environment, the risks, the partners, indeed all the evaluation criteria for the mandate of monitor/advisor of the LGM project, information to which no other bidder had access.

37. CIDA claimed that the fact that Mr. Courtemanche had access to certain information for the selection of the CSA did not place him in a position of having any undue advantage over other bidders, since this information could be relevant only with respect to Requirements 10 and 11 of the RFSP, which were more directly concerned with knowledge of the LGM project.[22] No information obtained in the context of the CSA selection process could affect the other requirements relating to education and work experience. CIDA added that, while Mr. Courtemanche may have had access to information relating to the selection of a CSA, other equally valuable sources of information were available to all bidders.

38. CIDA argued that it provided a considerable quantity of information in the RFSP to enable bidders to prepare a complete proposal for Requirement 10.[23] As for Requirement 11, the logic analysis framework published in the Request for Proposal (RFP) for the CSA was public information that was helpful in responding to it, which three of the seven bidders for the monitor/advisor contract for the LGM project had obtained by ordering it on MERX. Quality information was therefore publicly available.

39. Last, CIDA argued that Mr. Courtemanche was not unduly advantaged by his involvement in the selection of the CSA and that, if the Tribunal found otherwise, this should not result in the cancellation of the contract currently being performed, because even if all bidders had received the maximum 120 points for Requirements 10 and 11, thereby cancelling out any advantage Mr. Courtemanche may have had, he still would have received the most points.[24]

40. In the Tribunal's opinion, it is clear from the evidence on the record that the contract winner had information in his possession that was not available to B.E.S.T.E. and the other bidders. The Tribunal notes that, within the context of the contract with CIDA to assist with the selection and award of the CSA contract for the LGM project, from February 3, 2006, to March 31, 2007, Mr. Courtemanche had access to information of which B.E.S.T.E. and the other bidders for the RFSP were deprived. More specifically, this was information common to both procurements, the one for the selection of the CSA and the one in issue here.

---

21. *Ibid*. at 5.
22. GIR, Tab A at 52: Requirement 10: Understanding of the key governance and management issues that the project will face, 70 points; Requirement 11: Understanding of project risks and mitigation measures, 50 points.
23. CIDA gave as an example Appendix A of the RFSP, entitled "Project Description and Background Information".
24. Paragraph 83 of the GIR presents a table showing that Mr. Courtemanche received 637.7 points, finishing first, and that B.E.S.T.E. received 629.6 points, finishing second.

41. In fact, certain requirements in section 3.2.2, "Methodology", are virtually identical in the RFSP and the RFP.[25] For example, Requirement 10 of the RFSP (Understanding of the key governance and management issues that the project will face) is very similar to Requirement 6 of the RFP, and Requirement 11 of the RFSP (Understanding of project risks and mitigation measures) is very similar to Requirement 8 of the RFP. The Tribunal is not surprised to note the similarity between these key requirements of both solicitations, as they both concern the same project.

42. It must be noted, for Requirements 10 and 11 of the RFSP, of the seven bidders, the contract winner received the most points. He received nearly all points or almost 50 percent more than the second-place bidder, while B.E.S.T.E. received very few points for these two requirements.[26] The Tribunal cannot determine that the contract winner would not have received the most points for these two requirements had it not been for the fact that he had access to the information of which the other bidders were deprived. According to the evidence on the record, however, it is reasonable to conclude that he appears to have obtained a clear advantage from it. The Tribunal therefore finds that the fact that B.E.S.T.E. was deprived of information relevant to the preparation of its bid, information that the contract winner had because of his mandate relating to the selection of the CSA, constitutes a breach of the *AIT*.

Bias of the contract award process (favouritism)

43. B.E.S.T.E. alleged favouritism on the part of CIDA. In particular, it stated that one of the evaluators knew the contract winner very well, since they had been colleagues during the previous 9 to 10 months, including at least 20 days of meetings for the selection of the CSA. B.E.S.T.E. argued in particular that this person had headed up the evaluation committee, on which his colleague from the Africa Branch and a consultant also sat. B.E.S.T.E. raised the fact that these latter two individuals were especially likely to be influenced by the head of the evaluation, who knew more about the project than they did and knew one of the bidders very well. B.E.S.T.E. argued that the mere fact of being placed in this situation is problematic and undermines the credibility of the bidding process.

44. CIDA did not respond directly to B.E.S.T.E.'s allegations regarding the working relationship between the evaluator in question and Mr. Courtemanche. However, in the part of the GIR that deals with the involvement of CIDA's Vice-President in confirming the decision as part of its internal review process, CIDA states that the fact that Mr. Courtemanche knew CIDA employees whom he met when carrying out previous contracts does not create an apprehension of bias towards him. It also notes that CIDA's Vice-President was not on the evaluation team to select the monitor/advisor or on the evaluation team to select the CSA.

45. However, based on the evidence on the record, the Tribunal is of the view that Mr. Courtemanche had close and longstanding ties with the unit responsible for the LGM project at CIDA. In fact, it appears that Mr. Courtemanche was previously involved in the LGM project from August 2004 to October 2006 as senior planning advisor, from the design to the approval stages, and as well as assisting the project team in the selection of the CSA. The Tribunal notes that the head of the evaluation team is named as a client of Mr. Courtemanche during this period.[27] Mr. Courtemanche had therefore participated in this project for several months prior to the date on which the RFSP was published on MERX.

25. The RFSP is at Tab A of the GIR and the RFP is at Tab E.
26. GIR, para. 83.
27. Mr. Courtemanche's technical proposal at 16.

46. The Tribunal is of the view that this situation made the contract winner familiar with the project itself. It also made Mr. Courtemanche into a close work colleague of CIDA staff involved in the project, including the senior officer, and this situation existed since February 2006, the start date of his contract for selecting the CSA.[28] The Tribunal notes again that, in fact, evaluator No. 3, the head of the evaluation team for the monitor/advisor contract, is the same person as the Senior Project Officer of the Maghreb Program, in the Europe, Middle East and Maghreb Branch of CIDA,[29] with whom Mr. Courtemanche had contracts. Moreover, Mr. Courtemanche names this CIDA employee as a client in his technical proposal for two different projects, including the LGM project.

47. The Tribunal must therefore determine, in light of the evidence on the record, whether there is a reasonable apprehension of bias owing to the recent and longstanding working relationship between Mr. Courtemanche and CIDA personnel, and more specifically with one of the evaluators, in the context of Mr. Courtemanche's role as senior planning advisor, from the design to the approval stages, and then for the provision of services to assist the project team responsible for selecting the CSA.

48. In *Prudential Relocation Canada Ltd.*,[30] the Tribunal dealt with reasonable apprehension of bias. In its statement of reasons, the Tribunal refers to *Cougar Aviation Ltd. v. Canada*,[31] in which the Federal Court of Appeal found that, under the *AIT*, ". . . the Tribunal's jurisdiction was not limited to complaints of actual bias, but also included the adjudication of allegations of reasonable apprehension of bias."

49. The criterion applied by the Tribunal in determining whether the circumstances of this case gave rise to a reasonable apprehension of bias is the criterion set out by de Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*,[32] confirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,[33] which dissenting opinion stated as follows:

> . . . what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [this person], whether consciously or unconsciously, would not decide fairly?[34]

50. In this case, the Tribunal has closely studied the facts and, while it does not find there is *de facto* bias on the part of CIDA, it is of the opinion that, in applying the relevant test, there is indeed a reasonable apprehension of bias. Several factors support the Tribunal's reasoning in this regard. The mere fact that one of the evaluators had worked with Mr. Courtemanche in the past is not sufficient, in itself, to warrant a finding of reasonable apprehension of bias. Rather, it is the particular circumstances of this case that support this finding.

51. First, the Tribunal notes that it was for the same overall project, namely, the LGM project for which Mr. Courtemanche provided his services to CIDA for the selection of the CSA. The evaluator of the contract at issue and Mr. Courtemanche were called upon to work closely on this project, no doubt since

---

28. GIR, Tab D at 3.
29. B.E.S.T.E.'s complaint, "Correspondence" tab, letter dated March 14, 2007, from CIDA in response to an access to information request.
30. *Re Complaint Filed by Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT).
31. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.).
32. 1 S.C.R. 369 (S.C.C.).
33. [2003] 1 S.C.R. 884 (S.C.C.).
34. [1978] 1 S.C.R. 369 at 394.

February 3, 2006, the start date of his contract. This working relationship began well before the date on which the bids for the contract at issue were opened. It is therefore inevitable that he knew Mr. Courtemanche professionally.

52. Second, looking at the time frame, it can be seen that, because of his previous contracts with CIDA, Mr. Courtemanche had worked for the evaluator as early as August 2004. As the head of the evaluation team, this CIDA employee also sat on the selection committee for the CSA and the selection committee for the monitor/advisor. It seems, then, that the contract winner had worked for this CIDA employee starting in 2004, before becoming his colleague on the selection committee for the CSA, in 2006, and before finally being evaluated by him for the mandate of monitor/advisor later that same year.

53. Third, the Tribunal considers the key role played by the evaluator in question. Indeed, the head of the evaluation team for the monitor/advisor contract is the Senior Project Officer of the Maghreb Program, in the Europe, Middle East and Maghreb Branch of CIDA. It is likely that, because that person was the head of the evaluation committee, that person's opinion and judgment had considerable weight, and it is reasonable to believe that that person may have influenced the other two members of the evaluation team. Moreover, the Tribunal notes that the evaluator in question is the one who awarded Mr. Courtemanche the most points.[35]

54. In applying the criterion set out in *Committee for Justice and Liberty v. National Energy Board* and, in particular, in doing an overall analysis of the facts of the case, the Tribunal finds that there is a reasonable apprehension of bias. Indeed, the Tribunal determines that, in light of the facts, in all likelihood, an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the evaluator in question, and perhaps even the evaluation committee, whether consciously or unconsciously, would not decide fairly.

55. The Tribunal is of the view that CIDA could easily have avoided this situation by not relying on Mr. Courtemanche's services for the selection of the CSA, knowing full well that he might bid for the monitor/advisor contract. Not only does CIDA's approach taint the contract award process used at CIDA, but it also casts doubt on the impartiality of the evaluation committee in evaluating all the proposals of the bidders with regard to all the requirements.

Appearance of conflict of interest on the part of the contract winner

56. B.E.S.T.E. submits that the job of the monitor/advisor with CIDA is to monitor the progress of a project and identify discrepancies between the expected results and those observed during implementation of the project. Therefore, if this monitor has been involved in the design of the project and in the planning of certain activities and strategic choices, he puts himself in a position of having to critique his own work, and therefore is in a conflict of interest. Moreover, B.E.S.T.E. believes that the monitor should not be involved in the selection of the CSA so as to be able to criticize the latter's work freely.

57. In its GIR, CIDA maintained that a consultant who has been involved in the planning of a project can ensure that the project is properly implemented and can efficiently audit the work of the CSA without any real or apparent conflict of interest. Since the monitor is not involved in the implementation of the project, he is able to critique the work of the CSA objectively.

35. See Tab N (protected) of the GIR.

58. Regarding the appearance of a conflict of interest on the part of Mr. Courtemanche, the Tribunal is of the view that the question of whether or not Mr. Courtemanche will act impartially in the context of his mandate as monitor/advisor is not one that the Tribunal can address. It has more to do with CIDA's internal management than with the contract award process in issue. Having already concluded that Mr. Courtemanche's involvement in the selection of the CSA was a breach of the *AIT* by virtue of the fact that this involvement had deprived B.E.S.T.E. and the other bidders of relevant information of which the contract winner had knowledge, the Tribunal is of the view that no further discussion of this issue is necessary.

Apparent lack of expertise in local governance on the part of the contract winner

59. In its comments on the GIR, B.E.S.T.E. argues that the experience presented in Mr. Courtemanche's technical proposal shows that he does not have expertise in local governance and has never worked in this field for any considerable length of time, in Canada or abroad.[36] Expertise in local governance is central to the LGM project, and CIDA chose to hire someone who has no, or at least little, expertise in this field.

60. CIDA maintained that, contrary to what B.E.S.T.E. suggests in its complaint, expertise in local governance was not in itself a criterion in the evaluation of proposals, but rather one of the elements of Requirements 4, 5 and 6 of the RFSP. CIDA wanted to point out that the LGM project is a multidimensional project that does not necessarily require specialized experience in local governance to perform the mandate of monitor/advisor. CIDA further maintained that Mr. Courtemanche's technical proposal contradicts B.E.S.T.E.'s allegation that the contract winner lacks expertise in local governance. The contract winner in fact presented several projects that showed his experience in governance or in local governance in response to Requirements 4, 5 and 6 of the RFSP.

61. Mr. Courtemanche maintains that B.E.S.T.E. misleads the Tribunal when it argues that the concept of local governance is limited essentially to municipal management or governance. In fact, local governance in a Moroccan context refers to the governance of three types of local communities, namely, the region (top level of government), prefectural and provincial communities (intermediate level) and the rural or urban communes (lowest level) and therefore does not target only communes. Also, he argues that, contrary to what B.E.S.T.E. contends, expertise in local governance is primarily the job of the CSA, since it is the CSA, and not the monitor/advisor, that is responsible for providing services directly to the Moroccan stakeholders.

62. Based on the evidence on the record, the Tribunal is of the opinion that Requirement 4 of the evaluation grid for the proposals[37] was for experience in *implementation* as opposed to experience in *planning*. For example, Requirement 4 was "[d]emonstrated experience in *carrying out reforms*, preferably in the public sector and in city management or local governance"[38] [emphasis added].

63. The Tribunal does not usually substitute its judgment for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[39]

---

36. See B.E.S.T.E.'s comments on the GIR at 5.
37. Appendix B of the RFSP.
38. See the RFSP, section 3.2, "Rated Technical Component Requirements".
39. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

64. The evidence on the record, in particular the high number of points awarded to the contract winner for Requirement 4 of the RFSP, shows that the evaluators appear to have wrongly interpreted the scope of this requirement. The Tribunal is therefore of the view that the circumstances in the case warrant its intervention. The evaluators in fact awarded the contract winner a high number of points[40] for Requirement 4, a score that is clearly too high, given CIDA's requirement of "[d]emonstrated experience in carrying out reforms" rather than in planning reform. The examples of projects provided by the contract winner for Requirement 4 are primarily experience in planning reform, but not in conducting, carrying out or implementing reform.[41]

65. The Tribunal therefore finds that the relevant provisions of the *AIT* have been breached with regard to this allegation.

Breach arising from the detailed evaluation grid for proposals, more specifically, the sub-requirements and their relative weighting, and the absence of explanations in support of the points awarded

66. B.E.S.T.E. contends that the detailed evaluation grid[42] brought to light important information about the selection criteria that had not been published in the RFSP. In fact, it shows that CIDA severely penalized work experience dating back more than 5 years and more than 10 years. B.E.S.T.E. added that more recent experience is not necessarily more relevant and that this kind of experience is unaffected by the passage of time.

67. Regarding the evaluation grid, CIDA maintained that the one provided to bidders in the RFSP contained all the requirements considered and evaluated by CIDA for the selection of the monitor/advisor. In addition, it argues that the detailed evaluation grid and the guidelines were developed to ensure coherence and consistency in the three evaluators' evaluation of the proposals. CIDA further maintained that the guidelines are a measuring tool for the evaluators and were not published because they introduced no requirement or sub-requirement that was not in the RFSP. Finally, it states that it wanted to favour the hiring of a consultant current in his field and that it was therefore normal and reasonable to award more points for recent experience than for experience dating back 10 years and more, to counter the passage of time.

68. According to the Tribunal, it is clear that, with respect to the recent nature of experience, the detailed evaluation grid and guidelines introduce a new evaluation criterion that could not be presumed to exist from reading the RFSP. The "Detailed Grid – Evaluation Guidelines"[43] [translation] was not provided to bidders in the RFSP.[44] This document establishes a marking scheme for each requirement and, in the seventh, "Experience working in developing countries, preferably the Maghreb" [translation], the highest points were awarded to experience within the last 5 years or the last 10 years. Nowhere did the RFSP require "recent experience", and unlike the facts in *DMR Consulting Group Inc.*,[45] this change clearly led to the exercise of discretion by the evaluators, which here is unreasonable or discriminatory. In fact, in the above-cited case, one bidder complained about the evaluators' use of an evaluation guideline containing unpublished criteria. The Tribunal dismissed the complaint, believing that the guideline did not introduce new criteria. This is definitely not the case here, since the evaluation guideline undeniably introduces a new evaluation criterion.

---

40. Tab N (protected) of the GIR at 1.
41. Mr. Courtemanche's technical proposal at 16-19.
42. Tab M of the GIR.
43. *Ibid*.
44. Para. 127 of the GIR.
45. *Re Complaint Filed by DMR Consulting Group Inc.* (18 September 1997), PR-97-009 (CITT).

69. The Tribunal does not consider it appropriate to rule on the merits of allotting more points for recent experience. The Tribunal confines itself simply to considering the fact that this criterion was not disclosed to the bidders, who were deprived of the opportunity to object to it before the close of the RFSP. Moreover, this new criterion had the effect of tainting the results of the evaluation for this requirement.

70. Regarding the number of points allotted for experience in local governance in Morocco, the parties agree on the multidimensional aspect of the LGM project. However, B.E.S.T.E. maintains that this project is primarily one of local governance and that the 40 points (5 percent of the technical component) allotted for this component in the detailed evaluation grid and guidelines was not sufficient. CIDA, for its part, thought that 40 points for expertise in local governance was sufficient, since, despite being called "local governance in Morocco", the LGM project is multidimensional.

71. Concerning the number of points allotted for experience in local governance in Morocco, the Tribunal notes that the detailed evaluation grid and guidelines do not introduce any new requirements or new evaluation criteria relating to this aspect of the experience sought. They provide a weighting grid that reflects the requirements shown in the evaluation grid for the proposals presented in Appendix B of the RFSP. In fact, Requirements 4, 5 and 6 of the RFSP call for a range of experience, preferably in the field of local governance. According to the wording of the requirements of the RFSP, CIDA was entitled to allot as many points as it considered appropriate for experience in local governance in the detailed evaluation grid and guidelines.

72. In other words, the Tribunal is of the view that, on reading the evaluation grid for the proposals in the RFSP, a bidder could expect that few points would be allotted for experience in local governance. If a bidder considered the weighting inappropriate, it was entitled to ask questions to CIDA or object before the close of the RFSP. But it is too late now to raise this ground at this stage of the process, and the Tribunal cannot rule on its merits.

73. Finally, the Tribunal points out that it does not question the good faith of the contract winner or even his competence, but rather finds major deficiencies in the bidding process, and specifically, in the evaluation process and team put in place by CIDA. The Tribunal must also note the lack of transparency shown by CIDA in the context of this procurement and in the context of the proceedings before the Tribunal. The Tribunal cannot disregard the difficulties that B.E.S.T.E. had in getting explanations of the points received and the incompleteness of the briefing given by CIDA. It is unacceptable that B.E.S.T.E. had to file an access to information request to obtain, on April 27, 2007, the marking scheme. This not only deprived B.E.S.T.E., for several months, of information to which it was entitled, leading to the filing of a second complaint before the Tribunal, but it also complicated the proceedings. The Tribunal notes moreover that, on two occasions, it had to order CIDA to produce non-confidential documents and that B.E.S.T.E. was not able to obtain this information until after the GIR was filed. The Tribunal further notes that CIDA has not met the requirements of section 46 of the *CITT Act* regarding the provision of confidential information, in particular, regarding the provision of a non-confidential version or summary.

REMEDY

74. Having found that certain grounds of the complaint are valid, the Tribunal must now recommend the appropriate remedy to compensate B.E.S.T.E. for the prejudice that it suffered.

75. To recommend a remedy, the Tribunal relies on subsections 30.15(3) and (4) of the *CITT Act*, which stipulate as follows:

> (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or 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.
>
> (4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

76. The Tribunal would like first to point out that it noted numerous deficiencies in the procurement process in question, which translated into several breaches of the *AIT*. These breaches significantly prejudiced B.E.S.T.E. and also tarnished the procurement process in place at CIDA. Moreover, as mentioned earlier, although the Tribunal does not question the good faith of CIDA, it cannot overlook the lack of transparency that it demonstrated.

77. To determine the recommended remedy in this case, the Tribunal considered especially the extent to which the contract was performed and its particular features. Accordingly, the Tribunal deems it appropriate to allow CIDA to choose either to cancel the contract awarded to the contract winner or to compensate B.E.S.T.E., should it receive a higher number of points after a re-evaluation of the proposals.

78. In light of its findings regarding the appearance of a conflict of interest, the Tribunal also deems it necessary for CIDA to establish an evaluation team composed of new evaluators who have not been involved in any way in the procurement at issue or in a related procurement. Finally, in recommending the appropriate remedy, the Tribunal has tried to eliminate, as much as possible, all the consequences of the numerous breaches of the *AIT* noted by the Tribunal.

Costs

79. B.E.S.T.E. requested its costs relating to the complaints. CIDA sought the award of costs pursuant to section 30.16 of the *CITT Act*. Mr. Courtemanche also stated he was entitled to the costs stipulated in this same section.

80. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards B.E.S.T.E. its reasonable costs incurred in preparing and proceeding with the complaints.

81. 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 complaints is Level 3. The level of complexity of the procurement itself was high, since it concerned the provision of monitor/advisor services for a five-year period. The level of complexity of the complaints was also high, since there were several issues in dispute and they were complex. Also, the level of complexity of the proceedings was high, since there was an intervener, several

motions were filed, the Tribunal twice had to order CIDA to produce non-confidential documents and, finally, the proceedings took 135 days. Therefore, in accordance with the *Guideline*, the Tribunal's preliminary indication of the amount of the award is $4,100.

DETERMINATION OF THE TRIBUNAL

82. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid.

83. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that CIDA re-evaluate all technical proposals that were submitted by the potential suppliers and that were given a score equal to or greater than 60 percent in the first evaluation, so as to eliminate, as much as possible, all of the breaches of the *AIT* noted by the Tribunal.

84. To carry this out, the Tribunal recommends that CIDA form an evaluation team composed of new evaluators who have not been involved in any way in the procurement at issue or in a related procurement to re-evaluate the bids. All bidders whose technical proposals have been re-evaluated must be informed of the outcome of this re-evaluation.

85. During the re-evaluation, to ensure that no bidder has an advantage, the evaluators must eliminate Requirements 10 and 11 of the RFSP, namely, an understanding of the key governance and management issues that the project will face and an understanding of project risks and mitigation measures, and adjust the maximum number of points allotted to the technical proposal and the financial part accordingly.

86. Regarding Requirement 4 of the RFSP, the Tribunal recommends that the evaluators take into account its relevant elements, including demonstrated experience in facilitating reform, preferably in the public sector and at the level of municipal management or local governance. Finally, the re-evaluation must disregard the factor relating to "recent experience over the last 5 to 10 years" [translation], which is not expressly stated in the RFSP for Requirement 7, but is found in the Detailed Grid – Evaluation Guidelines.

87. Following the re-evaluation, if it is determined that the proposal of B.E.S.T.E. receives the highest number of points, the Tribunal recommends as follows:

- that CIDA cancel the contract awarded to Mr. Courtemanche, that the contract be awarded to B.E.S.T.E. and that CIDA compensate B.E.S.T.E. for lost profits incurred for the portion of the contract already performed by Mr. Courtemanche;
- alternatively, if CIDA decides not to cancel the contract with Mr. Courtemanche, that it compensate B.E.S.T.E. by an amount equal to the profit that it would have earned had it been awarded the full contract;
- that the parties develop a joint proposal for compensation to be presented to the Tribunal within 45 days of the publication of this determination. Should the parties be unable to agree on the amount of compensation, B.E.S.T.E. shall file with the Tribunal, within 60 days of the publication of this determination, a submission on the issue of compensation. CIDA shall have 7 working days after receiving the submission of B.E.S.T.E. to file a reply. B.E.S.T.E. shall then have 5 working days after receiving CIDA's reply submission to file any further submissions.

88. If it is determined after the re-evaluation, however, that the proposal of B.E.S.T.E. does not obtain the highest number of points, the Tribunal recommends that B.E.S.T.E. be awarded $7,500 for its costs incurred to prepare the bid. The Tribunal also recommends that, upon request, CIDA promptly provide B.E.S.T.E. with relevant information about the reasons for the rejection and disclose to it the relative characteristics and advantages of the selected bid.

89. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards B.E.S.T.E. its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by CIDA. The Tribunal's preliminary indication of the level of complexity of these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If any party disagrees with the preliminary indication of the level of complexity or with 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.

Meriel V. M. Bradford

Meriel V. M. Bradford
Presiding Member