



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2008-063

Service d'entretien JDH Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, August 10, 2009*

Canada

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IN THE MATTER OF a complaint filed by Service d'entretien JDH 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

SERVICE D'ENTRETIEN JDH INC.

Complainant

AND

THE DEPARTMENT OF PUBLICS WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services terminate the contract awarded to C.T. Entretien Général (2004) S.E.N.C. and award it to Service d'entretien JDH Inc., as soon as possible.

Also, pursuant to subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Service d'entretien JDH Inc. for the profit that it lost in being deprived of the contract in question for the period from February 1, 2009, to the date when Service d'entretien JDH Inc. is awarded the contract. The basis for calculating the lost profit will be the price submitted by Service d'entretien JDH Inc. in the proposal it submitted in response to Solicitation No. EF053-091182/A.

Based on this recommendation, the Canadian International Trade Tribunal recommends that Service d'entretien JDH Inc. and the Department of Public Works and Government Services negotiate the amount of compensation and report the results within 60 days following the date of this decision. If the parties are unable to agree on the amount of compensation, Service d'entretien JDH Inc. shall file with the Canadian International Trade Tribunal, within 70 days following the date of this decision, a submission on the matter of compensation. The Department of Public Works and Government Services will then have 7 working days after receiving Service d'entretien JDH Inc.'s submission to submit its own comments in reply. Service d'entretien JDH Inc. will then have 5 working days after receiving the reply submission of the Department of Public Works and Government Services to submit any additional comments.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Service d'entretien JDH Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity of this complaint case is Level 2, and its preliminary indication of the amount of the award is \$2,400. If either party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the 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 compensation for Service d'entretien JDH Inc.'s lost profits and to establish the final amount of the award for costs that Service d'entretien JDH Inc. incurred.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On March 27, 2009, Service d'entretien JDH Inc. (JDH) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint relates to a procurement (Solicitation No. EF053-091182/A) by the Department of Public Works and Government Services (PWGSC) for the provision of janitorial services.

2. JDH raised numerous grounds of complaint that can be summarized as follows: JDH alleged that its proposal was improperly evaluated and that PWGSC awarded the contract to a company that did not meet the mandatory requirements of the Request for Proposal (RFP); JDH also alleged that there was an inconsistent or incorrect application of the evaluation criteria in this case.²

3. As a remedy, in addition to its complaint costs, JDH requested that the current 24-month contract be terminated since it has not been substantially performed. JDH also requested that the Tribunal recommend that it be awarded the contract since it was the only bidder complying with the mandatory technical requirements of the solicitation.

4. On April 6, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ On April 8, 2009, PWGSC acknowledged receipt of JDH's complaint and confirmed that a contract valued at \$211,953 had been awarded to C.T. Entretien Général (2004) S.E.N.C. (CT Entretien Général). On May 1, 2009, PWGSC filed the Government Institution Report (GIR). On May 15, 2009, JDH, now represented by counsel, requested an extension of time until May 26, 2009 for filing its comments on the confidential version of the GIR. On May 22, 2009, JDH asked PWGSC to file the results of the evaluation of each bidder's compliance with the mandatory technical requirements done by the evaluating officer. On May 25, 2009, the Tribunal asked the parties to provide comments on JDH's request. On May 26, 2009, JDH filed its comments on the GIR. On June 3, 2009, in response to the request made to PWGSC on May 22, 2009, PWGSC informed the Tribunal that all the documents in its possession had been provided with the filing of the GIR. On June 5, 2009, JDH filed its comments in reply to PWGSC's response of June 3, 2009. On June 3, 2009, PWGSC sent a letter to the Tribunal in which it maintained that some of JDH's comments on the GIR raised new grounds of complaint and that they should not be taken into account or, alternatively, that PWGSC should be entitled to comment on them. On June 5, 2009, JDH filed its comments on PWGSC's request. On June 10, 2009, the Tribunal informed the parties that it considered it appropriate for PWGSC to have the opportunity to comment on some of the allegations raised in the comments on the GIR. On June 11, 2009, PWGSC filed its comments on those allegations and, on June 15, 2009, JDH filed its comments in reply.

5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

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

2. JDH's complaint at 5.

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

PROCUREMENT PROCESS

6. On December 2, 2008, PWGSC made the RFP available through MERX⁴ with a closing date of January 12, 2009. The RFP was for the provision of janitorial services. PWGSC said it received two bids in response to this solicitation, including the one from JDH.

7. On January 22, 2009, PWGSC sent a letter to JDH informing it that a contract had been awarded to CT Entretien Général. That same day, JDH made an objection by telephone to PWGSC.⁵ On January 30, 2009, JDH reiterated its objection to PWGSC, maintaining that the contract had not been awarded in accordance with the criteria set out in the tender documents, and requested a debriefing. On February 18, 2009, a debriefing between PWGSC and JDH was held. On February 20, 2009, PWGSC left a telephone message with JDH informing it that PWGSC had to check certain technical details before providing it with a reply to its objection.⁶ On March 13, 2009, JDH followed up with PWGSC to determine whether there had been any developments regarding the contract award. That same day, PWGSC responded to JDH that it was maintaining its position regarding the contract award. On March 25, 2009, JDH asked PWGSC to review its final decision. On March 26, 2009, JDH e-mailed PWGSC to determine the status of its objection. On March 27, 2009, PWGSC replied to JDH that no measures would be taken in response to JDH's objection.

8. On March 27, 2009, JDH filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

9. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *Agreement on Internal Trade*,⁷ the *North American Free Trade Agreement*,⁸ the *Agreement on Government Procurement*⁹ and the *Canada-Chile Free Trade Agreement*.¹⁰

10. Article 506(6) of the *AIT* provides 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."

11. Article 1015(4)(d) of *NAFTA* similarly provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

4. Canada's electronic tendering service.

5. JDH's complaint at 4.

6. *Ibid.*, tab 9.

7. July 18, 1994, C. Gaz. 1995.I.1323, on line: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

8. *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*].

9. April 15, 1994, on line: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

10. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

12. Article XIII(4)(c) of the *AGP* provides that “[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

13. Article Kbis-10(2) of the *CCFTA* provides that, “[u]nless an entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation.”

14. Therefore, it must be determined whether PWGSC evaluated the bids in accordance with the evaluation criteria set out in the RFP.

15. The relevant provisions of the RFP provide as follows:

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

1. Evaluation Procedures

- a) Bids received will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.

...

1.1 Technical Evaluation

1.1.1 Mandatory Technical Criteria

- have a valid Designated Organization Screening on bid closing date;
- take part in the mandatory visit
- fill out the attached price list;
- for the on-site supervisor, at least 5 years’ experience in home maintenance, provide c.v.;
- Proof of the firm’s experience in performing and completing (3) contracts, in the past (8) years, of similar size in terms of financial importance, surface area and complexity to this statement of work; (SEE ANNEX D)
- a copy of the WHMIS training certification of a company representative who provides training to employees.
- Proof that the employer has the knowledge, equipment, products and technology needed to remove stains from carpets.
- Prove the firm’s ability to prepare a health and safety prevention program specific to all the activities of this project.

[...]

2. Basis of Selection – Mandatory Technical Criteria Only

A bid must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

[Translation]

JDH

16. JDH alleged that PWGSC awarded a contract to the successful bidder even though it did not meet certain mandatory technical requirements of the RFP, more specifically the mandatory technical requirement regarding “[p]roof of the firm’s experience in performing and completing (3) contracts, in the past (8) years, of a similar size in financial importance, surface area and complexity to this statement of work.” JDH submitted that it discussed the matter with PWGSC during the debriefing held on

February 18, 2009, and that PWGSC, in its e-mail of March 13, 2009, clearly indicated that the successful bidder, just like JDH, did not meet all the mandatory requirements of Section 1 of the RFP. Thus, according to JDH, the successful bidder, like itself, should not have passed on to the financial evaluation stage of Section 2 and its bid should have been rejected.¹¹ JDH specifically referred to PWGSC's e-mail of March 13, 2009:¹²

We sent the details of the two submitted bids to our counsel. After evaluating them, she noticed that the projects you submitted were not all complete, at the time of your bid. Which brings us to the requirement that was not met on your part either, making it non-responsive.

As discussed at our debriefing session, both companies submitted very similar bids, leading us to believe in their technical, financial and management capabilities for purposes of performing the contract.

...

However, we are standing by our decision to award the contract to C.T. entretien général (2004) S.E.N.C., which submitted the lowest-priced bid.

[Translation]

17. JDH argued that at no time between January 12 and March 13, 2009, was compliance of JDH's bid with the mandatory technical criteria questioned. According to JDH, it was not until March 13, 2009, after an evaluation by a PWGSC counsel, that PWGSC claimed that the two bids had "the same defect" [translation] and that this legal opinion was "... based on a more narrow interpretation of the experience requirements" [translation].¹³ JDH maintained that, after the evaluation, PWGSC pointed out that, at the time of submitting its bid, the projects that JDH had provided as references had not all been completed (*complétés*), and that this observation had led PWGSC to conclude that the proof of experience requirement had not been met by JDH either, making its proposal non-responsive.

18. In this connection, JDH maintained that PWGSC is proposing inconsistent interpretations for the meaning of the word "completed". According to JDH, even if the Tribunal should adopt the interpretation that for a contract to be completed, it must have been finished (*conclu* or *achevé*), the arguments presented by PWGSC in this connection are not supported by the evidence.

19. JDH argued that its bid complied with the mandatory technical requirement for "[p]roof of the firm's experience..." because the three references given by JDH were similar in financial importance, surface area and complexity to the project in question.

20. JDH argued that the tender documents had stated that the lowest-priced responsive bid would be recommended for award of a contract. JDH added that there is no evidence to support the overarching argument of the GIR, that is, that PWGSC did reasonably and in good faith evaluate the abilities of each bidder against the mandatory technical requirements. According to JDH, the only evidence of bid evaluation is PWGSC's financial evaluation of the two companies, which consists of a copy of a tape listing the financial components of the two bids followed by the total amount of each one. JDH argued that the lack of an evaluation in respect of the mandatory technical requirements contravenes the provisions of Article 506(6) of the *AIT* and Articles 1015(4)(d) of *NAFTA* and XIII(4)(c) of the *AGP*.

11. JDH's complaint at 3.

12. *Ibid.*, tab 10 at 3-4.

13. GIR at 9.

PWGSC

21. PWGSC submitted that the evidence shows that it evaluated the only two companies in business in the region in a large, generous manner, considering their bids to be responsive and to have met the requirements of the RFP. PWGSC argued that, following the bid evaluation, it concluded that the two companies had submitted quite similar bids, leading it to believe that they had the technical, financial and management capabilities for performing the contract.

22. In response to JDH's allegations that the evaluation criteria had been inconsistently applied with respect to the requirement for proving experience, PWGSC claimed that it is unfortunate that the experience requirement asked for a "[p]roof of the firm's experience in performing and completing (3) contracts . . . of similar size in terms of financial importance, surface area and complexity to this statement of work". According to PWGSC, since these terms are subjective regarding what can be considered similar, they are open to challenge. According to PWGSC, the evidence shows that JDH's technical bid did not meet this mandatory criterion of the RFP.

23. In response to JDH's allegation that, following a consultation with PWGSC's legal services, it was told that its bid, as well, would be assessed as non-compliant since the contracts cited were not all completed and were not all of a similar size as the contract in question, PWGSC argued that the legal opinion was based on a stricter interpretation of the experience criteria.

24. PWGSC argued that the evaluators applied the criteria to the two contractors in a large, generous manner given that their previous contracts were "similar" to this contract. PWGSC argued that it then awarded the contract to the contractor offering the lowest price. PWGSC argued that it was aware of the capabilities of both of these companies because it had previously entered into contracts with them.

25. In response to JDH's allegation that the successful bidder had not completed the contracts that it is relying on to prove its experience, PWGSC submits that the word "completed" can have the meaning of "entered into", which means that both contractors were compliant because they had previously entered into at least three contracts. However, if JDH is interpreting the word "completed" as meaning that the contract period is over, then PWGSC alleges that JDH's technical bid does not meet this mandatory requirement of the RFP. According to PWGSC, a contract extension means that the original contract is extended, and not that the contract is finished and a new one awarded.

26. PWGSC submits that the complaint filed by JDH must be rejected on the grounds that PWGSC evaluated the bids in a reasonable manner and in good faith.

Decision on the Merits

27. In determining the issue of whether PWGSC evaluated the bids in accordance with the evaluation criteria set out in the RFP, the Tribunal will first consider the mandatory technical criterion regarding "[p]roof of the firm's experience in performing and completing (3) contracts, in the past (8) years, of a similar size in terms of financial importance, surface area and complexity to this statement of work".

28. The Tribunal also considered PWGSC's arguments that the latter evaluated the only two companies in business in the region in a "large, generous" manner, deeming their bids to be responsive.

29. The Tribunal stated, in previous determinations, that it will not substitute its judgment for that of the evaluators, unless they had not applied themselves in evaluating a proposal, had ignored vital information provided in a proposal, had wrongly interpreted the scope of a requirement, had based their evaluation on undisclosed criteria or had otherwise not conducted the evaluation in a procedurally fair way.¹⁴

30. In this case, the Tribunal is of the view that the evidence on the record shows that the evaluators did not apply themselves in evaluating the proposals and that they wrongly interpreted the scope of the requirement on the proof of experience. Therefore, the Tribunal is within its rights to inquire into the reasonableness of the interpretation given by PWGSC to the requirement of proof of experience and on the application of this requirement to the bids of JDH and CT Entretien Général.

31. Therefore, this involves determining the meaning and scope of the expression “contracts, in the past (8) years, of a similar size in terms of financial importance, surface area and complexity to this statement of work”. The *Nouveau Petit Robert*¹⁵ dictionary defines “*semblable*” (similar) as follows: “*qui ressemble à, qui a de la ressemblance avec*” (that which resembles, has a resemblance to). Therefore, the term “similar” does not mean “identical” (*identique*) and must not be interpreted that way. A large interpretation of the term “similar” can thus be used, providing its meaning is not stretched to the point of losing the idea of resemblance that is characteristic of any two things that are “similar”.

32. The project in question involves providing janitorial services at the border crossing in St. Armand, Quebec. The specified inside surface area consists of 3,020.50 square meters. The specified surface areas consist of 8,930 square meters of grass, 16,592 square meters of drivable area and 1,311 square meters of sidewalk.¹⁶ The value of the contract awarded was roughly \$212,000 (taxes included) and its term was for two years.¹⁷

33. The evidence on the record shows that JDH submitted, as references, projects of a similar size in terms of financial importance, surface area and complexity. The summary table shown in paragraph 12 of the GIR clearly proves this. One of the references provided by JDH refers to a project also mentioned in the RFP.¹⁸ The other two references provided are also, in the Tribunal’s view, projects of a similar size in terms of the three aspects mentioned above, even though they had lower annual values than those of the contract in question. Although lower than those of the contract in question, the contract values provided as reference are close enough to the value of the contract in question to be considered similar.

34. Contrary to the position put forward by PWGSC regarding projects under way but not “completed”, the fact that the option years are in progress does not negate the fact that the project has been “completed”, if the initial period is over. In fact, for the purposes of the RFP, the primary purpose of which is to ensure that bidders have the required experience, the Tribunal is of the view that the term “completed” must also be given a large, generous interpretation. The Tribunal has previously stated that the terms and conditions

14. *Re Complaint Filed by Antian Professional Services Inc.* (2 July 2008), PR-2008-001 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT); *Re Complaint Filed by Excel Human Resources Inc. (operating as excelITR)* (25 August 2006), PR-2005-058 (CITT); *Re Complaint Filed by The Impact Group* (14 June 2006), PR-2005-050 (CITT).

15. *Le Nouveau Petit Robert*, 2009, s.v. “*semblable*”.

16. File of attachments to the complaint, tab 1.

17. *Ibid.*, tab 11.

18. Comments on the GIR (non-confidential version) at 14, para. 47; attachments to the GIR (confidential version), reference No. 3, JDH’s bid at 36.

applicable to a call for tenders should be interpreted in the general context of the call for tenders.¹⁹ As such, it seems reasonable that the objective of the experience criterion, in this case, is to confirm the bidder's ability to satisfactorily carry out the functions set out in the contract in question. However, in this regard, it is clear that the interpretation of the word "completed" used by PWGSC is too restrictive. The Tribunal is of the view that PWGSC cannot reject JDH's proposal for the reason given in view of the meaning and scope that must be given to the word "completed" when applying the experience criterion.

35. As for CT Entretien Général's proposal, the Tribunal is of the view that the references provided do not deal with "contracts, in the past (8) years, of a similar size in terms of financial importance, surface area and complexity to this statement of work", even when adopting a large interpretation of the term "similar". In fact, a review of the references provided reveals that they are defective and that the projects are in no way of similar or comparable size to the contract in question in terms of financial importance. In fact, the value of the contracts provided as references is decidedly lower than that of the contract in question.²⁰ As for the surface area, the Tribunal cannot compare the references to the contract in question given that CT Entretien Général's references do not provide any information in this connection. However, a review of the value of the projects provided as references seems to prove that they were clearly not contracts of a similar size in terms of surface area and or complexity either.

36. Finally, regarding JDH's allegation that CT Entretien Général did not meet another requirement, specifically the one calling for proof of the firm's ability to prepare a health and safety prevention program specific to all the activities of this project,²¹ the Tribunal is of the view that it is not necessary to address this issue.

37. With respect to the criteria calling for "[p]roof of the firm's experience in performing and completing (3) contracts . . . of a similar size", the Tribunal is of the view that PWGSC, by rejecting JDH's proposal and accepting the one from CT Entretien Général, incorrectly evaluated the proposals of the two bidders. Therefore, the Tribunal finds that PWGSC contravened Article 506(6) of the *AIT*, Article 1015(4)(d) of *NAFTA*, Article XIII(4)(c) of the *AGP* and Article Kbis-10(2) of the *CCFTA*.

38. In light of the foregoing, the Tribunal determines that JDH's complaint is valid.

Remedy

39. Having determined that the complaint is valid, the Tribunal must now recommend a suitable means of redressing the prejudice caused to JDH.

40. JDH is specifically asking that the current 24-month contract be terminated since it has not been significantly performed. JDH is also asking the Tribunal to recommend that it be awarded the contract since it was the only bidder meeting the mandatory technical requirements of the call for tenders.

41. PWGSC argued that, if the Tribunal decided to accept the complaint on the grounds that PWGSC should have restarted the process since neither of the two bidders met the experience criteria, JDH would only have been entitled to compensation for lost opportunity.

19. *Re Complaint Filed by Immeubles Yvan Dumais Inc.* (10 June 2008), PR-2007-079 (CITT); *Re Complaint Filed by Quality Services International Inc.* (28 June 1999), PR-99-006 (CITT).

20. Attachments to the GIR (confidential version), CT Entretien Général's bid, at 34, 36.

21. JDH's comments on the GIR (confidential version), at 13, para. 41, and at 15, para. 50.

42. In recommending a remedy, the Tribunal is governed by subsections 30.15(2), (3) and (4) of the *CITT Act*, which provide as follows:

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant;
- (e) that the complainant be compensated by an amount specified by the Tribunal.

(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.

43. Therefore, in recommending an appropriate remedy in this case, the Tribunal considered all the factors relevant to the procurement in question, including those set out in subsection 30.15(3) of the *CITT Act*. In doing so, the Tribunal also took into account the comments from PWGSC and JDH regarding the appropriate remedy.

44. The Tribunal believes that an evaluation not conducted in accordance with the criteria set out in the RFP is a serious deficiency in the procurement process. The Tribunal is of the view that a deficiency this serious regarding the evaluation significantly prejudices the integrity and efficiency of the competitive procurement system as a whole. Although the evidence in this case does not lead to the conclusion that the evaluators acted in bad faith, it is still the case that there were serious deficiencies in the procurement process.

45. As to the degree to which JDH was prejudiced, the Tribunal believes that it is serious as well, given that JDH was the only bidder meeting the mandatory technical requirements of the call for tenders and that it should have been awarded the contract and able to profit therefrom.

46. Regarding the extent to which the contract was performed, the Tribunal notes that the RFP stated that the contract period is February 1, 2009, to January 31, 2011, inclusive. Therefore, less than 7 months of the contract period have elapsed out of a total of 24 months.

47. In light of these factors, the Tribunal is of the view that the appropriate remedy is to terminate the contract awarded to CT Entretien Général and award it to JDH, as soon as possible. The Tribunal is also of the view that since it should have been the only bidder judged to be compliant and should have profited from the contract, it is also necessary for JDH to be compensated for the loss of profits associated with the period during which JDH will not have been able to benefit from the contract, namely February 1, 2009, until the date that JDH is awarded the contract. This loss of profits is to be calculated using the price that JDH proposed in its bid.

48. The Tribunal awards JDH its reasonable costs incurred in preparing and proceeding with the complaint. JDH contends that, under the *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), the level of complexity for this complaint case is Level 3. In deciding the amount of compensation in this case, the Tribunal considered the *Guideline*, which contemplates classification of the level of complexity based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary indication regarding this complaint is that its level of complexity matches the second level of complexity set out in Annex A of the *Guideline* (Level 2). The complexity of the procurement itself was low, in that it involved maintenance services provided by one party. The complexity of the complaint was medium, in that it involved issues concerning bid evaluation. The complaint proceedings were medium as well, given that both parties filed additional comments. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication regarding the amount of the cost award is \$2,400.

DETERMINATION OF THE TRIBUNAL

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

50. Pursuant to subsections 30.15(2) and 30.15(3) of the *CITT Act*, the Tribunal recommends that PWGSC terminate the contract awarded to CT Entretien Général and award it to JDH, as soon as possible.

51. Also, pursuant to subsections 30.15(2) and 30.15(3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate JDH for the profit that it lost in being deprived of the contract in question for the period from February 1, 2009, to the date when JDH is awarded the contract. The basis for calculating the lost profit will be the price submitted by JDH in the proposal it submitted in response to Solicitation No. EF053-091182/A.

52. Based on this recommendation, the Tribunal recommends that JDH and PWGSC negotiate the amount of compensation and report the results within 60 days following the date of this decision. If the parties are unable to agree on the amount of compensation, JDH shall file with the Tribunal, within 70 days following the date of this decision, a submission on the matter of compensation. PWGSC will then have 7 working days after receiving JDH's submission to submit its own comments in reply. JDH will then have 5 working days after receiving the reply submission of PWGSC to submit any additional comments.

53. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards JDH its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity of this complaint case is Level 2, and its preliminary indication of the amount of the award is \$2,400. If either party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the award, it may make submissions to the Tribunal, as contemplated by the *Guideline*.

54. The Tribunal reserves jurisdiction to establish the final amount of compensation for JDH's lost profits and to establish the final amount of the award for costs that JDH incurred.

Serge Fréchette
Serge Fréchette
Presiding Member