



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2010-008

Dendron Resource Surveys Inc.

v.

Department of Natural Resources

*Determination and reasons issued
Wednesday, July 28, 2010*

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IN THE MATTER OF a complaint filed by Dendron Resource Surveys Inc. pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

DENDRON RESOURCE SURVEYS INC.

Complainant

AND

THE DEPARTMENT OF NATURAL RESOURCES

**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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Natural Resources its reasonable costs incurred in responding to the complaint, which costs are to be paid by Dendron Resource Surveys Inc. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

André F. Scott

André F. Scott

Presiding Member

Gillian Burnett

Gillian Burnett

Acting Secretary

Tribunal Member: André F. Scott, Presiding Member

Director: Randolph W. Heggart

Senior Investigator: Michelle Mascoll

Counsel for the Tribunal: Nick Covelli
Alain Xatruch

Complainant: Dendron Resource Surveys Inc.

Intervener: Geotech Geomatic Services

Government Institution: Department of Natural Resources

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STATEMENT OF REASONS

COMPLAINT

1. On May 5, 2010, Dendron Resource Surveys Inc. (Dendron) 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 concerning a procurement (Solicitation No. D020450W) by the Department of Natural Resources (NRCan) for the provision of aerial photograph scanning services.

2. Dendron alleged that the solicitation was unfair because specifications for one of the evaluated products (i.e. photomosaics) were not provided and that some bidders had previous knowledge of these specifications. Dendron further alleged that its proposal was not evaluated in its entirety with respect to the rated requirement that was used to reject its bid. Dendron requested, as a remedy, that the Tribunal recommend that NRCan terminate the contract awarded to Geotech Geomatic Services (Geotech). It also requested the reimbursement of its reasonable costs incurred in preparing and proceeding with the complaint and its bid preparation costs.

3. On May 13, 2010, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²

4. On May 20, 2010, NRCan informed the Tribunal that a contract had been awarded to Geotech on April 1, 2010. On May 25, 2010, the Tribunal granted a request by Geotech for intervener status. However, subsequently, Geotech filed no submissions.

5. On June 7, 2010, NRCan filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 17, 2010, Dendron filed its comments on the GIR.

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

PROCUREMENT PROCESS

7. On January 11, 2010, NRCan issued a Request for Proposal (RFP) for the provision of aerial photograph scanning services, including the creation of photomosaics. According to the RFP, the National Air Photo Library (NAPL), a unit of NRCan, has a requirement to set up a service contract to scan aerial photographs from its collection and provide electronic copies in various resolutions and, in some cases, provide paper prints in various sizes, in response to requests from NAPL's clients on an as-and-when-requested basis.

8. Article 1 of Part 3 of the RFP sets out the evaluation procedures and reads as follows:

Proposals will be evaluated in accordance with the Evaluation Criteria and Contractor Selection Method specified in Annex "C"; proposals received will be assessed against the evaluation criteria identified therein for the total requirement of this RFP and in conjunction with the Statement of Work, Annex "A" to the RFP.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

9. Annex A to the RFP includes the following task, which is relevant to this complaint:

SW-3 TASKS

The Contractor will be responsible for:

...

- Providing Black and White or Color mosaics in both digital and/or paper format. Photos/images are produced from scanned imagery and gradation adjustments are made by the contractor where necessary.

10. Section C.2, “**RATED REQUIREMENTS EVALUATION CRITERIA**”, of Annex C to the RFP provides as follows:

[...]

Proposals MUST achieve the stated minimum points required for each Rated Requirement Criteria to be assessed as responsive under the Rated Requirements Section; proposals not meeting the minimum required points will be deemed non-responsive and given no further consideration.

...

	RATED REQUIREMENTS EVALUATION CRITERIA	Maximum Points	<i>(Minimum Acceptable Points)</i>	Proposal page #
...				
R4	The Bidder shall demonstrate their technical experience by creating a mosaic from scanned aerial photographs. NRCan will provide the bidder with six (6) scanned aerial photographs images required to complete a “mosaic” task Attached is the link to access the images (scanned aerial photographs) required for this task. . . .	10	7	
[...]				

11. During the solicitation period, NRCan issued two amendments to the RFP, including a series of answers to questions submitted by potential bidders. Relevant to this complaint were the answers provided to questions 2 and 4, which read as follows:

Question 2:

One of the potentially required products is a mosaic but there does not seem to be any place for this item in the bid table. Am I missing something?

Answer 2:

Custom Mosaic are as per specification of the contractor. The cost is negotiated for each mosaic between NAPL and the supplier based on the time and effort to complete the job. The supplier has to see the number and clarity of the photos to be used to create the result the client is looking for. It is a process that has to be reviewed with each project based on the materials involved and the final desired product.

...

Question 4:

“Mosaic”

Would you have a viewable sample or specific specifications for its creation?

Answer 4:

Yes there are viewable samples of mosaics at NAPL. The specifications are noted in the RFP as a link; refer to R4 – Annex E Mosaic location details doc located at

12. On February 5, 2010, Dendron sent an e-mail to NRCan in which it asked the following question:⁴

There is a reference in Answer 4, to specifications for the mosaic. We were able to get the photos no problem but didn't see any specs. Can you provide these separately?

13. On February 8, 2010, NRCan sent an e-mail to Dendron in which it provided the following response:⁵

The bidder is to create the mosaic through their own initiative – we aren't providing specifications on how to proceed – that is part of the evaluation to see if they can do the task at hand.

14. On the same date, Dendron replied by e-mail to NRCan and stated the following: "That's perfect. It was the wording for Answer 4 that referred to specifications that threw us off."⁶

15. On February 19, 2010, bids closed. NRCan received three proposals, including the one submitted by Dendron. On April 1, 2010, Geotech was informed that it was the successful bidder and was awarded a contract pursuant to the RFP.

16. On April 12, 2010, NRCan advised Dendron by e-mail that its proposal had not achieved the minimum required number of points under rated requirement R4 and that, as a result, no further review of the proposal was done. The e-mail also provided Dendron with the name of the winning bidder, as well as the evaluators' comments for rated requirement R4, which read as follows:⁷

Evaluator#1) 3 points; Lines on mosaic showing individual prints, tone matching off –poor contrast, poor feathering of photos, no labelling of mosaic, would want to see more ground detail, grainy, could have cleaned edge, experience not demonstrated in output, shows poor quality on both formats.

Evaluator#2) 3 points; unsatisfactory reproduction (paper and digital copies), tone-matching off, poor feathering (distinct grade changes), grainy (not very sharp), edges are not straight on all sides of the mosaics, full coverage of photos was not included (fiducial mark not visible).

Evaluator#3) 3 points; [t]one matching off, poor feathering, bad contrast, grainy lines showing where each photo was overlaid.

17. On April 21, 2010, a debriefing session was held between NRCan and Dendron pursuant to the terms of the RFP. On the same day, Dendron sent an e-mail to NRCan stating that it was not satisfied with the outcome of the debriefing and that it intended to pursue the matter further. Further e-mails were sent by Dendron and NRCan on April 28, 2010.

18. On May 5, 2010, Dendron filed its complaint with the Tribunal.

4. Complaint, document No. 11.

5. *Ibid.*

6. *Ibid.*

7. Complaint, document No. 10.

TRIBUNAL'S ANALYSIS

19. 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. 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, is only the *Agreement on Internal Trade*.⁸

20. Article 506(6) of the *AIT* provides that "...[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

21. The Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of proposals.⁹ It does not generally 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 manner.¹⁰

22. In this case, Dendron alleges that NRCan based its evaluation on undisclosed criteria and did not apply itself in evaluating its proposal. The Tribunal will address each of these allegations in turn.

Alleged Failure to Disclose Evaluation Criteria for Rated Requirement R4

23. In its complaint, Dendron submitted that NRCan had specific undisclosed requirements for the creation of the mosaic and that its proposal was rejected because its mosaic did not meet those requirements. However, it submitted that the solicitation documents and answers to questions provided during the solicitation period led it to believe that its mosaic, as submitted, would meet all the stated requirements. In particular, it noted that NRCan's e-mail of February 8, 2010, which stated that specifications were not being provided on how to proceed, combined with Annex A to the RFP, "Statement of Work", which only spoke of gradation adjustments being made to mosaics, and the answer provided to question 2 by NRCan as part of the question and answer process, which indicated that the requirements could vary with each project, meant that its mosaic met all the requirements.

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*]. The requested aerial photograph scanning services fall under Category T, "Communications, Photographic, Mapping, Printing and Publication Services" of the Common Classification System and, as such, are specifically excluded from coverage under the *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), the *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) (Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008) and the *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) and are not included in the coverage under the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

9. *Re Complaint Filed by Chamber of Shipping of British Columbia* (24 March 2010), PR-2009-069 (CITT).

10. *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).

24. Dendron submitted that the evaluators' comments for rated requirement R4, which were included in the e-mail that it received from NRCan on April 12, 2010, made it clear that the evaluation was based on criteria that were not disclosed during the solicitation process. It submitted that these criteria could not be ascertained from a reading of the solicitation documents or the answers to the questions provided by NRCan and that they should not be considered as commonly accepted specifications for a generic mosaic product. In this regard, Dendron submitted that various sources of information, including NAPL's own Web page and a sample mosaic obtained from NAPL through a public request after the solicitation process, demonstrate that descriptions of mosaics can vary and that some of the criteria used by the evaluators were not reflected in these sources of information. It therefore submitted that, in the absence of specifically stated requirements, its mosaic was perfectly valid and, despite comments made by NAPL personnel, were of high quality and good workmanship according to generally accepted requirements for the generic term "mosaic".

25. Dendron also submitted that Geotech, the winning bidder, had obtained an unfair advantage in the solicitation process, as it had previously produced mosaics for NAPL and, therefore, had specific knowledge of its requirements for mosaics.

26. In its comments on the GIR, Dendron denied that it ever admitted to submitting a "substandard" mosaic. It stated that, once NRCan's specific requirements became known post-procurement, it recognized that its mosaic did not meet these requirements. However, it maintained that, in the absence of defined standards, there was nothing wrong with the mosaic submitted and that, in fact, it could be considered high quality by many standards, including those under which it provides many such products to paying customers across Canada and the United States. With respect to NRCan's assertion that specifications did not exist, Dendron reiterated its view that the evaluators' use of similar technical terms, which were addressed in a similar order, suggests that a checklist or guideline was made available to each evaluator and that, therefore, such a checklist or guideline should have been made available to Dendron. As for NRCan's characterization of Dendron's work as "... a simple cut and paste exercise ...", it submitted that the steps that it took to create the mosaic were reasonable for what it believed were the standards for the product. Finally, Dendron noted that it has many clients that accept mosaics that are similar in quality to the one that it submitted as part of its proposal and that it had no idea who NAPL's clients were or what was considered acceptable to them.

27. For its part, NRCan submitted that the solicitation was fair, as it was conducted in accordance with the terms of the RFP, which identified the requirements of the procurement, the criteria to be used in evaluating the proposals and the methods of evaluating the criteria. It submitted that NAPL does not have specifications for the creation of a mosaic nor have specifications been supplied in the past with similar contract tenders. It further submitted that, while NRCan did have expectations with respect to the quality of the produced mosaic, these expectations were in keeping with the quality expected from paying clients and in keeping with the description of a mosaic on NAPL's Web site. In this respect, it argued that it was reasonable for a bidder that conducts business in this field to expect that the mosaics delivered by NAPL, a nationally recognized source of expertise and a centre of excellence in providing quality aerial photographs to private clients for a fee, would be of high quality.

28. NRCan also submitted that it was evident that the purpose of rated requirement R4 was to give NAPL an opportunity to assess the quality of the mosaics produced by the bidders. It noted that Dendron was advised by e-mail on February 8, 2010, that there were no specifications for the mosaics and that bidders were expected to make their best efforts to produce a sample of the type of mosaic that they could produce if awarded the contract. In this respect, it submitted that the commonly understood and expected requirement was that the photos would be combined in such a way as to provide as seamless and as accurate a representation of a final product as possible. It submitted that experts in this area are expected to go well

beyond a simple cut-and-paste exercise. However, it submitted that, instead of producing its best quality mosaic in order to demonstrate its skill and expertise, Dendron elected to produce a mosaic that had a number of shortcomings and stated that it could have produced a better mosaic with more effort, time and money.

29. NRCan submitted that the evaluators were unanimous in assessing Dendron's mosaic as being inadequate and below the standard expected by a client. It submitted that the evaluators did not refer to undisclosed specifications, but instead used common descriptors to identify faults in weaknesses in Dendron's mosaic. It added that the evaluators' comments were of no surprise to Dendron, as it knew of its shortcomings by its own admission in its proposal and at the debriefing session. It further submitted that, if Dendron had additional questions relating to the creation of the mosaic after its e-mail exchange with NRCan on February 5 and 8, 2010, the RFP clearly placed the onus on Dendron to direct any further questions to NRCan.

30. Finally, NRCan submitted that there was no evidence of unstated requirements relating to the mosaic that would have been known to only one bidder. It submitted that both the successful bidder and Dendron have previous experience in producing mosaics, but that, while Geotech produced a high-quality mosaic as part of its proposal, Dendron chose to submit a mosaic significantly inferior in quality.

31. In the Tribunal's view, the evidence on the record clearly establishes that no specific evaluation criteria were provided by NRCan in relation to rated requirement R4. The evidence, most notably the evaluators' comments for rated requirement R4, also clearly establishes that NRCan had certain specific expectations in terms of the results that it was looking for in a mosaic. While the conclusion that must inevitably be drawn from these facts is that the evaluation in this instance was based on criteria that were not explicitly disclosed, the question that the Tribunal must answer is whether these criteria, or "expectations" as NRCan defines them, could reasonably have been predicted or anticipated from the solicitation documents and communications with NRCan.¹¹ If the Tribunal finds that these criteria could reasonably have been inferred from the RFP and the answers provided by NRCan to questions submitted by bidders, it will not interfere with the evaluation on the basis of undisclosed evaluation criteria. If, on the other hand, the Tribunal finds that these criteria could not have reasonably been inferred, it will find that there has been a violation of Article 506(6) of the *AIT*.

32. The *Merriam-Webster Online Dictionary* defines the word "photomosaic" as follows: "... an image composed of many smaller photographs ...". NAPL's own Web site further defines the term "mosaic" as follows: "... a photographic reproduction of a series of aerial photographs put together in such a way that the detail of one photograph matches the detail of all adjacent photographs."¹² Thus, at its most basic level, a mosaic is a combination of many smaller photographs that are made to appear as a single photograph.

33. As previously stated, rated requirement R4 required that bidders "... demonstrate their *technical experience* by creating a mosaic from scanned aerial photographs" [emphasis added]. Also, the Statement of Work at Annex A to the RFP provided that the contractor would be responsible for, *inter alia*, "[p]roviding Black and White or Color mosaics in both digital and/or paper format" and that these mosaics would be "... produced from scanned imagery and gradation adjustments [would be] made by the contractor where necessary." Further, NRCan's e-mail of February 8, 2010, sent in response to Dendron's e-mail of February 5, 2010, explained that the mosaic had to be created through the bidders "... own initiative ..."

11. *Re Complaint Filed by Beals, Lalonde & Associates* (27 July 2004), PR-2004-009 (CITT) at para. 29.

12. GIR, tab 1, para. 3.

and that NRCan was not providing specifications on how to proceed because that was "... part of the evaluation to see if [bidders could] do the task at hand." In its reply e-mail of February 8, 2010, Dendron acknowledged that it understood that NRCan would not provide any specifications on how to create the mosaic.

34. On the basis of the above, it can clearly be seen that the objective of rated requirement R4 was to determine whether bidders could create, through their own initiative, a mosaic from scanned aerial photographs while demonstrating their technical experience. In the Tribunal's view, it is implicit in this requirement that, in order for bidders to demonstrate their technical experience, they had to create the best possible mosaic taking into consideration the limitations imposed by the source material (i.e. aerial photographs) provided by NRCan.¹³ Therefore, at a minimum, Dendron knew, or reasonably should have known, that the objective was to evaluate its technical skills and expertise and that such an evaluation necessarily would include an assessment of adjustments made to the mosaic, including gradation adjustments. If Dendron had any remaining doubts regarding rated requirement R4 after NRCan's e-mail of February 8, 2010, it was incumbent upon it to seek further clarification.¹⁴

35. The Tribunal notes that the answer provided by NRCan to question 2 submitted as part of the question and Answer process during the solicitation period indicated that specifications for mosaics produced under the contract would vary based on the results expected from NAPL's clients. This further serves to underscore the point that bidders had to demonstrate that they could produce a mosaic in accordance with the highest possible client expectations.

36. However, in this case, NRCan's evaluators found that Dendron had not submitted the best possible mosaic. In fact, Dendron's own proposal acknowledged that such was the case. In section 3.4 of its proposal, Dendron noted that its mosaic was "... the result of the standard mosaic process which takes a couple of hours ... " and that "[r]esults could be improved by more intensive effort but costs could increase by a factor of 3-4 or more, depending on the quality of the photos and the size of the mosaic."¹⁵ This clearly demonstrates that Dendron knew that its mosaic could be improved and that it knew how to improve it.

37. As for the evaluators' comments regarding Dendron's mosaic, the Tribunal is of the view that they do not reveal evaluation criteria or expectations that could not have been reasonably predicted or anticipated by bidders in light of the language used in the RFP and the answers provided by NRCan in response to questions from bidders.

38. In light of the foregoing, the Tribunal finds that this ground of complaint is not valid.

13. Dendron argued that NRCan's evaluation criteria or expectations were not the highest possible, as "[t]he mosaic could also be draped over a Digital Elevation Model and shaded to create a 3-D effect ... [o]r , the scanning resolution of the original photos could have been improved ... " However, there is no indication that the source material provided by NRCan would have permitted such adjustments or modifications. The only materials provided by NRCan were scanned aerial photographs that were made available online.

14. In previous decisions, the Tribunal has made it clear that the bidder bears the onus to seek clarification before submitting an offer or a bid. See, for example, *Re Complaint Filed by Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT). Moreover, in this case, Article 1 of Part 2 of the RFP specifically states as follows: "It is the responsibility of the Bidder to obtain clarification of the requirements contained in the RFP, if necessary, **prior** to submitting a proposal."

15. Complaint, document No. 6 at 17.

39. With respect to Dendron's allegation that the winning bidder had obtained an unfair advantage as a result of having previously produced mosaics for NAPL, the Tribunal finds that, since it has already determined that evaluation criteria for rated requirement R4 could have been reasonably predicted or anticipated, Dendron was not placed at a disadvantage during the solicitation process or during the subsequent evaluation. The Tribunal notes that, in previous decisions, it has indicated that competitive advantages created as a result of incumbency are not considered to be unfair.¹⁶

Alleged Failure to Evaluate Dendron's Proposal in its Entirety

40. In its complaint, Dendron alleged that, during the debriefing session, it became evident that a key section of its proposal, which was directly relevant to the mosaic, had not been read by all evaluators. More specifically, it alleged that some of the evaluators admitted that section 3.4 of Dendron's proposal, which discussed some of what it maintains were the undisclosed requirements relating to rated requirement R4, had not been read. It therefore submitted that an incomplete evaluation resulted in the rejection of its bid.

41. In its comments on the GIR, Dendron submitted that, while NRCan's explanation of the events that took place at the debriefing session is possible, its impression remains that section 3.4 of its proposal had either not been read or not been carefully read at the time of evaluation.

42. In its GIR, NRCan denied Dendron's allegation and maintained that all the evaluators read the entire proposal, including section 3.4, when they evaluated the bid. It submitted that, in any event, section 3.4 of Dendron's proposal only describes how Dendron prepared its mosaic and acknowledges that results could be improved by more intensive effort. According to NRCan, Dendron is essentially arguing that NRCan could have read about its expertise and skill in creating a high-quality mosaic. However, NRCan submitted that only the mosaic itself was evaluated and that submitting that a better mosaic could have been achieved does not demonstrate that a better mosaic could actually have been produced.

43. While the Tribunal is unable to discern from the evidence on the record whether or not some of the evaluators read section 3.4 of Dendron's proposal, it is of the view that this issue is not relevant for purposes of addressing this ground of complaint. Section 3.4 of Dendron's proposal described how it prepared its mosaic, explained why all the aerial photographs could not be "seamlessly" contrast-matched and noted that ". . . results could be improved by more intensive effort . . ."

44. The Tribunal has already determined that evaluation criteria for rated requirement R4 could have been reasonably predicted or anticipated. Thus, Dendron should have created a mosaic that satisfied these criteria. However, the evaluators found that Dendron's mosaic did not meet those criteria and there is no evidence to indicate that they did not apply themselves in their evaluation. Whether or not the evaluators read section 3.4 of Dendron's proposal does not affect that outcome. Dendron chose to provide a mosaic that was not the best that it could produce but claimed that results could be improved with more effort. The Tribunal is of the opinion that merely stating that results could be improved does not demonstrate or guarantee that those results can actually be achieved.

45. Accordingly, the Tribunal finds that this ground of complaint is also not valid.

16. *Re Complaint Filed by Array Systems Computing Inc.* (25 March 1996), PR-95-024 (CITT) at 8; *Re Complaint Filed by CAE Inc.* (7 September 2004), PR-2004-008 (CITT) at para. 43.

Costs

46. The Tribunal awards NRCan its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

47. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The procurement was not complex, as it dealt with the provision of a simple set of services. The complaint was not complex, as it only dealt with whether or not there were undisclosed evaluation criteria and the evaluation of Dendron's proposal in relation to one rated requirement. For their part, the complaint proceedings were not complex, as there were no motions and only one intervener that did not file any submissions, and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

48. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

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

André F. Scott

André F. Scott
Presiding Member