

Ottawa, Thursday, June 6, 1996

File No.: PR-95-031

IN THE MATTER OF a complaint filed by FPG/HRI Joint Venture (Fall Protection Group Inc. and HRI Human Resources International Inc.) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

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

### **DETERMINATION OF THE TRIBUNAL**

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part.

Pursuant to subsection 30.15(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services not exercise the option to extend the contract for an additional two years and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable agreements.

Raynald Guay

Raynald Guay

Member

Michel P. Granger

Michel P. Granger

Secretary

**File No.: PR-95-031**

Date of Determination: June 6, 1996

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: FPG/HRI Joint Venture (Fall Protection Group Inc.  
and HRI Human Resources International Inc.)

Intervener: Pacific Granite Mountaineering Inc.

Government Institution: Department of Public Works and Government Services

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## **FINDINGS OF THE TRIBUNAL**

### **Introduction**

On March 8, 1996, FPG/HRI Joint Venture (Fall Protection Group Inc. and HRI Human Resources International Inc.) (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement (Solicitation No. XSH W04A2-5-N290/00/A) by the Department of Public Works and Government Services (the Department) for the supply of instruction and supervision services in various areas of technical expertise for the cadet leadership and challenge course at the Banff National Army Cadet Training Centre of the Department of National Defence (DND).

The complainant alleges that the procurement process was flawed because improper and unfair communications took place between members of the evaluation committee and Pacific Granite Mountaineering Inc. (the contract awardee) during the bidding process. The complainant also alleges that its bid was improperly evaluated and that the proposal by the contract awardee should have been declared non-compliant. Specifically, the complainant alleges that the DND evaluation committee had ongoing contact with the contract awardee during the bidding process, that a personal relationship existed between the President of Pacific Granite Mountaineering Inc. and the members of the evaluation committee, that privileged information was divulged to the contract awardee by the evaluation committee prior to the bid closing date and that the evaluation of the complainant's and the contract awardee's offers was inconsistent and biased in favour of the contract awardee. The complainant requested, as a remedy, that the Tribunal, *inter alia*, place a stop work order on this situation immediately, proceed with an examination of the mandatory criteria as written in the Request for Proposal (RFP) and deem non-responsive those bids that do not comply with these criteria. In addition, the offers should be re-evaluated in their entirety by an objective, impartial and competent body to determine the greatest value to the Crown.

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1. R.S.C. 1985, c. 47 (4th Supp.).

## **Inquiry**

The Canadian International Trade Tribunal (the Tribunal), having determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been met in respect of the complaint, decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of the *North American Free Trade Agreement*<sup>3</sup> (NAFTA) and Chapter Five of the *Agreement on Internal Trade*<sup>4</sup> (the AIT).

On April 9, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>5</sup> The complainant filed its comments with the Tribunal on April 22, 1996. An interim report was prepared by the Tribunal's staff and introduced into the record on May 9, 1996. The complainant, the Department and the contract awardee subsequently filed representations with the Tribunal on this report.

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 file.

## **Procurement Process**

The National Army Cadet Camp is located in Banff National Park, Alberta. It is the site for the cadet leadership and challenge course. The course is dedicated to developing the skills of a good leader, using Banff National Park as the setting because of the unique and varied opportunities to canoe, kayak, climb, hike and experience glacier travel. The top cadets are selected from the more than 26,000 Canadian army cadets and are taken to Banff for training. In 1989, DND decided to contract out the provision of instruction and supervision of the course. The contract awardee successfully competed for this requirement in 1989, 1990 and 1993 and has been providing those services to DND every summer since 1989. On October 19, 1995, a requisition for the provision of the services was received by the Department's Calgary office. The requirement was published in the November 10, 1995, edition of Government Business Opportunities.

The RFP, dated November 2, 1995, consists of 16 pages and three annexes. It is divided as follows:

- Part I - REQUEST FOR PROPOSAL CONDITIONS AND INSTRUCTIONS
- Part II - REQUIREMENT
- Part III - PROPOSAL FORMAT AND CONTENT
- Part IV - EVALUATION AND SELECTION METHODOLOGY
- Part V - CLAUSES APPLICABLE TO ANY RESULTING CONTRACT
- ANNEX A - Statement of Requirement
- ANNEX B - Certifications
- ANNEX C - Evaluation and Selection Methodology.

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2. SOR/93-602, December 15, 1993, Canada Gazette Part II, Vol. 127, No. 26 at 4547, as amended.

3. Done at Ottawa, Ontario, December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

4. As signed at Ottawa, Ontario, on July 18, 1994.

5. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.

The RFP incorporates, by reference, the Standard Instructions and Conditions in DSS-MAS 9403-5 (06/94) and General Conditions - Services in DSS-MAS 9676 (03/95), which are found in the manual entitled Standard Acquisition Clauses and Conditions.

Page 6 of the RFP contains a section entitled "9. ENQUIRIES" which reads, in part, as follows:

*It is the responsibility of the Bidder to obtain clarification of any details relating to the solicitation process. All inquiries and any other communication with the Crown during the period commencing with the date of issuance of this RFP and ending with the contract award **MUST** be directed exclusively and without exception to the Contracting Authority identified below. Non-compliance with this condition during the solicitation period may (for that reason alone) result in disqualification of your offer.*

*To ensure the consistency and equality of information provided to Bidders, answers to enquiries which are relevant to the interpretation of the RFP will be forwarded by OBS simultaneously to every prospective Bidder without revealing the source(s) of the enquiry. All such enquiries **must be received in writing, at least seven (7) working days prior to the Solicitation Closing Date.***

Page 14 of the RFP provides the format for a proposal price breakdown and includes a table requiring "firm all inclusive price" entries for year one and each of two option years. The table is divided, in part, as follows:

PART A: TRAINING CAMP

- 1) *Preparations leading up to actual training camp*
- 2) *Delivery of training*
- 3) *Preparations to close down the training camp including assessments and report referenced in the Statement of Requirement*

*SUB-TOTAL PART A*

PART B: TRANSPORTATION

- 1) *Provision of transportation including drivers to and from the training sites*

TOTAL PRICE (PART A + PART B)

With respect to the evaluation of proposals, page 12 of the RFP reads, in part, as follows:

*Proposals shall address the Statement of Work, Annex "A", and will be evaluated against the mandatory and point rated requirements set out in the Evaluation/Selection Criteria, Annex "B", attached hereto / set out herein.*

Page 14 of the RFP reads, in part, as follows:

*The evaluation and contractor selection will be in accordance with the criteria specified in Annex "C". **EACH SUBMISSION WILL BE EVALUATED SOLELY ON ITS CONTENT.***

In Annex C of the RFP, there is a general description of how proposals would be formally evaluated that reads, in part, as follows:

*Proposals will be evaluated against mandatory criteria and point rated criteria. **Proposals not meeting the mandatory requirements will be deemed not valid and will not be evaluated further.** Bidders are advised to address these criteria in the order specified and in sufficient depth to allow a thorough assessment. An item not addressed will be deemed as not meeting the mandatory requirements or given zero points under a point rated criterion.*

*The words “shall”, “must”, and “will” used herein are to be interpreted as **MANDATORY requirements. RATED requirements are characterized by the word “should”.***

*To be considered responsive, a bid must:*

- a) meet all the mandatory requirements of this solicitation; and,*
- b) obtain the required minimum of 75 percent of the points for the criteria which are subject to point rating specified in this solicitation. The rating is performed on a scale of 100 points.*

Annex C lists the mandatory criteria that will be assessed in the evaluation of proposals and reads, in part, as follows:

- A. The Bidder must provide evidence that the necessary authorities will issue the requisite license/permit for the following:
  - 1) a guiding license to operate in Banff National Park;*
  - 2) a business license required for the Town of Banff;*
  - 3) an Assiniboine Provincial park user permit; and*
  - 4) a Kananaskis user permit.**
- C. Re: Performance Objectives 401 to 429 of the Statement of Requirement. Provide sufficient instructors to meet the minimum instructor/student ratio acceptable industry wide standard. Included will be a minimum of three fully qualified members of the Association of Canadian Mountain Guides (UIAGM) these to be full mountain guides summer and winter. The remainder to be Associate or Restricted Members of the Association of Canadian Mountain Guides. ACMG Members will have first aid and CPR certification required to maintain their membership in good standing (Advanced First Aid). All other instructors will have a minimum of Standard First Aid and CPR.*

Annex C of the RFP also lists the rated criteria that were to be assessed in the evaluation of proposals as follows:

A.	<i>TECHNICAL PROPOSAL</i>	40
1.	<i>Understanding the requirement</i>	
2.	<i>Proposed approach, methods, and controls</i>	
3.	<i>Adequacy of work plan and schedule</i>	
4.	<i>Familiarity with local terrain and technical conditions</i>	
B.	<i>PERSONNEL</i>	15
1.	<i>Relevant training and experience</i>	
2.	<i>Adequacy and availability of personnel</i>	
3.	<i>Supporting management infrastructure</i>	
C.	<i>CORPORATE EXPERIENCE IN RELATED WORK</i>	35
1.	<i>Demonstrated experience:</i>	
	- <i>past successes</i>	
	- <i>size and complexity</i>	
	- <i>degree of similarity</i>	
2.	<i>Examples of previous training plans and work schedules</i>	
3.	<i>Written references</i>	
D.	<i>ORGANIZATION</i>	10
1.	<i>Overall organization of the project</i>	
		<hr/>
		100

Before the closing date for the receipt of proposals, the Department issued three bid updates. Two of these updates contained answers in response to questions posed, in writing, by the complainant before bid closing, and one was to advise of a change in address for the Department's Calgary office. In addition to the updates that were sent to all potential bidders, the Department sent letters of response directly to the complainant.

Three proposals were received. The contracting officer did an initial evaluation of the mandatory criteria. As a result of this evaluation, it was determined that one proposal was not compliant and, therefore, would receive no further consideration. Two proposals, that of the complainant and that of the contract awardee, were found to be compliant with the mandatory criteria. The technical and management portions of these proposals were sent to DND, along with a covering memorandum.

An evaluation of the proposals with respect to the rated criteria contained in the RFP was conducted by DND personnel. DND forwarded a covering memorandum dated January 12, 1996, to the Department, along with a proposal evaluation summary and consolidation of remarks for each proposal. After receiving the summary from DND, the contracting officer completed an evaluation of the two proposals with respect to the rated criteria. On January 29, 1996, in order to reconcile differences between the proposal evaluation summary of the DND evaluation committee and the evaluation conducted by the contracting officer, the contracting officer and the Staff Officer - Cadet Training and Support at DND conducted, by telephone, a consensus scoring of the proposals. As a result of this evaluation, it was determined that the complainant's

bid did not achieve the required minimum mark of 75 for rated requirements and, therefore, only the contract awardee was qualified to be awarded the contract.

On February 9, 1996, the contract was awarded to Pacific Granite Mountaineering Inc. The complainant was notified of the contract award on February 12, 1996. On February 19, 1996, the Department provided a debriefing to the complainant and followed up the meeting with a memorandum. The complainant filed a complaint with the Tribunal on March 8, 1996.

## **Validity of the Complaint**

### Complainant's Position

The complainant addresses certain concerns that relate to process. These are identified as ongoing contact and a personal relationship between the contract awardee and the technical evaluation committee in Winnipeg, Manitoba, during the bidding process and the divulgence of information to the contract awardee by DND prior to the bid closing date.

The complainant alleges that the evaluation of proposals was flawed in the assessment of both mandatory requirements and rated criteria. With respect to the mandatory requirements, the complainant takes issue with: (1) the acceptance of the contract awardee's evidence that the necessary authorities will issue it a Banff business licence; (2) the need for an Assiniboine Provincial Park licence when its bid does not include the use of this park; and (3) the assessment of the contract awardee's proposal as meeting the requirement to "[p]rovide sufficient instructors to meet the minimum instructor/student ratio acceptable industry wide standard."

The complainant takes issue with the marks that its proposal received in the assessment of rated criteria and with various remarks reported in the evaluation summary disclosed. With respect to the assessment of the technical proposal, the complainant believes that the mark that it received does not properly reflect the worth of that part of its proposal. The committee, by making remarks such as "too much discussion about perceived shortcomings of previous contractor" and "spends a lot of time discussing staff program, *what about cadet program,*" shows a lack of understanding of its proposal. With respect to the assessment of personnel, the complainant emphasizes the concern relating to résumés being submitted that have not been authorized by the individuals concerned. The complainant notes that the committee's comments regarding résumés that it had submitted as not clearly indicating first aid and CPR qualifications are evidence of the importance of the staff proposed. It also indicates that the committee's comments relating to the availability of staff indicate the importance of supplying the staff proposed. As such, it feels that the use of résumés without consent should result in a declaration of a bid being non-responsive. With respect to the assessment of related experience, the complainant feels that its score is not consistent with the remark from the previous section: "large support system utilizing HRI resources [and] supporting management infrastructure."

In its comments on the GIR, the complainant reiterates its concern with the contact between the contract awardee and DND personnel, in light of its interpretation of the enquiries clause of the RFP. The composition of the evaluation committee is questioned and the participation of the Staff Officer - Cadet Training and Support at DND in any aspect of the procurement is viewed by the complainant as favouring the contract awardee. The complainant questions the ability of the contract awardee to bid a price that is close to the actual budget figure and attributes this fact as evidence that information has been unfairly passed



between DND and the contract awardee. The complainant is of the view that its proposal documentation demonstrated that it has sufficient depth, character and personal and corporate experience to fulfil these requirements.

### Department's Position

In the GIR, the Department categorized the complaint into three subject areas: interaction between DND and the contract awardee, prior to and during the bidding process; the evaluation of the complainant's proposal; and the evaluation of the contract awardee's proposal and its subsequent selection as the contractor. The Department's position is that there was no interaction between the contract awardee and DND that was discriminatory or that had the effect of precluding competition, that both proposals were evaluated fairly and in accordance with the criteria and essential requirements specified in the tender documentation and that the Tribunal should dismiss the complaint.

On the question of interaction between DND and the contract awardee, prior to and during the bidding process, the Department is of the view that the clause in the RFP regarding communication between bidders and the Crown must be viewed in the context in which it is intended. The Department maintains that the ongoing business of the government is not to be constrained and that the clause is intended to eliminate a supplier, should it seek out and obtain knowledge of a requirement that would give it an unfair competitive advantage. The Department acknowledges that there may have been contact between the contract awardee and DND prior to and during the bidding process, but that such contact was limited to matters arising from administrative requirements of the previous contract and that nothing has compromised the competition in this respect. With respect to alleged contact during the 1993 process, the Department's position is that the 1993 process is not the subject of the present complaint. With respect to personal relationships developing between the contract awardee and members of DND, the Department acknowledges that personal relationships, both negative and positive, can and do develop in circumstances with long-term contracts, but takes the position that, in this case, numerous and adequate steps were taken to protect the process from any unfair advantage relating to these relationships.

On the question of the evaluation of the complainant's proposal, the Department's position is that all proposals were evaluated according to the requirements prescribed in the RFP. The Department acknowledges that there is some subjectivity in the application of this type of evaluation criteria, but that, in this case, evaluations were carried out as objectively as possible and that the points assigned to any particular criterion reflect the judgement of the evaluation team. In the GIR, the Department presented detailed arguments relating to the specific areas of assessment of the rated criteria of the complainant's proposal. An especially detailed explanation in the area of "Corporate Experience in Related Work" is included.

On the question of the evaluation of the contract awardee's proposal and its subsequent selection as the contractor, the Department's position is that the contract awardee's proposal met all the mandatory requirements as stipulated in the RFP and received the only passing mark on the rated criteria and, therefore, was entitled to be awarded the contract. With respect to the complainant's assertions in its proposal about the instructor/student ratio and the unauthorized use of résumés by the contract awardee, the Department views these issues as relating to either contract administration or the individual concerned and the bidder. The Department's position, in general, is that each proposal must be evaluated on its own merit and not in accordance with information or allegations contained in a competitor's proposal and that the opinions or views of a bidder on another bidder cannot be taken into consideration in the evaluation of proposals.

The Department summarizes its position by stating that the complainant was not discriminated against or treated less favourably than any other potential supplier during the procurement process; that the contract awardee was not provided with information with regard to the procurement process that was not available to any other prospective bidder or that would have the effect of precluding competition; that the evaluation of the complainant's proposal was carried out properly and in accordance with the criteria and essential requirements specified in the tender documentation; and that the evaluation of the contract awardee's proposal and the subsequent contract award were carried out in accordance with the criteria and essential requirements specified in the tender documentation.

#### Intervener's Position

The contract awardee sought and was granted status as an intervener in this case. With respect to the issues of safety, the intervener stands by its exemplary eight-year safety record. In summary, the intervener's position with respect to the complaint is that the allegations of misconduct and improprieties are without basis and sufficiently addressed within the GIR.

#### Tribunal's Decision

Section 30.14 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT and NAFTA.

Paragraph 3(b) of Article 504 of the AIT prohibits "the biasing of technical specifications in favour of, or against, particular goods or services, ... or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter." Article 501 of the AIT provides, in part, that the purpose of Chapter Five 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." Article 506(6) of the AIT provides, in part, 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."

Article 1008 of NAFTA, "Tendering Procedures," reads as follows:

1. *Each Party shall ensure that the tendering procedures of its entities are:*
  - (a) *applied in a non-discriminatory manner; and*
  - (b) *consistent with this Article and Articles 1009 through 1016.*
2. *In this regard, each Party shall ensure that its entities:*
  - (a) *do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and*
  - (b) *provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.*

Article 1015 of NAFTA reads, in part, as follows:

4. *An entity shall award contracts in accordance with the following:*
  - (a) *to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;*
  - (d) *awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.*

The Tribunal has examined all of the evidence before it and all of the arguments made in all of the submissions by the Department, the complainant and the intervener. After careful consideration of the requirements of the applicable agreements, the Tribunal determines that the complaint is valid in part. In evaluating the proposals of both the complainant and the contract awardee, the Department has failed to apply the stated evaluation criteria in the manner specified in the RFP. This action amounts to a violation of Article 506(6) of the AIT and paragraph 1(a) of Article 1008 and paragraph 4(d) of Article 1015 of NAFTA.

In the Tribunal's view, the complaint can be divided into five main issues: (1) the apparent personal relationship between the previous contract holder, the contract awardee, and DND personnel involved in the administration of the contract and the resulting effect that this had or could have had on the fairness of the conduct of the procurement at issue; (2) the communication of information by DND personnel to the contract awardee prior to or during the bidding process that had the effect of discriminating against other potential bidders; (3) the incomplete or improper evaluation of the mandatory requirements stipulated in the RFP; (4) the improper evaluation of the complainant's proposal with respect to the rated requirements stipulated in the RFP; and (5) the improper evaluation of the contract awardee's proposal and the subsequent improper award of the contract.

With respect to the first issue, the evidence shows that the Department and DND took and are taking steps (as stated in the GIR) to minimize the effect of personal relationships on the competitive procurement process, as it relates to this particular requirement. In the Tribunal's opinion, there is no evidence to suggest that such relationships have provided the contract awardee with an unfair advantage in this case.

With respect to the second issue, according to both the contract awardee and DND, there were communications between the contract awardee and DND personnel from Calgary and Winnipeg who were involved with the leadership training camp; these communications were limited to discussions about equipment to be purchased for the camp, and no information about budgets or other proposals was discussed at these times. The RFP requires that **all** inquiries and **any other communication** with the Crown be directed to the Department and that a violation of this clause **may** result in the disqualification of the offender's proposal. In the Tribunal's opinion, this clause must be read in the spirit in which it is intended, that is, in relation to and about the procurement being competed. This does not, however, mean that potential bidders are entitled to receive, through casual contact or through necessary administrative contact, information that will give them an unfair advantage over other potential bidders. Paragraph 2(b) of Article 1008 of NAFTA specifically forbids this. In the case at hand, information about equipment that was recommended to be purchased for the leadership camp, as a result of the previous contract, was discussed between the contract awardee and DND personnel. In some circumstances, such information could provide knowledge about the future procurement that was not readily available to other bidders. The requirement of

this procurement was specified in great detail in the tender documentation which was available to all suppliers. Therefore, in the Tribunal's opinion, based on the evidence before it, the contract awardee did not receive an unfair advantage based on the communication about equipment. Although the Tribunal determined that an unfair advantage was not created in this case, such a practice during the bidding period could lead to unfavourable perceptions.

With respect to the third issue, the Tribunal is satisfied, based on the information before the contracting officer in relation to the business licence required for the town of Banff, that she correctly accepted a licence for 1995 as "evidence that the necessary authorities will issue the requisite licence/permit."

With respect to the assessment of item "C" of the mandatory requirements, an examination of the proposed personnel was performed only to determine if the minimum requirement "of three fully qualified members [full mountain guides summer and winter] of the Association of Canadian Mountain Guides (UIAGM)" was met. The Tribunal determines that the omission of an assessment of the stated mandatory requirements to "[p]rovide sufficient instructors to meet the minimum instructor/student ratio acceptable industry wide standard" and ensuring that the remainder of the guides were "Associate or Restricted Members of the Association of Canadian Mountain Guides" amounts to a change in the evaluation criteria stipulated in the tender documentation and is, therefore, a violation of the requirements of paragraph 4(a) of Article 1015 of NAFTA and Article 506(6) of the AIT.

With respect to the fourth issue, the assessment of the rated requirements of the complainant's proposal, the Department and DND took definitive steps with the goal of making the evaluation objective. The RFP contained an annex dedicated to the evaluation and selection of proposals. The Department sent proposals to DND to be evaluated, with pricing information removed. The evaluation committee had two members not connected with the administration of the contract. An evaluation guide was prepared for the evaluation committee members. Each evaluation was done independently by committee members. The contracting officer performed an evaluation independent of DND, and the results of all of the evaluations were taken into consideration in arriving at the final scores. The Tribunal is of the opinion, however, that there were serious flaws in the conduct of the evaluation that may have resulted in a somewhat less than objective scoring of the complainant's proposal. The Tribunal notes, as the Department noted, that the evaluation committee was relatively inexperienced in assessing the kind of services being procured. The Tribunal does state, for the record, that the conduct of the individuals involved is not in question. There is no evidence to indicate that their behaviour was anything but conscientious. The flaws in the conduct of the evaluation are of a procedural nature relating to defects in the instruments used for that purpose, possibly compounded by the inexperience of the evaluators.

The evaluation rating guide used by the evaluation committee is seriously flawed in relation to the evaluation criteria stipulated in the tender documentation. The weighting allocated to the elements of the rated criteria cannot be predicted by the organization of the same criteria in Annex C of the RFP. Potential bidders could not possibly know what elements should be given greater explanation or how their proposals would be ultimately evaluated. The rating guide provides no scale of scoring for evaluators, i.e. what constitutes full marks, half marks, no marks, etc. The absence of such a scale results in allowing too much subjective judgement on the part of the evaluators and is a problem, particularly when the evaluators may not be familiar with the subject matter being reviewed. The Tribunal notes that two evaluators gave the complainant's proposal a zero score for three significant elements of the rated criteria for "Corporate

Experience in Related Work” and yet provided very little explanation for doing so. Although the Department expanded significantly on the reasons for this scoring in the GIR, the Tribunal’s examination of the individual scoring worksheets leaves doubt as to why those scores were zero. Given the fact that the proposal contained significant information in relation to this topic, scoring the proposal as such without explicit and detailed reasons amounts to a procedural issue rather than one of judgement. The averaging of the evaluators’ scores did not relieve the burden of explaining the low scores at the time of the evaluation. The Tribunal determines that the unpredictability of the point rating scheme and the lack of direction to evaluators, resulting in increased subjectivity in evaluations, favour the previous contract holder simply because of its past participation in the same procurement, discriminates against other potential bidders and is, therefore, a violation of paragraph 1(a) of Article 1008 of NAFTA and Article 506(6) of the AIT.

With respect to the fifth issue, the assessment of the contract awardee’s proposal, the evaluation committee chose to ignore the information in the complainant’s proposal that related to the contract awardee’s proposal. The Tribunal is of the opinion that the Department’s position on this matter, that each proposal be evaluated on its own merits, is supported by the wording of the RFP as to how the evaluation and selection would be conducted. With respect to the question of the availability of personnel, although there is no evidence that “bait-and-switch<sup>6</sup>” tactics have been used in this case, the lack of a definitive requirement relating to the availability of personnel proposed leaves open the possibility of such tactics. The Tribunal is of the opinion that the evaluation of the contract awardee’s and the complainant’s proposals was incomplete in the area of item “C” of the mandatory requirements found in Annex C of the RFP and that, therefore, the award of the contract without a complete evaluation was a violation of paragraph 4(d) of Article 1015 of NAFTA and Article 506(6) of the AIT.

Where the Tribunal determines that a complaint is valid, in recommending an appropriate remedy, it is required, pursuant to subsection 30.15(3) of the CITT Act, to consider all the circumstances relevant to the procurement of the services to which the designated contract relates, including the following:

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (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.

In examining the degree to which the complainant was prejudiced in this case, the Tribunal will discuss what should have happened to the complainant’s proposal at the initial stages of this procurement. The complainant’s proposal did not address the transportation requirement. The proposal did not contain any pricing for this portion of the requirement and did not make direct reference to this requirement in either the technical proposal or the management plan. Although, according to the complainant, a question of whether or not it was mandatory to bid on the transportation portion of the requirement came up during telephone conversations with the contracting officer and it was left with the impression that bidding on this portion of the requirement was optional, this enquiry and any subsequent

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6. Bait and switch occurs when a bidder obtains a favourable evaluation of its proposal by offering personnel that it does not expect to use during contract performance.

response was never communicated in writing, as required by the RFP. The tender documentation, in the Tribunal's opinion, required all portions of the pricing information to be completed and required transportation to and from the sites by the contractor as part of the statement of requirement. The complainant's proposal, therefore, did not, at the time of bid opening, conform to all the essential requirements of the tender documentation and should not have received further consideration.

Given that there is insufficient time to conduct a re-solicitation for this year and that a re-evaluation of the proposals would eliminate the complainant from contention, the Tribunal will not make a recommendation to terminate the contract. It is, however, recommended that the Department not exercise the option to extend the contract for an additional two years and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement. The re-issued solicitation should include a complete list of mandatory and rated criteria that will be examined and considered during the evaluation of any proposals. The RFP should clearly indicate the weighting and definition of any rated criteria. The Department should review any evaluation rating guide to ensure that proposals can be objectively and fairly evaluated and that evaluators have clear and detailed instructions on how to evaluate and the justification required for scoring. Attention should be paid to clarifying the clauses relating to key personnel and the extent to which the proposal of particular personnel translates to a commitment to provide those named individuals.

### **Determination of the Tribunal**

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the complaint is valid in part.

Pursuant to subsection 30.15(2) of the CITT Act, the Tribunal recommends, as a remedy, that the Department not exercise the option to extend the contract for an additional two years and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable agreements.

Raynald Guay

Raynald Guay

Member