Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2011-009 and PR-2011-010

The Access Information Agency Inc.

v.

Canada Revenue Agency

Determination issued
Monday, October 17, 2011

Reasons issued
Wednesday, December 21, 2011

Canada

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IN THE MATTER OF two complaints filed by The Access Information Agency 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 complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

THE ACCESS INFORMATION AGENCY INC. **Complainant**

AND

CANADA REVENUE AGENCY **Government Institution**

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaints are not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Revenue Canada Agency its reasonable costs incurred in responding to the complaints, which costs are to be paid by The Access Information Agency Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 2, and its preliminary indication of the amount of the cost award is $2,400. 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 its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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

Tribunal Members:	Serge Fréchette, current Presiding Member Jason W. Downey, initial Presiding Member
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STATEMENT OF REASONS OF JASON W. DOWNEY, INITIAL PRESIDING MEMBER, REGARDING THE DECISION TO CONDUCT AN INQUIRY INTO THE COMPLAINTS

BACKGROUND

1. I presided over the consideration of this matter until September 1, 2011. On August 29, 2011, I requested the Secretary of the Canadian International Trade Tribunal (the Tribunal) to inform the parties that I had just learned of a situation that could possibly lead to a conflict of interest if I was entrusted with the task of determining the validity of the grounds of complaint into which the Tribunal had decided to conduct an inquiry. The circumstances are described in a letter, which the Secretary immediately forwarded to the parties and in which he asked them to make submissions on the matter. The same day, counsel for The Access Information Agency Inc. (AIA) made unequivocal submissions requesting my withdrawal from these cases. On August 30, 2011, the Canada Revenue Agency (CRA) made submissions indicating that it had no objection to my continuing to consider these complaints.

2. For the reasons stated in the Tribunal's letter to the parties dated September 1, 2011, I decided to withdraw from these cases.[1] Mr. Serge Fréchette alone assumed the role of Presiding Member effective that date.

3. Prior to these events, I had decided that an inquiry should be conducted into certain grounds of complaint. I had considered a request to postpone the award of the contract and a motion for the production of documents. These decisions were communicated to the parties in letters dated June 10 and 21, 2011, in which it was indicated that the reasons would follow.

PROCEDURAL HISTORY AS OF SEPTEMBER 1, 2011

4. AIA filed two complaints with the Tribunal pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[2] concerning a procurement (Solicitation No. 1000290123) by the CRA for Access to Information and Privacy Consultants for a period of one year, plus three option years. The first complaint (File No. PR-2011-009) was dated June 3, 2011, and the second (File No. PR-2011-010) was dated June 10, 2011.

5. First of all, I note that AIA numbered its allegations successively from number 1 in each file. Moreover, AIA included, without exception, in each allegation of each file, several subcategories of allegations that I have chosen to call "grievances". At the time of the decision to inquire into some of the grounds of complaint in File No. PR-2011-010, I decided that, in view of the similarities between this file and File No. PR-2011-009, the two proceedings should be combined pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*.[3]

6. It also turns out that several allegations and grievances are repeated from one complaint to the other. Therefore, to facilitate the reading and understanding of these reasons and to deal with these complaints efficiently and intelligibly, I consolidated the similar and identical allegations and grievances as follows. I would have appreciated a greater effort by AIA itself to improve the clarity and conciseness of the presentation and articulation of its claims, at least within each of its complaints.

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1. Tribunal Exhibit PR-2011-009-40.
2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
3. S.O.R./91-499 [*Rules*].

7. AIA made certain allegations in its complaints, which are set out below.

Allegation No. 1 in PR-2011-009 and Allegation No. 2 in PR-2011-010

- Certain sub-criteria set out in the Request for Proposal (RFP) were not evaluated, namely, point-rated evaluation criteria R3, R6 and R7.
- Evaluation criteria were added that were not included in the RFP.
- Certain criteria set out in the RFP and in the amendment to the RFP defined general questions but provided no indication regarding the weighting and evaluation methods for these criteria.
- The evaluation committee did not take into account crucially important information contained in its proposal.

Allegation No. 2 in PR-2011-009 and Allegation No. 1 in PR-2011-010

The members of the evaluation committee and the monitor:

- did not apply themselves to ensure fair treatment during the evaluation and re-evaluation of its proposal;
- misinterpreted the scope of several requirements of the RFP, namely, mandatory technical evaluation criterion M1 (criterion M1) and point-rated evaluation criteria R1 (criterion R1), R4 (criterion R4) and R6 (criterion R6);
- did not take into account crucially important information contained in the amendments to the RFP and in its proposal; and
- based their evaluation on undisclosed criteria.

Allegation Nos. 3 and 4 in PR-2011-009 and Allegation No. 3 in PR-2011-010

- The rating scale and the oral information obtained on April 20, 2011, are not detailed, are incomplete and provide additional information that was not evident in the RFP.
- The disclosure made on May 27, 2011, is silent regarding the characteristics and relative advantages of the winning bid.

8. As a remedy in both complaints, AIA requested the following:

- postponement of the award of the contract;
- re-evaluation of AIA's bid;
- substitution of the Tribunal's judgment for that of the evaluation committee;
- disclosure by the CRA, to AIA, of all the details relating to the examination and discussion of its technical proposal;
- transmittal by the CRA of the reasons for the rejection of its bid and the characteristics and relative advantages of the winning bid;
- costs incurred by AIA for the preparation of its bid;
- cancellation of the contract and its award to AIA;
- compensation to AIA for lost profit or opportunity;
- costs incurred in preparing and proceeding with the complaints; and
- any other appropriate remedy, depending on the circumstances and the facts discovered in the course of the inquiry.

9. Moreover, AIA informed the Tribunal that if it decided to conduct an inquiry into the complaints, AIA would request the production of the initial analysis of its bid performed by the evaluation committee.

10. On June 10, 2011, the Tribunal informed the parties that it had decided to conduct an inquiry into certain grounds in the first complaint because they met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[4] Specifically, the Tribunal indicated that it was limiting its inquiry to allegation No. 1 in the first complaint concerning two of the technical sub-criteria of criterion R3. The two technical sub-criteria are the following:

- first sub-criterion: ". . . deemed sensitive as it was either already receiving media attention or had a very strong possibility of being susceptible to media attention"; and
- second sub-criterion: ". . . included applying the Income Tax Act[5]".[6]

11. According to AIA, these two technical sub-criteria of criterion R3 were not evaluated by the CRA, and AIA alleged that the CRA did not consider all the information presented by AIA regarding resource No. 5. Regarding the sub-criterion concerning the application of the *ITA*, AIA submitted that the CRA applied an evaluation criterion that had not been disclosed to the bidders or that was not reasonably foreseeable, that the information provided by AIA's resources was improperly evaluated and that, by requiring specific examples of the application of the *ITA*, the CRA forced the resources to act contrary to law.

12. In its letter dated June 10, 2011, the Tribunal informed the parties that it had decided not to conduct an inquiry into the other allegations and that it would provide the statement of reasons of its decision at the end of the inquiry. The Tribunal also informed AIA, concerning its motion for the production of the initial analysis of its bid, that it would wait for the filing of the Government Institution Report (GIR) to determine what additional documents would be necessary, if any.

13. On June 21, 2011, the Tribunal informed the parties that it had decided to conduct an inquiry into certain grounds in the second complaint. The Tribunal indicated that it would limit its inquiry to allegation No. 1 concerning criterion R6 and allegation No. 2 concerning the same two sub-criteria enumerated in allegation No. 1 in the first complaint. According to AIA, criterion R6 did not comply with the RFP, amended on February 14, 2011, because the words "*autres que des notes d'information régulières*" (other than routine briefing notes), eliminated by the amendment of February 14, 2011, had not been deleted in the French version of the amended RFP.

14. The Tribunal did not issue a postponement of award of contract order with regard to the two complaints because a contract had already been awarded.

15. Moreover, in its letter dated June 21, 2011, the Tribunal informed the parties that it had decided not to conduct an inquiry into the other allegations in the second complaint and that it would provide the statement of reasons of its decision at the end of the inquiry. The Tribunal then informed the parties that, in view of the similarities between File Nos. PR-2011-009 and PR-2011-010, it had decided, pursuant to rule 6.1 of the *Rules*, to combine the proceedings.

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4. S.O.R./93-602 [*Regulations*].
5. R.S.C. 1985 (5th Supp.), c. 1 [*ITA*].
6. Complaint, 3 June 2011, tab 1 at 47.

16. On July 5, 2011, the CRA filed a GIR with the Tribunal in accordance with rule 103 of the *Rules*.

17. On July 7, 2011, AIA filed a motion with the Tribunal for the production of certain documents by the CRA so that it could provide its comments on the GIR. AIA also informed the Tribunal that the public GIR contained confidential information on certain pages and requested that these pages be replaced by the CRA. On July 11, 2011, even though it believed that no confidential information had been disclosed, the CRA filed a public version of the pages with the Tribunal. On July 11, 2011, the CRA filed its comments on AIA's motion for the production of documents, as well as certain documents. On July 14, 2011, AIA filed its comments in response to the CRA's comments on AIA's motion for the production of documents. On July 15, 2011, the Tribunal ordered the CRA to file certain documents. On July 18, 2011, the CRA filed the individual evaluation grids of the May 2011 evaluation for criteria R3 and R6 only and informed the Tribunal that it already had in its possession the documents listed in points 2 to 5 of its order.

18. In a letter dated July 18, 2011, AIA alleged that the CRA had not fully complied with the Tribunal's order of July 15, 2011, because it had only filed the evaluation grids for criteria R3 and R6. On July 19, 2011, the Tribunal informed the parties that, in accordance with subsection 30.14(1) of the *CITT Act*, it was required to limit its considerations to the subject matter of the complaint, namely, the first and third sub-criteria of criterion R3 and criterion R6, and therefore considered that the conditions of the order for the production of documents had been met.

19. In its letter to the parties dated July 19, 2011, the Tribunal also informed them that, pursuant to rule 105 of the *Rules*, it would hold a hearing on August 24, 2011, in order to hear the factual and legal issues that the parties were putting forward in support of their respective positions.

20. On July 22, 2011, the CRA requested that the Tribunal postpone the hearing because its counsel were unavailable on August 24, 2011, and, on the same occasion, informed the Tribunal that it would call two witnesses in support of its claims.

21. On July 25, 2011, AIA filed its comments on the GIR with the Tribunal and informed it that it agreed to the postponement of the hearing.

22. On July 25, 2011, the Tribunal informed the parties that the hearing was postponed to September 1, 2011.

23. On August 9, 2011, AIA informed the Tribunal that it did not intend to call any witnesses.

24. On August 17, 2011, AIA filed its book of authorities.

25. On August 25, 2011, the CRA requested that the Tribunal provide it with instructions as to the procedure to follow and the scope of evidence that had to be presented at the hearing.

26. In a letter to the Tribunal dated August 28, 2011, AIA alleged that the CRA violated sections 45 and 46 of the *CITT Act* and rule 16 of the *Rules*.

27. On August 29, 2011, the Tribunal provided the parties with instructions as to the procedure to follow and the scope of evidence that had to be presented at the hearing.

28. On September 1, 2011, my participation ended and Mr. Fréchette continued the inquiry.

PROCUREMENT PROCESS

29. The RFP was published through MERX[7] on January 25, 2011. The RFP sought to retain the services of resources with expertise in the treatment of highly complex Access to Information and Privacy (ATIP) requests. The estimated term of the contract is one year, and the contract includes three extension options.[8] Two amendments, dated January 31 and February 14, 2011, were made to the RFP in response to suppliers' questions.

30. The solicitation was supposed to end on February 21, 2011, but the closing date for bid submissions was postponed to February 28, 2011. The CRA received four proposals in response to the RFP, including that of AIA.

31. On March 25, 2011, the CRA informed AIA of the reasons for which its proposal had been rejected and also informed it that a contract had been awarded to Altis Professional Resources (Altis) on March 24, 2011.

32. On April 19, 2011, the CRA informed AIA that three of its proposed resources had received additional points after a re-evaluation of mandatory technical evaluation criterion M3, thus increasing the total technical score of AIA's proposal from 72 to 78 points, for a combined total score of 83.98.[9]

33. A debriefing was held on April 20, 2011, during which the CRA informed AIA's representative of the reasons for which its proposal had been rejected.

34. On April 28 and 29, 2011, AIA filed four objections with the CRA, requesting that the latter re-evaluate its proposal.

35. From May 9 to 12, 2011, the CRA proceeded to re-evaluate the point-rated criteria for the four proposals received in response to the RFP, including that of AIA.

36. On May 27, 2011, the CRA informed AIA that it had re-evaluated each proposal submitted and that, in order to ensure the fair and consistent treatment of the four proposals received in response to the RFP, it had retained the services of an independent third party acting as fairness monitor. According to the re-evaluation of the proposals by this person, Altis's proposal obtained the highest number of points, while AIA's proposal ranked third.[10]

37. On June 2, 2011, AIA filed a fifth objection with the CRA.

38. On June 3, 2011, AIA filed its first complaint with the Tribunal (concerning the first four objections) and, on June 10, 2011, it filed its second complaint (concerning the fifth objection).

7. Canada's electronic tendering service.
8. Complaint, 3 June 2011, tab 1 at 21.
9. GIR, tab C.
10. Complaint, 3 June 2011, tab 7 at 5.

REASONS FOR DECISION TO CONDUCT AN INQUIRY

Legal Framework

39. Pursuant to subsection 6(1) of the *Regulations*, the potential supplier must file a complaint with the Tribunal "... not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier."

40. Paragraph 7(1)(*c*) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,[11] Chapter Five of the *Agreement on Internal Trade*,[12] the *Agreement on Government Procurement*,[13] Chapter K*bis* of the *Canada-Chile Free Trade Agreement*,[14] Chapter Fourteen of the *Canada-Peru Free Trade Agreement*[15] or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*[16] applies. In this case, the procurement is subject to *NAFTA*, the *AIT*, the *AGP*, the *CCFTA* and the *CPFTA*. The *CCOFTA* was not in effect when the solicitation was issued.

41. 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.

42. Article 1013(1) of *NAFTA* provides as follows:

> 1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2) (h). The documentation shall also include:
>
> ...
>
> h. the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders ...;
>
> ...

11. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
13. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
14. *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
15. *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) [*CPFTA*].
16. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx> (entered into force 15 August 2011) [*CCOFTA*].

43. Article 1015(4) of *NAFTA* provides 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; and
>
> . . .

44. Article 1015(6)(b) of *NAFTA* provides as follows:

> 6. An entity shall:
>
> . . .
>
> b. on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

45. Article 1015(8) of *NAFTA* provides as follows:

> 8. Notwithstanding paragraphs 1 through 7, an entity may withhold certain information on the award of a contract where disclosure of the information:
>
> a. would impede law enforcement or otherwise be contrary to the public interest;
>
> b. would prejudice the legitimate commercial interest of a particular person; or
>
> c. might prejudice fair competition between suppliers.

46. Article XII(2) of the *AGP* provides as follows:

> 2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:
>
> . . .
>
> (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . .;
>
> . . .

47. Article XVIII(2) of the *AGP* provides as follows:

> 2. Each entity shall, on request from a supplier of a Party, promptly provide:
>
> . . .
>
> (c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

48. The *CCFTA* and the *CPFTA* contain similar provisions.

49. Although this procurement is also subject to the *AIT*, there is no relevant section in that agreement that provides for the provision of pertinent information to unsuccessful bidders.

Grounds of Complaint not Accepted for Inquiry

50. The reasons for which I decided not to conduct an inquiry into certain grounds of complaint in File Nos. PR-2011-009 and PR-2011-010 are set out below.

Allegation No. 1 in PR-2011-009 and Allegation No. 2 in PR-2011-010

51. AIA alleged that the heading of criterion R6 in the rating scale contained the words "who/what level", which did not appear in the text of the RFP.[17] According to AIA, these words thus add requirements that were not obvious in the RFP. AIA also alleged that certain criteria set out in the RFP and in the amendments to the RFP provided few indications regarding the weighting and evaluation methods for these criteria.

52. The CRA's notes concerning the evaluation of AIA's proposal in relation to criterion R6, as presented to AIA on April 20, 2011, at the time of the debriefing, are as follows:

> **Summary of Technical Points**[18]
>
> . . .
>
> **R6** Experience in preparing briefings for Senior Management (at least 2 levels higher) 7/10
>
> - 5/7 resources demonstrated this requirement
> - did not demonstrate to *who/what level* the briefings were prepared for (provided a list of files only)
> - did not demonstrate to *who/what level* the briefings were prepared for (provided a list of files only)
>
> [Emphasis added]

53. Indeed, the words "who/what level" appear in the CRA's notes concerning the evaluation of AIA's proposal, as they were presented to AIA on April 20, 2011, at the time of the debriefing. However, these words do not appear in the CRA's letter of May 27, 2011, which remains the official statement of the reasons for rejecting AIA's proposal.

54. The Tribunal is of the view that either these words were really a factor, albeit absent from the RFP, which was applied in the evaluation of the bids or these words were only found there by innocent clumsiness. Finally, in my opinion, it is not at all apparent that these words, although present in the CRA's notes regarding this evaluation, were taken into consideration in the CRA's final evaluation.

55. I am therefore of the view that this ground of complaint does not disclose a reasonable indication that there was a breach of any of the trade agreements, because the CRA's letter of May 27, 2011, seems to contradict this claim or at least certainly does not corroborate it. In my opinion, the evidence on file does not allow me to find that the words "who/what level" in the unofficial notes can be likened, in the circumstances, to the use of an undisclosed criterion in the RFP. To conclude to the contrary would mean questioning the CRA's good faith and probity, and it is my opinion that this is not the case in this instance. Indeed, it is obvious that the other measures taken by the CRA, particularly the use of a third-party fairness monitor, show the probity with which the CRA intended to pursue this procurement.

17. Complaint, 3 June 2011, at paras. 55-57.
18. *Ibid*., tab 3 at 5.

56. Regarding the allegation that the criteria set out in the RFP did not provide any indication regarding the weighting and evaluation methods for these criteria, the Tribunal believes that it is up to the bidder to request clarifications and details, as needed. The Tribunal notes that, regarding these complaints, any issues relating to the RFP and its contents, including those relating to the evaluation criteria of the RFP, should have been filed with the Tribunal, pursuant to the *Regulations*, within 10 working days after February 28, 2011, the bid closing date, or not later than March 14, 2011, 10 working days after the closing date. Since the complaints were filed on June 3 and 10, 2011, they were not filed in a timely manner, and the Tribunal cannot therefore conduct an inquiry into these allegations.

Allegation No. 2 in PR-2011-009 and Allegation No. 1 in PR-2011-010

57. AIA alleged that the members of the evaluation committee and the fairness monitor did not apply themselves to ensure fair treatment during the evaluation and re-evaluation of its proposal. More specifically, AIA alleged that they did not take into account crucially important information contained in the amendments to the RFP and in its proposal and misinterpreted the scope of several requirements of the RFP, namely, criteria M1, R1 and R4.

58. The Tribunal has determined, in previous decisions, that it would not substitute its judgment for that of the evaluators except if they have not applied themselves in evaluating a bidder's proposal, ignored crucial information that was provided with the bid, misinterpreted the scope of a requirement, based their evaluation on undisclosed criteria or did not conduct the evaluation in a procedurally fair way.[19] The Tribunal is of the view that none of these situations exists in this instance because the evidence does not disclose a reasonable indication that such was the case. The Tribunal cannot lend credence to mere unsubstantiated assertions.

59. The ambiguity alleged by AIA regarding criterion M1 pertained to a discrepancy between the French and English versions of this criterion regarding the minimum number of bilingual resources. The Tribunal is of the view that it is the bidder's responsibility to obtain information when, in the bidder's opinion, the criteria are not clear enough or pose a difficulty, and to request details in a timely manner.

60. Criterion "*O1*" and its English version, criterion M1, provide as follows:

O1 Le soumissionnaire DOIT proposer un minimum de cinq (5) ressources nommées individuellement, qualifiées et qui sont en mesure de fournir les services demandés, tels qu'ils sont décrits dans l'Énoncé des travaux. *Le soumissionnaire DOIT proposer ce qui suit:* *a) deux [(2)] ressources parfaitement bilingues (français et anglais) et deux (2) ressources unilingues (anglais); **OU*** [...]	M1 The Bidder MUST propose a minimum of five (5) individually named resources, qualified and able to perform the required services as described in the Statement of Work. The Bidder MUST propose: a) two (3) fluently bilingual (English and French) resources and two (2) unilingual (English) resources; **OR** . . .

61. The Tribunal notes that, in these complaints, any issues relating to the RFP and its contents, including those relating to the evaluation criteria and the amendments made to the RFP, should have been filed with the Tribunal, pursuant to the *Regulations*, within 10 working days after the February 28, 2011, deadline, the bid closing date, or not later than March 14, 2011, 10 working days after the closing date. Since the complaints were filed on June 3 and 10, 2011, these grounds of complaint were not filed in a timely manner, and the Tribunal cannot therefore conduct an inquiry into these allegations.

19. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

62. AIA then alleged that the CRA misinterpreted criterion R1 regarding the number of points awarded to it.

63. Criterion R1 provides as follows:

R1	The Bidder will be awarded points for additional experience possessed by the proposed resources, over and above the experience identified at mandatory criterion M3, at the Senior Analyst level.	The proposed resource possesses the following number of years of experience at the Senior Analyst level: **10 points** – more than 3 to less than 4 years **15 points** – 4 to less than 5 years **20 points** – 5 to less than 6 years **24 points** – 6 to less than 7 years **27 points** – 7 to less than 8 years **30 points** – 8 or more years Each resource will be evaluated separately. The scores obtained for each resource will be summed and averaged to obtain a total score for this criterion.	**30 points**

64. In the Tribunal's opinion, the evidence on file does not support this claim. Indeed, the Tribunal notes that, in its letter dated May 27, 2011, which contains a much more detailed explanation of the points awarded to AIA's proposal, the CRA emphasized that AIA received almost all the points for this criterion.

65. Finally, AIA claimed that criterion R4 required that the proposed resources have professional designations in ATIP, some of which could not be obtained because they did not yet exist at the time of bid closing.[20] This ground of complaint was filed late for the same reasons that caused the dismissal of the ground of complaint regarding criterion M1.

Allegation Nos. 3 and 4 in PR-2011-009 and Allegation No. 3 in PR-2011-010

66. AIA alleged that the explanations provided by the CRA during the debriefing on April 20, 2011, were not detailed and were incomplete. AIA also alleged that the disclosure by the CRA on May 7, 2011, was silent regarding the characteristics and relative advantages of the winning bid.

67. AIA claimed that few details regarding the review and discussion of its proposal were given during the debriefing. According to AIA, this shows ". . . confusion, incoherence and negligence" [translation], and "[i]t involves a subsequent reductionist and rationalization exercise that seeks to diminish the relative merits of AIA's resources" [translation].[21] More specifically, AIA alleged that the CRA refused to disclose the names of Altis's subcontractors.

68. Regarding the evidence in support of these allegations, the Tribunal notes that the letter dated May 27, 2011, contained more detailed information than the information found in the rating scale given to AIA during the debriefing of April 20, 2011. In particular, this letter includes the names and prices of the proposals of all bidders and a more detailed explanation of the points awarded to AIA's proposal.

20. These professional designations would be the following: ". . . Access to Information and Privacy (AIP), delegated AIP professional, certified AIP professional, authorized AIP professional or professional master AIP" [translation]. Complaint, 3 June 2011, tab 1 at 49.
21. Complaint, 3 June 2011, at para. 113.

69. As appears from the wording of the above-mentioned provisions, these requirements concern, *inter alia*, the disclosure of the relevant information regarding the reasons for which AIA's proposal was rejected. In this case, the evaluation grid says a lot about the grounds for rejecting AIA's proposal. An objective analysis of the details revealed in this evaluation grid alone allows an understanding of the reasons that led to AIA's proposal being rejected. In the Tribunal's opinion, the annotations contained in the evaluation grid are very detailed. Consequently, it is the Tribunal's opinion that these allegations are unfounded.

Grounds of Complaint Accepted for Inquiry

70. The Tribunal's letter dated June 10, 2011, regarding File No. PR-2011-009, indicated that I had decided that there was a reasonable indication of a breach of the trade agreements regarding allegation No. 1 in respect of criterion R3, more specifically regarding the following sub-criteria:

- first sub-criterion: ". . . deemed sensitive as it was either already receiving media attention or had a very strong possibility of being susceptible to media attention";
- third sub-criterion: ". . . included applying the [*ITA*]".[22]

71. This letter also indicated that I had decided to dismiss AIA's request for the postponement of the award of the contract, pursuant to subsection 30.13(3) of the *CITT Act*, since a contract had already been awarded to Altis.

72. The Tribunal's letter dated June 21, 2011, regarding File No. PR-2011-010, indicated that I had decided that there was a reasonable indication of a breach of the trade agreements regarding the grievances of allegation Nos. 1 and 2, more specifically concerning the following criteria:

- allegation No. 1, criterion R6, regarding the words "other than routine briefing notes";
- allegation No. 2, criterion R3:
  first sub-criterion: ". . . deemed sensitive as it was either already receiving media attention or had a very strong possibility of being susceptible to media attention"
  third sub-criterion: ". . . included applying the [*ITA*]".[23]

73. This last correspondence also indicated that I had decided to dismiss the request for the postponement of the award of the contract, pursuant to subsection 30.13(3) of the *CITT Act*, since a contract had already been awarded to Altis.

Jason W. Downey
Jason W. Downey
Initial Presiding Member

22. *Ibid*., tab 1 at 47.
23. *Ibid.*

STATEMENT OF REASONS OF SERGE FRÉCHETTE, CURRENT PRESIDING MEMBER

PROCEDURAL HISTORY COMMENCING ON SEPTEMBER 1, 2011

74. As indicated above, I was mandated to review these complaints commencing on September 1, 2011, following Mr. Downey's withdrawal. In my opinion, Mr. Downey's reasons are a good description of the procurement procedure and, as such, I accept them as my own.

75. On September 14, 2011, AIA filed the documents that it planned to use at the hearing. On September 15, 2011, the Tribunal asked AIA to inform it of how it intended to use these documents. On September 16, 2011, AIA filed additional information with the Tribunal in response to this request.

76. In a letter dated September 19, 2011, the Tribunal informed AIA that, after reviewing the submissions of the parties concerning AIA's allegation that the CRA had violated sections 45 and 46 of the *CITT Act* and rule 16 of the *Rules*, it was of the view that the above-mentioned sections had not been breached by the CRA and that it considered the matter closed.

77. On September 20, 2011, the CRA filed submissions concerning the explanations provided by AIA regarding the relevance of documents that AIA was attempting to file late for the purposes of the hearing. Moreover, in this letter, the CRA informed the Tribunal that it only planned to summon one witness to appear at the hearing.

78. On September 26, 2011, the Tribunal informed the parties that it had reviewed the documents in the files and that it no longer considered it necessary to hold a hearing but asked the parties to file their submissions in this regard. In this letter, the Tribunal also informed the parties that, following their submissions and comments regarding the documents that AIA intended to use at the hearing, it refused to place certain documents on the record. On September 26, 2011, AIA indicated that it did not insist on a hearing. On September 27, 2011, the CRA indicated that, in its opinion, a hearing was not necessary.

79. On September 28, 2011, the Tribunal informed the parties that, following the submissions of AIA and the CRA regarding the need for a hearing, it had decided to dispose of these complaints solely on the basis of the information on record.

80. In its letter to the Tribunal dated September 26, 2011, AIA also requested the possibility of responding to evidence which allegedly had not been previously disclosed by the CRA. In its letter to the parties dated September 28, 2011, the Tribunal informed the parties that it did not grant AIA's request, since the Tribunal, in its letters dated July 15 and 19, 2011, had already disposed of an identical request made by AIA previously.

PRELIMINARY ISSUE

Motion for Dismissal of the Complaints

81. Before discussing the validity of the grounds of complaint into which the Tribunal decided to inquire, the Tribunal will first examine the CRA's claim that it is not useful to inquire into these grounds. Indeed, in the GIR, the CRA asked the Tribunal to dismiss the complaints, stating that allegation No. 2 of AIA's complaints is "theoretical" [translation] because, according to the CRA, assuming that the Tribunal determines that AIA's allegations are valid and that AIA obtained the maximum points for the two technical

sub-criteria of criterion R3, AIA's combined total score would increase from 83.22 to only 85.82. Consequently, according to the CRA, even if the Tribunal accepted these grounds of complaint, AIA would still be ineligible because it would still rank after Altis, which obtained a combined total score of 87.34.

82. The Tribunal is of the view that it remains relevant in this matter to examine all the grounds of complaint. The CRA's foregoing claims are valid only with regard to the expediency for the Tribunal to grant or not to grant a remedy in the event that it concluded that there was a breach of the trade agreements. Whether these agreements were breached nonetheless still remains a relevant question that the Tribunal cannot ignore.[24]

ANALYSIS

83. 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 case, are the *AIT*, *NAFTA*, the *AGP*, the *CCFTA* and the *CPFTA*. The *CCOFTA* had not yet entered into force at the time the solicitation was issued.

The First and Third Technical Sub-criteria of Criterion R3 Were not Evaluated

First Sub-criterion of Criterion R3: Media Attention

84. Criterion R3 of the RFP reads as follows:

R3	The Bidder will be awarded points based on the proposed resources' experience with processing complex or sensitive ATIP requests, which may have included one or more of the following elements: - deemed sensitive as it was either already receiving media attention or had a very strong possibility of being susceptible to media attention - included the application of exemption or exclusion of sensitive information in documents - included applying the Income Tax Act - included a court case	For each of the listed elements, the Bidder will obtain **three (3)** points if they are demonstrated in the summary. Each resource will be evaluated separately. The scores obtained for each resource will be summed and averaged to obtain a total score for this criterion.	**12 points**

85. AIA submitted that the two examples given by resource No. 5 demonstrate that the ". . . access to information requests worked on were 'sensitive' and that there was a 'possibility of being susceptible to media attention' . . ." [translation].[25] AIA submitted that, when a bidder is asked to demonstrate a

24. *Re Complaint Filed by Krista Dunlop & Associates Inc.* (14 April 2010), PR-2009-064 (CITT) at para. 28.
25. Complaint, 3 June 2011, tab 2 at 4.

"possibility", one of two things must be expected: either (1) it is reductionist and unreasonable to require "clear proof" [translation] that there was a "possibility"; or (2) the evaluation committee must accept "presumptive evidence" [translation], because AIA claimed that it is clearly illogical, iniquitous and unreasonable to request "clear proof" of the existence of a "possibility". According to AIA, a requirement of "clear proof" on the part of the evaluation committee regarding the existence of a "possibility" shows blatant lack of judgment.[26] AIA alleged that this description is sufficient to prove the existence of such a possibility.

86. The CRA submitted that the two examples given in the proposal for resource No. 5 did not allow the evaluation committee to conclude that the ATIP requests received or were susceptible to receive media attention. The CRA submitted that the proposal does not refer to the word "media" or to synonyms and is therefore silent on the subject. Moreover, the CRA submitted that it must rely only on the explanations and information provided by the bidder and cannot infer from the examples given that they could have been of such nature as to receive media attention, as AIA indicated in its complaints.[27] According to the CRA, this is what explains the zero score for this criterion in the re-evaluation grid given to AIA.

87. AIA submitted that an ambiguity exists regarding the evaluation of the following terms of the first sub-criterion: "*deemed* sensitive" and "had a very strong *possibility* of being susceptible to media attention".[28] AIA submitted that no way of quantifying and evaluating such an ambiguity exists ". . . when no evaluation sub-criterion exists" [translation].[29] AIA alleged that this sub-criterion was not given a reasonable evaluation by the evaluation committee and that the committee did not consider all the information submitted by AIA regarding resource No. 5.

88. The CRA submitted in this regard that Part 1 of the RFP[30] clearly indicated that the bidders had to demonstrate how they met the mandatory criteria and the point-rated criteria. In addition, the CRA submitted that the wording of Section 2 of the RFP[31] reiterated the importance for the bidders of preparing a sufficiently detailed proposal. The CRA submitted that the instructions that it gave to the bidders allowed the evaluators to evaluate each requirement, on the basis of the information contained in the proposal.

89. The Tribunal has stated repeatedly that ". . . suppliers bear the onus to respond to and meet the criteria established in a solicitation"[32] and that ". . . a bidder needs to do more than list an ability in order to demonstrate that it actually possesses that ability".[33] As it has also stated many times, the Tribunal reiterates that it will not 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 bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.[34] In the Tribunal's opinion, none of these circumstances apply to these complaints and, therefore, the Tribunal will not intervene in this instance.

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26. Comments on the GIR at para. 20.
27. Complaint, 3 June 2011, at paras. 13, 14; complaint, 10 June 2011, at paras. 34, 35.
28. Comments on the GIR at para. 39.
29. *Ibid.*
30. GIR, tab A, RFP at 4.
31. *Ibid.*, tab A, RFP at 15.
32. *Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT).
33. *Re Complaint Filed by Noël Import/Export* (6 February 2003), PR-2002-036 (CITT); *Re Complaint Filed by Antian Professional Services Inc.* (2 July 2008), PR-2008-001 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003) PR-2002-057 (CITT).
34. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

90. Indeed, the Tribunal is of the view that the evidence does not indicate that there is anything unreasonable in the way in which the sub-criterion regarding media attention was applied by the CRA. The evaluators simply applied the criterion that it was the bidder's responsibility to establish clearly the existence of the consultants' experience. Without doing a re-evaluation as such, the Tribunal notes that no information given in the proposal regarding resource No. 5, in the statement provided by AIA in response to criterion R3, establishes a factual correlation that clearly shows that the processed access to information request was sensitive within the definition of the criterion, i.e. that it was either already receiving media attention or had a very strong possibility of being susceptible to media attention. To reach a different conclusion on the basis of the information provided by AIA, the Tribunal is of the view that the evaluators should have relied on a presumption and not on an established fact. It was up to AIA to show clearly that it met the applicable criterion and not up to the evaluators to show, on the basis of a presumption, that such was the case.

Third Sub-criterion of Criterion R3: Applying the *ITA*

91. AIA claimed that it was sufficient for it to demonstrate that the proposed resources had dealt with requests pursuant to section 241 of the *ITA* to respond to the third sub-criterion of criterion R3.

92. The relevant part of section 241 of the *ITA* provides as follows:

> **241.** (1) Except as authorized by this section, no official or other representative of a government entity shall:
>
> . . .
>
> (*c*) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

93. AIA claimed that, during the debriefing of April 20, 2011, a member of the evaluation committee specified that points had been awarded only for "*. . . examples in which taxpayer files had been processed*" [translation].[35] AIA submitted that it was demonstrated that six of its seven resources had applied the *ITA* and that the RFP did not require that the proposed resources have '"*processed taxpayer files*"' [translation].[36] In addition, AIA submitted that it was not reasonably possible for a bidder to "guess" [translation][37] the existence of such a criterion or that the phrase "applying the [*ITA*]" could mean "processing taxpayer files". According to AIA, if this selection criterion had been known, it would have proposed a different project team in order to receive all the points.

94. AIA submitted that requiring specific examples regarding the application of the *ITA* is an illegal request. According to AIA, the *ITA* prohibits a representative of a government entity, in this case ATIP consultants, from using confidential information outside the framework of the application of the *ITA*. AIA submitted that applying the third sub-criterion of criterion R3 would be tantamount to asking consultants to violate section 241 of the *ITA* or, in other words, that they could not give examples of processing such files without breaching this section

95. The CRA claimed that it was looking for consultants who had experience in the general application of the *ITA* and that the resources had to show that they possessed this experience. According to the CRA, the evaluation committee did not amend the RFP to include an obligation concerning "*. . . processing taxpayer files . . .*" [translation].[38]

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35. Complaint, 3 June 2011, at para. 20; complaint, 10 June 2011, at para. 42.
36. Complaint, 3 June 2011, at paras. 27-29; complaint, 10 June 2011, at paras. 47-50.
37. *Ibid.*
38. GIR, tab 1 at para. 40.

96. In this regard, the CRA submitted that it was simply possible to provide enough details regarding this criterion without putting oneself in a situation of violating the law, e.g. by specifying the type of information processed to respond to ATIP requests and the conditions of disclosure. The CRA submitted that AIA's proposal was scored in this way because it failed to specify the consultants' experience.

97. The Tribunal is of the view that there is no evidence that the evaluators did not adequately apply themselves in evaluating AIA's proposal or that they ignored vital information in AIA's proposal. Therefore, the Tribunal will not substitute its judgment for that of the evaluators.

98. By definition, an Access to Information request regarding files subject to the *ITA* falls under section 241. However, in view of the specific context of the RFP and the specific description of the tasks to be performed, namely, tasks 2, 3 and 4 in Appendix A,[39] it is altogether reasonable, in the Tribunal's opinion, that the sub-criterion be interpreted as seeking to evaluate the experience of the proposed resources relating to the aspects of the *ITA* that go well beyond solely applying section 241. Specifically, the Tribunal is of the view that the RFP was clear enough to understand that this sub-criterion required the demonstration of the level of knowledge of the proposed resources regarding the application of the *ITA*, as was spelled out in the RFP. Indeed, the RFP did not mention the proof of experience regarding section 241 alone, which, in essence, is nothing other than the implementation of subsection 24(1) of the *Access to Information Act*.[40] In this context, the Tribunal adopts as its own the CRA's position that it would have been possible for AIA to describe or explain generically the precise nature and extent of experience under the *ITA*, as was requested in the RFP, without thereby making reference to information specifically protected by law.

Criterion R6

99. The French version of the amended RFP provides as follows:

C6	*Le soumissionnaire se verra accorder des points si les ressources proposées possèdent une expérience relative à l'analyse de la politique, des procédures et des processus d'AIPRP et à la recommandation ou à la suggestion de changements à ces éléments, en fonction de l'expérience, de lacunes découvertes ou de la constatation que des améliorations peuvent être*	***0 point –** le soumissionnaire n'a pas démontré que la ressource possédait une expérience relative à l'analyse de la politique, des procédures et des processus d'AIPRP et à la recommandation ou à la suggestion de changements à ces éléments, en fonction de l'expérience, de lacunes découvertes ou de la constatation que des améliorations peuvent être apportées.*	***5 points***

39. Tasks 2, 3 and 4 in Appendix A, "STATEMENT OF WORK", on page 33 of the RFP provide as follows:
"
- Through the application of the rules set out in the ATIA and PA, determine the statutory right of the requester to have access to federal information and to simultaneously protect the privacy of individuals.
- Analyze the content of records or disclosure packages to resolve complex, controversial and highly sensitive cases which may require consultation and resolution of issues involving the requesters, third parties, other federal institutions and other governments, International, provincial, municipal.
- Analyze Agency information and documentation for disclosure to requesters or their appointed representatives (i.e., taxpayers, lawyers, accountants, academics, political parties, business organizations, Members of Parliament, journalists, Agency employees, and the general public)."

40. R.S.C. 1985, c. A-1. The subsection provides as follows: "**24.** (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II."

	apportées. *Afin d'obtenir des points pour ce critère, pour chaque ressource proposée, le soumissionnaire doit fournir un résumé de l'endroit et du moment auxquels l'expérience a été acquise, y compris les coordonnées d'un ou de plusieurs répondants qui peuvent valider les renseignements fournis.*	***5 points –*** *Le soumissionnaire a démontré que la ressource possédait une expérience relative à l'analyse de la politique, des procédures et des processus d'AIPRP et à la recommandation ou à la suggestion de changements à ces éléments, en fonction de l'expérience, de lacunes découvertes ou de la constatation que des améliorations peuvent être apportées.* *Chaque ressource sera évaluée séparément. Les points obtenus pour chaque ressource seront additionnés et une moyenne sera établie pour obtenir une note totale pour ce critère.*	

100. The English version of the amended RFP provides as follows:

R6	The Bidder will be awarded points if the proposed resources have experience in preparing briefing material for Senior Management. Senior management is considered to be someone who is at least two levels higher than the resource. To obtain points for this criterion, for each proposed resource the Bidder must provide a summary of where and when this experience was obtained including contact information for a reference(s) that can validate the information cited.	The Bidder has demonstrated that the proposed resource has experience in preparing briefing material to Senior Management on: **5 points** – 1 to 5 occasions **10 points** – 6 or more occasions Each resource will be evaluated separately. The scores obtained for each resource will be summed and averaged to obtain a total score for this criterion.	**10 points**

101. Amendment No. 002 to the RFP, issued on February 14, 2011, reads as follows:

> **1.** Vendors have asked the following questions:
>
> . . .
>
> Q2. R7 States that: "The Bidder will be awarded points if the proposed resources have experience in preparing briefing material for Senior Management (other than routine briefing notes). Senior management is considered to be someone who is at least two levels higher than the resource." Would you consider removing the "other than routine briefing notes" so that the true experience preparing briefing notes (the usual responsibility of an ATIP Analyst) is reflected - preparing non-routine briefing notes is very rare.
>
> A. The term "other than routine briefing notes" has been removed from R7 (now R6).

102. The words "*autres que des notes d'information régulières*", which appeared in the initial version of the RFP, were therefore removed from the RFP by the amendment of February 14, 2011. It appears that their English equivalents were removed following this amendment but that these words still appeared in the

French version of the RFP after that date. Was this a simple clerical error or an error that had repercussions? According to AIA, there was one repercussion: it alleged that the CRA's evaluation committee and the fairness monitor took these words into consideration in French (when they should have been removed from the RFP) in their application of criterion R6 (instead of applying the English version of the RFP, in which the equivalent English words no longer appear).

103. In this regard, AIA alleged that the words "*autres que des notes d'information régulières*" would be found in the fairness monitor's report under criterion R6. The Tribunal immediately notes in this regard that, as the CRA also pointed out, this is not the case. Indeed, this report was written in English, it does not constitute an evaluation grid, and the words "*autres que des notes d'information régulières*" do not appear in it. However, the Tribunal notes that these words do appear in the translation of the re-evaluation grid, which was produced for the purposes of this case.[41] In the absence of proof to the contrary on record, the Tribunal is prepared to accept that these words are present in this translation only because they had not been removed from the French version of the RFP following the amendment of February 14, 2011. In other words, it seems that this clerical error perpetuated itself.

104. Rather, because the English equivalent of these words does not appear in the English version of the RFP, which the CRA says was used by the evaluation committee in its re-evaluation, the Tribunal considers that the committee had indeed scored AIA's proposal according to an evaluation grid (in this instance, its English version), in which the words "other than routine briefing notes" did not appear.

105. Consequently, the Tribunal has no reason to question the CRA's good faith when it says it used the English version of the evaluation grid, because all the bids, including AIA's bid, had been produced in English and it is therefore totally plausible for the Tribunal that the evaluations had been performed in that language. Moreover, for this reason, the Tribunal is of the view that it is not impossible that the evaluators never even consulted the (erroneous) French version of the RFP at any time whatsoever during their work. Consequently, it is the Tribunal's opinion that all AIA's arguments regarding the alleged consequences of what the Tribunal sees only as a clerical error are inconsequential.

106. Finally, in the event that the Tribunal erred in its understanding of the facts stated above, the Tribunal is of the view that, when it filed its proposal, AIA was in possession of the French version of criterion R6 of the amended RFP and was thus able to recognize that this version differed from the English version.[42] The RFP clearly specifies that "[a]ll inquiries regarding the RFP must be submitted in writing to the Contracting Authority named below as early as possible within the solicitation period . . . . The following schedule applies to this RFP: . . . Deadline for questions on RFP: (at Noon EDT) February 14, 2011 . . . ." As such, the Tribunal is of the view that it is the bidder's responsibility to request clarifications and details, as needed. The Tribunal notes that, in these complaints, any questions relating to the RFP and its contents, including those relating to the evaluation criteria and the amendments made to the RFP, should have been filed with the Tribunal, according to the *Regulations*, within 10 working days after February 28, 2011, the bid closing date, or not later than March 14, 2011, 10 working days after the closing date. Since the complaints were filed on June 3 and 10, 2011, the Tribunal cannot conduct an inquiry into these allegations, even if there is sufficient evidence to support them. Consequently, the Tribunal is ultimately of the view that it should not have inquired into this ground of complaint because it was filed late.

41. Complaint, tab 7.
42. Indeed, the complaints filed with the Tribunal on June 3 and 10, 2011, contained a copy of the amended RFP in French, as well as a copy of AIA's technical bid in English, which means, in the Tribunal's opinion, that AIA also had in its possession the English version of the RFP.

107. Therefore, the Tribunal finds that the complaints are not valid.

Costs

108. The Tribunal awards the CRA its reasonable costs incurred in responding to the complaints.

109. In determining the amount of the cost award for these complaint cases, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

110. The Tribunal's preliminary indication is that these complaint cases have a complexity level corresponding to the second level (Level 2) of complexity referred to in Annex A of the *Guideline*. The complexity of the procurement was low, as it concerned the provision of ATIP consulting services. The Tribunal finds that the complexity of the complaints was moderate, as they pertained to an evaluation based on a combination of mandatory and point-rated requirements. Finally, the complexity of the proceedings was high, as the Tribunal allowed the parties to present additional information going beyond the usual exchange of information in Tribunal inquiries. In addition, the proceedings required the use of the 135-day time frame to determine the validity of the complaints.

111. Accordingly, as contemplated in the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $2,400.

DETERMINATION OF THE TRIBUNAL

112. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are not valid.

113. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the CRA its reasonable costs incurred in responding to the complaints, which costs are to be paid by AIA. The Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 2, and its preliminary indication of the amount of the cost award is $2,400. 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 its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette

Serge Fréchette
Current Presiding Member