



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2012-015

Storeimage

v.

Canadian Museum of Nature

*Determination issued
Friday, January 18, 2013*

*Reasons issued
Wednesday, January 30, 2013*

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IN THE MATTER OF a complaint filed by Storeimage pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

STOREIMAGE

Complainant

AND

THE CANADIAN MUSEUM OF NATURE

**Government
Institution**

DETERMINATION

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

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Canadian Museum of Nature its reasonable costs incurred in responding to the complaint, which costs are to be paid by Storeimage. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is level 2, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey
Presiding Member

Gillian Burnett

Gillian Burnett
Acting Secretary

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

Place of Hearing: Ottawa, Ontario
Date of Hearing: December 13, 2012

Tribunal Member: Jason W. Downey, Presiding Member

Counsel for the Tribunal: Alain Xatruch
Anja Grabundzija

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STATEMENT OF REASONS

COMPLAINT

1. On September 7, 2012, Storeimage filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposal (RFP) (Solicitation No. 12-1630-CMN-067) issued by the Canadian Museum of Nature (CMN) for the provision of manufacturing and installation services for cabinets, graphics display panels and other components for a permanent exhibition at the Vale Earth Gallery of the CMN.

2. Storeimage alleged that the evaluation criteria specified in the RFP were ambiguous, that the CMN evaluated its proposal unreasonably and that there was a reasonable apprehension of bias on the part of the evaluators in this procurement process. As a remedy, Storeimage requested the re-evaluation of its bid and the reimbursement of its costs incurred in preparing and proceeding with the complaint, along with those related to the preparation of its proposal. It also requested that the Tribunal order the CMN to postpone the award of the contract.

3. On September 17, 2012, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On the same day, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered the CMN to postpone the award of any contract until it determined the validity of the complaint.

4. On September 18, 2012, the CMN certified that the procurement of the services in question was urgent and that a delay in the award of the contract would be contrary to the public interest. On September 19, 2012, in accordance with subsection 30.13(4) of the *CITT Act*, the Tribunal rescinded its postponement of award of contract order of September 17, 2012.

5. On October 11, 2012, the CMN filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On October 23, 2012, Storeimage filed its comments on the GIR. On November 1, 2012, Storeimage filed an amended version of that document.

6. On November 6, 2012, the Tribunal invited the CMN to respond to certain allegations made by Storeimage in its comments on the GIR, in particular, regarding the evaluation of the financial proposals. On November 9, 2012, the CMN submitted its reply to Storeimage's allegations. On November 14, 2012, Storeimage submitted a response to the CMN's reply.

7. On November 30, 2012, the Tribunal informed the parties that it would hold a public hearing, in accordance with subrule 105(6) of the *Rules*, to clarify the material facts and hear the arguments regarding the allegation of a reasonable apprehension of bias on the part of the evaluators in this procurement process. On December 6, 2012, the Tribunal informed the parties that the hearing would be held on December 13, 2012.

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

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

3. S.O.R./91-499 [*Rules*].

8. On December 6, 2012, the parties informed the Tribunal of the names of the witnesses whom they intended to call. On December 10, 2012, the parties filed additional books of authorities.

9. The hearing was held in Ottawa, Ontario, on December 13, 2012. The Tribunal heard evidence from six witnesses. Ms. Rachelle Fournier, President of Storeimage, and Mr. Patrick Molla, CEO of Storeimage, appeared as witnesses for Storeimage. The CMN called Mr. Max Joly, Senior Contracts and Purchasing Officer, and the three evaluators who participated in this procurement process: Ms. Caroline Lanthier, Project Manager, Mr. Marc Beck, Project Manager, and Mr. Daniel Boivin, Exhibition Designer.

PROCUREMENT PROCESS

10. On August 15, 2012, the CMN issued an RFP for the provision of manufacturing and installation services for components of a permanent exhibition at the Vale Earth Gallery. The bid closing date was August 29, 2012.

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

EVALUATION CRITERIA

The primary selection criteria will be the best overall value to the CMN. Value is defined as the best demonstrated proposal at the lowest cost. It is suggested that the proposals be put together using the headings and answering to the requested information outlined below. Submissions will be judged on the following.

PART 1 - TECHNICAL OFFER

1. 1. Experience of the Firm - (10 points)

- 1.1 How long has the bidder been in business?
- 1.2 What is the extent of the bidder's experience in the area of Museum quality interactive exhibitions?
- 1.3 What is the extent of the bidder's experience with similar projects?
- 1.4 What are the competence, creativity, and quality of execution demonstrated in previous projects (please provide samples)?
- 1.5 What is the extent of the bidder's experience with working in multi-disciplinary teams?
- 1.6 Provide 3 portfolio samples of projects in similar size, scope of work and or content and identify the responsibility of your firm in the project and how it relates to the Earth Gallery.
- 1.7 Provide a minimum of 3 references of similar projects, including contact names and phone numbers

2. Experience of the Project Team- (15 points)

- 2.1 What are the qualifications and experience of the individuals to be assigned to the project? (Please provide C V's and identify any subcontractors that you will use for this work).
- 2.2 Relevance of previous working contexts and projects.
- 2.3 Provide resume of project team and identify their specific responsibilities on this project and how their previous experience relates to and benefits this project.

3. Overall Quality of Submission (25 points)

- 3.1 Overall quality of submission and proposed approach to the scope of work
- 3.2 Demonstration of a knowledge of technical requirements
- 3.3 Demonstrate your teams ability and methodology toward achieving collaborative working relationship with the CMN throughout this phase of detailing and Fabrication.

- 3.4 Are there points that you feel the Museum has overlooked in this RFP, and which in your opinion, would enhance the project or your proposal.

4. Overall schedule(10 points)

- 4.1 Detailed schedule outlining a timeline that shows production and installation by November 23, 2012 and recognizing the Key Dates outlined above in the section “Scope of Work.”

5. Quality of guarantees vs. defects and/or breakdowns- (10 points)

- 5.1 Length of time
5.2 Level of service, including repairs and/or redesigns
5.3 Target turn-around time from notification to resolution

PART 2- PRICE QUOTATION

6. Overall cost (30 points)

- 6.1 Overall anticipated cost through to project completion
6.2 Realistic cost breakdown of individual components as per attached pricing schedule (Appendix B).
6.3 All inclusive hourly/daily rate
6.4 Cost of travel, administrative and incidental expenses

EVALUATION METHOD

The proposals will be evaluated by a committee. Proposals must obtain a minimum of 70 % in PART 1 - Technical Offer to be considered in the final selection process.

The results of the proposal evaluation according to the above criteria will be the prime tool in the overall evaluation. The Museum reserves the right to enter into negotiations concerning price.

12. In addition, the part of the RFP titled “**INSTRUCTIONS TO BIDDERS**” contains the following paragraphs:

15. The CMN reserves the right to verify all information provided by a Proponent by means of direct contact with the Proponent’s prior clients, associates and personnel. The Proponent must agree to provide and release necessary authorizations to verify any of the Proponent’s previous experience. Misstatements of experience and scope of prior experience may be grounds for disqualification of a Proponent.
16. The CMN reserves the right to disqualify any Proponent in the event that its response to the RFP indicates that the manner in which the Proponent provides services may adversely affect the Canadian Museum of Nature’s existing business relationships.

13. Between August 20 and 23, 2012, the CMN published updates and addenda to the RFP on MERX.⁴ The bid closing date was August 29, 2012. The CMN received three proposals, including one from Storeimage.

14. The bids were evaluated on August 30, 2012, by a committee of three evaluators. On August 31, 2012, the CMN telephoned the references supplied by the bidders. The bidders are companies that had qualified for first and second place, namely, the winning bidder and Storeimage. According to the CMN, the reference check process did not alter the results of the evaluation.

4. Canada’s electronic tendering service.

15. On September 4, 2012, the CMN informed Storeimage in writing that Aménagement Exposition TCD Inc. was the winning bidder. The same day, Storeimage called the CMN to request a debriefing on the evaluation of its proposal. A telephone conversation was held between Ms. Fournier and Mr. Joly. Conference calls were also held on September 5 and 6, 2012, between Mr. Joly, Ms. Fournier and Mr. Molla, during which a point-by-point explanation was provided concerning the evaluation of Storeimage's proposal.

16. On September 7, 2012, Storeimage filed a complaint with the Tribunal.

PRELIMINARY ISSUES

Time Limit for Filing the Complaint

17. As the first ground of complaint, Storeimage submitted that the RFP did not specify clearly and precisely the criteria and the method of evaluation of the bids. In particular, Storeimage complained of the fact that the RFP failed to provide a breakdown of the points by subcriterion and that it did not identify a scale according to which the points would be allocated under each subcriterion.

18. The CMN maintains that Storeimage should have discovered any deficiency regarding the evaluation criteria or the evaluation method on August 15, 2012, the date on which Storeimage obtained a copy of the RFP. According to the CMN, any allegation on this point in the complaint of September 7, 2012, is late having regard to section 6 of the *Regulations*.⁵

19. Through its comments on the GIR, Storeimage responded that the bidders had only two weeks to submit their proposals, which did not allow them time to ask questions at that stage.

20. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed 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."

21. Subsection 6(2) of the *Regulations* provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal "... within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

22. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

23. Concerning Storeimage's argument that the RFP did not specify clearly and precisely the criteria and method of evaluation of the bids, the Tribunal considers that this ground of complaint became known or reasonably should have become known to Storeimage when it obtained a copy of the RFP, i.e. on August 15, 2012.⁶

24. The Tribunal considers that, if Storeimage was of the opinion that the RFP contained deficiencies, then, in order to meet the requirements of section 6 of the *Regulations*, it had until August 29, 2012

5. Tribunal Exhibit PR-2012-015-10, Administrative Record, Vol. 1A at 81.

6. Tribunal Exhibit PR-2012-015-10A (protected), Administrative Record, Vol. 2, tab 13.

(i.e. 10 working days after August 15, 2012) to make an objection to the CMN or to file a complaint with the Tribunal on this specific point.

25. However, Storeimage did not make an objection to the CMN on this ground within the required time limit, and this complaint was not filed with the Tribunal until September 7, 2012, that is, after the expiry of the prescribed time limit.

26. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,⁷ the Federal Court of Appeal reviewed the Tribunal's approach on this issue and confirmed its validity as follows:

[18] In procurement matters, time is of the essence. . . .

. . .

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .

[21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

27. Therefore, the Tribunal concludes that this ground of complaint was not filed in a timely manner. Consequently, the Tribunal's inquiry will not address this ground of complaint.

28. This having been said, the Tribunal notes that, had it conducted an inquiry on Storeimage's first ground of complaint, it would, in all likelihood, have concluded that the RFP did not meet the requirements of Article 506(6) of the *Agreement on Internal Trade*,⁸ which 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.

29. Indeed, it appears to the Tribunal that, in this case, the evaluation criteria and evaluation method specified in the RFP should have been drafted more precisely and probably were below the standard required under Article 506(6) of the *AIT*. More specifically, the Tribunal notes that the RFP did not contain a breakdown of the points by subcriterion and did not specify how the points would be allocated.

30. The Tribunal must emphasize the fundamental nature of the requirement set out in Article 506(6) of the *AIT* for the integrity of the procurement process. Indeed, the Tribunal has already recognized that non-compliance with this provision results in adverse consequences, both for the bidders and for the government, resulting in delays and additional costs, and in a real possibility that deserving proposals are unfairly excluded.⁹

31. It is difficult to witness such a situation, but the Tribunal cannot proceed contrary to section 6 of the *Regulations*.

7. 2002 FCA 284 (CanLII).

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

9. See, for example, *Re Complaint Filed by Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT) at para. 103.

New Ground of Complaint

32. In its comments on the GIR, Storeimage alleged that the method followed by the CMN to evaluate the financial proposals differed from the method set out in the RFP.

33. It appears from the GIR that the evaluators did not award points separately under criteria 6.1 to 6.4 of the RFP, but instead applied a comparative mathematical formula based only on overall costs.

34. Storeimage added that this way of proceeding could have given an advantage to the winning bidder. As such, even if Storeimage is the bidder that obtained the best score according to the formula used, it submitted that the differential in points between its proposal and that of the winning bidder could have been greater if the criteria set out in the RFP had been applied in the evaluation.

35. In a letter dated November 6, 2012, the Tribunal invited the CMN to submit its comments regarding Storeimage's allegation that the financial proposals had not been evaluated in accordance with the RFP.

36. The CMN submitted, in its additional comments, that Storeimage's allegation pertained to the evaluation of the *financial* proposals of the *other* bidders, which is an allegation unrelated to the subject matter of the initial complaint, which, in this case, only concerned the evaluation of the *technical* part of its proposal. Indeed, the CMN noted that Storeimage, having obtained the best score for its financial proposal, had no reason to complain.

37. The CMN also argued that the financial evaluations were performed in accordance with the RFP. According to the CMN, the RFP, on the whole, indicated that a maximum of 30 points would be awarded on the basis of the "overall price" of the proposal, which corresponds to criterion 6.1. According to the CMN, criteria 6.2, 6.3 and 6.4, taken in isolation, had a value of zero and only served to enable the CMN to have a better understanding of the overall costs submitted by the bidders.

38. In response, Storeimage maintained that its complaint was not limited to the evaluation of its proposal, but generally accused the CMN of contravening Article 506(6) of the *AIT*, which provides that an RFP must specify the evaluation criteria that will be used. Storeimage further argued that the interpretation of the RFP as a whole leads to the conclusion that each criterion would be evaluated, including criteria 6.1 to 6.4, and that any ambiguity must be interpreted against the CMN. Storeimage added that it had learned of the method of evaluating the financial proposals only upon reading the GIR and thus could not complain about it initially.

39. First, to the extent that Storeimage's allegations are based on a lack of clarity of the evaluation criteria and evaluation method specified in the RFP, the Tribunal considers that the allegations concerning the evaluation of the financial proposals were time-barred, for the reasons stated above.

40. If Storeimage was of the opinion that the RFP contained deficiencies, in order to meet the requirements of section 6 of the *Regulations*, it had 10 working days after August 15, 2012 (the date on which these deficiencies became known or should have become known to Storeimage) to make an objection to the CMN or to file a complaint with the Tribunal. Since Storeimage did not make any objection to the CMN and did not file any complaint with the Tribunal within this time limit, the Tribunal cannot accept this ground for inquiry.

41. Second, to the extent that Storeimage complains that the financial proposals were not evaluated according to the criteria specified in the RFP, the Tribunal finds that this allegation was raised for the first time in Storeimage's comments on the GIR.

42. The Tribunal notes Storeimage's generic reference to Article 506(6) of the *AIT* in its initial complaint; however, it finds that such a reference does not amount to raising a ground of complaint as such.

43. Indeed, paragraph 30.11(2)(c) of the *CITT Act* provides that the complaint must "... contain a clear and detailed statement of the substantive and factual grounds of the complaint..." Therefore, the complainant has the responsibility of describing its grounds of complaint exhaustively, and the mere citation of provisions of the relevant trade agreements is insufficient.

44. The Tribunal finds that Storeimage's allegation that the criteria set out in the RFP for the evaluation of the financial proposals were not followed is therefore a new ground of complaint. Since 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, the Tribunal will not inquire into this ground of complaint.

45. The Tribunal notes that it is not possible to simply change the subject matter of a complaint and, consequently, of the Tribunal's inquiry, or to make additions thereto after the decision to conduct an inquiry has been made. The submission of a new ground of complaint would constitute a substantive amendment to the complaint, in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint.¹⁰

46. The appropriate remedy for Storeimage would have been to file a new complaint within the time limit prescribed in section 6 of the *Regulations* after having learned of this new ground of complaint,¹¹ which has not been done in this case. Storeimage is therefore barred from filing a complaint on this ground.

TRIBUNAL'S ANALYSIS

47. As discussed above, 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.

48. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*. According to the information in the complaint, the services in issue are expressly excluded from coverage under the *North American Free Trade Agreement*,¹² the *Canada-Chile Free Trade Agreement*,¹³

10. See *Re Complaint Filed by Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 42.

11. See, for example, *Re Complaints Filed by Hewlett-Packard (Canada) Ltd.* (21 February 2002), PR-2001-030 and PR-2001-040 (CITT), in which the complainant filed a second complaint after obtaining new information during the Tribunal's inquiry on the first complaint.

12. *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).

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

the *Canada-Peru Free Trade Agreement*¹⁴ and the *Canada-Colombia Free Trade Agreement*,¹⁵ and are not included in the coverage under the *Agreement on Government Procurement*.¹⁶ Moreover, the monetary thresholds applicable under these trade agreements do not seem to have been reached.

49. The only issue that validly remains before the Tribunal is whether the CMN evaluated Storeimage's proposal unreasonably.

50. Storeimage bases this allegation on three sub-grounds of complaint: the evaluation method of comparing the bids and averaging the scores used by the CMN; the excessively low scores awarded to Storeimage for certain criteria; and the existence of a reasonable apprehension of bias on the part of the CMN's personnel.

Evaluation Method

51. Storeimage criticized the CMN for its method of awarding points. In particular, Storeimage took issue with the comparative evaluation method used by the CMN whereby the bids were placed in opposition to each other in order to determine which would have the highest score for each evaluation item in question.

52. The GIR specifies, and this explanation was confirmed by the testimony of the three evaluators before the Tribunal, that each proposal was evaluated in relation to the evaluation criteria specified in the RFP. However, the number of points awarded for each criterion was established by comparing the merit of one proposal with the other two.

53. Indeed, one evaluator scored the proposals in turn, awarding more or fewer points to the second and third proposals evaluated, depending on their respective merit in relation to the first proposal. The other two evaluators read all the proposals and made brief comments, and then awarded the final score per criterion to the three proposals. The final overall score for each proposal, which determined their respective ranking, was established by calculating the average of the overall scores reached by the three evaluators.

54. Storeimage submitted that it was unreasonable for the CMN to proceed in this manner. It submitted that the evaluators should have awarded points per criterion on the basis of predetermined scales, instead of comparing the three proposals with each other. Moreover, according to Storeimage, the CMN should have established the final overall score of the proposals by consensus among the evaluators instead of calculating an average.

55. In the Tribunal's opinion, these facts do not establish that the CMN proceeded in a manner contrary to the provisions of the *AIT*.

56. Article 506(6) of the *AIT* requires that documents "... 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." As mentioned above, the RFP set out the evaluation method that would be followed

14. *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/perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

15. *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).

16. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

in this bidder selection process rather succinctly. However, this is a ground regarding which Storeimage cannot complain at this stage, for the reasons stated above.

57. The Tribunal finds that, in this instance, the fact of comparing the bids for the purpose of awarding points and then calculating an average of the points awarded by each evaluator is not contrary to the evaluation method set out in the tender documents.

58. The Tribunal adds that the comparison of the bids and the calculation of an average are not, in themselves, practices prohibited by the *AIT*. Nothing in the *AIT* makes it compulsory to proceed by way of consensus or by using an answer grid with a scale of the point allocations, unless a government institution indicates in the tender documents that it will proceed in this specific way.

59. The Tribunal finds that, provided the proposals are evaluated according to the criteria in the tender documents, the comparison of the bids shows the relative quality of the proposals and contributes to the selection of the best bid. As for the award of the final overall scores by consensus among the evaluators instead of calculating averages, this method is not inherently better, in the Tribunal's view. In any case, it is not a requirement of the *AIT*.

Bid Evaluation

60. In addition, Storeimage alleged that the score awarded to its proposal under several criteria was unreasonably low. For example, it considers that it deserved more points for the experience of the firm and of the team proposed for the project. According to Storeimage, the CMN attached more importance to the form of the bids than to their substance. The relatively large gap between the scores awarded by the different evaluators would be another indicator of the unreasonableness of this evaluation, according to Storeimage.

61. The CMN submitted that Storeimage's proposal was evaluated fairly, based on the demonstration, in its proposal, of its qualifications under the stated criteria. According to the CMN, the evaluators' scores and the explanations given to Storeimage during the debriefing of September 6, 2012 explain the scores awarded.

62. Moreover, the CMN submitted that the difference in the scores awarded by different evaluators is not unreasonable, given the subjectivity inherent in any evaluation. The CMN submitted that it would be inappropriate, in these circumstances, for the Tribunal to substitute its assessment of the merits of a proposal for the professional judgment of the evaluators.

63. The Tribunal has indicated in the past that it typically accords a large measure of deference to the evaluators regarding their evaluation of the proposals and that it will interfere only with an evaluation that is *unreasonable*.¹⁷

64. The Tribunal has also indicated that an evaluation could be considered unreasonable, for example, if it appears that the evaluators have not applied themselves in evaluating the proposal, have wrongly interpreted the scope of a requirement, have ignored vital information provided in a bid, have based their evaluation on undisclosed criteria or have not conducted the evaluation in a procedurally fair way.¹⁸

17. See *Re Complaint Filed by Samson & Associates* (19 October 2012), PR-2012-012 (CITT) at para. 26; *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 51.

18. *Northern Lights* at para. 52.

65. In the Tribunal's opinion, nothing indicates that, in this instance, the evaluation of Storeimage's proposal was unreasonable according to the standard of review accepted in jurisprudence concerning similar matters.

66. The mere existence of differences between the scores awarded by different evaluators is only a reflection of their professional judgment and does not allow the Tribunal to infer that an evaluation was unreasonable. Indeed, in File No. PR-2006-024,¹⁹ the Tribunal recognized that, based on the personal judgment involved in the evaluation of proposals, two different evaluation committees evaluating identical proposals could legitimately arrive at different results.

67. Nor is an evaluation unreasonable due to the fact that Storeimage considers that its score does not faithfully reflect its real quality. The bidders must be evaluated only on the basis of their proposals. Indeed, the Tribunal's jurisprudence recognizes that the bidders bear the burden of demonstrating how they meet the stated evaluation criteria *in their proposals*.²⁰

68. This having been said, although these facts are not conclusive in and of themselves, the Tribunal considers that they may be part of a more general context, and it will bear these facts in mind in its evaluation of Storeimage's allegation regarding the existence of a reasonable apprehension of bias.

Reasonable Apprehension of Bias

69. Storeimage alleged the existence of a negative prejudice against it on the part of the CMN, based on the fact that certain persons within the institution seem to have had bad experiences with Storeimage in the past. Storeimage submitted that this negative perception of the company at the CMN is unfounded and gives rise to a reasonable apprehension of bias, which renders the evaluation of its proposal unreasonable.

70. Specifically, the CMN's impartiality would have been compromised by comments made about the previous negative experience with Storeimage by Mr. Boivin to Storeimage's references during telephone checks. According to Storeimage, this also appears from certain comments made by Mr. Joly to Ms. Fournier during another telephone conversation explaining why Storeimage was not awarded the contract.

71. Storeimage also alleged that Mr. Boivin was biased in his evaluation on the basis of the fact that his handwritten notes indicated preliminary comments for certain criteria, such as "good" or "high" for Storeimage and another bidder, but that these notes somehow translated into a lower numerical score for Storeimage than for the competitor in his final evaluation.²¹ Storeimage alleges that these facts, considered in light of all the circumstances of the case, and specifically in light of the fact that the poorly defined evaluation criteria left a lot of room for discretion, give rise to a reasonable apprehension of bias tainting the evaluation process.

72. The CMN argued that, pursuant to the RFP, past experiences were relevant for the award of the contract and that the CMN's previous experience with Storeimage was raised legitimately and in good faith in the reference checks.

19. *Re Complaint Filed by Antian Professional Services Inc.* (20 December 2006) (CITT) at para. 50.

20. See, for example, *Re Complaint Filed by Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT) at para. 23.

21. *Transcript of Public Hearing*, 13 December 2012, at 265-66.

73. The CMN added that the issue of Storeimage's previous projects was mentioned by Mr. Boivin during the reference checks, which only occurred after the evaluation of the technical proposals. Indeed, the different scores were not changed after these checks.²²

74. Relying on the jurisprudence of the Federal Court of Appeal,²³ the CMN submitted that the mere fact that the evaluators might have had a pre-existing opinion regarding Storeimage based on their previous professional experience does not constitute an improper consideration establishing a reasonable apprehension of bias.²⁴ As for Mr. Joly, it appears that he was not part of the evaluation committee and therefore his conduct, according to the CMN, is irrelevant to the question of bias.

75. According to Ms. Fournier's testimony, Mr. Joly mentioned to her, during their telephone conversation of September 4, 2012, that two projects performed by Storeimage for the CMN were subject to issues and that the previous bad experiences of some evaluators with Storeimage explain certain low scores obtained by its proposal.²⁵ According to Ms. Fournier, when she requested additional explanations on these two projects, Mr. Joly described the CMN's experience as "nightmarish"²⁶ [translation], which Mr. Joly categorically denied.

76. Ms. Fournier testified that, in light of these comments by Mr. Joly, she remained incredulous, given the fact that a few days earlier, Ms. Sunniva Geuer, a reference for Storeimage, had been very positive regarding her conversation with the CMN's representatives.

77. In particular, Ms. Geuer had telephoned Ms. Fournier to inform her of her conversation with Mr. Boivin, a CMN evaluator, specifying that she had given an excellent reference. However, Ms. Geuer allegedly mentioned that he had talked about certain "concerns" [translation] about difficulties encountered during Storeimage's previous projects.²⁷ Moreover, following the conversation of September 4, 2012, with Mr. Joly, Ms. Fournier contacted another reference, who informed her of similar comments from the CMN.²⁸

78. Mr. Molla told the Tribunal that he was surprised to hear about these concerns. In his opinion, these two projects had run smoothly, and there had been only minimal replacements—Mr. Molla estimated them at \$35 to \$40 per project—performed within the deadlines and at no additional cost to the CMN.²⁹ Mr. Molla also testified that his records indicated a single project dating from the same period where certain work had to be redone, but that, in the end, the CMN had been satisfied.³⁰ This was confirmed by Ms. Lanthier, the person responsible for the project in question.³¹

79. According to Mr. Joly, it was Ms. Fournier who asked him questions, during the initial conversation of September 4, 2012, as to whether there were previous negative experiences with Storeimage, to which he

22. Tribunal Exhibit PR-2012-015-10, Administrative Record, Vol. 1A at 73-74, 84.

23. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (F.C.A.) [*Cougar Aviation*] at paras. 29-39.

24. *Transcript of Public Hearing*, 13 December 2012, at 294.

25. *Ibid.* at 73-74, 82.

26. *Ibid.* at 79-81.

27. *Ibid.* at 36-40, 64, 76.

28. *Ibid.* at 40.

29. *Ibid.* at 89-90, 107-109.

30. *Ibid.* at 93-94.

31. *Ibid.* at 204-205.

answered in the affirmative. He said that he was able to refer to two specific projects, after consulting his electronic record.³²

80. Mr. Joly explained that Storeimage performed a sizeable amount of work for the CMN.³³ He confirmed that he was aware of certain “problems” [translation] with Storeimage, through employees who had worked with the company. He also stated that none of “these employees” [translation] were part of the evaluation committee and that the members of the evaluation committee had never discussed with him their previous experiences with Storeimage.³⁴

81. In cross-examination, Mr. Joly indicated that one person in particular at the CMN was not satisfied with work performed and hoped not to have to work with Storeimage again.³⁵ He also indicated later that there were “possibly” [translation] other persons who held Storeimage in low esteem.³⁶

82. Mr. Joly also testified that his role in this evaluation of the technical proposals was limited to transmitting the proposals received and the answer grids to the evaluation committee.³⁷

83. Each of the three evaluators affirmed having some prior knowledge of Storeimage, either personal, or coming from information shared with other employees during section meetings. Each also affirmed not having discussed this knowledge with the other evaluators before undertaking the evaluation and not being influenced by this prior knowledge.

84. Indeed, Mr. Beck testified that he had limited personal experience with Storeimage, related to one of the projects designated as “problematic”. He explained that he had “minor worries” during this project, but that these worries did not leave him with any doubts regarding Storeimage’s abilities, since in his opinion, the previous project was “insignificant” [translation] compared to the current one.³⁸

85. Ms. Lanthier testified that she did not have a negative perception of Storeimage’s work and was not influenced by such considerations in this evaluation.³⁹ She testified that she did not discuss her previous experience with Storeimage with the other evaluators.⁴⁰

86. Mr. Boivin explained to the Tribunal that he heard about certain negative experiences with Storeimage during section meetings with other employees. However, he said that these considerations did not have any impact on his evaluation of Storeimage’s proposal.⁴¹ He also testified that he raised the CMN’s negative experiences when speaking to Storeimage’s references in order to obtain the most information possible and mentioned that he was pleased to learn that these individuals had a good experience.⁴²

32. *Ibid.* at 124.

33. *Ibid.* at 119.

34. *Ibid.* at 120-21.

35. *Ibid.* at 135-36.

36. *Ibid.* at 160.

37. *Ibid.* at 117.

38. *Ibid.* at 177.

39. *Ibid.* at 205.

40. *Ibid.* at 216-17.

41. *Ibid.* at 227-28, 236.

42. *Ibid.* at 234.

87. The Tribunal must determine, in light of the evidence on the record, whether the circumstances of the case raise a reasonable apprehension of bias.

88. In File No. PR-2002-070,⁴³ the Tribunal dealt with the question of reasonable apprehension of bias. In its statement of reasons, the Tribunal invoked *Cougar Aviation*, in which the Federal Court of Appeal held that, under the *AIT*, the Tribunal's jurisdiction on a complaint was not limited to complaints of actual bias, but included those regarding allegations of reasonable apprehension of bias.

89. The test applied by the Tribunal in order to determine if the circumstances of a case give rise to a reasonable apprehension of bias is the one set out by de Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v. Canada (National Energy Board)*,⁴⁴ as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,⁴⁵ which reads as follows:

... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the person], whether consciously or unconsciously, would not decide fairly.⁴⁶

90. First, concerning Mr. Boivin's negative comments to Storeimage's references, the Tribunal notes that the fact that the scores did not change after these conversations is irrelevant.

91. The issue in this case is not whether the comments made by the evaluator during his discussion with the reference had an impact on the recommendation provided by this person and thus may have influenced the score. Rather, the issue is whether the very fact of making the comments in question shows that the evaluator could have been biased against Storeimage and, consequently, that there was a reasonable apprehension that the entire evaluation was tainted.

92. Second, the Tribunal considers that the comments made by Mr. Joly during his conversation with Ms. Fournier are not relevant either. The evidence shows that Mr. Joly did not evaluate the technical proposals and that he did not give any specific instructions to the evaluation team.⁴⁷

93. The Tribunal must determine whether there is a reasonable apprehension of bias on the part of the persons who conducted the evaluation. The Tribunal will therefore not draw any conclusion from the exchanges between Mr. Joly and Ms. Fournier.

94. Having reviewed the facts on which Storeimage's allegation is based and having regard to the totality of the evidence, the Tribunal finds that, in this instance, there is no reasonable apprehension of bias.

95. The evidence shows that several persons at the CMN, including the evaluators, were aware of certain previous "problems" with Storeimage; it could be said that there was "talk" among the CMN's teams concerning Storeimage. However, the evaluators' general impression of Storeimage remained good.

96. This fact does not raise a reasonable apprehension of bias in the circumstances of this case. The mere fact that the evaluators have certain pre-existing professional experiences with a bidder, regardless of whether these experiences are good or not, does not constitute, in and of itself, a fact which raises a

43. *Re Complaint Filed by Prudential Relocation Canada Ltd.* (30 July 2003) (CITT).

44. [1978] 1 S.C.R. 369 [*Committee for Justice and Liberty*].

45. [2003] 1 S.C.R. 884.

46. *Committee for Justice and Liberty* at 394.

47. *Transcript of Public Hearing*, 13 December 2012, at pp. 154, 158.

reasonable apprehension that the evaluation was biased. Indeed, in this instance, no other circumstance of the evaluation gives reason to conclude, according to the applicable test, that the evaluation was unfair.

97. Indeed, the testimony showed that there was no discussion before the evaluation between Mr. Joly and the evaluation committee, or among the members of the evaluation committee, concerning the previous experiences with Storeimage.⁴⁸

98. Moreover, regarding the telephone conversations with the references, despite certain contradictions in the evidence, the Tribunal is of the view that they are likely explained by the evaluators' desire, in a context of budgetary cuts, to obtain some reinforcement for the evaluation committee's decision to submit for approval by the financial authority a proposal which obtained the highest technical score, but which was also significantly more expensive than Storeimage's proposal.⁴⁹

99. In the Tribunal's opinion, these telephone calls do not allow it to conclude that there was a reasonable apprehension that Storeimage did not emerge as the winner *due to* a bias against it.

100. Finally, regarding the comments (for example, "good" or "high") appearing in Mr. Boivin's handwritten evaluation notes, which do not translate into equivalent scores for two bidders having received the same comment, it appears from Mr. Boivin's testimony that these were only preliminary notes and that the numerical scores are the result of a more in-depth evaluation. This is not unreasonable either.

101. In summary, the Tribunal finds that the existence of a certain negative history of Storeimage, known to the evaluators, did not translate in this instance into a consideration compromising the impartiality of the evaluation of its proposal.

Costs

102. Storeimage requested its complaint costs. The CMN also requested that it be awarded costs.

103. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the CMN its reasonable costs incurred in responding to the complaint.

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

105. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2. The complexity of the procurement was low, as it concerned the provision of manufacturing and installation services for exhibition components. The complexity of the complaint was also low, as it was based on a few issues on which jurisprudence is uncontroversial. The complexity of the proceedings was higher, as there was a request by the Tribunal for the filing of additional documents, the Tribunal decided to hold a public hearing and the proceedings had to be extended to the 135-day time frame.

106. However, even though, according to the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award should be \$2,400, in this instance, the Tribunal deems it advisable to reduce to \$1,000 the costs awarded to the CMN that must be paid by Storeimage. The Tribunal considers that this

48. *Ibid.* at 179-80, 208, 216-17, 238.

49. See Mr. Beck's testimony, *ibid.* at 185; Mr. Boivin's testimony, *ibid.* at 243-47, 254-55.

reduction is justified due to the fact that the public hearing was held on the Tribunal's own initiative, which also had the effect of extending the time frame for the proceedings.

TRIBUNAL'S DETERMINATION

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

108. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the CMN its reasonable costs incurred in responding to the complaint, which costs are to be paid by Storeimage. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is level 2, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey
Presiding Member