



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2013-005 and
PR-2013-008

Raymond Chabot Grant Thornton
Consulting Inc. and
PricewaterhouseCoopers LLP

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, October 25, 2013*

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IN THE MATTER OF complaints filed by Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP 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

**RAYMOND CHABOT GRANT THORNTON CONSULTING INC.
AND PRICEWATERHOUSECOOPERS LLP**

Complainants

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION

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 Department of Public Works and Government Services its reasonable costs incurred in responding to the complaints, which costs are to be paid by Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP. 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 the complaints is between Level 1 and Level 2. Therefore, the Canadian International Trade Tribunal's preliminary indication of the amount of the cost award to the Department of Public Works and Government Services is \$1,500. Of this, \$500 is to be paid by Raymond Chabot Grant Thornton Consulting Inc. and \$1,000 is to be paid by PricewaterhouseCoopers LLP, as the complaint brought by PricewaterhouseCoopers LLP was of increased complexity due to the motion that it brought. If any party disagrees with the preliminary indications of the levels of complexity or the preliminary indications of the amounts of the cost awards, it may make submissions to the Canadian International Trade Tribunal, as contemplated by article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amounts of the awards.

Pasquale Michaele Saroli

Pasquale Michaele Saroli
Presiding Member

Jason W. Downey

Jason W. Downey
Member

Ann Penner

Ann Penner
Member

Dominique Laporte

Dominique Laporte
Secretary

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STATEMENT OF REASONS

BACKGROUND

1. On June 12, 2013, Raymond Chabot Grant Thornton Consulting Inc. (RCGT) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ alleging that the Department of Public Works and Government Services (PWGSC) unfairly evaluated RCGT's bid in relation to a Request for Proposal (Solicitation No. A0015-12-0040/A) (the RFP).
2. RCGT alleged that PWGSC improperly concluded that one of the projects listed in the résumé of the Partner/Managing Director resource, in purported compliance with mandatory technical (MT) criterion MT3, was not a forensic audit.
3. On July 5, 2013, PricewaterhouseCoopers LLP (PwC) also filed a complaint with the Tribunal under subsection 30.11(1) of the *Act*, alleging that PWGSC unfairly evaluated PwC's bid in relation to the RFP.
4. In particular, PwC argued that PWGSC improperly concluded that the sample forensic audit report provided by PwC, in purported compliance with point-rated technical criterion RT1, was not a forensic audit report.
5. On June 14, 2013 RCGT's complaint was accepted for inquiry, while PwC's complaint was accepted for inquiry on July 10, 2013.
6. The Tribunal subsequently granted intervener status to Deloitte LLP, Ernst & Young LLP and KPMG LLP (together, the interveners).
7. On July 26, 2013, in response to a request made by PwC pursuant to section 6.1 of the *Canadian International Trade Tribunal Rules*,² the Tribunal decided to combine the two proceedings, on the grounds that the parties, issues and circumstances of each complaint were substantially similar.
8. PWGSC filed the Government Institution Reports (GIRs) in response to the complaints on August 16, 2013.
9. On August 23, 2013, PwC filed a motion with the Tribunal, requesting an order pursuant to subsection 17(2) of the *CITT Act*, requiring PWGSC to provide PwC with further disclosure.
10. The motion for disclosure was dismissed by the Tribunal on September 5, 2013.
11. On September 6, 2013 the Tribunal received the interveners' comments on the complaints and the GIRs.
12. PwC filed its response to the GIRs, as well as to the interveners' comments, on September 13, 2013.
13. On September 20, 2013, RCGT filed its response to the GIRs, as well as to the interveners' comments.

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

2. S.O.R./91-499.

14. On September 27, 2013, PWGSC submitted a request to make additional comments on PwC's response to the GIR. PWGSC argued that, in its response to the GIR, PwC had made a new allegation of "impermissible evaluation repair".³ As a result, PWGSC contended that it should be permitted to make additional comments relating to this alleged new argument.

15. In its response of September 30, 2013, PwC maintained that its response to the GIR did not contain any new argument. PwC claimed that the allegation of "impermissible evaluation repair" was expressly addressed at note 6 of its complaint.⁴

16. The Tribunal reviewed the submissions of both parties and found, as argued by PwC, that the allegation of "impermissible evaluation repair" had in fact been raised by PwC in its complaint. As a result, the Tribunal determined that this was not a new argument by PwC and that no additional submissions by PWGSC were therefore warranted.

17. On September 27, 2013, the Tribunal also received a request from Deloitte LLP and Ernst & Young LLP, in which they stated that RCGT had also raised additional arguments in its response to the GIR. In particular, they contended that RCGT made novel arguments regarding alleged errors made by PWGSC when conducting the evaluation of RCGT's bid.⁵ Deloitte LLP and Ernst & Young LLP asserted that they should therefore be permitted to make additional comments to address these alleged new arguments.

18. Having examined RCGT's submissions in response to the GIR, the Tribunal finds that the additional arguments raised by RCGT were not in relation to the substance of the complaint, but rather that RCGT's comments regarding evaluation errors were made in support of PwC's motion for disclosure.⁶ The Tribunal, however, had already issued a final decision on the motion for disclosure prior to RCGT raising these grounds of argument. As a result, the Tribunal considered itself *functus officio* and therefore unable to reopen the motion in order to consider RCGT's supporting arguments.

19. Since the allegations regarding evaluation errors were advanced by RCGT in support of the motion for disclosure, not the substantive complaint brought by RCGT, they were not properly before the Tribunal when assessing the substance of the complaint itself. The Tribunal, therefore, determined that they were not in fact new arguments and that there were no grounds on which to permit Deloitte LLP and Ernst & Young LLP to make additional comments in respect thereof. The request made by Deloitte LLP and Ernst & Young LLP was therefore denied.

PROCUREMENT PROCESS

20. On February 15, 2013, PWGSC issued the RFP for the provision of work-stream 4 forensic audit services under the Professional Audit Support Services Supply Arrangement for the Department of Aboriginal Affairs and Northern Development. The closing date for the solicitation was March 8, 2013.

3. Exhibit PR-2013-005-055 at 1.

4. Exhibit PR-2013-005-057 at 2.

5. Exhibit PR-2013-005-054 at 1.

6. In particular, RCGT argued that, since evaluation mistakes were made by PWGSC, RCGT and PwC should have full disclosure to the evaluators' notes in order to determine what other errors were made in evaluating the bids. See Exhibit PR-2013-005-052 at 5.

21. The solicitation was restricted to work-stream 4 pre-qualified suppliers, with both RCGT and PwC being among the pre-qualified firms invited to bid on the solicitation.⁷

22. Section 1(a) of Part 4, “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, of the RFP provides as follows: “Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical evaluation criteria.” The technical criteria are comprised of “Mandatory Technical Criteria” and “Point Rated Technical Criteria”.⁸

Mandatory Technical Criteria

23. The mandatory technical criteria are set out in Attachment 1 to Part 4 of the RFP. In this regard, section 1.1.1, “Mandatory Technical Criteria”, provides as follows:

The bid must meet the mandatory technical criteria specified below. . . .

Bids which fail to meet the mandatory technical criteria will be declared non-responsive.

24. Among the mandatory technical criteria contained in the solicitation are MT1 and MT3, which respectively provide as follows:

MT1 For work-stream # four (4):

The bidder must propose a team comprised of at minimum the following:

- one (1) Partner/Managing Director
- one (1) Project Manager/Leader
- one (1) Senior Auditor
- one (1) Audit Support Specialist
- one (1) Administrative Support Clerk

Note: If the number of technically qualified individuals falls below the minimum required as per this mandatory technical criterion MT1, the bidder’s proposal will be declared non-responsive and rejected.

. . .

MT3 The bidder must submit detailed CVs for each of the proposed resources demonstrating that they meet the *minimum mandatory requirements* (educational, professional designations and work experience) for each applicable resource category *as described in Annex A, Statement of Work Section 5.*

[Emphasis added]

25. As concerns MT3, section 5 of the Statement of Work (SOW) provides as follows:

The experience of the proposed resources must be clearly identified by providing a summary/description of the previous projects/work experience and indicating when the work was carried out.

7. Exhibit PR-2013-005-23 at tab 1; Exhibit PR-2013-008-14 at tab 1.

8. *Ibid.*

26. As specifically concerns the required experience of the proposed Partner/Managing Director, section 5 of the SOW provides as follows:⁹

5.1 Stream 4: Forensic Audits

...

Minimum Mandatory Qualifications and Experience for the Resource Categories:

The following are the minimum mandatory requirements that must be met by the Contractor's personnel identified under each applicable resource category for work to be performed under this stream. User departments cannot reduce these minimum requirements but, if necessary, user departments may increase these requirements at the Request for Proposal (RFP) stage:

Partner/Managing Director

- Education/Professional Qualifications:
 - Professional Designation in any one of the following: CA, or CMA, or CGA, or CIA or CFE;
- Experience -
 - Must have completed a minimum of four (4) forensic audit projects, each valued at more than \$50,000, in the past four (4) years, AND must have a *minimum of five (5) cumulative years of experience in forensic audit in the past ten (10) years.*

[Emphasis added]

Point-rated Technical Criteria

27. In order to be declared responsive, a bid must also meet four separate point-rated technical (RT) criteria.

28. Moreover, section 2 of Part 4 of the RFP makes the responsiveness of a technical bid contingent on the attainment of the following prescribed minimum passing grade:¹⁰

1. To be declared responsive, a bid must;

...

- (c) obtain the required minimum number of points specified in Attachment 1 to Part 4 for the point rated technical criteria.

29. In this regard, the table for the point-rated technical criteria set out in Attachment 1 to Part 4 of the RFP provides as follows: "Total 320 points maximum - Global pass mark 75% - minimum passing mark 240 points".¹¹

9. *Ibid.*

10. *Ibid.*

11. *Ibid.*

30. Of particular relevance to these complaints are RT1 and RT2, which provide as follows:

Number	Point Rated Technical Criteria	Scoring Methodology
RT1	The Bidder should provide an example of a forensic audit report with relation to a First Nation community that was completed for the Canadian federal government within the last five (5) years prior to date of bid closing. ... Forensic audit reports submitted to a federal department as 'draft <i>final</i> report' will be considered as compliant.	Maximum 20 points per criteria based on the rating scheme multiplied by two
Total RT1: 100 points maximum		

...

Number	Point Rated Technical Criteria	Scoring Methodology
	CASE STUDY	
RT2	The Bidder should provide a maximum of three (3) to five (5) page proposal in response to the following scenario situation: ...	Maximum 20 points per criteria based on the rating scheme multiplied by two
Total RT2: 100 points maximum		

[Emphasis added]

ANALYSIS

RCGT

31. On May 31, 2013, RCGT received a letter from PWGSC informing it that its proposal was deemed non-compliant as a result of the adjudged failure to meet MT3 and, by extension, MT1. Specifically, PWGSC stated the following:

[The individual] proposed at the Partner Managing/Director level does not meet the PASS minimum mandatory requirements for that category under work-stream four (4). *The Partner/Managing Director demonstrated four (4) years or forty-eight (48) months of non-cumulative experience. In order to meet the PASS minimum mandatory the Partner/Managing Director had to demonstrate five (5) cumulative years of experience in forensic audit in the past ten (10) years.*

...

*As the requirement for the Partner/Managing Director was not met at MT3, Raymond Chabot Grant Thornton does not meet the MT1 requirement and therefore [its] proposal is deemed non-compliant and was not evaluated further.*¹²

[Emphasis added]

32. Under the terms of the solicitation, “. . . where the timelines of two or more projects or experience overlap, the duration of time common to each project/experience will not be counted more than once.”¹³ PWGSC’s determination that RCGT’s proposal was non-responsive was attributable to its finding that Project #7 was not a forensic audit but rather a contribution audit, as a result of which the remaining eligible forensic audit experience—adjusted for overlapping timelines—was insufficient to meet the temporal requirements of MT3.

33. RCGT, however, contended that “Project #7 [was] clearly identified as a Forensic Audit project in the Proposal and CV”. In this respect, RCGT surmises that PWGSC’s consideration of Project #7 as a contribution audit rather than a forensic audit was based on the following characterization of the project in its summary description of same in the résumé of RCGT’s proposed Partner/Managing Director resource:

*HRSDC requested that we conduct contribution audits to determine whether payments made to these organizations were in accordance with the terms of the various contribution agreements and contracts. We reviewed several hundred agreements under which organizations received payments from HRSDC during the period under review.*¹⁴

[Emphasis added]

34. In establishing the intended meaning of the term *forensic audit* for purposes of the RFP, the SOW, which forms part of the solicitation, is particularly helpful. In this respect, it states that, unlike, for example, in the case of internal audits where “. . . there is no assumption that fraud or other illegal acts against the Crown or loss of money has occurred, and the purpose of the audit and resulting report is to provide assurance regarding risk management, governance and/or controls”, when conducting forensic audits, “. . . *there are reasonable grounds to suspect that fraud or other illegal acts against the Crown or loss of money has taken place*, and the purpose of the investigation is to confirm or refute the allegations and take appropriate follow-up actions”¹⁵ [emphasis added].

35. The Tribunal has previously stated that the meaning of a term, in the context of its usage in an RFP, would logically be connected to the tasks/deliverables set out in the SOW.¹⁶ In this regard, that a forensic audit, for the purposes of the current solicitation, presupposes the existence of reasonable grounds to suspect fraud or other illegality is also supported by the malfeasance-centric nature of key tasks described in section 6.0 of the SOW,¹⁷ which include the following:

12. Exhibit PR-2013-005-01C at 1-2.

13. Exhibit PR-2013-005-23 at tab 1.

14. Exhibit PR-2013-005-001.

15. Exhibit PR-2013-005-23 at tab 1. In particular, see paragraph 5.0(i) of the SOW. In this regard, the SOW is consistent with the Canadian Institute of Chartered Accountants’ view that “forensic accounting engagements” “. . . *involve disputes or anticipated disputes, or engagements where there are risks, concerns or allegations of fraud or other illegal or unethical conduct*” and the following *Canadian Oxford Dictionary*, 2nd ed., definition of “forensic accounting”: “. . . the use of accounting skills to investigate fraud, embezzlement, etc. and to prepare an analysis of financial information suitable for use in litigation.”

16. *Joint Venture of BMT Fleet Technology Limited and Notra Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) [*BMT and Notra*] at para. 28.

17. Exhibit PR-2013-005-23 at tab 1. In particular, see section 6.0 of the SOW, Phases I, II and III.

- Initial identification and scoping of areas where misappropriation or wrongdoing may have occurred and prepare required evidence and recommendations”;
- ...
- Review of available financial and non-financial records and supporting documentation, *identifying those areas that warrant further investigation* (if applicable);
- ...
- Determine whether or not sufficient evidence exists in order to:
 - ✓ Refer the case to law enforcement organizations *for criminal investigations*;
 - ✓ Support administrative *disciplinary measures*;
 - ✓ Support turning over to legal counsel for *civil action*; and
 - ✓ Recommend *recovery of AANDC funds that were misused and misappropriated*;
- ...

Prepare summary of preliminary draft investigation report . . . which will provide observations, findings, summarizing key issues, conclusion, recommendations and *measures to be implemented to prevent further recurrences of losses of money, wrongdoing and offences against the Crown.*

[Emphasis added]

36. RCGT submits that the specific objective of assessing compliance with the terms and conditions of contribution agreements under Project #7 is of a forensic nature. There is however no indication in the description of Project #7 that the audits therein described are predicated on the existence of reasonable grounds to suspect that fraud or other illegal acts against the Crown have occurred. By contrast, each of the other experience-eligible projects listed by RCGT in its bid contained explicit clarifications confirming their respective forensic nature or content. In particular, each of the experience-eligible projects clearly involved the provision of audit services in follow-up to specific allegations of fraud or other malfeasance against the Crown.¹⁸

37. As the Tribunal has indicated in the past, responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.¹⁹ The Tribunal has also previously noted that it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood by PWGSC.²⁰ In this context, the SOW, which forms part of the current solicitation, provides that “[t]he *experience of the proposed resources must be clearly identified by providing a summary/description of the previous projects/work experience . . .*”²¹

38. RCGT argued that, if PWGSC had doubts or concerns about the nature of the project, it had the opportunity to seek clarification in accordance with section 5.30 of the Standard Acquisition Clauses and Conditions (SACC) Manual, as this clarification would not have altered its quoted price or any substantive element of its proposal. It stated as follows:

We maintain that in the case of doubt, PWGSC could have sought further clarification or verification for Project #7, but decided not to. This is permitted pursuant to SAAC Manual, chapter 5.30.

18. Exhibit PR-2013-005-01A.

19. See, for example, *ADRM Technology Consulting Group Corp./Randstad Interim Inc.* (26 April 2012), PR-2012-002 (CITT) [ADRM] at para. 22; *Cauffiel Technologies Corporation* (5 April 2011), PR-2010-094 (CITT) at para. 11; *Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT) at para. 11.

20. See, for instance, *ADRM* at para. 22; *BRC Business Enterprises Ltd. v. Department of Public Works and Government Services* (27 September 2010), PR-2010-012 (CITT) at para. 51.

21. Exhibit PR-2013-005-23 at tab 1; Exhibit PR-2013-008-14 at tab 1.

Client references could have been provided upon request that could have been made by PWGSC and/or AANDC, through which PWGSC could have confirmed that the engagement was undertaken as a result of concerns and risk of possible fraud on the government. In other instances, PWGSC and/or AANDC have contacted the bidder to validate the relationship with the proposed resource.

Independent verification of references with the client organization, would not in our view constitute bid repair in any way, since the forensic audit nature of the work was first, clearly demonstrated in the bid, and secondly, would not affect the fairness and objectivity of the solicitation process, and thirdly, is a common practice in solicitation of the federal government.

Had the evaluator reasonably performed the evaluation, the proposed resource would have been compliant with MT1 and MT3, thus meeting the minimum months of forensic audit experience²²

39. However, and as has been noted by the Tribunal in past cases, while “. . . a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, it is not under any obligation to do so”,²³ it being incumbent upon the bidder to ensure that the proposal clearly responds to all the requirements of the solicitation. Indeed, that PWGSC’s authority to seek clarification is discretionary is made explicit in the opening words of paragraph 5.30(b) of the SACC Manual,²⁴ which provides as follows:

If PWGSC decides to request clarifications. . . the contracting officer must ensure that this process does not give any bidder an advantage over the others.

[Emphasis added]

40. In *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services*,²⁵ the Tribunal stated as follows:

51. . . . The Tribunal will interfere only with an evaluation that is *unreasonable*.

52. . . . In the past, the Tribunal has noted that it will substitute its judgment for that of evaluators only when 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.

41. More recently, the Tribunal, in *Excel Human Resources Inc. v. Department of the Environment*,²⁶ reiterated its position in *Northern Lights*, confirming that it would only interfere with an evaluation that was “*unreasonable*” and would substitute its judgment for that of the evaluators only when the evaluators had not applied themselves in evaluating a bidder’s proposal, had ignored vital information provided in a bid, had wrongly interpreted the scope of a requirement, had based their evaluation on undisclosed criteria or had otherwise not conducted the evaluation in a procedurally fair manner.²⁷

22. Exhibit PR-2013-005-052 at 4.

23. See for example, *The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 (CITT) at para. 21; *Marathon Watch Company Ltd.* (19 May 2010), PR-2010-011 at para. 16; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT) at 15.

24. Pursuant to section 1 of Part 2 of the RFP, the SACC Manual provisions are incorporated by reference in the current RFP.

25. (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at paras. 51, 52.

26. (2 March 2012), PR-2011-043 (CITT) [*Excel*].

27. *Excel* at para. 33.

42. The Tribunal indicated, in *BMT and Notra*, that PWGSC's determination would be considered reasonable if it was supported by a tenable explanation, regardless of whether or not the Tribunal itself found that explanation compelling.²⁸

43. As already noted, it was incumbent upon RCGT to exercise due diligence in the preparation of its bid to ensure that it was compliant with all essential elements of the solicitation, including MT3 and, by extension, MT1. However, unlike the summaries provided for other projects listed in the résumé of the proposed Partner/Managing Director (which formed part of RCGT's bid), the description of Project #7 did not indicate that the audit therein described was predicated on the existence of reasonable grounds to suspect fraud or other illegal acts against the Crown.

44. Whereas the principal focus of a contribution audit is to provide assurances with respect to a recipient's compliance with the terms and conditions of a funding agreement, a forensic audit is based on reasonable grounds to suspect fraud or other illegal activities against the Crown and involves the application of particular investigative accounting methods to collect and present evidence aimed at confirming or refuting the occurrence of same.²⁹ While a contribution audit may result in findings that then lead to a forensic audit, the two types of audits are distinct.³⁰ In this regard, while Project #7 did require the proposed resource person "... to identify any possible fraudulent acts, conflict of interest and any other issues ...", there was nothing to suggest that this task was predicated on the existence of a reasonable suspicion of fraud or other malfeasance against the Crown. Rather, it appeared to be incidental to the principal task under the project, which was to "... conduct contribution audits to determine whether payments made to these organizations were in accordance with the terms of the various contribution agreements and contracts"—a task that is fundamental to sound fiscal control and good governance and that does not assume the occurrence of fraud or other illegal acts against the Crown. That being the case, it was not unreasonable, in the Tribunal's view, for the evaluators to have concluded that Project #7 was not a "forensic audit", within the understanding of that term in the SOW, but rather a contribution audit.

45. Finally, for PWGSC's evaluators to have allowed RCGT to provide additional information to establish Project #7 as a forensic audit (rather than a contribution audit, which it reasonably appeared to be on its face), would, in the Tribunal's view, have crossed the line separating clarification and bid repair. The Tribunal has previously held as follows:

Bid repair is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed.³¹

46. On the basis of the foregoing analysis, the Tribunal does not consider unreasonable PWGSC's assessment that Project #7 was not a forensic audit. Nor does it consider unreasonable PWGSC's resulting determination that RCGT's bid failed to meet the requirements of MT3 and, by necessary implication, those of MT1.

28. *BMT and Notra* at para. 25. See, also, *C3 Polymeric Limited v. National Gallery of Canada* (14 February 2013), PR-2012-020 (CITT) at para. 38; *Pelican Products, Inc. (Canada) v. Department of Public Works and Government Services* (17 October 2006), PR-2006-019 (CITT) at para. 19.

29. Exhibit PR-2013-005-044 at para. 17.

30. *Ibid.*

31. *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT) at para. 55.

PwC

47. In evaluating PwC's complaint, the Tribunal will first turn to a consideration of the score of zero given to PwC's technical bid under RT1. The Tribunal will only proceed with a consideration of the evaluation of the bid under RT2 if it determines that the score of zero assigned in respect of RT1 was unreasonable, since a vindication of that score under RT1 would preclude PwC's bid from achieving the minimum passing mark of 240 points.

48. PWGSC issued four amendments to the RFP in response to specific questions raised by bidders. Of particular relevance is answer No. 15 in amendment No. 4, which confirms that a final forensic report was required under RT1:

Question #15: Many of the forensic assignments undertaken by AANDC relating [to] First Nations follow a process and a series of documents are written communicating results -- often following a pattern of an initial scoping document, followed by a findings report to AANDC and then reporting to the First Nation Community. Each of these communications builds on the predecessor and [reflects] on the [bidder's] ability to communicate with the client and to adapt the approach and methodology. In order to access RT1 would the Crown be prepared to consider the three key communications around a given assignment prepared for the client[?]

Answer #15: *[T]he Crown only requires the final forensic report (not the other communication tools).*

[Emphasis added]

49. The Tribunal notes that answer No. 15 is in line with the explicit terms of RT1 itself, which, while allowing for the submission of a draft, requires that said draft be of a "final" forensic audit report. As noted by KPMG LLP, the indication provided in RT1 that a "draft final report" would be considered compliant "... makes it clear that anything less than a 'final' report (including one that is in draft), would not be considered as compliant."³²

50. On the basis of the foregoing, the Tribunal cannot accept the proposition that the term "forensic audit report", in the context of its use in the solicitation, should be "... defined broadly to include a report concluded after any one of the many phases of a forensic audit", as argued by PwC.³³ The Tribunal is instead satisfied that the example to be submitted under RT1 is of a final forensic audit report, although such report could have been submitted in draft form under the explicit terms of that criterion.

51. As noted above, the SOW, which forms part of the solicitation, explains that forensic audits are conducted in response to reasonable grounds to suspect that fraud or other illegal acts against the Crown have taken place. Section 6.0 of the SOW sets out that the purpose of the investigation is to confirm or refute the allegations, and to take appropriate follow-up actions.

52. In this regard, the Tribunal accepts as reasonable PWGSC's determination that the document submitted by PwC in purported compliance with RT1 was not a final forensic audit report which, pursuant to section 8 of the SOW, was a Phase III deliverable. Rather, the Tribunal accepts PWGSC's conclusion that the sample report provided by PwC was an earlier phase deliverable, in the nature of a scoping exercise, which would not have allowed either for the drawing of definitive conclusions confirming or refuting the specific allegations that triggered the audit or for the making of recommendations. As the sample report

32. Public Submission of KPMG LLP dated September 6, 2013, at para. 21.

33. Exhibit PR-2013-008-001 at para. 9.

provided by PwC met neither of these requirements, it did not fulfil the conditions of the Phase III deliverables under section 8 of the SOW.

53. Indeed, the scoping character of the document in issue, much of which concerns additional steps that should be taken, is confirmed by the statement of work for the scoping exercise, which indicates that it was to be forward-looking and anticipatory in nature. Additional work was never undertaken, however, as the Crown did not approve further funding beyond the initial scoping exercise itself. Accordingly, it is the Tribunal's view that PwC did not provide a "final report", as required by the RFP.

54. Given PwC's failure to provide an example of a final forensic audit report, the assigning of a score of zero to PwC's bid under RT1 was inevitable under the terms of the solicitation.

55. In particular, section 1.1.2 of Part 4 of the RFP provides that "[p]oint-rated technical criteria not addressed will be given a score of zero." This is reiterated in the rating scheme set out in Table 1 in section 1.1.2 of Attachment 1 to Part 4, which provides as follows:

The following rating scheme (Table 1) will be used to evaluate the Point Rated Technical Criteria RT1, RT2, RT3, and RT4.

0	Information provided does not address the criteria. Bidder receives 0% for the available points for this element.
...	

For RT1 and RT2, the rating scheme will be multiplied by two.

56. Having regard to the foregoing analysis, the Tribunal finds that the assignment of a score of zero to PwC's technical bid in respect of RT1 was not unreasonable.

57. Regarding the claim by Deloitte LLP and KPMG LLP that PwC's alternative argument is time-barred by operation of law, the Tribunal does not see an issue of timeliness. Deloitte LLP and KPMG LLP assert that PwC is protesting the chosen criteria in the RFP and, in particular, the requirement that a sample "final" forensic audit report be provided. This argument, Deloitte LLP and KPMG LLP contend, is time-barred, as PwC knew of this requirement when PWGSC issued amendment No. 4 to the RFP on March 1, 2013. Deloitte LLP and KPMG LLP therefore maintain that PwC should have raised this ground of complaint within 10 working days of when it became known, or reasonably should have become known, to it on March 1, 2013.

58. In this regard, the Tribunal concurs with PwC that:

PwC's complaint is not about how the criteria in the RFP were drafted or amended. PwC complains that its bid was unreasonably evaluated in relation to the criteria as drafted and as amended.³⁴

As PwC's complaint relates to how the criteria were applied to its bid, and not to the chosen criteria themselves, the Tribunal finds that the issue of timeliness is not in question.

59. In any event, it is well established in Tribunal jurisprudence that a government institution is entitled to define its legitimate operational requirements and to ensure that they are met. However, while a government institution has the right to establish the parameters of an RFP, it must do so reasonably, as it

34. Exhibit PR-2013-005-057 at para. 6.

does not have licence to establish conditions that are impossible to meet.³⁵ Thus, the prerogative of the procuring entity to define its procurement needs is circumscribed by reasonableness.³⁶ In the present case, given that the Phase III tasks set out in section 6.0 of the SOW explicitly require the successful contractors to, among other things, “[p]repare [a] final investigation report”, with section 8.0 specifically including “[f]inal report” as a Phase III deliverable (separate and apart from, for example, “[w]orking papers”), the Tribunal finds the call for a final forensic audit report to be reasonable. In this respect, and as was noted by Deloitte LLP, “[o]nly a final forensic report requires an auditor to take a definitive and clear written position on the difficult issue of whether fraud or misuse of money has taken place.”³⁷

60. Given the above conclusion, and for the reasons explained above, the Tribunal does not consider it necessary to proceed with a consideration of the evaluation of PwC’s technical bid under RT2.

COSTS

61. Having found that the complaints are not valid, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaints. 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 of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

62. The Tribunal’s preliminary view is that these complaints have a level of complexity falling between the first and second levels referred to in Appendix A of the *Guideline*. The complexity of the procurement itself was low, as it concerned the provision of forensic audit services. Similarly, the complaints were not complex, as they dealt primarily with a single issue, namely, whether or not PWGSC correctly determined that RCGT’s and PwC’s proposals were non-compliant with the mandatory requirements of the RFP, which entailed rather straightforward issues of interpretation of solicitation requirements.

63. With regard to the complexity of the proceedings, the Tribunal finds that these were complicated somewhat as a result of the motion filed by PwC. This required additional rounds of submissions by the parties in order to properly address the requests made by PwC in its motion. Moreover, the Tribunal notes that PwC was unsuccessful in this motion. The Tribunal therefore finds that the complexity of the proceedings, as relating to PwC in particular, was slightly higher.

64. Accordingly, the Tribunal’s preliminary indication of the amounts of the cost awards is \$1500, of which \$500 is payable by RCGT and \$1,000 is payable by PwC.

DETERMINATION

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

35. See, for example, *Daigen Communications* (23 August 2011), PR-2011-021 (CITT) at para. 15; *Forrest Green Management Corp. v. Canada Border Services Agency* (12 August 2010), PR-2009-154 (CITT) at para. 44; *MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. v. Department of Public Works and Government Services* (5 August 2005), PR-2004-061 (CITT) at para. 67.

36. See, for instance, *Daigen Communications* at para. 15; *Global Upholstery Co. Inc. v. Department of Public Works and Government Services* (6 July 2009), PR-2008-052 (CITT) at para. 10.

37. Exhibit PR-2013-005-042 at para. 41.

66. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaints, which costs are to be paid by RCGT and PwC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for the complaints is between Level 1 and Level 2. Therefore, the Tribunal's preliminary indication of the amount of the cost award to PWGSC is \$1,500. Of this, \$500 is to be paid by RCGT and \$1,000 is to be paid by PwC, as the complaint brought by PwC was of increased complexity due to the motion that it brought. If any party disagrees with the preliminary indications of the levels of complexity or the preliminary indications of the amounts of the cost awards, it may make submissions to the Tribunal, as contemplated by article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amounts of the awards.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Jason W. Downey
Jason W. Downey
Member

Ann Penner
Ann Penner
Member