



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-011

ADR Education

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, October 18, 2013*

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IN THE MATTER OF a complaint filed by ADR Education 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

ADR EDUCATION

Complainant

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 complaint is not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by ADR Education. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in 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.

Ann Penner

Ann Penner

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On August 1, 2013, ADR Education (ADR) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹

2. This was ADR's second complaint and it raised the same allegations about the same procurement process and involved the same parties.² The first (PR-2013-009) was filed on July 12, 2013, and was not accepted for inquiry because the Tribunal found that it had not been filed within the prescribed time limits.

3. Both of ADR's complaints relate to a Request for a Standing Offer (RFSO) (Solicitation No. E60ZG-090005/C) by the Department of Public Works and Government Services (PWGSC) for the provision of alternative dispute resolution services under five streams. ADR was issued a standing offer for certain services in the RFSO but not for those identified as "Stream 3 – Group Processes and Work Place Assessment".

4. Both times, ADR complained that PWGSC improperly evaluated its proposal for Stream 3 on the following two grounds:

- ADR alleged that a change to the bid closing date affected the degree to which one of its two proposed resources for Stream 3³ complied with the mandatory requirements of the RFSO. Specifically, ADR complained that the proposed resource's Project No. 10 was improperly deemed non-compliant on the basis that it was not started within five years of the bid closing date, as required by the RFSO (Ground 1).
- ADR alleged that the guidelines in the RFSO about what constituted "Group Processes and Work Place Assessment" services were unclear. Furthermore, ADR claimed that inconsistent and mistaken evaluation criteria were applied. As a result, ADR complained that the evaluation of its proposal was tainted, especially in regard to Projects No. 8 and 9 for the proposed resource in issue, both of which were considered non-compliant because they only related to group process examples and not to conflict situations in the workplace (Ground 2).

5. ADR also expressed its overall dissatisfaction with the way in which PWGSC handled ADR's concerns in relation to its proposal for Stream 3.

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

2. According to the doctrine of *res judicata*, where a final judicial decision has been pronounced, a party is estopped from disputing the merits of the decision in a re-litigation before the same court. See, for example, *Wavel Venture Corp. v. Constantini*, [1997] 4 W.W.R. 194 at para. 37; *TA Instruments* (15 September 2011), PR-2011-029 (CITT) at para. 8. In the Tribunal's view, the doctrine of *res judicata* does not prevent it from considering the complaint because the exception to that doctrine applies in the present circumstances. In this regard, the Tribunal accepts that ADR's discovery of new evidence relating to the procedural merits of the Tribunal's prior decision on lateness could not, by reasonable diligence, have been produced in the first complaint. It was only following the issuance of the Tribunal's statement of reasons in File No. PR-2013-009, on July 31, 2013, that ADR realized that the Tribunal had received its package late, which resulted in the complaint being time-barred. Having found that the exception to the doctrine of *res judicata* applies, the Tribunal concludes that it can conduct an inquiry into the present complaint on the same grounds as the first complaint.

3. Referred to herein as "the proposed resource in issue".

6. As a remedy, ADR requested that its proposal be considered eligible and compliant under Stream 3 of the RFSO and that it be issued a standing offer for Stream 3. ADR also requested that it be awarded costs for filing its complaint.

BACKGROUND

Procurement Process

7. On November 8, 2011, PWGSC published on MERX⁴ an RFSO for the provision of alternative dispute resolution services.⁵ The RFSO stated PWGSC's intention to authorize multiple standing offers in various locations across Canada.

8. The RFSO was amended 14 times during the bid solicitation period. Most notably for the present complaint, the bid closing date was changed and extended three times: from November 8 to December 19, 2011 (Amendment No. 1); from December 19, 2011, to January 6, 2012 (Amendment No. 6); and from January 6 to 13, 2012 (Amendment No. 13).

9. On November 18, 2011, PWGSC issued Amendment No. 3 to the RFSO, which provided clarification that suppliers were not obligated to bid on all the five streams.⁶

10. ADR submitted its original proposal by mail on December 13, 2011, to meet the bid closing date that was in effect at that time, i.e. December 19, 2011.⁷ The next day, ADR learned that PWGSC issued Amendments No. 5 and 6 to the RFSO, the latter of which extended the bid closing date to January 6, 2012.

11. On December 14, 2011, ADR wrote to PWGSC and expressed its concerns about Amendments No. 5 and 6, namely, the change to the bid closing date and certain changes to mandatory requirements identified in the RFSO as M.3 and M.4.⁸

12. ADR submitted a revised proposal, which was received by PWGSC on January 4, 2012.

13. Amendment No. 14 to the RFSO, dated January 5, 2012, indicated that PWGSC would not be extending the closing date beyond January 13, 2012.⁹ In fact, the RFSO closed on January 13, 2012.

14. The evaluation process for the RFSO took place between April 2012 and March 2013.¹⁰

4. Canada's electronic tendering service.

5. The date of publication as specified in the Notice of Proposed Procurement; however, the RFSO is dated November 7, 2011.

6. See PWGSC's answer "A.1 a)" to question "Q.1 a)" in Amendment No. 3, Government Institution Report (GIR), Attachment 4.

7. The Tribunal notes that the specified date of the original bid submission cannot be found in the documents submitted with the complaint; ADR's bid documentation was only provided in part. According to the GIR (para. 27), PWGSC received ADR's proposal on December 15, 2012.

8. The Tribunal notes that Amendment No. 7, dated December 14, 2012, undid the changes made to the mandatory requirements M.3 and M.4 in Amendment No. 5.

9. See PWGSC's answer "A.2" to question "Q.2" in Amendment No. 14, GIR, Attachment 16.

10. As confirmed by PWGSC in its GIR at para. 28.

15. On April 23, 2013, PWGSC informed ADR that it had been selected for issuance of a standing offer for Streams 2, 4 and 5 but not for Stream 3. ADR was rejected for Stream 3 on the basis that the proposed resource in issue did not comply with mandatory requirement MT-3.2 and its second proposed resource did not comply with mandatory requirement MT-3.4.¹¹

ADR's Objection and PWGSC's Response

16. On April 30, 2013, ADR objected to PWGSC by telephone with respect to the proposed resource in issue that did not meet mandatory requirement M.2 of the RFSO. PWGSC's Standing Offer Authority (SOA) undertook to review the evaluation of ADR's proposal for Stream 3.

17. According to the GIR, on May 2, 2013, the SOA contacted ADR by telephone and discussed the basis for PWGSC's finding that ADR's proposal was non-compliant for Stream 3.

18. Between May 9 and May 14, 2013, ADR and the SOA exchanged several e-mails and had further telephone discussions. As part of these exchanges, ADR repeated the view that its proposal for Stream 3 was compliant and requested a written response from the SOA confirming whether or not it would address ADR's concerns. ADR also sought clarification on why its proposal was rejected for the purpose of filing a complaint with the Tribunal.

19. During the same period, the SOA reiterated the reasons for its rejection of ADR's proposal for Stream 3, but eventually indicated that her manager would review the matter. Although the parties agreed that the SOA advised ADR by telephone that PWGSC would review the matter internally, they cited different dates for this conversation.¹² Furthermore, PWGSC denied that the SOA indicated she would provide ADR with an "official" written clarification, as alleged by ADR.¹³

20. On May 27, 2013, ADR wrote to the SOA to remind her that it was still waiting for the "promised"¹⁴ response (presumably from the SOA's manager). The next day, the SOA responded to ADR confirming that she would discuss the matter with her manager.

21. On June 7, 2013, ADR wrote to the SOA to inquire as to whether a decision had been made with regard to the matter.

22. On June 19, 2013, the SOA wrote to ADR stating that, after review of ADR's documentation and related projects, nothing justified a change to PWGSC's decision of April 23, 2013.

23. Further e-mails were exchanged between ADR and the SOA on June 19, 2013, showing that ADR still expected a letter from the SOA's manager as "promised". An e-mail on the record appears to indicate that in the SOA's view, no such commitment had been made. ADR requested a written response from the SOA's manager for the purposes of filing a complaint with the Tribunal and to "clos[e] the loop".

24. On June 21, 2013, the SOA sent a letter to ADR reiterating that PWGSC would not revise its decision of April 23, 2013.

11. The GIR confirmed that "MT-3.2" refers to the mandatory technical criterion for Stream 3 referred to in the RFSO as "M.2". On the basis of that information, the Tribunal assumes that "MT-3.4" refers to the mandatory technical criterion for Stream 3 referred to in the RFSO as "M.4", which is not at issue in the complaint.

12. See GIR at para. 37 and Attachment 21; see also Exhibit PR-2013-011-01A, Vol. 1, Attachment 10.

13. Exhibit PR-2013-011-01A, Vol. 1, Attachment 10.

14. *Ibid.*

Rejection of ADR's First Complaint

25. As stated above, ADR filed its first complaint with the Tribunal on July 12, 2013 (PR-2013-009). It was not accepted for inquiry because the Tribunal found that it had not been filed within the prescribed time limits.

Acceptance of ADR's Present Complaint

26. As soon as ADR learned that its first complaint was not accepted, it filed evidence with the Tribunal to demonstrate that the complaint was late due to circumstances beyond its control. ADR provided a copy of a receipt from Canada Post Corporation (CPC) dated July 2, 2013, as proof that the Tribunal should have received its complaint by July 4, 2013, the date by which it would have had to have been received to be deemed timely.¹⁵

27. This evidence convinced the Tribunal that the requirements of paragraph 6(3)(a) and subsection 6(4) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*¹⁶ had indeed been met. The receipt clearly showed that ADR's complaint should have been received by the Tribunal on time, i.e. by July 4, 2013, had it been delivered in accordance with the terms and conditions applicable to CPC's "XPost" services, and as ADR had paid for and expected. Therefore, the Tribunal found that the delayed delivery of the complaint was attributable to a cause beyond ADR's control.

28. The present complaint was filed on August 1, 2013. On August 6, 2013, the Tribunal informed the parties that it 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 *Regulations*. The Tribunal also granted ADR's request to incorporate the information and documents from the first complaint on the administrative record.

29. On August 30, 2013, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.¹⁷ On September 9, 2013, ADR filed its comments on the GIR.

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

PROVISIONS OF THE RFSO

31. The RFSO contained the following general provisions relating to the preparation of technical offers and the evaluation procedures:

15. The receipt shows proof of payment to CPC for its "XPost" delivery service of a package to the Tribunal's address (see Exhibit PR-2013-011-01, Vol. 1). According to publicly available information on CPC's website, "XPost", also known as "Xpresspost", refers to its express shipping services, which provide fast and affordable delivery within one to two business days between major urban centres in Canada. The tracking number specified on the receipt shows that ADR's package arrived at CPC's facilities in Ottawa on July 3, 2013. However, the Tribunal did not receive the hard copy of ADR's complaint until July 12, 2013.

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

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

PART 3 – OFFER PREPARATION INSTRUCTIONS

...

Section I: Technical Offer

In their technical offer, offerors should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.

...

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION

1. Evaluation Procedures

(a) Offers will be assessed in accordance with the entire requirement of the Request for Standing Offers including the technical and financial evaluation criteria.

...

(c) Listing experience without providing any supporting data to describe where and how such experience was obtained will result in the experience not being included for evaluation purposes.

...

2.2 Basis of Selection

For Stream 3 and 5

An offer must comply with the requirements of the Request for Standing Offers and meet all mandatory and financial technical evaluation criteria to be declared responsive.

To be declared responsive, an offer must:

- (a) comply with all the requirements of the Request for Standing Offers (RFSO); and
- (b) meet all mandatory technical evaluation criteria; and
- (c) submit an average all-inclusive daily rate not exceeding 20% of the median calculated from all responsive offers.

...

Offers not meeting (a) or (b) or (c) above will be declared non-responsive. A National Master Standing Offer (NMSO) will be issued to all responsive Offerors.

...

32. The RFSO contained the following mandatory technical criteria:

ATTACHMENT 1 to PART 4 TECHNICAL AND FINANCIAL CRITERIA

1.1.1 Mandatory Technical Criteria

The Offer must meet the mandatory technical criteria specified below. The Offeror must provide the necessary documentation to support compliance with this requirement for each proposed resource for each stream applicable.

Offeror must clearly indicate the Service Stream for which the Offeror is proposing service as well as submitting separate proposals for each Service Stream for which the Offeror is proposing service. Each stream will be evaluated separately.

Offers which fail to meet the mandatory technical criteria will be declared non-responsive. Each mandatory technical criterion should be addressed separately.

...

STREAM 3 – GROUP PROCESS AND WORK PLACE ASSESSMENT

...

M.2 The Offeror must demonstrate that each proposed resource has started and completed within the last five (5) years, either in the public or private sector, a minimum of ten (10) projects of demonstrated experience providing Group Process and Work Place Assessment services at the time of bid closing.

For three (3) of the projects submitted above, the following information must, as a minimum, be provided:

- Name of the client organization including name of the client reference, (telephone number and e-mail address if available) – client reference may be contacted to verify the information contained within;
- Brief description of the Scope and Objective of the project to clearly show relevancy of the project;
- Description of the resource’s role in the project;
- Start and end dates of the project (month/year to month/year); and
- Level of effort (in hours).

...

33. A detailed description of the services for Stream 3 is set out in the RFSO under “Annex A – Statement of Work”, which reads as follows:

3. DESCRIPTION OF SERVICES

...

STREAM 3 – GROUP PROCESSES AND WORK PLACE ASSESSMENT

As a possible first step, and when asked for by the Identified User, perform a diagnostic process to identify intra- and inter- group dynamics which impact the workplace to determine the underlying causes, identify the parties’ interests, and explore strategies for improvement. This participatory and impartial process has a series of steps involving participants in identifying ways of addressing conflict in the workplace, including: the convening of information meetings; gathering data in groups and individually; and the preparation of a summary of findings containing a survey of themes gleaned from the diagnostic process used.

A workplace Assessment identifies what is working effectively in a work unit and what is not, according to the employees or members who are working within the group can engage in discussions to resolve conflicts that are negatively impacting them. It allows all individuals in a work unit to provide their opinions, views and perceptions, in a confidential manner, on a variety of issues that are important to explore in order to understand their work environment.

Group processes provide an opportunity for group members to work through issues that are causing difficulties within the group and to find ways to improve the working environment. The Offeror is responsible for the process while the group maintains control over the topics discussed and any actions taken.

Group intervention is an ADR process that can be designed collaboratively with employees or members when impacted by conflict or as a preventative measure. It requires approval and involvement of those with authority within a group to bring about positive changes in that working unit or between working units. A group intervention is designed to provide a safe environment that encourages participants to discuss underlying needs and interests and resolve the conflicts in the workplace.

Based on initial input, either from the requester or a Group Needs Assessment, the Offeror recommends and implements a Group Intervention process to bring about positive and appropriate changes in the work environment. The expectation is that the group will acknowledge the issues in the work environment and develop strategies through the Group process facilitation piece to resolve current and potential conflicts that emphasize personal responsibility for follow through action.

...

POSITION OF THE PARTIES

PWGSC

34. In the GIR, PWGSC submitted that, because ADR's allegations were without merit, the complaint should be dismissed. PWGSC also argued that ADR failed to "demonstrate" that all of its submitted projects met the specified requirements of the RFSO as required by mandatory technical criterion M.2.

35. PWGSC distilled M.2 to three essential requirements: (1) the proposed resource has started and completed 10 applicable projects, (2) which fall within the meaning of "Group Processes and Work Place Assessment" services and (3) were started and completed within the last five years at the time of bid closing.

36. With respect to Ground 1 of the complaint, PWGSC argued that ADR's proposed Project No. 10 did not meet the mandatory time frame set out in M.2 because it was not started within the five years of the bid closing date. Given the closing date of January 13, 2012, any submitted projects had to have been started and completed between January 13, 2007, and January 13, 2012.

37. Although PWGSC conceded that Project No. 10 would have been compliant at the time ADR submitted its original proposal given that its start date was December 2006, the subsequent extension of the bid closing date from December 19, 2011, to January 6, 2012, meant that Project No. 10 no longer fell within the specified time frame. Nevertheless, PWGSC submitted that the burden fell upon ADR to revise its proposal accordingly as other bidders had done in response to the amended bid closing date of January 13, 2012.

38. In PWGSC's view, ADR knew or ought to have known that Project No. 10 was no longer compliant with requirement M.2 because it was outside the time frame of the amended bid closing date. PWGSC pointed out that ADR was apparently well aware that it could revise a previously submitted bid because ADR did, in fact, submit a revised proposal (dated January 6, 2012) on January 3, 2012. However, ADR did not replace Project No. 10 in its revised proposal.

39. In relation to Ground 2, PWGSC submitted that ADR's descriptions of Projects No. 8 and 9 did not meet requirement M.2 because they were simply examples of "group processes" and were not related to conflict in the workplace as required by the RFSO. As stated in PWGSC's letter to ADR dated April 23, 2013, PWGSC determined that Projects No. 8 and 9 did not cover a "conflict situation" and had "no work place assessment associated to it".

40. Highlighting the definition of "Group Processes and Work Place Assessment" services in the Statement of Work of the RFSO (section 3 of Annex A), PWGSC identified various required elements of that phrase for the purposes of Stream 3, including "conflict situation", "work", "workplace" and "work environment". It submitted that Projects No. 8 and 9 clearly did not involve individual disputes or conflicts relating to a workplace or work environment.

41. With respect to ADR's allegation that the guidelines in the RFSO about what constituted "Group Processes and Work Place Assessment" services were unclear, PWGSC submitted that this phrase was meant to be read as a whole and did not contemplate two distinct types of services, i.e. "group processes" and "work place assessments". According to PWGSC, it was clear that the applicable projects had to meet all the required elements, i.e. group processes and assessments in relation to conflict situations in the workplace.

ADR

42. In response to the GIR, ADR disputed PWGSC's argument with respect to Ground 1, namely, that ADR knew or ought to have known that Project No. 10 was no longer compliant after the bid closing date was extended, starting with Amendment No. 6.¹⁸

43. For ADR, PWGSC affected the degree to which Project No. 10 was compliant when it changed the bid closing date. Furthermore, PWGSC's actions gave rise to an equitable obligation, in light of the principles of procedural fairness and natural justice, whereby PWGSC was required to (1) expressly notify potential bidders that the amended bid closing date could affect the currency of projects submitted for their proposed resources and (2) give the benefit of the doubt to bidders where their proposed projects no longer fell within the specified time frame, due to the extended closing date.

44. ADR submitted that it would have revised its inclusion of Project No. 10 had it been clearly stated in the amendments subsequent to Amendment No. 6 that the currency of projects proposed for mandatory requirement M.2 may have been affected by the various extensions of the bid closing date. In fact, ADR alleged that, when the bid closing date was amended on December 14, 2011, it contacted the SOA to express its concern that the change would affect its original proposal that had already been submitted with a view to the prior closing date of December 19, 2011. In ADR's view, none of the subsequent amendments (i.e. Amendments No. 7 to 14), or PWGSC's answers to questions from potential bidders, specifically referred to having to revise the currency of the applicable projects.

45. On the basis of the above, ADR submitted that the disqualification of its proposal for Stream 3 was procedurally "unfair", especially in light of the complexity of this particular RFSO and related procurement process given the number of amendments that had been made.

46. With respect to Ground 2, ADR maintained its position that Projects No. 8 and 9 demonstrated the "diversity" of the proposed resource's experience in various types of group processes and not just workplace assessment services. ADR contended that, on the basis of the different "processes" described in the Statement of Work, it was reasonable for it to conclude that descriptions of either group processes or workplace assessments could be provided for the purposes of meeting mandatory requirement M.2.

47. Furthermore, ADR submitted that any example provided where some form of work was involved should be acceptable given that the RFSO did not provide a clear and express definition of words such as "workplace", "work" and "work environment". According to ADR, both Projects No. 8 and 9 involved work, and project No. 9 in particular related to work it had done for the federal government.

18. When ADR submitted its original proposal to meet the prior bid closing date of December 19, 2011, its Project No. 10 met the required time frame under mandatory requirement M.2, as it started in December 2006.

48. Finally, ADR challenged PWGSC's assertion that Projects No. 8 and 9 did not exhibit the resolution of conflicts between individuals in the workplace. ADR argued that PWGSC relied on a very specific "type" of conflict, even though the RFSO did not specify that applicable group processes must relate to conflicts involving relationships between individuals at work. On this basis, ADR submitted that Projects No. 8 and 9 addressed matters with underlying conflict situations, all of which were in line with the intent of mandatory requirement M.2 and, thus, should have been sufficient for compliance purposes.

TRIBUNAL'S ANALYSIS

49. 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. Subsection 30.14(2) of the *CITT Act* requires the Tribunal to 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.

50. 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 *Agreement on Internal Trade*,¹⁹ the *North American Free Trade Agreement*,²⁰ the *Canada-Chile Free Trade Agreement*,²¹ the *Canada-Peru Free Trade Agreement*,²² the *Canada-Colombia Free Trade Agreement*²³ and the *Canada-Panama Free Trade Agreement*.²⁴ The *Agreement on Government Procurement*²⁵ does not cover the procurement in issue.²⁶

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19. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].
 20. *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].
 21. *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.
 22. *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).
 23. *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).
 24. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).
 25. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].
 26. The Tribunal has determined that the AGP does not apply to the alternative dispute resolution services in question on the basis of Annex 4 of that agreement, which excludes "Arbitration and conciliation services" (CPC code 86602). The related explanatory note states as follows: "Assistance services through arbitration or mediation for the settlement of a dispute between labour and management, between businesses or between individuals. Exclusions: Representation services on behalf of one of the parties in the dispute and consulting services in the field of labour relations are classified in subclass 86190 (Other legal advisory and information services), 95110 (Services furnished by business and employers organizations) and 95200 (Services furnished by trade unions), respectively" [emphasis added]. In the Tribunal's view, this captures the nature of the services in question.

Preliminary Issue—Inquiry Limited to the Subject Matter of the Complaint

51. As a preliminary matter, the Tribunal notes that ADR's detailed statement of facts and arguments referred to mandatory technical criteria M.1 and M.2 of the RFSO for Stream 3.²⁷

52. In the Tribunal's view, however, only mandatory technical criterion M.2 is relevant to the disposition of the complaint. Indeed, ADR's grounds for complaint and response to the GIR clearly relate to PWGSC's determination that the proposed resource in issue did not comply with mandatory technical criterion M.2. Furthermore, PWGSC made no reference at all to the possibility that Projects No. 8, 9 and 10 were not compliant with the M.1 criterion.

53. That being said, the Tribunal notes that PWGSC's decision to reject ADR's proposal for Stream 3 was also based on its conclusion that ADR's second proposed resource was non-compliant with mandatory technical criterion M.4. However, ADR did not raise the rejection of its second proposed resource in its grounds for complaint nor does the complaint refer to mandatory criterion M.4.

54. The Tribunal has, therefore, limited its considerations to whether PWGSC improperly disqualified ADR's Projects No. 8, 9 and 10 on the ground that they did not comply with mandatory technical criterion M.2.

Relevant Provisions of the Applicable Trade Agreements

55. The Tribunal has narrowed its inquiry to the relevant provisions of the *AIT* and *NAFTA* in light of the fact that the other applicable trade agreements have similar obligations.

56. 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.

57. Article 1015(4) of *NAFTA* provides as follows:

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

General Principles

58. The Tribunal has long recognized that “. . . compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system” and, “[t]herefore, procuring entities must evaluate bidders' conformance with the mandatory requirements thoroughly and strictly.”²⁸

27. Exhibit PR-2013-011-01A, Vol. 1, Attachment 10.

28. *IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) at 7.

59. The Tribunal has also based its decisions on the fact that bidders bear the onus of demonstrating compliance with mandatory criteria.²⁹ In other words, it has consistently placed the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation with the bidder. In this way, bidders are solely responsible for seeking clarification on any questions that arise before submitting an offer.³⁰ Bidders must exercise due diligence in the preparation of their proposals to make sure that they are compliant in all essential respects.³¹

60. A large measure of deference has typically been accorded to evaluators in their evaluation of proposals. In *Excel*, the Tribunal confirmed that it “. . . will interfere only with an evaluation that is *unreasonable* . . .” and will substitute its judgment for that of the 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.”³² In other words, if the Tribunal finds that the evaluators have adequately assessed the submissions by applying the evaluation requirements as per the terms of the solicitation, it will not substitute its opinion for that of the evaluators.

61. Bearing these principles in mind, the issue before the Tribunal is whether PWGSC’s determination that ADR’s proposal for Stream 3 did not comply with mandatory technical criterion M.2 was reasonable under the circumstances and in accordance with the requirements of the relevant trade agreements. PWGSC’s evaluation will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.³³

62. Before addressing the specific circumstances relating to the two grounds of complaint, the Tribunal notes that the RFSO expressly stated, in section 2.2 of Part 4, that, in order to be declared responsive for Stream 3, “[a]n offer must comply with the requirements of the [RFSO] and meet all mandatory financial and technical evaluation criteria”

63. Similarly, in the “2006 (2011-05-16) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements” (Standard Instructions), which are incorporated by reference into and form part of the RFSO, section 05 on the “Submission of Offers” expressly states, *inter alia*, that it is the bidder’s responsibility to obtain clarification of the requirements contained in the RFSO, if necessary, before submitting an offer and to prepare its offer in accordance with the instructions therein.³⁴

29. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel*] at para. 34.

30. *Info-Electronics H P Systems Inc. v. Department of Public Works and Government Services* (2 August 2006), PR-2006-012 (CITT) at para. 23.

31. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT). In that case, the Tribunal also found that, while a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, it is not under any duty to do so.

32. *Excel* at para. 33. See also *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 26.

33. *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) at para. 25.

34. At the time of the Tribunal’s review of the complaint, the Standard Instructions were available online at <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/9>>.

Ground 1: Did PWGSC Improperly Disqualify Project No. 10?

64. The Tribunal finds that mandatory technical criterion M.2 clearly required bidders to demonstrate that each of their proposed resources had started and completed the applicable projects within five years of the bid closing date. The evidence shows that Project No. 10 for the proposed resource in issue fell outside the prescribed time frame and was, therefore, properly deemed non-compliant by PWGSC.

65. The fact that there were numerous amendments to the RFSO certainly appears to have made the bidding process more complex. Nevertheless, complexity cannot be used as an excuse. ADR could (and should) have amended its offer accordingly after the issuance of Amendment No. 6, at which point it knew, or ought to have known, that the bid closing date had been changed to January 13, 2012. ADR, as the bidder, was solely responsible for ensuring that its bid was compliant with the mandatory requirements, regardless of how many times the RFSO was amended.

66. Furthermore, the Tribunal is satisfied that PWGSC addressed the level of complexity in the procurement process by notifying potential bidders of the possibility that their previously submitted proposals might need to be revised in light of amendments to the RFSO. For example, both Amendments No. 13 and 14 included PWGSC's answers to other potential suppliers to the effect that they could, if they wished, revise their previously submitted proposals.³⁵ The Tribunal notes that these answers were issued on January 3, 2012, and January 5, 2012, respectively, which was after ADR wrote to PWGSC on December 14, 2011, regarding its concern that the change to the bid closing date affected the currency of its proposed projects.

67. Indeed, ADR submitted a revised bid on January 4, 2013. This bid continued to include Project No. 10 for the proposed resource in issue even though ADR must have known that Project No. 10 was no longer compliant with mandatory technical criterion M.2 on the basis of the extension of the bid closing date in Amendment No. 6.

68. Accordingly, the Tribunal finds that ADR did not exercise the requisite due diligence to ensure that its proposal was compliant with all the essential requirements of the RFSO.

Ground 2: Did PWGSC Improperly Disqualify Projects No. 8 and 9?

69. The Tribunal finds that PWGSC made a reasonable determination that Projects No. 8 and 9 did not meet all of the requirements for Stream 3, i.e. that these two projects did not fall within the meaning of "Group Processes and Work Place Assessment" services, as required by mandatory technical criterion M.2.

70. Although the phrase "Group Processes and Work Place Assessment" services was not expressly defined in the RFSO, section 3 of the Statement of Work did provide a fulsome description of its meaning and essential elements for the purposes of Stream 3. The frequent and interrelated explicit references to concepts such as "workplace", "conflict in the workplace", "work environment", "employees", "working unit" and "work" provide a reasonable indication to bidders that these concepts must be reflected in the applicable projects submitted.³⁶

35. See "Q.1" and "A.1" in Amendment No. 13, dated January 3, 2012, and "Q.1" and "A.1" in Amendment No. 14, dated January 5, 2012.

36. In previous inquiries, where a term is not expressly defined in the solicitation, the Tribunal has referred to the context in which that term is used in the solicitation to determine a reasonable interpretation of its meaning. See, for example, *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT) at 11.

71. The Tribunal is not persuaded by ADR's submission that it was reasonable to conclude, on the basis of the wording in section 3 of the Statement of Work, that projects dealing with either group processes or work place assessments were acceptable for the purposes of M.2. Instead, it was reasonably clear that PWGSC intended the meaning of "Group Processes and Work Place Assessment" to be read (and applied) as a whole in the context of section 3, i.e. encompassing group processes and assessments in relation to conflict situations in the workplace.

72. Section 3, for example, clearly described "Group Processes and Work Place Assessment" as interrelated services, as shown by the following excerpts:

- . . . perform a diagnostic process to identify intra- and inter- *group dynamics which impact the workplace* . . . and explore strategies for improvement.
- A *workplace Assessment* identifies what is working effectively in a *work unit* and what is not, according to the employees or members who are working within the group, *so the group can engage in discussions to resolve conflicts* that are negatively impacting them. It allows *all individuals in a work unit* to provide their opinions, views and perceptions . . . in order to understand their *work environment*.
- Based on initial input, either from the requestor or a *Group Needs Assessment*, the Offeror recommends and implements a *Group Intervention process* designed to bring about positive and appropriate changes *in the work environment*. The expectation is that the group will acknowledge the *issues in the work environment* and *develop strategies through the Group process facilitation piece to resolve current and potential conflicts* that emphasize personal responsibility for follow through action.

[Emphasis added]

73. ADR's descriptions of Projects No. 8 and 9 did not include express references to the required concepts outlined in section 3 of the Statement of Work, i.e. group processes and assessments in relation to conflict situations in the workplace. In stark contrast, however, ADR provided explicit references to the resource's experience in resolving conflicts between individuals or groups of individuals within the workplace in Projects No. 1 to 7.

74. While Projects No. 8 and 9 may have indirectly involved "work" and "conflict situations", as alleged by ADR in its comments on the GIR, ADR should have included this information in its proposal. Given that ADR bears the onus of demonstrating compliance with the mandatory requirements of the RFSO, it was incumbent on ADR to be more explicit in its descriptions of these projects, as it was in the descriptions for Projects No. 1 to 7. This is further supported by paragraph 2(f), section 05, "Submission of Offers", of the Standard Instructions that states that it is the bidder's responsibility to "provide a comprehensible and sufficiently detailed offer . . . that will permit a complete evaluation in accordance with the criteria set out in the RFSO."

75. On the basis of the information relating to Projects No. 8 and 9 that was before the evaluators, the Tribunal finds that it was reasonable for them to conclude that these projects did not involve a workplace or conflict situation between individuals.

76. In sum, having carefully reviewed the evidence before it, the Tribunal found no reason to interfere with the determination of the evaluators with respect to Grounds 1 and 2. The Tribunal is of the view that they evaluated ADR's compliance with mandatory technical criterion M.2 of the RFSO thoroughly and strictly in conformity with Article 506 of the *AIT* and the analogous provisions of *NAFTA* and the other applicable trade agreements.

77. As an aside, in reviewing the complaint, the Tribunal was mindful of ADR's allegation that PWGSC mishandled or failed to properly address ADR's concerns in relation to the grounds of complaint. In particular, the Tribunal notes that ADR alleged that the SOA was in a conflict of interest when it came to handling ADR's objection and debriefing, since that same person had been designated to administer the procurement process. Nevertheless, the Tribunal is not persuaded, on the basis of its review of this procurement process alone, that there is a systemic issue in breach of any of the applicable trade agreements.

78. On the basis of the foregoing, the Tribunal therefore finds that the complaint is not valid.

COSTS

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

80. The Tribunal's preliminary view is that this complaint has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. Although the procurement was moderately complex, as it dealt with five streams of professional services categories, the complexity of the complaint itself was low, as it only involved the issue of one mandatory evaluation criterion. Furthermore, the complaint proceedings were not complex, as there were no motions, no additional submissions by parties and no hearing was held.

81. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

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

Ann Penner
Ann Penner
Presiding Member