Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-013

Saskatchewan Institute of Applied Science and Technology

v.

Department of Foreign Affairs, Trade and Development

Determination and reasons issued Thursday, January 9, 2014

Canada

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

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*;

AND FURTHER TO an order issued by the Canadian International Trade Tribunal on October 10, 2013, which dismissed a motion filed by the Department of Foreign Affairs, Trade and Development seeking an order dismissing the complaint for lack of jurisdiction.

BETWEEN

SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND TECHNOLOGY	**Complainant**

AND

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT	**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 valid in part.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Saskatchewan Institute of Applied Science and Technology its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Foreign Affairs, Trade and Development. 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 $2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in 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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Procurement Case Officer:	Josée B. Leblanc
Complainant:	Saskatchewan Institute of Applied Science and Technology
Counsel for the Complainant:	David R. Elliott Douglas B. Richardson
Government Institution:	Department of Foreign Affairs, Trade and Development
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STATEMENT OF REASONS

COMPLAINT

1. On September 4, 2013, Saskatchewan Institute of Applied Science and Technology (SIAST) 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] The complaint relates to a Request for Proposals, Solicitation No. 2013-A-033388-1 (the RFP) issued by the Canadian International Development Agency (CIDA), now the Department of Foreign Affairs, Trade and Development (DFATD),[2] for professional services in relation to the implementation and management of a project in the Socialist Republic of Vietnam (Vietnam), titled the "Vietnam Skills for Employment Project" (VSEP), in partnership with various Vietnamese institutions.

2. SIAST alleged that DFATD failed to evaluate its technical proposal in accordance with the criteria published in the RFP.[3] As a remedy, SIAST requested that its proposal be re-evaluated on the basis of the published criteria and that it be awarded higher scores. SIAST also requested that the award of the contract be postponed pursuant to subsection 30.13(3) of the *CITT Act*.

3. On September 6, 2013, the Tribunal accepted the complaint 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*.[4] The Tribunal concurrently ordered the postponement of the award of any contract until it determined the validity of the complaint.

4. On September 23, 2013, the consortium of Agriteam Canada Consulting Ltd. and College of the North Atlantic (Agriteam), which submitted the winning bid, requested that the Tribunal grant it intervener status in this proceeding. The Tribunal granted this request on September 26, 2013.

5. On September 27, 2013, DFATD filed a motion requesting that the Tribunal order the dismissal of SIAST's complaint, on the basis that SIAST was not a "potential supplier" within the meaning of section 30.11 of the *CITT Act* and that, therefore, the Tribunal lacked jurisdiction to conduct an inquiry. Having considered the submissions of the parties, the Tribunal denied DFATD's request.[5]

6. On October 30, 2013, DFATD filed a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[6] Agriteam filed its comments on November 5, 2013. SIAST filed its replies to the GIR and Agriteam's comments on November 15, 2013.

PROCUREMENT PROCESS

7. The RFP was issued on August 8, 2012, and described the VSEP as follows:

> The Canadian International Development Agency (CIDA) is seeking to retain the services of a Consultant to implement and manage the project, in partnership with the Vietnam National University - Ho Chi Minh and the three Provincial People's Committees to strengthen Vietnamese

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. Throughout these reasons, references will be to DFATD or CIDA, as required by the context.
3. The bid was submitted by a consortium composed of SIAST, the Association of Canadian Community Colleges, the Fisheries and Marine Institute of Memorial University and the Vancouver Island University.
4. S.O.R./93-602 [*Regulations*].
5. The Tribunal's order was issued, together with reasons, on October 10, 2013.
6. S.O.R./91-499.

> capacity for Technical and Vocational Education Training (TVET) leadership and management and to enable the knowledge building and sharing of TVET best practices in TVET institutions.[7]

8. SIAST submitted its consortium's proposal on the bid closing date of October 24, 2012. Two other proposals were also submitted in response to the RFP.

9. On July 15, 2013, SIAST was informed that another bidder had been selected to enter into contract negotiations with DFATD.[8] The complaint is not clear about when or how SIAST found out that Agriteam was the successful bidder.

10. SIAST requested a debriefing session on several occasions. DFATD eventually agreed and met with SIAST on August 7, 2013, revealing the general scores that its evaluators had assigned to each element of SIAST's proposal.

11. SIAST wrote to DFATD after the meeting on August 7, 2013, indicating that it had further appealed the outcome of the evaluation process to the Regional Director General of DFATD's Asia Directorate. SIAST argued that a number of the scores were inconsistent with the point allocation for sub-criteria in the RFP. SIAST stated that the most obvious inconsistency concerned Requirement 9 and requested that DFATD provide a more detailed explanation of how points were allocated rather than the more general explanation given during the debriefing session.

12. SIAST reiterated its objections in a letter dated August 16, 2013, as a response from DFATD had not yet been received.[9]

13. DFATD responded to the objections by letter dated August 21, 2013. It advised SIAST that it had reviewed the scores allocated under Requirement 9 and concluded that they were consistent with the RFP. DFATD also provided the detailed allocation of points that were awarded to elements of SIAST's proposal.

14. In an e-mail dated August 22, 2013, SIAST requested a further appeal to the Deputy Minister of International Development. In addition to continuing to dispute the scoring under Requirement 9, it raised concerns about other requirements on the basis of the detailed allocation of points that it had received from DFATD the day before.

15. SIAST reiterated its objections in greater detail in subsequent letters dated August 26 and 29, 2013.[10]

16. On August 30, 2013, DFATD advised SIAST that no further information was available and assured SIAST that all bids had been evaluated with due diligence.

17. SIAST filed its complaint with the Tribunal on September 4, 2013.

18. In accordance with the Tribunal's order for the postponement of the award of any contract, no contract has been awarded by DFATD to date. Furthermore, it appears that, on September 16, 2013,

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7. See RFP, "Summary Description".
8. See complaint.
9. See "Response to Notice of Motion on Behalf of Saskatchewan Institute of Applied Science and Technology" dated October 2, 2013, tab I.
10. See complaint.

DFATD requested all bidders to consider extending the validity of their bids until March 31, 2014.[11] It is unknown to the Tribunal if any bidders other than SIAST and Agriteam agreed to do so.

PRELIMINARY ISSUE: WHETHER THE RFP RELATES TO A DESIGNATED CONTRACT

19. In the GIR, DFATD argued that SIAST's complaint did not relate to a designated contract. Accordingly, it suggested that the Tribunal did not have jurisdiction, given that the Tribunal only has jurisdiction under section 30.11 of the *CITT Act* to hear complaints "... concerning any aspect of the procurement process that relates to a designated contract ...."

20. Specifically, DFATD argued that the RFP was exempt from the coverage of the applicable trade agreements because it dealt with the provision of international government assistance or the direct provision of goods and services to a foreign government. In its view, "government assistance" and the "direct provision of goods and services to a foreign government" were outside the scope of the applicable trade agreements, namely, Article 1001(5)(a) of the *North American Free Trade Agreement*,[12] Article 518 of the *Agreement on Internal Trade*[13] and Note 2 of the General Notes for Canada to the World Trade Organization *Agreement on Government Procurement*.[14]

21. Indeed, DFATD argued that the RFP dealt with a contract for the provision of direct technical assistance to Vietnam, pursuant to certain agreements between the Government of Canada and the Government of Vietnam to promote a program of development cooperation.[15] Under a Memorandum of Understanding (MOU), DFATD argued that it was responsible for contracting a Canadian executing agency to implement the development assistance project in Vietnam known as the VSEP. According to DFATD, the RFP therefore related to government assistance and/or the provision of goods and services, both of which were exempt from the applicable trade agreements.

22. Agriteam concurred with DFATD's position. It also argued that, where the direct purpose of a solicitation is to provide assistance to other countries, the Tribunal has no jurisdiction over that

11. See "Response to Notice of Motion on Behalf of Saskatchewan Institute of Applied Science and Technology", tab S. According to the terms of the RFP, proposals were to remain valid and open for acceptance for a period of 180 days after the closing date for the receipt of bids (see paragraph 5.1 of section 1, "Instructions to Bidders", of the RFP). Since this period has expired, DFATD has requested bidders on at least two occasions to extend the validity of their proposals.
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) [*NAFTA*].
13. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
14. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
15. DFATD referred to the "General Agreement on Development Cooperation Between the Government of Canada and the Government of the Socialist Republic of Vietnam" (Canada-Vietnam Agreement) of June 21, 1994, under which the governments of the two countries have agreed to promote a program of development cooperation. DFATD further referred to the "Memorandum of Understanding between the Government of Canada and the Government of the Socialist Republic of Viet Nam Concerning Viet Nam Skills for Employment Project" (Canada-Vietnam MOU) dated August 29, 2012, a subsidiary arrangement related to the Canada-Vietnam Agreement, whereby the parties further outline the implementation of a Canadian development assistance project in Vietnam – the VSEP. See GIR at tabs 8 and 9 respectively.

procurement.[16] According to Agriteam, the Canada-Vietnam MOU clearly established that the direct purpose of the RFP was indeed government assistance.[17]

23. In the alternative, Agriteam argued that only the *AIT* could apply to the case at hand. Pursuant to Article 1001 of *NAFTA* and Article 1 of the *AGP*, CIDA could only be considered a covered entity when it procured "on its own account". This, however, was not the case with the RFP, because CIDA was not the "direct beneficiary" of the solicitation; CIDA was merely acting as an intermediary in the procurement process for Vietnam and its agents, all of whom were the direct beneficiaries of the VSEP.

24. SIAST opposed the arguments of DFATD and Agriteam. It argued that the selected consultant, not CIDA, would carry out the services under the VSEP. To that end, it highlighted Tribunal jurisprudence that determined that, when goods or services were not provided directly by a government department, the exemptions in the trade agreements did not apply.[18] SIAST submitted that the presence of the Canada-Vietnam MOU did not have the effect of transforming the direct purpose of the solicitation into government assistance. Instead, SIAST argued that government assistance was simply the indirect purpose of the RFP.

25. SIAST argued that the successful bidder would provide services to CIDA and, thus, be accountable to CIDA, as CIDA would maintain a supervisory role. Accordingly, SIAST argued that these facts clearly demonstrated that the direct purpose of the solicitation was to provide services *to CIDA*, not a foreign government, and that CIDA was conducting the procurement "on its own account".[19]

Tribunal Analysis on Jurisdiction

26. Pursuant to subsection 30.11(1) of the *CITT Act*, the Tribunal has jurisdiction to conduct an inquiry into ". . . any aspect of the procurement process that relates to a designed contract . . . ."

27. A "designated contract" is defined in section 30.1 of the *CITT Act* as ". . . a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations". The *Regulations* in turn refer to the contracts or classes of contracts described in relevant provisions of the applicable trade agreements.[20]

28. DFATD and Agriteam argued that the applicable trade agreements in this case are *NAFTA*, the *AGP* and the *AIT*. SIAST did not object.

29. All three trade agreements provide, in slightly varying terms, that the word "procurement" does not include "government assistance" or the "provision of goods and services" to persons or other governments.

16. Agriteam relied on *Valley Associates Inc.* (30 August 2011), PR-2011-025 (CITT) at para. 17.
17. In this respect, Agriteam referred to *IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT) [*IBM Canada*] at 5.
18. SIAST refers to *Bureau d'études stratégiques et techniques en économique v. Canadian International Development Agency* (5 September 2007), PR-2007-010 and PR-2007-012 (CITT) [*BESTE*], *Consortium Genivar - M3E - Université d'Ottawa* (11 August 2003), PR-2002-074 (CITT) [*Consortium Genivar*] and *IBM Canada*.
19. Hereafter, all references will be to DFATD instead of CIDA.
20. See subsection 3(1) of the *Regulations*.

30. Article 1001 of *NAFTA* provides as follows:

> **Article 1001: Scope and Coverage**
>
> . . .
>
> 5. Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. *Procurement does not include*:
>
> (a) non-contractual agreements or *any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments*;
>
> . . .
>
> [Emphasis added]

31. The General Notes to Canada's Appendix I Annexes in the *AGP* provide the following definition:

> 2. Procurement in terms of Canadian coverage is *defined as contractual transactions to acquire property or services for the direct benefit or use of the government*. The procurement process is the process that begins after an entity has decided on its requirement and continues through to and including contract award. *It does not include non-contractual agreements or any form of government assistance, including but not limited to, cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments.* It does not include procurements made with a view to commercial resale or made by one entity or enterprise from another entity or enterprise of Canada.
>
> [Emphasis added]

32. Article 518 of the *AIT* similarly provides the following definition:

> **procurement** means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:
>
> (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
>
> (b) government provision of goods and services to persons or other government organizations.

Interpretation and Application to this Case

33. The facts relating to the RFP are clear. The terms of the RFP underscore that DFATD conducted this procurement to retain a consultant for the VSEP.[21] In other words, DFATD would enter into a contract with the successful bidder, and the successful bidder would in turn provide services to DFATD.[22]

34. It is equally clear that the successful bidder would implement and carry out various stages of the VSEP[23] and that the beneficiaries of the VSEP would be the various Vietnamese institutions that received

21. RFP, "Summary Description".
22. See RFP at 1 for the definition of the term "Consultant". See, also, RFP at 83-85 for the definitions of "Consultant", "Party", "Recipient Country" and "Third Party".
23. The RFP describes the project and the expected results in the RFP at 46-56.

technical assistance. The ultimate beneficiaries, however, would be the Vietnamese people and businesses that would receive improved technical and vocational education in the country.[24]

35. The RFP specifies that DFATD would be responsible for setting the general direction of the project in conjunction with the Government of Vietnam. DFATD would also be responsible for ensuring appropriate use of Canadian funds and for managing the successful bidder's contract.[25] The RFP also reveals that the successful bidder would report continuously to DFATD, as various steps of the work would require DFATD's approval.[26]

36. Finally, it is also clear from the RFP that the VSEP was to be a Canadian development assistance project consistent with various agreements between Canada and Vietnam to foster development cooperation between the two countries, which was contemplated, in particular, in the Canada-Vietnam MOU.[27] According to its own terms, the Canada-Vietnam MOU provided that DFATD would be Canada's responsible authority and that it would select and contract a Canadian executing agency to implement the VSEP.

37. Accordingly, the direct purpose of the RFP is for DFATD to retain the professional services of a consultant. Put another way, the ultimate goal of the RFP is to hire a consultant to carry out the VSEP in conjunction with Vietnamese institutions, for the benefit of people and businesses in Vietnam.

38. SIAST pointed to three separate decisions in which the Tribunal found that the "government assistance" and/or "government provision of goods and services" restrictions in Article 1001(5) of *NAFTA*, General Note 2 to Canada's Appendix I Annexes in the *AGP* and Article 518 of the *AIT* (hereafter, the restrictions) did not exclude solicitations in which DFATD sought to retain the services of a consultant to carry out some part of an international development project.[28] SIAST also noted that the Tribunal made those decisions on the basis of facts that were almost identical to the RFP.

39. The Tribunal agrees with SIAST's view.

40. The relevant provisions of *NAFTA*, the *AGP* and the *AIT* simply stipulate that "procurement" does not include "government assistance" or "provision of goods and services". In their ordinary meaning, these phrases refer to the simple idea of a *government entity* handing out a type of assistance (be it, for example, fiscal incentives or goods given to individuals).

41. As the Tribunal stated in *BESTE* in respect of the *AIT*, in particular Article 518(b):

> 20. . . . Since Article 518(b) contemplates *government* provision of goods and services to persons or other government organizations, one of the pre-conditions of this exemption is the *direct* government provision of goods and services, which, of course, is not the case here, since the services are not provided directly by CIDA but rather through a consultant. The purpose of Article 518(b) is to exclude from the definition of "procurement" services that are provided directly by a government to its citizens or to other government organizations.
>
> [Underlining added for emphasis]

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24. Vietnam is described as the "Recipient Country". See definition of "Recipient Country" in RFP at 2. See, also, the description of "Project Beneficiaries" in the RFP at 51.
25. RFP at 51, "CIDA".
26. RFP at 59-69.
27. The RFP at 51 also refers to the Canada-Vietnam MOU.
28. See *IBM Canada*, *Consortium Genivar* and *BESTE* at paras. 16-22, remanded back to the Tribunal by the Federal Court of Appeal on an issue not relevant to this appeal and without mention of the jurisdictional issue. See *Bergevin v. Canada (International Development Agency)*, 2009 FCA 18 (CanLII). The Tribunal notes that, in *Consortium Genivar* and *BESTE*, the Tribunal only decided on the coverage under the *AIT*, finding it unnecessary to decide the extent of coverage under the other trade agreements.

42. The same observation applies to Article 1001(5) of *NAFTA* and to General Note 2 to Canada's Appendix I Annexes in the *AGP*.

43. DFATD's argument in this case would require adding words to these provisions and reading the restrictions as if they stated that "procurement" does not include *procurements conducted with a view to providing* government assistance/goods and services. However, had the intention of the drafters been to exclude from the scope of the trade agreements *procurements* conducted for this particular purpose, they could have done so explicitly. Indeed, the language of the restrictions contrasts with the wording of other provisions of the trade agreements, which specifically exclude from their scope "procurements" conducted for certain objectives or seeking certain types of services. For example, Article 1001(5)(b) of *NAFTA* provides that "procurement" does not include the following:

> (b) *the acquisition of* fiscal agency or depository services, liquidation and management services *for* regulated financial institutions and sale and distribution services *for* government debt.
>
> [Emphasis added]

44. Similarly, Article 507 of the *AIT* provides that other types of "procurements" are not subject to the procurement provisions of the *AIT*.[29]

45. Further, it appears that the main purpose of all the relevant provisions is to provide a definition for the word "procurement" as contractual transactions through which the government acquires something for its own use or benefit. The first sentence of all those provisions stipulates that the word "procurement" means an *acquisition* by the covered government entities, through *contractual transactions* such as purchase, rental, lease or conditional sale.

46. On the other hand, the relevant provisions describe government assistance as including "cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments".[30] It appears clear from these descriptions that, through such operations, the government does not acquire anything for its own use or benefit.

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29. Article 507 of the *AIT* provides as follows:

> This Chapter does not apply to:
> (a) procurement of goods intended for resale to the public;
> (b) procurement of goods, services or construction:
> (i) purchased on behalf of an entity not covered by this Chapter; or
> (ii) purchased by entities which operate sporting or convention facilities in order to comply with a commercial agreement with an entity not covered by this Chapter that contains provisions incompatible with this Chapter;
> (c) procurement from philanthropic institutions, prison labour or persons with disabilities;
> (d) procurement contracts with a public body or a non-profit organization;
> (e) procurement of:
> (i) goods purchased for representational or promotional purposes; or
> (ii) services or construction purchases for representational or promotional purposes outside the territory of a Party; and
> (f) procurement of any goods the interprovincial movement of which is restricted by laws not inconsistent with this Agreement.
>
> [Footnotes omitted]

30. See Article 1001(5)(a) of *NAFTA*. The language of the *AGP* is substantially the same. The text of the *AIT* is slightly different, in that it mentions separately "government provision of goods and services" and "government assistance through means such as grants, loans, equity infusion, guarantees or fiscal incentives".

47. All this leads the Tribunal to the view that procurement, on the one hand, and government assistance, on the other, describe entirely different realities. The provisions differentiate between *acquisitions* by the government and various types of assistance provided by the government. The latter are outside the scope of the word "procurement" because they are not acquisitions at all. In this way, the word "procurement" is restricted to situations where the government seeks out private actors in order to acquire something for its own use or benefit.

48. In this context, it would be inappropriate to extend the ordinary meaning of the words "government assistance" and/or "provision of goods and services" to include the idea of *procurements* conducted for those purposes.[31] As stated, the words "government assistance" and "provision of goods and services" appear in the relevant provisions of *NAFTA*, the *AGP* and the *AIT* to clarify, by opposition, the *fundamental nature* of government procurement; the purpose of these words is *not* to exclude from the scope of the trade agreements certain *types* of procurements.

49. Therefore, the Tribunal continues to hold that procurements to retain a consultant who will later provide certain services to another government do not constitute government assistance or government provision of goods and services within the meaning of the restrictions.[32]

50. In putting forward its argument, DFATD did not comment on the three cases that SIAST used to argue that the "government assistance" and/or "government provision of goods and services" restrictions did not exclude solicitations in which DFATD sought to retain a consultant to carry out some part of an international development project. Instead, DFATD relied exclusively on certain parts of the Tribunal's decision in *Valley Associates Inc.*,[33] in which the Tribunal determined that the direct purpose of the solicitation in that case was to assist other countries and concluded that the procurement, therefore, did not concern a designated contract within the meaning of subsection 3(1) of the *Regulations.*

51. Notwithstanding DFATD's position, the Tribunal does not believe that *Valley Associates* is fully applicable to the case at hand for three reasons. First, DFATD only relied on comments that the Tribunal made as an aside and did not acknowledge the primary basis of the Tribunal's decision. Second, *Valley Associates* was a decision that the Tribunal made not to conduct an inquiry into a filed complaint and was therefore reached without the benefit of submissions by the parties. Third, as SIAST rightly noted, the facts in *Valley Associates* were different from the case at hand, as the goods procured in *Valley Associates* were going to be provided directly by the government, not through a consultant.

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31. It may also be mentioned that other trade agreements contain, in addition to exclusions for "any form of government assistance" and "government provision of goods and services", an exclusion for "*purchases for the direct purpose of providing foreign assistance*" [emphasis added]. Although the Tribunal does not need to consider the exact import of this language for the purposes of this case, it would appear that this additional exclusion supports the Tribunal's interpretation that the restrictions themselves do not extend to procurements conducted for the purpose of providing assistance. See *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); *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008; *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).
32. *IBM Canada*.
33. (30 August 2011), PR-2011-025 (CITT) [*Valley Associates*] at para. 17.

52. In regard to Agriteam's alternative argument that Annex 1001.1a-1 of *NAFTA* and Appendix 1 to the *AGP* exempt DFATD from the application of those trade agreements in this case, the Tribunal cannot agree. Those provisions indicate that the respective trade agreements apply only to the "Canadian International Development Agency (*on its own account*)" [emphasis added]. The nature of DFATD's role in the current procurement process, the resulting contract, the VSEP and, indeed, the fact that DFATD stands to benefit from the procured services for its own purposes of carrying out its development mandate and commitments are all inconsistent with Agriteam's argument that DFATD is ". . . merely acting as an intermediary in the procurement process, while the selected bidder will be providing direct services to, and liaising and dealing directly with, the Vietnamese stakeholders."[34] Moreover, the evidence clearly indicates, instead, that DFATD is conducting this procurement "on its own account."[35]

53. Accordingly, the Tribunal finds that the RFP relates to a designated contract and that the Tribunal does indeed have jurisdiction to inquire into SIAST's complaint.

TRIBUNAL ANALYSIS: EVALUATION OF SIAST'S TECHNICAL PROPOSAL

54. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *AIT*, the *AGP* and *NAFTA*.

55. SIAST raised four grounds of complaint, all of which expressed its view that its proposal was not evaluated in accordance with the criteria under Requirements 1, 5, 6 and 9 of the RFP.

56. The applicable trade agreements require a procuring entity to evaluate proposals in accordance with the requirements set out in the solicitation documents (i.e. the RFP).[36]

57. The Tribunal must therefore determine whether DFATD breached the trade agreements by evaluating SIAST's proposal contrary to the requirements of the RFP.

Standard of Review

58. The Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. Therefore, the Tribunal has repeatedly stated 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.[37] In addition, the Tribunal has previously

34. Agriteam's comments at para. 33.
35. This conclusion is consistent with the Tribunal's decision, on similar facts, in *IBM Canada*.
36. See, in particular, Article 1015(4)(d) of *NAFTA*, Article 506(6) of the *AIT* and Article XIII(4)(c) of the *AGP*.
37. See, for example, *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at paras. 26-28.

indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.[38]

59. It is also well established that there is an onus on bidders to demonstrate how their proposals meet the mandatory and rated criteria published in the solicitation documents. Stated another way, the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation or meets the rated criteria ultimately resides with the bidder.[39] In this respect, the Tribunal has consistently refused to impose an obligation on government institutions to seek clarifications from bidders.[40] While bidders can and should ask questions to clarify mandatory and technical requirements before bids are submitted, government institutions are not required to do likewise when bids are received.

60. It is in the context of these overarching principles that the Tribunal must assess whether DFATD's evaluation of SIAST's proposal was in accordance with the published criteria in the RFP.

Requirement 9—Qualification of Proposed Canadian Field Project Director

61. The sub-criterion of Requirement 9 provides as follows:

> **Requirement 9 – Canadian Field Project Director (1 CV)**
>
> The Canadian Field Project Director supporting the project should meet the following minimum education and experience requirements:
>
> . . .
>
> b) Experience (maximum 120 points)
>
> . . .
>
> At least five (5) years in a leadership or management role (vice president, dean, department chair or other senior academic function) in Canada in a Canadian technical or vocational postsecondary institution (maximum 30 points)
> - 5 years of experience = 18 points
> - Additional years = one point per year (maximum 12 points)

62. SIAST's candidate, Mr. David Harvey, had 16 months of experience as SIAST's Associate Vice-President (AVP) of Business Development and Advancement and 13 years of experience as SIAST's Director of Business Development and International Partnership (Director).[41]

63. SIAST obtained a score of zero under this sub-criterion, a score that the evaluators justified as follows:

> Weaknesses: The Canadian Field Project Director failed to demonstrate his experience in a leadership or management role in an academic function . . . .[42]

64. In its complaint, SIAST alleged that the score of zero was unreasonable because Mr. Harvey ". . . held a leadership or management role at SIAST for 14 years and has been responsible for a number of

38. *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 52.
39. *Ibid.*
40. See, for example, *Accipiter Radar Technologies Inc. v. Department of Fisheries and Oceans* (17 February 2011), PR-2010-078 (CITT) [*Accipiter*] at para. 52.
41. SIAST's response to the GIR, tab 15.
42. *Ibid.*, tab. 13.

academic areas . . . .” SIAST requested that its score under sub-criterion of Requirement 9 be adjusted within the range of 18 to 30 points.

65. DFATD defended the evaluator’s score in the GIR, arguing that the requirement “other senior academic function” must be interpreted together with the preceding words. Consequently, other such senior academic functions must be *equivalent* to the roles of “vice president, dean, department chair”. In particular, DFATD argued that the proposed personnel must have “. . . experience in higher-ranking functions that is comparable or equivalent to . . . the level of vice president, dean, department chair”[43] and that it was not sufficient to demonstrate leadership at just any rank. DFATD further explained that, while Mr. Harvey’s experience as AVP “might” meet this requirement, he had only held this position for a short time and that his previous position as Director was not at a comparable rank.

66. Agriteam agreed with DFATD and added that the requisite experience under Requirement 9 must involve academic functions. Agriteam argued that, while SIAST’s candidate may have had leadership or management experience, his experience lacked an “academic function”. Furthermore, while Mr. Harvey’s position as AVP could be the only one arguably equivalent to the sub-criterion of Requirement 9 (although this was not admitted by Agriteam), Mr. Harvey had not held that position for the minimum period of five years.

67. In response, SIAST argued that DFATD did not explain why Mr. Harvey’s experience was not equivalent to the senior academic function required under this sub-criterion. SIAST underlined that DFATD’s main position seemed to be based on the title held by Mr. Harvey and that its assessment that Mr. Harvey’s position as Director was not a high enough rank. In this respect, SIAST argued that there is no universal standard for the *titles* used to identify senior leadership positions in academic institutions across Canada and that the actual *functions* of individual candidates must be taken into account. SIAST underlined that the GIR did not go as far as to say that the AVP position was unsatisfactory and underscored that its proposal explicitly stated that Mr. Harvey’s duties as Director were the same as his duties as AVP, with the exception of “donor and alumni relations”, duties which, in and of themselves, were not directly related to senior academic leadership or management, but to revenue generation instead.

68. Furthermore, SIAST argued that, on the basis of the actual functions carried out by Mr. Harvey, as opposed to his title, it was unreasonable to conclude that his experience did not meet the requirement in the RFP. In other words, the actual functions that Mr. Harvey preformed over his tenure at SIAST as Director established that he had leadership or management experience at a senior level. In this context, SIAST argued that DFATD’s decision to award a score of zero was arbitrary and ignored vital information in its proposal.

69. In response to all these views, the Tribunal notes that there appears to be a dissonance between the arguments presented in the GIR and the evaluators’ comments. The evaluators noted that SIAST’s proposal was weak because “[t]he Canadian Field Project Director failed to demonstrate his experience in a leadership or management role in an academic function . . . .”[44] While the GIR emphasized that Mr. Harvey’s position as Director did not meet the required rank, the evaluators emphasized the lack of an “academic function”. Indeed, the GIR did not claim that the analysis presented therein was actually undertaken by the evaluators.

43. GIR at para. 33.
44. See SIAST’s response to the GIR, tab. 13.

70. Therefore, the question of whether the evaluation was conducted consistently with the criteria in the RFP must be resolved by considering the *evaluators'* analysis, as opposed to arguments presented after the fact by counsel.

71. It appears that the evaluators interpreted Requirement 9 in the same manner as Agriteam. In other words, the evaluators considered that the sub-criterion called for a leadership or management role specifically related to academia and that the academic role was paramount to any other kind of leadership role in a Canadian technical or vocational postsecondary institution. In this respect, Agriteam argued that the words "senior academic function" qualified the terms that preceded them so that ". . . the only leadership or management roles that are responsive to this sub-criterion are those involving academic functions."[45]

72. The Tribunal considers that this interpretation of the sub-criterion is reasonable, in light of the language of Requirement 9.

73. When Requirement 9 is read in its entirety, the description "other senior academic function" reasonably indicates that the RFP required leadership or management experience in an academic function. In the Tribunal's view, a reasonable interpretation must normally give meaning to all the words of a published sub-criterion. In this case, the sub-criterion not only called for experience in a "leadership or management role" but also further characterized the type of experience required by the examples in parenthesis, that is, vice president, dean, department chair or other senior academic function. The interpretation adopted by SIAST in its comments on the GIR—that ". . . it is clear that the RFP is calling for at least 5 years leadership or management experience at a senior level within an academic setting"[46]—strips the words "academic function" of meaning. Indeed, that the experience had to have been acquired within an academic setting was already evident from the requirement that it be acquired "in a Canadian technical or vocational postsecondary institution."

74. As such, the Tribunal finds that the evaluators interpreted the sub-criterion consistently with the published criterion. In the Tribunal's view, while the requirement could have been formulated differently, the presence of the words "academic function" should at least have caught the attention of bidders about the type of leadership or management role that was being sought and should have enticed SIAST to seek clarification of the requirement. Indeed, while government institutions have a duty under the trade agreements to enunciate the requirements of any solicitation clearly, the ultimate responsibility to ensure that a proposal is responsive lies with the bidder.[47] In the Tribunal's view, this includes the responsibility to understand the scope of a requirement and seek clarifications as to its meaning, where necessary, from the procuring entity[48] or, failing a satisfactory clarification, to file a complaint with the Tribunal on the basis of the alleged ambiguity, within the timelines established by section 6 of the *Regulations*.

75. In addition, the Tribunal does not find any basis to substitute its judgment for that of the evaluators in their conclusion that SIAST's proposal failed to demonstrate the "academic function" in Mr. Harvey's cumulative experience, as required in the RFP. In fact, the evaluators' determination appears tenable against the standard of review applied by the Tribunal in reviewing evaluations; nothing in the evidence indicates that the evaluators did not apply themselves or ignored vital information in the proposal. In this respect, the Tribunal does not accept SIAST's suggestion that DFATD acted unreasonably in failing to request

45. Agriteam's comments on the GIR at para. 43.
46. SIAST's response to the GIR at para. 45.
47. See, for example, *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34.
48. As contemplated, for example, in section 6.1 of the RFP.

clarifications or further information regarding Mr. Harvey's experience. As was already indicated above, the Tribunal has consistently refused to impose an obligation on government institutions to seek clarifications from bidders.[49] Therefore, the score of zero under this sub-criterion is consistent with the requirement for a minimum five years of experience, a threshold which was not met by SIAST.

76. Accordingly, the Tribunal finds that this ground of complaint is not valid.

Requirement 6—Approach to Results-based Management

77. The relevant passages of Requirement 6 provide as follows:

> **Requirement 6 – Approach to Results-Based Management (maximum 2 pages)**
>
> Guided by Section 4 Terms of Reference (Annex A Project Description and Annex B Specific Mandate of the Consultant), the bidder should describe its approach to incorporating Results-Based Management tools, techniques and practices throughout the project life-cycle (up to 40 points)
>
> The approach will be rated as follows:
>
> . . .
>
> - Does the approach involve the relevant stakeholders? (minimum of three relevant stakeholders, up to 10 points for 5 relevant stakeholders)

78. The detailed evaluation criteria which were used by the evaluators, but not published in the RFP, added the following scoring methodology and non-exhaustive list of relevant stakeholders:

> Does the approach directly involve the relevant stakeholders? (five relevant stakeholders will yield 10 points, four relevant stakeholders will yield 8 points, three relevant stakeholders will yield 6 points, and two or fewer relevant stakeholders will yield zero points)
>
> Look for:
> - VPMU [Vietnamese Project Management Unit] staff
> - Heads of colleges
> - Students
> - Faculty
> - Local authorities
> - MOET [Ministry of Education and Training] & DOET [Department of Education and Training]
> - MOLISA [Ministry of Labour, Invalids and Social Affairs] & DOLISA [Department of Labour, Invalids and Social Affairs]
> - VACC [Vietnam Association of Community Colleges]
> - Other relevant stakeholders[50]

79. SIAST complained that, even though its proposal identified six relevant stakeholders, it received a score of 6 out of 10. SIAST argued therefore that its score should be adjusted to 10 out of 10 under Requirement 6.

80. In the GIR, DFATD suggested that SIAST received six points because it identified three relevant stakeholders. It explained that, even though SIAST identified many stakeholders, the evaluators, using their expertise, accorded only six marks because they found that only three were relevant. In particular, DFATD

49. See, for example, *Accipiter* at para. 52.
50. GIR, tab 14.

stated that SIAST did not mention the provincial labour and education departments, DOLISA and DOET, which were considered very relevant to the project, given its provincial focus.[51]

81. SIAST responded that it identified a list of specific stakeholders, including MOET, MOLISA, Vietnamese Executing Agency (Vietnam National University in Ho Chi Minh), the Vinh Long, Hau Giang and Binh Thuan Provincial People's Committees (PPCs), VACC, and Training Centres of Advanced Management, as well as other stakeholders, such as institutional management, instructors, learners, learner parents, community groups and mass organizations. It argued that it therefore exceeded the stated criterion in the RFP and held that it was "inexplicable" that the evaluators found only three of the above as "relevant". SIAST also noted that the GIR did not identify which stakeholders listed in its proposal were considered relevant or irrelevant.

82. SIAST went further and argued that the RFP provided no basis for penalizing a bidder for failing to specifically mention certain stakeholders, while listing many others. SIAST interpreted the GIR as saying that 4 points were deducted from the 10 because SIAST did not mention DOLISA and DOET. SIAST argued that the PPCs through which DOLISA and DOET co-ordinate provincial activities are the most significant government stakeholders and, further, that DOLISA and DOET themselves are not mentioned anywhere in the RFP or the Canada-Vietnam MOU attached to the GIR. Therefore, SIAST argued that the evaluators created relevant stakeholders with no support in the RFP.

83. The Tribunal notes that, in its plain meaning, Requirement 6 called for an evaluation of whether the proposed approach involved a certain number of relevant stakeholders. It is clear from the published sub-criterion that points would be awarded on the basis of the number of stakeholders involved in the approach narrated in the proposal. As such, the published sub-criterion leaves no place for *deducting* points for failing to name particular relevant stakeholders, as long as a given number of other relevant stakeholders is included.

84. The Tribunal also notes that SIAST's proposal, in which it explains its approach to results-based management and how various stakeholders would be implicated, also appears to have included several of the "relevant" stakeholders. Indeed, the Tribunal notes that the evaluators did not provide any negative comments about SIAST's proposal for Requirement 6. In fact, the very opposite appears to be true, as the evaluators deemed SIAST's approach to be "... generally very good, demonstrating an excellent understanding of actions necessary to ensure efficiency and effectiveness in results-based management. (Req 6)"[52]

85. The Tribunal agrees with SIAST that its proposal was evaluated unreasonably.

86. In the absence of negative comments by the evaluators and on the basis of the incomplete information provided in the GIR, the Tribunal is unsure of the evaluators' method and conclusion under this sub-criterion. The GIR merely states that three of the stakeholders named by SIAST were considered "relevant". The GIR does not state which of the three stakeholders were deemed relevant. As such, the explanations in the GIR are open to interpretation. Which stakeholders did the evaluators deem relevant and why? Furthermore, did they count MOET and MOLISA, named by SIAST, within the relevant stakeholders, then deducted points for not naming DOET and DOLISA, as the GIR is interpreted by SIAST? Or did the evaluators *not* include MOET and MOLISA in their count of the three relevant

51. GIR at para. 57. Note that Agriteam did not provide additional comments on this issue or under any of the other evaluation criteria, its comments on the evaluation being limited to Requirement 9.
52. See GIR, tab 12.

stakeholders due to the fact that they were not named in conjunction with DOET and DOLISA? The explanation is wanting, and the Tribunal is left to guess how the evaluation was conducted.

87. This lack of transparency puts the Tribunal in a difficult position to consider whether the evaluation that only three of the stakeholders named by SIAST were relevant for the purposes of this sub-criterion was supported by a tenable explanation and was therefore reasonable. While there may be a reasonable justification for the evaluators' assessment that only three stakeholders were relevant, the rationale was not explained by DFATD and is not apparent to the Tribunal on a fair reading of the relevant pages of the proposal.

88. In addition, the Tribunal considers that there was a clear contravention of Requirement 6 with respect to the treatment of MOET and MOLISA. The GIR does not dispute that MOET and MOLISA are relevant stakeholders or that they were "involved" in the approach to results-based management described in SIAST's proposal. Considering the plain meaning of the sub-criterion, the simple conclusion should thus have been that MOET and MOLISA should have been credited to SIAST as relevant stakeholders. In the Tribunal's view, withholding points, even though SIAST named these stakeholders, constitutes a clear contravention of the published sub-criterion.

89. If SIAST's interpretation of the GIR is correct, and the evaluators in fact counted MOET and MOLISA within the three relevant stakeholders, only to subtract points for failing to name DOET and DOLISA,[53] the breach of Requirement 6 becomes all the more clear.

90. Had the GIR actually meant to say that the evaluators did not count MOET and MOLISA within the three relevant stakeholders because SIAST did not name DOET and DOLISA at the same time—as appears to have been required by the detailed evaluation criteria—the Tribunal is equally of the view that this was a breach of the sub-criterion.

91. In this respect, the Tribunal is not convinced by DFATD's argument that it was reasonably consistent with the sub-criterion to award points for mention of MOET and MOLISA only if present in conjunction with DOET and DOLISA, due to the provincial focus of the project. As stated, Requirement 6 left no doubt that points would be awarded on the basis of the number of relevant stakeholders named. The fact that a provincial department was not named in conjunction with a relevant national department does not make the national department "irrelevant" for that matter. In addition, even if there was any doubt in this respect, it is noteworthy that DOET and DOLISA were not mentioned in the RFP, neither in section 2.6[54] of the RFP, to which the GIR refers, nor anywhere else in the Terms of Reference, to which the sub-criterion directs. As such, nothing in the RFP indicated that MOET and MOLISA were *irrelevant* in the VSEP if considered without mention of DOET and DOLISA.

53. SIAST's response to the GIR at para. 66.

54. The relevant portion of section 2.6 of the RFP at 64 provides as follows:

> *As described in the Project Description, the Consultant will work closely with VNU-HCM, the Provincial Peoples Committees in the three participating provinces and other stakeholders*. VNU-HCM and other stakeholders will have to provide certain inputs (human and material) required for achieving the project outcomes. Inputs to be provided by VNU-HCM and other stakeholders will be detailed in the Project Implementation Plan and Annual Workplans.
>
> If some inputs are not provided on time, the Consultant will be responsible to remind the responsible stakeholder and advise CIDA as soon as the facts have become known.
>
> [Emphasis added]

92. Accordingly, the Tribunal concludes that the evaluation under this sub-criterion is not supported by a tenable explanation and was conducted according to criteria not disclosed in the RFP. Therefore, the Tribunal finds that this ground of complaint is valid.

Requirement 1—Experience in Educational Reform

93. Requirement 1 provides as follows:

> **Requirement 1 – Experience in educational reform, preferably in technical and vocational education (maximum 4 pages)**
> Using Form Tech-4A, the Bidder should provide one project to demonstrate direct experience in educational reform projects of similar scope and complexity of the project description in Annex A.
>
> For this criterion, similar scope means: (up to 60 points)
> - Project involves experience in implementing an educational reform or providing technical assistance in implementing an educational reform with a focus on four, ideally seven of the following elements: institutional planning, faculty development and training, curriculum development and restructuring, technical training equipment assessment and/or upgrading, student engagement and retention, institutional evaluation, performance evaluation or benchmarking for development purposes (up to 30 points)
>   - Identical/Complete Match (seven elements) – 30 points
>   - Very Similar (six of seven elements) – 26 points
>   - Similar (five of seven elements) – 22 points
>   - Somewhat similar (four of seven elements) – 18 points

94. SIAST complained that DFATD unreasonably failed to recognize that it achieved an "identical/complete match" through a project carried out in Ukraine. In SIAST's view, its proposal identified all seven required elements of focus in educational reform and, therefore, deserved a perfect score of 30 out of 30 and not 26 out of 30, as given by the evaluators.

95. DFATD argued that, according to Requirement 1, 30 points would be awarded *if* all seven elements were the subject of focus in the project. With respect to SIAST's Ukraine project, only six out of seven elements were deemed to be the subject of focus. DFATD explained in particular that the element "student engagement and retention" was not directly addressed, nor was it sufficiently explained.

96. SIAST responded that the GIR did not explain what was missing from its proposal. It highlighted several passages from its proposal to demonstrate how its work in Ukraine involved "student engagement and retention".

97. After carefully reviewing SIAST's proposal, the Tribunal does not find DFATD's evaluation under this sub-criterion unreasonable. It was within the evaluators' discretion to determine whether the treatment of all seven elements was sufficient. Likewise, it was within the evaluators' authority to determine that the element "student engagement and retention" was insufficiently addressed and explained. The Tribunal is satisfied that nothing in the relevant passages of SIAST's proposal indicates that the evaluators' assessment was unreasonable and that, in particular, nothing indicates that the evaluators have not applied themselves in evaluating SIAST's proposal, have ignored vital information provided in the bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria so as to justify the Tribunal substituting its judgment to that of the evaluators.

Requirement 5—Approach to Developing Capacities and Sharing Knowledge with Vietnamese Stakeholders

98. Requirement 5 provides as follows:

> **Requirement 5 – Approach to developing capacities and sharing knowledge with Vietnamese stakeholders (maximum 3 pages)**
>
> Guided by Section 4 Terms of Reference (Annex A Project Description and Annex B Specific Mandate of the Consultant), the Bidder should provide a narrative describing how capacities will be developed and knowledge shared with the Vietnamese stakeholders.
>
> The approach will be evaluated based on its appropriateness. In this criterion, appropriateness refers to:
>
> . . .
>
> - Identification of methods specific to capacity development and knowledge sharing (a minimum of six relevant methods, up to 30 points for 10 relevant methods)

99. SIAST alleged that it identified at least six relevant methods and that its score for this sub-criterion should be adjusted to at least 15 out of 30 instead of zero.

100. The evaluators' comments showed that they found that "[t]he overall approach for capacity transfer was poor and failed to demonstrate a sufficient number of key actions necessary for capacity development and knowledge sharing. (Req 5)"[55]

101. Further, DFATD argued that the evaluators considered all the information contained in the proposal, which was too general and unclear.[56]

102. SIAST responded that the proposal described several specific methods for developing capacities and sharing knowledge.[57] It suggested that the evaluators were unfair to require too much detail, when the proposals were restricted to a maximum of three pages for Requirement 5. SIAST also suggested that the RFP did not require a score of zero in cases where the rated criteria were not completely addressed and that a score of zero was an unreasonable exercise of discretion.

103. The Tribunal finds that the evaluators' assessment appears to be supported by a reasonable explanation. On the basis of evidence in SIAST's proposal, the Tribunal cannot conclude that the evaluators ignored relevant information, did not apply themselves or otherwise conducted the evaluation unreasonably so as to warrant the Tribunal's intervention.

104. In addition, the Tribunal notes that the RFP required a minimum number of relevant methods. The reference to this minimum threshold reasonably indicates that, if that threshold was not met, no points would be awarded. Awarding a score of zero where a proposal was deemed not to meet the threshold is therefore consistent with the published criterion.

55. GIR, tab 12.
56. Protected GIR at para. 47.
57. SIAST's technical proposal at 62, 63, 64.

REMEDY

105. In summary, the Tribunal finds that only one of SIAST's four grounds of complaint is valid. The evaluation of Requirement 6 is the only one that can be deemed unreasonable on basis of the evidence in this case.

106. Therefore, the Tribunal must consider the appropriate remedy, pursuant to sections 30.15(2) and (3) of the *CITT Act*.

107. In its complaint, SIAST requested that its proposal be re-evaluated and that a higher score be awarded for Requirements 1, 5, 6 and 9. In its response to the GIR, SIAST went further and requested that the Tribunal recommend that it, not Agriteam, be awarded the contract.[58] SIAST also requested costs in the amount of $350,000 for reimbursement of complaint costs and/or bid preparation costs.

108. DFATD did not address the remedy issue.

109. Agriteam submitted that it would be unfair to order a re-evaluation of SIAST's proposal and/or the granting of higher scores. In its view, these remedies would be unfairly prejudicial, as it would put its contract with DFATD at risk. Moreover, these remedies would be unfair to other bidders whose bids would not be re-evaluated. Agriteam also submitted that it would be unfair if the RFP was re-tendered, because all bidders have, at this point, had access to sensitive details about the cost put forward in its financial proposal, which would allow them to tailor their own proposals to gain an advantage. Furthermore, fairness and objectivity in the evaluation could not be ensured, because the evaluators have also had access to the financial proposals and could no longer evaluate without regard to the bottom line price, as is envisaged in the RFP.

110. In recommending an appropriate remedy under subsection 30.15(3) of the *CITT Act*, the Tribunal must consider all the circumstances relevant to the procurement in question, including (1) the seriousness of the deficiencies found by the Tribunal, (2) the degree to which SIAST and other interested parties were prejudiced, (3) the degree to which the integrity and efficiency of the competitive procurement system were prejudiced, (4) whether the parties acted in good faith and (5) the extent to which the contract was performed.

111. As stated, the Tribunal found that SIAST's proposal was not evaluated consistently with the published sub-criterion under Requirement 6. Evaluating proposals in accordance with published criteria constitutes a central premise of the regulatory regime established by the applicable trade agreements. Contravening this fundamental principle has the potential to seriously affect the integrity and efficiency of the entire procurement system.

112. This breach was compounded by the fact that wanting explanations were provided by DFATD as to the basis of the evaluation, both in the evaluators' notes and in the GIR. Transparency and fairness can only be upheld in the procurement system if and when procuring authorities properly document their evaluations and are forthcoming in their explanations to bidders and the Tribunal alike. Indeed, transparency lies at the heart of the procurement regulatory regime,[59] and transparency is equally essential at the stage of publishing

58. SIAST's response to the GIR at para. 73.

59. Transparency furthers the purposes of the procurement system, which the Federal Court of Appeal enunciated as being (1) fairness to competitors in the procurement system, (2) ensuring competition among bidders, (3) efficiency and (4) integrity. See *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) at para. 23.

the requirements applicable to a solicitation, ensuring that evaluators are provided with guidelines fully consistent with the published criteria, as well as at the stage of providing bidders, and the Tribunal, with meaningful explanations regarding the evaluation.

113. Nevertheless, the Tribunal notes that the particular breach under Requirement 6 was insignificant to the outcome of the procurement process, given the small number of points that the sub-criterion was worth. Indeed, in the circumstances, regardless of the breach found by the Tribunal, SIAST was not prejudiced to a serious degree. Even if SIAST had obtained the maximum number of points under Requirement 6, it still would not have obtained the contract.[60]

114. In combination with these circumstances and the fact that no allegations of bad faith were made by SIAST, the Tribunal is not convinced that the interests of fairness and efficiency, or the general public's interest in the integrity and efficiency of the competitive system, require recommending a remedy. Instead, recommending a remedy could have the opposite effect. Any further delays or expenses incurred in this procurement process could have a greater negative impact on the system than the prejudice that SIAST has already suffered.

115. Likewise, the Tribunal will not award SIAST its bid preparation costs under subsection 30.15(4) of the *CITT Act*. Incurring costs in the preparation of a response to a solicitation is a normal incident of participation in competitive procurement processes; SIAST would have incurred the same costs for preparing its bid even if there had been no breach of the trade agreements.

Costs

116. However, the Tribunal awards SIAST its reasonable costs incurred in the Tribunal's inquiry process. When determining the amount of the cost award for this 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.

117. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline*. Although the services involved in this procurement were complex, involving an undefined service project, the issues in this complaint itself, which dealt with subjective evaluation criteria, were only moderately complex. The complaint proceedings were also moderately complex, as there was one motion, one intervener and an additional jurisdictional challenge raised in the GIR. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award to SIAST is $2,400.

118. In regard to whether costs should be awarded to DFATD because SIAST's complaint was only found to be valid in part, the Tribunal does not award any costs to DFATD. DFATD's motion regarding "potential suppliers" and the jurisdictional issue regarding "designated contracts" were unfounded and contributed significantly to the complexity and length of this proceeding. Accordingly, the Tribunal does not find it appropriate to award DFATD costs even though it prevailed on some of SIAST's grounds of complaint.

60. See the point differential between SIAST and Agriteam SIAST's response to the GIR, tab 9.

119. Finally, the Tribunal does not award any costs to Agriteam. Consistent with the principles referred to in previous determinations,[61] the Tribunal finds that Agriteam should not be awarded costs because it chose to intervene and brought no new substantive issues to the proceedings.

DETERMINATIONS OF THE TRIBUNAL

120. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part.

121. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal determines that the circumstances relevant to the procurement do not warrant the recommendation of a remedy.

122. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards SIAST its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by DFATD. 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 $2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Ann Penner

Ann Penner
Presiding Member

61. *TPG Technology Consulting Limited v. Department of Public Works and Government Services* (20 December 2007), PR-2007-060 (CITT) at 38; *Canadian North Inc. v. Department of Indian Affaires and Northern Development* (5 April 2007), PR-2006-026R (CITT); *Bosik Vehicle Barriers Ltd. v. Department of Public Works and Government Services* (6 May 2004), PR-2003-082 (CITT); *Bell Mobility v. Department of Public Works and Governments Services* (14 July 2004), PR-2004-004 (CITT); *Northern Lights.*