



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

Files No. PR-2018-014 and
PR-2018-024

KPMG LLP

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, November 23, 2018*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 BACKGROUND 1

 PROCEDURAL ISSUES..... 2

 REQUIREMENTS OF THE TRADE AGREEMENTS 3

 ANALYSIS OF THE COMPLAINTS..... 4

 Evaluation of Criterion RT7-6..... 4

 Evaluation of Criterion RT4-1 6

 Record-Keeping Requirements 7

CONCLUSION 7

COMPLAINT COSTS 7

DETERMINATION 8

IN THE MATTER OF complaints filed by KPMG LLP 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*.

BETWEEN

KPMG LLP

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 complaints are not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in preparing and proceeding with these complaints, which costs are to be paid by KPMG LLP. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the levels of complexity is Level 2 and Level 1 for Files No. PR-2018-014 and PR-2018-024, respectively, and its preliminary indication of the total amount of the cost award is \$3,900. If any party disagrees with the preliminary level of complexity or 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 *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

Tribunal Panel:	Randolph W. Heggart, Presiding Member
Support Staff:	Peter Jarosz, Counsel
Complainant:	KPMG LLP
Counsel for the Complainant:	Gerry Stobo Marc McLaren-Caux
Government Institution:	The Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Ian McLeod Roy Chamoun Kathryn Hamill Peter Osborne Scott Rollwagen Brendan Morrison Zachary Rosen
Intervener:	Deloitte Inc.
Counsel for the Intervener:	Vincent DeRose Jennifer Bradford

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

[1] On July 13, 2018, and August 29, 2018, KPMG LLP (KPMG) filed complaints with the Canadian International Trade Tribunal (Tribunal) concerning a request for proposal (RFP) with respect to a procurement (Solicitation No. G9292-189325/A) for the provision of advisory services regarding transformation planning, implementation, management and oversight at Employment and Social Development Canada (ESDC).

[2] KPMG alleges the following:

- With respect to File No. PR-2018-014, that Public Works and Government Services Canada (PWGSC)¹ improperly evaluated its response to criteria RT7-6 “Global Experience” and RT4-1 “Project Leadership Team” experience in three projects of “similar scope and deliverables”.
- With respect to File No. PR-2018-024, that PWGSC failed to maintain records in respect to a re-evaluation process undertaken in respect of RT7-6; that KPMG was not treated equally to Deloitte Inc. (Deloitte) in respect of the evaluation of criterion RT4-1 and that PWGSC improperly allowed Deloitte to clarify its bid.

[3] KPMG abandoned the last ground of complaint after receipt of the Government Institution Report (GIR) in response to PR-2018-024.

[4] For the reasons provided below, the Tribunal finds that these complaints are not valid.

BACKGROUND

[5] On December 4, 2017, PWGSC issued, on behalf of ESDC, the RFP (Solicitation No. G9292-189325/A) for the provision of advisory services regarding transformation planning, implementation, management and oversight at ESDC. The RFP was issued to certain pre-qualified suppliers.

[6] Bidding closed on February 13, 2018. Bids in connection with the RFP were ultimately received from KMPG and several other bidders.

[7] On May 3, 2018, PWGSC notified KPMG that it had not won the solicitation, and identified the winning bidder (Deloitte) and its evaluated price.

[8] On May 17, 2018, KPMG sent an objection letter to PWGSC, raising the same issues as in its complaint to the Tribunal and requesting a copy of the individual scoresheets of the evaluators.

[9] On June 29, 2018, PWGSC sent KPMG a letter denying its objections and maintaining its evaluation of KPMG’s bid. (Additionally, on July 4, 2018, PWGSC sent KPMG, *inter alia*, the individual scoresheets of the evaluators.)

1. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services was changed to Public Services and Procurement Canada. The procurement in question was conducted under the former name.

[10] On July 13, 2018, KPMG filed its first complaint with the Tribunal. The Tribunal accepted this complaint on July 18, 2018, and began its inquiry (PR-2018-014). KPMG alleged that PWGSC improperly evaluated its response to criteria RT7-6 “Global Experience” and RT4-1 “Project Leadership Team” experience in three projects of “similar scope and deliverables”.

[11] After reviewing PWGSC’s GIR in PR-2018-014, KPMG filed a second complaint on August 28, 2018. The Tribunal accepted that complaint on August 30, 2018 (PR-2018-024). This second complaint alleged, *inter alia*, that:

- a) PWGSC failed to maintain records in general and specifically in respect to a re-evaluation process undertaken in respect of RT7-6;² and
- b) KPMG was not treated equally to Deloitte in respect of the evaluation of criterion RT4-1, specifically in relation to two identified elements.³

[12] Deloitte requested and was granted intervener status in PR-2018-014 as well as in PR-2018-024 and filed comments on the GIR in both inquiries.

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

PROCEDURAL ISSUES

[14] During the course of the inquiry, the Tribunal received two procedural requests of note.

[15] KPMG requested that the Tribunal inspect certain documents which were claimed to be privileged. The Tribunal agreed to this request, and the Chair of the Tribunal (who was not the presiding member in this inquiry) inspected the documents and found that they were subject to solicitor-client and litigation privilege and thus were not admissible in this proceeding.⁴

[16] Another request, filed by PWGSC, asked for leave to file sur-reply submissions regarding statements made regarding the actions of PWGSC officials during the procurement process. The Tribunal did not grant the request since it considered any submissions unnecessary to making its determination on the merits of the complaints. The Tribunal is cognizant, and parties should also be, that allegations of bias, partiality, conflict of interest and other improper conduct are untenable without the support of convincing evidence. Making such untenable allegations will not advance parties’ cases and may result in cost consequences.⁵

-
2. In its detailed explanation of this ground of complaint, KPMG also alleged that PWGSC failed to conduct the reevaluation with sufficient procedural safeguards.
 3. An additional ground of complaint with respect to bid repair was abandoned by KPMG after the filing of the GIR in PR-2018-024: Exhibit PR-2018-014-38A, Vol. 1A at para. 5.
 4. The Tribunal was guided in its decision by the principles set out in *Solosky v. The Queen*, [1980] 1 SCR 821 and *Oleynik v. Canada (Privacy Commissioner)*, 2016 FC 1167 (CanLII).
 5. *Bodnarchuk (Re)*, [1995] 3 FC 300, 1995 CanLII 3516 (FC).

REQUIREMENTS OF THE TRADE AGREEMENTS

[17] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint.⁶ 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 and their provisions.⁷

[18] KPMG submits (and PWGSC has not contested) that the applicable trade agreements are the *Canadian Free Trade Agreement*,⁸ the *North American Free Trade Agreement*,⁹ the *Canada-European Union Comprehensive Economic and Trade Agreement*¹⁰ and the *Revised Agreement on Government Procurement*.¹¹

[19] The trade agreements stipulate that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.

[20] When considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. As the Supreme Court of Canada has repeatedly underlined, “. . . reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”¹²

[21] As a result, the Tribunal does not generally substitute its judgments for that of the evaluators, unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a proposal, have based their information on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.¹³ In addition, the Tribunal is of the

6. *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*], s. 30.14.

7. *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 [*Regulations*], s. 11.

8. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

9. *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, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

10. *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017).

11. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) [*Revised AGP*].

12. *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (CanLII) at para. 11 (citing *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)).

13. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.

view that the responsibility for ensuring that a proposal is compliant with all essential criteria of a solicitation ultimately resides with the bidder.¹⁴

[22] As to record-keeping requirements, *NAFTA* and the *Revised AGP* also require procuring entities to maintain complete documentation regarding each of its procurements.¹⁵ The proper retention of documents is an integral part of a fair procurement process. It allows for verification that the procurement process was in fact carried out in accordance with the trade agreements.

[23] However, the Tribunal has specified that such a requirement “. . . ensures the right of each bidder to an evaluation of its bid in a fair and transparent manner without creating an unduly rigorous and impractical standard for purchasers and, specifically, for evaluators. Whether such a balance is struck depends upon the particular facts of each case.”¹⁶ This confirms that such records do not need to meet specific format or content requirements.

ANALYSIS OF THE COMPLAINTS

[24] The statement of work for this procurement provided as follows:

ESDC is seeking private sector expertise and capacity to supply solutions to Departmental level transformation planning, implementation, management and oversight across a spectrum of interlinked investments, projects, initiatives, and activities defined within a Roadmap concept to achieve ESDC Service Strategy goals. The overarching requirement is to ensure seamless integration of all transformation work through the provision of the various solution services described within this SOW to successfully achieve these Service Strategy goals. ESDC is seeking a Contractor with a proven record enabling successful service transformations that has demonstrated a proven and successful approach to change management with experience navigating government processes, building awareness and support for major initiatives.¹⁷

[25] In order to evaluate which bidder was best suited to perform the work, the RFP set out a number of requirements as evaluation criteria for the bids. Five evaluators scored the various proposals. Their evaluation with respect to two of the point-rated criteria is at issue in this inquiry.

Evaluation of Criterion RT7-6

[26] Criterion RT7 stated as follows:

The Bidder's proposal should demonstrate the depth of experience of their global practice in business transformation and its application in providing services as per the requirements described in Section 6.0 (6.3) Support Services Requirements of the Statement of Work. The Bidder should consider Section 7.0 Deliverables in the Statement of Work.

The Bidder should demonstrate its global corporate practice experience and describe its:

14. *Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CITT).

15. See Article 1017(1)(p) of *NAFTA* and Article XVI(3)(a) of the *Revised AGP*.

16. *Almon Equipment Limited* (1 March 2011), PR-2008-048R (CITT) at para. 32.

17. Exhibit PR-2018-014-14, Vol. 1 at 99.

...

6. Global experience

- o Depth of experience (e.g., Bidder number of national or international clients)
- o Breadth of experience (e.g., Bidder number of years in global industry)
- o Bidders ability to directly leverage international experience and expertise.

[27] KPMG argued three grounds regarding the re-evaluation of RT7, specifically that Deloitte's bid should not have been re-evaluated as a result of an objection by KPMG to the evaluation of the KPMG bid, that the re-evaluation with respect to both bids was done improperly (substantively and procedurally), and that records of the re-evaluations were not kept by PWGSC.

[28] Both PWGSC and Deloitte submitted that the evaluation was necessary and fair.

[29] Firstly, the Tribunal is convinced that PWGSC, having determined that it may have interpreted a requirement of the RFP incorrectly, had a positive obligation to make such a correction in the evaluation (which can be referred to as a re-evaluation) of all of the bids. Had PWGSC only re-evaluated KPMG's proposal, it would have amounted to a situation whereby bidders were not treated equally, thus violating the trade agreements.¹⁸

[30] Secondly, as far as the substance of the evaluation, the Tribunal does not find the evaluation of responses with respect to RT7 to be unreasonable, either with respect to KPMG's bid or Deloitte's. In this case the Tribunal is satisfied that the methodology used to arrive at the scores of the bidders was driven by a reasonable interpretation of the RFP and an equal application of the criteria to the contents both bids. Thus, the Tribunal will not interfere with the conclusions of the evaluators on this issue.

[31] Thirdly, the Tribunal is not persuaded that any such additional procedural actions were necessary in this case. Evaluations can change before they are recorded as "final". A correction or change made during a re-evaluation after an objection is made are similar and are also properly part of the overall evaluation process. KPMG has tried to differentiate the scenarios in terms of the process necessary to engage in one versus the other such as additional "procedural safeguards" being necessary in a re-evaluation. In effect, these arguments mean that, since the re-evaluation occurred after the initial evaluation and award, some more rigorous process and documentation may be required as a matter of course. The Tribunal's view is that, on the contrary, it would have been problematic for PWGSC to require different methodology and documentation for the re-evaluation of the responses to RT7 than was required for its initial evaluation of this criterion.

[32] The Tribunal is not persuaded that any violation of the trade agreements occurred as a result of the re-evaluation, either in substance or procedure.

[33] As such, the Tribunal finds this ground of complaint to be not valid.

18. *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)* 2017 FCA 165 (CanLII) at para. 33.

Evaluation of Criterion RT4-1

[34] Criterion RT4-1 stated as follows:

The bidder should propose a solutions Project Leadership Team with demonstrated transformation and integration experience as follows:

1. The Project Executive has successfully managed 3 projects involving contracts of similar scope and deliverables. These projects should encompass transformation support services and provide recommendations regarding digital delivery of public facing programs or services. The Bidder should describe the environment and program(s) in addition to contract value and duration;

[35] KPMG alleges that in not recognizing one of the projects listed in its bid, the evaluators considered factors which were not properly part of the “similar scope and deliverables” criteria in RT4. These allegedly improper factors included various specific aspects of the project. KPMG also argued that the “similar scope” criterion was applied improperly to the facts disclosed by its bid and those disclosed by Deloitte’s bid. Each of these grounds of complaint will be discussed in turn. Finally, KPMG alleges that its bid did not receive equal treatment in respect of RT4-1; specifically, that PWGSC did not require Deloitte’s projects to encompass the full range of “planning, overseeing and managing”, whereas that standard was applied to KPMG’s projects, and that although KPMG and Deloitte projects were in fact similar, they were treated unequally.

[36] Both PWGSC and Deloitte submitted that the evaluation was fair and reasonable and that any difference in scores was a result of the contents of the bids.

[37] The Tribunal notes that the consensus view of the five evaluators was that two projects which KPMG relied on to make its bid did meet the above requirements of RT4, but that the third project did not meet these requirements.¹⁹ This agreement appears to have been unanimous, at least with respect to the overall score for RT4.²⁰ The GIR in PR-2018-014 pointed to many reasons why the evaluators could have so concluded.²¹ Notable is that the evaluators found that the project did not “encompass transformation support services” and therefore did not qualify as being of “similar scope and deliverables” as the subject matter of the RFP.²² This was a conclusion that was reasonably open to them on the basis of KPMG’s bid.

[38] Similarly, regarding Deloitte’s bid, the evaluators concluded that the projects Deloitte had relied upon met the requirements of RT4. The Tribunal finds that this evaluation was reasonable and thus will not interfere with the conclusions of the evaluators on this issue.

19. Exhibit PR-2018-014-14A (protected), Vol. 2D at p. 623 (of the PDF file).

20. *Ibid.* at pp. 646, 659-660, 674 and 688 (of the PDF file). The fact that some evaluators may have changed their evaluations after the consensus stage is a useful feature of consensus discussions and is therefore not a violation of the trade agreements.

21. Exhibit PR-2018-014-14A (protected), Vol. 2B at pp. 17 and 29-34.

22. The GIR in PR-2018-014 outlines that KPMG’s bid, unlike Deloitte’s, did not describe the six solution areas which would allow a detailed comparison of the project with the scope of work: Exhibit PR-2018-014-14, Vol. 1 at paras. 83, 87; Exhibit PR-2018-014-35, Vol. 1A at pp. 2-3.

[39] Ultimately, the Tribunal finds the evaluation with respect to RT4 to be a reasonable one. While some of the explanations as to why KPMG's bid was scored lower than that of Deloitte may be *ex post facto* ones, this does not change the standard of review applied to either contemporaneous reasons recorded by the evaluators or an *ex post facto* explanation. It was reasonable, given the requirement that the projects be of "similar scope and deliverables" and that the bidders were to describe the contract value and duration, that the evaluators considered issues of size, value and duration in their evaluation. The Tribunal finds that, given an appropriate level of deference to the evaluators and taking all of the explanations and arguments into consideration, the proposals of KPMG and Deloitte were treated equally and fairly during the process of their evaluation.

[40] Thus, the Tribunal does not find the evaluation of responses with respect to RT4 to be unreasonable and will not interfere with the conclusions of the evaluators on this issue.

[41] Accordingly, this ground of complaint is not valid.

Record-Keeping Requirements

[42] KPMG argued that PWGSC did not keep records of the re-evaluation as required by the trade agreements.

[43] It must be noted that the initial results and the corrected results for both KPMG and Deloitte were recorded in the individual and consensus scoresheets²³ and that the initial and corrected results were communicated to KPMG, on the basis of which it formulated its initial complaint.²⁴

[44] The records kept by PWGSC in this case, while not exhaustive, enabled KPMG to state its concerns as to these evaluations via a complaint to the Tribunal, and the Tribunal was able to adjudicate the dispute; this is what the record-keeping requirement of the trade agreements are supposed to ensure.

[45] For these reasons, the Tribunal finds that this ground of complaint is not valid.

CONCLUSION

[46] For the reasons above, the Tribunal concludes that the complaints are not valid.

COMPLAINT COSTS

[47] Pursuant to section 30.16 of the *Act*, the Tribunal may award costs of, and incidental to, any procurement inquiry.

[48] As the successful party in this inquiry, PWGSC is entitled to its reasonable costs.

[49] In determining the amount of cost award for these complaints, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of

23. Exhibit PR-2018-014-01A (protected), Vol. 2B at Attachments 3-4 and 6-7; Exhibit PR-2018-014-14A (protected), Vol. 2E.

24. Exhibit PR-2018-014-01A (protected), Vol. 2B at Attachments 3-4 and 6-7.

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.

[50] The procurement here was not particularly complex. The RFP was not hundreds of pages; the services procured were pursuant to a general albeit unique requirement for advisory services regarding transformation of a federal government department.

[51] The first complaint (PR-2018-014) was complex, consisting of several hundred pages of text and documents regarding multiple grounds of complaint. The second complaint (PR-2018-024) was simpler.

[52] The ensuing proceedings were also complex. They consisted of two inquiries which were joined after the second complaint was filed. They included a motion for production of documents, a motion for inspection of privileged documents, interventions (which, as set out above, were granted and necessitated several additional filings in the joint inquiry) and two sets of GIRs and comments on the GIR. It was also necessary to adopt the 135-day extended schedule for issuing a decision in PR-2018-014.

[53] Given the above, the preliminary indication of the levels of complexity is Level 2 (\$2,750) and Level 1 (\$1,150) for PR-2018-014 and PR-2018-024, respectively. The Tribunal will award two sets of costs as these are two inquiries, albeit disposed of jointly. In accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the total amount of the cost award is \$3,900.

DETERMINATION

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

[55] Pursuant to section 30.16 of the *Act*, the Tribunal awards PWGSC its reasonable costs incurred in preparing and proceeding with these complaints, which costs are to be paid by KPMG. In accordance with the *Guideline*, the Tribunal's preliminary indication of the levels of complexity is Level 2 and Level 1 for PR-2018-014 and PR-2018-024, respectively, and its preliminary indication of the total amount of the cost award is \$3,900. If any party disagrees with the preliminary level of complexity or 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 cost award.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member