



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-010

University of Saskatchewan

v.

Agriculture and Agri-Food Canada

*Determination issued
Wednesday, September 18, 2019*

*Reasons issued
Wednesday, October 2, 2019*

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IN THE MATTER OF a complaint filed by the University of Saskatchewan 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

THE UNIVERSITY OF SASKATCHEWAN

Complainant

AND

AGRICULTURE AND AGRI-FOOD CANADA

**Government
Institution**

DETERMINATION

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

The Canadian International Trade Tribunal determines that it will not award costs in this matter.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

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

Tribunal Panel: Susan D. Beaubien, Presiding Member

Support Staff: Sarah Perlman, Counsel

Complainant: University of Saskatchewan

Government Institution: Agriculture and Agri-Food Canada

Counsel for the Government Institution: Susan Clarke
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STATEMENT OF REASONS

1. The University of Saskatchewan (University) has complained to the Canadian International Trade Tribunal (Tribunal) about the process used by Agriculture and Agri-Food Canada (AAFC) to award a contract under the Living Laboratories Initiative: Collaborative Program (LLICP).¹
2. This complaint was filed on May 6, 2019. It is the third complaint filed by the University in relation to the LLICP. Earlier complaints filed on March 25, 2019,² and April 5, 2019,³ were dismissed as premature as the record indicated that the University was seeking recourse from AAFC directly but had not yet received a substantive response.⁴
3. In its Order and Statement of Reasons in both PR-2018-068 and PR-2019-002, the Tribunal indicated that ongoing silence from AAFC extending from 30 days of the Tribunal's disposition of the University's first-filed complaint may be deemed constructive denial of relief by AAFC. In turn, this would trigger the 10-working day statutory period for the University's filing of a timely complaint with the Tribunal.
4. It appears as if the University received no further communication from AAFC. Consequently, this complaint was filed.
5. The University's application under the LLICP was submitted by Dr. Christy Morrissey, a professor in the Department of Biology. The application pertained to a project entitled "Living Lab Prairies: Promoting Resilience and Agroecosystem Innovations that Restore and Incentivize Ecosystem Services".⁵
6. By letter dated May 14, 2019, the Tribunal gave notice that it proposed to commence an inquiry. The substantive content of the University's previously filed complaints have been incorporated by reference into this file.
7. By way of motion filed May 29, 2019, AAFC contested the Tribunal's jurisdiction to conduct an inquiry into the University's complaint. The motion sought an Order for cessation of these proceedings.
8. At the request of AAFC, the Tribunal suspended the requirement for the filing of AAFC's substantive response to the complaint, pending disposition of its motion. The Tribunal also extended the timeline for completion of these proceedings to 135 days.⁶
9. By Order dated July 30, 2019,⁷ the Tribunal dismissed AAFC's motion. The parties were advised that the reasons for that decision would be incorporated within the reasons that would address the merits of the University's complaint.

1. Exhibit PR-2019-010-01, Vol. 1.

2. *University of Saskatchewan* (1 April 2019), PR-2018-068 (CITT) [*University I*].

3. *University of Saskatchewan* (11 April 2019), PR-2019-002 (CITT) [*University III*].

4. *University I*; *University II*.

5. Exhibit PR-2019-010-01, Vol. 1.

6. Exhibit PR-2019-010-08, Vol. 1.

7. Exhibit PR-2019-010-12, Vol. 1.

10. AAFC filed a Government Institution Report (GIR) on August 16, 2019. It comprised written representations,⁸ an affidavit of Dr. Anna Pacheco,⁹ and a further copy of AAFC's motion to strike.¹⁰ The GIR also included written representations.

11. The University filed materials in reply on August 21, 2019,¹¹ which included written rebuttal to arguments made by the AAFC.

12. The Tribunal has reviewed all of this material in reaching its decision.

LIVING LABORATORIES INITIATIVE COLLABORATIVE PROGRAM (LLICP)

13. The Living Laboratories Initiative is a program operated by AAFC. It is described as being an integrated approach to agricultural innovation. Participants include AAFC, farmers, scientists and "other partners" who are brought together in order to "conduct science in agricultural landscapes across rural communities, and to co-develop, test, monitor and implement new mitigation technologies, beneficial management practices (BMPs) and processes that will improve the sustainability of the sector."¹²

14. The Living Laboratories Initiative has an internal component and an external component. The Living Laboratories Science Development Program comprises work that is done or managed internally by AAFC. In addition to this internal program, there is an external collaborative program (Living Laboratories Initiative: Collaborative Program) that is referred to in these reasons by its acronym (LLICP).

15. The LLICP contemplates a nation-wide network of "living laboratories" administered by AAFC. Each living laboratory brings together a number of partners with complementary scientific, technical and other relevant expertise to address a range of "critical agri-environmental issues (i.e. phosphorous runoff, methane emissions from livestock, nutrient loading, water quality and soil erosion) in sensitive landscapes across Canada."¹³ In the living laboratories, there is also a focus on environmental issues and threats to productivity arising from the effects of climate change.

16. The LLICP is described as a five year program having up to \$10 million to fund living laboratory projects of eligible applicants. The living laboratory is considered to comprise a range of partners working in concert on a range of activities to improve the sustainability of farming practices in a specific agricultural system. Partners may include agriculture producers, producer groups, indigenous groups, not-for-profit organizations, government institutions, for-profit organizations and universities/colleges. The entity receiving LLICP funding is responsible for co-ordinating, integrating and overseeing the work of the partners and the project activities.

17. The objective of LLICP is described as follows: "to enable distinct living laboratories to improve adoption, agro-ecosystem resilience and allow for sustainable production practices for the sector."¹⁴ The living laboratories will serve as venues for research, experiments, prototype trials and other work to be carried out in a field, farm or watershed at different locations within the living laboratory. New agricultural

8. Exhibit PR-2019-010-13, Vol. 1 at 3.

9. Exhibit PR-2019-010-13, Vol. 1 at 402.

10. Exhibit PR-2019-010-13, Vol. 1 at 316.

11. Exhibit PR-2019-010-16, Vol. 1.

12. Exhibit PR-2019-010-13, Vol. 1 at 62.

13. Exhibit PR-2019-010-13, Vol. 1 at 62.

14. Exhibit PR-2019-010-13, Vol. 1 at 62.

practices that are created will benefit the areas in which they were developed. Results will also be shared with comparable agroecosystems at the national level through AAFC.¹⁵

18. The work done by the living laboratories of the LLICP is combined and co-ordinated with the internal work of AAFC within the Living Laboratories Science Development Program. The national network of living laboratories is administered by AAFC. Oversight and coordination on a national scale by AAFC enables the better allocation of resources, integration of ideas, and increased dissemination of knowledge. In turn, this facilitates the development and adoption of innovative solutions to address persistent agri-environmental issues.

19. Prior to officially launching the LLICP, AAFC held several meetings and events with prospective stakeholders and applicants for the LLICP. Initially, these meetings took the form of workshops intended to introduce the LLICP and “co-creation of living labs” and to receive feedback from a “diverse group of partners” concerning “regional environmental health priorities; potential partners and end-users involvement, roles, responsibilities and contributions; and, key criteria to be used in site selection processes.”

20. From early to mid-2018, outreach workshops were held in Winnipeg, Manitoba; Agassiz, British Columbia; St-Hyacinthe, Quebec; Guelph, Ontario; and Charlottetown, Prince Edward Island. Objectives of the workshops included the collection of information on agro-environmental issues and the generation of ideas for possible Living Lab projects.¹⁶

21. At the P.E.I. planning session, an AAFC representative gave a presentation outlining the scope of the LLICP, which included the following:

The objective of AAFC’s Living Laboratories: CP is to create discrete Living Laboratories where the end users of technologies will have increased involvement in innovation processes and thus improve adoption, agro-ecosystem resilience and sustainable intensification.

The CP project will be managed by an eligible applicant who will ensure the local management of stakeholders to address priority environmental issues within the landscape (e.g., organize/host/facilitate development meetings; local site management and leadership; extension activities; communications; integration of funding; local management of complementary science activities)¹⁷

22. A Prairie Living Labs meeting was held on October 17, 2018, in Winnipeg. The purpose of the meeting was to assemble potential partners external to AAFC in order to discuss project objectives for “an eventual Living Labs Project”.¹⁸

23. Participants from AAFC and various stakeholders discussed a range of topics, including approaches and methodology for the co-creation of living labs; the roles, responsibilities and empathy needs of prospective participants (i.e. First Nations, researchers, governments, non-governmental organizations); potential challenges; project structure and design; examples of living lab projects; key ingredients and building blocks for living labs; role of innovation in the design and operation of a living lab.¹⁹

15. Exhibit PR-2019-010-13, Vol. 1 at 62-63.

16. Exhibit PR-2019-010-13, Vol. 1 at 120.

17. Exhibit PR-2019-010-13, Vol. 1 at 218.

18. Exhibit PR-2019-010-13, Vol. 1 at 227.

19. Exhibit PR-2019-010-13, Vol. 1 at 120 et seq., 144 et seq.

24. The meeting comprised a range of presentations from various attendees.²⁰ One presentation provided a pictorial concept of a living lab as the overlapping interface between “intelligence space”, “talent space”, “solution space” and “technology space”. A pictorial diagram depicted the Living Lab as the integrated operation of co-creation, a “multi-method” approach, user engagement, multi-stakeholder participation and a real-life setting.²¹

25. Also discussed was a prior Living Lab workshop that had been conducted in Winnipeg during March 2018. In one of its presentations, AAFC described some priorities for a possible Living Lab. These priorities included soil health; water management (quality and quantity); habitat conservation and climate change.²²

26. Henry Wilson of AAFC gave a presentation concerning AAFC’s internal Eastern Prairie Living Lab. Aspects of project design and objectives were discussed, including the “sustainability model that should be employed in designing a project to increase the adoption of sustainable agricultural production systems and associated practices on the Eastern Prairies.”

27. Mr. Wilson canvassed potential next steps for the Eastern Prairie Living Lab which were summarized as follows:

- (1) to find consensus on the metrics by which to measure environmental, economic and social wellbeing
- (2) to prioritize the number of locations/scale of focus
- (3) to identify landowners (individuals or groups) with strong interest in co-developing and implementing practices to maximize environmental performance associated with agriculture; and
- (4d) to identify where AAFC possesses strengths to contribute or gaps in expertise.²³

28. An additional AAFC presentation was directed to the prospective application process for external Living Labs. Topics included the various priority areas for Living Labs; funding; project details; form of contribution agreement and reporting agreements. The resulting discussion was summarized (in part) as follows:

AAFC encouraged ongoing discussions amongst partners to identify lead applicants and coordinate external project contributions and roles of each of the partners involved. Continued dialogue with AAFC-lead [*sic*] applicants is also imperative to ensure complementarity between the external and AAFC-led project. AAFC also clarified that coordination of the external application(s) should be done through the various partners, although AAFC would be happy to identify any gaps if there were.²⁴

29. The University also gave a presentation entitled “Enhancing Agroecosystem Resilience – Canadian Prairie Agroecosystem Resilience Network (CPARNet).” The main objectives of this initiative as presented were summarized in the meeting minutes as follows:

- (1) Enhancing landscape diversity

20. Exhibit PR-2019-010-13, Vol. 1 at 228.

21. Exhibit PR-2019-010-13, Vol. 1 at 146.

22. Exhibit PR-2019-010-13, Vol. 1 at 227.

23. Exhibit PR-2019-010-13, Vol. 1 at 227-228.

24. Exhibit PR-2019-010-13, Vol. 1 at 228.

(2) Enhancing in field diversity and its main research themes (soil health, wetland function, biodiversity, crop and livestock production, and economics and policy).²⁵

30. The minutes of this meeting also summarize a discussion concerning the organization structure of an external (to AAFC) Living Lab for the Eastern Prairies:

A final activity allowed participant [*sic*] in their breakout groups to discuss the involvement of partners in a potential LL project, which led to an important discussion on who the best candidate was to lead an external proposal in the Eastern Prairies. Based on this activity and the discussion that followed, CPARNet mentioned that they would not be a lead for the proposal, but that some of the research activities could be realigned (or extracted) from their NSERC proposal and included in the Living Lab project. Participants identified ideal candidates to lead the LL project which included a joint IISD-DUC proposal, or one led by MCDA. Neil suggested that IISD-DUC could lead with MCDA doing the ground work. CPARN was suggested as an academic partner. Martin Entz (U. of Sask) mentioned that this was a good opportunity to empower agri-ecological groups. Holweger suggested that a sub-committee continue the dialogue and Roy (IISD) proposed that they could host a follow-up discussion.²⁶

31. The meeting appears to have then turned to a discussion of the next steps, which were described as follows:²⁷

Based on the conclusion, Chrétien concluded that the southwest area of Manitoba (within the Lake Winnipeg Basin) had many key ingredients in terms of a potential LL project location including linkages with ongoing/developing initiatives. Morrissey mentioned that a cluster of farms would be ideal, and offered the knowledge and ideas included in their NSERC proposal. Chrétien reiterated the importance of including partners that have already built relationships with the producers and have their trust.

Chrétien mentioned that the release of the AAFC LL application form and user guide will be released in the coming weeks. He also indicated that follow-up meetings should be organized amongst partners to further discuss the specific objectives, roles and responsibilities of a potential LL project in the Eastern Prairies. IISD has offered to host the first meeting.

Gracia-Garza provided some closing remarks, including the importance of complementarity between external and internal LL projects.

32. On October 24, 2018, Dr. Pacheco of AAFC sent an email to attendees of the Prairie Living Labs workshop. The email thanked the attendees for their participation and attached copies of some of the meeting materials, namely, the agenda, list of participants and presentations.²⁸ The participants were also advised that AAFC would advise them “as soon as the Living Lab external application form and user guidelines are released on our external-facing website.”²⁹

33. AAFC then issued an email invitation addressed to “Prairie Partners” for a follow-up meeting to be held in Brandon, Manitoba, on November 16, 2018. The University was among those invited to participate. The invitation described the meeting as follows:

25. Exhibit PR-2019-010-13, Vol. 1 at 228.

26. Exhibit PR-2019-010-13, Vol. 1 at 230.

27. Exhibit PR-2019-010-13, Vol. 1 at 230.

28. Additional materials were transmitted in a subsequent email dated November 1, 2019. Exhibit PR-2019-010-13, Vol. 1 at 225.

29. Exhibit PR-2019-010-13, Vol. 1 at 113.

The main objective of the meeting is to develop consensus on the identification of specific Eastern Prairie sites where Living Lab project co-development will occur around the four overarching environmental priorities of: 1) water quality & quantity, 2) soils, 3) climate change adaptation & net emission reduction and 4) biodiversity and wildlife habitat capacity. Achieving this next step is fundamental to help direct partners, and AAFC and other federal scientists to define specific objectives for the Living Labs project.

To ensure a productive meeting, we have attached an agenda and a site selection criteria document to assist in the final selection of the sites for the Eastern Prairie Living Lab project. As you will note in the agenda, some time has been allotted for partners to present on suggested sites for the project. Please consider ahead of the meeting whether there are locations of study (sub-watersheds or groups of farms) that meet the selection criteria outlined in the attached document. Participants will have 5-7 minutes to provide a concise description of their site and how it meets the selection criteria attached. If you would like to present, please let us know along with your RSVP.³⁰

34. Relevant excerpts of the site selection criteria are reproduced below:

Defining an Agroecosystem Living Laboratory Program for the Eastern Prairies

Within the Canadian agri-environmental context, living laboratories are simultaneously an interdisciplinary approach and a place for innovation where multiple stakeholders co-develop new knowledge and technologies. Biophysical processes and interactions as well as the socio-economics associated with bundles of agri-environmental issues are integrated, examined and demonstrated at the farm to landscape scales to help inform science and practice adoption.

Vision: An AAFC facilitated interdisciplinary approach to the co-development and evaluation of sustainable agricultural systems.

Mission: Establish a coordinated network of sites where producers, companies, non-profit groups, research organizations and governmental institutions collaborate to develop, assess and implement innovative solutions that are rapidly adopted, to address persistent agri-environmental issues.

Goal: The goal of AAFC Living Laboratories is to provide an approach to co-development and to establish a network of working landscape sites where the end users of technologies will have increased involvement in innovation processes and thus improve adoption, agro-ecosystem resilience and sustainable intensification.

How will an Eastern Prairie Living Laboratory take shape?

The structure of the network, science activities, and location of sites in the broader landscape have intentionally remained undefined to allow for co-creation of the Living Laboratory with users of the knowledge to be generated. However, general priorities for action to increase agroecosystem resilience have been defined based on an initial stakeholder meeting that was held in Winnipeg: 1) water quantity and quality, 2) soils, 3) climate change adaptation and net emission reduction, and 4) biodiversity and wildlife. The Living Laboratory will be designed to ensure development of agricultural practices in each priority area (preferably practices that address multiple priorities) and to facilitate greater adoption of these practices.

Given the diversity of physiography and production systems in the region, we envision activity occurring in each of 3 ecoregions (Aspen Parkland, Southern Manitoba Uplands, and Lake Manitoba Plain) that cover much of the Eastern Prairie and the two largest watersheds in the region, the Red River and the Assiniboine/Souris (Figure 1).³¹

35. On December 24, 2018, the AAFC sent an email addressed to “Dear partners” advising that the attached LLICP application materials were in final form and that applications would be received up until February 16, 2019. Prospective applicants were provided with AAFC contact information should they have any questions concerning the application process, eligible costs or budget template. The email further stated:

30. Exhibit PR-2019-010-13, Vol. 1 at 233.

31. Exhibit PR-2019-010-13, Vol. 1 at 236.

As describe [sic] in the Applicant Guide, we look forward to interact with you throughout this application process and you can contact Henry Wilson, Melanie Dubois and/or Jason Vanrobaeys who are leading the internal/federal proposal that need to be complementary to your external application.

FYI and following the four meetings with producers that were held over the last 2 weeks, we have been informed that MCDA will be leading the development of a proposal so please feel to connect [sic] with Sean Goertzen . . . if you are interested in participating in this integrated proposal.³²

36. The Living Labs Program website became active on or about January 7, 2019.³³

37. The application materials for the LLICP comprised an Applicant Guide and a Project Application Form.

38. The Applicant Guide asserted that it was framed to provide “directions and explanations” in order to assist with completion of the application form. The Applicant Guide was structured into sections which dealt with a range of topics, including an overview of the program; eligible applicants; funding and cost-sharing; Living Laboratory Locations and Priorities; eligible activities; application deadlines; expected results; assessment criteria; reporting requirements and considerations.³⁴

39. The following excerpt from the Applicant Guide is of particular relevance to this dispute:

The LLICP project will be managed by an eligible applicant who will ensure the local management of partners to address priority environmental issues within the landscape (e.g., organize/host/facilitate co-development meetings; local site management and leadership; extension activities; communications; integration of funding; local management of complementary science activities).

The living laboratories network will commence through the LLICP and AAFC’s Living Laboratories Science Development Program. There is an expectation that the LLICP projects will also be associated and connected to other AAFC research projects which will be aligned to achieve the objectives and desired outcomes of the Living Laboratories Initiative. AAFC has identified the following Canadian regions that will be prioritized for LLICP:

2019 – 2020 – Canadian Prairie Region (SK/MB) and Atlantic Canada Region (PEI)

2020 – 2021 – Quebec and Ontario

2021 – 2022 – British Columbia

Within these regions, the LLICP will focus on specific vulnerable landscapes that are subject to: climate change, water quality degradation, water quantity challenges, poor soil health, and loss of natural habitats and biodiversity. These areas could include, but are not limited to, landscapes near or within the Fraser Valley, the Lake Winnipeg Basin, the Lake Erie Basin, the Ottawa River Watershed, the Lake Saint-Pierre Basin or the Dunk River watershed. Specific living laboratory geographical boundaries will need to be defined in the project proposal. **The applicant will achieve this by interacting directly with AAFC’s Science and Technology Branch throughout the development of the application.**³⁵

40. The Project Application Form (Form) is divided into several sections, each of which solicit a range of information. The sections include “Applicant Information” (type of organization, identification of organization, contact and mailing information); “Project Information” (project title, proposed start/end dates,

32. Exhibit PR-2019-010-13, Vol. 1 at 266.

33. Exhibit PR-2019-010-13, Vol. 1 at 269.

34. Exhibit PR-2019-010-13, Vol. 1 at 61.

35. Exhibit PR-2019-010-13, Vol. 1 at 65-66.

total estimated costs, amount of funding requested, project objectives, project narrative; roles and responsibilities of participants, including financial contributions; detailed description; feasibility; justification of proposed budget spending; and a data management plan); and “Environmental Considerations” (whether federal lands will be used; existence or need for environmental authorizations or permits; potential risks or effects on the environment).

41. The “Project Information” portion of the Form requires a description of: roles and responsibilities of participants, including financial contributions to/from participants; recent progress in activities and literature related to the proposal; proposed objectives; proposed approach and methodology; Living Laboratories methodology (i.e. a description of how the Living Laboratories co-development or other open innovation methodologies will be applied to the collaborative project); interactions and partnerships (i.e. a description of how the proposed work will be complementary to other initiatives; inclusion of indigenous communities, as applicable, and engagement with AAFC); knowledge and technology transfer; summary of work plan (road map for project duration, milestones and deliverables); benefits to Canada and project partners; project feasibility (i.e. potential to achieve objectives and deliver outputs); risk identification; mitigation strategies; justification of proposed budget spending; and a proposed data management plan.³⁶

42. On or about February 6, 2019, Dr. Morrissey made inquiries of AAFC concerning the application process. Curtis Snell of AAFC replied the following day. The pertinent aspects of AAFC’s reply are reproduced below:

The program is an open program and anyone is welcome to apply. But it is important that you read the applicant guide, and then decide on whether or not you feel that your project/proposal will fit into the program or with another partner’s proposal. Also it is important that you work with STB on your project/proposal as well. I have attached the guide for your information.

Please note on page 5 that:

“The LLICP will accept applications from eligible organizations to work in target geographic areas in Canada. Throughout the application process each applicant will be required to interact directly with AAFC’s Science and Technology Branch in all stages of the application development including: project concept, science methodology, and consortium/collaboration development in advance of any application submission.”

So it is good that you have been in touch with STB already.³⁷

43. Dr. Morrissey contacted AAFC again on February 12, 2019. On this occasion, her correspondence was directed to François Chrétien, Associate Director of Living Laboratories, Science and Technology Branch of AAFC:

Francois [sic]

Please can you tell me some information about the review process for this External Collaborative call. I would like to have confirmation about who will make the decisions and what criteria will be used on what proposal(s) to fund. Since AAFC has been intricately involved in the application process and with specific external applicants, there is a serious conflict of interest that I hope you recognize and will acknowledge given this has been advertised as an open competition.

While I was not aware until middle of last week this important detail that its [sic] an open advertised call, I have now gone to extraordinary lengths to make every attempt to engage all potential stakeholders, follow the published guideline document, and provide some much needed leadership to see this to a successful outcome that serves the broadest community.³⁸

36. Exhibit PR-2019-010-13, Vol. 1 at 81.

37. Exhibit PR-2019-010-13, Vol. 1 at 75-76; STB is an acronym for Science and Technology Branch of AAFC.

38. Exhibit PR-2019-010-13, Vol. 1 at 239-240.

44. Mr. Chrétien replied on the same day as follows:

The review process will comprise of a technical evaluation by a Director level committee from AAFC and ECCC that will be making recommendation for approval by a Director General level committee within AAFC.

The assessment criteria are described on pages 10 and 11 of the Applicant Guide that you have received (attached here for your convenience). Please also note the additional information section on page 12:

In advance of the application, applicants should have developed a network of partnerships “. . .” and engagement with the AAFC Science and Technology Branch.

So the way this program is built, is for AAFC/STB to interact with potential external partners throughout the application process in order to make sure that external Living Laboratory proposals are aligned with the Living Laboratories Initiative objectives, desired outcomes and proposed activities (including the co-development process with the end-users/farmers).

As you know, Henry Wilson, Jason Vanrobaeys and Melanie Dubois are leading an internal AAFC Eastern Prairie Living Laboratory proposal. Please feel free to reach out to them to discuss potential collaboration.

Please also feel free to contact the Program team . . . or myself should you require further information.³⁹

45. Over the next few days, Dr. Morrissey corresponded by email with Henry Wilson of AAFC. Those discussions indicated that the University felt that a project having a broader geographic focus was scientifically and technically preferable to the more targeted approach chosen by the AAFC internal project which focused on Manitoba sites. The University advised Mr. Wilson that it would be submitting its own bid proposal in lieu of joining with a proposal being submitted by the Manitoba Conservation Districts Association (MCDA).⁴⁰

46. Dr. Morrissey submitted the University’s proposal on February 16, 2019. The University’s project was estimated to cost approximately \$4.6 million over four years. It sought the amount of \$2.4 million from AAFC.⁴¹

47. AAFC acknowledged receipt on February 18, 2019, of the University’s bid and advised that the proposal would be reviewed in due course. The University was invited to submit further refinements to its proposal, at the University’s discretion, for a further 10 days (until February 28, 2019).⁴² This acknowledgment and invitation was sent to at least one other applicant, namely, the MCDA who was ultimately awarded a contract under the LLICP.⁴³ The University made no revisions to its proposal.⁴⁴

48. AAFC reviewed the applications that it received. Several individuals at AAFC were involved with the review process. Upon reviewing the University’s application, AAFC found that the University’s application was a “decent proposal”, but that it demonstrated little to no connection with AAFC’s internal Living Laboratory work. The University’s proposal extended to geographic areas (parts of Saskatchewan

39. Exhibit PR-2019-010-13, Vol. 1 at 239.

40. Exhibit PR-2019-010-13, Vol. 1 at 277-286.

41. Exhibit PR-2019-010-01A, Vol. 1 at 15.

42. Exhibit PR-2019-010-13, Vol. 1 at 239.

43. Exhibit PR-2019-010-13, Vol. 1 at 597.

44. Exhibit PR-2019-010-13, Vol. 1 at 410.

and Alberta) falling outside the scope of the LLICP Applicant Guide. AAFC considered that it could not support multiple Living Labs with overlapping geographic coverage.⁴⁵

49. As such, AAFC found that the University's proposal did not align with the LLICP program. The proposal appeared to track the University's NSERC proposal and was said to be "more science driven" as opposed to being "ground up driven" from the local area. The University's proposal was found not to reflect close interaction with AAFC at all stages of proposal development (project development, science methodology, consortium/collaboration development) prior to submitting the application.⁴⁶

50. In addition, AAFC considered that the University's proposal had not been conceptualized or developed in collaboration with AAFC. The proposal did not demonstrate adequate and sufficient complementary with the work being done internally at AAFC. In addition, AAFC was not satisfied that the University's proposal demonstrated that the University had already secured an adequate network of partnerships and partners in geographic areas relevant to AAFC's Eastern Prairie Living Laboratory.⁴⁷

51. Accordingly, AAFC decided to screen out the University's proposal.

52. On or about February 28, 2019, AAFC informed Dr. Morrissey that it had reviewed the University's application, but had rejected it. The purported reason for the rejection was that the University's application did not "contain evidence as noted in the LLI: CP Applicant Guide, that requires applicants to demonstrate in their submission to have interacted directly with AAFC's Science and Technology Branch, in all stages of their LLI: CP project development including: project concept, science methodology and consortium/collaboration development." Consequently, no further consideration would be given to the University's proposal and the file was closed.⁴⁸

53. Dr. Morrissey promptly initiated telephone and email communications with AAFC to express both disappointment about the outcome and her concerns about an evaluation process that the University felt was unfair. Those communications spanned the period from February 28, 2019, to approximately March 5, 2019.⁴⁹

54. Following one or more telephone discussions in early March 2019, it appears as if AAFC did not provide any further response to the University.

55. The University filed complaints with the Tribunal. The first two complaints were deemed premature, because it appeared as if a further response from AAFC might be forthcoming.⁵⁰ The third (and current) complaint is before the Tribunal.

COMPLAINT

56. The University alleges that its application was unfairly disqualified for unsubstantiated reasons and that the assessment process was tainted by lack of transparency, unfairness and favouritism, if not outright bias. The University also asserted that the evaluation process did not adhere to the deadlines, criteria and process as set forth in the Applicant Guide.⁵¹

45. Exhibit PR-2019-010-13, Vol. 1 at 601.

46. Exhibit PR-2019-010-13, Vol. 1 at 250.

47. Exhibit PR-2019-010-13, Vol. 1 at 603.

48. Exhibit PR-2019-010-13, Vol. 1 at 253.

49. Exhibit PR-2019-010-13, Vol. 1 at 272-276.

50. *University I; University II.*

51. Exhibit PR-2019-010-01, Vol. 1.

57. The University's complaint was premised on the following five grounds:
- 1) That the Living Labs Collaborative Program proposal call was not properly advertised and open submission of proposals were actively discouraged.
 - 2) In response to the claim for dismissal that I "did not interact with AAFC scientists during all phases of the proposal development", is wholly unsubstantiated.
 - 3) That my application was not reviewed on the published Assessment criteria.
 - 4) That I was disqualified on unfair grounds that hinge on the same individuals within AAFC to determine if I interacted or "aligned" with their AAFC scientists which by default precludes any arms-length evaluation required for fair process.
 - 5) That AAFC showed clear bias by granting the other competing applicant additional time and opportunity to revise and complete their application while disqualifying mine without the same opportunity.⁵²
58. The University claims the following remedies:
- (a) that a new solicitation for the designated contract be issued;
 - (b) that the bids be re-evaluated;
 - (c) that the designated contract be awarded to the complainant;
 - (d) that the University be awarded compensation for lost time and opportunity in the amount of \$600,000, being an amount adequate to fund the University's project for one year, while enabling it to seek new funding opportunities elsewhere.⁵³

JURISDICTION

59. On May 29, 2019, AAFC filed a motion with the Tribunal, pursuant to section 24 of the *Canadian International Trade Tribunal Rules*, requesting that the Tribunal dismiss the University's complaint for lack of jurisdiction.⁵⁴

60. AAFC advanced two grounds for its motion, namely, that the LLICP (1) does not constitute "government procurement" for the purposes of trade agreements, and (2) does not pertain to a "designated contract" within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act (CITT Act)*⁵⁵ and section 3 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations (Regulations)*.⁵⁶

61. The University filed brief submissions in response to AAFC's motion.⁵⁷ AAFC then submitted a reply.⁵⁸

62. The Tribunal is a creature of statute. Its authority to act is defined by the *CITT Act*. For the purpose of these proceedings, the relevant provision of the *CITT Act* is section 30.11(1). It provides as follows:

52. Exhibit PR-2019-010-01, Vol. 1 at 9-10.

53. Exhibit PR-2019-010-01, Vol. 1 at 8.

54. Exhibit PR-2019-010-07, Vol. 1.

55. R.S.C., 1985, c. 47 (4th Supp.).

56. S.O.R./93-602.

57. Exhibit PR-2019-010-09, Vol. 1.

58. Exhibit PR-2019-010-10, Vol. 1.

Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

63. Section 30.1 of the *CITT Act* defines the term “designated contract” as follows:

designated contract means 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;

64. In turn, subsection 3(1) of the *Regulations* prescribes that a “designated contract” is referable to the terms of trade agreements that have been signed by the Government of Canada. Trade agreements have been analogized as “doors” which permit access to the Tribunal’s complaint procedure in procurement matters. The subject matter of the procurement must fall within the scope of at least one trade agreement such that the grounds of the complaint are likewise covered by the scope of the trade agreement. If so, the “door is open” and the Tribunal may have jurisdiction to decide the complaint.⁵⁹

65. In the circumstances of this case, the relevant trade agreement is the *Canadian Free Trade Agreement (CFTA)*.⁶⁰ The *CFTA* is the successor agreement to the *Agreement on Internal Trade (AIT)*.⁶¹ Its provisions and preamble are analogous to those of the *AIT*, which has been construed as a “domestic free trade agreement” applicable to “domestic trade” within Canada.⁶²

66. Subsection 3(1) of the *Regulations* provides the nexus between the definition of “designated contract” found in the *CITT Act* and a trade agreement (*CFTA*):

3(1) For the purposes of the definition *designated contract* in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in . . . Article 504 of Chapter Five of the CFTA . . . , that has been or is proposed to be awarded by a government institution, is a designated contract.

67. Article 504(11) of Chapter Five of the *CFTA* provides that certain types of transactions are excluded from its scope and, consequently, from the definition of “designated contract”. The relevant exclusions relied upon by AAFC are as follows:

11. This Chapter does not apply to: . . .

(c) any form of assistance, such as grants, loans, equity infusions, guarantees, and fiscal incentives;

68. AAFC argues that the LLICP is a funding program providing government financial assistance to encourage and enable improvements in sustainable farming and agricultural practices. As such, it is a form of contribution program effected by way of transfer payment.

69. AAFC further asserts that “a) the Crown does not acquire a good or service through contribution funding; and b) [transfer payments] are not ‘designated contracts’ within the meaning of the *Procurement*

59. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 SCR 309, 2009 SCC 50 (CanLII) [*Northrop*] at para. 17.

60. 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).

61. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-internal-trade/>>.

62. *Northrop* at paras. 11, 23-24.

Inquiry Regulations as the trade agreements contain explicit exceptions for all forms of government assistance and funding.”⁶³

70. The LLICP program materials indicate that funding will be provided pursuant to a contract (Contribution Agreement) between AAFC and a recipient(s). AAFC contends that contribution funding is a tool for the creation and implementation of public policy which serves to “assist, support, or encourage activities which align with government policy objectives.” In support of these contentions, AAFC relies upon the content of a government policy document (Treasury Board Policy on Transfer Payments).

71. In essence, AAFC contends that the funding provided by the LLICP is a form of government “assistance” excluded from the scope of the *CFTA* because it is a “transfer payment” that consequently does not give rise to a “designated contract”. As such, AAFC argues that the process for issuance of LLICP funding is not a “procurement” and accordingly the Tribunal lacks jurisdiction to conduct an inquiry.

72. According to the Treasury Board Policy on Transfer Payments, transfer payments comprise a large part of federal government spending. However, they do not result in the acquisition by the Government of Canada of any goods, services or assets. Transfer payments are a key instrument for furthering broad policy objectives and priorities. They comprise “grants, contributions and other transfer payments including those made to other orders of government, international organizations and Aboriginal peoples.”⁶⁴

73. More particularly, a “transfer payment” is defined as “a monetary payment, or a transfer of goods, services or assets made, on the basis of an appropriation, to a third party, including a Crown corporation, that does not result in the acquisition by the Government of Canada of any goods, services or assets. Transfer payments are categorized as grants, contributions and other transfer payments. Transfer payments do not include investments, loans or loan guarantees.”⁶⁵

74. A “grant” is defined as “a transfer payment subject to pre-established eligibility and other entitlement criteria. A grant is not subject to being accounted for by a recipient nor normally subject to audit by the department. The recipient may be required to report on results achieved.”⁶⁶

75. A “contribution” is defined as “a transfer payment subject to performance conditions specified in a funding agreement. A contribution is to be accounted for and is subject to audit.”⁶⁷

76. “Other transfer payment” is defined as a “transfer payment, other than a grant or contribution, based on legislation or other arrangement, that may be determined by a formula. Examples of other transfer payments are transfers to other orders of government such as Equalization payments as well as Canada Health and Canada Social Transfer payments.”⁶⁸

77. LLICP funding cannot be characterized as a “grant”. The terms set out in the LLICP Applicant Guide make it clear that LLICP funding is subject to audit and financial controls. Nor is there any entitlement to receive funds if prescribed eligibility criteria are met. Significantly, in the course of the 2018 stakeholder workshops, AAFC admitted that LLICP funding is not a “grant”.⁶⁹

63. Exhibit PR-2019-010-13, Vol. 1 at 320.

64. Exhibit PR-2019-010-13, Vol. 1 at 35-36.

65. Exhibit PR-2019-010-13, Vol. 1 at 47.

66. Exhibit PR-2019-010-13, Vol. 1 at 44.

67. Exhibit PR-2019-010-13, Vol. 1 at 44.

68. Exhibit PR-2019-010-13, Vol. 1 at 45.

69. Exhibit PR-2019-010-13, Vol. 1 at 573.

78. Moreover, the LLICP program is readily distinguishable from being an “other transfer payment”. There is no underlying statutory provision or legislation which prescribes or directs the disbursement of funds, much less according to a formula.

79. Accordingly, in addressing AAFC’s arguments, the Tribunal is left to consider whether LLICP funding is a “transfer payment” in the form of a “contribution”.

80. AAFC’s own materials (i.e. the LLICP Applicant Guide; preprogram workshop materials) do characterize the LLICP as providing contribution funding. However, AAFC’s own self-description is not dispositive. The Tribunal must examine whether the facts support the conclusion that the LLICP is actually government “assistance” in the form of contribution funding (as alleged by AAFC), so as to consequently exclude the LLICP from being a “designated contract”, for the purposes of the *CFTA*.⁷⁰

Analysis

81. The jurisprudence indicates that the Tribunal has wide latitude when deciding both legal and factual matters within its jurisdiction with respect to procurement matters.⁷¹

82. In assessing the ambit of its jurisdiction, the Tribunal must interpret its governing legislation in a purposive manner, so long as the statutory language is given a meaning that it can reasonably bear.⁷²

83. The jurisprudence supports the conclusion that the exemptions from the protections afforded by trade agreements should be narrowly construed. In *Opsis, Gestion d’infrastructure inc. v. Canada (Public Works and Government Services)*, the Federal Court of Appeal cautioned that shielding a procurement process from review by a specialized Tribunal creates “the potential for serious abuse”.⁷³ Although *Opsis* pertained to a situation where a national security exemption was invoked, the potential mischief identified by the Court is not affected by the type of exemption being asserted. The end result is to insulate the procurement process from scrutiny.

84. A procurement contract is predominantly commercial in nature.⁷⁴ As noted in *Irving*, contracts issued by government “lie at the intersection of public law and private law”.⁷⁵ This observation provides a useful touchstone when assessing the characteristics of the LLICP for the purpose of determining whether it is exempt from the scrutiny of the bid challenge provisions of the trade agreement. Although the LLICP may further certain policy objectives of AAFC, it also has significant, if not overriding, commercial features.

70. This requires a substantive analytical exercise. See e.g. *Lotus Development Canada Limited, Novell Canada, Ltd. and Netscape Communications Canada Inc.* (14 August 1998), PR-98-005, PR-98-006 and PR-98-009 (CITT) for an illustration of this type of substantive analysis, albeit applied in a different context. The Tribunal analyzed whether the underlying factual grounds for invocation of a national security exception had been properly made out, so as to exempt the procurement from bid challenge, before finding that the Tribunal lacked jurisdiction to continue the inquiry.

71. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FC 292, 2001 FCA 241 (CanLII) at paras. 24, 30.

72. *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 93 (CanLII) at para. 15.

73. 2012 FCA 42 (CanLII) [*Opsis*] at para. 16.

74. *Rapiscan Systems, Inc. v. Canada (Attorney General)*, 2014 FC 68 (CanLII) at para. 48, citing *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2010] 2 FCR 488, 2009 FCA 116 (CanLII) [*Irving*] at para. 46.

75. *Irving* at para. 1.

85. The evidence demonstrates that the Living Laboratories initiative is characterized by a large, complex structure having many dimensions including a diversity of participant ability and skill sets. Having regard to the Applicant Guide (and indeed, the University's own proposal), an external, funded Living Lab would have a staff comprising (but not necessarily limited to) scientists (both academic and non-academic), researchers, accounting/financial managers, administrative support, human resource personnel, farm co-ordinators, program managers and data managers. The job functions and activities of these individuals would have to be managed both on an internal scale and externally, in terms of co-ordinated outreach and work with external stakeholders or partners such as individual farmers, indigenous groups, non-governmental organizations and for-profit entities. It would also have to align with and complement AAFC's internal Living Lab.

86. The management of such an undertaking requires sophisticated co-ordination and integration and project management in order to achieve the desired objectives.

87. On these facts, the Tribunal considers that the LLICP is analogous, in terms of its complexity, sophistication and overall structure, to an infrastructure project, albeit one that is directed to agro-environmental objectives. In essence, AAFC is outsourcing the design, operation and project management of a complementary Living Lab.

88. LLICP funding is not provided as a "contribution" to assist a recipient to pursue its own project on its own desired terms. Rather, the LLICP requirement that the external Living Lab be complementary to, and integrated with, AAFC's internal Living Lab work supports the conclusion that the recipient of an LLICP contract may be subject to ongoing direction and/or control by AAFC.

89. The Applicant Guide makes it clear that the "recipient" of LLICP funding is responsible for the hiring, and managing of staff as well as the disbursement of funds to subcontractors or participants, as may be needed. For practical purposes, an LLICP funding recipient is serving as a project manager for one particular aspect of AAFC's country-wide network of Living Labs.

90. In these circumstances, AAFC is a direct beneficiary of project design and management services for operation of a complementary Living Lab. This remains the case even though other entities (i.e. farmers, producers) may benefit (and are intended to derive benefit) from the Living Lab, in the form of improved measures for agricultural sustainability and related innovations.

91. The Tribunal considers these circumstances to be distinguishable from those considered in *Georgian College of Applied Arts and Technology*.⁷⁶ In *Georgian College*, the funding at issue was provided in furtherance of a specific statutory scheme. There is no statutory scheme associated with the LLICP.

92. This case is also readily distinguishable from *TSI Services Management Inc.*,⁷⁷ which involved a competition to assess ideas and proposals for the development of new technology related to improved power grids and transmission of electricity. The winning proposal was to receive a grant to facilitate further research and development.

76. (29 May 2002), PR-2001-067 (CITT).

77. (29 March 2019), PR-2018-067 (CITT).

93. Instead, the Tribunal considers this case to be analogous to the circumstances of *IBM Canada Limited* where the Tribunal found that it had jurisdiction, despite the objection that the contract at issue in IBM was a form of governmental assistance:

Article 518 of the *AIT* provides that “procurement means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction” but does not include “any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives” or “government provision of goods and services to persons or other government organizations”.

The evidence indicates that the **direct** purpose of this solicitation is to obtain consulting services for CIDA. Through this solicitation, CIDA will select a consultant with whom to negotiate a contract for the personnel resources necessary to organize technical assistance to the recipient countries. CIDA could have chosen to make use of its own employees to perform these services rather than to enter into a contract with a consultant who would provide them.

However, the evidence also indicates that the **indirect** purpose of this solicitation is to provide government assistance to the recipient countries. The consultant will be responsible for overall project planning, management and financial administration, procurement, contracting and the provision of personnel for the delivery of the government assistance. The Tribunal notes that the benefit to the recipient countries will not occur until the personnel engaged by the consultant begin to deliver the government assistance, in the form of trade-related technical assistance, focussed training and support for establishing and maintaining thematic networks. Furthermore, given that the contract resulting from this solicitation will be between CIDA and the consultant, it will not create any obligation by CIDA to the recipient countries to deliver the government assistance. Any such obligation would need to be created by a separate instrument, such as a treaty or a memorandum of understanding with the government in question. . . .

. . . The Tribunal considers that these comments apply not only to *NAFTA* and the *AGP* but also to the *AIT* and should govern the interpretation of the exemption at issue in the current complaint. Accordingly, the Tribunal considers that the exemptions for government assistance do not apply in this case because they should be interpreted narrowly and confined to situations where government assistance is the **direct** purpose of the solicitation.⁷⁸

94. Having regard to the foregoing, the Tribunal finds that AAFC receives a direct benefit, namely, it acquires the services of project design and ongoing project management of an external Living Lab that is designed to be operationally tailored and aligned with AAFC’s internal Living Lab.

95. As such, the LLICP does not involve a “contribution” or a “transfer payment” and is thus not a form of “assistance” operating to exempt the LLICP from the bid challenge provisions of the *CFTA*.

96. It is otherwise undisputed that AAFC is a covered Canadian government entity and that the University is a domiciled Canadian supplier. The requisite monetary threshold has also been met.

97. Accordingly, the Tribunal has jurisdiction to pursue this inquiry and dismissed AAFC’s motion.

98. The Tribunal now turns to a consideration of the University’s complaint, on the merits.

78. *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 Limited*].

ANALYSIS

Ground 1: That the LLICP proposal call was not properly advertised and open submission of proposals were actively discouraged

99. The specialized nature of the LLICP and its objectives indicate that the relevant audience would be individuals and entities with some expertise in agro-environmental issues and sustainable farming, as opposed to the general public.

100. AAFC undertook extensive, country-wide workshops that were intended to inform potential stakeholders and suppliers about the LLICP. The record includes copies of presentations given by several individuals at AAFC. The Tribunal finds that these materials were intended to promote and generate interest in the LLICP.

101. The workshops and meetings had a consultative aspect and spanned a period of months, all before the application materials were finalized and made available. Once the application materials were available, AAFC created a Living Laboratories website.

102. The Tribunal finds no evidential basis to conclude that the LLICP was not properly advertised. AAFC took rational steps over a period of many months to make the program known to potential stakeholders and maintained an active website. Moreover, these facts indicate effort to attract prospective applications, as opposed to “actively discouraging” applications.

103. The University’s complaint that “open” submissions were “actively discouraged” appears to be predicated on the University’s view that the LLICP should receive bids (and award a contract) regardless of the extent to which the proposed Living Lab could align, or be integrated with AAFC’s internal Living Lab program.

104. Essentially, the University contends that the imposition of a requirement to consult constitutes unfairness. However, any contracting authority is free to define the specifications of a tender as it sees fit, in order to receive bids that are tailored to its requirements. It is for prospective bidders to tailor their proposals to the tender, as opposed to the converse.

105. The University has complained that it was “actively discouraged” from applying to the program. Based on its review of the evidence, the Tribunal finds that the University’s focus was to secure funding for a project that had already been designed. The criteria of the LLICP would have required modification of the geographic reach and/or methodology of the University’s project. It appears that the University was well aware of AAFC’s objectives throughout (and before) the tender process.

106. The evidence shows that the need for bids to integrate with AAFC’s internal work was stressed throughout, together with the need for ongoing consultation with AAFC personnel. The record further demonstrates that AAFC stood ready to work with the University to assist it in tailoring its bid to align with the prescribed specification of alignment with the internal Living Lab project at AAFC. The fact that another applicant did so does not mean that the process was not open or that the University was unfairly treated.

107. The University was apparently disinclined to align its project with the direction of AAFC’s internal Living Lab, based on a scientific disagreement and the University’s preference for its own project design. Instead, the University may have hoped to persuade AAFC that the University’s approach to living

laboratories was preferable to that of AAFC. The fact that AAFC was not persuaded may have been disappointing to the University. However, the Tribunal does not consider that such a reaction by AAFC constitutes “actively discouraging” the University from filing an application.

108. The Tribunal finds no evidence that AAFC would have refused to receive or consider any application tailored to the bid requirements, which included the geographic parameters of AAFC’s Eastern Prairie Living Lab and the need for the external Living Lab to complement AAFC’s internal Living Lab.

109. Accordingly, the first ground of the complaint is dismissed.

Ground 2: The basis for AAFC’s determination that the University did not interact with AAFC scientists during all phases of the proposal development was wholly unsubstantiated.

110. The record indicates that the University was looking to the LLICP to obtain funding for a project that the University had either commenced or wished to commence, in order to supplement other program funding that the University had obtained or was seeking to obtain.⁷⁹

111. The University’s grievance appears to be rooted, at least in part, by its view that the scientific merits of its proposal, including the broader geographic scope of its proposed Living Labs extending into Saskatchewan and Alberta should outweigh the AAFC’s emphasis for a Living Lab with a narrower focus within eastern Manitoba.

112. In reviewing this Complaint, the Tribunal must assess whether the AAFC has acted reasonably in its handling and disposition of the University’s application.⁸⁰

113. Where a decision-making process involves the consideration and assessment of multiple factors, those factors may be weighed differently, potentially giving rise to different outcomes. A reasonableness standard contemplates that different outcomes may be reached by different decision makers in those circumstances.

114. In determining whether a decision is reasonable, it is not sufficient for the Tribunal to reweigh or rebalance the merits of the proposal, even if it disagrees with AAFC or would have decided differently at first instance.

115. So long as the decision is rationally underpinned by a line of reasoning rooted in the evidence, the Tribunal cannot intervene.

116. In this case, AAFC placed heavy emphasis on the need for proposals to align and integrate with its internal work on Living Labs, with a geographic focus in eastern Manitoba. To achieve that objective, AAFC stressed the importance of detailed interaction with AAFC personnel throughout development of the proposal and the intended methodology. AAFC maintained this emphasis throughout from the early outreach workshops up to (and including) release of the Applicant Guide.

79. Exhibit PR-2019-010-13, Vol. 1 at 212, 230, 282, 462, 566, 583.

80. *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at paras. 26-27; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33; *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25.

117. When assessing bids in the context of a procurement, the contracting authority must necessarily assess the bids on their merits. This process includes a consideration of how well the bids have complied with the prescribed requirements.

118. In this case, the University asserts that it did interact with AAFC personnel and thus fulfilled this aspect of the bid criteria. However, the requirement for “interaction” cannot be segregated from the other specifications in the Applicant Guide. AAFC determined that the extent of the University’s interaction with AAFC was insufficient to produce a Living Lab proposal that was sufficiently complementary to the internal AAFC project, which was another criterion identified in the Applicant Guide.

119. Moreover, the evidence indicates that the University’s application referenced future or prospective consultation, indicating that the University had not fully consulted AAFC on all aspects of its proposal or intended methodology.⁸¹

120. The AAFC’s letter of February 28, 2019, provided reasons for rejecting the application. Those reasons have been amplified by the additional evidence provided by the GIR. The University disagrees with those reasons and is understandably disappointed by the outcome.

121. However, the record demonstrates no basis for the Tribunal to intervene. The Tribunal is satisfied that the AAFC considered the criteria set forth in the Applicant Guide when assessing the University’s bid. In doing so, it reached a reasonable decision that is defensible on the record. Accordingly, the second ground of the complaint is dismissed.

Ground 3: The University’s application was not reviewed on published assessment criteria

122. As noted above, the Applicant Guide emphasized (in bold font) the importance of prospective applicants working with AAFC personnel throughout in order to tailor the application to meet AAFC requirements. This factor was also emphasized by AAFC in email communications during the application process and the earlier consultation workshops attended by the University.

123. The premise of this aspect of the University’s complaint is that other aspects of the University’s proposal should outweigh AAFC’s assessment of the University’s interactions with AAFC.

124. The Tribunal cannot second-guess or substitute its own evaluation with respect to the scientific and operational rationales of a more geographically focused Living Lab versus the broader scope of project contemplated by the University’s proposal. Accordingly, the third ground of the complaint is dismissed.

Ground 4: The University’s application was unfairly disqualified by a non-arm’s-length process

125. The University’s complaint is premised on an allegation that unfairness or bias is created by AAFC personnel evaluating bids for compliance with bid criteria as prepared by AAFC itself.

126. In preparing the bid criteria, a contracting authority (AAFC in this case) is best placed to determine its own needs and requirements for procurement purposes. The Living Laboratory Initiative specifically contemplates the existence of both internal and external sites working in collaboration. In such circumstances, a fair evaluation of the *external* bids does not require an “arm’s length” assessment by individuals with no involvement with the AAFC internal project. The internal and external projects were intended to collaborate, not compete.

81. Exhibit PR-2019-010-13, Vol. 1 at 405.

127. Prescribing a requirement that applicants align with AAFC's internal Living Lab project does not create bias, unfairness or conflict of interest. Indeed, it is consistent with the outsourcing of project design and management of a node site within a national network of Living Labs. Fairness requires that the external bids be individually assessed for compliance with the prescribed requirements of the specification. Based on its review of the evidence, the Tribunal is satisfied that this process took place.

128. The fourth ground of the complaint is consequently dismissed.

Ground 5: The AAFC showed clear bias by granting another competing applicant additional time and opportunity to revise and complete their application while disqualifying the University's application without the same opportunity

129. The evidence shows that the University's bid was filed on February 16, 2018. Receipt was acknowledged on February 18, 2018. At that time, the University was advised that it could further refine its proposal, if desired, up until February 28, 2019. This consideration appears to have been provided to other bidders. As such, there was no differential treatment.

130. On February 28, 2018, AAFC decided to reject the University's bid. At that stage of the process, the proposals do not stand on an equal footing as one has been accepted and the other rejected. Subsequent steps taken by AAFC with respect to the competing proposal that was accepted does not demonstrate that the University was treated unfairly. A request for additional information with respect to application(s) retained for further consideration is not evidence of unfairness or bias.

131. Accordingly, the fifth ground of the complaint is dismissed.

132. In view of the above findings, the Tribunal need not consider the University's claim for remedies.

133. The University has expressed concern that the content of its application contains intellectual property that is now in the hands of AAFC.⁸² At present, the University's concerns in this regard are both speculative and beyond the mandate of the Tribunal.

COSTS

134. AAFC has asked that the University's complaint be dismissed, with costs of these proceedings being awarded to AAFC.

135. The Tribunal has full discretion with respect to an award of costs, which derives from section 30.16 of the *CITT Act*. The provision reads as follows:

30.16 (1) Subject to the regulations, the Tribunal may award costs of, and incidental to, any proceedings before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.

136. Costs generally follow the event. However, there may be circumstances where an order of costs is contra-indicated.

137. In this case, the University filed two earlier complaints arising from the rejection of its bid for LLICP funding. Those complaints were dismissed as premature, on the basis that the University was awaiting a substantive reply from AAFC concerning the University's requests for redress/reconsideration.

82. Exhibit PR-2019-010-01, Vol. 1 at 8.

138. Based on the record before the Tribunal, the University never received a reply.

139. It appears that the University's complaints to the Tribunal were triggered by Dr. Morrissey's frustration at not receiving a substantive reply from AAFC concerning her requests for clarification of the reasons underpinning rejection of the University's bid.

140. The Tribunal issued *two* orders dismissing the University's predecessor complaints as being premature. Those orders were served on AAFC, yet it appears no steps were taken by AAFC to respond to Dr. Morrissey.

141. Multiplicity of proceedings should be avoided.

142. The GIR contained further information and documentation describing the processes and reasons for the rejection of the University's bid.⁸³ Had those documents been provided to Dr. Morrissey in early March 2019, it is possible that she may not have sought recourse before the Tribunal by bringing this proceeding and its two predecessors.

143. The record indicates some personnel turnover within AAFC at the relevant time.⁸⁴ This may (or may not) have compromised AAFC's ability to deal with Dr. Morrissey's inquiries.

144. Another relevant factor is the Tribunal's dismissal of AAFC's interlocutory motion on the issue of jurisdiction.

145. In view of the foregoing, the Tribunal declines to award costs to AAFC. The parties shall bear their own costs.

DECISION

146. The complaint is dismissed. The parties shall bear their own costs.

Susan D. Beaubien
Susan D. Beaubien
Presiding Member

83. Exhibit PR-2019-010-13, Vol. 1 at 601-602.

84. Exhibit PR-2019-010-13, Vol. 1 at 271.