



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2020-035

PricewaterhouseCoopers LLP

v.

Immigration and Refugee Board of  
Canada

*Determination issued  
Tuesday, December 1, 2020*

*Reasons issued  
Thursday, December 17, 2020*

*Corrigendum issued  
Wednesday, January 20, 2021*

**TABLE OF CONTENTS**

DETERMINATION..... i

CORRIGENDUM ..... ii

STATEMENT OF REASONS ..... 1

    POSITIONS OF THE PARTIES ..... 4

    ANALYSIS..... 6

IN THE MATTER OF a complaint filed by PricewaterhouseCoopers 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**

**PRICEWATERHOUSECOOPERS LLP**

**Complainant**

**AND**

**THE IMMIGRATION AND REFUGEE BOARD OF 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 valid, in part.

With respect to remedy, the Tribunal recommends that the Immigration and Refugee Board of Canada (IRB) compensate PricewaterhouseCoopers LLP (PwC) for lost opportunity. The Tribunal further awards PwC its reasonable bid preparation costs, also payable by the IRB.

The Tribunal encourages the parties to negotiate and reach agreement concerning the amounts payable to PwC, by way of compensation and bid preparation costs. If the parties are unable to reach a settlement within 45 days of the date of this Determination, the parties are directed to so advise the Tribunal. The Tribunal will then determine the quantum of compensation that should be paid to PwC and will assess the amount of bid preparation costs awarded to PwC, after hearing further submissions from the parties, in accordance with a timetable to be fixed.

PwC is also awarded its reasonable costs for this complaint case. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary determination of the level of complexity for this complaint case is Level 2. The Tribunal's preliminary indication of the amount of the cost award is \$2,750. The parties may make submissions on costs in conjunction with any further submissions made to the Tribunal concerning the assessment of compensation and bid preparation costs or within 45 days from the date of this Determination, whichever is later.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

IN THE MATTER OF a complaint filed by PricewaterhouseCoopers 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*.

**BY**

**PRICEWATERHOUSECOOPERS LLP**

**AGAINST**

**THE IMMIGRATION AND REFUGEE BOARD OF CANADA**

**CORRIGENDUM**

The last sentence of paragraph 14 of the Statement of Reasons should read as follows:

PwC requested a debrief meeting with the IRB.

By order of the Tribunal,

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

Tribunal Panel:	Susan D. Beaubien, Presiding Member
Support Staff:	Helen Byon, Counsel Isaac Turner, Student-at-law
Complainant:	PricewaterhouseCoopers LLP
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## STATEMENT OF REASONS

[1] PricewaterhouseCoopers LLP (PwC) has complained to the Tribunal concerning the outcome of a tender issued by the Immigration and Refugee Board of Canada (IRB).

[2] Solicitation No. 20191483IRB (RFP) was issued on January 23, 2020, with an initial closing date of February 11, 2020.<sup>1</sup> The RFP was issued under the framework of the Supply Arrangement for Task and Solutions Professional Services (E60ZT-18TSPS) for professional services described as the “Business Consulting/Change Management Stream”.<sup>2</sup> The RFP’s Statement of Work provided additional details concerning the nature of the professional services to be procured.<sup>3</sup>

[3] The RFP’s Statement of Work describes the IRB as the largest administrative tribunal in Canada. Its mandate is to fairly, lawfully and efficiently resolve immigration and refugee cases. Due to a recent surge in asylum claims, attributable in large part to irregular border crossings, the IRB has found itself facing a substantial increase in its workload and an unprecedented backlog of cases. Accordingly, the IRB has identified certain operational priorities, including seeking ways to improve productivity and maximizing effectiveness in its processes. To achieve these objectives, the IRB seeks to implement “. . . measures to increase throughput and eliminate unnecessary rework at each stage of the case processing continuum, encompassing intake, triage, case management, decision-making and recourse.”<sup>4</sup>

[4] The IRB’s “overarching objective” was described by the RFP as follows:

. . . to obtain professional consultancy services to help the IRB find efficiency improvements by leveraging technology and streamlining surrounding business process, practices and toolsets to improve upon while maintaining and strengthening decision-making framework.<sup>5</sup>

[5] The RFP prescribed certain mandatory technical requirements for bids. A bid that did not comply with each and every mandatory requirement would be deemed non-responsive and disqualified. Bidders were required to provide supporting documentation to demonstrate compliance with the mandatory technical criteria.<sup>6</sup>

[6] Bids meeting the mandatory technical requirements would then be assessed and scored for technical merit, according to prescribed scoring criteria, i.e. the “Corporate Point Rated Technical Criteria (CRT)”. A bid which failed to obtain a minimum point score would be deemed non-responsive and disqualified.<sup>7</sup>

[7] A further round of technical evaluation would be carried out with respect to those bids achieving the minimum technical point score. This further assessment would comprise an oral

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<sup>1</sup> Exhibit PR-2020-035-01 at 78.

<sup>2</sup> *Ibid.* at 82.

<sup>3</sup> *Ibid.* at 122-127.

<sup>4</sup> *Ibid.* at 122.

<sup>5</sup> *Ibid.* at 122-123.

<sup>6</sup> *Ibid.* at 96-97.

<sup>7</sup> *Ibid.* at 98-101.

presentation by the bidder to IRB representatives, who would assign a point score to the presentation. According to the RFP, “[t]he presentation should include a demonstration on the Bidder’s existing solutions that meet requirements similar to the ones outlined in the Statement of Work.”<sup>8</sup>

[8] Following the technical assessments, the bids would be subjected to financial evaluation. The winning bid was to be selected using a combined weighted rating of technical merit (80 percent) and price (20 percent), according to a prescribed formula.<sup>9</sup>

[9] Among other information provided to bidders, the RFP included the following:

In their technical bid, bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability and describe their approach in a thorough, concise and clear manner for carrying out the work.

The technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated. Simply repeating the statement contained in the bid solicitation is not sufficient.<sup>10</sup>

[10] Although several companies were invited to compete during the tender process,<sup>11</sup> only two bids were received. The bidders were PwC and Deloitte LLC (Deloitte).<sup>12</sup>

[11] During the course of the tender, five amendments were made to the RFP, which included extending the closing date of the tender to February 26, 2020.<sup>13</sup>

[12] PwC submitted a bid on February 26, 2020.<sup>14</sup> On June 30, 2020, PwC was informed that its bid was found to be non-compliant with two of the four mandatory technical requirements. Consequently, PwC’s bid was disqualified, and PwC was not invited to make an oral presentation to the IRB. Nor was the financial aspect of its bid given any consideration.<sup>15</sup>

[13] The contract was awarded to the only other bidder, Deloitte.<sup>16</sup>

[14] PwC sought clarification from the IRB concerning the grounds for the disqualification of its bid. Based on correspondence from the IRB, PwC formed the view that the information provided was insufficient to enable PwC to understand why its bid had been disqualified. IRB requested a debrief meeting with PwC.<sup>17</sup>

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<sup>8</sup> *Ibid.* at 101-103.

<sup>9</sup> *Ibid.* at 94-95.

<sup>10</sup> *Ibid.* at 90.

<sup>11</sup> *Ibid.* at 85.

<sup>12</sup> *Ibid.* at 412.

<sup>13</sup> *Ibid.* at 141-179.

<sup>14</sup> *Ibid.* at 2, 187-380.

<sup>15</sup> *Ibid.* at 3-4.

<sup>16</sup> *Ibid.* at 412.

<sup>17</sup> *Ibid.* at 390-391.

[15] At issue was the IRB's assessment of PwC's bid content with respect to the following point-rated technical criteria CRT1 and CRT2, which are both mandatory requirements:<sup>18</sup>

CRT1	Each of the projects provided for requirements MT1 to MT4 will be evaluated based on their relevancy to IRB's Statement of Work focus area requirements.
CRT2	The Bidder should demonstrate that it has completed seven (7) projects within the last five (5) years, from bid closing, on public service projects relevant to the Statement of Work to implement enhancements aimed at improving process efficiency and effectiveness with advanced cognitive automation, robotics or artificial intelligence (AI) technology.

[16] From July 1, 2020, to August 25, 2020, correspondence passed between PwC and IRB.<sup>19</sup> This included a letter dated July 15, 2020, wherein PwC contended that its bid, particularly its bid content relevant to CRT1 and CRT2, had been unfairly assessed by PwC.<sup>20</sup>

[17] The correspondence culminated in an oral debrief session which was conducted on July 17, 2020, by way of teleconference and attended by representatives of PwC and the IRB<sup>21</sup>. PwC was dissatisfied with the information and explanation provided by the IRB during the oral debriefing session, as well as the group consensus sheets for the evaluation which were provided to PwC shortly after the oral debrief session.<sup>22</sup> Further written correspondence ensued,<sup>23</sup> with PwC maintaining its objection to the manner in which its bid had been assessed and evaluated. This culminated in an email sent by PwC to the IRB on August 25, 2020, wherein PwC communicated its understanding that the IRB had declined to grant a remedy for PwC's complaint and to which the IRB did not reply.<sup>24</sup>

[18] On September 2, 2020, PwC filed this complaint<sup>25</sup> with the Tribunal.

[19] The Tribunal accepted PwC's complaint for inquiry on September 9, 2020, and the prescribed notice was published in the *Canada Gazette* dated September 19, 2020.

[20] The Tribunal notified Deloitte that it could seek leave to intervene in the proceedings, but Deloitte took no action to do so.<sup>26</sup>

[21] The IRB sought an expedited disposition of PwC's complaint. The Tribunal declined to abridge the 90-day timeline prescribed by section 12(a) of the *Canadian International Trade*

<sup>18</sup> *Ibid.* at 4-5, 170-173, 403-404.

<sup>19</sup> *Ibid.* at 381-448.

<sup>20</sup> *Ibid.* at 403-406.

<sup>21</sup> *Ibid.* at 5, 408-414.

<sup>22</sup> *Ibid.* at 416-431.

<sup>23</sup> *Ibid.* at 433-447.

<sup>24</sup> *Ibid.* at 447.

<sup>25</sup> *Ibid.* at 1.

<sup>26</sup> Exhibit PR-2020-035-08.



*Tribunal Procurement Inquiry Regulations*<sup>27</sup> by invoking the express option, i.e. the 45-day timeline provided by section 12(b) of the *Regulations*, as requested by the IRB.<sup>28</sup>

[22] The IRB filed a Government Institution Report (GIR) on October 9, 2020.<sup>29</sup>

[23] PwC filed comments in response to the GIR on October 21, 2020.<sup>30</sup>

[24] Both parties agreed that an oral hearing was not required.<sup>31</sup>

## POSITIONS OF THE PARTIES

[25] PwC alleges that the procurement process was not fair, open or transparent. It bases its complaint on the following three principal grounds:

- (a) The IRB is alleged to have evaluated PwC's bid on the basis of an undisclosed preference for federal projects, contrary to the final, amended version of the RFP;
- (b) Important information in PwC's bid pertaining to past project experience was disregarded because IRB was using criteria for relevance, and substantiation of relevance, that was not disclosed by the RFP; and
- (c) The IRB did not evaluate PwC's bid in accordance with published evaluation criteria and/or overlooked important information in PwC's bid.

[26] PwC notes<sup>32</sup> that the RFP, as originally published, prescribed that bidders had to demonstrate, with respect to mandatory technical requirements, completion of seven projects in the last five years, from bid closing, "with the Government of Canada where a reporting solution was developed using an analytics tool such as Tableau, [Q]likview, SAP, or Cognos, in the context of the Statement of Work."<sup>33</sup> As a result of questions posed by prospective bidders during the tender process, this requirement was modified and broadened to allow bidders to use previous "public service projects" as reference projects.<sup>34</sup>

[27] Notwithstanding this amendment, PwC contends that the IRB maintained a preference for federal government projects and that this preference underpinned and tainted the evaluation of PwC's bid.

[28] In evaluating the bids, the IRB assessed the relevance of the bidders' reference projects with respect to the Statement of Work. In doing so, PwC argues that the IRB used criteria for relevance that were not disclosed in the RFP and required a specific type of substantiation of relevance, including a requirement for supporting evidence that was not included within the RFP.

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<sup>27</sup> SOR/93-602 [*Regulations*].

<sup>28</sup> *PricewaterhouseCoopers LLP v. Immigration and Refugee Board of Canada* (16 October 2020), PR-2020-035 (CITT).

<sup>29</sup> Exhibit PR-2020-035-12.

<sup>30</sup> Exhibit PR-2020-035-15.

<sup>31</sup> Exhibit PR-2020-035-18; Exhibit PR-2020-035-19.

<sup>32</sup> Exhibit PR-2020-035-01 at 15.

<sup>33</sup> *Ibid.* at 96.

<sup>34</sup> *Ibid.* at 170.

[29] PwC says that the IRB evaluators focused on whether PwC had shown relevance in a particular way and on the quantity of supporting evidence, as opposed to the quality of the reference project described in PwC's bid. This evaluation process led to the IRB overlooking information contained within PwC's bid that PwC asserts was important to a fair assessment of its bid.

[30] In addition, PwC asserts that the IRB took into account and applied other undisclosed criteria.<sup>35</sup>

[31] PwC further contends that the IRB assessed its bid by comparing its content to that of the bid of the only other bidder, Deloitte, instead of assessing it against the published criteria of the RFP.

[32] According to PwC, the IRB's failure to evaluate PwC's bid in accordance with the published criteria and its oversight in disregarding information in PwC's bid had a cumulative effect, in terms of precluding a fair and transparent evaluation of PwC's bid.

[33] PwC alleges that the procurement thus fails to comply with the requirements of the World Trade Organization Agreement on Government Procurement, the Canada-European Union Comprehensive Economic and Trade Agreement and the Canadian Free Trade Agreement, which require that bids be fairly evaluated in accordance with the criteria prescribed by the solicitation documentation.<sup>36</sup>

[34] PwC requests the following remedies:

- (a) that the Tribunal determine that PwC's complaint is valid;
- (b) that the Tribunal order IRB to terminate the designated contract awarded to Deloitte and stop any work being performed by Deloitte to implement the contract;
- (c) that the Tribunal order IRB to re-evaluate PwC's and Deloitte's bids using a new evaluation team, in accordance with the directions of the Tribunal and the evaluation criteria stated in the RFP;
- (d) that if, as a result of the re-evaluation, IRB determines that PwC's bid is the highest ranked bid, that PwC be awarded the Contract or that PwC be compensated for lost profits;
- (e) that PwC be awarded the costs of proceeding with this complaint; or
- (f) in the alternative, that PwC be awarded the costs associated with preparing its bid; and
- (g) such further and other relief as the Tribunal deems appropriate.<sup>37</sup>

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<sup>35</sup> These are said by PwC to comprise "i) a requirement for a separate narrative indicating relevancy for CRT1; ii) a requirement under CRT4 to demonstrate knowledge of the "guidelines or standards established at the GoC level", and iii) the application of a binary scoring scheme for CRT2". Exhibit PR-2020-035-01 at 38.

<sup>36</sup> *Ibid.* at 5.

<sup>37</sup> *Ibid.* at 42.

[35] The IRB filed a brief GIR, comprising written submissions<sup>38</sup> and copies of the individual evaluation sheets prepared by the evaluators.<sup>39</sup>

[36] The IRB submits that PwC's bid was assessed fairly and reasonably, in a manner consistent with published evaluation criteria. In such circumstances, it argues that the Tribunal should defer the IRB's evaluators and not substitute its evaluation for that of the evaluators.

[37] In its written submissions, the IRB further states that the bids were assessed individually by three evaluators at a consensus meeting.

[38] To the extent that PwC complains about vague or indefinite evaluation criteria with respect to the assessment of the relevance of the reference projects, the IRB argues that PwC's complaints are out of time. It adds that, if PwC had concerns about the criteria for assessing relevance, it should have sought clarification during the tender process.

[39] The IRB points out that bid requirements, including the evaluation criteria, must be read holistically and in the overall context of the RFP. Bidders have an obligation of due diligence during bid preparation. The onus rests on the bidders to demonstrate compliance with the requirements of the RFP. In essence, the IRB contends that PwC's complaint is self-inflicted, arising from PwC's own failure to include adequate and sufficient information in its bid.

[40] According to the IRB, the basis for evaluation was clear from the tender documents on their face, and the interpretation was a matter for the IRB's evaluators. Even if the parameters for relevance were not explicitly stated in the RFP, they were reasonably inferable from the RFP. Procuring entities cannot be reasonably expected to spell out every nuance of bid evaluation in the RFP.

[41] In evaluating the bids received during this tender process, the IRB was "... assessing the relevance of the proffered projects to the statement of work and the requirements of the IRB".<sup>40</sup> There was no preference for federal projects and PwC has misinterpreted the information provided by the IRB with respect to the evaluation process. The IRB stresses that each project was evaluated on its merits with respect to relevance and that there is no merit to PwC's claim that undisclosed criteria underpinned the assessment of bids.

[42] PwC provided extensive comments in reply to the GIR.<sup>41</sup>

## ANALYSIS

[43] There is no dispute that the RFP pertains to a "designated contract" within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act (CITT Act)*.

[44] Upon reviewing the record, the Tribunal is persuaded that PwC's complaint is well-founded, in part. The documents purportedly illustrating the parameters for bid evaluation and how that process was conducted indicate that the IRB's application of the RFP's point-rated technical requirements was inconsistent and unduly fluid.

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<sup>38</sup> Exhibit PR-2020-035-12 at 3-18.

<sup>39</sup> *Ibid.* at 20-43.

<sup>40</sup> *Ibid.* at 8.

<sup>41</sup> Exhibit PR-2020-035-15.

[45] The Tribunal limits its review to requirements CRT1 and CRT2 as these are the mandatory technical requirements for which PwC's bid did not receive the requisite minimum score, which precluded advancement of PwC's bid to the next phase of the competition (oral presentation).

[46] The starting point in this analysis is the RFP. The requirement for CRT1 is defined as follows:

Each of the projects provided for requirements MT1 to MT4 will be evaluated based on their relevancy to IRB's Statement of Work focus area requirements.<sup>42</sup>

[47] The requirement for MT1 is described as follows:

The Bidder must demonstrate that they have completed five (5) projects in the last five (5) years, from bid closing, on public service projects where a reporting solution was developed using an analytics tool such as Tableau, Qlikview, SAP, or Cognos, in the context of the Statement of Work.<sup>43</sup>

[48] MT2 and MT3 likewise prescribed a bidder to demonstrate previous work on "public service projects", albeit for a different range of specific services.<sup>44</sup>

[49] "Public service projects" is defined as ". . . any project for a department, Agency, or Board for a government in Canada or a Crown Corporation. This includes Federal, Provincial, Municipal or Territorial Government. . . ."<sup>45</sup>

[50] The Statement of Work identifies and defines the scope of work in very broad and general terms.<sup>46</sup> Although there is a brief description of the IRB's work and mandate, the nature of the services being procured are not framed or mapped to any specific aspect of the IRB's operations. By way of example, the role of the Contractor is expressed as follows:

The Contractor will provide professional services and expertise to the IRB to enable successful service transformation, development and implementation of digital transformation. The Contractor is required to effectively navigate government processes, build awareness and support for IRB's major initiatives, on an "as and when requested" basis with a focus on provision of the following key responsibilities:

- a) Assist the IRB with organizing, planning, directing, and implementing activities while helping ensure that work, investments and activities remain aligned with the IRB's strategic priorities, digital strategy and roadmaps in order to continue tracking towards achievement of IRB desired outcomes and the realization of defined benefits.
- b) To support the IRB in engaging employees and stakeholders in support of the transformation agenda; provide expertise in leading change in alignment with the

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<sup>42</sup> Exhibit PR-2020-03-01 at 172.

<sup>43</sup> *Ibid.* at 170.

<sup>44</sup> *Ibid.* at 171.

<sup>45</sup> *Ibid.* at 170.

<sup>46</sup> *Ibid.* at 122-127.

overarching IRB's strategic priorities, digital strategy and, assist with the development and implementation of communications strategies and plans in support of the agenda.<sup>47</sup>

[51] The Scope of Work is defined as follows:

## 5.0 SCOPE OF WORK

In order to meet the IRB's needs, the professional services of Business Consultants and Change Management Consultants are required to perform various solutions-based tasks to support IRB program delivery and to assist in the planning, preparation, execution, and management in order to facilitate achieving service strategy goals, ensuring the following is achieved/provided

- Building on existing and review of business processes and identification of areas of improvement, providing recommendations and working with management to implement enhancements aimed at improving process efficiency and effectiveness.
- Guidance and facilitation with managing cultural change, organizational change management and integration.
- Identifying opportunities for operational enhancements.<sup>48</sup>

[52] The Scope of Work section further references three "focus areas", namely analytics, process efficiency, effectiveness and automation, and change management. For each focus, a list of representative tasks is provided, e.g.

**a) Analytics:** Initiatives to measure and improve upon performance management and decision-making through data integrity and advanced data analytics and visualization techniques and tools.

Examples of tasks include, but may not be limited to:

- Developing data analytics data sets, tools and competencies to support ongoing analysis and management decision-making;
- Identifying data gaps and recommending gap closure approaches;
- Evaluating the adequacy and availability of information to support decision-making;
- Identifying and recommending enhancements to data for decision-making, including the design and use of supporting technologies e.g. data visualization software;
- Identification of leading practices and enabling technology to optimize operations and management functions and facilitation of alignment with common processes that support improved quality of information for decision-making;
- Providing advice and assistance on data structuring, integration, mining, extraction, and identification of key data trends and outliers;
- Providing advice and assistance on deriving actionable insights from complex data sets, through use of data analytics and data visualization;
- Providing recommendations related to effective analytics.<sup>49</sup>

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<sup>47</sup> *Ibid.* at 123.

<sup>48</sup> *Ibid.* at 124.

<sup>49</sup> *Ibid.* at 125.

[53] Examples were also provided for the other two focus areas, namely process efficiency, effectiveness and automation, and change management.<sup>50</sup>

[54] In view of the foregoing, the Tribunal finds that the content of the RFP signalled to bidders that the relevance standard for CRT1 could be met by demonstrating, in the project descriptions, experiences with respect to the three identified “focus areas”, so long as that experience had been obtained in a public service context.

[55] However, the evaluation documents indicate that the IRB prioritized and placed a premium on whether the project descriptions reflected experience within a particular context. More particularly, the IRB evaluators appeared to be seeking bid content that reflected a problem/solution approach with a nexus to the IRB’s operational challenges, as opposed to confirmation that the bidder had previously performed the type of tasks falling within the scope of the three focus areas identified by the RFP.

[56] Although the RFP states that bidders are responsible for providing supporting documentation to demonstrate compliance,<sup>51</sup> a contextual reading of the RFP supports the interpretation that documentation confirming past project experience with the tasks described in the Statement of Work would suffice.

[57] However, the bid evaluation documents indicate that the evaluators were looking for, or expecting, something more than confirmation of previous project experience. The second phase of the evaluation (group consensus meeting) indicates that a higher threshold was being sought, namely *evidence*. The evaluation sheet emphasized<sup>52</sup> that, for both CRT1 and CRT2, “quality of evidence” was a factor, with this being assessed with reference to the features of “applicable, apposite, appropriate, suitable, fitting, pertinence, importance, materiality, applicability, significance, aptness, relativity”<sup>53</sup>, none of which are mentioned by the RFP as evaluation criteria or could be inferred from the RFP.

[58] The evaluation documents indicate that the quality of evidence was not assessed with reference to the types of skills or experiences falling within the scope of the three focus areas,<sup>54</sup> but extended to a wider framework, namely the type of organization. In finding that PwC’s bid did not achieve the minimum technical score, comments from the consensus evaluation group included the following remarks:

The vast majority of presented projects only have at best somewhat relevancy relating back to IRB requirements and objectives.<sup>55</sup>

[59] This finding indicates that the IRB evaluators were measuring relevancy for CRT1 and CRT2 not with respect to comparing the type of tasks and work prescribed by the RFP (notably in the Statement of Work) with the work done by PwC on previous projects, but by assessing the described

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<sup>50</sup> *Ibid.* at 125-126.

<sup>51</sup> *Ibid.* at 170.

<sup>52</sup> Using capital letters and bold font.

<sup>53</sup> Exhibit PR-2020-035-01 at 426.

<sup>54</sup> Namely, analytics, process efficiency, effectiveness and automation, and change management as these are described in the statement of work.

<sup>55</sup> Exhibit PR-2020-035-01 at 426.

experience with reference to the IRB's own operational infrastructure, requirements and organizational objectives.

[60] Comments from the consensus report also contained the following remarks:

True "relevancy" could very well be a stretch as opposed to a 2.5 "some-what relevant" score. The bidder's inability to articulate and substantiate aside for inserting words from SOW and focus areas, provided in most cases little to no information that could justify through evaluation that projects were above somewhat relevant. I would even suggest that a few could even be deemed as scoring 0 points "irrelevant" based on lack of information provided.

Based on quality of evidence for relevancy ((applicable, germane, apposite, appropriate, suitable, fitting, pertinence, importance, materiality, applicability, significance, aptness), as well as additional lack of touchpoints;

- Nature of the client organization: FPT/M, mandate, regulations, oversight
- Scope and activities completed: analytics, robotics, etc.
- Meeting requirements and achieving intended results: more than SOW
- Relevant approaches and methodologies: Above and beyond SOW<sup>56</sup>

[61] These comments indicate that the nature of the client organization for whom previous work had been done was given weight during bid evaluation especially the factors of "mandate, regulations, oversight". The Tribunal concludes that these remarks support the conclusion that the reviewer was focused on previous work projects carried out for public sector organizations analogous to the IRB itself,<sup>57</sup> as opposed to those demonstrating performance of services representative of analytics, process efficiency, effectiveness and automation, and change management, as these are described in the Statement of Work.

[62] The IRB attempts to explain this comment as indicative of a screening function, namely consideration as to whether the client organization is indeed a public sector entity.<sup>58</sup> The Tribunal finds this explanation to be unpersuasive. This factor is not limited to the name or identity of the client organization as a public sector entity but extends to its *nature* being referable to three features of the organization (mandate, regulations and oversight) indicative of its operations. Taken together, those features define a benchmark for assessing the extent to which the client organization is similar to the IRB.

[63] In addition, the consensus evaluation report indicates that demonstration of "relevance"<sup>59</sup> could not be achieved by meeting the terms of the Statement of Work, i.e. a bidder needed "more than SOW" or "above and beyond SOW".<sup>60</sup>

[64] It is possible that the IRB's evaluation was driven by the content and structure of Deloitte's bid, leading it to compare PwC's bid with Deloitte's bid. While it is understandable that the IRB was

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<sup>56</sup> *Ibid.* at 427.

<sup>57</sup> Although this is suggestive of a possible preference to federal entities, the Tribunal concludes that this is not dispositive.

<sup>58</sup> Exhibit PR-2020-035-12, para. 25.

<sup>59</sup> That would achieve the full value of available points.

<sup>60</sup> Exhibit PR-2020-035-01 at 427.

seeking a service provider that could best serve its needs, the procurement process undertaken to achieve that goal was flawed.

[65] In the Tribunal's view, the RFP was either drafted very broadly to provide bidders with a blank slate in the hope that they would submit a problem/solution proposal specifically tailored to the IRB's specific organizational challenges or, in the alternative, the evaluation route took a detour by comparing the two bids with each other, instead of the RFP. If the former, the RFP was flawed from the outset because it was premised on an evaluation matrix that was not disclosed to prospective bidders and could not have been reasonably inferable, given the description of the Statement of Work and the undisclosed expectation that bidders would provide cogent evidence, as opposed to confirmatory documentation.<sup>61</sup>

[66] With respect to the latter, the Tribunal notes that the bid evaluation comprised two phases: a first evaluation carried out by three individual evaluators, followed by a meeting at which a "group consensus" was reached. The group consensus evaluation sheet reflects scoring for both the PwC and the Deloitte bids on the same page,<sup>62</sup> and the Tribunal has not been persuaded that there was no comparative process. As this phase of the evaluation process is described as a "consensus meeting", it is inferable that the merits and scoring of both bids would have been compared and discussed. If the evaluation had been completed based on the scores assigned independently by the individual evaluators, no "consensus" meeting would have been needed; the evaluators would have simply reported their scores for tally, a simple mathematical exercise.

[67] As such, the Tribunal considers it likely, if not probable, that the evaluation of PwC's bid comprised a comparison with the technical content of Deloitte's bid, as opposed to the evaluation as against the requirements of the RFP alone.

[68] The Tribunal notes that the GIR did not provide copies of Deloitte's evaluation,<sup>63</sup> or include an affidavit from an individual at the IRB who could have explained the processes that were followed by the IRB during bid evaluation.

[69] Given the nature of procurement proceedings and the statutory timeline for completing them, there is at least an expectation that a party, including a government institution filing a GIR, will put its best foot forward. A party is generally expected to prove those matters falling squarely within its knowledge or means of knowledge, especially where the requisite facts or information are not within the power, possession or control of the opposing party, i.e. the complainant. If it fails to do so, an adverse inference may be drawn.<sup>64</sup>

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<sup>61</sup> See paras. 46-58, *infra*.

<sup>62</sup> Exhibit PR-2020-035-01 at 423.

<sup>63</sup> It is understandable that the IRB did not provide PwC with copies of its evaluation documents pertaining to Deloitte's bid, for reasons of confidentiality. However, that limitation is not present in proceedings before the Tribunal which routinely receives, considers and protects confidential information.

<sup>64</sup> See e.g. *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 SCR 311; *Canadian Northern Quebec R. Co. v. Pleet*, 1921 CanLII 518 (ON CA), 50 O.L.R. 223, *affd* 1921 CanLII 564 (SCC), [1923] 4 DLR 1112; *Hoffmann-La Roche Ltd. v. Apotex Inc.* (1984), 1984 CanLII 1883 (ON CA), 47 O.R. (2d) 287 at 288; *Les Systèmes Equinox Inc. v. Department of Public Works and Government Services* (12 March 2009) PR-2006-045R (CITT) at para. 74. The Tribunal's adverse inferences were confirmed by the Federal Court of Appeal. See *Attorney General of Canada v. Les Systèmes Equinox Inc.*, 2009 FCA 304 at para. 3.



[70] In this case, only individuals at the IRB had first-hand knowledge concerning the bid evaluations. As there is no persuasive evidence from the IRB that could explain or rebut the statements made in the bid evaluation documents concerning CRT1 and CRT2, the Tribunal concludes that PwC's has a valid complaint that its bid was evaluated as against criteria that differed from those of the RFP or were undisclosed in the RFP.

[71] Accordingly, the Tribunal also dismisses the IRB's argument that PwC's complaint was not timely. The evaluation criteria for relevance as prescribed by the RFP were not inherently ambiguous, so as to trigger an obligation on PwC to seek clarification. Rather, the flaw arose when those criteria were varied or narrowed during the evaluation of the bids. PwC complained about the outcome of the procurement to the IRB and filed a timely complaint with the Tribunal once it received constructive notice that it would receive no remedy from the IRB.<sup>65</sup>

[72] In its complaint, PwC makes submissions concerning the scores that it believes should have been awarded to its bid.<sup>66</sup> The Tribunal declines to uphold this aspect of PwC's complaint, including its contention that it should have received higher scores, as this would place the Tribunal in the position of assessing bid content and assigning a point score.

[73] Accordingly, the Tribunal finds that PwC's complaint is valid, in part.

[74] In recommending a remedy as provided by subsection 30.15(2) of the *CITT Act*, the Tribunal is required to consider the factors specified by subsection 30.15(3):

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

[75] The Tribunal finds that the deficiency in this procurement was significant but is mitigated by its specific circumstances. It is likely that the flaws in the assessment process arose from, and are likely attributable to, the fact that only two bids were received. Such circumstances facilitate the inclination to compare the bids to each other, as opposed to the criteria of the RFP. Although this operated to the prejudice of PwC, it also means that no other parties were likewise prejudiced or affected.

[76] The nature of the prejudice is also relevant. This is not a situation where the flaws in the bid evaluation process allow the Tribunal to reach the conclusion that PwC was denied a contract that it

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<sup>65</sup> Exhibit PR-2020-035-01 at 447.

<sup>66</sup> For example, Exhibit PR-2020-035-01 at 15-26.

otherwise would have won. There were at least two other significant variables, i.e. the score on the oral presentation and the bid price that may well have had significant impact, if not been dispositive, concerning the outcome of the procurement. Neither can be presumed to have necessarily worked in PwC's favour, especially given the weighed formula to be applied to the technical merits score and price.

[77] Accordingly, the Tribunal concludes, on these facts, that any prejudice to the integrity and efficiency of the competitive procurement system is minimal. There is no suggestion of bad faith. The Tribunal is satisfied that the IRB was seeking what it perceived to be the best service provider for the services that it required for its operational needs.

[78] The IRB has previously advised PwC and the Tribunal that the work to be performed under the contract is considered to be operationally urgent and will be performed, in large part, during the fall of 2020, concurrently with these proceedings.<sup>67</sup>

[79] In view of the foregoing, the Tribunal does not consider it appropriate to recommend cancellation of the contract, especially since the contract is likely to have already been substantially performed as of the date of the Tribunal's determination. Moreover, it would be speculative to conclude that PwC would have won the contract, as this would have been contingent on the assessment of an oral presentation that PwC might have given and its bid price, together with a revised technical merit score. Nor is the Tribunal in a position to reach this conclusion by conducting its own remedial technical and financial assessment of PwC's bid.

[80] In recommending a financial remedy, the Tribunal's objective is to place the complainant in the position that it would have been in, but for the deficiencies in the procurement process and consequent breach of the trade agreements.<sup>68</sup> The recommendations should not represent a windfall, but should reflect the actual loss suffered as a result of the government's breach. In that regard, the principle is generally consistent with common law principles of damages.<sup>69</sup> Having regard to the foregoing, an award for lost profit from the contract is not justified. In this case, what PwC has lost is the opportunity for its bid to have advanced to the oral presentation stage of the procurement. As such, the Tribunal recommends that PwC be financially compensated by the IRB for that lost opportunity.<sup>70</sup>

[81] The Tribunal further awards PwC its reasonable bid preparation costs, also payable by the IRB. If the criteria for relevance had been more clearly enunciated by the RFP or if the RFP had been more transparent concerning the importance placed by the RFP on demonstrating relevance referable to the IRB itself with supporting evidence, PwC may well have decided not to submit a bid.

[82] As costs typically follow the event and PwC's complaint has been found valid on at least one substantive ground, the Tribunal awards PwC its reasonable costs of this proceeding, which are considered to fall, on a preliminary basis, within Level 2.

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<sup>67</sup> Exhibit PR-2020-035-06 at 2.

<sup>68</sup> *Conair Aviation* (30 January 1997), PR-95-039 (CITT).

<sup>69</sup> *Maritime Fence Ltd.* (1 April 2011), PR-2009-027 (CITT) at para. 5; *Oshkosh Defense Canada Inc.* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) [*Oshkosh*] at para. 71; *Spacesaver Corp.* (27 April 1999), PR-98-028 (CITT); *Mechron Energy Ltd.* (26 October 1995), PR-95-001 (CITT).

<sup>70</sup> *Procurement Compensation Guidelines* (2014), art. 3.1.4, art. 3.1.5, <<https://citt-tcce.gc.ca/en/resource-types/procurement-compensation-guidelines.html>>.

[83] The parties are encouraged to negotiate and settle the amount of financial compensation, reasonable bid preparation costs and costs of this proceeding. If the parties are unable to agree, the Tribunal will fix these amounts upon hearing further submissions from the parties, in accordance with the Determination below.

#### **DETERMINATION**

[84] Pursuant to subsection 30.14(2) of the *CITT Act*, the Canadian International Trade Tribunal determines that the complaint is valid, in part.

[85] With respect to remedy, the Tribunal recommends that the IRB compensate PwC for lost opportunity. The Tribunal further awards PwC its reasonable bid preparation costs, also payable by the IRB.

[86] The Tribunal encourages the parties to negotiate and reach agreement concerning the amounts payable to PwC, by way of compensation and bid preparation costs. If the parties are unable to reach a settlement within 45 days of the date of this Determination, the parties are directed to so advise the Tribunal. The Tribunal will then determine the quantum of compensation that should be paid to PwC and will assess the amount of bid preparation costs awarded to PwC, after hearing further submissions from the parties, in accordance with a timetable to be fixed.

[87] PwC is also awarded its reasonable costs for this complaint case. In accordance with the Procurement Costs Guideline,<sup>71</sup> the Tribunal's preliminary determination of the level of complexity for this complaint case is Level 2. The Tribunal's preliminary indication of the amount of the cost award is \$2,750. The parties may make submissions on costs in conjunction with any further submissions made to the Tribunal concerning the assessment of compensation and bid preparation costs or within 45 days from the date of this Determination, whichever is later.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

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<sup>71</sup> <<https://www.citt-tcce.gc.ca/en/resource-types/procurement-costs-guideline.html>>.