



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File Nos. PR-2020-038,  
PR-2020-044 and PR-2020-056

Marine Recycling Corporation  
and Canadian Maritime  
Engineering Ltd.

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, January 22, 2021*

*Reasons issued  
Monday, February 22, 2021*

*Corrigendum issued  
Wednesday, April 7, 2021*

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IN THE MATTER OF complaints filed by Marine Recycling Corporation and Canadian Maritime Engineering Ltd. 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 complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**MARINE RECYCLING CORPORATION**

**Complainant**

**AND**

**CANADIAN MARITIME ENGINEERING LTD.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**Government Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act (CITT Act)*, the Canadian International Trade Tribunal determines that the complaints are valid in part.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services (PWGSC) re-evaluate all bids that were considered for evaluation during Phase III of the phased bid compliance process solely with respect to mandatory technical criteria M.2.4.1, M.2.6, M.2.9 and M.2.10, in accordance with the Tribunal's direction set out in the reasons for this determination. The re-evaluation should be conducted as soon as practicable and no later than six months from this determination.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Marine Recycling Corporation its reasonable costs incurred in preparing and proceeding with its complaint (File No. PR-2020-038), which costs are to be paid by PWGSC. In accordance with the *Procurement Costs Guideline (Guideline)*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Canadian Maritime Engineering Ltd. its reasonable costs incurred in preparing and proceeding with its complaints (Files No. PR-2020-044 and PR-2020-056), which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for these complaint cases, considered together, is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the

preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Cheryl Beckett

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Cheryl Beckett  
Presiding Member

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

IN THE MATTER OF complaints filed by Marine Recycling Corporation and Canadian Maritime Engineering Ltd. 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 complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**MARINE RECYCLING CORPORATION**

**Appellant**

**AND**

**CANADIAN MARITIME ENGINEERING LTD.**

**Respondent**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**CORRIGENDUM**

At paragraph 99 of the reasons, the references to “M.2.9” should be replaced by “M.2.10”.

Cheryl Beckett

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Cheryl Beckett

Presiding Member

Tribunal Panel:	Cheryl Beckett, Presiding Member
Support Staff:	Helen Byon, Lead Counsel Zackery Shaver, Counsel
Complainant:	Marine Recycling Corporation
Counsel for the Complainant:	Vince DeRose Stephanie Desjardins
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## STATEMENT OF REASONS

[1] The inquiry concerns a Request for Proposal (Solicitation No. F7044-200238/A) (RFP) for the disposal of the former *CCGS W.E. Ricker* vessel, issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans. Three complaints were filed in respect of this RFP. The first complaint was filed by Marine Recycling Corporation (MRC) on September 9, 2020 (File No. PR-2020-038), and two complaints were filed by Canadian Maritime Engineering Ltd. (CME), one on September 17, 2020 (File No. PR-2020-044), and the other on October 21 and 22, 2020 (File No. PR-2020-056). These complaints were consolidated as described below.

[2] The Tribunal accepted the complaints for inquiry, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

[3] The Tribunal conducted an inquiry into the validity of the complaints as required by sections 30.14 and 30.15 of the *CITT Act*. For the reasons provided below, the Tribunal finds that the complaints are valid in part.

### SUMMARY OF THE COMPLAINTS

[4] In its complaint in File No. PR-2020-038, MRC alleged that PWGSC breached its obligations under the Canadian Free Trade Agreement<sup>3</sup> in its evaluation of rated requirements M.2.1, M.2.4.1, M.2.6, M.2.9 and M.2.10. MRC submitted that the evaluators relied on undisclosed criteria, ignored vital information contained in its bid or failed to evaluate its bid in accordance with the published criteria. These errors allegedly resulted in MRC not being awarded the contract. Furthermore, MRC submitted that PWGSC's cancellation of the solicitation process was in breach of the CFTA.

[5] In its complaint in File No. PR-2020-044, CME alleged that PWGSC breached the CFTA by improperly cancelling the contract it was awarded and the solicitation. CME also argued that PWGSC's disclosure of its contract price and technical score breached the CFTA and that the disclosure would cause it to be prejudiced in the next solicitation process.

[6] In its complaint in File No. PR-2020-056, CME alleged that PWGSC breached its obligations under the CFTA in its evaluation of rated requirements M.2.3.1, M.2.4.1, M.2.6, M.2.9 and M.2.10. Similarly to MRC, CME submitted that the evaluators relied on undisclosed criteria, ignored vital information contained in its bid or failed to evaluate its bid in accordance with the published criteria.

[7] Both CME and MRC contended that they should be awarded the contract at issue, each arguing that they would have had the highest combined score but for the evaluation errors. Both parties also argued that they will be prejudiced by a resolicitation process. As an alternative, MRC and CME indicated that the bids should be re-evaluated in accordance with the RFP. In the case that the Tribunal recommends resolicitation, MRC submitted that both parties should receive

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

<sup>2</sup> SOR/93-602 [*Regulations*].

<sup>3</sup> Canadian Free Trade Agreement, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

lost-opportunity costs (i.e. each a 50 percent portion of lost profits under the contract). CME also requested lost profits and bid preparation costs, as well as the cost of responding to any future tendering. Both MRC and CME requested their respective litigation costs.

[8] PWGSC submitted that none of the relief sought by either MRC or CME was appropriate in light of the termination of the contract and pending retendering of the RFP.

## PROCUREMENT BACKGROUND

### The RFP process

[9] PWGSC issued the RFP on April 22, 2020.<sup>4</sup> There were six amendments of the RFP.<sup>5</sup> The closing date was extended to June 25, 2020, pursuant to Amendment No. 005.<sup>6</sup> PWGSC received five bids.

[10] The RFP included a phased bid compliance process. In Phase I, bids were reviewed to determine whether any information required to be included in the financial bid was missing. Bidders were permitted to remedy any deficiencies identified by PWGSC. Phase II was limited to a review of the technical bid to identify any instances where the bid failed to meet any Eligible Mandatory Criteria. Bidders were issued a Compliance Assessment Report (CAR) identifying any Eligible Mandatory Criteria that the bid failed to meet and were provided a period in which they could provide additional information to achieve compliance with the identified criteria.<sup>7</sup> Additional information submitted in accordance with the RFP would be considered as part of the bid, but would only be considered for the purpose of determining compliance with the Eligible Mandatory Criteria in Phase II. The additional information would not be used to increase any score that the original bid would have achieved. During Phase III, technical bids were assessed for responsiveness to the solicitation requirements.<sup>8</sup>

[11] The contract was awarded to CME on August 4, 2020. The contract award notice published by PWGSC included the total contract value.<sup>9</sup> That same day, PWGSC advised MRC that the contract had been awarded to CME. In the regret letter, PWGSC included CME's contract price as well as the final evaluation scores for each of MRC's and CME's bids.<sup>10</sup>

[12] On August 11, 2020, MRC notified PWGSC of its objection regarding the contract award and the evaluation of its bid.<sup>11</sup>

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<sup>4</sup> The Tribunal's Order and Reasons in respect of File No. PR-2020-044 issued on October 6, 2020, indicated that the RFP was issued on April 21, 2020, as described in CME's complaint. PWGSC's GIR filed on October 26, 2020, indicated that the RFP was issued on April 22, 2020.

<sup>5</sup> Amendment No. 001 dated May 21, 2020; Amendment No. 002 dated June 1, 2020; Amendment No. 003 dated June 11, 2020; Amendment No. 004 dated June 12, 2020; Amendment No. 005 dated June 15, 2020; and Amendment No. 006 dated June 19, 2020. See Exhibit PR-2020-0038-07A at 78, 157, 240, 322, 401, 403.

<sup>6</sup> Exhibit PR-2020-038-07A at 402.

<sup>7</sup> A bidder that was responsive to the requirements reviewed during Phase II would receive a CAR stating that its bid was responsive to the requirements at Phase II. Section 4.1.1.3(b) of the RFP, Exhibit PR-2020-038-07A at 336.

<sup>8</sup> See sections 4.1.1.2 to 4.1.1.4 of the RFP. See Exhibit PR-2020-038-07A at 334-337.

<sup>9</sup> Exhibit PR-2020-044-01 at 433.

<sup>10</sup> Exhibit PR-2020-038-01B, paras. 13, 14 at 22; Exhibit PR-2020-038-01C (protected) at 729-732.

<sup>11</sup> PWGSC received objections from two other unsuccessful bidders regarding the procurement process. These bidders did not participate in these proceedings. Exhibit PR-2020-038-41, paras. 39, 40 at 16.



[13] On August 28, 2020, PWGSC notified MRC and CME that it was terminating the contract due to “issues” with the RFP and that it intended to resolicit the requirement with revised terms.<sup>12</sup> The same day, CME objected to the termination of the contract and requested a debrief. CME also inquired with PWGSC regarding available contract amendment procedures and raised concerns with respect to the publication of CME’s bid price on Buyandsell.gc.ca, as it related to CME’s ability to participate in the resolicitation process.<sup>13</sup> On September 2, 2020, PWGSC confirmed with CME its intention to retender the requirement with revised terms.<sup>14</sup>

[14] On September 10, 2020, CME received a teleconference debriefing from PWGSC.

### Complaint proceedings

[15] On September 9, 2020, MRC filed a complaint (File No. PR-2020-038) with the Tribunal, which was accepted for inquiry by the Tribunal on September 14, 2020.

[16] The Tribunal issued a letter to MRC with respect to its designation of confidential information contained in its complaint on September 15, 2020. MRC refiled its complaint on September 18, 2020.

[17] On September 17, 2020, CME filed its first complaint (File No. PR-2020-044) with the Tribunal, which was accepted for inquiry on September 22, 2020. In its complaint, CME requested that the Tribunal order the postponement of the retendering. On September 24, 2020, the Tribunal notified the parties that CME’s request would not be granted.<sup>15</sup>

[18] On September 28, 2020, CME requested leave to intervene in the proceedings for File No. PR-2020-038. MRC filed submissions on September 30, 2020, indicating it did not oppose CME’s request for intervener status provided MRC could participate as an intervener in the proceedings for File No. PR-2020-044. MRC also requested that the two complaints be consolidated. PWGSC consented to the intervention requests in both cases and also consented to the consolidation of the complaints. On October 2, 2020, CME consented to MRC being granted intervener status but requested an opportunity to review MRC’s confidential complaint before providing comments on the consolidation of the complaints.

[19] On October 6, 2020, the Tribunal granted CME intervener status in File No. PR-2020-038 and MRC intervener status in File No. PR-2020-044.

[20] With no objections from the parties, on October 9, 2020, the Tribunal confirmed the consolidation of the proceedings for File No. PR-2020-038 and File No. PR-2020-044 and advised the parties that the deadline for the Tribunal’s determination in respect of the complaints would be extended to 135 days from the filing of the complaint in File No. PR-2020-038. The deadline for filing the Government Institution Report (GIR), with respect to File No. PR-2020-038 and File No. PR-2020-044, was extended to October 20, 2020.

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<sup>12</sup> Exhibit PR-2020-044-01 at 436. The Contract Amendment for Termination of Convenience was dated August 25, 2020. See Exhibit PR-2020-038-41 para. 45 at 17; Exhibit PR-2020-038-28B (protected) at 377, 378; Exhibit PR-2020-038-1B, para. 22 at 23.

<sup>13</sup> Exhibit PR-2020-044-01 at 438.

<sup>14</sup> *Ibid.* at 440.

<sup>15</sup> The order and reasons for the Tribunal’s decision were issued on October 6, 2020. Exhibit PR-2020-044-15.

[21] On October 21 and 22, 2020, CME filed its second complaint (File No. PR-2020-056), which was accepted for inquiry on October 26, 2020.

[22] After granting a request to further extend the deadline for filing the GIR for File No. PR-2020-038 and File No. PR-2020-044, PWGSC filed the GIR on October 26, 2020. A revised version of the GIR was filed on October 29, 2020.

[23] On October 29, 2020, MRC filed a motion for the Tribunal to cease its inquiry into CME's complaint in File No. PR-2020-056 on the basis that it was filed outside of the time limits prescribed under section 6 of the *Regulations*. In the alternative, should the Tribunal proceed with its inquiry, MRC requested intervener status. The next day, CME filed submissions opposing MRC's motion and consented to MRC's request for intervener status. CME also requested that the proceedings in File No. PR-2020-056 be joined with those of File No. PR-2020-038 and File No. PR-2020-044.

[24] On October 30, 2020, the Tribunal granted MRC intervener status in File No. PR-2020-056 and requested submissions from PWGSC with respect to MRC's motion. On November 2, 2020, PWGSC confirmed it had no position on the motion.

[25] On November 3, 2020, the Tribunal issued an order dismissing MRC's motion on the basis that CME's second complaint was filed within the time limits prescribed by section 6 of the *Regulations*.<sup>16</sup> As no objections were made, the Tribunal also notified the parties that it would consolidate File No. PR-2020-056 with the proceedings of File No. PR-2020-038 and File No. PR-2020-044.

[26] On November 4, 2020, PWGSC indicated that it would be relying on the GIR filed in File No. PR-2020-038 and File No. PR-2020-044 for its response to CME's complaint in File No. PR-2020-056; the GIR addressed the relief sought by CME in its first complaint and explained the need for retendering. PWGSC's position in this regard was confirmed again on November 19, 2020, after it received MRC's and CME's comments on the GIR on November 13, 2020. Revised comments on the GIR by MRC were filed on December 8, 2020, to address information that was previously designated as confidential by PWGSC.

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

[28] On January 22, 2021, the Tribunal issued its determination with respect to the complaints.

[29] On February 8 and 9, 2021, the MRC and PWGSC, respectively, confirmed that the public version of the GIR contained confidential information. PWGSC filed a revised public GIR on February 11, 2021.

[30] On February 17, 2021, the Tribunal issued a draft copy of its determination and reasons to allow the parties to confirm that it did not contain confidential information.

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<sup>16</sup> The order and reasons were issued on November 17, 2020. Exhibit PR-2020-056-13B.

## PRELIMINARY MATTER

### PWGSC's GIR

[31] In its comments on the GIR, MRC submitted that PWGSC failed to fully respond to the allegations of MRC and CME concerning the evaluation of certain rated requirements. Accordingly, PWGSC did not comply with rule 103 of the *CITT Rules* which provides that a GIR shall contain “. . . all other documents that are relevant to the complaint; a statement that sets out all findings, actions and recommendations of the government institution and that responds fully to all allegations that are contained in the complaint; and any additional evidence or information that may be necessary in order to resolve the complaint.”

[32] Indeed, the Tribunal finds that PWGSC did not respond appropriately to the issues complained of by MRC and CME concerning the procurement process. The GIR mainly addressed PWGSC's position with respect to the remedies sought by MRC and CME, procedural events leading up to and following contract award, and the rationale for its decision to terminate the contract and resolicit the requirement. Although the GIR included documents relevant to the evaluation, i.e. copies of the individual and consensus evaluations for each of MRC and CME, there were no submissions specifically addressing the evaluation issues or an explanation for the evaluators' comments on the bids. PWGSC's position in this regard appeared limited to its view that the retender would “address the balance of the issues complained of.”<sup>17</sup>

[33] PWGSC inappropriately concluded that it was not required to address MRC's and CME's allegations more fulsomely on the sole basis that it was entitled to cancel the solicitation after terminating the contract. As described below, PWGSC held the position that the complaints no longer concerned a procurement process in respect of a designated contract. In the Tribunal's view, the validity of PWGSC's decision to cancel the solicitation was squarely an issue that formed part of the Tribunal's inquiry in these proceedings. PWGSC's position therefore did not alleviate its obligation to fully respond to the allegations concerning the evaluation errors specified by MRC and CME. The GIR was limited to submissions concerning how PWGSC discovered that the RFP was ambiguous and provided examples of the various ways in which ambiguous language in the RFP could lead to subjectivity in the evaluation process. However, no submissions were made explaining specifically how the evaluation of the rated requirements was conducted, and perhaps more importantly, how the alleged evaluation errors could be explained by ambiguous terms in the RFP.

[34] The impact of PWGSC's conduct in these proceedings was further exacerbated after the Tribunal accepted for inquiry CME's second complaint (File No. PR-2020-056). As noted above, PWGSC indicated it would rely on the GIR filed previously for File No. PR-2020-038 and File No. PR-2020-044 as its response to CME's second complaint. In describing the deficiencies of the GIR, MRC noted the impact of PWGSC's failure to address the allegations concerning the evaluation would have on the Tribunal's inquiry, including its ability to assess the extent to which the CFTA was breached and its consideration of the appropriate remedy, which could include contract award. Following the comments on the GIR, PWGSC reiterated to the Tribunal its reliance on the GIR and stated it had nothing further to add in reply to the parties' comments on the GIR. Consequently, in these circumstances, the Tribunal was limited in its ability to assess the validity of the scores. The evidence provided in the GIR was altogether insufficient to verify or modify scores

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<sup>17</sup> Exhibit PR-2020-038-41, para. 55 at 19.

that have been determined by the evaluators on consensus. The Tribunal, therefore, has recommended re-evaluation of certain sections of the RFP where appropriate.

## ANALYSIS

[35] Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements. In the present case, the RFP states that the procurement is subject to the CFTA.<sup>18</sup>

[36] The provisions of the CFTA raised by the allegations made by MRC and CME are Articles 502(1), 503(2), 507(3)(b), 509(7), 515(5) and 517(1). The text for each of these provisions can be found in Appendix I.

[37] Using these provisions as the framework for its analysis, the Tribunal will determine the validity of the grounds of complaints by considering whether PWGSC (1) improperly cancelled the contract awarded to CME; (2) improperly cancelled the solicitation; (3) disclosed CME's bid price and technical score in breach of the CFTA; and (4) evaluated rated requirements M.2.1, M.2.3.1, M.2.4.1, M.2.6, M.2.9 and M.2.10 by using undisclosed criteria, ignoring vital information contained in the bids, or failing to evaluate the responses in accordance with the RFP.

### **Cancellation of the awarded contract and retendering of the solicitation**

#### Cancellation of the awarded contract

[38] CME's arguments with respect to PWGSC's termination of the awarded contract were three-fold. First, PWGSC's termination of the contract constituted a failure to award the contract in accordance with the obligation in Article 515(5) of the CFTA. In this regard, CME also argued that PWGSC breached its duty to conduct a fair competition by cancelling the contract after being advised of issues with the RFP by another bidder. As bidders must seek clarification before bid submission, they should not be permitted to raise "after-the-fact" complaints outside of the Tribunal's procurement inquiry process. Second, by terminating the contract and cancelling the RFP, PWGSC breached Article 503(2). As issues relating to the obligations in Articles 515(5) and 503(2) were also raised by MRC, the Tribunal will address these issues below.

[39] The third argument raised by CME related to whether PWGSC breached its duty to perform the contract in good faith. CME submitted that Articles 503(2) and 515(5) of the CFTA create an obligation on PWGSC to "follow through on the procurement" for which the RFP was issued. Moreover, CME referred to a common law duty to perform a contract honestly and in good faith, noting that Canadian courts have held that a party may not exercise an unfettered contractual right to terminate a contract without a reasonable and "good faith" reason.<sup>19</sup> In this regard, CME indicated it was not provided an opportunity to discuss possible amendments with PWGSC under the contract.

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<sup>18</sup> Section 1.2 of the RFP.

<sup>19</sup> Exhibit PR-2020-044-01, paras. 24, 26 at 12.

[40] The Tribunal finds that issues concerning the manner in which PWGSC terminated the contract, i.e. PWGSC's right to terminate or amend the contract pursuant to the terms and conditions of the contract, are directly related to PWGSC's administration of the awarded contract. As such, they are outside the scope of the Tribunal's jurisdiction.<sup>20</sup> As a creature of statute, the Tribunal's jurisdiction for conducting its inquiry into a procurement complaint is established by sections 30.1 to 30.19 of the *CITT Act*. These provisions create a dispute resolution mechanism solely in respect of the procurement provisions of the prescribed trade agreements.

[41] As discussed below, obligations set out in the CFTA apply to the solicitation process itself. In this context, PWGSC's termination of the contract to address errors in the solicitation process did not in and of itself constitute a breach of the CFTA. As the Tribunal and the Federal Court of Appeal have stated, a contracting authority must take appropriate steps to correct errors in the procurement process in keeping with the terms of the solicitation and in a manner that preserves the integrity of the competitive procurement process.<sup>21</sup> However, a key issue examined for this inquiry was whether the termination of the solicitation with the intent to retender was the appropriate step to correct the evaluation errors at issue, considering the entirety of the circumstances.

#### Cancellation of the solicitation and retendering

[42] Both MRC and CME contended that PWGSC contravened Articles 515(5) and 503(2) of the CFTA by not awarding the contract and cancelling the solicitation without a sound public policy reason. MRC submitted that both the Tribunal and the Federal Court have held that, in situations where there is a compliant bidder, the government institution is obligated to award a contract unless there is a sound public policy reason to cancel the solicitation.<sup>22</sup> Rather than proceeding to re-evaluate the bids after receiving objections with respect to the evaluation and awarding the contract to the highest ranking bidder, PWGSC opted to cancel the RFP.

[43] PWGSC submitted that after considering the objections and reviewing the RFP, it had determined that the evaluation criteria and scoring methodology was ambiguous, leading to subjective bid evaluations that rendered the scores unjustifiable upon review. Accordingly, PWGSC determined that the appropriate action was to cancel the awarded contract and retender the RFP with amended terms. PWGSC contended that since a contract had been awarded, there was no longer a procurement process subject to the obligations of Article 515(5) of the CFTA. In other words, Article 515(5) applies only *prior* to contract award. PWGSC also referenced the definition of

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<sup>20</sup> See *Aerospace Facilities Group Inc.* (12 October 2017) PR-2017-015 (CITT) [*Aerospace*] at para. 31; *Valcom Consulting Group Inc.* (14 June 2017), PR-2016-056 (CITT) [*Valcom*] at para. 32; *HDP Group Inc.* (28 December 2016), PR-2016-047 (CITT) at para. 10; *ML Wilson Management* (6 June 2013), PR-2012-047 (CITT) at para. 36.

<sup>21</sup> See *CGI Information Systems and Management Consultants Inc.* (14 October 2014) PR-2014-016 and PR-2014-021 (CITT) [*CGI*] at para. 137; *Valcom* at para. 52; *Francis H.V.A.C. Services Ltd.*, 2017 FCA 165 at para. 33.

<sup>22</sup> While the jurisprudence cited by MRC discusses this principle with respect to Article 1015(4)(c) of the North American Free Trade Agreement, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc-nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA], the Tribunal agrees that it applies equally to Article 515(5) of the CFTA. *Valcom* at para. 36. *Lincoln Landscaping Inc.* (16 September 2016), PR-2016-018 (CITT) [*Lincoln*] at para. 20; *Wang Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [1999] 1 FCR 3, 1998 CanLII 9093 (FC); *Conair Aviation, A division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CITT) [*Conair*]; *Carsen Group Inc.* (22 March 1995), 94N66W-021-0019 (CITT).

“designated contract” in section 30.1 of the *CITT Act* in arguing that there is no contract that is proposed to be awarded.<sup>23</sup> In the alternative, PWGSC argued that there were sound public policy reasons to cancel the RFP.

[44] PWGSC’s submissions raise a question regarding the Tribunal’s jurisdiction to inquire into the complaints. For the reasons below, the Tribunal is of the view that PWGSC’s award and termination of the contract, as well as its cancellation of the solicitation, does not remove the Tribunal’s jurisdiction nor alleviate PWGSC from the obligations contained in the CFTA. Furthermore, PWGSC’s decision to cancel the solicitation and retender the RFP was inconsistent with its obligations under Article 515(5) and Article 503(2) of the CFTA.

- The Tribunal’s Jurisdiction

[45] As submitted by MRC, the Tribunal’s jurisdiction concerns any aspect of the procurement process that relates to the “designated contract” as defined in the *CITT Act*. The fact that the contract has been canceled does not deprive the Tribunal of its jurisdiction.<sup>24</sup> The Tribunal’s continuing jurisdiction was addressed in *Valcom* where the Tribunal found that the procurement process was “re-engaged” following contract award, when the contract was terminated and the requirement retendered. Moreover, “. . . the procurement process only comes to an end once the contract has been attributed in a definitive way. . . . [T]he trade agreements and the Tribunal’s jurisdiction encompass all elements of the procurement cycle up to and including contract award.”<sup>25</sup> In *Valcom*, the Tribunal found that it had jurisdiction to determine whether the Department of National Defence acted in contravention of Article 1015(4)(c) of NAFTA when it revoked the contract and sought to retender the requirement.<sup>26</sup> The Tribunal finds that there is no reason to depart from the principle set out in *Valcom*; it retains its jurisdiction to review issues relating to the procurement process where the awarded contract has been terminated. The Tribunal may therefore consider whether PWGSC’s decision to cancel the solicitation and retender the RFP was inconsistent with its obligations under Article 515(5) and Article 503(2) of the CFTA. It may also further consider the grounds of complaint associated with PWGSC’s evaluation of the bids.

- Cancellation of the solicitation process breached the CFTA

[46] PWGSC submitted that it had an obligation to correct errors and that the cancellation of the solicitation was warranted due to the discovery of ambiguities and inconsistencies in the technical evaluation scheme; this was a breach in the tendering process which impacted overall scoring of the bids. To support its position, PWGSC cited the following from a previous decision of the Tribunal:

. . . [C]ases where the exercise of the right to cancel a procurement process would be *appropriate* normally include those where unforeseen circumstances arise, such as where it is

<sup>23</sup> Pursuant to section 30.1 of the *CITT Act*, “designated contract” means a contract “that has been or is proposed to be awarded.”

<sup>24</sup> *Medi+Sure Canada Inc.* (27 January 2017), PR-2016-031 (CITT) [*Medi+Sure*] at paras. 11-12; *Bluenose Transit Inc.* (6 March 2020) PR-2019-044 (CITT) at para. 39; *Telecore v. Department of Public Works and Government Services Canada* (10 October 2017), PR-2017-021 (CITT) at paras. 9-11; *Access to Information Agency Inc.* (26 October 2016), PR-2016-001 (CITT) at paras. 32-36; *Valcom* at para. 35 (confirmed by the Federal Court of Appeal in *Attorney General of Canada v. Valcom Consulting Group Inc.*, 2019 FCA 1).

<sup>25</sup> *Valcom* at paras. 31, 35.

<sup>26</sup> *Ibid.* at para. 36. See also *Lincoln* at para. 20.

belatedly discovered that the specifications are inadequate. In fact, in such situations, cancellation of the process is usually viewed as preserving the equality of bidders and the integrity of the process.<sup>27</sup>

[Italics in original]

[47] PWGSC submitted that the technical criteria and scoring grid of the RFP were ambiguous, which led to subjective bid evaluations. This deficiency would be corrected in the retendered RFP. PWGSC submitted that the RFP was inconsistent with Article 509(7) of the CFTA, which requires that the tender documentation include all pertinent details concerning the evaluation criteria, including the methods of weighing and evaluation, unless price is the sole criterion. As evidence of its internal review, PWGSC submitted internal correspondence dated August 18, 2020, in which the following was noted:

In many instances, the technical evaluation criteria were subjective rather than objective. Subjectivity leads to ambiguity and uncertainty in bid evaluation, and this subjectivity in the interpretation of these criteria and how they are scored is the reason we are receiving the complaints.<sup>28</sup>

[48] The Tribunal notes that in PWGSC's consideration of re-evaluation as an option in dealing with the objections, the following comments were made:

Note that going with this option does not address the issue of subjectivity in the evaluation criteria. If Canada re-assessed the bids and potentially awarded to another bidder, it is highly likely that CME would file a complaint with CITT, which if successful could result in damages.

The bids are only valid until August 24, 2020 (60 day validity period), which impacts our ability to pursue this option.<sup>29</sup>

[49] Based on the above as well as other comments noted in PWGSC's internal correspondence, MRC submitted that the cancellation of the solicitation was primarily to mitigate PWGSC's risk of further litigation and potential damages; it was not a means to properly rectify errors in the tendering process. The decision was a result of a cost-benefit analysis without an assessment of whether the decision to cancel the solicitation would breach the CFTA.<sup>30</sup>

[50] Indeed, the evidence on the record confirms that PWGSC was concerned with the prospect of further litigation. However, the Tribunal is not convinced that this is a basis upon which to find PWGSC in breach of the CFTA. The Tribunal finds that the breach stemmed from the fact that PWGSC did not meaningfully review the alleged evaluation errors in order to determine which

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<sup>27</sup> *Agence Gravel Inc.* (26 January 2017), PR-2016-035 (CITT) [*Agence Gravel*] at para. 93 (confirmed in *Canada (Attorney General) v. Agence Gravel Inc.*, 2018 CAF 120), cited in *Aerospace* at para. 34.

<sup>28</sup> Exhibit PR-2020-038-36A at 1. The document laid out three options for responding to the complaints: (1) proceed with the existing contract; (2) reassess the bids; and (3) cancel the contract and resolicit the bid. PWGSC submitted that it did not share the details of the ambiguities with the bidders as doing so might risk compromising the integrity of the retender.

<sup>29</sup> Exhibit PR-2020-038-36A at 2.

<sup>30</sup> Exhibit PR-2020-038-40, paras. 40-43 at 11-13.

bidder should properly be considered the highest ranking bidder.<sup>31</sup> This was an important step before deciding to cancel the RFP, particularly considering the prejudice a retendering would cause against CME and MRC, as discussed below.

[51] PWGSC's decision to cancel the solicitation must be considered in the context of its obligation set out in Article 503(2) of the CFTA, which prohibits the cancellation of a procurement in a manner that circumvents the obligations set out in Chapter 5. This is consistent with the principle of preserving the efficiency and integrity of the procurement system. Similar objectives were noted by the Tribunal in *Agence Gravel* where the right to cancel a solicitation was considered in light of the purpose of the regulatory regime under the Agreement on Internal Trade.<sup>32</sup> For the reasons below, having considered the submissions of the parties and the evidence on the record, the Tribunal finds that PWGSC's cancellation of the solicitation circumvented its obligations under the CFTA. The Tribunal is not persuaded that PWGSC's late discovery of ambiguous terms in the RFP justified the cancellation of the solicitation.

[52] Subjectivity in the evaluation process does not, in and of itself, constitute a breach of the obligations of the trade agreements that would justify cancellation of the solicitation. Both the Tribunal and the Federal Court of Appeal have recognized that evaluating proposals involves, to an extent, subjective assessments of proposals by reference to objective criteria. However, subjectivity in the evaluation would be a breach where it was conducted in a manner inconsistent with the published criteria, leading to arbitrary assessments or resulting in unequal treatment of bidders.<sup>33</sup> The Tribunal does not find this to be the case on the present facts.

[53] The Tribunal also cannot discount the fact that neither of the complainants submitted that the evaluation errors occurred as a result of ambiguous terms in the RFP. In fact, MRC and CME submitted that the RFP was not ambiguous. For its part, MRC submitted that the scoring scheme for the rated criteria provided sufficient detail and explanation for how the terms were to be applied and that the technical rated criteria themselves were clear. Insofar as they were not clear, bidders could have requested clarifications. CME also submitted that the RFP was clear in both its objectives, i.e. disposal of the vessel and methodology for the work. There was no evidence that the evaluators failed to comprehend how to apply the scoring grid or found terms in the technical criteria to be ambiguous. Indeed, based on the RFP, PWGSC awarded the contract to CME following individual and consensus evaluations of the bids.

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<sup>31</sup> With respect to the expiration of the bid validity period, the Tribunal has stated that the bid validity period clause incorporated by reference into the RFP, "... only operates to limit PWGSC's discretion to award a contract after bids have expired when no award has yet been made. The clause does not prevent PWGSC from, when it has already made an award within the bidding period, remedying a breach of the trade agreements brought to its attention. This can be done even after the expiration of the bidding period, as long as it is accomplished consistent with the bidders' rights as they had crystallized before the expiration of the bidding period." *Medi+Sure* at para. 17. See also *Turbo Expert Québec Inc.* (6 February 2019), PR-2018-029 (CITT) at paras. 34-38.

<sup>32</sup> *Agence Gravel* at paras. 89, 90, 92.

<sup>33</sup> See *AmeriData Canada Ltd.* (9 February 1996), PR-95-011 (CITT) at 7; *Frontec Corporation* (6 May 1998), PR-97-035 (CITT) at 15; *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.) at para. 36. This is consistent with the principle that a procuring entity will comply with its obligations under the trade agreements as long as it uses an evaluation approach that is logically consistent with, and could reasonably be anticipated or derived from, the methodology stated in the tender documents. *CGI Information Systems and Management Consultants Inc.* (27 August 2014), PR-2014-006 (CITT) [CGI PR-2014-006] at para. 77; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 F.C. 292 [Siemens] at paras. 41, 43, 45.



[54] Having reviewed PWGSC's examples of ambiguity in the RFP, the Tribunal is not convinced that these were latent ambiguities that could only have been discovered after contract award or were ambiguities with respect to which bidders could not have sought clarification prior to bid submission.<sup>34</sup> More importantly, having considered the evidence, the Tribunal does not find that the evaluation errors alleged by MRC and CME were made as a result of ambiguities in the RFP. Ambiguity in the RFP therefore did not warrant cancellation of the RFP.

[55] PWGSC submitted that the scoring scheme was ambiguous and that this impacted *all* point-rated criteria. It should be noted at the outset that, insofar as any of PWGSC's concerns affected the scoring of point-rated criteria beyond those that were raised by MRC and CME, the Tribunal is limited, by virtue of subsection 30.14(1) of the *CITT Act*, to consider only those issues that affect the subject matter of the complaints, i.e. the rated requirements relevant to the complaints.

[56] PWGSC submitted that the scoring scheme lacked an explanation for distinguishing between "Excellent", "Good", "Acceptable", "Poor", "Incomplete", "Unsatisfactory", "Sufficient" and "Inadequate."<sup>35</sup> While the Tribunal can appreciate that PWGSC may wish to clarify the scoring system for future solicitation, the scoring scheme was clear that the bids would be evaluated or *rated* on a spectrum that considered the scope of the information in the bid, including the sufficiency of the bidder's explanation as to how the criterion was met and/or the examples provided, as applicable. As the Tribunal has previously stated, in these circumstances, where no bidder has previously objected to or sought clarification with respect to the scoring system, the evaluators are entitled to deference from the Tribunal in how they assess the information contained in the bid. Indeed, the scarcity of published details in the RFP may provide evaluators with broad latitude within the terms of the RFP.<sup>36</sup>

[57] PWGSC also submitted that the use of "and/or" in M.1.1 left unspecified how to allocate points, particularly where the number and quality of examples to be provided by bidders is ambiguous.<sup>37</sup> None of the complainants raised this as an issue with the evaluation and the Tribunal does not find that the use of "and/or" in M.1.1 contributed to errors in the evaluation of MRC's and CME's bids. In the Tribunal's view, the use of "and/or" provided the evaluators latitude to determine how the conditions of the scoring scheme would apply to each individual rated criterion as appropriate.

[58] With respect to conditions for each point level in the scoring scheme, PWGSC argued that these were insufficiently defined, noting, for instance, that an "incomplete or limited" explanation from the bidder received 1 point and a "poor explanation" from the bidder received 2 points. For the assessment of 4 points, the RFP stated that the "Response is without any significant exceptions," but without any further definition as to how "without significant exceptions" is defined. The Tribunal does not find that the descriptions for each point level prevented the evaluators from reaching consensus in respect of the final points to be awarded for each rated requirement. Moreover, neither MRC nor CME took issue with equivalency between the score that was awarded and the evaluators' comments; their concern was generally that the evaluators should not have found *any* deficiency with respect to their responses to the RFP criteria. Absent evidence as to how these conditions impacted

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<sup>34</sup> *Accipiter Radar Technologies Inc.* (26 April 2019), PR-2018-049 (CITT) [*Accipiter*] at para. 72.

<sup>35</sup> Exhibit PR-2020-038-41, para. 58 at 19-21.

<sup>36</sup> *Pacific Northwest Raptors Ltd.* (16 October 2019), PR-2019-017 (CITT) at paras. 27-29; *CGI PR-2014-006* at paras. 86, 87.

<sup>37</sup> Exhibit PR-2020-038-41, para. 58 at 19-21.

the evaluators' scoring, the Tribunal remains unconvinced that the scoring scheme warranted immediate cancellation of the RFP.

[59] With respect to ambiguity in the technical criteria, PWGSC submitted that, overall, “[t]he language of the requirement may create confusion in respect of what is obligatory and what is not and on what basis points would be awarded.”<sup>38</sup> In particular, PWGSC provided the following examples:

- (a) M.2.4.1 . . . did not define what was considered a “temporary” facility and the requirement that bidders provide the requested information if the bid included a temporary facility did not specify what point score would be provided for this criteria for bids which did not include such a facility;
- (b) M.2.6 states that a bidder must provide a Project Plan and proceeds to list elements which “should be included” therein. Despite this permissive language, the M.3 Scoring Grid states that the bid must show all components listed in M.2.6, even though the language of M.2.6 is itself permissive;
- (c) M.2.9 includes a list of eleven items which a [bidder] must submit. The M.3 Scoring Grid provides up to five points for this criterion, even though M.2.9 requires all 11 elements to be met. It is not clear from the requirement on what basis a bid would receive a score from 0 to 5. For example, as it is mandatory that all aspects of M.2.9 be met, it can be interpreted that a bidder can only achieve no points or all points; and
- (d) M.2.10 requires that a bidder submit a preliminary Environmental Protection Plan which should include the enumerated elements. The language of the requirement may create confusion in respect of what is obligatory and what is not and on what basis points would be awarded.<sup>39</sup>

[60] Having considered the allegations made in respect of rated requirements M.2.4.1, M.2.6, M.2.9 and M.2.10, as further discussed below, and the evidence on the record with respect to the evaluation, the Tribunal is not persuaded that the ambiguity described by PWGSC contributed to the evaluation errors complained of by MRC and CME. While PWGSC may wish to clarify the criteria in hindsight, this is not a sufficient basis on which to cancel the solicitation. This is not a case where subjectivity in the evaluation necessarily resulted in errors in the solicitation process that could only be rectified through retendering. As described below, while some allegations appear to have involved the evaluators' subjective assessment, the evidence does not indicate that the subjectivity was necessarily applied by the evaluators in a manner that was unfair or inconsistent with the RFP. As explained below, the limited evidence on the record indicates the possibility that there were issues with respect to the evaluators' objective assessment of the bids in that information contained in the bid was ignored, not properly considered in accordance with the terms of the RFP, or that undisclosed criteria was applied in the evaluation.

[61] Another key consideration is the impact that a retender will have on the ability of MRC and CME to fairly compete in the resolicitation. In this regard, CME argued that the cancellation of the RFP was unreasonable given that PWGSC's disclosure of its pricing information and technical score (in the regret letters to all potential suppliers<sup>40</sup>) was contrary to Article 517(1) of the CFTA, which

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<sup>38</sup> *Ibid.*, para. 58 at 19-21.

<sup>39</sup> *Ibid.*, para. 59 at 21, 22.

<sup>40</sup> Exhibit PR-2020-044-01 at 442.

prohibits the disclosure of supplier information that might prejudice fair competition. CME submitted that the disclosure will prevent CME from fairly competing in the next solicitation process. According to CME, ship scrapping and demolition is complex work with few companies in Canada capable of undertaking such a project. As each vessel is unique, pricing is closely tailored to each vessel and its particular circumstances. Further, CME's competitors will be aware of CME's price and methodology. CME's competitors can reverse-engineer its bid from its bid price and technical score.<sup>41</sup> These claims were uncontroverted. While PWGSC has indicated its intention to improve the scoring methodology, there are no submissions or evidence on the record to indicate how PWGSC may revise the terms of the RFP such that the risks to CME's ability to fairly compete may be mitigated. On the basis of the foregoing, the Tribunal agrees that PWGSC's disclosure of CME's pricing and technical score breached Article 517(1).

[62] Similarly, MRC also submitted that it will be prejudiced in the resolicitation by enabling competitors with low technical scores to effectively "re-write the exam." MRC argued that as it achieved a very high technical score, there is little room for it to improve its score other than by reducing its pricing. In this regard, MRC would be prejudiced by the disclosure of CME's price. In the retendering process, other bidders would have significant room to improve their technical scores and if the weighting between pricing and technical scores was revised to favour pricing, this could also result in additional prejudice to MRC. Although PWGSC has not improperly disclosed information related to MRC's bid, the Tribunal finds MRC's concerns with respect to the retendering to be valid.<sup>42</sup>

[63] The fact remains that the requirement to be fulfilled by the procurement process will be unchanged, i.e. it will again be for the disposal of the former *CCGS W.E. Ricker* vessel. It is difficult to imagine how the RFP could be constructed so as not to disadvantage the bidders in one way or the other. Accordingly, the findings of the Tribunal in *Conair* are applicable here: the disclosure of total bid price during the award notification phase has made it near impossible to rebid competitively.<sup>43</sup> While the Tribunal has previously acknowledged, as noted by PWGSC, that the disclosure of the price on contract award is a "feature of the long-established public tendering and award system",<sup>44</sup> it must nevertheless consider the impact of such practice in the context where the government institution proposes to retender the same requirement and obligations for fair competition must be considered.<sup>45</sup>

[64] Considering the foregoing, the Tribunal agrees that PWGSC's actions constituted a breach of Article 503(2) of the CFTA. The decision to cancel the RFP prior to conducting a re-evaluation amounted to a vital step being missed in the procurement process, one that cannot be justified on the basis of public interest. The Tribunal has not been persuaded that the ambiguity in the RFP described by PWGSC prevented it from determining the highest-ranking bidder nor did it constitute unforeseen circumstances in which it needed to exercise its right to cancel the RFP. In consideration of MRC's and CME's relative scores, careful review of their bids was warranted. It should be noted that the

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<sup>41</sup> *Ibid.*, paras. 4, 19 at 9, 11.

<sup>42</sup> This is consistent with the record at the time the Tribunal issued its determination on January 22, 2021.

<sup>43</sup> *Conair* at 16. Similar findings with respect to the disclosure of confidential pricing information: *Lincoln* at para. 50; *Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT) at para. 41; *Lengkeek Vessel Engineering* (2 November 2006), PR-2006-022 (CITT) at para. 17; *Hawboldt Industries* (27 April 2018), PR-2017-045 (CITT) [*Hawboldt*] at paras. 44-48.

<sup>44</sup> *Aerospace*, footnote 15 at para. 49.

<sup>45</sup> As noted in *Hawboldt* at para. 48, Article 1015(8) of NAFTA permitted the non-disclosure of information where it "might prejudice fair competition between suppliers." See also *Hawboldt* at para. 49.

Tribunal does not believe that PWGSC's response to the objections made by the complainants to be in bad faith; rather it was based upon a faulty assumption that there was only one possible recourse. The option to cancel in this instance was ultimately chosen due to an apparent lack of due diligence on the part of PWGSC to assess the evaluation errors alleged by the bidders and to mitigate the impact of these errors on the integrity of the procurement process, particularly as there were at least two compliant bidders who were capable of performing the contract.

### Evaluation-related grounds of complaint

[65] Both MRC and CME have raised concerns with respect to the evaluation of particular rated requirements; together these were M.2.1, M.2.3.1, M.2.4.1, M.2.6, M.2.9, and M.2.10. When considering the manner in which bids are evaluated, it is well established that the Tribunal will apply the standard of reasonableness.<sup>46</sup> A procuring entity's evaluation would be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.<sup>47</sup> The Tribunal has repeatedly held that it will interfere only with an evaluation that is *unreasonable* and will substitute its judgment for that of the evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>48</sup>

#### M.2.1: Shipbreaking experience

[66] Only MRC raised an issue with respect to the evaluation of rated requirement M.2.1 which required bidders to demonstrate their experience either under M.2.1.1 (shipbreaking) or M.2.1.2 (ship construction/major ship refit experience).<sup>49</sup> With respect to MRC's shipbreaking experience, the evaluators justified their evaluation as follows: "[s]ome examples not very detailed. On some projects, milestones missing and references (to validate experience claims) of some projects missing."<sup>50</sup> MRC submitted that there is no reference in M.2.1 to require bidders to provide "milestones or references (to validate experience claims)." As such, PWGSC introduced undisclosed evaluation criteria in assessing MRC's response to M.2.1.

[67] The Tribunal agrees that there is no *express* reference to "milestones" or "references" in the criteria set out in M.2.1. and more specifically under M.2.1.1 (shipbreaking). However, the Tribunal does not find the evaluators' assessment of M.2.1 to be unreasonable. As discussed above, the scoring scheme outlines a spectrum of possible scores based on the scope of information contained in the bid. Accordingly, the evaluators were entitled to some deference as to their assessment of the

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<sup>46</sup> *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd.* (2 January 2019), PR-2018-023 (CITT) at para. 45.

<sup>47</sup> As the Supreme Court of Canada underlined in a different context, "... reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (CanLII) at para. 11 (citing *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [CanLII]).

<sup>48</sup> *Samson & Associates* (13 April 2015), PR-2014-050 (CITT) at para. 35; *Harris Corporation* (22 October 2018), PR-2018-016 (CITT) at para. 21.

<sup>49</sup> Exhibit PR-2020-038-07A at 390.

<sup>50</sup> Exhibit PR-2020-038-01B, para. 50 at 31.

adequacy of the information contained in the bid. For instance, to achieve the highest possible score, the response had to be “excellent and in-depth” demonstrating “no weaknesses.”<sup>51</sup>

[68] In considering issues of whether evaluators applied undisclosed criteria, the Tribunal adheres to the principle that a procuring entity will comply with its obligations under the trade agreement as long as it uses an evaluation approach that is logically consistent with, and could reasonably be anticipated or derived from, the methodology stated in the tender documents.<sup>52</sup>

[69] With respect to the various projects described by MRC in response to M.2.1, while there is a general period in which the projects are said to have occurred, there were no specific dates or timelines mentioned in respect of the projects. Considering that a key requirement described in M.2.1.1 was for all projects to have been completed since “01 January 2005,”<sup>53</sup> the fact that there were no details that would enable the evaluators to reference the specific period in which the projects occurred would suggest that the response was not at a “depth” that would justify a perfect score.<sup>54</sup> Additionally, the Tribunal notes that in respect of the project for which a disposal plan was proposed, M.2.1.1 required in respect of the Sequencing Plan “. . . *timelines* from arrival to the demolition site to project completion” [emphasis added]. It would not be unreasonable, for the evaluators to have expected that each event outlined in the sequencing plan include a timeline, rather than one general timeframe for the execution of the entire plan.<sup>55</sup> The evaluation notes also do not suggest that the absence of “milestones” or “references” was the only deficiency in MRC’s proposal.

#### M.2.3.1: Environmental management system

[70] Only CME raised an issue with respect to the evaluation of rated criteria M.2.3.1., which had the following requirements:

The Contractor must have in place an environmental management system consistent with the procedures required for the Environmental Management System ISO 14001-2015 Requirements published by the International Organization for Standardization (ISO).

The Bidder must describe the environmental management system, modeled on ISO 14001-2015, that it has in place at its Approved Site(s).<sup>56</sup>

[71] CME submitted that its bid in response to M.2.3.1 was evaluated using undisclosed criteria. For its part, MRC submitted that the undisclosed criterion described by CME was in fact a central purpose of ISO 14001-2015, noting in particular that “this International Standard enables an organization to use a common approach and risk-based thinking to integrate its environmental management system with the requirements of other management systems.”<sup>57</sup> Moreover, MRC noted that section 6.1 of the ISO expressly deals with “actions to address risks and opportunities”<sup>58</sup> in general, as well as specifically in the context of environmental aspects/objectives, compliance obligations and planning actions.

<sup>51</sup> Exhibit PR-2020-038-07A at 390.

<sup>52</sup> *CGI* at para. 77; *Siemens* at paras. 41, 43, 45.

<sup>53</sup> Exhibit PR-2020-038-07A at 390.

<sup>54</sup> Exhibit PR-2020-038-01C (protected) at 474.

<sup>55</sup> *Ibid.* at 476.

<sup>56</sup> Exhibit PR-2020-038-07A at 392.

<sup>57</sup> Exhibit PR-2020-038-32 at 43.

<sup>58</sup> *Ibid.* at 51.

[72] The Tribunal finds that M.2.3.1. clearly required CME to provide an environmental management system that was equivalent to an ISO 14001-2015. While there was no requirement for the system to be ISO certified, it was not unreasonable that CME was required to demonstrate how its environmental management system was consistent with the ISO standard. Accordingly, the factor which CME described as an undisclosed criterion could in fact be reasonably interpreted from the criterion.<sup>59</sup>

#### M.2.4.1: Facilities

[73] Both MRC and CME raised concerns with respect to the evaluation of rated requirement M.2.4.1, which includes criteria in respect of the facilities that would be used by the bidders in carrying out the required work. The Tribunal will first address the submissions concerning certification requirements as they were raised by MRC and secondly, the submissions concerning access to the facilities.

#### - Certification requirement

[74] MRC submitted that undisclosed evaluation criteria were applied in the evaluation of its bid, specifically that PWGSC required a “P. Eng certification of the dry dock” as well as information “on the state of repair on the dry dock.” MRC argued that these requirements were not specified in the RFP. The relevant requirements applicable to the proposed dry dock are set out in M.2.4.4 as follows:

If the Bidder proposes utilizing a dry dock . . . the Bidder must:

Provide evidence in the form of a signed statement to certify that the Bidder has uninterrupted access to the dry dock for the entirety of the project in accordance with the Bidder’s anticipated schedule.

- a. Demonstrate that the dry dock is certified and capable of accommodating the former CCGS W.E. Ricker at the expected conditions during the anticipated Ship Breaking period; and
- b. Specify the dry dock certification validity period and indicate subsequent inspection schedules.<sup>60</sup>

[75] MRC submitted that pursuant to section 2.9 of the RFP, it did not need to supply the dry dock certification with the bid, as it was supposed to be obtained after the evaluation process from the successful bidder prior to contract award. The successful bidder would also need to provide information concerning the “conditions of the docking facility.” Section 2.9 of the RFP reads as follows:

Before contract award, the successful Bidder may be required to demonstrate to the satisfaction of Canada that the certified capacity of the docking facility, including any means or conveyance to remove the vessel from the water, is adequate for the anticipated loading in accordance with the related dry docking plans and other documents detailed in the Contract. The successful Bidder will be notified in writing and will be allowed a reasonable period of

<sup>59</sup> Exhibit PR-2020-056-01, para. 24 at 13; Exhibit PR-2020-056-01A (protected), para. 24 at 13.

<sup>60</sup> Exhibit PR-2020-038-07A at 393.

time to provide detailed keel block load distribution sketches and blocking stability considerations, along with the supporting calculations to show the adequacy of the proposed docking arrangement.

Before contract award and within 5 calendar days of written notification by the Contracting Authority, the successful Bidder must provide current and valid certification of the capacity and condition of the docking facility to be used for the Work. The certification must be provided by a recognized consultant or classification society and must have been issued within the past two years.<sup>61</sup>

[76] Notwithstanding its submissions that undisclosed criteria were applied in the evaluation, MRC also argued that the evaluators ignored vital information contained in its bid which responded to the evaluators' concerns with respect to the dry dock certification as well as its state of repair. MRC purported that it provided the required certification in its bid as well as information addressing the stability and capabilities of the facilities.

[77] The Tribunal finds that, as certification requirements were clearly indicated in M.2.4.1<sup>62</sup> (as they are further described in M.2.4.4), bidders were required to satisfy this criterion at the time of bid submission. Any certification requirements described in section 2.9 of the RFP applied only with respect to the successful bidder. Insofar as there was any ambiguity with respect to whether the certification requirements described by M.2.4.1 could be satisfied after bid closing in accordance with section 2.9, this was a patent ambiguity, on which bidders could have sought clarification prior to bid submission or otherwise filed an objection or a complaint in a timely manner.<sup>63</sup>

[78] That said, having reviewed the evidence on the record,<sup>64</sup> the Tribunal finds that key information contained in MRC's bid may have been ignored or the evaluators may have applied criteria which were not specified in the RFP or evaluated MRC's bid in a manner inconsistent with the published criteria. Absent an explanation from PWGSC as to why the information contained in MRC's bid did not meet the facility-related certification requirements, the Tribunal is of the view that it would be appropriate for PWGSC to re-evaluate the bids in respect of the certification requirements for M.2.4.1. In its re-evaluation, PWGSC should apply a standard position with respect to the certification requirements that is consistent with the terms of the RFP. Insofar as the documents submitted by the bidders do not meet those requirements, PWGSC should clearly record how the certification requirements were not met, with reference to the applicable criteria in the RFP.

[79] CME also challenged its score with respect to M.2.4.1 as it related to requirements concerning certification requirements and the capability of its proposed facilities. As the Tribunal has determined that it would be appropriate for PWGSC to re-evaluate responses to M.2.4.1 with respect to the applicable certification requirements due to MRC's complaint, for reasons of judicial economy, the Tribunal finds it unnecessary to examine CME's allegations concerning this issue. CME's bid will also be re-evaluated for compliance with the certification requirements in M.2.4.1.

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<sup>61</sup> *Ibid.* at 332.

<sup>62</sup> All of M.2.4 was considered in the rating of M.2.4.1 as applicable. Exhibit PR-2020-038-41, para. 30 at 10; Exhibit PR-2020-038-07A at 399.

<sup>63</sup> *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10; *Deloitte Inc.* (25 July 2017), PR-2016-069 (CITT) at para. 39.

<sup>64</sup> Exhibit PR-2020-038-01B, paras. 63, 64 at 34, 35; Exhibit PR-2020-038-01C (protected), paras. 63, 64 at 32, 33, 502-540; Exhibit PR-2020-056-01, para. 28 at 14; Exhibit PR-2020-056-01A (protected), para. 28 at 14; Exhibit PR-2020-056-01C (protected) at 309.

- Access to the facilities

[80] CME also raised concerns that the evaluators' applied undisclosed criteria in respect of its evidence of uninterrupted access to its proposed facilities. Pursuant to M.2.4.3 the bidder must "[p]rovide evidence in the form of a signed statement to certify that the Bidder has uninterrupted access to the along-side area/facility for the entirety of the project in accordance with the Bidder's anticipated schedule." M.2.4.4 includes a similar requirement in respect of the dry dock.<sup>65</sup> CME submitted that its bid contained the required signed statement certifying that it would enjoy uninterrupted access to its proposed facility throughout the anticipated schedule, namely, a letter from Harbour Homes Marina Incorporated.<sup>66</sup>

[81] MRC argued that the criteria in M.2.4.7 applied in respect of the letter described by CME, which required evidence that a "... Subcontractor has agreed to make the facility available to the Bidder during the anticipated Work Period and in accordance with the Bidder's Preliminary Schedule."<sup>67</sup> The work period was defined in sections 2.8 and 7.3.1 of the RFP as commencing on contract award to a maximum of 240 calendar days, i.e. up to April 1, 2020.<sup>68</sup> MRC contended that CME's score would be impacted if it did not demonstrate uninterrupted access for this work period up to the maximum period of time.

[82] In the Tribunal's view, the work period of 240 calendar days from contract award reflects the maximum timeframe in which a bidder may complete the required work. The reference to the bidder's preliminary schedule in M.2.4.7 also informs the period in which the bidder must have uninterrupted access to the facility. Accordingly, insofar as the period of access conformed to the bidder's preliminary schedule, the timeframe of which may be shorter than the work period, it remains possible that the evidence provided by CME was sufficient to demonstrate uninterrupted access to "the Bidder's anticipated schedule."

[83] The Tribunal therefore finds that it would be appropriate for PWGSC to re-evaluate rated requirement M.2.4.1 to assess bids in respect of their evidence concerning uninterrupted access to the relevant facility for the necessary period with reference to the work period and the bidder's preliminary schedule. While there is some question in the evidence as to information concerning CME's preliminary schedule, the Tribunal notes the evaluators may only determine the Bidder's anticipated schedule based on information contained in the bid as it was submitted.

#### M.2.6: Project Plan

[84] Both MRC and CME made allegations concerning the evaluation of rated requirement M.2.6, which requires the bidder to provide a project plan that describes its "approach and methodology for the Work required in Annex "A" – Statement of Work." A number of elements were listed that should be included in the plan, such as a draft tow plan for each leg of the tow.<sup>69</sup>

[85] MRC described three issues that may have affected its score for M.2.6. The first issue was the evaluators' finding that a "dedicated system temporarily installed with remote notification" was

<sup>65</sup> Exhibit PR-2020-038-07A at 393.

<sup>66</sup> Exhibit PR-2020-056-01, para. 30 at 14; Exhibit PR-2020-056-01C (protected) at 311.

<sup>67</sup> Exhibit PR-2020-038-07A at 394.

<sup>68</sup> Sections 2.8 and 7.3.1 of the RFP; Exhibit PR-2020-038-07A at 331, 342, 343.

<sup>69</sup> Exhibit PR-2020-038-07A at 394, 395.



not a component of its flood monitoring plan.<sup>70</sup> MRC submitted that as neither the RFP nor Transport Canada's "Checklist of Dead-Ship Towing Operation" (TC Checklist) required a remote notification system, if the evaluators deducted any points on this basis, this would amount to an application of undisclosed evaluation criteria.

[86] Having considered the terms of the RFP and the TC Checklist, which did not expressly reference a system that uses remote notification, the Tribunal finds that it would be appropriate for the bids to be re-evaluated with consideration as to whether this particular feature (i.e. remote notification) is a standard that can be reasonably implied or anticipated from requirements set out in M.2.6. To the extent that it cannot be so implied or anticipated, the evaluators should review their scores to ensure that points were not deducted on the basis that the proposed system did not use remote notification.

[87] MRC also submitted that its bid was consistent with the TC Checklist which refers to "Draft marks of the towed vessel should be clearly visible" and the "Draft indicator line painted and clearly visible."<sup>71</sup> The Tribunal finds no indication on the record that these requirements would not apply to a response to M.2.6. As such, bid responses to M.2.6 should be re-evaluated with consideration of Transport Canada's towing requirements as they pertain to draft marks of the towed vessel and indicator line. Insofar as these requirements are applicable, no points should be deducted for information submitted to comply with the TC Checklist requirements described above.

[88] MRC's other issue with respect to the evaluation of M.2.6 concerned the extent to which points were deducted based on the evaluators' difficulty in locating information contained in the bid. MRC argued that to the extent that evaluators located the relevant details in the bid, such information must be fairly evaluated. As mentioned above, the scoring scheme for rated criteria entitles evaluators to considerable deference and allocation of the highest score "excellent" would require a score that demonstrates no weaknesses. The instructions in "M.1 Technical Bid Preparation" also provided requirements with respect to how information in the bid could be cross-referenced.<sup>72</sup> Furthermore, the Tribunal has consistently held that bidders bear the onus of demonstrating that their bids meet the mandatory criteria at the time of bid closing. In this regard, bidders bear the responsibility of preparing their bids diligently in accordance with the instructions in the solicitation, taking care to ensure that information provided clearly demonstrates compliance. Put another way, bidders must carefully "connect the dots" for evaluators, drawing together details and specifications that may be included in various places throughout a bid.<sup>73</sup>

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<sup>70</sup> Exhibit PR-2020-038-01B, para. 67 at 35.

<sup>71</sup> *Ibid.*, para. 69 at 36, 477.

<sup>72</sup> In this regard, the Tribunal notes the instructions in M.1 Technical Bid Preparation which states the following: ". . . 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 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. . . . Canada requests that Bidders address and present topics in the order of the evaluation criteria under the same headings. To avoid duplication, Bidders may refer to different sections of their bids by *identifying the specific paragraph and page number where the subject topic has already been addressed*" [emphasis added]. Exhibit PR-2020-038-07A at 389.

<sup>73</sup> *Accipiter* at para. 71; *Valcom* at para. 54; *CGI Information Systems and Management Consultants Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 150; *ADR Education* (18 October 2013), PR-2013-011 (CITT) at para. 59.

[89] In the Tribunal's view, information that is not clearly identified as part of the bidder's response to the criteria may very well factor into the evaluators' assessment of awardable points. For instance, where it is difficult to find information relevant to the evaluated criteria, the evaluators may not clearly understand whether certain information was supposed to be considered as part of the bidder's response. Poorly identified information could also result in the evaluators missing information altogether that the bidder intended to be part of its response to the criteria. The Tribunal is uncertain, based on the evidence on the record, how difficulty in locating information in the bid impacted the evaluators' scoring, if at all. For the re-evaluation of M.2.6, the evaluators should assess points based on the clarity and sufficiency of the response to the relevant criteria. If the evaluators have difficulty locating relevant information in the bid, insofar as this impacts their assessment of the clarity or sufficiency of the bid response, this should be clearly documented.

[90] With respect to the "draft tow plan" required under M.2.6, bidders were required to address "anticipated schedule and route including safe harbor." Additionally, under M.2.6, a bidder was required to "[o]utline step-by-step proposed methodology for disposing of the vessel . . . ." <sup>74</sup> CME submitted that its response satisfied M.2.6 and its route plan was sufficiently detailed. <sup>75</sup> CME also submitted that the point deductions in respect of its step-by-step plan were not warranted. For its part, MRC submitted that CME's allegations did not identify any objective undisclosed evaluation criterion and that the evaluators fully considered CME's proposal. The onus lay with CME to exercise due diligence in the preparation of its bid to ensure it was properly understood by the evaluators.

[91] In the absence of submissions from PWGSC in respect of the evaluators' comments concerning M.2.6, the Tribunal is prevented from ascertaining the basis for CME's score. As a result, the Tribunal finds that it would be appropriate for PWGSC to re-evaluate responses to M.2.6 in respect of information contained in the bid with respect to route planning and the step-by-step plan ensuring that the evaluation is conducted in manner consistent with the applicable criteria.

#### M.2.9: Health and safety

[92] Rated requirement M.2.9 required each bidder to "demonstrate its commitment to the safety of its workers." In this regard, the bidder was required to provide the following elements:

1. Provide evidence of good standing with the provincial work safe authority.
2. Describe the Occupational Health and Safety (OH&S) management system that it has in place at its Approved Site; and
3. Demonstrate how it protects workers at the Approved Site by identifying procedures for the following elements:
  - a. Gas freeing for burning and welding operations;
  - b. Hot work, performing burning operations on steel and aluminum covered in layers of paint containing elements such as lead, chromium, cadmium, and copper;
  - c. Asbestos abatement;
  - d. Handling PCB laden electrical equipment and cabling;

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<sup>74</sup> Exhibit PR-2020-038-07A at 395.

<sup>75</sup> Exhibit PR-2020-056-01, para. 35 at 15; Exhibit PR-2020-056-01A (protected), para. 34 at 15.

- e. Mold abatement;
- f. Sewage;
- g. Oily water and waste oil; and
- h. Confined space entry.<sup>76</sup>

[93] MRC submitted that its bid responded to this requirement and should have been awarded full points. Contrary to the evaluators' comments, MRC disagreed that its bid lacked "details/specifics" with respect to the standard operating procedures it referenced in describing its OH&S management system. MRC contended that sufficient information was conveyed by its "Health and Safety Manual" contained in its bid and that to determine otherwise would amount to ignoring vital information contained in its bid. MRC also submitted that any point deduction in respect of MRC's reference that its OH&S system was modelled based on a certain ISO standard was unwarranted. Moreover, MRC disputed the evaluators' finding that its bid lacked clarity with respect to its oversight of subcontractor work as this issue was "repeatedly" addressed throughout the response.<sup>77</sup> Finally, with respect to the evaluators' comment that "[s]ome details were difficult to find throughout the proposal but were covered in sufficient detail", MRC submitted that no points should have been deducted for information that was purportedly "difficult to find."

[94] The Tribunal finds that without additional information from PWGSC as to the rationale for its evaluation, it cannot determine whether relevant information in the bid failed to be considered by the evaluators. That said, as discussed above, insofar as the evaluators considered all of the relevant information and allocated points based on the sufficiency of the information, the Tribunal notes that the scoring scheme provides discretion to assess the depth of the information submitted in response to the criteria. With respect to whether evaluators had "difficulty locating information contained in the bid," as indicated by the Tribunal above, this may factor into the evaluators' assessment of awardable points.<sup>78</sup> However, it is not clear from the evidence how any difficulty in locating information in the bid impacted the evaluators' scoring, if at all. Based on the foregoing, the Tribunal finds it appropriate that PWGSC re-evaluate the bids to ensure that in evaluating the requirements set out in M.2.9, no vital information relevant to the criteria was missed and that, in assessing the sufficiency of the response, this was done in a manner consistently as between the bids and with the requirements of the RFP. Insofar as the evaluators found that information contained in the bid was insufficient, this claim should be clearly documented.

[95] The Tribunal finds that CME's concerns with respect to the evaluation of its response to M.2.9 were similar to some of the issues raised by MRC.<sup>79</sup> As the Tribunal has stated that it would be appropriate to re-evaluate responses to M.2.9 for reasons of judicial economy, the Tribunal finds it unnecessary to examine CME's allegations concerning this requirement. However, the Tribunal does not agree with CME's submission that point deductions based on the fact that bid responses were limited to information that was only available at the time of bid closing would constitute a failure to conduct the evaluation in accordance with the CFTA. In this regard, the Tribunal has stated the following:

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<sup>76</sup> Exhibit PR-2020-038-07A at 397.

<sup>77</sup> Exhibit PR-2020-038-1B, paras. 80-83 at 38, 39; Exhibit PR-2020-038-1C (protected), paras. 80-82 at 36, 37.

<sup>78</sup> See requirements in "M.1 Technical Bid Preparation" in Exhibit PR-2020-038-07A at 389.

<sup>79</sup> Exhibit PR-2020-056-01A (protected), paras. 41-42 at 16, 17; Exhibit PR-2020-056-01, paras. 41-42 at 16.

[A]s a general rule, a procuring entity is entitled to define its own procurement needs, provided, of course, it does so reasonably and in compliance with the rules of the applicable trade agreements . . . . The procuring entity is under no obligation to compromise its legitimate operational requirements to account for the special circumstances of a potential supplier or to meet suppliers' needs. It follows then that *to the extent that a bidder proposes a solution that is inconsistent with the requirements of the RFP as they are stated, the relevant requirements need not be interpreted in a manner that preserves the bidder's standing in the solicitation process. It is incumbent on a bidder to, before submitting its bid, seek clarification from the procuring entity to assure itself that it has not made incorrect assumptions regarding how the requirement ought to apply.* The trade agreements do not shield a bidder when its interpretation of the requirement turns out to be incorrect.<sup>80</sup>

[Footnotes omitted, emphasis added]

[96] As such, bidders are not exempted from meeting the criteria on the basis that relevant information was not available to the bidder at the time of bid submission. In the re-evaluation, evaluators are not expected to assess the criteria based on the information that was available to the bidder, unless this would be consistent with the criteria.

#### M.2.10: Preliminary environmental protection plan

[97] Rated requirement M.2.10 sets out criteria in respect of a preliminary Environmental Protection Plan that demonstrates the “. . . Bidder's commitment to avoidance of adverse environmental impacts through implementation of best practices rooted in pollution prevention and the promotion of sound environmental practices.” The plan should include the following elements:

- a. Description and /or identification of Site(s) for Hazardous Material disposal.
- b. Description and /or identification of any other approved disposal sites. (i.e. municipal landfill site)
- c. Description and /or identification of recycling facility including materials to be recycled as part of this project.
- d. Copy of the asbestos abatement registration certificate.
- e. Description of the method of vessel cleaning. The description must include transportation from the work site to the disposal site and the method of packaging and bundling.
- f. Environmental Contingency Plan – this plan shall indicate the process of how contaminants are to be contained and how to deal with situations involving petroleum product leaks in water or on the ground, ozone depleting substance leaks, or fire on the vessel or explosion. Tools and materials to be used and available on board or on the site of work for the duration of the contract shall be identified.
- g. Provide details on the process for cleaning, removal, and disposal of hazardous materials, hydrocarbon impacted areas and miscellaneous items including . . . ; and
- h. Vessel flood monitoring and response plan.

The Preliminary Environmental Protection Plan should also describe the procedures in place to ensure that their facility is operated and maintained in a manner that complies with all applicable laws and regulations.

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<sup>80</sup> *Accipiter* at para. 75.

The Preliminary Environmental Protection Plan should also describe procedures to ensure that all subcontractors (including those involved in handling, transport, treatment, storage and disposal) hold valid permits, registrations and/or certificates, as applicable for each Hazardous Material listed in the Environmental Survey.<sup>81</sup>

[98] MRC takes issue with the evaluators' comments that its response for Section F was "not covered well and that the response is weak."<sup>82</sup> MRC submitted that the score was based solely on the evaluators' subjective assessment. Additionally, the evaluators allegedly missed vital information in MRC's bid by concluding that there were "limited details on the disposal sites chosen."<sup>83</sup> MRC argued that details with respect to disposal sites were fully set out in "Tab 8 in M.2.5 Subcontractor List."<sup>84</sup> Moreover, MRC refuted the evaluators' assessment that its flood monitoring plan was weak as its plan and Towing Manual met all Transport Canada requirements. MRC also took issue with the evaluators claim that while some areas were covered well in the bid, some other information was "missing and other areas weak on details. In many cases the information was scattered amongst various sections and was not referenced or cross referenced in the explanation."<sup>85</sup>

[99] As the Tribunal discussed above, the Tribunal does not find that subjectivity in the evaluators' assessment of MRC's bid in and of itself constituted an error in the evaluation. The scoring scheme provides the evaluators with discretion as to how points may be awarded based on the sufficiency of the information contained in the response to the criteria. In this case, it appears that the evaluators were clearly looking for more detail with respect to MRC's environmental contingency plan, disposal sites and flood monitoring plan, which were undoubtedly key issues for PWGSC in the context of this procurement. However, absent an explanation from PWGSC explaining the deficiencies in MRC's response to M.2.9, the Tribunal cannot assume that the evaluators' assessment was valid. The responses to M.2.9 should therefore be re-evaluated based on the relevant criteria ensuring that all information in the bid relevant to the criteria is considered.

[100] The Tribunal finds that CME's concerns with respect to the evaluation of its response to M.2.10 were similar to some of the issues raised by MRC, insofar as they concerned assessments regarding the sufficiency of the response.<sup>86</sup> As the Tribunal has determined that it would be appropriate to re-evaluate responses to M.2.10, for reasons of judicial economy, the Tribunal finds it unnecessary to examine CME's allegations with respect to this requirement in detail. However, as the Tribunal discussed above, it does not agree with CME's submission that point deductions based on the fact that bid responses were limited to information that was only available at the time of bid closing would constitute a failure to conduct the evaluation in accordance with the CFTA. As such, in the re-evaluation, evaluators are not expected to assess the criteria based on the information that was available to the bidder, unless this would be consistent with the relevant criteria.

## REMEDY

[101] As the complaint is valid in part, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) to (4) of the *CITT Act*. For its part, PWGSC submitted that no remedy be awarded as it had cancelled the solicitation and will retender the requirement with revised terms.

<sup>81</sup> Exhibit PR-2020-038-07A at 397, 398.

<sup>82</sup> Exhibit PR-2020-038-01B, paras. 89, 87 at 39, 40.

<sup>83</sup> *Ibid.*, paras. 88 at 40.

<sup>84</sup> *Ibid.*, para. 90 at 39; Exhibit PR-2020-038-01C (protected), paras. 89, 90 at 39.

<sup>85</sup> *Ibid.*, para. 92 at 40, 41.

<sup>86</sup> Exhibit PR-2020-056-01A (protected), paras. 47-52 at 17, 18; Exhibit PR-2020-056-01, paras. 47-52 at 17, 18.

[102] To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, including the following:

- (1) the seriousness of the deficiencies found;
- (2) the degree to which the complainant and all other interested parties were prejudiced;
- (3) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (4) whether the parties acted in good faith; and
- (5) the extent to which the contract was performed.

[103] The Tribunal finds that the deficiencies were serious. PWGSC opted to cancel the solicitation without thoroughly examining the evaluation errors alleged by the bidders to determine the highest-ranked bidder based on the published criteria. The Tribunal's analysis of the allegations concerning the evaluation of M.2.4.1, M.2.6, M.2.9 and M.2.10 raises doubt as to whether it was conducted with reference to undisclosed criteria or without adequate consideration of the information contained in the bids. Evaluation errors of this nature are serious and there was little evidence that PWGSC considered them with the necessary diligence that was required in the circumstances.

[104] PWGSC's concerns of subjectivity in the evaluation process due to ambiguity in the RFP were not sufficient grounds to cancel the RFP. The seriousness of this deficiency was compounded by the fact that neither of the complainants took issue with the terms set out in the RFP and both could face significant prejudice in the retendering process. The fact that the retendered RFP would be in respect of the same requirement (i.e. the disposal of the former vessel *CCGS W.E. Ricker*), the risks to MRC's and CME's ability to fairly compete as a result of the disclosure of the latter's bid price are unlikely to be mitigated. The Tribunal is of the view that the cancellation of the solicitation, in the present circumstances, compromised both the integrity and efficiency of the competitive procurement.

[105] For the foregoing reasons, the Tribunal finds that it would be appropriate to recommend re-evaluation of the bids with respect to compliance with mandatory technical criteria M.2.4.1, M.2.6, M.2.9 and M.2.10, in the manner described in these reasons. To ensure that the re-evaluation does not cause further prejudice to other bidders, the Tribunal is of the view that in the interest of fairness, the re-evaluation should be in respect of all bids that were considered for evaluation during Phase III of the phased bid compliance process. This would be appropriate considering that the technical bids were not assessed for responsiveness to the solicitation requirements until Phase III, after bidders had the opportunity to remedy non-compliance issues with respect to the Eligible Mandatory Criterion identified in the CAR during Phase II.<sup>87</sup> The Tribunal is of the view that this would be consistent with the factors set out in subsection 30.15(2) as well as the CFTA.<sup>88</sup>

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<sup>87</sup> See sections 4.1.1.3 and 4.1.1.4 of the RFP; Exhibit PR-2020-038-07A at 336, 337.

<sup>88</sup> See *CGI* at para. 211; *Space2Place Design Inc.* (30 October 2015), PR-2015-012 (CITT) at para. 57; *KPMG LLP* (23 November 2018), PR-2018-014 and PR-2018-024 (CITT) at para. 29.

[106] To the extent that it is possible, given the highly technical nature of the RFP, the Tribunal would also recommend that the re-evaluation be done by the same evaluators that conducted the original evaluation. Moreover, the evaluation should be conducted as soon as practicable and no longer than within six months of this determination.

## **COSTS**

[107] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MRC its reasonable costs in preparing and proceeding with its complaint in File No. PR-2020-038. CME is also awarded its reasonable costs incurred in preparing and proceeding with its complaints in Files No. PR-2020-044 and PR-2020-056. For clarity, although CME filed two separate complaints, the Tribunal sees no reason to award CME additional costs for its second complaint, which was filed in part to respond to the allegations raised in MRC's complaint.

[108] In accordance with the *Procurement Costs Guideline (Guideline)*, the Tribunal's preliminary indication of the level of complexity for the complaints is Level 2. The solicitation requirements were complex given the nature of the services being procured, i.e. dismantling a former vessel, which entails a level of risk which PWGSC had to manage through its procurement process. There were numerous allegations concerning several mandatory rated criteria. The proceedings were made more complex by PWGSC's refusal to address these submissions in full. The inquiry was extended to the 135-day timeframe and the proceedings were made more complex by having to consider the appropriateness of consolidating the complaints. Accordingly, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750.

## **DETERMINATION**

[109] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid in part.

[110] Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC re-evaluate all bids that were considered for evaluation during Phase III of the phased bid compliance process solely with respect to mandatory technical criteria M.2.4.1, M.2.6, M.2.9 and M.2.10, in accordance with the Tribunal's direction set out in the reasons for this determination. The re-evaluation should be conducted as soon as practicable and no later than six months from this determination.

[111] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MRC its reasonable costs incurred in preparing and proceeding with its complaint (File No. PR-2020-038), which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

[112] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards CME its reasonable costs incurred in preparing and proceeding with its complaints (Files No. PR-2020-044 and PR-2020-056), which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for these complaints, considered together, is Level 2, and its

preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary level of complexity or indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

## POSTSCRIPT

[113] On March 5, 2021, following the issuance of its reasons on February 22, 2021, the Tribunal received correspondence from PWGSC. In its letter, PWGSC noted the following:

. . . in respect of M.2.4.1, we note that the Decision indicates at paragraphs 73-83 that a re-evaluation should be conducted for M.2.4.1. This requirement relates to Temporary Facilities, which was not an issue in the Complaints. Arising from a typographical error in the evaluation notes, we believe the Tribunal intended to refer to a re-evaluation of M.2.4.1, M.2.4.2, M.2.4.3 and M.2.4.4 instead of solely M.2.4.1. All of these criteria were to be considered together pursuant to the terms of the Request for Proposal. Given this, PWGSC respectfully submits that all criteria are to be re-evaluated pursuant to the Decision.<sup>89</sup>

[114] On March 11, 2021, the Tribunal requested comments from MRC and CME with respect to PWGSC's letter. In response, MRC and CME confirmed, on March 16 and 18, 2021, respectively, their consent to PWGSC's request for corrections to the reasons issued by the Tribunal.

[115] In response to PWGSC's recent comments with respect to mandatory technical criterion M.2.4.1, the Tribunal issues this postscript as a clarification of its determination and reasons. The statements contained herein do not alter the determination or reasons previously issued.

[116] Both MRC and CME made allegations regarding the evaluation of mandatory technical criterion M.2.4.1. In analyzing these allegations, the Tribunal relied on the submissions of the parties and evidence on the record, which confirmed that the evaluation of M.2.4.1 encompassed other criteria. In other words, the Tribunal understood that the score provided by the evaluators for M.2.4.1, as indicated in the evaluation notes, was based on their assessment of the requirements set out in M.2.4.1 to M.2.4.4, as applicable. In this regard, CME noted that its rating for M.2.4.1 encompassed "Technical Criteria M.2.4.1 to M.2.4.4, some of which were only applicable depending on the bidder's plan to complete the Work".<sup>90</sup> This was similarly indicated in the GIR, which included an excerpt from the M.3 scoring grid of the RFP. Below is a reproduction of the information concerning scored "item" M.2.4.1 from the GIR.<sup>91</sup>

Item	Section	Rating Where Appropriate	Mandatory? (Yes/No)	Notes regarding Mandatory inclusion in bid and point ratings
M.2.4.1	Temporary facilities	All of M.2.4 – Facilities rated for a combined rating out of 0 to 5	Only if Applicable	Details only required if a temporary facility is required as part of the Bidder's project plan

<sup>89</sup> Exhibit PR-2020-038-42.07 at 1.

<sup>90</sup> Exhibit PR-2020-056-01 at para. 26.

<sup>91</sup> Exhibit PR-2020-038-41 at para. 30.



[117] While PWGSC referred to “All of M.2.4” in the GIR, the M.3 scoring grid of the RFP was clear that a score of “0 to 5” would be provided based on a combined rating of M.2.4.1, M.2.4.2, M.2.4.3 and M.2.4.4.<sup>92</sup>

[118] The Tribunal stated in its determination that all bids were to be re-evaluated with respect to, among other criteria, M.2.4.1, *in accordance with the Tribunal’s direction set out in the reasons*.

[119] In its In its reasons, the Tribunal addressed MRC’s allegations concerning the evaluation of mandatory technical criterion M.2.4.1 by reference to M.2.4.4 which applies to a proposed dry dock.<sup>93</sup> The Tribunal determined that it was appropriate for PWGSC to “re-evaluate the bids in respect of the certification requirements for M.2.4.1” and provided further instructions with respect to how PWGSC should conduct its re-evaluation of the certification requirements.<sup>94</sup> Assessing the score for M.2.4.1 necessarily requires PWGSC to assess any certification requirements mentioned in M.2.4.1 to M.2.4.4 as they apply to the bids. Only M.2.4.3 and M.2.4.4 make any reference to certification requirements.

[120] Similarly, in addressing CME’s allegations concerning the evaluation of M.2.4.1 as it related to evidence contained in its bid of uninterrupted access to its proposed facilities, the Tribunal referred to M.2.4.3 and M.2.4.4.<sup>95</sup> The Tribunal determined that it was appropriate for PWGSC to re-evaluate M.2.4.1 “to assess bids in respect of their evidence concerning uninterrupted access to the relevant facility for the necessary period with reference to the work period and the bidder’s preliminary schedule”.<sup>96</sup> To assess the score for M.2.4.1, this would necessarily require PWGSC to assess the requirements set out in M.2.4.3 and M.2.4.4 pertaining to the bidders’ evidence of uninterrupted access to the relevant facilities.

[121] Any changes to the combined rating for the final score for “item” M.2.4.1 should be limited to PWGSC’s re-evaluation of the relevant requirements set out in M.2.4.3 and M.2.4.4 as described in the reasons and clarified in this postscript. There were no submissions or evidence on the record during the proceedings to warrant re-evaluation of any requirements described under the headings “M.2.4.1 Temporary Facilities” and “M.2.4.2 Approved Shipbreaking Site” in the RFP.

Cheryl Beckett

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Cheryl Beckett

Presiding Member

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<sup>92</sup> Exhibit PR-2020-038-07A at 399.

<sup>93</sup> See paras. 74 and 77. It bears repeating that in its complaint, MRC alleged that PWGSC failed to properly evaluate M.2.1, M.2.4.1, M.2.6, M.2.9 and M.2.10. CME’s allegations concerned the evaluation of M.2.3.1, M.2.4.1, M.2.6, M.2.9 and M.2.10.

<sup>94</sup> See para. 78.

<sup>95</sup> See para. 80.

<sup>96</sup> See para. 83.

**APPENDIX I****RELEVANT PROVISIONS OF THE CANADIAN FREE TRADE AGREEMENT****Article 502: General Principles**

1. Each Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.

**Article 503: General Procurement Rules**

2. A procuring entity shall not use options, cancel a procurement, or modify an awarded contract in a manner that circumvents the obligations of this Chapter.

**Article 507: Conditions for Participation**

3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:

- (b) base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation.

**Article 509: Technical Specifications and Tender Documentation***Tender Documentation*

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Tender documentation shall include all pertinent details concerning:

- (a) the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighting and evaluation, unless price is the sole criterion; and
- (b) the requirements to be fulfilled by the supplier, and the terms or conditions applicable to the tender, including, if applicable:
  - (i) technical specifications;
  - (ii) requirements for servicing or warranty;
  - (iii) transition costs;
  - (iv) applicable conformity assessment certification, plans, drawings, or instructional materials; and
  - (v) requirements related to the submission of the tender.

**Article 515: Treatment of Tenders and Award of Contracts***Evaluation and Award of Contract*

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

- (a) the most advantageous tender; or
- (b) if price is the sole criterion, the lowest price.

**Article 517: Disclosure of Information**

1. Notwithstanding any other provision of this Chapter, a procuring entity shall not provide to any particular supplier information that might prejudice fair competition between suppliers.