



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2021-034

Marine Recycling Corporation

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, December 23, 2021*

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IN THE MATTER OF a complaint filed by Marine Recycling Corporation pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

MARINE RECYCLING CORPORATION

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 complaint filed by Marine Recycling Corporation (MRC) is not valid.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by MRC. In accordance with the *Procurement Costs Guideline* (Guideline), the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. 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

Cheryl Beckett

Presiding Member

Tribunal Panel:	Cheryl Beckett, Presiding Member
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STATEMENT OF REASONS

SUMMARY OF THE COMPLAINT

[1] The complaint concerns a procurement (Solicitation No. F7044-200238/A) made by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans.¹ The solicitation was for the disposal of the former vessel CCGS *W.E. Ricker* (Ricker).²

[2] The complainant is Marine Recycling Corporation (MRC). MRC claims that PWGSC breached the Canadian Free Trade Agreement (CFTA) by failing to award the contract to MRC based on the evaluation criteria in the Request for Proposal (RFP).³ MRC alleges that in evaluating certain rated mandatory technical criteria in the RFP, PWGSC introduced and relied on undisclosed evaluation criteria, failed to apply disclosed evaluation criteria and ignored vital information included in MRC's bid, and failed to explain why MRC lost points.⁴

[3] As a remedy, MRC asks for the designated contract to be terminated and awarded to MRC.⁵ In the alternative, MRC seeks compensation for lost profits.⁶ MRC also seeks reimbursement of its complaint costs and bid preparation costs.⁷

PROCUREMENT PROCESS

[4] PWGSC issued the RFP (dated April 21, 2020)⁸ on April 22, 2020,⁹ with a closing date of June 5, 2020.¹⁰ PWGSC made six amendments to the RFP.¹¹ The closing date was extended to June 25, 2020, pursuant to Amendment No. 005.¹²

[5] The RFP prescribed a three-phase bid compliance process.¹³ Phases I and II were preliminary.¹⁴ Phase III involved assessing bids in accordance with the requirements of the solicitation including the technical and financial evaluation criteria.¹⁵

[6] On August 4, 2020, PWGSC advised MRC that the contract had been awarded to Canadian Maritime Engineering Ltd. (CME).¹⁶ On August 11, 2020, MRC notified PWGSC of its objection to

¹ Exhibit PR-2021-034-01 at 67.

² *Ibid.*

³ *Ibid.* at 9.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.* at 9-10.

⁷ *Ibid.* at 11.

⁸ Exhibit PR-2021-034-10 at 67.

⁹ Exhibit PR-2021-034-01 at para. 1.

¹⁰ *Ibid.* at 67.

¹¹ *Ibid.* at 145-476.

¹² *Ibid.* at 473.

¹³ Exhibit PR-2021-034-10 at 10-15.

¹⁴ *Ibid.* at 10.

¹⁵ *Ibid.* at 13.

¹⁶ Exhibit PR-2021-034-01A (protected) at 752; Exhibit PR-2021-034-01 at para. 15.

the contract award and the evaluation of its bid.¹⁷ On August 28, 2020, in response to the objection, PWGSC advised that it would terminate the contract and re-solicit bids with revised terms.¹⁸

PROCEDURAL HISTORY

[7] MRC's current complaint is further to MRC's and CME's earlier complaints regarding the same solicitation.¹⁹

MRC's original complaint proceedings

[8] MRC filed its original complaint with the Tribunal on September 9, 2020.²⁰ The original complaint raised issues regarding PWGSC's breach of its obligations under the CFTA in its evaluation of certain rated criteria and in cancelling the solicitation process. The Tribunal accepted the complaint for inquiry on September 14, 2020.²¹ CME filed two related complaints.²² On September 22, 2020, the Tribunal accepted CME's first complaint for inquiry.²³ On October 26, 2020, the Tribunal accepted CME's second complaint for inquiry.²⁴ The three complaints were joined on November 3, 2020.²⁵

[9] On January 22, 2021, the Tribunal determined that MRC's and CME's complaints were valid in part and recommended that PWGSC re-evaluate all bids that were considered for evaluation during Phase III with respect to mandatory technical criteria M.2.4.3, M.2.4.4, M.2.6, M.2.9 and M.2.10.²⁶ The Tribunal issued a corrigendum on April 7, 2021, clarifying its instructions regarding the recommended re-evaluation. Relevant excerpts from the Tribunal's determination are provided in Appendix I.

MRC's current complaint

[10] Following re-evaluation of the bids, PWGSC informed MRC and CME on July 22, 2021, that PWGSC intended to award a contract to CME. Although MRC met all of the mandatory criteria, PWGSC informed MRC that based on the re-evaluation results and the evaluation methodology, CME had achieved the highest-ranking score. On July 22, 2021, MRC requested a debriefing from PWGSC. On July 23, 2021, PWGSC informed MRC that it would proceed with a written debriefing and provided MRC with the technical re-evaluation scoring guide used by the evaluators, the consensus summary, the individual evaluators' notes and the final consensus with regard to the

¹⁷ Exhibit PR-2021-034-01 at para. 17.

¹⁸ *Ibid.* at para. 18.

¹⁹ *Marine Recycling Corporation and Canadian Maritime Engineering Ltd. v. Department of Public Works and Government Services* (22 January 2021), PR-2020-038, PR-2020-044 and PR-2020-056 (CITT) [*MRC and CME*].

²⁰ *MRC and CME* at para. 15.

²¹ *Ibid.*

²² *Ibid.* at paras. 17, 21.

²³ *Ibid.* at para. 17.

²⁴ *Ibid.* at para. 21.

²⁵ *Ibid.* at para. 25.

²⁶ *Ibid.* at paras. 105, 110, 120.

determination and reasons. MRC filed its current complaint on August 10, 2021,²⁷ and requested postponement of the contract award.²⁸

[11] On August 12, 2021, the Tribunal accepted the complaint for inquiry.²⁹ On August 13, 2021, the Tribunal issued an order postponing the contract award.³⁰ By letter dated August 24, 2021, PWGSC asked the Tribunal to rescind the postponement of award order.³¹ PWGSC's letter certified that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest.³² The Tribunal rescinded the order on August 26, 2021.³³

[12] On September 2, 2021, PWGSC requested a 10-business day extension to file its Government Institution Report (GIR).³⁴ On September 3, 2021, MRC objected to the extension, citing the urgency of its complaint and the reduced availability of remedies should the matter be further delayed.³⁵ By letter dated September 7, 2021, PWGSC submitted that the requested extension would not have any impact on the appropriate or available remedies.³⁶

[13] On September 8, 2021, the Tribunal granted PWGSC's extension request.³⁷ The Tribunal noted that an extension would not impede the Tribunal's ability to recommend an appropriate remedy and would facilitate each party's ability to put forward its best evidence regarding the substantive matters at issue.³⁸ Pursuant to paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations),³⁹ the GIR deadline extension changed the timeframe for the Tribunal to issue its findings and recommendations to 135 days.

[14] PWGSC submitted its GIR on September 28, 2021.⁴⁰ MRC filed its comments on the GIR on October 8, 2021.⁴¹

ANALYSIS

[15] To determine the validity of a complaint, the Tribunal must determine whether PWGSC acted in accordance with the procedures and requirements prescribed in the designated contract.⁴² In assessing complaints, the Tribunal shows deference to evaluators' expertise, interfering only when an evaluation or award is unreasonable.⁴³ The Tribunal's role is to decide if an evaluation is supported

²⁷ Exhibit PR-2021-034-02.

²⁸ Exhibit PR-2021-034-01 at 11.

²⁹ Exhibit PR-2021-034-05.

³⁰ Exhibit PR-2021-034-04.

³¹ Exhibit PR-2021-034-07.

³² *Ibid.*

³³ Exhibit PR-2021-034-08.

³⁴ Exhibit PR-2021-034-11.

³⁵ Exhibit PR-2021-034-12.

³⁶ Exhibit PR-2021-034-13.

³⁷ Exhibit PR-2021-034-14.

³⁸ *Ibid.*

³⁹ SOR/93-602.

⁴⁰ Exhibit PR-2021-034-16.

⁴¹ Exhibit PR-2021-034-18.

⁴² Subsection 30.14(2) of the *Canadian International Trade Tribunal Act* (CITT Act).

⁴³ *AJL Consulting v. Department of Agriculture and Agri-food* (12 February 2020), PR-2019-045 (CITT) [*AJL Consulting*] at para. 8; *Heiltsuk Horizon Maritime Services Ltd./Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (3 May 2021), PR-2020-068 (CITT) at para. 44.

by a reasonable explanation; it is “not to step into the shoes of the evaluators and reassess the unsuccessful proposal”.⁴⁴

[16] The Tribunal has held that a procuring entity’s “determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.”⁴⁵ The Tribunal has also held that an evaluation or award is unreasonable where evaluators have not applied themselves in evaluating a bid, have interpreted the scope of a solicitation requirement incorrectly, have ignored vital information provided in a bid, have based their evaluation on undisclosed criteria (subject to the qualification in paragraph 18 below), or have otherwise not conducted the evaluation in a procedurally fair way.⁴⁶

[17] The Tribunal must also determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements.⁴⁷ The RFP identifies the CFTA as the applicable trade agreement.⁴⁸ MRC identifies the following CFTA provisions as relevant to its complaint: Article 502(1); Article 507(3)(b); Article 509(7)(a); and Article 516(1).⁴⁹ Excerpts of CFTA provisions relevant to the complaint are in Appendix II.⁵⁰

[18] The Tribunal has held that the CFTA requires procuring entities to evaluate bids in accordance with essential criteria set out in the tender documentation.⁵¹ Where an evaluation is based on undisclosed criteria, it complies with trade agreements as long as the evaluation approach was logically consistent with, and could reasonably be anticipated or derived from, the methodology stated in the tender documents.⁵²

[19] Therefore, the Tribunal must decide whether PWGSC conducted its re-evaluation of MRC’s bid in accordance with the RFP criteria at issue and in a manner consistent with the CFTA. The Tribunal notes that any bidder could have been awarded more or fewer points for the criteria at issue in the re-valuation than those awarded in the original evaluation. To make its decision, the Tribunal considers the re-evaluation on its own merits, not in comparison to the original evaluation.⁵³

[20] MRC has four general grounds of complaint, namely that the evaluators: (i) introduced and relied on undisclosed evaluation criteria for rated criteria M.2.4, M.2.6 and M.2.10, contrary to Article 509(7)(a) of the CFTA;⁵⁴ (ii) failed to apply disclosed evaluation criteria and ignored vital

⁴⁴ *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Ltd.*, 2021 FCA 26 at para. 70. See also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83.

⁴⁵ *AJL Consulting* at para. 8; citing *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25.

⁴⁶ *Menya Solutions Inc. v. Department of Public Works and Government Services* (28 May 2020), PR-2020-003 (CITT) at para. 38.

⁴⁷ Section 11 of the Regulations.

⁴⁸ Exhibit PR-2021-034-01 at 70.

⁴⁹ Exhibit PR-2021-034-01 at paras. 3–4, 45.

⁵⁰ Article 507(3)(b) is not included in Appendix 2 because it relates to questions of whether a supplier satisfies conditions for participation in a procurement, which is not at issue in the current complaint.

⁵¹ *AJL Consulting* at para. 7.

⁵² *SL Ross Environmental Research Limited v. Department of Fisheries and Oceans* (9 April 2021), PR-2020-073 (CITT) at para. 48; *MRC and CME* at 68; *Siemens Westinghouse Incorporated* (19 March 2001), PR-2000-039 (CITT) [*Siemens*], upheld in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241 [*Siemens Westinghouse*].

⁵³ *Siemens* upheld in *Siemens Westinghouse*.

⁵⁴ Exhibit PR-2021-034-01 at 25.

information in MRC's bid in respect of rated criteria M.2.4, M.2.6 and M.2.10, contrary to the CFTA;⁵⁵ (iii) failed to provide MRC with an explanation of the reasons why it lost points in the re-evaluation of technical criterion M.2.9, contrary to Article 516(1) of the CFTA;⁵⁶ and (iv) failed to award the contract to MRC as it should have done if its decision had been based solely on evaluation criteria specified in the RFP, further to the re-evaluation conducted pursuant to the Tribunal's recommendations, contrary to the CFTA.⁵⁷

[21] MRC's specific allegations regarding the re-evaluation of technical evaluation criteria M.2.4, M.2.6, M.2.9 and M.2.10 are addressed in turn below.

Criterion M.2.4: facilities

[22] MRC and PWGSC acknowledge that the re-evaluation under criterion M.2.4 was limited to criteria M.2.4.3 and M.2.4.4.⁵⁸ MRC does not complain about the re-evaluation of criterion M.2.4.3. Therefore, the Tribunal will focus its inquiry on criterion M.2.4 and the re-evaluation of criterion M.2.4.4.

[23] MRC submits that in evaluating criterion M.2.4.4, the evaluators introduced and relied on undisclosed criteria,⁵⁹ and ignored vital information in MRC's bid.⁶⁰ MRC also claims that the evaluators' scoring of criterion M.2.4 is patently unreasonable.⁶¹ Each claim is addressed in turn below.

Did the evaluators rely on undisclosed criteria in evaluating criterion M.2.4.4?

[24] MRC submits that criterion M.2.4.4 does not require bidders to reference the expected weight of the vessel at the time of the lift or the process for validating the vessel's weight to achieve the 1100LT max. capacity of the dry dock that had been proposed in MRC's bid.⁶² MRC argues that accurate information related to pre-lift vessel condition is only available immediately before the vessel lift takes place, making it unreasonable to expect bidders to address such information in their bids.⁶³ Citing an industry letter,⁶⁴ MRC argues that between the time of the bid submission and the removal of certain matter prior to towing, and between that time and the actual vessel lift, the vessel's condition will change several times. This is why the vessel's condition when it will be lifted on to the dry dock in the future could not be determined at the time of MRC's bid submission.⁶⁵ According to MRC, this means that any requirement to provide such information could not be reasonably anticipated by bidders.⁶⁶

⁵⁵ *Ibid.* at 26.

⁵⁶ *Ibid.*; Exhibit PR-2021-034-01A (protected) at 26.

⁵⁷ Exhibit PR-2021-034-01 at 26.

⁵⁸ *Ibid.* at para. 52; Exhibit PR-2021-034-15 at para. 43.

⁵⁹ Exhibit PR-2021-034-01 at para. 56.

⁶⁰ *Ibid.* at para. 61.

⁶¹ Exhibit PR-2021-034-18 at para. 36.

⁶² Exhibit PR-2021-034-01 at para. 57.

⁶³ Exhibit PR-2021-034-18A (protected) at paras. 31–33.

⁶⁴ *Ibid.* at para. 32.

⁶⁵ Exhibit PR-2021-034-18 at para. 32.

⁶⁶ *Ibid.* at para. 33.

[25] PWGSC criticizes MRC's failure to provide such information,⁶⁷ and views the documentation provided by MRC as insufficient to satisfy the certification requirement because it does not provide such information.⁶⁸ PWGSC submits that the intent of criterion M.2.4.4, and "what the Evaluation Team was looking for, is to conduct a preliminary assessment of the dry dock proposed to ensure the dock will have the necessary capacity to dock the vessel".⁶⁹ PWGSC further submits that if the Tribunal finds that the re-evaluation was based on criteria that were not explicitly disclosed, then the Tribunal should find that the criteria could reasonably have been inferred from the RFP and should not interfere with the evaluation.⁷⁰

[26] While MRC is correct that criterion M.2.4.4 does not expressly identify such factors, the requirement directs bidders to "[D]emonstrate 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" [emphasis added].⁷¹

[27] The evaluators' notes indicate that there were unanswered questions about a possible discrepancy involving MRC's proposed dry dock's capacity and the Ricker's specifications.⁷² The Tribunal's review of the RFP and MRC's bid revealed that MRC had access to and referenced the information giving rise to those questions,⁷³ and that the possible discrepancy was clear (as described, for example, in the GIR).⁷⁴ Additionally, MRC's statement that it was not possible for bidders to "accurately" provide certain information,⁷⁵ seems to presume that the evaluators were looking for a required level of precision that is not reflected in the evaluators' notes. Nothing in their notes suggests that the evaluators were looking for quantitative information based on precise calculations. Rather, their concerns were focused on the lack of an explanation for how the discrepancy apparent in MRC's bid would be addressed.⁷⁶

[28] It is well-established that while an RFP must identify all major evaluation criteria, it does not have to identify all aspects of each criterion that may be considered in an evaluation, as long as the unidentified aspects are reasonably related to the criterion.⁷⁷ Factors such as expected (not necessarily accurate or exact) vessel weight at lift, and a process capable of verifying that weight, are reasonably related to the evaluators determining whether a dry dock can accommodate a particular vessel. The Tribunal agrees with PWGSC that such factors can be an implicit part of demonstrating that a dry dock's capacity is sufficient to accommodate a specific vessel, particularly where dry dock capacity appears to be in issue, and as such, they do not constitute undisclosed criteria.

[29] Moreover, the technical re-evaluation scoring guide requires a bidder to "demonstrate to the satisfaction of Canada, that it or its Subcontractor(s), meet each of the mandatory criteria by providing substantial information to describe completely and in detail how the requirement is met or

⁶⁷ Exhibit PR-2021-034-15A (protected) at para. 48.

⁶⁸ *Ibid.* at para. 50.

⁶⁹ Exhibit PR-2021-034-15 at para. 52.

⁷⁰ *Ibid.* at para. 86.

⁷¹ Exhibit PR-2021-034-01 at 136.

⁷² Exhibit PR-2021-034-01A (protected) at 791.

⁷³ See, for example, Exhibit PR-2021-034-01A (protected) at 532, 537, 543, 545, 547, 563.

⁷⁴ Exhibit PR-2021-034-15A (protected) at paras. 48, 49, 50, 53.

⁷⁵ Exhibit PR-2021-034-15 at para. 32.

⁷⁶ Exhibit PR-2021-034-01A (protected) at 791, 900.

⁷⁷ *Siemens Westinghouse* at para. 43.

addressed.”⁷⁸ MRC had access to the information that gave rise to a possible discrepancy, but did not provide the evaluators with a detailed complete description addressing the issue. Criterion M.2.4.4 made it clear that the evaluators would seek to confirm that proposed facilities had sufficient capacity. Therefore, even if the expected vessel weight and a weight verification process were undisclosed criteria, the evaluation approach was logically consistent with the RFP and could reasonably be anticipated by MRC from the methodology stated in the RFP.

[30] MRC also takes issue with PWGSC’s statement that the intent of criterion M.2.4.4 is to conduct a preliminary assessment of a proposed dry dock to ensure it has the necessary capacity.⁷⁹ MRC submits that “intent” is irrelevant unless it is stated in the RFP or can be reasonably anticipated as flowing from express RFP provisions.⁸⁰ MRC submits that relying on “intent” and a preliminary assessment “requirement” constitutes the introduction of undisclosed evaluation criteria.⁸¹

[31] The Tribunal finds that PWGSC’s statement did not introduce an undisclosed criterion. As noted above, an RFP does not have to identify all aspects of each criterion that may be considered in an evaluation, as long as the unidentified aspects are reasonably related to the criterion. A plain reading of PWGSC’s statement is that PWGSC was explaining the rationale underpinning criterion M.2.4.4. Moreover, it is implicit in criterion M.2.4.4 that the evaluators sought to preliminarily assess proposed dry dock capacity. The RFP’s technical evaluation is designed to preliminarily assess bidders’ ability to fulfil the contract if awarded. Even if PWGSC’s statement was considered to introduce an undisclosed criterion, this approach was consistent with the RFP and could reasonably have been anticipated by MRC based on the nature of the inconsistency contained in its bid.

[32] MRC also submits that the evaluators considered undisclosed criteria in the form of risks of environmental harm, damage or loss of the vessel and damage to the facilities.⁸² MRC argues that neither the RFP bid scoring scheme (criterion M.1.1) nor the technical re-evaluation scoring guide state that there would be an assessment of the significance of missing or inadequate responses based on the risk of environmental harm, risk of damage or loss of the vessel, or risk of damage to the facilities (and such an assessment was not done in the original evaluation).⁸³ MRC argues that this is contrary to the CFTA, which requires evaluators to follow the evaluation process established by the RFP (i.e., evaluation criteria and scoring scheme).⁸⁴

[33] MRC also contests the evaluators’ conclusion that alleged inadequacies in the bid are “significant”.⁸⁵ MRC submits that section 2.9 of the RFP establishes that dry dock certification and docking plans can be requested by the contracting authority after the technical evaluation.⁸⁶ According to MRC, this means the evaluators could have obtained up-to-date information addressing

⁷⁸ Exhibit PR-2021-034-01 at 496.

⁷⁹ Exhibit PR-2021-034-18A (protected) at para. 29.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Exhibit PR-2021-034-01 at para. 68.

⁸³ *Ibid.*

⁸⁴ *Ibid.* at para. 69.

⁸⁵ *Ibid.* at para. 66.

⁸⁶ *Ibid.*

alleged inadequacies in the bid regarding criterion M.2.4.4 immediately before the contract award, so such inadequacies cannot be “significant”.⁸⁷

[34] PWGSC submits that the RFP rating levels “specifically asse[ss] the sufficiency of provided information, and the significance of any missing information on a successful award.”⁸⁸ Accordingly, the evaluators interpreted the meaning of the word “significance” through the lens of how significant the missing information was with regard to meeting the bid requirements and the overall outcome of the safe disposal of the vessel.⁸⁹ PWGSC argues that risks to the environment and human safety concerns are of central importance in vessel disposal work.⁹⁰ There is the risk of not doing the work safely, the risk of exposure to hazardous materials, significant risks to the environment, and the risk of damage to or loss of the vessel.⁹¹ PWGSC argues that the evaluators had to consider bids in this context,⁹² and that it is reasonable to consider such risks in an evaluation.⁹³

[35] PWGSC further argues that if the Tribunal finds that there were undisclosed criteria, the question is whether the criteria could reasonably have been predicted or anticipated by MRC from the solicitation documents.⁹⁴ If so, the Tribunal should not interfere with the re-evaluation. PWGSC notes that throughout the RFP and re-evaluated criteria, there are constant references to safety, safety plans, and risk mitigation, and it is clear that bidders were to provide substantial information to describe in detail how criteria were met in a way to address such concerns.⁹⁵

[36] MRC’s reply to the GIR submits that the evaluators did not apply the undisclosed “harm test” criteria in the first evaluation.⁹⁶ MRC also contests PWGSC’s interpretation of the word “significance” as meaning “risk of harm to the environment, the risk of damage or loss of the vessel and the risk of damage to the facilities”.⁹⁷ According to MRC, the word “significant” in the RFP’s technical scoring scheme was not a qualification to be interpreted by the evaluators.⁹⁸

[37] MRC submits that the undisclosed “harm test” is not relevant to determining whether a bid response is significant (properly defined to mean of a noticeably or measurably large amount).⁹⁹ MRC further submits that it is unreasonable for PWGSC to suggest that bidders should have anticipated that environmental and human safety concerns would be implicitly evaluated in all evaluation categories, because such risks are independently evaluated under other RFP provisions.¹⁰⁰

⁸⁷ *Ibid.*

⁸⁸ Exhibit PR-2021-034-15 at para. 40.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at paras. 41, 91.

⁹² *Ibid.* at para. 42.

⁹³ *Ibid.* at paras. 90-91.

⁹⁴ *Ibid.* at para. 86.

⁹⁵ *Ibid.* at para. 92.

⁹⁶ Exhibit PR-2021-034-18 at para. 12.

⁹⁷ *Ibid.* at para. 15.

⁹⁸ *Ibid.* at para. 14.

⁹⁹ *Ibid.* at para. 15.

¹⁰⁰ Exhibit PR-2021-034-18 at para. 17; citing *L.P. Royer Inc. v. Department of Public Works and Government Services* (10 January 2017), PR-2016-030 (CITT) at paras. 54–55, upheld in *Canada (Attorney General) v. L.P. Royer Inc.*, 2018 FCA 27.

[38] The Tribunal finds that the evaluators did not introduce undisclosed criteria in the form of “harm tests”. The entire RFP is grounded in ensuring proper protection for the environment,¹⁰¹ human health and safety.¹⁰² Undoubtedly environmental and human safety concerns are of central importance in vessel disposal work. Mandatory criteria in a solicitation are designed to meet underlying objectives, which may or may not be specified.¹⁰³ In evaluating criterion M.2.4.4, the evaluators were evaluating responses to criteria linked to future work that, if improperly completed, could harm the environment or humans. Therefore, it was reasonable for the evaluators to assess the sufficiency of information and the significance of missing information in that context. In *MRC and CME*, the Tribunal recommended that PWGSC explain why information in a bid does not meet the facility-related certification requirements.¹⁰⁴ PWGSC’s references to various risks are properly viewed as an explanation of the evaluators’ rationale for their decisions and scoring, and not as the imposition of undisclosed criteria.

[39] Regarding MRC’s suggestion that the evaluators should not have considered deficiencies in the bid as “significant” because MRC could have addressed any inadequacies after the technical evaluation was completed, the argument is without merit. The fact that the procuring entity could require a winning bidder to take such “remedial” steps is unrelated to the evaluators determining whether a deficiency identified in a technical evaluation is significant.

Did the evaluators ignore vital information in MRC’s bid regarding criterion M.2.4.4?

[40] MRC submits that the evaluators ignored the step-by-step disposal methodology provided in its bid.¹⁰⁵ MRC seems to be arguing that because the methodology describes certain pre-lift activities, it was unreasonable for the evaluators to deduct points for MRC not indicating the vessel’s lift weight.¹⁰⁶ Put another way, if the evaluators had considered the methodology, according to MRC they would or should not have required MRC to indicate the lift weight pursuant to criterion M.2.4.4.

[41] The Tribunal finds that the evaluators did not ignore vital information in MRC’s bid. MRC has not established how the disposal methodology could assure the evaluators that the dry dock could accommodate the vessel. The methodology does not address certain key matters necessary to meet criterion M.2.4.4. Therefore, the information was not vital to the evaluators’ assessment of criterion M.2.4.4.

[42] Moreover, MRC’s bid response to criterion M.2.4.4 does not reference the methodology or cross reference its location in a different part of the bid. The RFP instructs bidders to cross-reference different sections of their bids by identifying the specific paragraph and page numbers relevant to the

¹⁰¹ Exhibit PR-2021-034-01 at 70.

¹⁰² *Ibid.* at 97.

¹⁰³ In *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA), at para. 18, the Federal Court of Appeal noted that “procuring entities must evaluate a bidder’s conformance with mandatory requirements thoroughly and strictly. But this is not to suggest that mandatory requirements should be construed in an isolated and disjunctive manner. As was held in *Re E.D. Elections Inc.*, [1998] C.I.T.T. No. 44 at 5, they should “be interpreted as a whole with consideration of the overall purpose and objectives of the [Request for Proposal]”.

¹⁰⁴ At para. 78.

¹⁰⁵ Exhibit PR-2021-034-01 at para. 61. See Exhibit PR-2021-034-01A (protected) at 586, for the methodology.

¹⁰⁶ Exhibit PR-2021-034-01 at para. 61; Exhibit PR-2021-034-01(A) (protected) at para. 61.

criterion.¹⁰⁷ The Tribunal has repeatedly held that the onus is on a bidder to demonstrate unambiguously how its bid fulfills solicitation requirements.¹⁰⁸ It is not incumbent on evaluators to search through bids to find information addressing a criterion.

[43] Regarding PWGSC's view that MRC's certification documentation was insufficient, MRC disagrees.¹⁰⁹ MRC points out that the evaluators' re-evaluation notes do not indicate that MRC's documentation is not a particular type of certification.¹¹⁰ MRC then refers to a letter from an industry source and claims the letter confirms that MRC's documentation is the type of certification at issue.¹¹¹ MRC also relies on an industry standard (not referenced in its bid)¹¹² and its disposal methodology¹¹³ to establish the sufficiency of its certification documentation.

[44] MRC argues that the industry standard for dry dock certification is that it is valid for one year unless the certification says otherwise.¹¹⁴ The Tribunal is not persuaded by an industry standard that was not before the evaluators as part of MRC's bid. Criterion M.2.4.4 is clear, and MRC has not established that its bid specified the validity period of its dry-dock certification documentation. MRC also suggests that its step-by-step disposal methodology will ensure that the necessary inspection will be done.¹¹⁵ Again, criterion M.2.4.4 is clear, and MRC has not established that it indicated inspection schedules in its bid.

[45] The Tribunal finds that it was reasonable for the evaluators to determine that MRC's certification documentation was insufficient and to award points accordingly. Criterion M.2.4.4 expressly requires bidders to "specify the dry-dock certification validity period and indicate subsequent inspection schedules." Nothing before the Tribunal establishes that MRC provided such information in its bid, and MRC does not argue that it did so.

Was the evaluators' scoring of criteria M.2.4 and M.2.4.4 unreasonable?

[46] MRC submits that it was unreasonable for the evaluators to deduct additional points in the re-evaluation based on information that was in its bid during the original evaluation.¹¹⁶ As noted previously, to make its decision, the Tribunal considers the re-evaluation on its own merits, not in comparison to the original evaluation.¹¹⁷ The Tribunal finds any arguments comparing the original evaluation with the re-evaluation to be without merit.

¹⁰⁷ RFP Annex "M", M.1 Technical Bid Preparation, requires bidders "to refer to different sections of their bids by identifying the specific paragraph and page number where the subject topic has already been addressed." Exhibit PR-2021-034 at 133. The same requirement is also set out in RFP Part 3, Bid Preparation Instructions, Exhibit PR-2021-034 at 75.

¹⁰⁸ *ACT for Performance Inc. v. Department of Foreign Affairs, Trade and Development* (15 June 2021), PR-2020-085 (CITT) at para. 59 [ACT].

¹⁰⁹ Exhibit PR-2021-034-18 at para. 27; Exhibit PR-2021-034-18A (protected) at para. 27.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Exhibit PR-2021-034-01 at para. 63; Exhibit PR-2021-034-01A (protected) at para. 63.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Exhibit PR-2021-034-01A (protected) at para. 64.

¹¹⁶ Exhibit PR-2021-034-18 at para. 4.

¹¹⁷ At para. 19.

[47] MRC further argues that it had a “near perfect response to criteria M.2.4.1 - M.2.4.3” in the re-evaluation, yet the evaluators found that alleged deficiencies in response to criterion M.2.4.4 made MRC’s overall response to criterion M.2.4 incomplete and inadequate.¹¹⁸ MRC views PWGSC’s scoring as patently unreasonable.¹¹⁹

[48] The Tribunal finds that the evaluators reasonably scored criterion M.2.4.4 specifically, and criterion M.2.4 overall. The Tribunal has found no introduction of undisclosed criteria. Therefore, the evaluators’ conclusion on that issue is not based on undisclosed criteria and does not undermine their decision. The Tribunal has also found that the evaluators did not ignore vital information in MRC’s bid. Therefore, the evaluators’ decision is properly founded on the information it considered. Finally, MRC failed to meet two mandatory requirements in criterion M.2.4.4.

[49] The technical bid scoring scheme for point-rated criteria describes points awarded for different rating levels. The Tribunal finds that MRC’s failure to meet two mandatory requirements in criterion M.2.4.4, the incomplete and inadequate response regarding the dry dock’s capacity to accommodate the vessel, and the significance of those weaknesses as determined by the evaluators, aligns with the scoring scheme rating level reflected in their notes.

[50] Nothing before the Tribunal establishes that the evaluators did not apply themselves in evaluating criterion M.2.4, interpreting the scope of criterion M.2.4 incorrectly, or otherwise conducting the evaluation of criterion M.2.4 in a procedurally unfair way. The evaluators’ expertise is not impeached, nor has MRC established that their explanation is not tenable. Therefore, the Tribunal has no reason not to defer to their expertise in evaluating criterion M.2.4 and finds that they reasonably decided MRC’s overall score for criterion M.2.4.

Criterion M.2.6: project plan

[51] MRC claims that in re-evaluating criterion M.2.6, the evaluators introduced and relied on undisclosed criteria and ignored vital information in MRC’s bid. Each claim is addressed in turn below.

Did the evaluators rely on undisclosed criteria in evaluating criterion M.2.6?

[52] MRC submits that the evaluators introduced undisclosed criteria by evaluating whether MRC’s bid *actually addressed* each category for criterion M.2.6, rather than evaluating whether the bid demonstrated *how MRC would address* each category (as required by the RFP).¹²⁰ MRC points to criticisms in the evaluators’ notes that identify specific alleged deficiencies regarding the schedule and route, the vessel condition report, towing limitations and keel clearance as identified in criterion M.2.6(2).

¹¹⁸ Exhibit PR-2021-034-18 at para. 36.

¹¹⁹ *Ibid.*

¹²⁰ Exhibit PR-2021-034-01 at para. 84.

[53] Criterion M.2.6 requires bidders to provide a project plan describing their “approach and methodology” for work completion.¹²¹ Criterion M.2.6(2) provides, in part, as follows:¹²²

(2) Provide a draft tow plan **for each leg of the tow** to move the vessel from the Canadian Coast Guard Base . . . to the Bidder’s Approved Site for Ship Breaking by providing a draft tow plan for that *[sic]* demonstrates how the Bidder will address each of the following, and considering information contained in the “Former CCGS W.E. Ricker Pre-Tow Inspection Report”:

- . . .
- b. Anticipated schedule and route including safe harbour;
- . . .
- d. Vessel condition report;
- . . .
- f. Towing limitations;
- . . .
- h. Chart datum to provide evidence that the chosen route maintains necessary keel clearance at the ship’s anticipated draft;
- . . .
- j. Emergency Preparedness Response;
- k. Oil Pollution Response Plan/Spill Emergency Response Plan;
- . . .
- m. Flood monitoring for vessel when under tow and response plan; and
- . . .

[54] MRC submits that the RFP did not require bidders to provide an exact tow route with latitude and longitude, identify various safe harbours available along the route, or use any specific nautical navigation tool. The RFP did not require the route to be set out on a map or prescribe types of maps that could be included in a bid.¹²³ MRC argues that the evaluators’ criticism of the bid referencing the absence or inadequacy of such details means the evaluators relied on undisclosed criteria.¹²⁴ According to MRC, the level of detail sought by the evaluators in terms of assessing the condition of the vessel was not specified in the RFP.¹²⁵ MRC also claims that the RFP did not require bids to include “defined limitations”, and points to the evaluators finding MRC’s response incomplete because it did not provide such limitations as demonstrating that they therefore relied on undisclosed information.¹²⁶

[55] MRC also challenges the evaluators’ criticism that the bid did not refer to chart datum showing that the chosen route would have sufficient keel clearance.¹²⁷ MRC objects to the evaluators looking for actual evidence of keel clearance instead of “how” MRC would address keel clearance.¹²⁸ Similarly, MRC objects to the evaluators’ determination that the emergency preparedness response was incomplete because they could not find safety procedures, a flooding response plan, or a

¹²¹ *Ibid.* at 137.

¹²² *Ibid.* at 138.

¹²³ *Ibid.* at para. 86.

¹²⁴ *Ibid.* at paras. 86, 88.

¹²⁵ *Ibid.* at para. 92.

¹²⁶ *Ibid.* at para. 93.

¹²⁷ *Ibid.* at para. 94.

¹²⁸ *Ibid.*

reference to onboard emergency equipment.¹²⁹ In MRC's opinion, the RFP did not require all these details and they are therefore undisclosed criteria.¹³⁰ Once again MRC argues that deficiencies identified in the re-evaluation that were not raised in the original evaluation show that the evaluators relied on undisclosed criteria.¹³¹

[56] PWGSC submits that no undisclosed criteria were applied,¹³² and Annex "M" of the Technical Evaluation Plan (RFP Annex "M") made bidders aware that they had to provide substantial information to describe, with sufficient detail, how mandatory requirements were met or addressed.¹³³ PWGSC submits that MRC's descriptions of step-by-step methodologies were lacking and insufficient in explaining the flood monitoring and response plan, the oil pollution response plan and the spill emergency response plan. PWGSC submits that a general descriptive response regarding the proposed tow route was incomplete.¹³⁴ PWGSC also submits that MRC did not refer to chart datum to provide evidence that the chosen route had the required keel clearance.¹³⁵ PWGSC provided several other examples of what it viewed as responses providing minimal details for criteria M.2.6(2)(c), M.2.6(2)(d), M.2.6(2)(k) and M.2.6(2)(m).¹³⁶

[57] PWGSC argues that if the Tribunal finds that the evaluation was based on criteria that were not explicitly disclosed, then the Tribunal should find that the criteria could reasonably have been inferred from the RFP, and the Tribunal should not interfere with the evaluation.¹³⁷

[58] The Tribunal agrees with MRC that criterion M.2.6(2) does not expressly state what information bidders must provide in the draft tow plan. For example, criterion M.2.6(2)(d) does not state that bidders must provide a vessel condition report. Rather, it requires bidders to demonstrate how they will address a vessel condition report. Therefore, the Tribunal finds that the evaluators relied on undisclosed criteria to the extent MRC did not provide the specific information described above.

[59] However, the Tribunal finds that the evaluators' approach was logically consistent with, and could reasonably be anticipated from, the methodology stated in the RFP. As a preliminary comment, the Tribunal notes that MRC's suggestion that bidders only had to explain how they would address each item in criteria M.2.6(2)(a) to (n) without actually addressing each item,¹³⁸ is not sustainable. RFP Annex "M" requires bidders to explain how they would meet criteria by demonstrating their capability and describing their approach in a "thorough, concise and clear manner for carrying out the work."¹³⁹ MRC's interpretation would mean that bidders should have been awarded full points even if they only identified an appropriate subcontractor to "actually address" each item. Such an

¹²⁹ *Ibid.* at para. 95. MRC also points to the evaluators' determination that the oil pollution response plan and spill emergency response plan were insufficient.

¹³⁰ Exhibit PR-2021-034-01 at para. 96.

¹³¹ *Ibid.* at para. 99.

¹³² Exhibit PR-2021-034-15 at para. 10.

¹³³ *Ibid.* at para. 88.

¹³⁴ Exhibit PR-2021-034-15A (protected) at para. 62.

¹³⁵ Exhibit PR-2021-034-15 at para. 56.

¹³⁶ Exhibit PR-2021-034-15A (protected) at 20–21.

¹³⁷ Exhibit PR-2021-034-15 at para. 87.

¹³⁸ Exhibit PR-2021-034-01 at para. 84.

¹³⁹ *Ibid.* at 133.

interpretation is at odds with an RFP designed to elicit detailed information on the bidders' ability to perform highly specialized work.

[60] Criteria M.2.6(a) to (n) set out a detailed list identifying areas of concern for the evaluators in their consideration of bidders' ability to perform a contract with environmental, human health and safety risks. The RFP generally, and Annex "M" in particular, make it clear that bidders were expected to provide fulsome and detailed information to allow the evaluators to assess their approach, capacity and experience. Therefore, the evaluators' approach in wanting to review information, "actually addressing" each item, is logically consistent with the RFP's methodology and could be anticipated by bidders. Regarding the latter, the Tribunal notes that the evaluators' notes reveal that for some items in criteria M.2.6(a) to (n), MRC "actually addressed" the requirement. For example, in one instance, MRC provided the type of documentary information referenced in a requirement.¹⁴⁰ This more fulsome and detailed information for some items identified in criterion M.2.6(2) indicates that bidders were able to anticipate the type of information considered by the evaluators.

[61] MRC also objected to the evaluators considering various risks of harm to assess the significance of alleged deficiencies.¹⁴¹ For example, MRC cited the evaluators' view that the alleged tow route and schedule deficiency was "significant" because of the risk of environmental harm, risk of damage or loss of the vessel.¹⁴²

[62] The Tribunal finds that the evaluators properly considered risk of harm to assess the significance of deficiencies in MRC's bid. As discussed above, the RFP is grounded in ensuring proper protection for the environment,¹⁴³ human health and safety.¹⁴⁴ Its mandatory criteria are designed to meet underlying objectives that may not be specified expressly.¹⁴⁵ In evaluating criterion M.2.6.2, it was reasonable for the evaluators to assess the significance of any deficiencies in that context. PWGSC's references to any risks of harm are properly viewed as an explanation of the evaluators' rationale for their decisions and scoring and not as a stand-alone subjective risk assessment.

Did the evaluators ignore vital information in MRC's bid regarding criterion M.2.6?

[63] MRC submits that the evaluators ignored vital information submitted regarding criterion M.2.6, namely, MRC's description of how it would meet criteria M.2.6(2)(b) and (d).

[64] The Tribunal finds that the evaluators did not ignore vital information regarding criterion M.2.6. A review of the evaluators' notes demonstrates that MRC's descriptions were considered, but found deficient. The evaluators did not ignore MRC's tow plan information. Rather the evaluators took issue with the level of detail in the plan. Similarly, the evaluators did not ignore MRC's information on the vessel condition report. Rather, the evaluators' notes indicate that they considered the relevant information but found it deficient. Other allegedly relevant information did not, in fact, address a vessel condition report.

¹⁴⁰ Exhibit PR-2021-034-01A (protected) at 902.

¹⁴¹ Exhibit PR-2021-034-01 at para. 85.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at 70.

¹⁴⁴ *Ibid.* at 97.

¹⁴⁵ *Supra* note 103.

Did the evaluators change the scoring scheme for criterion M.2.6.2?

[65] MRC argues that the evaluators changed the scoring scheme by introducing an assessment of various risks of harm (e.g., to the environment), which changed the RFP's method of weighting and evaluating.¹⁴⁶ Specifically, MRC alleges that these changes led to a change in the score it had achieved in the original evaluation to a lower score after the re-evaluation.¹⁴⁷

[66] The Tribunal finds that the evaluators did not change the scoring scheme by considering risks of harm. As discussed above, the RFP is grounded in ensuring proper protection for the environment,¹⁴⁸ human health and safety.¹⁴⁹ Its mandatory criteria are designed to meet underlying objectives that may not be specified expressly.¹⁵⁰ In evaluating and scoring criterion M.2.6.2, it was reasonable for the evaluators to assess the significance of any deficiencies in that context. PWGSC's references to any risks of harm are properly viewed as an explanation of the evaluators' rationale for their decisions and scoring.

Criterion M.2.9: health and safety

[67] Criterion M.2.9 requires bidders to demonstrate their commitment to protecting the safety of workers by providing information on their provincial authorization, occupational health and safety management system at the proposed site, and procedures regarding certain elements such as asbestos, sewage and mold.

[68] MRC submits that the evaluators did not identify a specific deficiency or shortcoming in its response to criterion M.2.9.¹⁵¹ In MRC's view, either it should have been awarded a certain number of points or the evaluators failed to clearly document insufficient information.¹⁵² MRC submits that PWGSC is providing an *ex post facto* justification for the scoring by referring to alleged weaknesses in the bid that were not identified by the evaluators.¹⁵³ MRC submits that an individual evaluator's notes, to the extent they may raise potential issues, do not represent the consensus view unless they form part of the final consensus notes.¹⁵⁴ According to MRC, the fact that alleged weaknesses raised in the evaluator notes were not identified in the consensus notes should be interpreted to mean that no weaknesses were identified.¹⁵⁵ MRC submits that the final consensus results do not explain why MRC lost any points, contrary to Article 516(1) of the CFTA.¹⁵⁶

[69] PWGSC submits that MRC did not receive its desired score because its bid did not provide certain information.¹⁵⁷ The GIR provides a detailed explanation of why MRC's bid was not viewed as providing such information.¹⁵⁸ The explanation replicates the lead evaluator's affidavit on this

¹⁴⁶ Exhibit PR-2021-034-01 at paras. 80, 85.

¹⁴⁷ Exhibit PR-2021-034-01A (protected) at para. 80.

¹⁴⁸ Exhibit PR-2021-034-01 at 70.

¹⁴⁹ *Ibid.* at 97.

¹⁵⁰ *Supra* note 103.

¹⁵¹ Exhibit PR-2021-034-01 at para. 104.

¹⁵² *Ibid.* at para. 105.

¹⁵³ Exhibit PR-2021-034-18 at para. 47.

¹⁵⁴ *Ibid.* at para. 48.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at para. 105.

¹⁵⁷ Exhibit PR-2021-034-15A (protected) at para. 48.

¹⁵⁸ *Ibid.*

point; his affidavit also notes that MRC's bid did not rise to the level of "excellent" (with indirect reference to the scoring guide).¹⁵⁹

[70] The Tribunal finds that MRC received an explanation of why it was not awarded the points it sought. MRC is correct that the final re-evaluation consensus does not include the explanation provided by the lead evaluator in his affidavit.¹⁶⁰ However, the re-evaluation consensus summary, which arguably underpins the final re-evaluation consensus, includes evaluator notes supporting the lead evaluator's explanation.¹⁶¹

[71] The Tribunal has previously taken a broad view of the information that may form part of a procuring entity's explanation to a losing bidder. For example, in *Almon*, the evaluators had not described, in their contemporaneous evaluation record, all factors considered in scoring the bid.¹⁶² The Tribunal's view was that such a deficiency in the evaluation process could not be "cured" by additional information provided after the fact (e.g., in the GIR).¹⁶³ However, the Tribunal went on to find that information subsequently provided to the complainant in the debrief was not new information but an elaboration on the evaluators' contemporaneous evaluation records.¹⁶⁴ Ultimately, the Tribunal found that a reading of the evaluators' comments on the consensus scoring sheet, together with information provided later, provided a consistent and adequate explanation of the point deductions.¹⁶⁵ The Tribunal has also previously held that individual evaluations logically underlie the consensus evaluation, and the reasons for the scoring noted in a consensus evaluation can be reflected in (and discerned from) individual evaluations.¹⁶⁶

Criterion M.2.10: preliminary environmental protection plan

[72] MRC submits that in evaluating criterion M.2.10, the evaluators introduced and relied on undisclosed criteria and ignored vital information contained in MRC's bid. MRC also claims that the evaluators' scoring of criterion M.2.4 is patently unreasonable. Each claim is addressed in turn below.

Did the evaluators rely on undisclosed criteria in evaluating criterion M.2.10?

[73] MRC submits that the evaluators did not assess whether its Preliminary Environment Protection Plan (EPP) demonstrated MRC's commitment to avoid adverse environmental impacts through implementation of best practices rooted in pollution prevention and the promotion of sound environment practices.¹⁶⁷ MRC argues that it provided a preliminary plan showing its commitment, yet the evaluators introduced new criteria in the form of excessive details not required by the RFP.¹⁶⁸

¹⁵⁹ Exhibit PR-2021-034-15 at para. 49.

¹⁶⁰ Exhibit PR-2021-034-01A (protected) at 904.

¹⁶¹ Interestingly, the lead evaluator's own notes do not appear to support the explanation provided in his affidavit.

¹⁶² *Almon Equipment Limited v. Department of Public Works and Government Services* (1 March 2011), PR-2008-048R (CITT) [*Almon*] at para. 33.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* at paras. 34–36.

¹⁶⁵ *Ibid.* at para. 37.

¹⁶⁶ *Nations Translation Group Inc. v. Department of Public Works and Government Services* (23 June 2020), PR-2020-07-06 (CITT) at paras. 33–35; citing *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) at para. 62.

¹⁶⁷ Exhibit PR-2021-034-01 at para. 112.

¹⁶⁸ *Ibid.*; Exhibit PR-2021-034-18 at para. 50(b).

MRC makes a specific argument that requiring a procedure for flood response while the vessel was under tow was not required in the RFP.¹⁶⁹ MRC further argues that these criteria were not applied during the original evaluation and as such could not have been reasonably anticipated by the bidders.¹⁷⁰

[74] The GIR lists some, but not all, weaknesses identified by the evaluators.¹⁷¹ The list is limited to weaknesses regarding two requirements in criterion M.2.10.¹⁷² PWGSC submits that MRC's responses did not include detailed information or was otherwise incomplete.¹⁷³ PWGSC notes that section 7.16 of the RFP states that the winning bidder must have detailed procedures and processes for identifying, removing, tracking, storing, transporting and disposing of all potential pollutants and hazardous material, as well as plans and procedures for oil spill and other environmental emergency responses.¹⁷⁴

[75] Criterion M.2.10 requires bidders to submit a preliminary EPP. It states as follows:¹⁷⁵

The Bidder must submit a preliminary Environmental Protection Plan (EPP) 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 preliminary Environmental Protection Plan (EPP) should include the following elements:

...

- 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, but not limited to; tanks, piping, boilers, engines, shafting, gearing, stern tubes, steering gear, hydraulics, bilge, sonar, areas, black and grey water, hazardous materials, asbestos, polychlorinated biphenyls (PCBs), paint, and other hazardous materials. To also include the engineering controls and personal protective equipment to be used to minimize worker exposure to hazardous materials; and
- h. Vessel flood monitoring and response plan.

¹⁶⁹ Exhibit PR-2021-034-18 at para. 50(d).

¹⁷⁰ *Ibid.* at para. 51.

¹⁷¹ See, for example, the re-evaluation consensus summary which includes evaluator notes for criteria M.2.10(a) to (h). Exhibit PR-2021-034-1A (protected) at 800–802.

¹⁷² Exhibit PR-2021-034-15A (protected) at para. 76.

¹⁷³ *Ibid.*

¹⁷⁴ Exhibit PR-2021-034-15 at para. 77. For ease of reference, section 7.16 of the RFP is at Exhibit PR-2021-034-01 at 90.

¹⁷⁵ Exhibit PR-2021-034-01 at 140.

...

[76] The Tribunal finds that the evaluators did not introduce undisclosed criteria in the form of excessive details not required by the RFP. While MRC is correct that the RFP does not spell out every detail recorded in the evaluators' notes and final consensus, and addressed in the GIR, the RFP did not have to identify all aspects of each criterion, as long as the unidentified aspects are reasonably related to the criterion.¹⁷⁶ Criteria M.2.10(a) to (h) provide a detailed description of what was required for bidders to demonstrate their commitment to avoiding having an adverse impact on the environment. For example, criterion M.2.10(f) states that the preliminary EPP *shall* indicate certain contaminate-related control processes and available tools and materials, and it is clear that the EPP should include information such as a flood response plan (criterion M.2.10(h)).¹⁷⁷ Read in the context of RFP section 7.16 that requires a winning bidder to have detailed procedures and processes for environmental emergency responses,¹⁷⁸ the details considered by the evaluators were reasonably related to the items in criterion M.2.10.

[77] MRC also submits that the evaluators introduced an undisclosed "harm test" in evaluating criterion M.2.10(h). According to MRC, the application of this "test" is evident in the evaluators' statement that "[T]he missing or inadequate response is significant due to the risk of harm to the environment and the risk of damage or loss of the vessel".¹⁷⁹

[78] The Tribunal finds that the evaluators did not introduce undisclosed criteria in the form of a "harm test". The entire RFP is grounded in ensuring proper protection for the environment, human health and safety. In evaluating criterion M.2.10, the evaluators were evaluating responses to criteria linked to future work that if improperly completed, could harm the environment or humans. Therefore, it was reasonable for the evaluators to assess the sufficiency of information and the significance of missing information in that context. PWGSC's references to various risks are properly viewed as an explanation of the evaluators' rationale for their decisions and scoring, and not as the imposition of undisclosed criteria.

Did the evaluators ignore vital information in MRC's bid regarding criterion M.2.10?

[79] MRC submits that the evaluators ignored vital information relevant to cleaning the vessel at criteria M.2.10(e) and (g), and to flood response at criterion M.2.10(h).

[80] Regarding vessel cleaning, MRC submits that the evaluators ignored information describing how certain services would be performed, confirmation that employees and subcontractors had to follow MRC's spill cleanup procedures, confirmation that certain preliminary cleaning activities would be completed, and confirmation of environmental contingency plans.

[81] Regarding a flood response plan, MRC submits that the evaluators ignored its confirmation that MRC complies with all Transport Canada requirements. MRC argues that the Transport Canada Checklist for Dead-Ship Towing Operation (TC Checklist), which requires "[p]reparedness for pumping water ingress at sea", is the flood response required for a vessel under tow. MRC states that

¹⁷⁶ *Siemens Westinghouse* at para. 43.

¹⁷⁷ Exhibit PR-2021-034-01 at 140.

¹⁷⁸ Section 7.16 advises bidders that the winning bidder must have detailed procedures and processes for identifying, removing, tracking, storing, transporting and disposing of all potential pollutants and hazardous material, as well as plans and procedures for oil spill and other environmental emergency responses.

¹⁷⁹ Exhibit PR-2021-034-01 at paras. 109(c), 111.

by confirming compliance with the TC Checklist (and a related safety bulletin), MRC confirmed its commitment to a flood response. MRC also submits that it met criterion M.2.10(h) because it submitted MRC's flood monitoring plan and *Towing Manual* with its bid.

[82] The Tribunal finds that the evaluators did not ignore vital information regarding criterion M.2.10. Regarding criteria M.2.10(e) and (g), MRC's bid response mentions its Environmental Management System (EMS),¹⁸⁰ but does not identify any specific pages or paragraphs within its bid for the evaluators to consider, as required by section 3.2 of the RFP.¹⁸¹ This means that MRC did not properly put what it considers to be vital information before the evaluators. Despite the absence of the requisite cross-reference, the evaluators' notes indicate that they did look over the EMS, but did not find Ricker-specific information on vessel cleaning.¹⁸² The Tribunal's review of MRC's EMS revealed that it does not describe how the Ricker would be cleaned. Only MRC's previous cleaning activities for a different vessel were described, and MRC did not establish the relevance of the other vessel's cleaning to the Ricker. It was not for the evaluators to assume that the Ricker's cleaning would be identical or even similar to the other vessel's cleaning procedures. The onus was on MRC to explain the relevance of the information in the EMS to the Ricker.¹⁸³ MRC's response to criterion M.2.10 also referenced another source of cleaning services,¹⁸⁴ but the description of services was general and lacking in specific processes or procedures.

[83] Concerning the evaluators' findings regarding criterion M.2.10(h), the evaluators do not mention the TC Checklist and related documents. However, the MRC's bid response regarding criterion M.2.10 does not reference the *Towing Manual*. Even if there were such a reference, the manual does not include a flood response plan, and the contingency plans therein do not specifically address flooding. MRC's response to criterion M.2.9 addresses flood response, but only with respect to worker safety, and in any event, criterion M.2.10 does not cross-reference to criterion M.2.9. Moreover, MRC's bid response to criterion M.2.10 does not expressly reference the TC Checklist, the Safety Bulletin or the International Maritime Organization's guidelines for safe ocean towing. Further, with the exception of mentioning "preparedness" for pumping water ingress at sea, those three documents do not appear to expressly address flooding or a flood response plan. It is noteworthy that MRC claims that the RFP did not require a procedure for flood response under tow, yet the only flood-related aspect of the TC and associated documents concerns pumping water out of a vessel at sea. Overall, it appears that MRC's claim is not supported by its response to criterion M.2.10.

¹⁸⁰ Exhibit PR-2021-034-01A (protected) at 709.

¹⁸¹ Exhibit PR-2021-034-01 at 75.

¹⁸² Exhibit PR-2021-034-01A (protected) at 905.

¹⁸³ As noted previously, the *Technical Re-Evaluation Scoring Guide Plan* requires a bidder to demonstrate that each mandatory criterion is met by providing sufficient information to describe completely and in detail how the requirement is met or addressed. The onus is on a bidder to demonstrate how its bid fulfills solicitation requirements (*ACT* at para. 59).

¹⁸⁴ Exhibit PR-2021-034-01A (protected) at 581.

Was the evaluators' scoring of criterion M.2.10 reasonable?

[84] The Tribunal has found that in evaluating criterion M.2.10, the evaluators did not rely on undisclosed criteria, nor did they ignore vital information. The evaluators' notes indicate that there were some weaknesses in MRC's response to criterion M.2.10, but none of major significance. Nothing before the Tribunal establishes that the evaluators did not apply themselves in evaluating criterion M.2.10, interpreted the scope of criterion M.2.10 incorrectly, or otherwise conducted the evaluation of criterion M.2.10 in a procedurally unfair way. The evaluators' expertise is not in question, nor has MRC established that their explanation is not tenable; therefore, the Tribunal has no reason not to defer to their expertise in evaluating criterion M.2.10 and finds that they reasonably decided MRC's overall score for criterion M.2.10.

CONCLUSION

[85] For the reasons above, the Tribunal finds that MRC's complaint regarding PWGSC's evaluation of mandatory technical criteria M.2.4, M.2.6, M.2.9 and M.2.10 is not valid. The evaluation and award were reasonable, and PWGSC conducted the evaluation in accordance with the solicitation documents, as required by applicable trade agreements.

COSTS

[86] Pursuant to section 30.16 of the CITT Act, the Tribunal awards PWGSC its reasonable costs, incurred in responding to the complaint, which are to be paid by MRC.

[87] In accordance with the *Procurement Costs Guideline* (Guideline), the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1. Although the solicitation requirements were complex and there were numerous allegations concerning multiple rated mandatory technical criteria, the matters at issue were straightforward. An oral hearing was not required. Extending the proceedings to the 135-day time frame did not add complexity. Therefore, the Tribunal's preliminary indication of the amount of the cost award is \$1,150.

[88] Pursuant to article 4.2 of the Guideline, parties that believe that the preliminary indication is not appropriate may make submissions on the complexity of the case, the amount of the flat rate or the reason why the Guideline should not be followed. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

DETERMINATION

[89] Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

Cheryl Beckett

Cheryl Beckett
Presiding Member

APPENDIX I**TRIBUNAL DIRECTION TO PWGSC FOR RE-EVALUATION OF CERTAIN CRITERIA**

In *MRC and CME*, the Tribunal recommended re-evaluation of the bids in respect of several rated mandatory technical criteria in the RFP for Solicitation No. F7044-200238/A, namely, criteria M.2.4, M.2.6, M.2.9 and M.2.10. The relevant excerpts are set out below.

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.

[Footnote omitted]

[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 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.

[Footnote omitted]

[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 (as they are further described in M.2.4.4), bidders were required to satisfy this criterion at the time of bid submission [footnote omitted]. 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 [footnote omitted].

[78] That said, having reviewed the evidence on the record, 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 [footnote omitted]. 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.

- 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 [footnote omitted]. 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 [footnote omitted].

[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.” 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 [footnote omitted]. 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 [footnote omitted].

[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 not a component of its flood monitoring plan [footnote omitted]. 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” [footnote omitted]. 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 the 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 [footnote omitted]. 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 [footnote omitted].

[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 . . ." [footnote omitted]. CME submitted that its response satisfied M.2.6 and its route plan was sufficiently detailed. 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;
 - e. Mold abatement;
 - f. Sewage;
 - g. Oily water and waste oil; and
 - h. Confined space entry.

[Footnote omitted]

[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 [footnote omitted]. 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 the 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 [footnote omitted]. 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 [footnote omitted]. 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:

[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.

[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.

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.

[Footnote omitted]

[98] MRC takes issue with the evaluators' comments that its response for Section F was "not covered well and that the response is weak" [footnote omitted]. 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" [footnote omitted]. MRC argued that details with respect to disposal sites were fully set out in "Tab 8 in M.2.5 Subcontractor List." 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" [footnote omitted].

[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 [footnote omitted]. 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.

[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. 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.

[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.

...

[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.

...

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.

[Footnote omitted]

[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" [footnote omitted]. 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 [footnote omitted].

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

[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 [footnote omitted].

[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 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 [footnote omitted]. 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 [footnote omitted]. 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 [footnote omitted]. 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” [footnote omitted]. 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.

APPENDIX II

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 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 516: Transparency of Procurement Information*Information Provided to Suppliers*

1. A procuring entity shall promptly inform participating suppliers of its contract award decisions, and, on the request of a supplier, shall do so in writing. Subject to Article 517, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender.