



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File PR-2022-019

Contract Community Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, November 2, 2022*

*Reasons issued
Thursday, November 24, 2022*

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DECISION 15

IN THE MATTER OF a complaint filed by Contract Community Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

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

CONTRACT COMMUNITY INC.

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 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, to be paid by Contract Community Inc. In accordance with the *Procurement costs guidelines* (Guidelines), the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The Tribunal's 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 Guidelines. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Georges Bujold

Georges Bujold
Presiding Member

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

Tribunal Panel:	Georges Bujold, Presiding Member
Tribunal Secretariat Staff:	Zackery Shaver, Counsel Kim Gagnon-Lalonde, Registrar Officer Rekha Sobhee, Registrar Officer
Complainant:	Contract Community Inc.
Government Institution:	Department of Public Works and Government Services
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Intervener:	Tiree Facility Inc. Colliers Project Leaders Inc.
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STATEMENT OF REASONS

SUMMARY OF THE COMPLAINT

[1] Contract Community Inc. (CCI) filed this complaint with the Canadian International Trade Tribunal, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (CITT Act) concerning a request for proposal (RFP) (solicitation EN439-211126/A) issued by the Department of Public Works and Government Services (PWGSC) for the provision of real property project management support services.

[2] The RFP describes the required services as a range of day-to-day duties to assist PWGSC in the management of real property projects in the National Capital Region. These services are divided into four separate workstreams, each to be awarded its own separate resulting contract. Bidders were therefore invited to submit proposals in respect of all or a subset of workstreams, depending on the resources that they could offer. The workstreams are labelled as follows: real property project management services, project finance and performance management, business consulting/change management, and specialized consulting.

[3] This is the second complaint filed by CCI concerning this procurement process. To address the concerns raised by CCI in its initial complaint,² PWGSC decided to proceed with a re-evaluation of the bids in respect of certain mandatory and rated criteria. In the present complaint, CCI alleges that PWGSC erred in finding that its bid failed to demonstrate compliance with Mandatory Technical Criterion 1 (MT1) of the RFP and in disqualifying it on that basis following the re-evaluation. CCI asserts that this re-evaluation was subjective and led to a result that is incongruously at odds with PWGSC's prior assessment. In this regard, CCI submits that, in the first evaluation of its bid, completed by four separate evaluation panels, none of the panels identified it as failing to meet MT1. As such, CCI alleges that the re-evaluation should similarly have resulted in its bid being found responsive.

[4] Additionally, CCI alleges that in re-evaluating its bid, the independent evaluator retained by PWGSC unfairly based the finding of non-compliance on a review of irrelevant information, such as the curriculum vitae (CV) of the proposed resources. According to CCI, by considering elements that were not included in the pertinent sections of its bid containing information pertaining to MT1, PWGSC impermissibly broadened the scope of the re-evaluation that was previously mutually agreed upon. CCI also claims that the independent evaluator's comments are replete with inconsistencies, which cast doubt on the evaluator's understanding of the terms of the RFP and qualifications to assess the compliance of its bid with MT1.

[5] The Tribunal accepted the complaint for inquiry in accordance with subsection 30.13(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations).³

¹ R.S.C., 1985, c. 47 (4th Supp.).

² As discussed below, CCI's initial complaint challenged the evaluation of its bid against certain criteria, including that different evaluation teams reviewing the same information and applying the same rated requirements scored its bid inconsistently and subjectively.

³ SOR/93-602.

[6] Following its inquiry into the complaint, and for the reasons that follow, the Tribunal finds that CCI's complaint is not valid.

PROCUREMENT PROCESS AND PROCEDURAL HISTORY

[7] The RFP was published on December 15, 2020. PWGSC subsequently issued 12 amendments to the RFP, including one to extend the bid closing date to February 5, 2021.

[8] On February 5, 2021, CCI submitted its bid on all four workstreams.⁴ Pursuant to the RFP, each of the four workstreams had its own specific mandatory and rated criteria, but there were evaluation criteria which were common to all four workstreams, namely MT1, Rated Technical Criteria 1 (RTC1), Rated Technical Criteria 2 (RTC2) and the Indigenous Participation Plan (IPP). Moreover, the RFP indicated that a separate technical evaluation would be conducted for each workstream.⁵

[9] The evaluation procedures set out in the RFP also prescribed what is known as a “phased bid compliance process” (PBCP). As such, the evaluation was structured in separate phases including an initial review of the mandatory technical criteria to determine, on a preliminary basis, whether a bidder met those criteria and, if not, whether the compliance assessment report (CAR) process would be used to allow a bidder to provide additional information (after bid closing) to demonstrate compliance with any mandatory criterion. Assuming that a bidder was deemed to meet all mandatory criteria (whether or not by way of the CAR process), after this preliminary phase, the bidder's proposal would then move to the next phase of the evaluation, at which point the scoring of the rated requirements and the final evaluation as to whether the bid was responsive to the solicitation would take place.⁶ In this regard, the RFP made it clear that a determination, during the initial phase of the evaluation, that a bid complied with the mandatory criteria did not preclude a finding, at the final stage of the evaluation (Phase III), that this bid was non-responsive because it failed to meet all mandatory criteria.

[10] During the initial phase of the evaluation of technical bids, the evaluators determined that CCI's bid was non-compliant with certain mandatory criteria. Between March 11 and April 8, 2021, a total of nine CARs was sent to CCI, pursuant to section 4.1.1.3 of the RFP, to give it an opportunity to provide additional or different information to demonstrate compliance with those mandatory criteria, including MT1. CCI responded to each of the CARs and provided further information and clarification in response to the evaluation teams' inquiries. Following a review of CCI's responses to the CARs, the evaluators deemed its bid compliant with MT1 for all four workstreams.

⁴ PWGSC received 12 bids in total, including 3 bids in respect of Workstream 1, 4 bids in respect of Workstream 2, 3 bids in respect of Workstream 3 and 2 bids in respect of Workstream 4. The only bidders to bid on all four workstreams were CCI and the bidder who was ultimately awarded contracts for the 4 workstreams.

⁵ In fact, the initial evaluation was performed by four separate teams—one for each workstream—with each team evaluating the proposals received in respect of those criteria for each workstream.

⁶ In accordance with the PBCP, any bid determined not to meet all the mandatory technical criteria following the review of the additional information provided through the CAR process would be declared non-responsive and, therefore, not receive further consideration. In other words, only the bids that were preliminarily found responsive to the requirements reviewed during the early phase of the evaluation process, which did not include a review of either the rated technical criteria or the IPP, would receive a final evaluation and would remain eligible for contract award.

[11] However, at the final stage of the evaluation, CCI's bid did not obtain the highest relative total score in terms of the combined technical and financial merit and the IPP for any of the four workstreams.⁷ Accordingly, on June 21, 2021, in regret letters addressed to CCI for each of the four workstreams, PWGSC informed it that it was not the winning bidder and that contracts had been awarded to Colliers Project Leaders Inc. (Colliers) and Tiree Facility Solutions Inc. (Tiree), in a joint venture, for the four workstreams.

[12] On the same day, CCI requested a debriefing. On July 12, 2021, CCI attended a debriefing session with PWGSC's representatives during which it expressed its concerns with the outcome of the solicitation. These included a grievance that the common evaluation criteria had been evaluated inconsistently by the different evaluation teams for the four workstreams.

[13] On July 22, 2021, in an email sent to PWGSC, CCI formally objected to the results of the evaluation. It notably alleged that there was subjectivity in the evaluation process because the scoring of its bid for certain rated requirements was not uniform across all four workstreams despite the fact that the materials reviewed were identical.

[14] On July 22, 2021, before receiving a response to its objection, CCI also filed its initial complaint with the Tribunal. CCI alleged that PWGSC scored its bid inconsistently. It also complained of subjectivity in the evaluation process and of a failure to evaluate its proposal in accordance with the terms of the RFP in respect of Workstream 4. Finally, CCI implied that PWGSC was improperly trying to eliminate its bid.

[15] On July 28, 2021, the Tribunal made its decision, declining to inquire into CCI's initial complaint.

[16] On August 3, 2021, the Tribunal issued its decision and reasons on the complaint, finding that it was premature in the absence of a denial of relief from PWGSC in response to CCI's objection.⁸ The Tribunal indicated that its decision did not preclude CCI from filing a new complaint within 10 working days of receiving a denial of relief from PWGSC. The Tribunal also noted that, if PWGSC failed to respond to CCI's concerns within 20 days of August 3, 2021, CCI could consider this lack of response as a denial of relief.

[17] On August 23, 2021, PWGSC wrote to CCI to advise that, after a review of the file, it had decided to re-evaluate the common solicitation requirements across the four workstreams. PWGSC's email explicitly requested CCI to confirm its agreement to PWGSC's taking these steps to address the concerns raised in its objection. PWGSC also expressed its position that it is only after CCI obtains the results of the re-evaluation that it would know whether it has a basis for bringing a complaint to the Tribunal. In this respect, PWGSC acknowledged that a complaint made by CCI at that time would not be late if it were filed within 10 working days of the communication of the re-evaluation results to CCI.

[18] On August 24, 2021, CCI replied to PWGSC, confirming that it agreed with the terms of the proposed re-evaluation and noting that it would await the results. On September 8, 2021, CCI wrote to PWGSC, asking it to confirm specifically which requirements of the RFP were being re-evaluated.

⁷ Pursuant to section 4.4 of the RFP, the responsive bid with the highest combined rating of technical merit, price and IPP would be recommended for contract award for each workstream.

⁸ *Contract Community Inc.* (3 August 2021), PR-2021-027 (CITT).

PWGSC responded, on September 9, 2021, that it would be re-evaluating the common solicitation requirements, defined as MT1, rated requirements RTC1 and RTC2, and the IPP in every bid across all four workstreams.

[19] Subsequently, PWGSC retained the services of an evaluator from an outside consulting firm to perform the re-evaluation of the bids (the independent evaluator). According to PWGSC, it had a separate re-evaluation of the technical bids for each workstream performed by a single independent evaluator to address CCI's concerns about the inconsistency between the evaluation of the common solicitation requirements by different teams of evaluators during the initial evaluation. The re-evaluation took place between October 2021 and April 2022.

[20] Unlike the evaluation teams that initially reviewed CCI's bid, the independent evaluator concluded that it did not meet the requirements of MT1 for any of the four workstreams. On April 22, 2022, PWGSC issued a second regret letter to CCI informing it of the results of the re-evaluation and indicating that, as its bid was found to be non-compliant with MT1, it would not receive further consideration and was disqualified for each of the workstreams. However, given the concerns raised by CCI in its objection with respect to the scoring of the common rated requirements during the initial evaluation, PWGSC explained that the independent evaluator re-evaluated its technical bid as if it had met MT1.

[21] Thus, even if this was no longer required in view of the determination that CCI's bid was non-responsive, the independent evaluator nonetheless assessed CCI's bid against the common rated requirements to provide consistent scores for the four workstreams. PWGSC stated that this was done to ensure transparency regarding the scoring of the common rated technical criteria. Moreover, to assist CCI in responding to future solicitations, PWGSC provided it with its scores, as determined by the independent evaluator, in respect of RTC1, RTC2 and the IPP.

[22] On April 27, 2022, CCI requested PWGSC to confirm the scope of the re-evaluation process and to clarify whether it reviewed CCI's responses to the CARs. On April 29, 2022, PWGSC replied to CCI's email indicating that, to address its concerns, an independent evaluator completed the re-evaluation of the common requirements and reiterating that those were MT1, RTC1, RTC2 and the IPP. PWGSC also stated that the independent evaluator reviewed both CCI's original bid and the additional information it provided in response to the CARs. PWGSC added that the independent evaluator determined that CCI's responses to the CARs did not remedy the deficiencies in its bid in relation to MT1.

[23] On April 29, 2022, CCI wrote to PWGSC to make further inquiries regarding the re-evaluation and the comments of the independent evaluator set out in the regret letter dated April 22, 2022, and its attachments. CCI indicated that it was providing its response to the evaluator's comments and requested clarification on certain shortcomings of its bid that were identified. For example, it requested PWGSC to provide substantiation on the specific elements of the bid that were found deficient. CCI also stated that the purpose of its questions was to understand what PWGSC was looking for and be better prepared to provide a stronger response to future opportunities.

[24] On May 6, 2022, PWGSC acknowledged receipt of CCI's email, with a follow-up email dated May 17, 2022, stating that a response to CCI's questions from the independent evaluator would be forthcoming.

[25] CCI wrote to PWGSC regarding its inquiry again on May 31, 2022, requesting that PWGSC provide it with a response by June 7, 2022.

[26] PWGSC provided the response from the independent evaluator to the questions and issues raised by CCI's inquiry on June 13, 2022, including additional details on the type of information that was found missing from its bid to demonstrate compliance with MT1.

[27] CCI filed the present complaint with the Tribunal on June 20, 2022.

[28] The Tribunal accepted CCI's complaint for inquiry on June 27, 2022.

[29] On July 19, 2022, Colliers and Tiree requested leave to intervene in the complaint. Following correspondence with CCI and PWGSC confirming that they had no objections to Colliers/Tiree's intervention, the Tribunal granted intervener status to Colliers/Tiree.

[30] PWGSC filed its government institution report (GIR) on August 10, 2022.

[31] On August 24, 2022, Colliers and Tiree confirmed that they would not be making any submissions with respect to the procurement complaint.

[32] CCI filed its comments on the GIR on August 30, 2022.

POSITIONS OF THE PARTIES

[33] CCI submits that the re-evaluation conducted by PWGSC was unfair and inconsistent with the terms of the RFP. In support of its position, CCI cites the fact that the results of this process contradict the determination, at the conclusion of the initial evaluation, that its bid met MT1. In this regard, it notes that the deficiencies identified by the independent evaluator were never brought up during the CAR process. CCI also relies on its contention that the independent evaluator wrongly reviewed elements of its bid that were unrelated to the common solicitation requirements. According to CCI, this went beyond the parties' agreement on the scope of the re-evaluation and, in any event, PWGSC erred in grounding the finding of non-compliance on such irrelevant information.

[34] Other arguments made by CCI include claims that the independent evaluator incorrectly relied on superseded information in her assessment by failing to properly review the documents provided in response to the CARs, incorrectly calculated the duration of the experience of CCI's resources in respect of the projects it had put forward in response to MT1, and incorrectly concluded that the work described by CCI to demonstrate its relevant experience did not constitute "projects" within the meaning of this term in MT1 and the RFP. In its comments on the GIR, CCI also called into question the independent evaluator's understanding of the different workstreams and industry knowledge and suggested, contrary to the original evaluation teams, that this evaluator lacked the credentials to determine its bid's compliance with MT1.

[35] PWGSC submits that CCI's complaint with respect to the re-evaluation of its bid was not filed within the time limits prescribed by the Regulations. It argues that CCI had all the information necessary to make an objection to PWGSC or file a complaint with the Tribunal about the outcome of the re-evaluation by April 22, 2022. Instead of doing so within 10 working days of that date as required by section 6 of the Regulations, PWGSC submits that CCI chose to make inquiries for the purpose of improving its performance in future solicitations, not for informing a potential objection

or complaint.⁹ In any case, PWGSC submits that the re-evaluation of CCI's bid was reasonable and should not be disturbed. It argues that the re-evaluation was conducted fairly and in accordance with the criteria set out in the RFP. Accordingly, PWGSC maintains that PWGSC did not breach any obligation under the applicable trade agreements.

ANALYSIS

[36] Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

[37] Section 11 of the Regulations specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which, in this instance, includes the Canadian Free Trade Agreement (CFTA).¹⁰

[38] The subject matter of the complaint that the Tribunal accepted for inquiry is limited to the allegations of errors during the re-evaluation process conducted by PWGSC. As such, the Tribunal agrees with PWGSC that CCI's grievances concerning the initial evaluation are no longer relevant.

[39] Indeed, as discussed above, after PWGSC considered the grounds of complaint raised in CCI's original objection, it decided to address those grievances by conducting a re-evaluation of all bids on the common solicitation requirements and advised CCI accordingly. CCI expressly consented to this course of action and agreed that whether a basis for a complaint remained would depend on the results of the re-evaluation. Consequently, the allegations of misconduct in the initial evaluation and the allegations of improprieties in the conclusions then reached are moot, since, with respect to these previous grounds of complaint, relief has already been provided to CCI in the form of the re-evaluation. At the most, PWGSC's original evaluation and CCI's previous complaint in this regard provide useful context to understand the issues raised in the present complaint.

[40] As the initial determinations of PWGSC with respect to CCI's bid have been replaced by a new conclusion on CCI's non-compliance with MT1, the Tribunal will limit its considerations to the allegations disputing the merits of this outcome. The Tribunal further notes that, while PWGSC suggested in its GIR that CCI's complaint may also include claims of errors in the re-evaluation of its bids against other criteria, CCI stated in its comments on the GIR that it "... can agree on the scores for the Common Elements in the Rated Requirements portion."¹¹ Therefore, there is no doubt that the subject matter of this complaint is, in summary, the contention that, given the information included in CCI's bid and provided in response to the CARs, the independent evaluator incorrectly concluded that this bid was non-compliant with MT1.

[41] In essence, the issue before the Tribunal is whether PWGSC failed to properly evaluate CCI's proposal against this mandatory criterion and, in so doing, breached the relevant provisions of the applicable trade agreements. For the reasons that follow, the Tribunal has determined that

⁹ To the extent that CCI's complaint incorporates by reference allegations made in its initial complaint, PWGSC submits that any allegations of errors during the initial evaluation are also untimely and, in addition, now clearly irrelevant, since they have been rendered moot by the subsequent re-evaluation.

¹⁰ Online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017).

¹¹ Exhibit PR-2022-019-29 at 6.

PWGSC did not commit any reviewable error in disqualifying CCI's bid on the grounds that it did not meet the requirements of MT1. As this finding is dispositive of the matter, the Tribunal deemed it unnecessary to address PWGSC's arguments regarding the issue of the timeliness of the complaint.¹²

The re-evaluation of CCI's bid was reasonable and in accordance with the RFP

[42] The relevant provisions of the applicable trade agreements governing the evaluation of bids by a procuring entity can be summarized as follows.

[43] The CFTA provides that a procuring entity shall "... base its evaluation on the conditions that the procuring entity has specified in advance in its tender notice or tender documentation"¹³ and that, "[t]o be considered for an award, a tender shall ... at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation ..."¹⁴

[44] Moreover, Article 515(5) of the CFTA provides the following:

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.

[45] The other applicable trade agreements contain similar provisions.¹⁵

[46] The Tribunal's mandate in this type of inquiry is to decide if the evaluation is supported by a reasonable explanation, not to step into the shoes of the evaluators and reassess the unsuccessful proposal. Thus, the Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals.¹⁶ The Tribunal has indicated as follows:

... it will interfere only with an evaluation that is *unreasonable* and will substitute its judgment for that of the evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way. In

¹² For greater certainty, as the complaint must fail *even assuming* that it was filed within the time limits prescribed by section 6 of the Regulations, the Tribunal proceeded based on this assumption. For reasons of judicial economy, the Tribunal decided not to rule on the issue of the timeliness of the complaint, which would have required it to determine when, as a matter of fact, the basis of the complaint became known to CCI (i.e. on April 22, 2022, as submitted by PWGSC, or June 13, 2022, when additional information substantiating the determinations of the independent evaluator was provided, as implied by CCI).

¹³ Article 507(3)(b) of the CFTA.

¹⁴ Article 515(4) of the CFTA.

¹⁵ For example, see articles VIII(3)(b), XV(4) and XV(5) of the Agreement on Government Procurement.

¹⁶ See e.g. *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) [*Saskatchewan Institute*] at para. 58; upheld on judicial review in *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16 (CanLII).

addition, the Tribunal has previously indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling.¹⁷

[Emphasis in original, footnotes omitted]

[47] The Tribunal has also held that the onus lies on the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood by PWGSC and is compliant with the requirements of the solicitation.¹⁸ When evaluating compliance with mandatory evaluation criteria, the test is one of strict compliance. In the words of the Federal Court of Appeal, procuring entities must evaluate a bidder's conformance with mandatory requirements thoroughly and strictly.¹⁹

[48] The Tribunal finds that PWGSC was entitled to review the compliance of CCI's bid with MT1 as part of the re-evaluation process and that the independent evaluator's determinations in this regard are defensible in light of the published criteria.

The re-evaluation process was consistent with PWGSC's statements, entitlement and the agreement between the parties

[49] CCI claims that there was no justification for PWGSC to alter the conclusion reached by the initial evaluators that its bid complied with MT1 and suggests that focusing the re-evaluation on this mandatory criterion was improper. It posits that PWGSC should instead have concentrated the re-evaluation on the scoring of the bids against the common rated requirements, which was the main reason why it objected to the initial evaluation.

[50] However, the Tribunal finds that both parties agreed that all bids would be re-evaluated to assess their compliance with criterion MT1. PWGSC made it clear that MT1 was included in the scope of the re-evaluation, that is, MT1 formed part of what it meant by "common solicitation requirements" when it informed CCI, on August 23, 2021, that "after a review of the file, PWGSC has decided to re-evaluate the common solicitation requirements across the four Workstreams".²⁰ That MT1 was one such common solicitation requirement was also clearly stipulated in the RFP and, as previously noted, expressly confirmed by PWGSC to CCI on September 9, 2021. CCI did not take exception to the inclusion of MT1 in the re-evaluation process at that time. Now that this re-evaluation is complete, CCI cannot rightly claim that PWGSC should have limited the re-evaluation to a review of the bids against the common point-rated criteria across all four workstreams.

[51] Given that PWGSC expressly informed CCI that the bids would be re-evaluated against MT1 before the re-evaluation took place, on the facts of this case, there was clearly no basis for CCI to assume that the re-evaluation would be constrained to a review of the bids against the criteria

¹⁷ *Saskatchewan Institute* at para. 58.

¹⁸ See e.g. *Tri-Tech Forensics Inc.* (26 March 2018), PR-2017-064 (CITT) at para. 20; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT).

¹⁹ *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA) at para. 18.

²⁰ Exhibit PR-2022-019-27.B (protected) at 444.

relevant to the issues raised in its original complaint. In fact, PWGSC unequivocally indicated that the scope of the re-evaluation would be broader.

[52] In any event, PWGSC was entitled to re-evaluate the bids for compliance with the mandatory criteria that it thought necessitated a second look “after its review of the file”. There was no obligation for it to only address concerns raised by CCI in its initial objection to the results of the evaluation.²¹ What matters is that PWGSC properly undertook to re-evaluate the bids to ensure it corrected potential errors that may have tainted the original evaluation. Moreover, the Tribunal’s jurisprudence is clear that once a procuring entity sets out to re-evaluate bids, it is not limited to just the content that has been requested to be reviewed.²² Accordingly, PWGSC was justified to reassess the bids for consistency with MT1 to the extent that it deemed it necessary.

[53] CCI also alleges that PWGSC unfairly went beyond the parties’ agreement on the scope of the re-evaluation by reviewing information in its bid that was not intended to address the common solicitation requirements. In particular, CCI argues that the finding of non-compliance with MT1 was improperly based on the contents of the CVs of the proposed resources, as opposed to the actual information in its proposal pertaining to MT1. However, the Tribunal finds that the approach of the independent evaluator on this issue rather indicates the conduct of a thorough evaluation of CCI’s bid against MT1, which is precisely what the trade agreements require.

[54] As outlined in the independent evaluator’s affidavit,²³ the review began with the relevant section of the bid, and it was only when it was determined that the necessary information to establish compliance was not located therein that she proceeded to review the resources’ CVs for further information. The Tribunal finds this approach to be reasonable and, indeed, correct, since it is incumbent on procuring entities to apply themselves in evaluating a bidder’s proposal and avoid ignoring vital information provided in a bid. By looking at the CVs to determine whether they contained information that could demonstrate compliance with MT1, the evaluator set out to review all potentially relevant information in CCI’s bid and to give it the benefit of anything that could have supported a finding of compliance.

[55] This evidence also indicates that nothing turned on the review of the CVs by the independent evaluator, as the result of the re-evaluation would have been the same had they been ignored. As such, any claim that the review of the CVs, which was done in an appropriate attempt to find information in CCI’s bid to establish its compliance with MT1, means that the re-evaluation was not conducted in a procedurally fair way must fail. Therefore, the Tribunal is unable to accept CCI’s argument that the consideration of the CVs amounts to a failure on the part of PWGSC to observe the evaluation methodology it had set out for itself in the RFP or the agreement between the parties on the scope of the re-evaluation.

²¹ *LDC Solutions Inc.* (8 April 2020), PR-2020-001 (CITT) at para. 41; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 52.

²² *KPMG LLP v. Department of Public Works and Government Services* (23 November 2018), PR-2018-014 and PR-2018-024 (CITT) at paras. 29–31; *Service Star Building Cleaning Inc.* (23 May 2002), PR-2001-063 (CITT).

²³ Exhibit PR-2022-019-27.A at 263–266 (paras. 12–16).

The different outcomes of the original evaluation and subsequent re-evaluation are supported by a reasonable explanation

[56] Contrary to CCI's submissions, the Tribunal finds that PWGSC was not bound by the results of the original evaluation. If this were the case, there would be no point in performing a re-evaluation. The fact that, unlike the original evaluation teams, the independent evaluator concluded that the contents of CCI's bid did not demonstrate compliance with MT1 is not, thus, in itself, indicative of any wrongdoing or unreasonableness in the evaluation process.²⁴ Once PWGSC decided, with CCI's approval, to re-evaluate the bids against MT1, the possibility existed that its bid (or others) would be declared unresponsive to MT1 following this exercise. Put another way, CCI cannot validly argue that the conclusions of the initial evaluation with respect to MT1 were determinative, nor could it legitimately expect that they would necessarily be maintained. The very purpose of the re-evaluation was to erase the prior findings concerning the common solicitation requirements and, notably, have the bids' conformance with MT1 reassessed.

[57] Similarly, the fact that CCI "successfully responded to the CAR in regards to this matter [MT1]"²⁵ as part of the initial phase of the evaluation is not determinative. Considering the terms of the RFP, this cannot be interpreted as providing a compelling indication that CCI's bid demonstrated compliance with MT1.

[58] Even with the PBCP in place for the evaluation of proposals, PWGSC was under no obligation to issue CARs, before the final phase of the evaluation, to identify all errors in a bid and provide bidders with an opportunity to correct any such errors with additional information. Part 4 of the RFP, which describes the evaluation procedure and basis of selection, makes it clear that, in the course of the review of bids in phases I and II of the PBCP (i.e. the initial phases prior to the final evaluation), "Canada does not undertake, by reason of this review, any obligations or responsibility for identifying any or all errors and omissions in bids or in responses by a Bidder to any communication from Canada."²⁶

[59] Furthermore, it is stated in capital letters that "... the reviews in Phase I and II of this PBCP are preliminary and do not preclude a finding in Phase III that the bid is non-responsive, even for mandatory [criteria]" and that, "... notwithstanding that the bid had been found responsive in such earlier phase, Canada may deem a bid to be non-responsive to a mandatory requirement at any phase."²⁷

[60] For this reason, CCI submissions that PWGSC should have raised the deficiencies of its bid identified by the independent evaluator earlier during the CAR process to give it an opportunity to correct them are not persuasive. Given the relevant provisions of the RFP, this fact does not constitute a flaw in the evaluation process. On the contrary, it is manifest that the absence of CARs addressing the shortcomings noted by the independent evaluator in relation to MT1 in the initial

²⁴ The Tribunal is also unable to accept CCI's contention that the relatively long duration of the re-evaluation process and the fact that PWGSC did not quickly respond to its inquiries are indicative of irregularities. While it is regrettable that the process took several months, the Tribunal finds that this delay is understandable in the circumstances. As discussed above, the scope of the re-evaluation was fairly broad, there were many bids to review and, most importantly, evaluators are required to apply themselves in evaluating the bidders' proposals. On balance, the Tribunal finds that PWGSC acted as diligently as it could.

²⁵ Exhibit PR-2022-019-01.B at 14.

²⁶ Exhibit PR-2022-019-27.A at 54, para. 4.1.1.1(b).

²⁷ *Ibid.*

phase of the PBCP, and the preliminary finding that CCI's bid was responsive to MT1 at that earlier stage, did not preclude PWGSC from concluding otherwise at the final phase of the PBCP (Phase III).

[61] There is also no doubt that the independent evaluator was retained to perform a final and definitive re-evaluation of specific aspects of the bids, that is, to redo the final evaluation of the bids against identified criteria, that is, to conduct a new Phase III evaluation pursuant to section 4.1.1.4 of the RFP.²⁸ As part of the re-evaluation process, the independent evaluator was therefore entitled to find CCI's bid to be non-responsive to MT1 at that stage. The fact that CCI was previously found responsive after Phase II of the PBCP based on its responses to the CARs merely meant that its bid would receive a Phase III evaluation, which it did.

[62] The outcome of the independent evaluator's review differed from the evaluations completed by the previous teams that evaluated CCI's bid at Phase III. This, however, does not mean that the independent evaluator misinterpreted or misapplied the requirements of MT1 or that the revised determination is not acceptable. In fact, the evidence indicates that the re-evaluation was conducted in accordance with the relevant provisions of the RFP and that nothing warrants the Tribunal's intervention.

[63] MT1, as amended, and the relevant guidance for its interpretation provided to bidders in the RFP read as follows:

MT1: The Bidder must submit information related to three (3) real property projects the Bidder has worked on within the last fifteen (15) years prior to the solicitation closing date. Minimum work duration for each project must be two (2) continuous years or more. The minimum work duration for each project must include work in all of the project phases identified in Annex A at RS2, RS3, RS4 and RS5. Joint venture submissions are not to exceed the maximum number of projects. Only the first three (3) real property projects listed in sequence will receive consideration.

Interpretation of the Requirements by the Evaluation Team

1. The statements and requirements in this article apply to the information provided by the Bidder for each of its proposed personnel (i.e. resource(s)).
2. To demonstrate the experience (as defined in Attachment 1 to part 4 "Experience" of personnel, the Bidder must provide complete project details as to where, when (month and year), and how (through which activities/responsibilities) the stated qualifications/experience were obtained. The Bidder is advised that only listing position or assignment titles without providing any supporting data to describe responsibilities, duties, and relevance to the requirements will not be considered "demonstrated" for the purpose of this valuation.
3. The Bidder is advised that the month(s) of valid experience listed for a project whose time-frame overlaps that of another referenced project will only be counted once. For example: Project 1 timeframe is July 2001 to December 2001; Project 2 timeframe is October 2001 to

²⁸ Pursuant to the RFP, it is only at Phase III of the PBCP that the evaluation of bids against point-rated criteria would take place. This confirms that the independent evaluator, who was tasked to re-evaluate the "common solicitation requirements", including certain point-rated requirements, stepped in to perform a second Phase III evaluation of the bids.

January 2002; the total months of experience for these two project references is seven (7) months. ...

[64] MT1 clearly required bidders to provide information on three projects to demonstrate their relevant experience. For each project submitted, MT1 stipulated that the “minimum work duration” must be “two (2) continuous years or more”. The RFP also made it clear that, for the purposes of calculating this minimum work duration, “the month(s) of valid experience listed for a project whose time-frame overlaps that of another referenced project will only be counted once.”

[65] As correctly noted by the independent evaluator in her affidavit, and argued by PWGSC in the GIR,²⁹ no matter how one looks at the information provided by CCI in its bid and, even considering its response to the CARs concerning MT1, only two of the three projects it submitted met the minimum work duration requirement. This is due to the overlap in the timing of the projects submitted involving the provision of services by the same resources.

[66] The RFP was clear that evaluators could only count the overlapping period in the projects described in a bid once, that is, toward the experience of one of the projects. Put simply, MT1 required that bidders demonstrate 24-month periods of non-overlapping project experience for each of the 3 projects submitted and, despite CCI’s claims that the independent evaluator incorrectly calculated the duration of its experience for the project described in its bid, the Tribunal sees no reviewable error in the assessment made in this regard.

[67] Moreover, the allegation that the independent evaluator incorrectly reviewed superseded information while performing the re-evaluation by failing to consider or give proper weight to the response to the CARs—which updated its bid in respect of MT1—is not borne out in the evidence. In fact, the independent evaluator’s affidavit that PWGSC filed with the Tribunal confirms that all the information provided by CCI to demonstrate compliance with MT1 was considered.

[68] This evidence demonstrates that the independent evaluator began by reviewing CCI’s original proposal and subsequently reviewed the CARs and the responses to them, adjusting the evaluation based on the additional information contained therein. Again, the Tribunal is satisfied that this shows that the independent evaluator applied herself in evaluating CCI’s bid and sought to give CCI the benefit of any information that could establish that it met MT1.

[69] Unfortunately for CCI, even when considering the information provided by it in response to the CARs, in which CCI submitted a new project to replace the prior Project Reference #3, this replacement project did not correct the overlap in timeframe problem explained above between it and CCI’s Project Reference #2, limiting the months of experience that could be validly considered for this new project for the purpose of MT1. As a result, when considered in light of the evaluation

²⁹ Exhibit PR-2022-019-27.B (protected) at 26–28. More specifically, the Tribunal accepts the arguments set out at paras. 82–91 of the GIR.

methodology set out in the RFP, the new Project Reference #3 had a duration of only 21 months, while a minimum duration of 24 months was required for each project.³⁰

[70] On that basis alone, the evaluator's finding that CCI's bid was non-compliant with MT1 is reasonable. In fact, in view of the explanations that the independent evaluator provided, it appears that it is the original evaluation teams that misconstrued MT1 and incorrectly evaluated CCI's bid against that requirement. Be that as it may, what matters is that the independent evaluator's conclusion that CCI's bid did not demonstrate the required minimum duration of relevant experience for three projects as required by MT1 is supported by a tenable and, indeed, compelling explanation.

[71] This is sufficient for the Tribunal to find no reason to interfere with PWGSC's conclusion to declare CCI's bid unresponsive for failure to demonstrate compliance with MT1. Since, per section 4.1.1.4 of the RFP, a bid that did not meet all mandatory evaluation criteria of the solicitation would not receive further consideration, CCI cannot rely on the independent evaluator's revised scores that were provided strictly for the sake of completeness of the re-evaluation to claim that it is entitled to a contract for any of the workstreams.

Other issues

[72] CCI also made allegations about other perceived inconsistencies in the results of the re-evaluation. It submitted that PWGSC incorrectly concluded that the work described by CCI to demonstrate its relevant experience did not constitute "projects" within the meaning of MT1 and disputed the finding of the independent evaluator that its bid did not provide sufficient details to demonstrate compliance with this mandatory criterion. In this regard, it noted that there was a page number restriction in the RFP that limited the amount of information that could be provided. CCI also suggested that the independent evaluator's comments indicate that the information it provided to demonstrate compliance with MT1 was misinterpreted or misunderstood.

[73] The Tribunal finds that, while the evaluation of CCI's bid in this regard was strict, it is consistent with the terms of the RFP and, therefore, the Tribunal does not see a basis to interfere with the independent evaluator's assessment. The RFP was clear that bidders had to "provide complete project details as to where, when (month and year), and how (through which activities/responsibilities) the stated qualifications/experience were obtained" and indicated that "listing position or assignment titles without providing any supporting data to describe responsibilities, duties, and relevance to the requirements will not be considered 'demonstrated' for the purpose of this valuation."³¹

[74] The independent evaluator's interpretation of MT1 as imposing a high threshold in terms of the level of detail required about the relevant projects submitted by the bidder and the roles and responsibilities of its proposed resources to demonstrate compliance with MT1 is consistent with these instructions and, thus, reasonable. As well, the Tribunal finds that, in applying this strict but permissible reading of MT1, the independent evaluator's conclusion that the information and

³⁰ CCI also claims that the independent evaluator erred by not counting the duration of experience for the project submitted up to February 5, 2022, the revised closing date of the RFP, and wrongly considered relevant experience for ongoing projects up to January 31, 2022. However, the Tribunal notes that, as correctly argued by PWGSC, even with the benefit of the additional five days (from January 31 to February 5, 2021) for each of the projects, the overlap in work duration is still such that CCI's bid cannot demonstrate compliance with MT1 for more than two of its projects.

³¹ Exhibit PR-2022-019-27.A at 75.

documentation provided by CCI were insufficiently detailed to demonstrate compliance with MT1 is defensible.³² In the Tribunal's opinion, the comprehensive explanations that were provided to CCI in PWGSC's correspondence since the communication of the results of the re-evaluation and to the Tribunal in the affidavit of the independent evaluator to support this conclusion are very tenable.

[75] Finally, CCI raised concerns with respect to the qualifications of the independent evaluator, suggesting that this consultant did not have experience in real property project management and would not necessarily be qualified to assess the bids' compliance with MT1. The Tribunal notes that the RFP did not require that the members of the evaluation team possess any specific qualification or experience.³³ In previous cases, the Tribunal has determined that, absent specific provisions in the RFP with respect to the qualifications of the evaluators, the procuring entity could not be found to be in breach of the trade agreements with respect to its assignment of evaluators.³⁴ As there was no provision in the RFP that obligated PWGSC to select evaluators that had the type of professional experience or industry knowledge preferred by CCI, its grievance against the qualifications of the independent evaluator is without merit. Moreover, as evidenced by the information on the background of the evaluator contained in the affidavit that was filed with the Tribunal, the independent evaluator undoubtedly has considerable relevant experience in providing evaluation services in respect of solicitation processes of this nature. Therefore, the Tribunal finds that there is no credible basis to question her qualifications to perform the re-evaluation at issue in this inquiry.

[76] In light of the foregoing, the Tribunal concludes that the re-evaluation was conducted in a procedurally fair way and consistently with the terms of the RFP. As such, there is no basis to recommend the remedies sought by CCI.

COSTS

[77] Both CCI and PWGSC have requested their costs relating to the complaint. Tiree and Colliers have not requested their costs.

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

[79] In determining the amount of the cost award for this complaint, the Tribunal considered its *Procurement costs guidelines* (Guidelines), which contemplate the classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[80] The Tribunal's preliminary indication of the level of complexity for this complaint is Level 1. While the procurement process was relatively complex, involved various types of property management services and necessitated an in-depth re-evaluation of the bids, the matters at issue in this inquiry were straightforward, revolving around the interpretation and application of one mandatory criterion. In addition, the proceedings were not overly complex, as they were completed by way of written submissions and the intervener chose not to participate. Therefore, the Tribunal's preliminary indication of the amount of the costs to be paid by CCI is \$1,150.

³² On this issue, the Tribunal accepts the evidence and argument discussed in Exhibit PR-2022-019-27.A at 28–31 (paras. 92–97).

³³ *Ibid.* at 54.

³⁴ See *Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT).

DECISION

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

[82] Pursuant to section 30.16 of the CITT Act, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by CCI. In accordance with the Guidelines, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. Any party that disagrees with the preliminary level of complexity or the preliminary indication of the amount of the cost award may make submissions to the Tribunal, in accordance with Article 4.2 of the Guidelines. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Georges Bujold

Georges Bujold

Presiding Member