



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-024

Antian Professional Services Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, December 20, 2006*

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IN THE MATTER OF a complaint filed by Antian Professional Services Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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

**BETWEEN**

**ANTIAN PROFESSIONAL SERVICES INC.**

**Complainant**

**AND**

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

**Government Institution**

**DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services not exercise the option clause contained in the standing offer and that the standing offer be terminated at the end of its first year. The Canadian International Trade Tribunal also recommends that the Department of Public Works and Government Services compensate Antian Professional Services Inc. by an amount equal to one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A. Using this as the basis, the Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Canadian International Trade Tribunal within 30 days of the date of the publication of this determination.

Should the parties be unable to agree on the amount of compensation, Antian Professional Services Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of the publication of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of Antian Professional Services Inc.'s submission to file a response. Antian Professional Services Inc. will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Antian Professional Services Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost

award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry  
Ellen Fry  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

Tribunal Members: Ellen Fry, Presiding Member  
Zdenek Kvarda, Member  
Meriel V. M. Bradford, Member

Director: Randolph W. Heggart

Senior Investigator: Michael W. Morden

Counsel for the Tribunal: Dominique Laporte

Complainant: Antian Professional Services Inc.

Counsel for the Complainant: Paul Lalonde  
Rajeev Sharma  
Judith Parisien

Intervener: Impact Marketing Solutions Ltd. (operating as CMG  
Canada)

Government Institution: Department of Public Works and Government Services

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## STATEMENT OF REASONS

### COMPLAINT

1. On August 11, 2006, Antian Professional Services Inc. (Antian) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned a procurement (Solicitation No. EN578-054602/A) by the Department of Public Works and Government Services (PWGSC) for a Regional Master Standing Offer (RMSO) for the provision of exhibit management/coordination services and/or exhibit personnel services.

2. Antian alleged that the evaluation team improperly evaluated its proposal and the proposal of the company that ranked first in the solicitation process, Impact Marketing Solutions Ltd., operating as CMG Canada (CMG). Antian also alleged that the evaluation team should not have been led by a member from the Department of Agriculture and Agri-Food, due to that department's familiarity with CMG, which held the previous standing offer for the same services.

3. On August 18, 2006, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> Also on August 18, 2006, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of a contract<sup>3</sup> until the Tribunal determined the validity of the complaint. On August 29, 2006, CMG requested leave to intervene in the proceedings. On August 30, 2006, the Tribunal granted CMG's request. On September 12, 2006, PWGSC submitted the Government Institution Report (GIR). On October 3, 2006, Antian submitted its comments on the GIR.

4. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

### PROCUREMENT PROCESS

5. The Request for a Standing Offer (RFSO) that is the subject of the complaint was made available through MERX<sup>4</sup> on June 15, 2006, with a due date for the receipt of bids of July 10, 2006. It was issued to obtain exhibit management/coordination services and/or exhibit personnel services in support of the exhibitions programs of various Government of Canada departments for regional, national and international expositions. The RFSO anticipated the issuance of a maximum of two standing offers, to be in force until March 31, 2007, with an option to renew for two additional one-year periods. It specified that the bidder whose technical proposal met all the mandatory requirements and whose proposal had the lowest cost per point would be recommended for the issuance of a standing offer and have the right of first refusal for all work. The bidder whose proposal had the second-lowest cost per point would also be recommended for the issuance of a standing offer on the understanding that it would be used instead of the first-ranked bidder in the event that that bidder was unable to undertake the work.

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

2. S.O.R./93-602 [*Regulations*].

3. In cases where a standing offer has been issued, the Tribunal's postponement of award order postpones the raising of any call-ups against that standing offer until the Tribunal determines the validity of the complaint.

4. Canada's electronic tendering service.

6. PWGSC indicated that it received three proposals, one of which was declared non-compliant. Both CMG and Antian were considered to have submitted compliant offers. As CMG obtained a lower cost per point than Antian, it was issued the first standing offer, valued at \$1 million, and Antian was issued the second standing offer, valued at \$0.<sup>5</sup>

7. On August 3, 2006, Antian attended a debriefing with all three evaluators and, on August 11, 2006, it filed its complaint with the Tribunal.

### TRIBUNAL'S ANALYSIS

8. 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. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *Agreement on Internal Trade*.<sup>6</sup>

9. The notice of proposed procurement (NPP), published on June 15, 2006, categorizes the services in question under Goods and Services Identification Number (GSIN) T002AQ, a sub-category of the general "T" grouping that includes communications, advertising and arts/graphics services, among others. In accordance with Annex 1001.1b-2 of the *North American Free Trade Agreement*,<sup>7</sup> services classified within the "T" grouping are excluded from coverage under *NAFTA*. Annex 4 of the *Agreement on Government Procurement*<sup>8</sup> provides a list of the covered Canadian services. The services included in GSIN T002 are not listed in Annex 4 and are therefore not covered by the *AGP*. Annex 502.1B of the *AIT* provides a listing of the services that are not covered by that agreement. Exhibit management/coordination services and/or exhibit personnel services are not listed and are therefore covered by the *AIT*.

10. The Tribunal will first examine Antian's allegation that PWGSC's evaluation of its proposal did not follow the criteria in the RFSO. It will then examine the allegation that the evaluation was biased in favour of CMG.

### PWGSC's Evaluation of Antian's Proposal

11. Antian alleged that, for rated criteria R1, R2, R3, R5 and R6, PWGSC either did not follow the specific wording of the criteria or introduced new evaluation criteria that were not made known to bidders.

12. Subsection 506(6) of the *AIT* provides as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

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5. MERX Contract Award Notice attached to the complaint.

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat [http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm) [*AIT*].

7. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

8. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

13. The RFSO contained the following provisions relating to the evaluation of the proposals:

...

### 2.3 EVALUATION PROCEDURES

1. Offers will be evaluated in accordance with the Evaluation Procedures and Criteria specified in ANNEX "C". Offers received will be compared separately against the evaluation criteria identified therein for the total requirement of this Solicitation and in conjunction with the accompanying Statement of Work, ANNEX "A".

...

### ANNEX "C"

#### EVALUATION PROCEDURES AND CRITERIA

...

Offerors are advised to address each evaluation criteri[on] in the following order and in sufficient detail to permit a complete analysis and assessment.

...

14. The Tribunal has stated, in previous determinations, that it will not substitute its judgment for that of the evaluators unless they have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>9</sup>

15. Taking the above into consideration, the Tribunal will examine each of the contested rated criteria individually.

#### Rated Criterion R1—Experience of the Firm

16. This criterion provides as follows:

**(Maximum of 90 points, minimum of 63 points)<sup>[10]</sup>**

The Offeror must provide the following information (maximum of two (2) pages per project) for **each** of the three (3) projects (which must be similar in nature and have been completed in the last five (5) years), outlining its capacity to provide exhibit coordination and management services and exhibit personnel services:

- Name and summary description of the project.
- Names of the client for whom the work was performed and a contact.
- Location and duration of the exhibit.
- Start and end dates of the firm's involvement in the project.
- Description of the work performed by the firm, including level of responsibility, some of the problems encountered and corrective action taken during the course of the project.
- Name, role and responsibility of assigned personnel.

9. *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT); *Re Complaint Filed by Excel Human Resources Inc. (operating as excellTR)* (25 August 2006), PR-2005-058 (CITT); *Re Complaint filed by The Impact Group* (14 June 2006), PR-2005-050 (CITT).

10. Bidders had to obtain 70 percent of the available marks for each criterion in order for a proposal to be considered compliant.

- Dollar value of the project (provide the initial cost of the services offered and indicate whether costs differed at the end of the project).
- Services subcontracted (if applicable).
- Letters of reference from a client for two (2) of the projects submitted for evaluation. These references must include the name of the organization and the name and telephone number of the contact person for whom the work was performed. (A reference check could be conducted.)

Each project will be scored on a scale of 30 points.

17. According to PWGSC, Antian's proposal was not awarded full marks for this criterion because the examples of projects that were included were similar to each other, which reflected negatively on the breadth of Antian's experience. PWGSC submitted that rated criterion R1 required the projects to be similar in nature to the Statement of Work (SOW), but not necessarily similar to each other.

18. Although rated criterion R1 does specify the information pertaining to experience that the bidders had to provide, it does not give clear guidance on how the quality of the bidders' experience would be evaluated. In the Tribunal's opinion, one fundamental piece of missing guidance is whether or not the evaluators were to evaluate on the basis of the depth of experience (i.e. the amount of experience that is the same or similar), the breadth of experience (i.e. the extent to which there is a wide range of experience) or some combination of depth and breadth.

19. Antian chose to respond to the RFSO on the basis of depth of experience, by providing three projects that demonstrated "... experience in the precise areas requested in the SOW ...",<sup>11</sup> arguing that, given that the wording of the criterion specifically states that the projects should be "... similar in nature ...", it is axiomatic that they would be similar to one another.<sup>12</sup> PWGSC interpreted the wording of the RFSO and scored Antian's proposal on the basis of breadth of experience.

20. The Tribunal does not consider that PWGSC's approach could reasonably be inferred by bidders when preparing their proposals. The RFSO is neutral on this issue other than to state that the projects "... must be similar in nature ...". The Tribunal agrees with PWGSC's interpretation that, when rated criterion R1 is read together with mandatory criterion M3, which covers the same information requirement,<sup>13</sup> the logical conclusion is that the RFSO is requesting projects similar to the SOW rather than similar to each other. However, logic also indicates that it is very likely that projects similar to the SOW would also be similar to each other. This would reasonably lead bidders to conclude that it is depth, rather than breadth, of experience that is sought. Accordingly, the Tribunal finds PWGSC's approach in evaluating Antian's proposal to be unreasonable.

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11. Comments on the GIR, para. 16.

12. Comments on the GIR, para. 17.

13. The RFSO was structured so that the first four rated criteria had a corresponding mandatory criterion. Rated criterion R1 corresponded to mandatory criterion M3, which read as follows: "The Offeror **must** demonstrate that it has at least three (3) years' experience in the last five (5) years in the delivery of exhibit management and coordination services and in the delivery of exhibit personnel services. In order to meet this mandatory requirement, the Offeror must present three (3) projects that are similar in nature to [the] Statement of Work herein. These items will be rated under R1." In short, mandatory criterion M3 required bidders to submit specific information on experience, and rated criterion R1 was the rating of that same information. The same was true of mandatory criterion M4 and rated criterion R2, mandatory criterion M5 and rated criterion R3, mandatory criterion M6 and rated criterion R4.

Rated Criterion R2—Experience of the Project Manager

21. This criterion provides as follows:

**(Maximum of 110 points, minimum of 77 points)**

The Offeror must provide the following information for the Project Manager and backup project manager proposed:

a) Three (3) exhibit projects (maximum of one (1) page per project) completed in the last five (5) years for which the proposed individual provided exhibit management services. The Offeror must provide the following information for each project:

- Name and summary description of the project.
- Names of the client for whom the work was performed and a contact.
- Location and duration of the exhibit.
- Start and end dates of the Exhibit Project Manager's involvement in the project.
- Description of the work performed by the Exhibit Project Manager.
- Dollar value of the project (provide the initial cost of the services offered and indicate whether costs differed at the end of the project).
- Letter of reference from a client for two (2) of the projects submitted for evaluation, confirming that the work performed, in accordance with the services required, was performed by the Project Manager. This reference must include the name of the organization and the name and telephone number of the contact person for whom the work was performed. A reference check could be conducted.

b) A description of the authority of the Project Manager and backup project manager proposed under the standing offer, their responsibilities and the level of effort required of them.

c) A curriculum vitae clearly demonstrating the language capabilities, education, training, and relevant experience and expertise of the Exhibit Project Manager and the backup project manager proposed.

Each of the six (6) projects (item a)) will be scored on a scale of 10 points.

Item b) will be scored on a scale of 40 points, and item c) will be scored on a scale of 10 points.

22. Consistent with its approach concerning rated criterion R1, PWGSC assessed the quality of experience of the project manager on the basis of breadth rather than depth of experience.

23. As in the case of rated criterion R1 concerning experience of the firm, the wording of rated criterion R2 concerning experience of the project manager is neutral as to whether depth or breadth of experience, or a combination of the two, is sought. The Tribunal was unable to find any guidance on this issue elsewhere in the RFSO. Accordingly, the Tribunal considers that, in this respect, PWGSC's evaluation approach was not specified in the RFSO, could not reasonably be inferred from the RFSO by bidders and was therefore unreasonable.

24. PWGSC also indicated that, in assessing Antian's proposal for this criterion, it took into account the fact that the proposed backup project manager's experience was all mining-related and international in nature. The Tribunal could not find anything in the RFSO that would reasonably lead a bidder to conclude that mining/international experience was undesirable or that a mixture of mining/international and other experience was preferred. The Tribunal finds, therefore, that PWGSC's evaluation approach in this respect was not specified in the RFSO, could not reasonably be inferred from the RFSO by bidders and was therefore unreasonable.

25. PWGSC also indicated that it took into account the fact that the backup project manager's experience was at a high organizational level and could not be linked clearly to the tasks described in the SOW. In this regard, the nature of the tasks for the project manager described in rated criterion R2 of the RFSO indicates that PWGSC's approach could reasonably be inferred from the RFSO by bidders and, hence, is not unreasonable.

Rated Criterion R3—Experience of Exhibit Site Managers

26. This criterion provides as follows:

**(Maximum of 105 points, minimum of 73.5 points)**

The Offeror must provide the following information for **each** of the three (3) proposed exhibit site managers:

a) Two (2) exhibition projects completed in the last five (5) years for which the proposed individual was the Exhibit Site Manager. The Offeror must provide the following information for each project (maximum of one (1) page):

- Name and summary description of the project.
- Names of the client for whom the work was performed and a contact.
- Location and duration of the exhibit.
- Start and end dates of the Exhibit Site Manager's involvement in the project.
- Description of the work performed by the Exhibit Site Manager.
- Letter of reference (maximum of one (1) page) from a client for one (1) of the projects submitted for evaluation, confirming that the work performed in accordance with the services required was performed by the Exhibit Site Manager. This reference must include the name of the organization and the name and telephone number of the contact person for whom the work was performed. A reference check could be conducted.

b) A description of the Exhibit Site Manager's authority under the standing offer, responsibilities and level of effort required.

c) A curriculum vitae clearly demonstrating each exhibit site manager's language capabilities, education, training, and relevant experience and expertise.

Each project (item a) will be scored on a scale of 10 points.

Item b) will be scored on a scale of 15 points, and item c) will be scored on a scale of 5 points.

27. As in the case of rated criterion R1 concerning the firm's experience and rated criterion R2 concerning the project manager's experience, the RFSO is neutral as to whether depth or breadth of experience, or a combination of the two, is being sought. The Tribunal was unable to find any guidance on this issue elsewhere in the RFSO. Accordingly, the Tribunal considers that, in this respect, PWGSC's evaluation approach was not specified in the RFSO, could not reasonably be inferred by bidders from the RFSO and was therefore unreasonable.

28. In evaluating rated criterion R3, PWGSC also took into account the fact that, in the evaluators' opinion, the involvement of the proposed project manager in all decision-making resulted in high risk. The Tribunal is of the opinion that, in concluding that the proposed project manager would be involved in all decision-making, the evaluators misinterpreted the bid. The Tribunal notes that Antian's proposal<sup>14</sup> provided for a number of functions in which the site manager was to work closely with the project manager,

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14. Complaint, confidential attachment at 67-68.

but, in its view, while these functions do indicate close and frequent communication, they do not indicate that the project manager would be involved in all decision-making.

29. Furthermore, while the RFSO required that the site managers' authority be indicated in the proposal, it did not indicate what the desired degree of authority was to be, i.e. to what extent it was considered desirable for the site manager to function independently from the project manager. In the Tribunal's view, the desired degree of authority is not necessarily self-evident, as it would logically depend on the client department's preference.

30. Accordingly, the Tribunal finds that PWGSC's evaluation approach concerning the site managers' authority was unreasonable.

31. In its evaluation, PWGSC also took into account the fact that, in its view, Antian's bid did not show involvement of the site managers in event pre-planning. In the Tribunal's view, rated criterion R3 does not require this involvement to be provided for in bidders' proposals. PWGSC submitted that paragraph 3.2 of the SOW required site managers to be involved in pre-planning, as it included a section entitled "Before the event" regarding the tasks and responsibilities of the site manager. However, in the Tribunal's opinion, the listed tasks and responsibilities for site managers before the event (e.g. liaising with clients, meeting with fair authorities, reviewing distribution of material) are not clearly planning activities. This is in contrast to paragraph 3.1 of the SOW regarding the responsibilities of the project manager, which sets out tasks that are clearly related to pre-planning, in particular the following: "... Plan activities ... Develop a Scope of Work for the various aspects of the project ... Identify the government publications and promotional items ...". The Tribunal therefore finds that PWGSC was unreasonable in requiring bids to show involvement of the site managers in event pre-planning.

#### Rated Criterion 5.1—Exhibit Management and Coordination Services

32. This criterion provides as follows:

**(Maximum of 75 points, minimum of 52.5 points)**

The Offeror must describe its approach and methodology outlining how it would deliver the exhibit management and coordination services by showcasing how it would manage the CNE project ... [a fictitious example provided in the RFSO] on behalf of the client and indicating how many hours of management that may represent for the Project Manager and his or her assistant. It must demonstrate, in a detailed manner, the relevant and important components that would allow it to successfully manage the project. The Offeror must also demonstrate how it would plan and operate a working environment that includes meeting challenges, encouraging participation and working with other suppliers and many departmental participants.

**Note:** The management hours indicated in the approach and methodology description will be used to measure the exhibit management and coordination services against the standing offer.

33. In its evaluation of this criterion, PWGSC took into account the fact that, in its view, Antian's proposal relied on an excessive level of effort for its project manager. However, the RFSO does not appear to give bidders a basis to infer the level of effort at which they should be aiming in this regard. PWGSC also took into account the fact that Antian's proposal failed to include a sufficiently large role for the site managers. Again, the RFSO does not appear to give bidders a basis to infer the level of effort contemplated by PWGSC. The Tribunal therefore finds that PWGSC's approach was unreasonable in its evaluation of these two elements of Antian's proposal.

34. PWGSC also took into account the fact that Antian's proposal included a Gantt chart that in its view was difficult to follow and reconcile with the project manager's level of effort. The Tribunal agrees that it appears to be difficult to reconcile the Gantt chart with the project manager's level of effort contained in Antian's proposal.<sup>15</sup> Therefore, the Tribunal does not consider that PWGSC's evaluation approach was unreasonable.

Rated Criterion R5.2—Exhibit Personnel Services

35. This criterion provides as follows:

**(Maximum of 75 points, minimum of 52.5 points)**

The Offeror must describe its approach and methodology for the delivery of exhibit personnel services on the basis of the project outlined above. It must:

- Set out its work approach to ensure effective site management meeting the requirements of this standing offer.
- Describe its work approach to ensure effective communication between the Site Manager and hosts/hostesses.
- Describe in a detailed manner the method that it would use to determine the linguistic qualifications of the exhibit personnel.
- Present a training plan (maximum of one (1) page) indicating the themes addressed for the training of site managers and host/hostesses.
- Develop a work schedule for the personnel chosen for the event, clearly indicating the overtime required.

36. In evaluating Antian's proposal, PWGSC took into account the fact that, in its view, the staffing schedule was excessive, in particular because Antian's staff was working nine-hour days with only two half-hour meal breaks.

37. Rated criterion R5.2 does not provide clear guidance for bidders on what type of staff schedule is preferred. For example, rated criterion R5.2 does not indicate whether it is considered preferable to have a greater number of staff, each of whom would work fewer hours, to provide a fresher perspective, or to have a smaller number of staff, working longer hours, to provide continuity. Rated criterion R5.2 does however contemplate that the staff schedule would not be limited to a 7.5- or 8-hour workday, since it requested that bidders "... clearly [indicate] the overtime required." The SOW also states<sup>16</sup> that "... personnel must be available to work irregular schedules, including overtime, weekends and statutory holidays..." The Tribunal therefore finds that bidders could not reasonably infer PWGSC's evaluation approach in this regard and that PWGSC evaluated Antian's proposal in an unreasonable manner.

38. In its evaluation, PWGSC also took into account the fact that, in its view, there was nothing in Antian's proposal regarding team building or motivation. Rated criterion R5.2 requires that bidders include information regarding training and communication between personnel. The Tribunal notes that the NPP stated that "... [p]ersonnel must have the ability ... to work on a team ..." However, the NPP is an administrative document that does not form part of the RFSO requirements, and the Tribunal cannot find any requirement in the RFSO itself for proposals specifically to address team building and/or motivation. While the Tribunal considers that team building and motivation are generally accepted to be desirable

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15. Complaint, confidential attachment at 124.

16. Para. 3.2.

management practices, PWGSC would not necessarily want to involve itself this closely in specifying the management practices of its contractor. Therefore, bidders would not reasonably infer from the RFSO that this was in fact a requirement, and the Tribunal considers that PWGSC acted unreasonably in evaluating Antian's proposal.

Rated Criterion R6 - Presentation of Offer

39. This criterion provides as follows:

**(Maximum of 10 points, minimum of 7 points)**

The Offeror must present its proposal in accordance with the guidelines in paragraph 2.19 of Section 2: Instructions to Offerors. It is important that the Offeror not exceed the number of pages indicated for each point-rated requirement.

40. This criterion refers to "paragraph 2.19 of section 2", which the Tribunal could not find in the RFSO. In the evaluators' notes, "2.19" has been struck out and "2.2" has been substituted. However, this information was not provided to the bidders. Therefore, the only requirements relating to rated criterion R6 to which bidders could reasonably have been expected to respond were those specifically mentioned in rated criterion R6 itself.

41. According to the GIR, the evaluators took into account the fact that, in their view, Antian's proposal was "too long".

42. Based on the evidence submitted, Antian's proposal appears to respect all the specific page limits that were set out in the RFSO for the rated requirements, which read as follows:

[Criterion R1] The Offeror must provide the following information (maximum of two (2) pages per project) for **each** of the three (3) projects . . .

[Criterion R2] Three (3) exhibit projects (maximum of one (1) page per project) completed in the last five (5) years . . .

[Criterion R3] Two (2) exhibition projects completed in the last five (5) years for which the proposed individual was the Exhibit Site Manager. The Offeror must provide the following information for each project (maximum of one (1) page) . . .

43. The evaluators also took into account the fact that, in their view, "Antian misunderstood R5". The Tribunal is of the opinion that, if the bidder did misunderstand rated criterion R5, it would reasonably expect this deficiency to be reflected in the scoring for rated criterion R5 and not in the scoring for rated criterion R6, which, as indicated above, relates only to the way in which the proposal is presented.

44. The Tribunal therefore finds that PWGSC acted unreasonably in evaluating Antian's proposal with respect to rated criterion R6.

45. In summary, the Tribunal's analysis indicates that, in a number of instances, PWGSC did not follow the rated criteria in the RFSO when it evaluated Antian's proposal and that its evaluation approach could not reasonably be inferred by bidders from the RFSO. As the tender documents did not clearly identify the criteria that were used in the evaluation of bids, the Tribunal finds that this ground of complaint is valid.

## Evaluation Biased in Favour of CMG

46. Article 501 of the *AIT* reads as follows:

... the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

47. Regarding the composition of the evaluation team, the RFSO contained the following provision:

### **2.3 EVALUATION PROCEDURES**

...

2. An evaluation team composed of government officials from PWGSC and client departments will evaluate the proposals on behalf of Canada. In addition, Canada reserves the right to include as evaluation members, non-government employees that are not in a conflict of interest by performing this task. The evaluation committee will be chaired by PWGSC.

48. Antian submitted that the 2006 RFSO that is the subject of the complaint is virtually identical to a 2005 RFSO for the same services. It submitted that its 2006 proposal was similar to the one that it submitted in 2005, the key difference being that its 2006 proposal incorporated the debriefing input that it received from PWGSC officials in 2005. It submitted that it received fewer points for its 2006 proposal than for its 2005 proposal. Antian also submitted that the cost in its 2006 proposal was much lower than CMG's cost, but that CMG had been awarded maximum points. Antian considered that it had been given fewer points in order for CMG to win the standing offer. Antian also submitted that the evaluation team should not have been led by a member of the Department of Agriculture and Agri-Food, due to that department's familiarity with CMG, which held the previous standing offer for the same services, and the department's lack of knowledge of Antian.

49. PWGSC submitted that a wholly different evaluation team was used to assess the 2006 proposals. PWGSC did not consider that the participation of a Department of Agriculture and Agri-Food employee on the evaluation team gave CMG an "unfair advantage". It submitted that the evaluations of the bids for the 2006 RFSO were based strictly on the information provided in the proposals and not upon knowledge or prior experience in dealing with any company. It submitted that the evaluators' comments regarding each of the rated criteria provide a tenable explanation for the scoring of Antian's proposal.

50. In the Tribunal's view, no matter how closely related (or not) the 2006 RFSO was to the 2005 RFSO, the case before it concerns the 2006 RFSO. The responsibility of the evaluation team was to evaluate the 2006 bids in accordance with the applicable provisions of the 2006 RFSO and the trade agreements. The evaluation team was not required to ensure that it evaluated the 2006 bids consistently with the evaluation of the 2005 bids, and to do so would have been improper unless provided for in the 2006 RFSO. The Tribunal also notes that, given the element of personal judgment involved in evaluating proposals, two different evaluation teams scoring identical proposals under identical RFSOs might legitimately arrive at different scores. In the Tribunal's view, the evidence does not indicate that there was any bias in scoring the 2006 bids.

51. Regarding the make-up of the evaluation team, the Tribunal notes that the RFSO advised bidders that the evaluation team would be made up of PWGSC and client department representatives. Accordingly,

the inclusion of a Department of Agriculture and Agri-Food employee, in and of itself, does not represent a breach of any *AIT* provisions. The evidence does not indicate that the participation of this evaluator caused any bias in the evaluation process. Accordingly, the Tribunal finds that this ground of complaint is not valid.

## REMEDY

52. Having found the complaint to be valid in part, the Tribunal must now recommend a suitable means of redressing the harm that the deficiencies in the evaluation process caused to Antian.

53. In this connection, the Tribunal is directed by subsection 30.15(3) and (4) of the *CITT Act*, which read as follows:

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

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

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

54. The Tribunal considers that using criteria which were not clearly specified in the RFSO and could not reasonably be inferred from the RFSO is a serious deficiency in the procurement process. Furthermore, this is not a case of misinterpreting the criteria in the RFSO or incorrectly applying only a single criterion. In evaluating all but one of the rated requirements, PWGSC used evaluation criteria that were not in the RFSO and could not reasonably be inferred from the RFSO. In this complaint, the instances of misuse of the evaluation criteria were so pervasive that, in the Tribunal's view, they amounted to a general disregard for the criteria in the RFSO.

55. The Tribunal considers that the potential prejudice to Antian is serious. The standing offer is valued at \$1 million and is for a significant period of time, when the option years are taken into account. Although it is not clear what the result would have been had Antian's proposal been evaluated correctly, there is certainly a significant possibility that Antian could have gained enough points to become the top-ranked bidder, thereby having right of first refusal for all call-ups under the standing offer.

56. The Tribunal also believes that such a serious deficiency in the evaluation of proposals prejudices the integrity and efficiency of the competitive procurement system. However, the evidence does not indicate that PWGSC was acting in bad faith, although it is unlikely that errors so widespread occurred merely by accident or inattention.

57. The standing offers for this procurement have been issued, but no call-ups have been initiated against them since the Tribunal issued its postponement of award order on August 18, 2006. The RFSO indicates that the standing offers are set to expire on March 31, 2007, but can be extended for up to two additional one-year periods by PWGSC.

58. In light of the seriousness of the errors that were made, a significant remedy is warranted.

59. The pervasive nature of the errors strongly suggests that the RFSO may not have been written in a way that truly reflected PWGSC's requirements. The Tribunal also notes that the standing offers are due to expire on March 31, 2007. Because of the foregoing factors, it does not recommend a re-evaluation of Antian's proposal regarding this RFSO. Instead, the Tribunal recommends that PWGSC terminate the standing offers at the end of the initial period and, should the requirement still exist, re-issue the solicitation in a fashion that clearly states the requirements. Due to the significant possibility that Antian could have been the top-ranked bidder if it had been evaluated in accordance with the RFSO evaluation criteria as written, the Tribunal also recommends that Antian be compensated by an amount equal to one half the reasonable profit that it would have received during the initial period had it been ranked first. This amount represents the value of Antian's lost opportunity to be ranked first in the procurement process.

### Costs

60. In accordance with the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*, the Tribunal awards Antian its reasonable costs incurred in preparing and proceeding with the complaint.

61. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it involved a defined service project on an "as required" basis. The complexity of the complaint was medium, in that it dealt with multiple grounds and involved an evaluation of rated requirements. Finally, the complexity of the complaint proceedings was low, as there was a single intervener, there was no need for a public hearing, and the minimum legislated time frame for the complaint proceedings could be respected. Accordingly, the Tribunal is of the preliminary view that this complaint case has an overall complexity level corresponding to the medium level of complexity referred to in Appendix A of the *Guideline* (Level 2). As contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400. The Tribunal reserves jurisdiction to establish the final amount of the award.

### DETERMINATION OF THE TRIBUNAL

62. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part.

63. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC not exercise the option clause contained in the standing offer and that the standing offer be terminated at the end of its first year. The Tribunal also recommends that PWGSC compensate Antian by an amount equal to one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A. Using this as the basis, the Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Tribunal within 30 days of the date of the publication of this determination.

64. Should the parties be unable to agree on the amount of compensation, Antian shall file with the Tribunal, within 40 days of the date of the publication of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of Antian's submission to file a response. Antian will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

65. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Antian its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry

Ellen Fry  
Presiding Member

Zdenek Kvarda

Zdenek Kvarda  
Member

Meriel V. M. Bradford

Meriel V. M. Bradford  
Member