



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-018

jmpconsultants

*Decision made  
Friday, June 20, 2008*

*Decision and reasons issued  
Thursday, July 10, 2008*

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

**BY**

**JMPCONSULTANTS**

**AGAINST**

**THE DEPARTMENT OF CANADIAN HERITAGE**

**DECISION**

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

André F. Scott  
André F. Scott  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after finding that a complaint complies with subsection 30.11(2), the Tribunal shall decide whether to conduct an inquiry into the complaint.

2. The complaint filed by jmpconsultants (JMP) in this case relates to a procurement by the Department of Canadian Heritage (Canadian Heritage) for the writing, editing and translation of a range of communications products. The Request for a Standing Offer (RFSO), Request No. 10071463, was made available through MERX<sup>3</sup> on September 10, 2007. It covered three service categories and informed potential suppliers that Canadian Heritage could issue up to 12 standing offers, two per category. The categories were as follows:

Category A — Writing of speeches and other communications products (in English and French)

Category B — Editing of various communications products (in English and French)

Category C — Translation of various communications products (English to French and French to English)

3. JMP argued that Canadian Heritage had misplaced certain documents included with its bid, improperly evaluated its bid by using restrictive specifications and criteria and improperly limited the checking of references.

4. The deadline for submitting bids was October 10, 2007. On May 1, 2008, Canadian Heritage informed JMP that, since it had not provided the two required samples, it had failed to meet the mandatory criteria for the following categories: Category A—French writing; Category B—English editing; Category B—French editing; and Category C—English to French translation. Canadian Heritage also indicated that JMP had not earned the number of points required for its proposal to be deemed compliant under Category C—French to English translation.

5. On May 3, 2008, in an e-mail to Canadian Heritage, JMP maintained that it had provided the required samples with its bid. On May 9, 2008, after receiving further explanations from Canadian Heritage about the evaluation of its bid, JMP informed Canadian Heritage by e-mail that the latest explanations differed markedly from those that it had received on May 1, 2008. Accordingly, it filed a formal objection. On May 13, 2008, in an e-mail to Canadian Heritage, JMP listed the reasons for its objection.

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

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

3. Canada's electronic tendering service.

6. On June 2, 2008, JMP attended a briefing session with Canadian Heritage. On June 4, 2008, in an e-mail to JMP, Canadian Heritage confirmed that it had contacted the two references that JMP had named in its proposal. On June 4, 2008, JMP wrote a letter to the Minister of Canadian Heritage asking her to intervene in the matter.

7. On June 13, 2008, JMP filed its complaint with the Tribunal.

8. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Five of the *Agreement on Internal Trade*,<sup>4</sup> Chapter Ten of the *North American Free Trade Agreement*<sup>5</sup> or the *Agreement on Government Procurement*<sup>6</sup> applies. In this case, the *AIT* and *NAFTA* apply.

9. Article 506(6) of the *AIT* provides the following:

... 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.

10. Article 1015(4) of *NAFTA* provides as follows:

...

a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

d awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

...

11. Under clause 7.1 of the RFSO, bidders' proposals had to meet all the mandatory criteria for their submissions to be considered.

#### 7.1 MANDATORY CRITERIA

a) Bidders' proposals must meet ALL of the following mandatory criteria for their submissions to be considered for further assurance services work. Failure on the part of Bidders to meet any one of these requirements will result in their proposal being deemed non-compliant, with the proposal being given no further consideration.

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4. 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*].

5. *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*].

6. 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)>.

12. Mandatory criterion M2 of the RFSO reads as follows:

M2	<p>Bidders MUST submit written summaries (maximum 2 pages per summary) of two (2) projects completed in the last three years, showing experience in delivering products within tight deadlines for each bid category from among the following in which they are applying — Category A (Writing of speeches and other communications products).</p> <p>A. (writing of speeches and other communications products)  B. (editing of various communications products)  C. (translation of various communications products)</p> <p>Such summaries must include a description of the project, the proposed schedule, the results obtained, as well as the name and contact information of the client for each methodology proposed (example of a writing, editing and/or translation project managed by the bidder). Bidders must also submit two (2) samples of such completed projects.</p> <p><b>Note:</b> At least one of the two samples (between 750 and 1,000 words) submitted for Category A (writing) MUST be a speech.</p> <p><b>Note:</b> Samples (between 300 and 500 words) for Category B (editing) must include the original version and the edited version. Please be sure to indicate which is the original version and edited version.</p> <p><b>Note:</b> Samples (between 300 and 500 words) for Category C (translation) must be submitted in the source language and in the target language. For example, English translators shall provide the original French text together with their English translation.</p>
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#### **CATEGORY A—WRITING OF SPEECHES AND OTHER COMMUNICATIONS PRODUCTS**

13. With regard to Category A, Canadian Heritage confirmed that it had received the two samples contained with JMP's bid. However, according to its evaluation notes:

sample 1 . . . refers to a rewriting project, not to writing speeches and other communications products, as stipulated in the request for standing offers . . . although the bidder provided notes for a speech by Maryanntonett Flumian, we did not evaluate them. These notes were not linked to any project summary in the proposal. Since we do not know in which context these notes were written, we were not able to evaluate them.

14. According to JMP, its proposal stated that it was asked to re-write a speech, but the process used by the writer was the same as that used for a writing request. It also submitted that the circumstances in which its samples were prepared for Category A—French writing and Category A—English writing were similar and that it therefore did not understand why it qualified for only one category.

15. The Tribunal is of the view that the RFSO outlined the mandatory criteria in a clear and reasonable manner. The Tribunal is of the view that the onus is on the bidder to ensure that its proposal is compliant with all the essential elements.

**CATEGORY B—EDITING OF VARIOUS COMMUNICATIONS PRODUCTS**

16. With regard to Category B—English editing, Canadian Heritage’s evaluation notes read as follows:  
On page 28 of the proposal, the bidder presents a revision project for the National Research Council. We were not able to evaluate the samples linked to this project as they did not appear in Appendix B as mentioned by this bidder on page 28.
17. JMP maintained that the samples in question were included with its bid, while Canadian Heritage maintained that JMP had not submitted them.
18. As for JMP’s claim that Canadian Heritage had lost some of its documents, the Tribunal is of the view that there is insufficient supporting evidence and that the circumstances described by JMP indicate, at the very most, that a document unrelated to JMP’s bid was found in the documentation of a Canadian Heritage official at the June 2, 2008, briefing session. In the Tribunal’s view, this does not necessarily mean that JMP’s proposal was improperly evaluated. The Tribunal has already ruled, in File No. PR-2007-026,<sup>7</sup> that in the absence of compelling evidence (i.e. concrete evidence beyond a mere allegation), the Tribunal cannot reasonably dispute Canadian Heritage’s conclusion that the proposal that it received from JMP was incomplete.

**CATEGORY C—TRANSLATION OF VARIOUS COMMUNICATIONS PRODUCTS**

19. With regard to Category C—French translation, Canadian Heritage’s evaluation notes read as follows:  
PC: “On page 30 of the proposal, the bidder presents two translation projects. However, these samples (China Gaming and Integrated Results-based Management (...)) did not respect the requirement clearly mentioned in the request for standing offers with regard to length of the submitted text (between 300 and 500 words).”
20. JMP submitted that the evaluation was too restrictive and subjective, and had not taken into account the quality of the work that JMP had performed for Canadian Heritage for six years. It argued that the evaluators could have decided to evaluate only 300 to 500 words of its sample, rather than reject this section on the grounds that JMP had failed to meet the criteria.
21. The information submitted with the complaint does not indicate that Canadian Heritage did anything other than follow the requirements clearly and precisely outlined in the RFSO.

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7. 1075773 Ontario Inc., operating under the name CTC TrainCanada (23 July 2007) (CITT).

22. Canadian Heritage confirmed that it had received the two samples concerning this category with JMP's bid. JMP complained that it had earned a score of only 45 percent, while the minimum required score was 75 percent. JMP lost the following points for the reasons listed below:

R3 Category C: Translation of communications products, particularly news releases, speeches, ministerial messages (100 points)	Points	Points Awarded	Comments
i) . . .	10	10	
Description of the two projects (in keeping with mandatory criterion M2) (20 points)	20	10	- project 1: incomplete description (no mention of the proposed calendar, of the obtained results, of the goal of the project)  - project 2 : no mention of results obtained
iii) . . .	10	10	
iv) References (in keeping with mandatory criterion M2) (15 points)	15	7.5	- Canadian Heritage (would not recommend them/not satisfied with the quality of the work) (0)  - Virtual Museum of Canada (7.5)
v) Analysis of samples submitted (in keeping with mandatory criterion M2)  - Style (10 points); - Clarity (15 points); - Quality (spelling, syntax, etc.) (20 points)	45	7.5	Style : 0/10; Clarity : 7.5/15; Quality : 0/20  See appendix 'A' and appendix 'B' <sup>[8]</sup>

23. The information submitted with the complaint does not indicate that Canadian Heritage did anything other than follow the requirements stated in the RFSO. The Tribunal is of the view that there is no evidence to suggest the evaluators did not adhere, as they should, to the evaluation criteria for JMP's proposal. Accordingly, there is no reason for the Tribunal to substitute its judgment for that of the evaluators.

24. The Tribunal is also of the view that the onus is on the bidder to ensure that a proposal complies with all the essential elements of a solicitation. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal and to make sure that it complies with all the required essential elements.

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8. Appendices A and B listed the reasons, with examples, for which Canadian Heritage had deducted the points.

25. For these reasons, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

26. Accordingly, the Tribunal will not conduct an inquiry into the complaint.

#### **DECISION**

27. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

André F. Scott \_\_\_\_\_

André F. Scott  
Presiding Member