Federal Court  Cour fédérale

Date: 20141002

Docket: T-494-08

Citation: 2014 FC 933

Ottawa, Ontario, October 2, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

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I. Introduction

[1] TPG Technology Consulting Ltd. [TPG] provided information technology services, specifically engineering and technical support [ETS] services to the Information Technology Services Branch [ITSB] of Public Works and Government Services Canada [PWGSC]. It did so from 1999 to 2007 under a contract [ETS 1].

[2] In 2006, PWGSC issued a Request for Proposal [RFP] with respect to the ETS services to be provided to ITSB following the expiration of ETS 1. It specifically stipulated that it represented a "new articulation" of the required services and that those who had previously provided ETS services should not assume that its existing capabilities met the requirements of the RFP:

> Bidders who have previously satisfied this requirement or similar requirements, in particular, should note that this solicitation represents a new articulation of the requirement and no Bidders should assume that past practices will continue, except to the extent that they have been expressly articulated in this solicitation, or that the Bidder's existing capabilities meet the requirement simply because they have met previous requirements.

[3] Three companies submitted proposals in response to the RFP: TPG, IBM Canada Ltd. [IBM], and CGI Group Inc. [CGI]. The RFP provided that the bidder who submitted a compliant bid and had the highest combined technical and financial ratings would be the successful bidder [the Contractor] and would be awarded the next contract [ETS 2]. TPG in this action complains only of the assessment of its technical proposal. CGI was successful; TPG and IBM came second and third respectively.

[4] TPG seeks damages from the Crown for an alleged breach of contract arising out of the RFP. TPG alleges that PWGSC breached its duty of fairness in the evaluation of its bid for ETS 2. It also alleges that the winning bid by CGI was non-compliant, that the Crown knew or ought to have known that the bid was non-compliant, and ought to have either disqualified the bid, or terminated the contract upon non-performance by CGI.

[5] The value of the lost contract including the option years was approximately $428 million. TPG claims damages in the amount of $250 million.

II. The Law Relating to Procurement

[6] The fundamental principles of procurement law are set out in a series of four decisions of the Supreme Court of Canada: *Ontario v Ron Engineering & Construction (Eastern) Ltd*, [1981] 1 SCR 111 [*Ron Engineering*]; *M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 [*M.J.B.*]; *Martel Building Ltd v Canada*, [2000] 2 SCR 860 [*Martel Building*]; and *Double N Earthmovers Ltd v Edmonton (City)*, [2007] 1 SCR 116 [*Double N Earthmovers*].

[7] The fundamental legal principles expressed in these authorities that are relevant to this action and upon which this Judgment is rendered, are the following:

1. Where a RFP is issued and a party responds with a proposal, a contract forms between the party issuing the RFP and the party responding to it. This contract (Contract A) is said to "come into being forthwith and without further formality."
2. The principal term of Contract A is that the proposal of a responding party is irrevocable and the parties have a mutual obligation to enter into a contract (Contract B) upon acceptance of the proposal.

3. The RPF document(s) provide the other express terms of Contract A.

4. Contract A may also contain implied terms.

5. One implied term of Contract A is that only a proposal that is compliant with the terms of the RFP will be accepted. It is no defence to a claim that a non-compliant bid was accepted to say that the acceptance was made in good faith or was based upon what was believed to be the correct interpretation of the contract.

6. Contract A contains an implied obligation to treat all those who respond "fairly and equally."

7. Contract A contains an implied obligation to assess competing proposals on the same terms and conditions and not to rely on a criterion that has not been disclosed to those who have responded.

8. Other terms may be implied in Contract A based upon the presumed intention of the parties where necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed."

III. **The RFP**

[8] The RFP was issued by PWGSC on May 5, 2006 and closed on September 5, 2006. Between May 31, 2006 and June 24, 2006, PWGSC responded to 206 questions from bidders. Some questions sought clarification of ambiguous aspects of the RFP. Others described perceived unfairness as a result of the structure of the RFP, or the wording of specific sections. As a result of this question and answer process, 24 solicitation amendments were issued. These amendments were incorporated into the RFP and were binding on both PWSGC and the bidders.

Throughout these Reasons reference to passages in the RFP is to the RFP as amended by the solicitation amendments, entered at trial as Exhibit P-6.

IV. Express Terms of Contract A in the RFP for ETS 2

A. *Requirements Stated in the RFP*

[9] Each requirement set out in the RFP was identified to be a mandatory requirement, a rated requirement, or both. The RFP specified: "Proposals must comply with each and every mandatory requirement. If a proposal does not comply with a mandatory requirement, the proposal will be considered non-compliant and be disqualified." TPG alleges that at least one mandatory requirement was not fulfilled by CGI, to the knowledge of PWGSC, and therefore its proposal ought to have been rejected as non-compliant.

[10] Rated requirements were those which would be assessed "in accordance with the evaluation methodology" described in the RFP. TPG alleges that the evaluators unfairly marked its proposal in 9 of the many rated requirements: Namely, 2.2.3.1, 2.3.1.1, 2.3.1.2, 2.3.1.4, 3.1.4, 3.3.3, 3.3.5, 3.4.2, and 3.6.1, attached as Annex A. At trial, TPG led evidence only with respect to the rating of requirements 3.3.3 and 3.3.5.

B. *The Work*

[11] The Work, as defined in the RFP, was to provide ETS services. The majority of these services were to be provided by the Contractor's resources directly to ITSB [ITSB Dedicated Services]; however, some services, as in the past, would be provided by resources dedicated to

clients of PWGSC such as Transport Canada and the Canadian Intellectual Property Office [Client Dedicated Services]. Article 2 of Part A of the RFP described the Work as follows:

> The Contractor shall perform the Work specified in Annex A, Part I, II and III of the Statement of Requirement (SOR), which describes the requirement for the following types of services:
>
> a) Enterprise Server Domain - various engineering and technical support services in support of large mainframe computers;
>
> b) Cross Platform and Network Domain - various engineering and technical support services in support of UNIX and NT Servers; and
>
> c) Support Services Domain - various general support services delivered in the two domains above and to other areas of ITSB, including a Client Dedicated Resource Requirement.
>
> The Contractor will be responsible for Functions work that is comprised of services from specified resources on an on-going basis for the Contract Period, and Project Work that will be implemented on an "as and when requested" basis through Task Authorizations (TAs).

C. *The Resources*

[12] The RFP spoke of the "resources" to be used to provide the ETS services. By this is meant the staff (individuals, employees or contractors) retained by the Contractor to provide the contracted services.

[13] When TPG provided services under ETS 1, it did so using approximately 150 resources, who were subcontractors to TPG. The Statement of Requirements (Annex A, Parts II and III) annexed to the RFP and referenced in Article 2 of Part A of the RFP listed the "staffing requirement" for the ITSB Dedicated Services and Client Dedicated Services. In the initial RFP

these totalled 145 staff; however, in the RFP amended by the 24 Solicitation Amendments (Exhibit P-6), it was increased to 159 staff, comprised of 133 providing ITSB Direct Services, and 26 providing Client Dedicated Services.

[14] A substantial component of this litigation focuses on one mandatory requirement, Article A.24 of the RFP, headed "Status of Resources" which reads as follows:

> By submitting a proposal, the Bidder is certifying that either:
>
> (i) all the individual resources proposed are employees of the Bidder: or
>
> (ii) in the case of any individual proposed who is not an employee of the Bidder, the Bidder is certifying that it has written permission from such person (or the employer of such person) to propose the services of such person in relation to the work to be performed in fulfillment of this requirement and to submit such person's resume to the Contracting Authority in connection with this solicitation. During the bid evaluation, the Bidder must upon the request of the Contracting Authority provide a copy of such written permission in relation to any or all non-employees proposed. Failure to comply with such a request may lead to disqualification of the Bidder's proposal.

[15] Bidders were not required to name all of the resources that it was proposing to use if its proposal was selected. Annex D-1 to the RPF, the Evaluation Criteria Matrix [ECM], made it a mandatory requirement that a bidder provide information on ten named individuals as example resources:

> ITSB recognizes that over the course of its contract with the Contractor, the specific resources that are supplied to deliver services to ITSB will change, as individuals move and progress in their careers. Accordingly, ITSB does not intend to examine and evaluate all individuals that the Bidder proposes to provide to satisfy the initial Function, Client Dedicated, and Task Authorization requirements defined in this RFP. However, ITSB

> will evaluate ten (10) resources as an example of the resources that the Bidder is able to supply.

[16] The Crown takes the position that the mandatory requirement in A.24 applies only to these ten specifically identified resources. As will be discussed in detail below, TPG interprets A.24 differently and argues that CGI's proposal was not compliant with this requirement.

D. *Transition*

[17] Article B.10.3 of the RFP, the model contract which the Contractor would execute, provided that "the Contractor is required to plan, manage, and execute an effective transition of ETS services from the existing resources to the Contractor's resources and a management structure provided by the Contractor." That Article further provided, subject to possible extensions, that the Contractor was to meet with ITSB within five working days after the contract was entered into to review the Transition Plan submitted, to adjust it as necessary, and to submit a finalized Transition Plan within five days following that initial review. The successful bidder was then to "begin to deliver services according to the requirements in this RFP no later than 60 working days following the acceptance of the Transition Plan." TPG alleges that CGI was also non-compliant with these requirements.

E. *Framework for Compensation*

[18] ETS 1 provided that the services rendered would be compensated on a level of effort basis, i.e. on the basis of a set daily or monthly rate, but it was also understood that the basis of payment could change such that TPG would be paid in terms of deliverables or result.

[19] This latter mode of compensation was described at trial as performance based service delivery or results based service delivery. For consistency, this compensation framework shall be referred to in this Judgment as a results based framework. In a results based framework, one is compensated based on the result achieved, regardless of the time or effort required to achieve that result. It is agreed that the compensation framework of ETS 1 never evolved from level of effort to a results based framework.

[20] Article 4.6.5 of the RFP specified that the successful bidder would be required to transition from a level of effort framework, to a results based framework, soon after being awarded ETS 2.

> At the outset of the Contract all services shall be provided by the Contractor on a "level of effort" basis. Where and when deemed applicable by ITSB, the Contractor may establish with ITSB an evolving basis of payment for various services through which the Contractor will be paid in terms of deliverables or results.
>
> This will result in a scalable basis of payment for a given Function or Project such that the actual amount paid, during any period, will be based on the volume of services and/or deliverables provided. It is also anticipated that the Contractor will be provided with a high degree of flexibility with respect to how the services are provided and will only be constrained by the acceptability of the deliverable and service levels. This will provide ITSB with improved results-oriented costing.
>
> ITSB will not undertake any such initiative if the resulting service is more expensive than the provision of the service in accordance with the previous basis of payment or where the initiative will result in increased risk to ITSB. The migration to "Results Based Services" will only take place when a Business Case is approved by ITSB.

Unlike what occurred with ETS 1, the evidence at trial was that the compensation arrangement in ETS 2 did migrate from a level of effort framework to a results based framework. It would

appear that this may not have been the success the government hoped for as Dominique Gagnon advised the Court that the RFP for the next contract, which has been or soon will be released, will provide for compensation on the basis of level of effort, as had been done with ETS 1.

F. *Contract Period*

[21] The model contract incorporated as part of the RFP provided that the contract would be effective from the date it issued for an initial period of three years. It also provided that the period could be extended at the option of the Crown by four one-year periods.

[22] The contract the Crown entered into with CGI issued on October 31, 2007, and it was extended for the full extent permitted. It will end on October 31, 2014.

V. Other Relevant Events Prior to the Evaluation

[23] In June 2006, prior to submitting its proposal, TPG entered into an agreement with most if not all of its subcontractors on ETS 1 [Authorization to Bid Agreement]. The Authorization to Bid Agreement had two key provisions. First, the subcontractor, either directly or through his or her company, agreed not to "offer services to, or assist in any way, another entity that is competing with TPG" on the RFP. Second, TPG agreed that if it was the successful bidder on the RFP, subject to the approval of PWGSC, it would contract with the subcontractor to provide services under ETS 2.

[24] Initially, the Authorization to Bid Agreement provided that it would end on the first of (i) TPG fulfilling its promise to enter into a subcontract for ETS 2, (ii) December 31, 2007, (iii) four months after the completion of the transition from ETS 1 to ETS 2, and (iv) PWGSC not

approving TPG entering into the subcontract for ETS 2. Subsequently, in June 2007, the Authorization to Bid Agreement was amended to provide that the parties' obligations continued until the latest of the four events, rather then the first of them.

[25] Mr. Powell testified in chief that TPG had two reasons for entering into the Authorization to Bid Agreement: (1) "we knew who we could provide at the time that the contract was awarded, that we would actually have the people to do the work," and (2) "we believe[d] that no matter how things turned out, we would all be in a stronger position as a team rather than individually." In cross-examination, he frankly admitted that these agreements also put TPG in a stronger position vis-à-vis others bidding for ETS 2:

> Q. Of course. You locked them up so they can't commit to work with CGI during the bid process, right, during the RFP process; that's number one?
>
> A. Right.
>
> Q. You lock them up so they can't commit to CGI during the transition process, which is you, and I have talked about is when CGI is to deliver the names of the resources.
>
> A. Right.
>
> Q. And so that helps you competitively in the bid to win?
>
> A. Absolutely.
>
> Q. But then you lock them up for 4 months after that.
>
> A. So if in fact CGI, as I said, had been even slightly ethical, they would have called me and said, "Let's work out a deal. We haven't got the people." And then Mr. Fleming and everybody else would have been far better off than dealing with CGI directly, so that was a benefit to them, a benefit to me.

[26] In addition to these agreements, TPG also came to an agreement with IBM – one of the other bidders. That agreement permitted both parties to bid some of the other's subcontractors. This increased the opportunities for both companies to participate to some degree on the new contract should either of them win the bid.

VI. The Evaluation of the Technical Proposals

[27] Between September 12 and 27, 2006, PWGSC conducted a technical evaluation of the proposals, facilitated by Mr. Robert Tibbo of Partnering and Procurement Inc. [PPI]. PPI guided the evaluation process. Mr. Tibbo's role was to ensure fairness in the process. Mr. Tibbo had assisted in developing the RFP itself, working closely with Mark Henderson, Director, Administrative Services and Contract Management, Business Planning and Management Services, ITSB, PWGSC, and Pierre Demers, a manager who reported to Mr. Henderson. Mr. Tibbo also assisted in developing answers to the questions posed by the bidders.

[28] The technical evaluation was conducted by a team of five evaluators: Mr. Bartlett, Mr. Bezanson, Mr. Boudreault, Mr. Swimmings, and Mr. Verma. These evaluators worked within various departments of ITSB and brought diverse experience and expertise to the team.

[29] The evaluation was conducted in two phases: first, the evaluators evaluated the individual bids independently. Then there was a consensus meeting where the individual scores were discussed and discrepancies were resolved by way of discussion among all five evaluators, leading to a single consensus score.

[30] In the individual phase, each evaluator was given an order in which to evaluate the bids that was independent of the others in order to reduce the potential for bias as a result of which bid was evaluated first, second, or last. At the consensus meetings the bids were evaluated in alphabetical order: CGI, IBM, and then TPG.

[31] At the kick-off meeting before the start of the individual evaluations, the entire evaluation process was explained to the evaluators, including the progression from the individual evaluation stage to the consensus stage. The evaluators were instructed to: (1) read the RFP; (2) read a proposal in its entirety; (3) re-read and score that proposal; and (4) repeat steps 2 and 3 for the other two bids.

[32] The evaluators were given binders with scoring sheets to record their score for each of the criterion, and there was a section for the evaluator to provide comments. A description of each and the basis for its evaluation from the RFP itself were listed. For each mandatory criterion, there were boxes that the evaluators were to check off labelled "yes" or "no" to indicate compliance. For a rated criterion, there was a box for the evaluator to record the score, and the range of possible scores was indicated in brackets to the right of the box.

[33] At the kick-off meeting, evaluators were told to keep in mind that during both the individual and consensus sessions, they should consider that a losing bidder would expect a "justifiable reason for the assigned score that any other reasonable person would concur with," for any instance in which "the proposal did not receive the maximum rated points available."

[34] Evaluators were also given a code of conduct and instructed not to discuss any of the evaluation process or the results with anyone outside of the team. During the evaluation, the evaluators attended at the MacDonald Cartier Data Centre. The evaluators were seated in the same room with all of their materials during the evaluation process; however, there was no discussion (other than to ask questions at scheduled progress meetings) during the individual phase of the evaluation. None of the evaluators' materials left the room until the entire evaluation was completed.

[35] During the first three days of the individual evaluation stage (September 13-15), there were meetings where the progress of each evaluator was noted and identified issues were discussed. After September 15, no further issues were identified. Progress meetings continued to be held, but only to monitor the progress of the evaluation.

[36] After all of the evaluators had completed their individual evaluations of each of the bids, the evaluation moved to the consensus phase. At this stage, Mr. Tibbo led the team through each of the bids, criterion by criterion and a single consensus score was reached for each. This score was recorded in a master record which was displayed on a screen for the evaluators to see as the consensus meeting progressed. Where there was no discrepancy between the scores of the individual evaluators, little or no discussion ensued. Where there was a discrepancy, Mr. Tibbo led the evaluators in a discussion of the results and the group arrived at a score on which all of the evaluators agreed. This score was displayed on screen and a paper backup copy was maintained by Mr. Tibbo. In most instances, the individual evaluators also recorded the consensus score in their individual scoring sheets.

[37] During consensus, each bid was evaluated start to finish before moving on to another bid. No bid was explicitly compared to any other bid at any time.

[38] The entire technical evaluation process ended on September 27, 2006. The master copy of the consensus scores was printed out on October 2, 2006 and provided to Mr. Hamid Mohammad, the Contracting Authority for PWGSC.

VII. Post-Technical Evaluation

[39] Following the technical evaluation, there was a meeting on October 27, 2006 with Hamid Mohammad and the evaluators to discuss the results of the evaluation and to clarify issues raised by Mr. Mohammad with the substantiation of some of the scores. During this meeting the evaluators provided some comments supporting their scores but at no time were any of the scores changed.

[40] Following the technical evaluation, the financial component of the evaluation was completed on November 9, 2006. No one involved in the technical evaluation was involved in the financial evaluation.

[41] On February 26, 2007, TPG first became aware that CGI was the winning bidder and was to be awarded the contract for ETS 2.

VIII. CITT Complaints

[42] Between March 23, 2007, and October 31, 2007, TPG launched four complaints with the Canadian International Trade Tribunal [CITT] alleging: unfairness and reasonable apprehension of bias (complaint 1 filed March 23, 2007), alteration of evaluation methodology after bid closing (complaint 2 filed June 27, 2007), unfair process and reasonable apprehension of bias in the evaluation of the bids (complaint 3 filed August 29, 2007), and failure to conduct the evaluation in accordance with the RFP in relation to reference checks (complaint 4 filed October 5, 2007).

[43] The first complaint was rejected as being time-barred: [2007] CITT No 21, April 3, 2007. The Federal Court of Appeal ultimately allowed TPG's application for judicial review, but it was determined that TPG's complaint was premature.

[44] The second complaint was found to be valid: [2007] CITT No 91, November 2, 2007. The CITT found that the evaluation methodology had been changed after bidding closed for seven requirements: 1.3.2.4.11.4, 1.3.2.11.10, 1.3.3.4.11.4, 1.3.3.4.11.10, 1.3.4.2.11.4, 1.3.4.2.11.10, and 3.6.3. It found that the evaluators had allotted scores of 0, 1, or 2 for those seven requirements despite 0 or 2 being the only permissible scores. However, no remedy was recommended because the changed methodology was applied equally to all 3 proposals and because even if one scored TPG's proposal most favourably and CGI's proposal least favourably, the ultimate result did not change. The CITT also determined that there was no indication that PWGSC did not correctly follow the appropriate respective rating scheme for any other requirements.

[45] The third complaint was rejected without the tribunal conducting an inquiry: [2007] CITT No 108, September 12, 2007. In its view, the issues raised had already been dealt with in TPG's first complaint, and there was no reasonable basis for alleging bias or a conflict of interest.

[46] The fourth complaint was rejected on its merits: [2007] CITT No 116, December 20, 2007. The CITT found that PWGSC was required to check the references of all bidders to determine whether the mandatory requirements had been met, but that it was not unreasonable for PWGSC to check the references in the manner it did. There was nothing in the RFP that described how or when the reference check should have been performed, other than requiring that the references be checked before the contract was awarded.

IX. Transition

[47] The new contract was officially awarded to CGI on October 31, 2007. Letters informing both IBM and TPG of the contract award were sent on November 5, 2007.

[48] As required by ETS 2, CGI submitted its transition plan dated November 15, 2007. The plan was revised following feedback and the final transition plan was ultimately accepted on November 28, 2007, marking the start of the transition period.

[49] ETS 1, the contract with TPG, ended on December 21, 2007.

[50] ETS 2 provided CGI with 60 working days to complete the transition of all functions, with the option for up to three, 15 calendar day extensions. Two extensions requested by CGI were granted by PWGSC. CGI completed the transition of all functions on March 26, 2008.

X. History of this Litigation

[51] In 2008, TPG commenced this action for damages. The claim as then constituted was based on allegations relating to the RFP and the hiring of TPG's subcontractors by CGI. TPG claimed damages for breach of contract, inducing breach of contract, intentional interference with economic interests, and negligence.

A. *Motion for Summary Judgment*

[52] In March 2010, the Crown filed a motion for summary judgment. Justice Near granted the motion and dismissed the claim in its entirety: *TPG Technology Consulting Ltd v Canada*, 2011 FC 1054 [*TPG v Canada No 1 FC*]. That decision was reversed by the Federal Court of Appeal on the basis that the motion judge misapplied the test for summary judgment: *TPG Technology Consulting Ltd v Canada*, 2013 FCA 183 [*TPG v Canada No 1 FCA*].

[53] The Federal Court of Appeal was of the view that the motion judge failed to appreciate that the claim for breach of contract was based not only on allegations of bias and inexplicable changes to the evaluations but, in substance, on an allegation that the bids were not fairly evaluated. Contrary to the motion judge's finding, the Court of Appeal concluded that the evidence adduced "did not squarely answer all questions about the fairness of the evaluation process."

[54] The motion judge, relying on *Double N Earthmovers* concluded that events that occurred during the transition could not form the basis of a breach of contract claim by TPG. The Federal Court of Appeal took the view that this finding was based on a misapprehension of the claim of TPG. In its view, the claim of TPG was that the Crown breached the RFP in failing to declare that CGI's bid was non-compliant because, to the knowledge of the Crown, CGI had failed to accurately certify that the persons to perform ETS 2, were its employees or persons who had consented to being named by CGI. In the opinion of the Federal Court of Appeal, TPG was relying on events that occurred during transition to prove this non-compliance by CGI. It found that the RFP was ambiguous and therefore the "merits of TPG's proposed interpretation cannot be determined in the absence of a full evidentiary record."

[55] After it was awarded ETS 2, CGI actively recruited the resources who were then working for TPG on ETS 1. Each had executed an Authorization to Bid Agreement agreeing that they would not work on ETS 2, except for TPG, for sometime following the transition. TPG alleged that the Crown induced these persons to breach this retention agreement and accept employment with CGI. The motion judge, on the basis of *Double N Earthmovers*, found that once the contract was awarded to CGI, the Crown's obligations to TPG were discharged and the claim was not sustainable. The Federal Court of Appeal described this as a "relatively weak claim" but found that it involved no additional evidence from the breach of contract claim and thus ought to be permitted to proceed.

[56] Lastly, the motion judge dismissed the claims in tort for inducing breach of contract, unlawful interference with economic interests, and negligence on the basis that there was no

evidence to support them. The Federal Court of Appeal found that these "claims appear to be substantially weaker than the claims in contract, but they too are based largely on the same factual allegations … [and there is] no practical reason at this stage not to permit them to continue to trial if TPG is so advised."

[57] The motion judge made one other important finding that was not the subject of the appeal. He dismissed the submission of the Crown that TPG was precluded from bringing the action on the basis of the doctrine of *res judicata*, or issue estoppel. The Crown submitted that these doctrines applied because of the four previous CITT complaints filed by TPG against the Crown relating to the RFP. The Crown asserted that these complaints challenged the fairness of the evaluation and awarding of ETS 2 to CGI, the very issues raised in the litigation.

[58] The motion judge stated that although he found some merit to the Crown's submission, he was "not comfortable granting a summary judgment to the Crown on the basis of issue estoppel without examining the submitted evidence." He also dismissed the submission that the action was precluded by cause of action estoppel, or *res judicata*, because:

> TPG could not have, and it cannot be said that TPG should have, raised all of the causes of action that constitute the present litigation before the CITT. TPG's present action is based on breach of contract (for which I would be more likely to accept the *res judicata* argument) and tort, including the tort of inducing breach of contract, unlawful interference with economic interests, and negligence. The tort claims could not have been raised before the CITT, for the CITT clearly does not have the jurisdiction to deal with them. TPG's position with respect to the breach of contract claim is much weaker since the obligations of the contract that TPG argues existed between itself and the Crown consist almost entirely of the duty to deal fairly. This issue was essentially before the CITT. However, TPG submits that all of the facts relating to the evaluation of the bids were solely in the possession

> of the Crown, and were not obtained by TPG until 2008, after the complaints to the CITT. I accept TPG's submission that in this respect, TPG relies on "fresh" evidence that was not capable of being discovered at an earlier stage.

B. *Consent Order Restricting Claim*

[59] An Order issued on February 19, 2014, by the Case Management Prothonotary, on consent, "in consideration for the trial commencing prior to September, 2014" [Consent Order]. The Consent Order provided that the trial was set down for 25 days beginning on May 12, 2014. TPG agreed to limit the action to its claim that the Crown had breached Contract A. Fresh as Amended pleadings were filed by the parties. The Consent Order reads, in relevant part, as follows:

> [T]he following claims have been formally withdrawn by the Plaintiff, with prejudice, and shall form no part of the allegations against the Defendant, notwithstanding any ambiguous language in the pleadings that may be capable of a contrary interpretation:
>
> (i) all allegations of conflict of interest;
>
> (ii) all claims for punitive damages;
>
> (iii) all allegations of negligence;
>
> (iv) all allegations of bad faith, including all claims of misconduct, bias, fraud or unconscionability;
>
> (v) all allegations related to process as it relates to the evaluation of the TPG Technology Consulting Ltd. ("TPG") bid;
>
> (vi) all allegations that the RFP was drafted, or re-drafted, to favour CGI or prejudice TPG; and
>
> all allegations that the Defendant induced a breach of contract or interfered with the Plaintiff's economic interests.

XI. Witnesses at Trial

[60] TPG called six fact witnesses (Donald Powell, Stan Estabrooks, Brian Fleming, Valerie Bright, David Watts, and Perry Henningsen) and two expert witnesses (Tom McIlwham and Greg McEvoy). Following a *voir dire*, the court made the following ruling regarding the scope of evidence and qualifications of Mr. McIlwham:

> I am satisfied, based on the evidence adduced in the *voir dire*, that Mr. McIlwham through experience in the implementation, delivery and management of IT services for roughly 40 years has gained specialized knowledge and the court qualifies him as an expert in performance metrics and Service-Level measures for IT services, and as such, he may provide opinion evidence on the following: One, what "performance metrics" and "Service Level measurements" are understood to be in the IT industry; two, the application of performance metrics and Service-Level measurements to Service-Level contracts; and three, whether the performance metrics and Service-Level measurements proposed by the Plaintiff were relevant and could reasonably be expected to be used by ITSB in the Service-Level contractual framework.

[61] The Crown called 10 fact witnesses (Mark Henderson, Robert Tibbo, Don Bartlett, Vikas Verma, Jim Bezanson, Louis Boudreault, Paul Swimmings, Michele Charette, Dominique Gagnon, and Luc Boileau) and one expert witness, Dave Clarke.

[62] Both Mr. McEvoy and Mr. Clarke are chartered accountants and chartered business valuators and were both qualified as experts in business valuation and damages quantification.

[63] There were occasions when a witness was argumentative or evasive; however, all of the witnesses, except Luc Boileau, were found to be generally credible. Mr. Boileau's credibility was damaged when he repudiated some, but not all of the express words written by him in his

notebook with the explanation that notwithstanding what he wrote, it was merely an *aide memoire* to say the exact opposite of what he had written:

> As I said, this is to remind me, right? I'm very busy. I write stuff without thinking. As long as I have a word or two that reminds me what I should say, then I talk about it, but don't take my notes as being black and white.

I do not accept that explanation. It flies in the face of common sense and logic that one would write entries that express exactly what one intends and others that express exactly the opposite of what one intends - all in the same record and made on the same day.

[64] The five evaluators each testified and did their best to recall the events and discussions that occurred some eight years before. Each appeared proud of the work he did in the evaluation process and accordingly, on occasion, bristled when it was suggested that he had failed in that task. Such a response is not unexpected. Similarly, it was not unexpected when Mr. Powell, who has spent a considerable amount of time and money in this litigation, occasionally offered a strong opinion on the deficiencies of the process.

[65] The consensus sessions which formed a great part of the evidence was attended by the evaluators, Mr. Tibbo who acted as the facilitator, and Mr. Henderson. The uncontradicted evidence was that Mr. Henderson took no part in these sessions, except to be present. He testified that his role was to "oversee the process." He was the senior executive primarily responsible for the RFP and its resulting contract. In fact, he retired the very day he recommended to Treasury Board that ETS 2 be accepted by the government. Because he had no

direct involvement in the consensus process, the Court prefers the evidence of the five evaluators over his evidence where there is any disagreement.

[66] The evidence of the five evaluators differed from time to time on minute detail; however, on the broad picture, their evidence was largely consistent.

[67] In the end, given the Court's interpretation of the RFP, and conclusions on the issues raised, much of the evidence presented was not relevant. Neither party could have known that at the commencement of trial.

XII. Issues To Be Determined

[68] The following questions arise in the action as now framed:

1. Does the CITT have exclusive jurisdiction to hear and determine TPG's complaint and, if so, is this a complete defence to this action?
2. Was TPG's proposal evaluated unfairly?
3. Was CGI's bid non-compliant, and if so, did the Crown have an obligation to disqualify it or terminate the contract it had been awarded?
4. If TPG is entitled to damages, what is the appropriate quantum?

XIII. CITT as a Defence to the Action

[69] For the reasons that follow, judgment must be awarded in favour of the Crown. The Federal Court has concurrent jurisdiction with the CITT in actions against the Crown related to procurement matters; however, in this case, the Court will decline to exercise that jurisdiction.

The CITT is a specialized tribunal dealing specifically with government procurement issues and it has a wide discretion in terms of available remedies. The appropriate recourse in the Federal Court, given the limited scope of the action as now constituted, is judicial review of a decision of the CITT on the breach of Contract A issues raised herein.

A. *Jurisdiction of the CITT*

[70] The Crown's primary defence is that the CITT has exclusive jurisdiction to deal with TPG's allegations in this action. The CITT derives its powers from the Canadian International Trade Tribunal Act, RSC 1985, c 47 (4th Supp) [CITT Act] and the Crown submits that Parliament intended it to be a complete and exhaustive statutory code for dealing with procurement complaints. The Crown points out that the Federal Court of Appeal has determined that the CITT is a specialized administrative tribunal with expertise in procurement matters and that recent decisions from the CITT address allegations similar to those raised by TPG in this case.

[71] TPG responds that Justice Near in *TPG v Canada No 1 FC* has already determined that the CITT does not have exclusive jurisdiction to resolve disputes regarding allegedly unfair or improper procurement processes, particularly where the cause of action is breach of contract or tort. It points out that the Crown did not appeal that part of his decision to the Federal Court of Appeal. It submits that the issue of the jurisdiction of the CITT as a complete defence to this claim is *res judicata*: It has already been decided.

[72] The Crown replies that the issues in the litigation differ substantially from those when the matter was before Justice Near. Specifically, it notes that there are no longer any claims of tort or bad faith; the action has been narrowed solely to a claim for breach of Contract A. Additionally, it says that TPG had all of the information it needed with respect to the current allegations by February 26, 2008, when it received all of the scoring sheets and the list of the criteria where CGI's winning proposal obtained a higher score than TPG and the rationale for those results. It submits that TPG could and should have brought a complaint to the CITT at that time rather than instituting a claim in the Federal Court. The Crown submits that failing to engage with the more efficient CITT process has delayed the adjudication of the claim until the eve of the end of ETS 2. This, the Crown asserts, puts it in a position where it may have to pay both CGI and TPG when the claim could have been resolved much sooner, potentially reducing its liability.

B. The Effect of TPG v Canada No 1 FC

[73] As noted above, the issues before this Court are much narrower in scope than those before Justice Near in *TPG v Canada No 1 FC*. He found that the facts of the action, as it was then constituted, did not fall within the jurisdiction of the CITT because TPG was alleging "causes of action not provided for under the CITT Act." He further found that the causes of action then alleged had no adequate alternative remedy other than a suit in the Federal Court. As a consequence, the principle that the Court should not assume jurisdiction if there is an adequate alternate remedy provided by statute did not apply.

[74] Justice Near also noted that the CITT Act does not expressly state that no civil proceedings lie against the Crown, whereas in other statutes that intention is made explicit. Finally, he noted that the CITT itself has held that issues of "contract administration or contract performance do not fall within its jurisdiction;" rather, its primary function is to determine compliance with Canada's obligations under specific international and domestic trade agreements, not the resolution of common law claims against the Crown.

[75] While I agree with many of Justice Near's observations, in my view, where the only claim being raised is a breach of Contract A because of unfairness in the procurement process and the acceptance of a non-compliant proposal, the Federal Court should defer to the CITT which has jurisdiction to deal with both.

C. *Framework for Determining Jurisdiction*

[76] The analytical framework for determining issues of jurisdiction in the administrative context was recently set out by the Federal Court of Appeal in *Assoc des compagnies de téléphone du Québec Inc v Canada (Attorney General)*, 2012 FCA 203, [2012] FCJ No 1162 at paras 26-29 [*Assoc*]. In that case, the appellants brought a motion in the Federal Court of Appeal to stay an order of the Canadian Radio-television and Telecommunications Commission [CRTC], pending an appeal of its decision to the Governor in Council, without bringing an appeal on the merits to the Federal Court of Appeal. While the context of *Assoc* differs from that here, the arguments addressed by the Court are similar to those raised in this case in that the respondent argued that there was an adequate alternative forum.

[77] The Federal Court of Appeal stated that one must ask three questions. First, does the Court have jurisdiction such that it can consider the matter placed before it? Second, are there any discretionary bars against exercising jurisdiction (such as adequate alternative relief or the existence of another forum which possesses superior expertise)? Third, what result should the Court reach on the merits? That is the framework within which the Crown's defence will be assessed.

D. *Does the Court have jurisdiction such that it can consider the matter placed before it?*

[78] The Crown accepts that that the Federal Court has jurisdiction over the action as framed. Section 17 of the *Federal Courts Act*, RSC 1985, c F-7 vests the Federal Court with "concurrent original jurisdiction in all cases in which relief is claimed against the Crown," except as otherwise provided in other sections of the *Federal Courts Act*, or any other Act of Parliament. There is nothing in the CITT Act which explicitly ousts the concurrent original jurisdiction of the Federal Court in relation to proceedings against the Crown – the Crown concedes as much. This is similar to what the Federal Court of Appeal concluded on the facts in *Assoc*. Consequently, the question is whether this Court should nevertheless decline to exercise that jurisdiction.

E. *Are There Any Discretionary Bars against Exercising Jurisdiction*

[79] The Crown submits that the Court should decline to exercise its jurisdiction in CITT matters related to procurement. In its view, despite the absence of an explicit ouster of jurisdiction in the legislation, it can be inferred that Parliament intended that the CITT be a complete and exclusive body to hear and determine complaints related to procurement: *Vaughn v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at paras 2, 59-61 [*Vaughn*].

[80] The Federal Court of Appeal in *Lebrasseur v Canada*, 2007 FCA 330, [2007] FCJ No 1365 at para 18 [*Lebrasseur*] interpreted *Vaughn* as saying:

> [W]here an individual has recourse to a statutory grievance scheme such as Part III of the Royal Canadian Mounted Police Act to seek a remedy for a complaint arising from a workplace event, the Courts generally should decline to deal with claims for damages arising out of the same event, even if the statutory grievance scheme does not expressly oust the jurisdiction of the courts. Although the courts retain the discretion to hear such claims, they should exercise that discretion only in exceptional cases. The scope of the exception remains undefined, although it is suggested that an exception might be found if the integrity of the grievance procedure has been compromised (which may occur, for example, in certain cases where a whistleblower is alleging employer retaliation). [emphasis added]

[81] The CITT Act provides a scheme under which parties may seek a remedy for complaints arising out of alleged breaches by the Crown of its procurement processes. As noted in *Assoc*, however, the mere existence of an alternative administrative scheme does not, by itself, oust the Court's jurisdiction: *Assoc* at para 26. The CITT is a tribunal which specializes (among other things) in procurement issues. This is exemplified by its decision in TPG's second complaint where the CITT expressly found unfairness in the application of specific requirements in the RFP – a reincarnation of the very argument that TPG is making here.

[82] The Federal Court of Appeal has held that Parliament has conferred on the CITT a "broad remedial discretion" and that it has "expertise in selecting an appropriate remedy." *Envoy Relocation Services v Canada (Minister of Public Works and Government Services)*, 2007 FCA 177, [2007] FCJ No 627 at para 7.

[83] In *Siemens Westinghouse Inc v Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2001] FCJ No 1184 [*Siemens*] at para 21, the Federal Court of Appeal also stated that the CITT was created to deal with:

> complex legal and factual issues that demand specialized expertise in the fields of economics, business and procurement practices. The detailed criteria in the RFP and the second evaluation handbook have to be interpreted in addition to intricate contractual and legislative provisions. In other words, in this case the CITT had to decide whether the tender documents properly identified the requirements and evaluation criteria in the RFP and whether the procurement was conducted according to them and the applicable contracts, trade agreements and legislation. This complex exercise demands unique expertise and experience and is the everyday work of the Tribunal. [emphasis added]

[84] In *Siemens*, the applicant brought an application for judicial review of a decision of the CITT dismissing a complaint that a re-evaluation of the technical merits of the proposals for the procurement in issue was conducted unfairly. The Federal Court of Appeal's comments occurred in the context of determining the standard of review of a CITT decision, but it noted certain factors that are relevant to the jurisdictional analysis, as they relate to the adequacy of the CITT as an alternative forum:

> The expertise of the CITT in these matters is undoubted. Since 1995, it has dealt with more than 375 procurement complaints. The CITT became Canada's bid challenge authority pursuant to Article 1017 of the North American Free Trade Agreement (NAFTA) on January 1, 1994, replacing its predecessor under the Canada-United States Free Trade Agreement, the Procurement Review Board of Canada. The CITT also became the bid challenge authority for the Agreement on Internal Trade (AIT) on July 1, 1995 and for the World Trade Organization Agreement on Government Procurement (AGP) on January 1, 1996. Legislation has been enacted to ensure that procurements are conducted openly and fairly, and the CITT is responsible for overseeing all of this activity. The CITT consists of a Chairperson, two Vice-Chairpersons and not more than six other permanent members

appointed for terms of up to five years. Assisting the members are staff experts with in-depth knowledge of procurement practices.

Hence, it is clear that Parliament meant this expert tribunal to be responsible for overseeing the procurement activities of the government and that the Courts' review of their decisions, except for jurisdictional and other exceptional cases, ought to be on the standard of patent unreasonableness, which means that, unless they are clearly irrational, they must stand.

Also to be considered, in addition to comparative expertise, is the legislative language. The power granted to the CITT to review the procurement process demonstrates that it is to be afforded wide latitude. In order to comply with the AIT, which requires governments to promote "fair, open and impartial procurement procedures"(see Article 514(2)), bid protest procedures were created. Section 30.11 of the CITT Act allows complaints to the Tribunal on "any aspect of the procurement process". Subsection 30.14(2) of the CITT Act also mandates that the Tribunal shall determine the validity of a complaint on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been or are being observed. Section 11 of the Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602 (the Procurement Regulations) further specifies that, in conducting an inquiry into a complaint, the CITT is to determine whether the procurement was conducted in accordance with the NAFTA, AIT, or AGP, whichever is applicable. This is a broad authority indeed.

The language of the CITT Act also indicates that the Tribunal was designed to grapple with issues affecting the interrelated and interconnected rights and interests of different constituencies. In this connection, the CITT has been granted certain policy and advisory functions in addition to its supervisory role in the procurement field. For example, section 18 of the CITT Act provides that the Tribunal is to conduct inquiries into, and prepare reports on, any economic, trade or commercial matters referred to it by the Governor in Council. This advisory function is clearly distinguishable from the regular functions of a court in adjudicating legal rights. Although the Tribunal was not acting under section 18 or an analogous section of the CITT Act in the matter presently under review, its legislated role in policy formation, as suggested in Mattel (at para. 31), reflects upon the scope of the CITT's expertise and suggests a degree of deference be accorded to that Tribunal by this Court.

> There is no privative clause in the statute creating the CITT. Nor is there any specific right of appeal given. It appears, therefore, that the usual judicial review provisions of sections 18 to 18.5 (except subsection 18.4(2)) and section 28 of the *Federal Court Act* govern the scope of review of the CITT's decisions on procurement. [emphasis added]

[85] In short, the CITT is a highly specialized tribunal which deals daily with complex issues relating to procurement and the relationship between RFPs, legislation, and domestic and foreign trade agreements.

[86] On the other hand, as Justice Near observed at para 43 of *TPG v Canada No 1 FC*, unlike other federal statutes, there is nothing in the CITT Act that specifically prohibits civil proceedings against the Crown. Moreover, the comments of the Federal Court of Appeal above come in the context of a judicial review application. The CITT's primary function is the determination of whether Canada has breached its obligations under specified international and domestic trade agreements. This is clear from section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602, which states that "if the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement, the CCFTA, the CPFTA, the CCOFTA or the CPAFTA applies" [emphasis added].

[87] This primary role is also evident in the decisions in relation to the four complaints initiated by TPG prior to this action. The CITT itself states that it is "required to determine whether the procurement was conducted in accordance with the applicable trade agreements,

which, in this case, are the Agreement on Internal Trade, the North American Free Trade Agreement and the Agreement on Government Procurement" [NAFTA]: [2007] CITT No 91 at para 11.

[88] However, certain articles of those agreements incorporate concepts of the fairness of the evaluation – for example, Article 1015(4)(d) of NAFTA provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation." Therefore, fairness of the evaluation of the bids and compliance with the terms of the RFP are all within the specific jurisdiction of the CITT.

[89] Although breach of the terms of the RFP give rise to a civil "breach of contract claim" by virtue of breaching the terms of Contract A, the thrust of TPG's claim is that it was evaluated unfairly or not in accordance with the terms of the RFP. The thrust of the claim is set out in the written summary of its closing argument as follows:

> The express terms of Contract A are based on the tender documents. In this case, the tender documents establish an express obligation to terminate Contract B if the winning bidder does not have the required resources at transition. This express term of Contract A was breached in this case.
>
> Contract A also includes implied terms:
>
> i) a duty to treat all bidders fairly and equally;
>
> ii) a duty not to accept a non-compliant bid;
>
> iii) a duty not to rely on undisclosed terms in evaluating bids;
>
> iv) a duty to enter into contract B based on the terms in the tender documents.
>
> All of these implied terms were breached in this case.

[90] TPG argues that the CITT has itself held that issues of contract administration or contract performance do not fall within its jurisdiction: *Airsolid Inc v Canada (Public Works and Government Services)*, PR-2009-089 (18 Feb 2010) [*Airsolid*]. In that case, a bidder discovered after the procurement process and after the contract was awarded to the winning bidder, that the winning bidder supplied a boat that was 10 cm shorter than the one requested in the RFP. PWGSC was notified, and it responded that the bid was compliant on its face (the winning bidder submitted a picture of the boat which indicated its length met the requirements set out in the RFP), and that in any event, PWGSC would abide by the contract in force between it and the winning bidder. The CITT determined that failure to provide the boat required by the awarded contract went to issues of contract performance and not to issues of procurement. It was on that basis that the CITT held it had no jurisdiction to determine the complaint.

[91] This suggests that the Court should at least exercise its jurisdiction in relation to TPG's allegation that PWGSC accepted a non-compliant proposal. However, unlike the situation in *Airsolid*, the non-compliance of CGI's proposal is alleged by TPG to have been known by PWGSC prior to contract award. Moreover, TPG concedes that it has no claim in relation to Contract B between PWGSC and CGI. TPG's evidence of the transition phase goes only to the allegation that PWGSC accepted a non-complaint bid and it knew it.

[92] Accordingly, this evidence goes to the unfairness of the overall evaluation during the procurement process. In *Airsolid*, there was no evidence to suggest that PWGSC knew that the bid was non-compliant and therefore there was nothing unfair about the procurement process itself. Once the contract was awarded, any non-compliance would be dealt with as between

PWGSC and the winner of Contract B. By contrast, in this case, TPG alleges that CGI was non-compliant (as demonstrated by its actions after contract award) and that at all material times before contract award, PWGSC was aware of CGI's non-compliance. As TPG's claim relates to the unfairness of PWGSC's actions during the procurement process itself, the CITT has jurisdiction to hear this aspect of TPG's claim as well.

[93] I find therefore that no aspect of TPG's claim falls outside of the jurisdiction of the CITT. The Federal Court of Appeal has consistently commented on the specialized nature and expertise of the CITT. TPG ought to have brought a complaint before the CITT, as it had done four previous times. Its proper remedy before the Court in this case is applying for judicial review of the CITT's decision.

F. *Adequate Alternative Remedies*

[94] The second discretionary bar to exercising jurisdiction is the adequacy of alternative remedies.

[95] The CITT has been empowered with a broad remedial discretion; however, the CITT only has the power to "recommend" remedies and it is up to the government institution to implement those recommendations to the greatest extent possible. It is unclear whether or not the CITT's recommendations would be enforceable by a complainant as against the government institution. However, in my view, TPG still had an obligation to exhaust its possible avenues of recourse with the CITT and show that it could not obtain an adequate remedy before proceeding to this Court.

[96] The Federal Court of Appeal set out the doctrine of alternative remedies in the administrative context in *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61, [2010] FCJ No 274 at paras 30-33 [*CB Powell*]:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point [references omitted].
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> …
>
> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted

> prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin, supra*; *Okwuobi, supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
>
> [emphasis added]

[97] These comments from the Federal Court of Appeal were made in the context of determining whether the Court had jurisdiction to judicially review a decision of the President of the Canada Border Services Agency; however, its comments may be interpreted broadly and are applicable when determining whether the Court should entertain this action. This is supported by para 4 where Stratas J.A. states, "Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called 'jurisdictional' issues."

[98] In this case, as in *CB Powell*, the parties did not argue that there were any exceptional circumstances permitting early recourse to the courts. Mr. Powell reiterated throughout his testimony that the CITT was not useful:

> A. I decided that CITT was not a useful mechanism because it has no discovery capability at all.
>
> Q. In your words, Mr. Powell, you decided that CITT wasn't too interested in getting to the bottom of this matter and you decided it was a waste of time?
>
> A. That would be about right.

> Q. And instead of bringing a complaint to the CITT then you launched the action that brings us here to this court today?
>
> A. Yes, I concluded we needed a lot more information about what happened to make our scores go from almost perfect to terrible, and I didn't think we would get that through the CITT process.

[99] Mr. Powell may be right about the differences between court proceedings and proceedings before the CITT; however, I note that section 17 of the CITT Act vests the CITT with all of the powers of a superior court of record including the power to compel witnesses to attend, and "other matters necessary or proper for the due exercise of its jurisdiction."

[100] In any event, the doctrine of adequate remedies does not inquire as to how close the administrative proceedings mirror court proceedings. It only requires that there be an adequate remedy available to the complainant. While Mr. Powell was of the view that "CITT is about trade agreements, it's not about civil damages," the reality is that the CITT is empowered to recommend that damages be paid as a remedy.

[101] Section 30.15 of the CITT Act empowers the CITT to "recommend such remedy as it considers appropriate" including: issuance of a new solicitation for the designated contract; re-evaluation of the bids; termination of the designated contract; award of the designated contract to the complainant; or compensation in an amount to be specified by the tribunal" [emphasis added]. Undoubtedly this is a wide discretion, and compensation for any found breach is a remedy open to the CITT.

[102] Subsection 30.15(3) of the CITT Act sets out the factors the CITT is to consider in recommending a remedy including: the seriousness of any deficiency in the procurement process; the degree to which the complainant or other interested parties were prejudiced; the degree to which the integrity and efficiency of the procurement system was prejudiced; whether the parties acted in good faith; and the extent to which the contract was performed.

[103] Section 30.18 reads that "where the [CITT] makes recommendations to a government institution under section 30.15, the government institution shall, subject to the regulations, implement the recommendations to the greatest extent possible" [emphasis added]. While this is mandatory language, there is also a caveat as to the extent to which a government institution would have to implement a remedy. Further, subsection 30.18(2) contemplates a situation where a government institution may not implement the recommended remedy at all. In such a situation, the government institution must advise the CITT of the extent to which it intends to implement the recommendations, and if it does not intend to implement them fully, the reasons for not doing so.

[104] Mr. Powell's testimony reveals his reservation as to the enforceability of damages that the CITT might be able to award TPG and his overall impression of the value of the CITT process:

> Q. My point was simply this, sir: You got the material again in July, you knew you could bring a CITT complaint, you knew you had to do it within 10 days and you declined.
>
> A. I would reserve judgment on that, but it's clear that CITT is a very minimum mechanism. They can't impose damages really, or at least not enforceable damages. You get no power of discovery. You can't compel testimony. It was a waste of time.

> Q. I wonder if I could ask for a short reserve on your judgment and get an answer to that question now.
>
> A. Which question?
>
> Q. You agree with me that when you received the material again in July, the financial and the technical scores, you knew you could bring a complaint to CITT within 10 days and you declined to do so?
>
> A. Yes, it was a waste of time.

[105] Irrespective of Mr. Powell's views of the value of the CITT process, it was an avenue of recourse available to TPG. By February 26, 2008, TPG had received scoring sheets for each of the five evaluators, consensus scores for the evaluation of the technical proposal, and a list of those rated criteria where the winning proposal obtained a higher score than TPG together with the rationale for those scores. TPG had all of the information it needed to launch a complaint with the CITT on the same grounds on which this action is based, and in the words of its owner, it declined to do so because, in its view, "it was a waste of time."

[106] With respect, the qualms Mr. Powell had about the CITT process are not the types of exceptional circumstances contemplated by the exception to the adequate alternative remedy discretionary bar. He had the opportunity to bring a complaint to the CITT, and if he felt that either the process or the remedy were unreasonable he could have brought an application to this Court for judicial review of the CITT's decision. Instead, TPG declined to engage with the process at all with respect to the matters of which it now complains. This voluntary refusal to engage with the administrative process does not entitle TPG to bypass it and choose the Court as the preferred forum.

[107] Given that there was an adequate alternative remedy available, which TPG chose not to employ, it is irrelevant that the CITT Act does not explicitly prohibit parallel civil proceedings against the Crown.

[108] In summary, I find that the Federal Court has jurisdiction to hear this claim against the Crown by virtue of section 17 of the *Federal Courts Act*. However, this is a case in which the Court should not exercise its jurisdiction because the CITT is a more appropriate forum that specializes in dealing with all of the issues raised by TPG in this action. Further, it is capable of recommending the remedy being requested by TPG – compensation. TPG therefore had an obligation to exhaust its potential remedies before the CITT before launching an action in the Federal Court. In the face of a refusal to exercise that avenue of redress, this Court ought not to intervene.

[109] Notwithstanding that this finding disposes of the action, I shall consider the two principal claims of TPG relating to a breach of Contact A, in the event that there is an appeal and my view is not upheld.

XIV. Was TPG's Proposal Fairly Evaluated?

[110] TPG alleges that its bid was evaluated unfairly and consequently, its scores on 9 of the rated requirements were unreasonably reduced in the consensus process from those initially awarded individually by the evaluators. TPG submits that for the 9 requirements in issue, there was ambiguity in the language of the RFP which led to inconsistent approaches to evaluation. It says that in such a situation, the evaluators ought to have given the benefit of the doubt to all

bidders and awarded the maximum number of points available. Under the benefit of the doubt approach, TPG would have won the technical evaluation. TPG further alleges that the score reductions were not adequately substantiated and it asks the Court to draw an adverse inference against the Crown.

[111] The Crown submits that the majority of TPG's allegations as to the evaluation have largely been abandoned by the Consent Order pursuant to which the following allegations were abandoned:

1. all allegations of conflict of interest;
2. all claims for punitive damages;
3. all allegations of negligence;
4. all allegations of bad faith, including all claims of misconduct, bias, fraud, or unconscionability;
5. all allegations related to the process of the evaluation of the TPG bid;
6. all allegations that the RFP was drafted, or re-drafted to favour CGI or prejudice TPG; and
7. all allegations that the Defendant induced a breach of contract or interfered with the plaintiff's economic interests. [emphasis added]

[112] Further, at trial the parties reached an agreement and read into the record that there would be no allegation that the Master Evaluation Record did not reflect the comments of all five evaluators, no allegation that the scores were changed at any time following the final consensus

meeting on or about September 27, 2006, and no allegation with respect to the chain of custody of the Master or individual evaluation records.

[113] Given these abandoned allegations, the Crown submits that in the absence of bad faith, the Court should not substitute its evaluation for that of the evaluators, who were highly skilled experts in their field, and came from a diversity of backgrounds within ITSB. In any event, it is submitted that the evaluators followed the instructions given to them in the evaluation process and evaluated all of the bids fairly and equally. It says that any ambiguity arising from the RFP language was resolved either in the progress meetings or during the consensus meetings and the same evaluation methodology was applied to all three bidders. Further, the Crown submits that TPG is cherry-picking which requirements it takes issue with and there is no logical relationship between 3.3.3, 3.3.5 and the other 7 in issue.

[114] The Evaluation Criteria Matrix sets out the 3.3.3 and 3.3.5 requirements in the RFP and their evaluation criteria, as follows:

#	**Requirement**	**Evaluation Criteria**	**Weight**
3.3.3	**[R]** The proposal should include a list of the performance metrics and service level measurements that the Bidder believes may be relevant to the ETS services, and that may be effectively employed in the "Service-Level" contractual framework.	The proposal will be rated on the extent of relevant measurements proposed. One (1) point for every relevant and measurable performance metric / service level measurement that can reasonably be expected to be used by ITSB in a "Service-Level" contractual framework. **Maximum** 100 points	3.4892%
3.3.5	**[R]** The proposal should include a description of a previous project or	The proposal will be rated on the extent of relevant measurements	3.4892%

	contract in which the Bidder delivered services within a "Service-Level" contractual framework that employed similar, to the ones proposed under 3.3.3 above, performance metrics and service level measurements. The proposal should include the name and contact information for an individual representing the client in the example project who the Evaluation team can contact to verify the information provided. Answer 147: The evaluation will be performed at a high level and if any specific detail of a response is required the evaluator will ask the reference to provide a specific contacts [*sic*] that can confirm the information required (e.g. the number of Intermediate Cabling Technical Analysts). Amendment #16, Answer 156: The use of Consortium (Prime with subcontractor(s)) references are acceptable. Answer 162: The reference must be an individual who was considered "the Client' during the period of the contract.	employed in the example project. One (1) point for every relevant and measurable performance metric / service level measurement that can reasonably be expected to be used by ITSB in a "Service-Level" contractual framework. **Maximum** 50 points	

[115] The individual scores and consensus score given the three bidders for these two requirements were as follows:

Scoring for 3.3.3

Bidder	Individual Scores	Maximum Score	Consensus Score

CGI	Mr. Bartlett ……100 Mr. Bezanson ……100 Mr. Boudreault ……..100 Mr. Swimmings ……...98 Mr. Verma ……...90	100	99
IBM	Mr. Bartlett ……..94 Mr. Bezanson ……..85 Mr. Boudreault ……..100 Mr. Swimmings ……100 Mr. Verma ……100	100	65
TPG	Mr. Bartlett ……..……....80 Mr. Bezanson ……77 Mr. Boudreault……...100 Mr. Swimmings ……..46 Mr. Verma……..……100	100	49

Scoring for 3.3.5

Bidder	**Individual Scores**	**Maximum Score**	**Consensus Score**
CGI	Mr. Bartlett ……..50 Mr. Bezanson ……..45 Mr. Boudreault ……50 Mr. Swimmings ……...49 Mr. Verma ……...44	50	50
IBM	Mr. Bartlett ……..18 Mr. Bezanson ……..35 Mr. Boudreault ……50 Mr. Swimmings ……...50 Mr. Verma ……...16	50	35
TPG	Mr. Bartlett ……..…....10 Mr. Bezanson ……..32 Mr. Boudreault ……50 Mr. Swimmings ……...22 Mr. Verma……50	50	22

[116] While I agree with the Crown that the average or mean of the scores given individually is not determinative, it is informative. The average of the individual scores as shown on the chart below reveals, on average, that CGI scores improved during consensus, that only TPG suffered a

reduction in rating for both requirements, and that it suffered a significant reduction in assessment during the consensus process.

Criterion 3.3.3

Bidder	Average of Individual Scores	Consensus Score	Change
CGI	97.6	99	+1.40
IBM	95.8	65	-30.5
TPG	80.6	49	-31.6

Criterion 3.3.5

Bidder	Average of Individual Scores	Consensus Score	Change
CGI	47.4	50	+2.60
IBM	33.8	35	+1.20
TPG	32.8	22	-9.20

[117] The evidence of the evaluators, Mr. Henderson and Mr. Tibbo establishes that there was confusion among the evaluators surrounding the evaluation of these two criteria and the meaning of the terms 'performance metrics', 'service level measurements', and 'Service-Level contractual framework'. There was also confusion as to the methodology to employ when a bidder listed more than 100 metrics for 3.3.3, given that the maximum number of points that could be awarded was capped at 100. Furthermore, there was significant confusion among them about what constituted a "relevant and measurable performance metric/service level measurement that can reasonably be expected to be used by ITSB."

[118] During the progress meeting on September 14, 2006, a decision was made by the evaluators that they would only evaluate the first 100 performance metrics or service level measurements listed by a bidder in response to 3.3.3. Despite that agreement, Mr. Boudreault

and Dr. Verma continued to evaluate all of the metrics at the individual evaluation stage, whereas the other three evaluators stopped after the first 100 metrics listed.

[119] At some point during the consensus sessions, the evaluators concluded that all of the metrics proposed should be evaluated and not just the first 100 because, as Mr. Boudreault testified, "if a part of the answer is in the bid somewhere even though it's in another heading or if it's somewhere else, if it provides an answer to the question… if it's in there, you have to consider it."

[120] Only Mr. Henderson testified that when this decision was made, the consensus meeting was adjourned and the evaluators re-evaluated the metrics of each proposal individually before continuing consensus. None of the evaluators supported that account. Their evidence, which I accept, was that the consensus meeting was not adjourned; they simply re-evaluated all of the metrics as a group while arriving at consensus. In my view, this remedies any irregularities in the individual evaluation stage in this regard. This is part of the reason there is a consensus stage – to address issues in the individual phase. I simply do not accept the submission of TPG that it was treated differently than the others because its metrics (or at least those in excess of 100) were not assessed individually by three of the evaluators but were assessed only during the consensus sessions. What matters is that all of TPG's metrics were eventually evaluated. There is no evidence that in this respect TPG was treated differently than the others.

[121] The issues relating to terminology and the basis upon which the proposals were evaluated in regard to 3.3.3 and 3.3.5, are different matters.

[122] Confusion surrounding the terminology used in the RPF surfaced early on during the question and answer phase, as is illustrated by the following:

Question 55:

Annex D-1, 1.3.2.4.9
The Requirement states, "Was the Bidder responsible for delivering specific performance, service or function Metrics or Service Levels?" but the Evaluation Criteria only evaluates Performance Metrics.

a) please define Performance Metrics

b) why are service or Function Metrics or Services Levels mentioned?

c) why does 2. mention performance measurements, not performance metrics? Are they identical?

Answer 55:

The following are the definitions:

a) Performance metrics are units of measure utilized to describe and measure work. For example, performance metrics for engineering could include but not be limited to: number of change requests completed, number of problem tickets solved.

b) Service levels are used to describe the application of Performance metrics to deliver an acceptable service. For example, Change Management service level could be set at 12 completed change requests per week, or Problem Management service level could be 50% of all problem tickets must be resolved and closed within 30 minutes of notification of the problem.

c) Function metrics are those units of measure used to describe and measure work delivered by a specific function. For example, number of database modification requests completed by the function unit supporting database administration.

d) Yes.

Question 140

…

> At various places within the RFP documents the terms 'Results Based Delivery', 'performance-based service delivery approach', 'Results Based Services' and "Service-Level" approach' are used. As far as we can determine all these phrases are used to refer to the same concept. Can PWGSC confirm that they do indeed all refer to the same thing?
>
> **Answer 140:**
> Yes – Performance-base service delivery approach, Results Base Services Delivery and Service Level are all similar and should be treated the same.

[123] An email from Mr. Bartlett following the evaluation suggesting improvements in the process also reveals the difficulties that the evaluators had with these concepts:

> The evaluation team needs to agree on definitions of terminology used in the RFP. Definitions for terminology like "metric", "performance metric" and "service level metric" need to be agreed upon by the team.

[124] The evaluators discovered during the consensus sessions that they were not of one mind as to the test for awarding a point for a metric. The ECM in the RFP to be used by the evaluators was quite specific with respect to 3.3.3 that a proposal would be awarded "one (1) point for every relevant and measurable performance metric / service level measurement that can reasonably be expected to be used by ITSB in a 'Service-Level' contractual framework." Mr. Henderson best described the different approaches used and the resolution of the evaluators to focus on the "quality" of the metric:

> Some of the evaluators just went through a list and said, "Okay. We asked for 100. Yes, there is 100 there" and that was it. Others looked at each metric to determine whether it could in fact be applied to a future Service-Level agreement, et cetera.
>
> Because of that inconsistency, the marks were inconsistent, so the discussion ensued and a consistent approach was determined which was to evaluate -- to go back, re-evaluate that portion of the

> proposals, each evaluator was to do that, looking at the, I guess, quality of the performance metric based on how the requirement was articulated in the RFP, and that occurred.

Apparently this focus on the "quality" of the metric was based on the evaluators rereading the Requirement, and focusing on its statement that the metrics were those the bidder believed to be relevant and "that may be effectively employed in the 'Service-Level' framework [emphasis added]."

[125] All of the evaluators testified that with this adjustment (and with the decision to assess all criteria), as a group they then assessed TPG's bid for 3.3.3 and later for 3.3.5. I find that the evidence supports that this was done in the consensus meeting and not done individually by the evaluators and then in consensus. The evidence also supports that the evaluators also went back and revaluated the IBM bid. There is no clear evidence that a revaluation of the CGI proposal was done.

[126] I agree with TPG that the record of the consensus meetings and decisions made therein is quite simply incomplete. In fact, I find it woefully inadequate to answer some basic questions, such as when the evaluators became aware that they were not of one mind as to the standard to be employed in rating 3.3.3, and what was then done regarding the proposals that had already been rated in a consensus process. Further, the record is quite simply not sufficient to respond to questions by a losing bidder as to why its proposal was rated as it was. This sort of detail, Mr. Tibbo testified, was what he told the evaluators they must supply – yet Mr. Tibbo failed to maintain exactly that sort of record in the sessions that mattered most – the consensus sessions.

[127] Based on the evidence of the evaluators, and particularly the different ink colours used by some of them in their rating sheets, it is most likely that the decision to focus on the "quality" of the metric was a decision made after the CGI bid had been assessed at consensus. If the evaluators did not go back and reassess the CGI bid in the same manner that it did TPG's bid, then TPG was not treated in a fair and consistent manner. This is so even if, as the evaluators testified, CGI's proposal and its metrics were attuned to the requirement that the response had to be focused on a results based framework, and TPG's was not. It is not for the Court to make the assessment that the evaluators ought to have made – the Court's role is to determine whether TPG was treated equally and fairly with CGI, and in this respect, I find that it was not.

[128] TPG having proved that there was a change in the evaluation process when its bid was rated, the burden must lie on the Crown to satisfy the Court on the balance of probabilities that the same was done for the other bidders. The Crown has failed to meet that burden – in large part as a consequence of the incomplete and imprecise record of the discussions and decisions made during the consensus sessions.

[129] The Court also finds that the evaluation of TPG with respect to the 3.3.3 and 3.3.5 requirements was not fairly made because the evaluations are not consistent.

[130] The Crown has established that in response to these two requirements, TPG merely responded with the metrics it had developed for ETS 1. Despite the fact that such metrics were developed in collaboration with PWGSC, the reality is that those metrics were developed in the

context of a per-diem or level of effort framework contract, not a results based framework which was what was asked for in these requirements.

[131] There is no basis for TPG to assume that metrics it developed under a per-diem contract would be relevant to a results based contract, especially when the evaluation criteria specifically indicates that the metrics must be relevant to a results based contract. PWGSC's intention to move to a results based model was stated clearly in the RFP and these requirements were of obvious relevance.

[132] Mr. McIlwham gave evidence that all of the metrics proposed by TPG mapped onto Information Technology Infrastructure Library [ITIL] disciplines. Mr. McIlwham described ITIL as a "framework for people on how they should deliver services." ITIL "created assessments and knowledge base and process improvement initiatives to take organizations from a maturity level of one to maturity level five, five being very expensive."

[133] Mr. McIlwham described his process in preparing his report as follows:

> [W]hat I did was I took all of the elements of the responses that were supplied by TPG and mapped them to the ITIL discipline that they were actually relevant to, so the third column in there was -- the first column was what area of performance are you evaluating, and the other column is the ITIL discipline that is actually relevant to that. Every single one of them fell into ITIL elements and disciplines, so I couldn't figure out why things were not evaluated as relevant.

[134] I give little weight to Mr. McIlwham's evidence. First, he only evaluated TPG's bid and did not consider CGI or IBM's bid. Second, that TPG's proposed metrics map onto ITIL

disciplines is irrelevant. ITIL does not provide metrics or indicate what metrics would be relevant for each of its disciplines. Mr. McIlwham described the significance of ITIL as follows:

> Q. Yeah. And going on: "The role of the ITIL framework is to describe approaches, functions, roles and processes, upon which organisations may base their own practices. The role of ITIL is to give guidance at the lowest level that is applicable generally. Below that level, and to implement ITIL in an organisation, specific knowledge of its business processes is required to tune ITIL for optimum effectiveness." And you agree with all of that?
>
> A. Yeah.
>
> Q. And the point of that is, as I understand it, and I think you and I can agree on this, is just as it says, you apply those baseline guidelines and then you use your expertise and judgment to tailor them to meet the needs of the organization to which they're being applied, right?
>
> A. That's the way it works, yeah.

[135] Accordingly, ITIL just provides a baseline of best practices in the industry. To the extent that it is even relevant information; that TPG's metrics mapped onto ITIL disciplines only shows that they met the baseline industry best practice standards. Mr. McIlwham conceded that whether or not the metrics map onto ITIL disciplines does not answer the question of whether the metrics proposed were responsive to the RFP:

> Q. What you say in your chart here is every one of these performance metrics aligns with an ITIL discipline, right?
>
> A. Correct.
>
> Q. And I'm suggesting to you that's all that chart says.
>
> A. This chart?
>
> Q. Yeah.
>
> A. Correct.

> Q. And then phase two, or stage two, if I can put it this way and put words in your mouth, you're saying then in your opinion all of those performance metrics are responsive to 3.3.3 as well.
>
> A. Correct.
>
> Q. Okay. And I'm simply saying to you, your opinion is those two lists are the same, they may or may not be. This wasn't meant to be controversial, simply just because a metric aligns with ITIL doesn't help us at all whether it's responsive to an RFP. To decide that we have to look at the RFP?
>
> A. The total RFP.
>
> Q. Right. Are we agreed on that?
>
> A. Yeah.

[136] Mr. McIlwham also conceded that different metrics would be needed for a results based contract than for a per diem or level of effort contract:

> Q. Right, you get paid for an outcome, and it follows logically, just as you have said then, that the metrics by which you measure that would be different because it's a different proposition, right?
>
> A. Yeah.
>
> Q. In other words, if it were results based, it's not enough to measure how many widgets were made, but you'd have to measure how many were made within a time defined period or as against a certain requirement or metric, right?
>
> A. Yeah.
>
> Q. Because you've got to measure, there's a need to measure, in your words, whether and how the job is done in order to see if you performed, right?
>
> A. Correct.
>
> Q. And then you've got to see if you performed in order to see whether or not you get paid because, as you told us, you measure that against your commitment in the contract, right?
>
> A. Right.

> Q. So if I get paid when the job is done, we've got to measure whether or not the job is done in order to decide whether or not I get paid, right?
>
> A. It's results based, yeah.
>
> Q. You got it. And because in a results based environment you get paid not on a per diem, in other words, whether you worked X hours times Y people, but just if the job is done and not otherwise, right?
>
> A. Yeah, it's based on the result.
>
> Q. And that's why the metrics would be different?
>
> A. I'm trying to figure out how you would measure it but, yes, the metric would be different. You have to have some sort of measurement somewhere.

[137] Mr. McIlwham's evidence is not probative of anything. That metrics could be mapped to ITIL disciplines is an independent issue from whether or not those metrics are responsive to the specific requirements in the RFP. He conceded that different metrics would be needed between a per diem contract and a results based contract. His mandate was limited to examining only the metrics submitted by TPG and not those from any of the other bidders.

[138] Nevertheless, in my view, TPG's metrics in response to 3.3.3 and 3.3.5 were not evaluated properly. At trial, TPG pointed out that some of the metrics which were considered relevant and awarded points in 3.3.3 were not awarded points in 3.3.5. Mr. Boudreault could not provide an adequate explanation as to why a metric might be assessed as relevant for 3.3.3 but not for 3.3.5:

> Q. These were considered not relevant or duplicates. And if you go to the first grouping you'll see the listing of the items that were found to be irrelevant or duplicate. If you look at that list, you'll

see that items number 29 to 32, which is what we were just looking at, are not on that list. Do you see that?

A. I see that.

Q. In other words, for items 3.3.3 what we have here in the bid at page 611 were found to be relevant. Do you see that?

A. I do.

Q. For the same metric for 3.3.5 they were found to be irrelevant. Do you see that?

A. Yes.

Q. And my question is actually a very simple one. Why?

A. I would say question 5 is referring to a previous project in which the bidder delivered services within a service level contractual framework, so -- and again, my recollection of eight years ago is what it is, but the fact that this contract was used as a reference, which was not a service level based contract, would suggest why these were not accepted.

Q. Do you know that for certain or is that your best guess?

A. I'm speculating.

Q. I understand.

A. I can't recall 100 per cent.

Q. It's fair for me to say in that a relevant metric is a relevant metric? If it's relevant in 3.3.3 it should be relevant in 3.3.5; doesn't that make sense?

A. It does, except the fact that this question was about providing previous experience and the experience cited in the response was not in itself valid. We still attributed a number of points, from what I can see, but essentially the reference was not valid, because it was a resource based example as opposed to a service level based contract.

[139] Mr. Boudreault's explanation does not make sense. Given the relationship between 3.3.3 and 3.3.5, it is nonsensical that a metric would be relevant and awarded a point for one

requirement but not the other. Further, if TPG's reference project was truly not valid because it was not a service level contract, then it should have been awarded 0 points, or even disqualified. In my view, the above shows that there was a flaw in the evaluation of the metrics.

[140] The Crown submits that it is not for this Court to substitute its opinion for that of highly skilled evaluators. The evaluation of 3.3.3 and 3.3.5 required subjective assessments and the judgment of the evaluators should be given significant deference: *Monit International Inc v Canada*, [2004] FCJ No 59 at paras 277-278.

[141] Contrary to what the Crown suggests, the observation that the evaluation of 3.3.3 and 3.3.5 was deficient is not equivalent to the Court substituting its evaluation for that of the evaluators. No particular expertise is required to see the deficiency in the evaluation process, nor would the special expertise of the evaluators justify the way in which 3.3.3 and 3.3.5 were evaluated (as Mr. Boudreault's testimony reveals). Given that there is no explanation for why metrics relevant to 3.3.3 would not be awarded points in 3.3.5, this does not rise to the level of reasonableness: there is no justification, transparency or intelligibility.

[142] In conclusion, the move to a results based contractual framework was a significant change for PWGSC and required different metrics. It may be that TPG submitted metrics that were entirely irrelevant in such a framework. However, the evaluation of 3.3.3 and 3.3.5 was itself deficient.

[143] However, although it has been found on the balance of probabilities that TPG was not treated fairly and equally in the evaluation of its proposal, and while this is a breach of Contract A, TPG cannot succeed in this action unless it can prove that it has suffered damages as a consequence of that breach. For the reasons that follow, I find that it has failed in that respect.

[144] Even if it is accepted that requirements 3.3.3 and 3.3.5 were unfairly evaluated, there is no evidentiary basis for finding that the other 7 requirements upon which the Claim is based were also unfairly evaluated. In fact, TPG's only basis for calling those other 7 requirements into question is that "the consensus scores [are] substantially lower than the median of the individual scores." There is no other evidence to suggest that these other 7 requirements were evaluated unfairly. As was noted by the Crown in its written submissions: "The plaintiff led no evidence, and did not cross-examine any of the five evaluators, with respect to any alleged unfairness in the evaluation of the nine criteria in issue other than 3.3.3 and 3.3.5."

[145] In its written submissions, TPG claims that these 7 requirements were "the most important evaluation criteria in addition to 3.3.3 and 3.3.5." It suggests that since sections 3.3.3 and 3.3.5 were evaluated unfairly, it follows that the whole bid was evaluated unfairly and it cites the comment of the Federal Court of Appeal in *TPG v Canada No 1 FCA* at para 10 that if 3.3.3 and 3.3.5 "were unfairly evaluated, it is probable that the entire bid was unfairly evaluated." Further, TPG says that where there is not a clear basis for awarding scores, the bidder should be given "the benefit of the doubt." Under TPG's analysis, if it was awarded the "benefit of the doubt" for all 9 of the criteria in issue, it would have won the bid.

[146] The Crown has proven that even if TPG were awarded full marks for 3.3.3 and 3.3.5 and the other bidders' scores remain unchanged, the result of the RFP would be the same. In addition to having failed to lead evidence regarding the 7 other criteria in issue, it says that the 9 criteria complained of were not selected on any principled basis and there is no logical connection between them. I agree. TPG has not discharged its burden of showing that any unfairness in the evaluation would have changed the ultimate result of the evaluation.

[147] The Federal Court of Appeal's comment came in the context of an appeal from a decision on a motion for summary judgment. The determinative question was whether there was a genuine issue for trial. In stating that "if they [3.3.3 and 3.3.5] were unfairly evaluated, it is probable that the entire bid was unfairly evaluated" the Court cannot be taken to have suggested that unfairness of the evaluation of the entire bid followed automatically. The plaintiff would still have to lead evidence to show that other parts of the bid were evaluated unfairly.

[148] Further, the Federal Court of Appeal did not have the evidentiary record that is before this Court. There is simply no evidentiary basis for suggesting that any other aspect of the evaluation was unfair. Further, the Federal Court of Appeal's decision was premised largely on the evidence of James Over that criticized the evaluation of 3.3.3 and 3.3.5. That evidence was not before this Court.

[149] I also agree with the Crown that there appears to be no principled basis on which the 9 requirements were selected. TPG claims that they are the 9 most important requirements, but that position does not withstand scrutiny. They are not the 9 requirements accorded the greatest

weight, although they are 9 of 20 of the requirements with the greatest weight. They are not related to each other in terms of what is being asked of the bidder – for example, 3.3.3 and 3.3.5 relate to performance metrics and service level measurements, whereas 2.3.1.4 relates to how closely the proposal matches the requirements set out for cross platform engineering, while 3.1.4 relates to an example of a transition plan that the bidder developed in the delivery of similar services to another client. The only element linking these 9 criteria together is that they represent those requirements for which there was the "greatest deviation" for TPG between the consensus score and the median individual score.

[150] The top 20 requirements account for 62.2% of the technical evaluation score. Interestingly, the 9 requirements that TPG complains of account for only 22.2% of the technical evaluation score, roughly 1/3 of the maximum allowable score of the top 20 criteria. By contrast, criteria 2.2.4.1 and 2.4.1 were unchallenged by TPG, and yet their consensus score in those requirements deviated from the median individual scores in their favour. 2.2.4.1 and 2.4.1 together account for 9.1% of the technical evaluation. Therefore, at the very least, these two criteria that are unchallenged already outweigh 3.3.3 and 3.3.5 which were challenged.

[151] In my view, this suggests that TPG's selection of the criteria they are challenging is largely arbitrary. The basis for suspecting unfairness in the evaluation - deviation from the median individual scores - is not a sufficient basis for demonstrating unfairness.

XV. Was CGI's Proposal Non-Compliant?

[152] TPG submits that the CGI bid was non-compliant, that the Crown knew or was wilfully blind to CGI's non-compliance at the time it accepted CGI's bid, and that the Crown had an obligation to disqualify CGI. Specifically, TPG alleges that: (1) CGI bid the incumbents as its own team without permission; (2) some of the evaluators raised concerns about CGI being able to deliver the incumbents but did not investigate further; (3) CGI took steps to recruit the incumbents with PWGSC's help; (4) instead of disqualifying CGI, PWGSC worked with CGI to address its non-compliance including changing the requirements and timing for completing transition; (5) the transition was disruptive; and (6) CGI did not supply the required number of resumes.

[153] The Crown responds that CGI's bid was compliant at all times. Specifically: (1) CGI submitted its own resources as part of its bid and never submitted the names of the incumbent personnel at any time prior to contract award; (2) PWGSC was entitled to change the required functions over time; (3) the transition was effective, and in any event, TPG cannot rely on breaches of contract after contract award; and (4) all required resumes were submitted.

A. *Reliance on Events Post-Contract Award*

[154] The Crown submits that when TPG alleges that the Crown failed to enforce the RFP requirement that CGI deliver the required resources after contract award, TPG is really asserting a breach of Contract B, and this it cannot do.

[155] In my view, TPG can rely on evidence of events that occurred after the award of contract B, but only to prove unfairness or a breach of the terms of Contract A. TPG has no right of action as against breaches of Contract B between CGI and PWGSC; it claims none.

[156] In *Double N Earthmovers*, a losing bidder (Double N) discovered after contract award that the winning bidder (Sureway) had submitted a non-compliant piece of equipment. The tender documents called for 1980 machinery or newer for two specific items. On its face, Sureway asserted its equipment for item 1 would be 1980 or newer, and 1977 or 1980 for item 2. In reality, the serial number of the machine submitted for item 1 corresponded to a 1979 machine, and a 1977 machine for item 2. Double N discovered this fact before the contract was ultimately awarded and brought it to the attention of the City. The City responded that it would insist on the winning bidder supplying 1980 equipment and about a month later, awarded the contract to Sureway.

[157] When Sureway attempted to register its non-compliant equipment with the City, the City insisted on compliance with the 1980 requirement. Sureway agreed that its equipment would be upgraded to 1980 machinery within 30 days, but nevertheless supplied the 1979 unit temporarily. The unit was in fact upgraded and the City was content to let the matter "lie peacefully."

[158] The Supreme Court held at paras 71-73 that:

> The conduct Double N complains of (i.e. the waiver by the City of the 1980 requirement) is conduct which occurred after the award of Contract B. Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed. Thus, any obligations on the part of the owner to unsuccessful bidders have been fully discharged.

> Contract B is a distinct contract to which the unsuccessful bidders are not privy. In Ron Engineering, Estey J. held that the "integrity of the bidding system must be protected where under the law of contracts it is possible to do so" (p. 121 (emphasis added)). The law of contract does not permit Double N to require the cancellation of a contract to which it is not privy in the name of preserving the integrity of a bidding process, which is by definition completed by the time an award of Contract B is made.
>
> In the face of a failure to perform Contract B on the part of one of the parties, the other party has the contractual rights and remedies set out in the contract and at common law. Bidders may be held to perform as promised, or the owner may have the right to cancel the contract. It is this range of remedies that acts as a disincentive to submit deceitful bids as, absent collusion, bidders cannot predict how the owner will respond. Where an owner determines that it is in its best interests to waive a term of the contract, that is within its contractual rights unless the contract stipulates otherwise. In this case, Condition 9 conferred a right of cancellation upon the City where the successful bidder did not comply with the specifications. It did not oblige the City to cancel the contract.
>
> Finally, we note that there are good policy reasons for rejecting Double N's position. The observation of Russell J.A., at para. 56, is particularly apt:
>
> > [P]arties to contract B might be subject to constant surveillance and scrutiny of other bidders, challenging any deviation from the original terms of contract A, thereby ultimately frustrating the tendering industry generally, and introducing an element of uncertainty to contract B.
>
> [emphasis added]

[159] It is of note that the trial judge held that the "City was unaware of Sureway's deceit until after it had accepted Sureway's tender. In his words, 'no one in the City knew as a matter of fact that [Sureway] had bid the 1979 unit until August 28 or 29, 1986 and that is after the contract had already been let to [Sureway]' (para. 27)." The Supreme Court accepted the trial judge's

findings that the City "was not aware of Sureway's deceit until after it had accepted Sureway's bid," notwithstanding that a month prior to contract award and "on several prior occasions", Double N told the City of its suspicions of non-compliance by Sureway.

[160] More recently, the Federal Court of Appeal in *TPG v Canada No 1 FCA* at para 23 stated that

> In the circumstances of this case, it seems to me arguable that it makes no difference that some of the evidence upon which TPG relies to prove the breach of Contract A relates to events that occurred during the transition phase. TPG is relying on CGI's post-award recruitment of incumbent resources to establish that the bid of CGI was not compliant when submitted. In my view, Double N does not necessarily bar a claim for breach of Contract A merely because the breach is proved in part by evidence of events that occurred after the contract was awarded.
>
> [emphasis added]

[161] I agree with the Federal Court of Appeal. *Double N* stands for the proposition that once Contract B is awarded, a losing bidder has no ability to insist that the contracting authority terminate the contract; once contract B is formed, all rights and remedies exist only between the contracting authority and the winning bidder. However, evidence of events occurring after Contract B is awarded can be used as proof of a breach of Contract A.

B. *Compliance with A.24*

[162] TPG's main complaint relates to requirement A.24 of the RFP which is repeated for ease of reference:

> By submitting a proposal, the Bidder is certifying that either:

> (i) all the individual resources proposed are employees of the Bidder: or
>
> (ii) in the case of any individual proposed who is not an employee of the Bidder, the Bidder is certifying that it has written permission from such person (or the employer of such person) to propose the services of such person in relation to the work to be performed in fulfillment of this requirement and to submit such person's resume to the Contracting Authority in connection with this solicitation. During the bid evaluation, the Bidder must upon the request of the Contracting Authority provide a copy of such written permission in relation to any or all non-employees proposed. Failure to comply with such a request may lead to disqualification of the Bidder's proposal

[163] TPG submits that A.24 requires bidders to have written permission for any resources submitted in the bid, whether named individually or referenced as a group. In oral argument, counsel set out his client's position as follows:

> But A.24 says if you're going to put anyone in your proposal, if you're going to advance a name -- or not a name, because there's this thing about example resources -- but rightfully if you're putting somebody in your proposal and they identify the incumbents, not by name, but as a group, then you have to have their written permission. In my respectful submission, that is both the letter and indeed the spirit of the provision. It's what IBM and TPG did. And there's a certain logic to that, and a logic to that interpretation. I think it's a fair and reasonable interpretation, because the procurement authority needs to know that you're in a position to deliver. If you don't have the permission of the people, how can you deliver?

[164] There can be no question that CGI proposed, first and foremost, the incumbents – the then current resources providing services to TPG on ETS 1, and there is no question that at the time it submitted its proposal it did not have any agreement from them to do so. Although it had committed to pre-qualifying its own employees as resources, this was expressly stated to be only

a contingency in the event that it was unable to retain the existing resources, and in that scenario it stated that it was counting on the cooperation of ITSB. Its proposal stated as follows:

> The most important element in transitioning the function is the retention and transition of resources currently providing ETS services. CGI's approach to transitioning resources is designed to maintain current service levels. There are four steps to this approach:
>
> 1. CGI will pre-qualify resources for all 66 categories as a contingency for the following point (2) of our approach. CGI will ensure it has resources available for all 145 positions.
>
> 2. CGI will work with ITSB to identify the current resources that ITSB considers to be key in delivering ETS services. CGI will recruit all of those resources identified by ITSB for retention. In certain cases CGI might be able to suggest a CGI resource that is better qualified than the existing resource.
>
> 3. CGI will identify the resource gaps after completing point (2) above and will fill those gaps with resources already identified and pre-qualified. This identification and pre-qualification of resources started during the development of our response to this RFP as noted in point (1) above.
>
> 4. CGI will proactively contact the current Service Provider after Contractor Selection (CGI Winning Bid Notification Phase) to establish an agreement between our companies for the purposes of planning a transition strategy of current incumbents' resources to CGI.
>
> …
>
> The retention of the majority of the incumbent resources significantly reduces the risks involved in transferring service delivery from one provider to another. This approach will allow ITSB to benefit from the knowledge held by the current resources and also to benefit from the corporate knowledge CGI is able to bring to the engagement.
>
> In the event the incumbents are not available, CGI will use its pre-qualified resources to ensure all positions are filled as required. CGI is confident it can fill every required role.
>
> [emphasis added]

[165] The Crown submits that A.24 must be read in context with the rest of the RFP and when so read, it is clear that A.24 only relates to the 10 example resources that are submitted with the bid pursuant to Requirement 2.5.1. It submits that provided those 10 resources are employees of the bidder or the bidder has written permission to bid those resources, the requirements of A.24 have been met. In closing, it was submitted that all that was required of the bidder was an ability to show that they had the capability to "recruit and staff" as required for ETS 2.

[166] For the reasons that follow, I agree with the Crown that when read in context, A.24 only relates to the 10 example resources submitted in a bid.

[167] First, as the Crown notes, A.24 specifies that for "any individual proposed" the bidder must have permission "to submit such person's resume to the Contracting Authority in connection with this solicitation" [emphasis added]. This wording more closely aligns with the Crown's view that what is required by A.24 is permission to bid that individual and submit their resume in the bid than it does with that of TPG. Moreover, when closely examined, and despite what one might think of the Crown not requiring that bidders actually have its own resources at the ready, the express words can only be interpreted as proposed by the Crown because the only resumes required were those to be submitted for the 10 example resources. No other resumes were required to be submitted "in connection with this solicitation." Therefore, these are the only "individual[s] proposed." It is not possible to propose an individual person if you have not identified that person and do not know who that person is. In my view, A.24 does not extend further to what occurs after the bidding process – for example to transition – nor does it extend to the actual performance of Contract B.

[168] This interpretation is further supported by the fact that the list of names of the resources who would actually perform the work was to be submitted with the transition plan after contract award and not before. Requirement 2.5 and several of the Questions and Answers make this clear. Requirement 2.5 reads:

> ITSB recognizes that over the course of its contract with the Contractor, the specific resources that are supplied to deliver services to ITSB will change, as individuals move and progress in their careers. Accordingly, ITSB does not intend to examine and evaluate all individuals that the Bidder proposes to provide to satisfy the initial Function, Client Dedicated, and Task Authorization requirements defined in this RFP. However, ITSB will evaluate ten (10) resources as an example of the resources that the Bidder is able to supply.
>
> [emphasis added]

Question 42 states:

> RE: RIO.3 Transition Functions, page 41 of 70, b) A finalized Transition Plan will be submitted for approval by the Project Authority no later than five working days following the review.
>
> Is the successful bidder required to identify the resources proposed for each position within each function when the bidder submits its finalized Transition Plan for approval?
>
> Answer 42:
>
> Yes

Question 170 further states:

> This response now requires the successful bidder to prepare resumes and related grids for 145 resources within 5 days of contract award. This is a new requirement, and an unrealistic request that favors the incumbent. In the interest of starting the project in a manner that allows both parties to succeed, we suggest that the Amendment 4 Question 42 and Amendment 9 Question 82 requirements be removed. This will allow for the focus to be on the Transition plan in the first few days rather than just on naming resources.
>
> Answer 170:

> The Bidder is to provide resumes for all 145 resources and submit the resumes with their finalized transition plan, which is within 10 days of contract award. Each resume proposed will be evaluated against the classification requirements detailed in Annex A Part III for each positions. In order for Canada to properly evaluate the transition plan after contract award it is imperative that Canada be assured that the personnel performing the transition are qualified as per the classification requirements.
>
> [emphasis added]

Finally, Question 141 makes the timing explicitly clear:

> Question 141:
>
> In Reference to Answer 105: ... The Contractor will be required to provide the name of the specific individuals and their firm.
>
> At what time precisely must the contractor provide the name of the specified individuals and their firm (e.g. within their proposal at RFP closing)?
>
> Answer 141:
>
> The name of the specified individuals and their firm will be required upon submission of the proposed transition plan.

[169] These components of the RFP make it clear that the only time the names of all of the resources had to be submitted was alongside the transition plan after contract award. It is at this time that individuals beyond the 10 example resources would be "proposed."

[170] Further, in Question and Answer 61, PWGSC made clear that the bidder is not required to demonstrate capacity at the time of contract award. It is only through the transition plan that this capacity is verified:

> Is it a mandatory requirement that the bidder have the proven capacity of delivering the 145 resources described in Annex A Part II within the National Capital Region (NCR) at the time of contract award?

> Since the 10 Example Resources represent less than 7% of the required resources, they do not have to be resident in the NCR, have government security clearance or, in fact, even be available at time of contract award (re: RFP Amendment 001, Answer 7); it is unreasonable to accept them as a demonstration of proven capacity to deliver 145 resources, of the highly technical nature required, within the NCR.
>
> Additionally, unless one or more of the three corporate references provided are for a client within the NCR; the corporate references will not demonstrate a proven capacity to deliver the required resources within the NCR.
>
> Given this situation, what criteria will PWGSC use to determine that a bidder has a proven capacity to deliver the required number and quality of resources within the National Capital Region?
>
> Answer 61:
>
> This RFP does not specifically require that the Bidder demonstrate its capacity in the NCR at the time of contract award. The RFP evaluates the Bidder's capacity to provide the resources required, and also to demonstrate its recruiting and retention processes. This capacity will be verified through the Transition Plan and acceptance exercise.
>
> [emphasis added]

[171] PWGSC never intended to examine the full palette of resources submitted – it recognized that its needs would change and that some of the resources proposed may move on in their careers. It therefore wanted to evaluate the bidders' ability to supply qualified resources and it measured this based on "corporate capability." For example, the answers to Questions 4 and 11 state, respectively:

> The Request for Proposal is structured in a way to examine the Corporate capability of the Bidder to provide the required resources based on their capability and documented past performance. For example, see Annex D-1, Evaluation Criteria, 1.3.2.4.3.

> It is PWGSC's intent to validate Bidder's ability to provide required resources ... during the Evaluation phase by way of Corporate evaluation criteria. See Annex D-1, Evaluation Criteria, 2.5 Example Resources for additional reasons for not evaluating every single resource prior to Contract award.

[172] The position being advanced by TPG seems eminently reasonable - that a party seeking ITS services should wish to be satisfied that those advancing proposals have appropriate qualified resources available to fulfil its needs if awarded the contract. Nevertheless, it is clear from reading the RFP as a whole and particularly Question and Answer 12 that this was not the approach that was being taken by the Crown in this RFP.

> Question 12:
>
> The current structure of the RFP makes it possible for a bidder to be selected as the winner without having a single qualified resource available to meet the service requirements defined in the RFP. By arranging the RFP in this manner, PWGSC is providing an unfair financial advantage to such a vendor since they can ignore the real costs for such highly technical resources and propose fictional per diem rates, while those bidders who are providing legitimate proposals must incorporate rates at which they can be confident that they can deliver real resources.
>
> Since PWGSC's and its OGD clients' core business processes depend on the reliable and consistent delivery of these services, this represents a significant risk to the Government of Canada.
>
> <u>What substantive steps will ITSB take to protect its PWGSC and OGD clients, and mitigate this major risk, by preventing a bidder from being selected without having the required skilled resources available?</u>
>
> Answer 12:
>
> <u>The Request for Proposal is structured in a way to examine the Corporate capability of the Bidder to provide the required resources based on their capability and documented past performance.</u>
>
> [emphasis added]

[173] As another example of how little if any reliance was placed on the specific resources identified in the bid, PWGSC did not even require that the example resources proposed in the bid be delivered to actually perform the contract. Question 7 reads:

> We can find no requirement that the bidder must provide the services of the personnel submitted as example resources if they are awarded a subsequent contract. We request that PWGSC clarify whether or not the example resources are required to be provided ...
>
> Answer 7:
>
> The actual resources presented as 'example resources' by the Bidder will not be required if the resource is not available at contract award, as long as replacements are provided that meet the minimum criteria...
>
> [emphasis added].

[174] Further evidence that it is only the bidder's ability to recruit that is being evaluated comes from rated requirement 2.4.1 which states:

> The proposal should include a description of the Bidder's recruitment management process to ensure the availability of qualified and experienced resources during the Contract period. The proposal will be rated on the extent to which the following is satisfactorily addressed:
>
> 1. Sources of potential candidates;
>
> 2. Process for identifying, documenting and storing potential candidate experience, qualifications, and skills;
>
> 3. process for identifying resource classifications in which knowledge of and experience delivering services within an ITIL framework would be beneficial, and prioritizing candidates who are ITIL-certified and/or who have experience delivering services within an ITIL framework;
>
> 4. ability to respond to an urgent need for additional resources for existing classifications of resources already detailed in the Statement of Requirements - Part III, by identifying sources of

> resources and the Bidder's proposed process that can reasonably be expected to deliver candidates in an urgent manner;
>
> 5. ability to respond to an urgent need for additional resources for new classifications of resources not detailed in the Statement of Requirements - Part III, by identifying sources of resources and the Bidder's proposed process that can reasonably be expected to deliver candidates in an urgent manner;
>
> 6. Structured interview techniques and skills evaluation processes including testing mechanisms.

I note in passing that criterion 2.4.1 was weighted at 4.35%, higher than either 3.3.3 or 3.3.5. Clearly, PWGSC placed great emphasis on the bidder's ability to identify and recruit resources.

[175] In my view, the only reasonable interpretation of A.24 and the RFP as a whole is that only 10 resources were expected to be specifically identified, and those resources had to comply with A.24. CGI was compliant with that requirement.

[176] It was CGI's plan from the outset to attempt to retain as many of the incumbent resources as possible in order to mitigate the risks to ITSB of a transition to a new Contractor. It asserted that it had pre-qualified resources and that it would have sufficient resources from its pool to ensure that every role would be filled.

[177] At trial, the Crown argued that there is a distinction between proposing someone's services, and proposing to recruit their services. I accept that fine distinction. In my view, CGI proposed to recruit the TPG resources – it would offer the incumbent resources service contracts or employment – but it was up to those resources to accept or decline the offers. CGI did not promise that it would deliver all or even any of the incumbent resources. Given that there had to

be some voluntary act on the part of the incumbent resources, it cannot be said that CGI "proposed the incumbents" as TPG alleges. What CGI proposed was what several witnesses including Mr. Powell confirmed was standard industry practice - a new supplier would attempt to recruit incumbent resources.

[178] It was evident that Mr. Powell was frustrated by CGI's recruitment of TPG's resources in light of the Authorization to Bid agreements it had in place that restricted their ability to work for competitors. Because of these agreements, TPG believed that any competitor who wished to recruit the TPG resources would have to negotiate directly with TPG and not with the individual resources.

[179] In my view, these agreements are irrelevant to the issues in this litigation. They did not prevent CGI from offering these resources positions to provide services under ETS 2. It was up to the individual resource to accept or decline such offers from CGI. There was nothing in the agreements which obligated CGI to deal directly with TPG if it wished to approach its resources. If the individual resources wished to breach their agreements and engage in discussions with CGI, that was their choice.

[180] To summarize, all bidders were required to certify that the 10 example resources, whose resumes were being submitted along with the bid, were either employees of the bidder or that the bidder had written permission from those resources, nothing more. PWGSC had no intention of evaluating any resources other than those 10 examples until it received the winning bidder's transition plan. In any event, CGI did not "bid the incumbents." Instead, it proposed to recruit

as many of the incumbents as possible, but that in any event, it would draw on its immense pool of resources to fill any gaps in recruitment.

C. *Did CGI Submit the Required Number of Resumes?*

[181] TPG alleges that CGI did not submit the required number of resumes with its transition plan. In its view, 159 resumes were required and CGI only submitted 133 with its transition plan on November 14, 2007.

[182] TPG claims that the 133 resumes did not include the Client Dedicated Resources. In its view, these resources were required to be submitted along with the 133 resources that would fill the function positions. It points to Question and Answer 76 which states:

> **Question 76:**
>
> Request for Proposal, page 41 of 70, section B.10A outlines four methods to provide services:
>
> o Provision of Services Authorized by Task Authorization
>
> o Provision of Work Authorized by Functions
>
> o Provision of Work Authorized by Client Dedicated Resources
>
> o On-Call Services
>
> a. i) Please indicate the current staffing levels for each of these four methods. For example, how many of the resources under the current contract are authorized by Task Authorization vs. Client Dedicated Resources?
>
> ii) The response to Question 2 provided in Amendment 1 indicated that there are currently 47 resources fulfilling requirements through Task Authorizations. Would these be considered "Client Dedicated Resources" or Task Authorization services?
>
> iii) Are these 47 part of the staffing numbers provided in Annex A, Part II Scope of Work, Section 12 Engineering and Technical Support Domains?

> b. i) Does the table in Annex A, Part II Scope of Work, Section 12 Engineering and Technical Support Domains include all resources being contracted using all four methods?
>
> ii)The Enterprise Server Domain includes Client Dedicated Resources. Is this the only domain that will require these resources?
>
> iii) Is it the only domain that employs these resources currently?
>
> **Answer 76:**
>
> a. i) Task Authorization 47, Function = 133, Client dedicated = 26, On call = maybe all
>
> ii) Task Authorization
>
> iii) No
>
> b. i) No, other Domains have Client Dedicated resources
>
> ii) No, all other areas may have requirements for Client Dedicated resources
>
> iii) No, all other areas may have requirements for Client Dedicated resources.

[183] If the 26 Client Dedicated Resources identified in Question 76 are added to the 133 required resources, the total number of required resources is 159. TPG's position is further supported by the fact that the table requiring 145 resources in the original RFP was amended by the Question and Answer to a table that included Cient Dedicated Resources for each of the ETS domains. This number of resources identified in this table totalled 159.

[184] This issue treads very close to the line set out in *Double N Earthmoving* because this evidence goes to events occurring after the award of Contract B. In my view, even if it were true that 159 resumes were required and only 133 of those were submitted by CGI, that fact does not

tend to either prove or disprove whether Contract A was breached. TPG has led no evidence to suggest that PWGSC knew that CGI intended to deliver fewer resumes than required.

[185] CGI's bid indicated on its face that 145 resources would be delivered (the number then required): "CGI will ensure it has resources available for all 145 positions." This is in compliance with the requirements set out by question 170 in the RFP, reproduced in full above: "The Bidder is to provide resumes for all 145 resources and submit the resumes with their finalized transition plan, which is within 10 days of contract award." It cannot be said that 159 resumes were required when what was explicitly asked for was 145.

[186] Further, several provisions in the RFP make clear that the requirements could change at any time and either grow or shrink. Requirement 4.6.1 provides such an example:

> At the outset of the Contract all services shall be provided by the Contractor through the provision of a team of personnel to carry out various Function(s) and Project(s). ITSB shall retain the option to change the scope of the work such that the change involves:
>
> 1) An increase to the scope of a Function or Project.
>
> 2) An addition of a Function or Project.
>
> 3) A decrease to the scope of a Function or Project.
>
> 4) A decrease through termination of a Function or Project.
>
> 5) Acceptance and implementation of a Business Case to improve the efficiency of a Function.
>
> 6) A change from "Level of Effort Services" to "Results Based Services".

Under B.10.4, item 3 provides:

3. Provision of Work Authorized as Client Dedicated Resource Requirements

a) Client Dedicated Resource Requirements are requirements for one or more resources to provide Professional Services to support a specific ongoing task over an indeterminate period of time within the Contract Period. The specific Resources are normally required to perform work on a Client site.

b) Client Dedicated Resource Requirements may be specified at any time during the Contract Period.

c) The Contractor shall perform the work associated with various Client Dedicated Resource Requirements which are described in the Statement of Requirements Part Ill.

d) The Contractor acknowledges that over the Contract Period, the work associated with any Client Dedicated Resource Requirements may change such that there may be an overall increase or decrease to the work requirements of the Contractor and a resulting change to the number of Contractor resources required to provide Professional Services associated with the Client Dedicated Resource Requirements.

e) Any changes to requirements associated within any Client Dedicated Resource Requirements, including but not limited to the termination of a Client Dedicated Resource Requirement or the implementation of a new Client Dedicated Resource Requirement, shall be authorized through a duly approved Contract Amendment.

f) Client Dedicated Resource Requirements may be terminated by Canada, at its convenience, upon 10 days prior written notice to the Contractor. Charges associated with Termination for Convenience, as specified in the General Conditions, shall not apply provided such prior notice is given.

Finally, 3.0.1 states:

3.0.1 Function Requirements Disclaimer

The requirements specified in this Domain represent the Functions that exist at the time of releasing the Statement of Requirements. It should be recognized that as a significant period of time shall elapse between the release of the Statement of Requirements and the ultimate award of a Contract, it is possible that:

• Functions as stated could be removed

> • Functions could be added
>
> • Function information as stated could be changed
>
> The requirements specified in this Domain represent the staffing requirements of the Functions as specified at the time of releasing the Statement of Requirements. It should be recognized that as a significant period of time shall elapse between the release of the Statement of Requirements and the ultimate award of a Contract, it is possible that:
>
> • Staffing requirements as stated could be reduced
>
> • Staffing requirements could be increased
>
> • Staffing requirements as stated could be changed
>
> • To amend the number of resources by Classification
>
> • To remove certain Classifications
>
> • To add classifications.
>
> The requirements specified in this Domain represent the skills, experience and knowledge for the Classifications that exist at the time of releasing the Statement of Requirements. It should be recognized that as a significant period of time shall elapse between the release of the Statement of Requirements and the ultimate award of a Contract, it is possible that:
>
> • Certain requirements defining experience and knowledge could change to reflect the requirements that are appropriate
>
> • Certain requirements defining experience and knowledge could be eliminated as products and tools are retired, replaced or eliminated
>
> • Requirements of experience and knowledge could be added to reflect changes in technology

[187] These provisions clearly indicate that PWGSC contemplated that requirements could change between the issuance of the RFP and contract award and the above provisions could

explain the move from 145 resources to the eventual 133 that were requested and accepted by PWGSC. Question 79 explicitly set out what was expected of bidders:

> **Question 79:**
>
> Reference: page 40 of 70, B.I 0.3 Transition Functions
>
> The Bidder shall begin to deliver services according to the requirements in this RFP no later than 60 working days following the acceptance of the Transition Plan as detailed herein.
>
> We can find no where within the RFP documents where it is specified what exactly what must be delivered by the winning bidder. Three domains, 19 functions and 145 resource positions are detailed within Annex A Part III but the importance of the number and nature of these domains, functions and resources is dismissed by clauses 3.0.1, 4.0.1 and 5.0.1, within Annex A Part III…
>
> This ambiguity might be acceptable if the RFP was for a supply arrangement where the government is not committing to any volume of work; however this RFP is stated as being for a specific contract to deliver specific resources to PWGSC to perform specific duties, Moreover, we are required to propose a management structure that will be included as part of the deliverables.
>
> The nature of the RFP requirements mandates that these management individuals be senior technical management resources. Resources of this type are quite expensive to attract and retain. Additionally, because the management team is not directly billable, their cost has to be built in (as overhead) to the per diem rates for the technical positions.
>
> Obviously, depending on the number of resources required, this management overhead can have a very significant cost impact on a bidder's financial proposal. However, the number and nature of the management resources required to ensure that PWGSC receives the level of service demanded is very much dependant on the number and types of functions and technical resources to be managed. Should, as clauses 3.0.1, 4.0.1 and 5.0.1 allow, the number and nature of domains, functions and/or resources change at contract award time; we could be required to allocate significantly more management resources than originally estimated based on the RFP document.

> Additionally, should any vendor have information that the structure will decrease significantly by contract award, they could lower their proposed per diem rates knowing they will never have to cover the costs of a robust management team. This would obviously give them a significant advantage in the financial evaluation.
>
> Therefore, without knowing the specific number and nature of domains, functions and resources that we must provide and manage at contract award time, we are not being provided with enough information to create competitive response to the RFP.
>
> Additionally, this ambiguity could provide a vendor with inside knowledge and unfair advantage. Therefore, in order for the bidders to be able to construct informed and competitive proposals and to ensure that the competition is fair and open, we request that PWGSC state the exact number and nature of domains, functions and resources that must be provided and managed at contract award time.
>
> **Answer 79:**
>
> For the purpose of this RFP the requirements identified in Annex A part III are to be bid as if no changes will occur. If changes materialized at contract award the Contractor will be notified and given sufficient time to adapt to the changes.
>
> [emphasis added].

[188] Under Annex A, Part III – Statement of Requirements, the staffing requirements for each of the functions under the contract are explicitly set out. These total 133. In the same Annex, the following details surrounding the Client Dedicated Resources are included:

> **6.0 Client Dedicated Resources**
>
> Client Dedicated (CD) Resources are staffed with resources that perform work for certain Other Government Department (OGD) clients. Their roles and responsibilities will vary from client to client, however they will only perform work for the clients they are assigned to. They will be given the work assignment detail, including the reporting relationship, once the service level agreement between ITSB and the Contractor has been finalized to

describe the functions, roles, and reporting relationship for the CD staff on a per OGD team basis.

The CD resources generally work at the client site.

The reporting relationship in the CD Resources falls under one of the following two structures:

- One or two resources supplied to OGD and can be managed by the contractors management team

- Larger unit that has a senior level contractor supplied resource that would be in charge of this team at the OGD. This senior level contractor is expected to complete his/her work as per the service level agreement and to assist in the management of the Contractors team, which includes determining their workload priorities and reviewing their performance.

The work performed by the CD Resources can be assumed to be similar to that described under the Functions in the three Domains, being:

Enterprise Server Domain

- Enterprise Server Migration and Customization
- Capacity Planning
- Disaster Recovery Plan Development
- Production Centre Infrastructure Engineering

Cross Platform and Network Domain

- Cross Platform Engineering
- Production Network Support
- Production Network Engineering
- PKI Secure Applications

Support Services Domain

- Database Administration
- Security and logical Access

> • Asset & Infrastructure Management
>
> • Web Development
>
> It therefore can be concluded that some of the CD Resources would require a certain amount of the skills and experience that cross the Functions as described in previous sections.
>
> The clients serviced under this arrangement include Transport Canada and Canadian Intellectual Property Office.
>
> • Currently there are 12 resources performing work for the two clients identified above.
>
> • The details of the requirements for this Function shall be provided to the Contractor upon contract award.
>
> [emphasis added]

[189] Mr. Boileau confirmed that in some cases, PWGSC did not even know the requirements for the Client Dedicated Resources and were not in a position to provide these to the winning bidder until sometime after contract award:

> Q. I'm going to ask you to explain this to us. I will go back to Ms. McKeown's question. How was it that you weren't aware of the Client Dedicated positions for CIPO and others?
>
> A. From what I remember, when I first got on the job, the first thing I did is I did what I called a "current state" meaning tell me, give me the list of who is onsite and so on in terms of TAs, in terms of Client Dedicated and in terms of incumbent. These two positions, they never showed up in the current state, so it was a surprise to me and to other folks in BPMS, the procurement support folks. Perhaps it was our fault, I don't know, but I'm just saying that we were not aware of it.
>
> …
>
> Q. In relation to this issue, this e-mail we were just looking at, you have described that you didn't know about those positions. The 133 resources that CGI had to provide a list of, were they aware of these positions? Had they been notified of them back when they had to provide the 133 resources list on November 14th?

> A. These two are not part of the 133. They are Client Dedicated which is another group, and I believe it's in the contract but it was not specified. We didn't ask for CGI, I believe, if I remember, to name people for Client Dedicated.

[190] Ms. Charette confirmed that on November 20, 2007, ITSB had not fully determined the extent to which Client Dedicated Resources were needed:

> Q. Can you tell us: The 133 resources, does that include Client Dedicated resources?
>
> A. No, it doesn't.
>
> Q. Why was that?
>
> A. Because the requirement for Client Dedicated wasn't fully fleshed out at that time by the client ITSB, they weren't quite sure what that was going to look like, so the requirement was to have the 19 functions fully staffed but the Client Dedicated would be done a little bit later.
>
> Q. How does that work?
>
> A. They would have done the same process. ITSB would have told CGI what the requirement was for the resource profile, what kinds of resources were required and their credentials. They would have asked them, then, to propose these individuals with their resumes demonstrating that they meet the qualification grids.

[191] Mr. Powell himself acknowledged that the RFP did not define the skills and qualifications required for the Client Dedicated Resources:

> Q. So stopping there. There is no issue between you and I about the 133 that are defined by function, the ones we just looked at, right?
>
> A. Right.
>
> Q. And I'm going to suggest to you that a winning bidder did not have to identify the remaining 26 client identified at that time, and you disagree with me on that.

A. Where does it say that?

Q. We will talk about that.

A. The details, will be provided at contract award. 10 days later you need the resumes and the people.

Q. You agree with me that at the time of submitting a bid, certainly, none of the contractors knew what even the requirements for the Client Dedicated were going to be, right?

A. Fair enough.

Q. They come later.

A. Yes.

Q. And if you don't know the functions, obviously you can't name the individuals, right?

A. Fair enough.

Q. I'm going to suggest to you, Mr. Powell, that it will be the evidence in this trial of Michele Charette and Mr. Pierre Demers that the information about the 26 Client Dedicated resources was ultimately provided in March 2008.

A. So they again violated --

Q. Do you have any reason to disagree with me on that?

A. They violated the terms of the RFP again, I guess. It says right there they are going to identify them at contract award, so I guess they just ignored that, did they? I don't know.

[192] It would have been impossible for a bidder to provide a list of individuals to fill requirements that were not known to them. As for Mr. Powell's concern that PWGSC violated terms of the RFP by not identifying Client Dedicated Resources at contract award, this is simply irrelevant in light of the RFP's clear language that requirements could be changed at any time by PWGSC.

[193] Further, the delivery of resumes following the award of contract was intended to be a dialogue between the winning bidder and PWGSC. It was not intended that all resumes submitted needed to be accepted immediately or the contract would be terminated, nor was it intended that there be a strict number of resumes submitted. The only requirement was that all functions be filled. The transition plan was meant to be a fluid concept that changed according to the needs of PWGSC, as expressed in the RFP and Question and Answer 60:

> The Contractor shall meet with the Project Authority (PA), at a mutually agreeable time within five (5) working days after the Contract Start Date to review the Transition Plan submitted in the Contractor's Proposal. Based on this meeting, the Contractor shall adjust the Transition Plan to meet any detailed requirements specified by the Project Authority.
>
> …Rejection would be a final action. As opposed to rejection, the Transition Plan may require modification prior to being accepted by the Project Authority.

[194] In short, if the number of resumes that were submitted were less than the number set out in the RFP, that is a breach of Contract B, not Contract A. Moreover, given the fluidity in the number that PWGSC might request, that evidence does not establish that CGI's proposal was in breach of the RFP and thus non-compliant.

[195] In my view, on the totality of the evidence, the requirements for Client Dedicated Resources changed as time passed (as they were entitled to) and it is clear that the final details for the requirements for Client Dedicated Resources were only to be provided to the contractor on contract award and not before. This is supported by the fact that parts of the RFP explicitly acknowledge that Client Dedicated Resources, and in fact, requirements for any function, were subject to change in accordance with PWGSC's needs at that given time. It would be impossible

to hold the winning bidder to a particular number of resources given the fluid nature of the requirements. In any event, bidders were requested to bid assuming the requirements set out in Annex A Part III would remain unchanged. Those requirements only identified 133 resources, which is what was submitted by CGI.

D. *Did PWGSC Assist CGI in Recruiting TPG Resources?*

[196] TPG alleges that PWGSC improperly assisted CGI in recruiting the incumbent resources. To be clear, TPG has not alleged any improper conduct on the part of PWGSC. All claims of bad faith, misconduct, bias, fraud, or unconscionability, as well as any claim related to inducing breach of contract, have been abandoned. Therefore, TPG's complaint of PWGSC's conduct is only relevant to the extent that it demonstrates PWGSC's knowledge of any non-compliance by CGI.

[197] TPG points to internal documents that show PWGSC was concerned about the ability of CGI to deliver the incumbents after the contract was awarded. In my view, these documents are irrelevant. First, delivery of the incumbents is not a requirement of the RFP, nor was it a promise given by CGI. Again, it emphasized that it would recruit as many incumbents as possible to mitigate risk. Second, even if delivery of the incumbents was a requirement, these documents do not show what TPG needs to show which is that PWGSC knew <u>at the time CGI's bid was accepted</u> that CGI was non-compliant. These documents simply show that as the time for transition drew nearer, there were some concerns about how many of the incumbents would be retained. This is not relevant for determining whether the procurement process was carried out unfairly.

[198] TPG also points to evidence of PWGSC's request for "interviews" to transition the functions over to CGI, which TPG suggests were "thinly veiled attempts by PWGSC to assist CGI in recruiting team TPG." Again, given that all claims of bad faith and inducing breach of contract have been dropped, the fact that PWGSC may have assisted CGI in recruiting TPG resources after contract award does not prove one way or another that it knew that CGI's bid was non-compliant.

E. *The Transition*

[199] TPG also alleges that CGI did not complete transition in time and that the transition was disruptive, contrary to the terms of the RFP. This, TPG suggests, indicates that PWGSC knew that "CGI could not produce a team for the purposes of transition."

[200] Like TPG's allegation of improper recruiting of resources, evidence of the effectiveness of the transition, in my view, is irrelevant. First, whether or not the transition was actually successful does not prove one way or the other that PWGSC knew that CGI would be unable to transition the functions successfully. In my view, TPG has simply led no evidence that PWGSC could have known at the time it accepted CGI's bid that transition might be unsuccessful.

[201] Second, TPG's complaint of transition issues is exactly the type of conduct that the Supreme Court of Canada warned against in *Double N Earthmovers* at para 73: "[P]arties to contract B might be subject to constant surveillance and scrutiny of other bidders, challenging any deviation from the original terms of contract A, thereby ultimately frustrating the tendering industry generally, and introducing an element of uncertainty to contract B."

[202] Third, although TPG pointed to evidence of panic and stress among employees of PWGSC during transition and the transition being carried out in a less-than-ideal manner, the record also shows that there was no disruption to the ETS infrastructure or user community.

[203] TPG points to some PWGSC employees describing the difficulties with the transition, for example, Don Bartlett:

> Q. And the word "SWAT" does that actually mean anything or is it supposed to refer to kind of like a SWAT police team? Can you tell me?
>
> A. It's an unfortunate term. That's what it was called for whatever reason. I didn't coin it.
>
> Q. It's like an emergency team?
>
> A. It was like an emergency meeting, yeah, just to manage the transition, which was rapidly becoming a difficult situation.

[204] However, the document being referred to in Mr. Bartlett's testimony reveals that at least some of the difficulty with the transition related to the availability of documents and confusion surrounding the Crown's obligations and rights, aspects wholly unrelated to CGI's role in the transition.

[205] Mr. Swimmings described situations where clients were unhappy and alarmed in an email dated November 14, 2007 (the date CGI's transition plan had been submitted, but two weeks prior to its acceptance):

> Hi Michel,
>
> I am very concerned about parts of the PWGSC transition strategy for the ETS contract. The biggest concern is the timeline of 60 days or December 21, 2007 which I think exposes our clients to

potentially degraded service and PWGSC in a bad light especially in terms of proceeding with Shared Services.

The RFP states transition in the following manner: There is 10 days to get the resumes, 60 days to transition, several 15 day extensions if they do not meet the acceptance criteria and then if they still do not meet the criteria the process can be repeated. The new vendor does not get paid during this time. Obviously if incumbents decide to work for the new vendor then this process will be smoother but I get the impression lots of incumbents feel hostile to CGI due to the low per diem they offer.

The driving factor for the tight deadline is the fact that PWGSC had to negotiate with TPG to get the extension to December 21, 2007. Their contract has been extended several times so it is not like we can not do it again until we feel we can accept that the new contractors can perform the functions our current contractors do. I am sure it will be difficult to negotiate this but it is better to have people more prepared to perform the functions than it is to just hold our noses and proceed with people who do not understand the environments, the relationships of clients, the technical intricacies, the many processes, the internal workings of PWGSC and frankly it is not fair to them or our clients.

How many SLA's will suffer if we are ill-prepared? The RFP was written so we could protect ourselves so we should ensure we do. Let us test our functions' criteria thoroughly. Each function manager can interview the new people and actually create specific tests for them to perform to see if they understand the 'how to' of the function before we accept the new contractors. This can be done several times during the transition to see if they are gaining an understanding of the environments, relationships and processes.

It has been a rocky road the last year regarding the ETS contract, let us not make it rockier by rushing the transition.

Other concerns: (which I believe are being addressed?)

How do we find space to put the new contractors with the old contractors for knowledge transfer?

Who vets their PCs before we allow them to be connected to our network and where do they connect?

How do we do large group requests for OSSRO's, security, badges, access to drives, specific software requirements etc.?

What do we tell our clients?

[206] Again, while there is some indication of panic and concern, nothing identified in Mr. Swimming's email is attributable to CGI. In fact, Mr. Swimmings notes that the main issue making the deadline seem tight is the negotiation that occurred between TPG and PWGSC. Further, it must be remembered that prior to November 2007, TPG had initiated numerous complaints and brought several applications before the Federal Court and the CITT. Other concerns relate to logistical concerns outside the responsibility of CGI such as physical space, technology vetting, and security clearances.

[207] No doubt, transition was not occurring in an optimal fashion. There were few people on site to shadow the incumbent resources – a practice that several witnesses, including Mr. Bartlett described as the ideal way for effective knowledge transfer to take place:

> A. Well, not necessarily that, but I think it was shadowing. We had thought that the new service provider would shadow the TPG resources there, you know, sort of learn the ropes, so to speak. Because I think it's simplistic to -- a very technical environment to just hand somebody a bunch of binders and say: Here, do your job. In a perfect world you might be able to do that, but there are always, you know, hidden things or little -- I don't want to call them secrets, but things you only know by doing the job. So we had hoped that there could be a period of shadowing, and I believe that's what CGI wanted to do.
>
> Q. Did you, in your own group, in your function, did you see any shadowing?
>
> A. No, no. No, I don't think TPG would agree to that.
>
> Q. Do you know whether they agreed to it or not?
>
> A. I'm positive they didn't.

[208] However, irrespective of the concerns expressed, the reality is that the transition occurred without the disruptions that the functional managers were concerned about. For example, an

email chain starting on December 22, 2007 – the day after the transition – reveals what was accomplished as of that date:

> Ok our work is done for the day. This concludes the end of phase 1 of the transition from the TPG team to CGI team. Listed below are some of the activities that were completed as a result:
>
> * All the teams (i.e. Functional Managers, Domain Managers, Helpdesk support folks, LRA folks, Thin Client folks, Tech Support folks, M/F Access folks, Infoman folks, facilities folks, Mid-Range folks, Mainframe folks, Network folks, operations folks, etc.) provided 200% supports, on-site and off-site;
>
> * TPG resources vacated all sites as of 5 PM yesterday;
>
> * Everything has run smoothly... 50 CGI resources were indoctrinated today at APDC, KEDC, and PDP;
>
> * All proposed IBM resources are indoctrinated as well;
>
> * Dedicated clients are covered during the holidays;
>
> * Functional Managers have personally showed up to provide oversight;
>
> * The CGI Team were absolutely outstanding as well…very well organized;
>
> * IT Operations were on site to ensure smooth transition and continuity of support;
>
> * All CGI workstations has been delivered, installed and tested;
>
> * All accesses were tested and under control;
>
> * On-Call resources are adequately equipped with CGI pagers;
>
> * Infoman and automated systems have been updated with new pagers numbers;
>
> * Any service impacted incidents will follow normal operational processes;
>
> * After hours support structure is intact ... on-call plan is now operational (attached);
>
> * We are covered on all aspect of operations;

> * Staffing level through the Holidays period is more than adequate (allows for additional trg time); and
>
> * In case of extreme emergency situations, CGI has a direct line to their call centre in Montreal.
>
> I feel that we are in a very good posture operationally as a result of the Crown/CGI working very well together. I would like to add that CGI Domain managers and the Crown Functional managers
>
> (Rita Jain and Dave Holdham) did an outstanding job and are the cause of this weekend successful transition from the TPG team to the CGI team. Also, a special thank to all of the Directors who ensured (via their staff) optimum support through this phase.
>
> Lastly, I feel very confident that all of the bases are covered for the holiday season. Please note that there is still a lot of work to be done such as the acceptance of the complete team of CGI resources in the functions. We still need to formally accept the functions and staff up on Task Authorizations as required, etc.
>
> Thus we are going to be very busy still for the next two months.

[209] There were no service interruptions despite the abrupt switch over of personnel from the incumbents on December 21, 2007, to CGI on December 22, 2007.

[210] Further, by March 28, 2008 all 133 functions had successfully been transitioned over to CGI, as outlined in an email from Mr. Boileau to Mr. Rondeau:

> Patrice, the ETS transition of all 19 engineering functions has formally and successfully been completed as of Mar 26th within the prescribed number of days of the contract (105 days ... confirmed).
>
> The transition of the 19 engineering functions from the incumbent provider (TPG) to the new service provider (CGI) was relatively transparent from an operational perspective. No major outages or client impacts were recorded as a result of the transition. Despite the low quality knowledge transfer from the incumbent service provider, the new service provider managed to maintain all IT

> services at 100% capacity and day-to-day incidents were resolved in a timely manner as per the approved SLAs
>
> …
>
> Additionally, the ETS resources were all successfully trained with our newly implemented ITIL methodologies and processes within our IT operations. The ETS transition overall was a complete success!

[211] Mr. Boileau testified that transition occurred within the timeframe contemplated by the RFP Questions and Answers:

> [Subject to extensions provided for in the RFP] The Bidder shall begin to deliver services according to the requirements in this RFP no later than 60 working days following the acceptance of the Transition Plan as detailed herein.

[212] In sum, despite initial frustrations and concerns regarding the lack of knowledge transfer and the concerns about service interruptions, transition of all functions was completed successfully by March 28, 2008, with no major service interruptions. CGI was compliant.

XVI. Conclusion

[213] For the reasons given above, the Court finds that (1) TPG failed to fully utilize the avenues of redress provided for in the CITT Act - and this is a full defence to the claim; (2) the evaluation of TPG's bid by PWGSC was not done fairly and equitably however, there is no evidence that this breach of Contract A resulted in TPG suffering any loss; and (3) CGI was compliant with the RFP and there was thus no requirement that PWGSC disqualify it and award the contract to TPG.

[214] Although TPG proved unfairness, it was not successful in this action, and the Crown is entitled to its costs. As indicated at the close of trial, the Court will retain jurisdiction on the issue of costs, if the parties are unable to reach agreement. Failing agreement, the Crown is to serve and file its costs submissions (not exceeding 15 pages), within 20 working days of the date of these Reasons, TPG shall respond within a further 15 working days, and the Crown may file a brief reply (maximum of 5 pages) within 5 working days thereafter.

[215] I must express my appreciation to all counsel (including their law students and clerks who undoubtedly had much involvement with this case) for their most helpful submissions and, in particular, for the very professional manner in which this trial was conducted.

JUDGMENT

THIS COURT'S JUDGMENT is that the action is dismissed, and the Court retains jurisdiction to deal with costs.

"Russel W. Zinn"

Judge

ANNEX A

#	Requirement	Evaluation Criteria	Weight
2.2.3.1	[R] The proposal should provide a description of the Bidder's approach to implementing and maintaining administrative processes to ensure that contract requirements are met. The proposal should address the following requirements and each requirement will be evaluated against the given criteria (Maximum 5 points per requirement): 1. Contract administration - process for maintenance of documentation, including change orders, task authorizations, performance management, and other relevant documentation. 2. Time accounting and reporting - process for time logging, matching to task authorizations and functions, client sign-off, and other relevant time accounting and reporting responsibilities. 3. Process for ensuring billing accuracy 4. Scheduling resources in line with project schedule, Task Authorizations, Function requirements, and Client Dedicated resource requirements. (Ensuring qualified resources are available when required) 5. Process for changes in key resources	5 = Clear and Comprehensive response / description delivering 100% or more of the requirement. 4 = Response substantially addresses the requirement, delivering 80 % - 99% of the requirement. 3 = Response satisfactorily addresses the requirement, delivering 60% - 79% of the requirement. 2 = Fair response, delivering 40% - 59% of the requirement. 1 = Poor response, delivering 20% - 39% of the requirement. 0 = None or insufficient response, delivering less than 20% of the requirement. Maximum 5 x 5 points = 25 points	1.3533%

	Amendment #4, Answer 41: Under item 5, key resources refers to technical resources under contract within the various functions. Amendment #8, Answer 80: Answer 41 was an error, it should be non-billable contract management resources. Amendment #16, Answer 152: Performance management would be such things as gathering information on the performance of the functions, number of incidents that cause a problem etc. Answer 153: A change order is a request to have the function modified and would result in a contract amendment. An example would be a request for additional funds to compensate for the additional work.		
2.3.1.1	[R] Enterprise Server Software Migration and Customization;	Score the Bidder's proposed approach: 5 = Clear and Comprehensive response / description delivering 100% or more of the requirement. 4 = Response substantially addresses the requirement, delivering 80% - 99% of the requirement. 3 = Response satisfactorily addresses the requirement, delivering 60% - 79% of the requirement.	2.4500%

		2 = Fair response, delivering 40% - 59% of the requirement. 1 = Poor response, delivering 20% - 39% of the requirement. 0 = None or insufficient response, delivering less than 20% of the requirement. Maximum 5 points	
2.3.1.2	[R] Enterprise Server Software Installation and Engineering;	Score the Bidder's proposed approach: 5 = Clear and Comprehensive response / description delivering 100% or more of the requirement. 4 = Response substantially addresses the requirement, delivering 80% - 99% of the requirement. 3 = Response satisfactorily addresses the requirement, delivering 60% - 79% of the requirement. 2 = Fair response, delivering 40% - 59% of the requirement. 1 = Poor response, delivering 20% - 39% of the requirement. 0 = None or insufficient response, delivering less than 20% of the requirement. Maximum 5 points	2.4500%
2.3.1.4	[R] Cross-Platform Engineering; and	Score the Bidder's proposed approach:	2.4500%

		5 = Clear and Comprehensive response / description delivering 100% or more of the requirement. 4 = Response substantially addresses the requirement, delivering 80% - 99% of the requirement. 3 = Response satisfactorily addresses the requirement, delivering 60% - 79% of the requirement. 2 = Fair response, delivering 40% - 59% of the requirement. 1 = Poor response, delivering 20% - 39% of the requirement. 0 = None or insufficient response, delivering less than 20% of the requirement. Maximum 5 points	
3.1.4	[R) ITSB expects that the successful vendor will have experience delivering similar services to other clients. The proposal should include an example of a transition plan that the Bidder developed for a similar project. The example transition plan should comprehensively address the following topics, each topic will be evaluated against the given criteria (Maximum 5 points per topic): 1. Completeness of the Transition Plan; 2. Achievability of the Transition Plan;	Score the Bidder's proposed approach: 5 = Clear and Comprehensive response / description delivering 100% or more of the requirement. 4 = Response substantially addresses the requirement, delivering 80% - 99% of the requirement. 3 = Response satisfactorily addresses the requirement, delivering 60% - 79% of the requirement.	3.6000%

	3. Roles and responsibilities of client, the Bidder, and the previous service provider; 4. Schedule of transition and services activities; 5. Quality Assurance Controls *I* Testing activities; and 6. Contingency plans. Amendment #6, Answer 57: The Bidder may provide explanatory notes that substantiate how the pre-existing transition plan satisfies the requirement. Amendment #20, Answer 189: Reference 3.1.4.1 The plan will be evaluated using the 6 categories in Annex 0-1, 3.1.4. It is possible for an initiative to be successful without a complete plan, therefore, the success of the plan is a factor but not the only indicator of a complete plan. Amendment #20, Answer 190: Reference 3.1.4.2 The plan will be evaluated using the 6 categories in Annex 0-1, 3.1.4. Achievability relates to the reasonableness of the plan, such as, are the timeframes reasonable, etc. It is possible for an initiative to be successful without a complete plan which is achievable, therefore, the success of the plan is a factor but not the only indicator of a complete plan. Answer 194: Ref. 3.1.4 The Bidder will be evaluated using the criteria in 3.1.4. It is not required that the	2 = Fair response, delivering 40% - 59% of the requirement. 1 = Poor response, delivering 20% - 39% of the requirement. 0 = None or insufficient response, delivering less than 20% of the requirement. Maximum 6 x 5 points = 30 points	

	transition project submitted have been completed in 60 days. The emphasis is on the similarity of the project to the requirement covered by this RFP. It need not be exactly 60 days.		
3.3.3	[R] The proposal should include a list of the performance metrics and service level measurements that the Bidder believes may be relevant to the ETS services, and that may be effectively employed in the "Service-Level" contractual framework.	The proposal will be rated on the extent of relevant measurements proposed. One (1) point for every relevant and measurable performance metric / service level measurement that can reasonably be expected to be used by ITSB in a "Service-Level" contractual framework. Maximum 100 points	3.4892%
3.3.5	[R] The proposal should include a description of a previous project or contract in which the Bidder delivered services within a "Service-Level" contractual framework that employed similar, to the ones proposed under 3.3.3 above, performance metrics and service level measurements. The proposal should include the name and contact information for an individual representing the client in the example project who the Evaluation team can contact to verify the information provided. Answer 147: The evaluation will be performed at a high level and if any specific detail of a response is required the evaluator will ask the reference to provide a specific contacts [*sic*] that can confirm the information required (e.g. the number of Intermediate Cabling	The proposal will be rated on the extent of relevant measurements employed in the example project. One (1) point for every relevant and measurable performance metric / service level measurement that can reasonably be expected to be used by ITSB in a "Service-Level" contractual framework. Maximum 50 points	3.4892%

	Technical Analysts). Amendment #16, Answer 156: The use of Consortium (Prime with subcontractor(s)) references are acceptable. Answer 162: The reference must be an individual who was considered "the Client' during the period of the contract.		
3.4.2	[R] The proposal should include a description of a previous project or contract in which the Bidder used a similar approach, to the ones proposed under 3.4.1 above, and/or methodology to advise and assist another client to maintain its ITSM processes, relevant to the evolving industry best practices. The proposal will be rated on the relevant actions that can reasonably be expected to benefit ITSB The proposal should include the name and contact information for an individual representing the client in the example project who the Evaluation team can contact to verify the information provided. Amendment #16, Answer 156: The use of Consortium (Prime with subcontractor(s)) references are acceptable. Answer 157: The phrase (in the above paragraph from "another client") should read "a client". Answer 162:	One (1) point for each relevant action that can reasonably be expected to contribute to a consistent approach to ITSM best practices. Maximum 8 points.	1.5120%

	The reference must be an individual who was considered "the Client" during the period of the contract.		
3.6.1	[R] The proposal should include a description of the process the Bidder intends to implement in order to collaborate with ITSB and continually examine and modify its service delivery in order to improve services and/or reduce costs to ITSB.	5 = Clear and Comprehensive response 3 = Response substantially addresses the requirement. 0 = None or insufficient response Maximum 5 points	1.3569%

FEDERAL COURT

SOLICITORS OF RECORD

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