



Office of the Procurement  
Ombudsman

Bureau de l'ombudsman  
de l'approvisionnement



# Review of Complaint Acquisition of the Services of a Host Photographer for the G7 Summit by Global Affairs Canada

December 2018

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## THE COMPLAINT

1. On May 14, 2018, the Office of the Procurement Ombudsman (OPO) received a written complaint from a supplier (the Complainant) regarding a contract awarded by Global Affairs Canada (the Department). The contract was for the services of a host photographer for the G7 Summit in Charlevoix, Quebec from June 7 to 9, 2018 (the G7 Summit).
2. On May 16, 2018, the Complainant also filed a complaint with the Canadian International Trade Tribunal (CITT) regarding the award of the same contract.
3. On May 29, 2018, the Procurement Ombudsman determined that OPO did not have jurisdiction to review the complaint, as the facts and grounds of the complaint were the subject of an inquiry before the CITT.
4. On June 22, 2018, the CITT issued its decision that it did not have jurisdiction to review the complaint as the contract value was below the *Canada Free Trade Agreement* threshold (\$101,100 before taxes for services).
5. On June 26, 2018, the Complainant re-filed its written complaint (the Complaint) with OPO regarding the contract awarded by the Department. The amount of the awarded contract was \$83,350.
6. The Complaint raised the following procurement-related issues:
  1. Did the Department award the contract to a non-responsive bidder?
  2. Were the Department's requirements divided unnecessarily to avoid trade agreement thresholds (i.e. contract splitting)?
7. On July 11, 2018, OPO determined that the Complaint met the requirements of the *Procurement Ombudsman Regulations* (the Regulations) and the Procurement Ombudsman launched a review.

## MANDATE

8. This review of complaint was conducted under the authority of Paragraph 22.1(3)(b) of the *Department of Public Works and Government Services Act* and Sections 7 to 14 inclusive of the Regulations.
9. Pursuant to Subsection 9(2) of the Regulations, the Procurement Ombudsman requested the Department provide documents and information necessary for the review. The request was for all departmental records associated with the award of the

contract in question, as well as the Department's procurement policies and guidelines in effect at the time of the solicitation. The Procurement Ombudsman also requested the Complainant provide any additional information that was not submitted as part of the Complaint.

10. The records were necessary to conduct the review in accordance with Subsection 12(1) of the Regulations, which specifies six factors that must be taken into consideration by the Procurement Ombudsman during the conduct of a review:
  - a) Whether the complainant would have had a reasonable prospect of being awarded the contract, but for the actions of the contracting department;
  - b) The seriousness of any deficiency in complying with the regulations made under the *Financial Administration Act*;
  - c) The failure or refusal of the complainant to provide information about its goods and services at the request of the contracting department;
  - d) The degree to which the complainant was prejudiced;
  - e) The degree to which the fairness, openness or transparency of the procurement process was prejudiced; and
  - f) Whether any of the parties acted in bad faith.
11. The Department provided OPO with records associated with the award of the contract in question. The Department did not provide OPO with any internal procurement policies and guidelines. The Complainant also provided additional documents beyond those submitted as part of the Complaint.
12. The findings in this report are based on the records provided by the Department and the Complainant, as well as relevant publicly available information. The failure by either the Department or the Complainant to disclose any relevant records or information could impact the findings of this report.

## **BACKGROUND**

13. On January 25, 2018, a Request for Proposal (Solicitation 1) was issued by the Department through an open tendering process posted on BuyandSell.gc.ca. Solicitation 1 sought the services of a host photographer for the G7 Summit. No bids were received by the Department.
14. On March 26, 2018, a second Request for Proposal (Solicitation 2) was sent by email to six potential bidders who had originally contacted the Department to express interest in Solicitation 1.

15. Solicitation 2 indicated the supplier would be selected based on the highest combined rating of technical merit and price. The technical component represented 70% of the overall score and the price represented 30%.
16. Two bids were received in response to Solicitation 2 and both were deemed compliant by the Department. The Complainant's combined score was 73.57. The combined score of the other bidder (the Successful Supplier) was 85.71. The contract was awarded to the Successful Supplier.

## CHRONOLOGY OF EVENTS

17. On May 25, 2017, the Department issued a contract for the services of a photographer to cover the announcement that the G7 Summit would be held in Charlevoix, Quebec in June 2018.
18. On June 15, 2017, the photographer who covered the announcement invoiced the Department for its services, for a total of \$525.00, before taxes.
19. On December 13, 2017, the Department completed a contract request form for the services of a host photographer for the G7 summit. Funds were committed for \$75,000.
20. On January 25, 2018, the Department published Solicitation 1 on BuyandSell.gc.ca for the services of a host photographer for the G7 Summit.
21. On February 13, 2018, Solicitation 1 was amended to remove the national security exception, and replace it with a reference to the applicability of the free trade agreements.<sup>1</sup> The bid receiving address was also changed.
22. On February 20, 2018, the Complainant asked the Department if it was too late to submit a bid for Solicitation 1.
23. On February 21, 2018:
  - At 8:01 AM, the Department responded to the Complainant that Solicitation 1 was still available on BuyAndSell.gc.ca.
  - At 9:09 AM, the Complainant asked the Department about the mandatory criteria, specifically in regard to the requirement of experience with "Very Very Important Persons." The Complainant also asked about the requirement regarding managing a database of photographs of the G7 Summit. The

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<sup>1</sup> The *World Trade Organization Agreement on Government Procurement (WTO-AGP)*, the *North American Free Trade Agreement (NAFTA)*, the *Canada-European Comprehensive Economic and Trade Agreement (CETA)*, and the *Canadian Free Trade Agreement (CFTA)*.

Complainant indicated it wanted to avoid submitting a proposal if there was no chance of meeting the mandatory criteria.

- At 9:50 AM, the Department responded by directing the Complainant to the relevant sections in Solicitation 1.
24. On March 1, 2018, at 2:00 PM, the bidding period for Solicitation 1 closed. There were no bids received.
25. On March 2, 2018, at 8:26 AM, the Department suggested an internal meeting to review its options.
26. On March 19, 2018, the Department confirmed that “the maximum price we want to set it [the requirement] at is \$95,000.”
27. On March 23, 2018, the Department completed a second contract request form and committed funds in the amount of \$95,000.
28. On March 26, 2018:
- At 10:37 AM, the Department sent Solicitation 2 by email to a list of potential bidders who had originally expressed interest in Solicitation 1. The bid closing date for Solicitation 2 was April 5, 2018, at 2:00 PM.
  - At 12:58 PM, the Complainant asked the Department about the differences between Solicitation 1 and Solicitation 2.
29. On March 27, 2018, the Department responded by email only to the Complainant to outline the differences between Solicitation 1 and Solicitation 2. These differences included an increase to the limitation of expenditures from \$75,000 to \$95,000, and changes to the mandatory criteria.
30. On March 29, 2018, the Successful Supplier asked the Department 10 questions regarding Solicitation 2. No responses to these questions were contained in the procurement file.
31. On April 1, 2018, the Department amended Solicitation 2 to extend the bid closing date by six calendar days, from April 5 to 11, 2018.
32. On April 3, 2018, at 9:31 AM, the Complainant asked the Department for additional information on the database that would be used to manage photographs during the G7 Summit. Later that day, the Department responded only to the Complainant and explained that further details would not be provided, and that it would be up to the winning bidder to manage the database put in place by the Department.

33. On April 9, 2018, the Complainant requested “an extension of 10 to 14 days to submit the file.” [Translation] On the same day, the Department amended Solicitation 2 to extend the bid closing date by five calendar days, from April 11 to 16, 2018.

34. On April 13, 2018, at 11:31 AM, the Successful Supplier’s bid for Solicitation 2 was received by the Department.

35. On April 16, 2018:

- At 11:26 AM, the Complainant’s bid for Solicitation 2 was received by the Department.
- At 2:00 PM, the bidding period for Solicitation 2 closed. The only bids received were from the Complainant and the Successful Supplier.

36. On April 29, 2018:

- At 4:03 PM, the Department asked both bidders for clarification on point-rated criterion 2.3. This criterion required bidders to submit a portfolio of photographs for each photographer, and to include metadata regarding the name and type of event. The Department stated that the evaluation team could not view the metadata in the photographs provided by both bidders. The Department stated that “the [departmental] evaluation team is unable to see this data. We ask you to please contact us by Monday, April 30, at 2:00 PM (Ottawa time), to confirm if this information is missing. If there is no answer by Monday, April 30 at 2:00 PM, we will evaluate this criterion of your proposal without the data.” [Translation]
- At 4:59 PM, the Complainant responded to the Department and explained that the information required in point-rated criterion 2.3 had already been provided in its original submission. The Complainant referred to three software programs that could be used to view the information in each photograph, and provided three screenshots to demonstrate that the metadata had been originally included with the photographs at bid submission.

37. On April 29, 2018, the consensus evaluation on the technical and financial bids was signed by the evaluators.

38. On April 30, 2018:

- At 2:02 PM, the Successful Supplier advised the Department that “I want to inform you that the update of the photo data has been completed for five of our main photographers... This will be a long process, and the identification, date and location have been put in the folder names and in the comments for each photo. We are in the process of finalizing the last three photographers and this will be completed by 3:00 PM.” [Translation]

- At 2:09 PM, the Department confirmed to the Successful Supplier that the deadline to receive this information was at 2:00 PM, and it could not accept new information after this time.
- At 2:20 PM, the Successful Supplier responded to the Department that “[t]he vast majority of the information was corrected before 2:00 PM on the Dropbox” and that the Department would have “enough information to conduct [their] evaluation of this criterion.” [Translation]
- At 10:32 PM, the Successful Supplier clarified to the Department that “[f]ollowing [the Department’s] email of [April 29, 2018], we reworked the presentation and description of the portfolios on the Dropbox database. The information requested was initially partially available and unclear. We corrected it so that [the Department can] conduct a better evaluation. The vast majority of the information was corrected before 2:00 PM on the Dropbox. If necessary, I can get you a time-stamped status of patches to justify it.” [Translation]

39. On May 2, 2018:

- At 12:05 AM, the first of two Departmental Project Authorities indicated that they were able to view the metadata for point-rated criterion 2.3.
- At 7:34 AM, the Contracting Authority asked the second Departmental Project Authority if they could view the metadata in the photographs, and the Contracting Authority stated that “[the Contracting Authority would] adjust the mark accordingly.”
- At 7:45 AM, the first Departmental Project Authority confirmed they were able to view the metadata for point-rated criterion 2.3 for both bids.
- At 11:28 AM, the second Departmental Project Authority stated that they had problems accessing the requested information, but that “if [the other Project Authority] can see/access all the metadata then it’s fine.”

40. On May 4, 2018:

- At 12:45 PM, the Department requested a new financial proposal from the Successful Supplier and the Complainant: "In order to finalize the evaluation of the proposals received, we are required to ask you to send us a new financial proposal..." [Translation] The email included a modified Annex B: Basis of Payment as an attachment, which required that daily rates be provided for the aggregate number of resources and include travel and living expenses. The Department provided a deadline of May 8, 2018, at 2:00 PM.
- At 1:28 PM, the Successful Supplier confirmed with the Department that it would meet the deadline to provide a new financial proposal, and was willing to provide it earlier, if a new deadline was given to all bidders.

- At 1:56 PM, the Successful Supplier informed the Department that based on experience, it was reluctant to send its price in advance of the deadline, not knowing in whose hands it would find itself. However, considering the tight timelines, it would send a revised financial proposal by 3:00 PM.
  - At 2:37 PM, the Complainant sent its financial proposal to the Department. There were no changes made from the original financial proposal.
  - At 2:58 PM, the Successful Supplier sent its updated financial proposal to the Department and confirmed that the daily rates included the travel and living expenses for the aggregate number of resources.
41. On May 7, 2018, the Department sent a letter to inform the Successful Supplier that it would be awarded the contract for the services of a host photographer for the G7 Summit. The letter stated “[c]onsidering the adjusted financial proposal, received on May 5, 2018 [sic], at the request of the Department, here is the summary of your technical and financial evaluation...” [Translation] The technical score was 78/98, and the price was \$49,515.
42. On May 7, 2018, the Department sent a regret letter to the Complainant. The letter included the Complainant’s technical score of 64/98 (45.71/70), financial score of 27.86/30, the name of the Successful Supplier, the amount of the awarded contract of \$49,515, and an offer to debrief the Complainant in response to any questions or concerns.<sup>2</sup>
43. On May 10, 2018, the Department held a debrief session with the Complainant.
44. On May 13, 2018:
- At 6:47 AM, the Complainant informed the Department of its dissatisfaction with the contract award process.
  - At 10:32 AM, the Department responded to the Complainant and stated that applicable contract rules were followed.
45. On May 14, 2018, the Department awarded the contract to the Successful Supplier, which included a clause that “Canada’s total liability to the contractor under the contract must not exceed \$83,350 and the applicable taxes are excluded.” [Translation]
46. On May 14, 2018, the Complainant filed a written complaint with OPO, listing the contract’s value as \$49,515, based on the amount included in the regret letter it received from the Department.

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<sup>2</sup> The Department calculated the price of the contract by adding the total half day, full day, and hourly rates of the resources.

47. On May 14, 2018, at 10:52 AM, the Department informed OPO that the maximum budget for the requirement was \$95,000, and that the contract had a maximum value of \$83,350 (before taxes). The Department indicated that the requirements for the G7 Summit could change throughout the term of the contract and to the extent there were changes, the contract would have to be amended.
48. On May 14, 2018, the Department responded to the Complainant to address its additional concerns regarding the value of the contract. The Department explained:
- “The amount of \$95,000 represents the estimated financial resources for the requirements. This amount is in no way a guaranteed amount to the company. When the solicitation was launched, we did not have a specific program at the time. The financial package in Annex B therefore only sought to obtain details of the bidders’ rates. The winning bidder’s rates were to be subsequently applied to the contract. In reality, we do not know how much the contract could amount to, 40K, 60K, for a maximum of 95K. The requirements are constantly evolving and will be until the date of the event. As of the date of bid closing, two bids with financial proposals of similar value were received. Please note that invoices will only be payable on work that is authorized and delivered in a compliant manner. [...] For our part, we may need to work to clarify the information provided in our solicitations.” [Translation]
49. On May 24, 2018, emails were exchanged within the Department identifying the need for a photographer for the Gender Equality Advisory Council meeting to be held during the G7 Summit.
50. On May 30, 2018, the Department approved that a contract be issued for a photographer for the Gender Equality Advisory Council meeting.
51. On June 1, 2018:
- At 6:04 AM, the Department confirmed that there were no photographers available on a standing offer list to cover the Gender Equality Advisory Council meeting, and decided to search for photographers online.
  - At 3:57 PM, the Department confirmed that four photographers had been contacted, and their bids were expected to be received that weekend.
  - At 6:49 PM, the Department emailed the Complainant the itinerary for the Gender Equality Advisory Council meeting and indicated it was looking forward to receiving a bid from the Complainant.
  - At 9:38 PM, the Complainant submitted a bid regarding the Gender Equality Advisory Council meeting.

52. On June 2, 2018, the Department decided not to issue a contract for a photographer for the Gender Equality Advisory Council meeting, and not to contact any of the photographers who had been previously contacted.
53. On June 4, 2018, the Complainant followed up with the Department on its requirement for a photographer for the Gender Equality Advisory Council meeting.
54. On June 11, 2018, the Successful Supplier invoiced the Department for \$94,167.50 (before taxes) for photography services for the G7 Summit. The invoice included photography services for the Gender Equality Advisory Council meeting held during the G7 Summit.
55. On June 14, 2018, the Department provided OPO with its account of events regarding the requirement for a photographer for the Gender Equality Advisory Council meeting. The Department stated that, after looking internally and determining that a standing offer for photography services did not exist, it randomly selected three photographers online with experience in events. The Complainant also became aware of the requirement and contacted the Department to submit a proposal. The Department later decided not to issue a separate contract but rather to include the additional requirement for the Gender Equality Advisory Council meeting as an “add-on” to the contract for the host photographer for the G7 Summit.
56. On June 28, 2018, the Department completed a “rationale for cost overrun” to justify the \$10,818 in additional costs incurred above the original contract value that was not to exceed \$83,350. [*Translation*] The Department explained that, at the time the solicitation was prepared, there was limited information available regarding requirements. Between the time the bidders submitted their proposals and the time of the G7 Summit, there were additional events which broadened the scope of the requirements.
57. On July 17, 2018, the Complainant emailed OPO with evidence of alleged contract splitting by the Department. The evidence included a screenshot of 24 photographs from a webpage on the official G7 Summit website. Each photograph included links to additional photographs of various events leading up to, and including, the G7 Summit in June 2018. The Complainant suggested that each of the 24 sets of photographs represented a separate contract and that these photographs were not part of the requirements in Solicitation 2.
58. On July 29, 2018, the Complainant wrote to OPO requesting compensation in the amount of \$1,090,818.

## ANALYSIS AND FINDINGS

### Issue 1 – Did the Department award the contract to a non-responsive bidder?

59. The Complainant alleged the Department awarded the contract to a non-responsive bidder, and that it should have been awarded the contract.
60. The Department's response to OPO stated that the procurement was conducted in a fair, open, and transparent manner. A competitive process was launched, and a contract was awarded in accordance with the terms of the solicitation.

### Analysis

#### *Applicable Legislation, Regulations and Policy*

61. The Government of Canada's commitment to taking appropriate measures to promote fairness, openness, and transparency in the bidding process for government contracts is expressed in Section 40.1 of the *Financial Administration Act*.
62. Section 10.8.6 of the Treasury Board Contracting Policy (TBCP) states that "a bid or proposal is non-responsive if it does not meet all the mandatory requirements listed in the Request for Proposal or other solicitation documents and will be rejected."
63. OPO's analysis was informed by the CITT's decision in *Valcom Consulting Group Inc. v. Department of National Defence*, which emphasized that the evaluation of mandatory criteria is an issue of strict compliance. "The standard for evaluating bids against mandatory criteria is not one of a balance of probabilities. [...] [B]ids must be evaluated thoroughly and strictly for compliance. It is not enough that a bid 'may have been' compliant or was 'more likely than not' compliant. A bid is either compliant or it is not."
64. In determining whether a bid was evaluated in accordance with a stated criterion, the Procurement Ombudsman will normally accord a large measure of deference to evaluators. As stipulated in Section 12(2) of the Regulations:  
  
"The Procurement Ombudsman shall not substitute his or her opinion for the judgment of the persons involved in the acquisition process for the contract in relation to the assessment of any bid, unless there is insufficient written evidence to support that assessment or the assessment is unreasonable."
65. Sufficient written evidence was provided to support the assessment; however, the reasonableness of the Department's evaluation (i.e. assessment) of the Successful Supplier's bid required additional analysis. To determine if an assessment was

unreasonable, the Procurement Ombudsman will consider whether evaluators “have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.”<sup>3</sup>

### Mandatory Requirements

66. Solicitation 2 included four mandatory requirements that a bidder had to meet for their bid to be deemed responsive. The solicitation goes on to say that “[p]roposals not meeting all of the mandatory requirements will be considered non-responsive and given no further consideration.”

67. Mandatory criterion M.1 required that bidders have experience in the area of photographic coverage and technical support services with at least two official events that included “International Protected Persons” (IPPs) and “Very Important Persons” (VIPs).

68. Mandatory criterion M.2 required that bidders demonstrate experience in which “[t]he bidder’s responsibility must have been to supply photographic services to the media in attendance and to the meeting [organizers]” of two official events.

69. Mandatory criterion M.3 focused on the experience of the proposed personnel. It required the bidder to provide a “list of the management and key technical personnel and their roles for the G7 Summit...and the languages they speak and comprehend.” Mandatory criterion M.3 was further divided into two sub-criteria:

- M.3.1 required that “the Bidder must provide a summary for each of the personnel listed in M.3.”
- M.3.2 required that “the Bidder must provide a written confirmation of the availability of all personnel (this includes the project leader, photographers and editors).” The requirements for M.3.2 had to be met for the project leader, a minimum of **nine** [emphasis added] photographers, and a minimum of three editors. Please refer to the following table:

M.3.2 The Bidder must provide a written confirmation of the availability of all personnel (this includes the project leader, photographers and editors). This confirmation can be provided through an email or a signed document between the Bidder and the individual.
Project Leader
Photographers (minimum of nine)
Editors (minimum of three)

<sup>3</sup> CITT Solutions Moerae Inc. o/a MSI v. Industry Canada (PR 2016-004) – Paragraph 25

70. Mandatory criterion M.4 required that the bidder provide a web link to a database “which includes folders of each photographer’s portfolio.”

*Department’s Evaluation of the Mandatory Criteria – Successful Supplier*

71. To determine if the Department awarded the contract to a non-responsive bidder, the Procurement Ombudsman had to determine if the evaluators’ assessment of the mandatory criteria was unreasonable.

72. The evaluators assessed the Successful Supplier’s bid to be compliant with mandatory criteria M.1, M.2, M.3 and M.4 of Solicitation 2.

73. Mandatory criterion M.1 (Experience of the Bidder) required that bidders have experience in the area of photographic coverage and technical support services with at least two official events that included IPPs and VIPs.

74. In addition, both Section 4.1.1.1 (Mandatory Technical Criteria) and Annex E of Solicitation 2 stated that “the experience of the Bidder must be work for which *the Bidder* [emphasis added] was under contract to clients. In the case of a joint venture, the combined experience of the parties forming the joint venture will be considered in the evaluation of the experience of the Bidder.” Therefore, to comply with M.1, the Successful Supplier’s bid had to demonstrate that either:

- it (the named bidder or its employees not including subcontractors) had direct experience in the area of photographic coverage and technical support services with at least two official events that included IPPs and VIPs; or
- it was part of a joint venture where the combined experience of the parties forming the joint venture had that experience.

75. OPO reviewed the Successful Supplier’s bid to determine whether the evaluators’ assessment of compliance with mandatory criterion M.1 was unreasonable. Several elements of the bid raised questions and concerns about whether the Successful Supplier’s bid demonstrated compliance with M.1:

- In responding to M.1, the Successful Supplier’s bid references eight photographers and multiple events including IPPs and VIPs in which these photographers participated. However, the bidder (i.e. Successful Supplier) itself is not linked to any of these events.
- In responding to M.1, the Successful Supplier stated that it “retained the services of a team of experienced photographers...” [*Translation*] This statement suggests that the team of photographers proposed in the Successful Supplier’s bid were neither employees of, nor part of a joint venture with, the Successful Supplier, and that their experience in meeting the requirements of M.1 could not be attributed to the Successful Supplier.

- The confirmation of availability statements signed by the same eight photographers state that “[i]f the contract is awarded to [the Successful Supplier], I will sign a contract with the company...” [*Translation*] This commitment to sign a contract if the contract is awarded to the Successful Supplier implies no existing contractual relationship at the bid submission deadline. This further suggests the photographers named in the bid who had the experience to meet the requirements of M.1 were neither employees of, nor part of a joint venture with, the Successful Supplier at the bid submission deadline.
- In reviewing the Successful Supplier’s bid, OPO found no evidence that the Successful Supplier bid had entered into a joint venture with the eight photographers that would have enabled it to meet the requirements of M.1.

76. The Standard Instructions incorporated by reference into Solicitation 2 state: “In conducting its evaluation of the bids, Canada may, but will have no obligation to, do the following:

- a. seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation.”

77. While there was no obligation requiring the Department to seek clarification from the Successful Supplier regarding compliance with M.1, the Procurement Ombudsman found that by failing to seek clarification, the evaluators either wrongly interpreted the scope of the requirements of M.1, or lacked sufficiently clear information to determine the named photographers were either employees of, or bid as a joint venture with, the Successful Supplier. Therefore, the Procurement Ombudsman found that the evaluators’ assessment that the Successful Supplier’s bid complied with M.1 was unreasonable.

78. The Procurement Ombudsman reached a similar finding in regard to mandatory criterion M.2, which required that bidders demonstrate experience in which “[t]he Bidder’s responsibility must have been to supply photographic services to the media in attendance and to the meeting [organizers]” of two official events.

79. In responding to mandatory criterion M.2, the Successful Supplier’s bid contained no evidence that it supplied the required photographic services either directly (i.e. by the bidder itself), through its employees, or as a joint venture. There was also no evidence that the Department sought clarification from the Successful Supplier regarding compliance with M.2. Therefore, as with mandatory criterion M.1, the Procurement Ombudsman found that the evaluators’ assessment of compliance for M.2 was unreasonable.

80. For mandatory criterion M.3, the evaluators also assessed the Successful Supplier’s bid to be compliant. The Successful Supplier provided a list of proposed personnel which

included a project lead, eight photographers, and three photo editors. The Successful Supplier stated that “[d]epending on project planning with the Summit Management Office, we have two other photographers available as alternates.” [Translation]

81. Mandatory criterion M.3 included two sub-criteria (M.3.1 and M.3.2). Mandatory sub-criterion M.3.1 required that “the Bidder must provide a summary for each of the personnel listed in M.3.” The evaluators determined M.3.1 was met, and the Procurement Ombudsman did not find this assessment to be unreasonable.
82. Mandatory sub-criterion M.3.2 required that “the Bidder must provide a written confirmation of the availability of all personnel (this includes the project leader, photographers and editors).”
83. In its bid, the Successful Supplier included eight photographers and two back-up photographers as personnel. The notes from one of the evaluators indicated that the two back-up photographers were used to meet the minimum requirement of nine photographers. Mandatory criterion M.3 did not prohibit the use of back-up personnel to meet the minimum requirement of nine photographers.
84. However, mandatory sub-criterion M.3.2 also required that written confirmation of availability be provided for a minimum of nine photographers. The Successful Supplier’s bid only provided a written confirmation of availability for eight photographers. The bid did not include the written confirmation of availability for either of the two back-up personnel.
85. As outlined in the CITT’s ruling in *Valcom Consulting Group Inc. v. Department of National Defence*, the standard for evaluating bids against mandatory criteria is not one of a balance of probabilities, and bids must be evaluated for strict compliance. As the Successful Supplier was required to provide written confirmation of availability for nine photographers but only did so for eight, the Procurement Ombudsman found the evaluators’ assessment that the Successful Supplier’s bid complied with M.3.2 to be unreasonable.
86. The TBCP considers a bid to be non-responsive if it does not meet all the mandatory requirements listed in the Request for Proposal. This was reflected in Solicitation 2, which stated that “[p]roposals not meeting all of the mandatory requirements will be considered non responsive and given no further consideration.” As the Successful Supplier’s bid did not meet the requirements of mandatory criteria M.1, M.2 and sub-criterion M.3.2, it should have been considered non-responsive and given no further consideration.

Department's Evaluation of the Mandatory Criteria – Complainant

87. The evaluators also assessed the Complainant's bid to be compliant. To determine if the Complainant's bid should have been recommended for contract award, OPO had to confirm that the evaluators' assessment of compliance was not unreasonable.
88. For M.1, the Complainant's bid demonstrated experience with two official events, which included IPPs and VIPs.
89. For M.2, the Complainant's bid demonstrated responsibility for supplying photographic services to the media in attendance and the organizers of two official events.
90. For M.3.1, the Complainant's bid provided a summary of relevant work experience for all proposed personnel.
91. For M.3.2, the Complainant's bid provided written confirmation of availability for the project leader, nine photographers, two photo editors and three back-up personnel. The three back-up personnel could be either a photographer or a photo editor.
92. For M.4, the Complainant's bid provided the web link to a database which included folders of each photographer's portfolio.
93. Therefore, the Procurement Ombudsman did not find the evaluators' assessment that the Complainant's bid complied with mandatory criteria M.1, M.2, M.3 and M.4 to be unreasonable.

## Finding 1

94. The Procurement Ombudsman found the evaluators' assessment that the Successful Supplier's bid complied with mandatory criteria M.1, M.2 and sub-criterion M.3.2, to be unreasonable. Therefore, the Department awarded the contract to a non-responsive bidder.
95. The Procurement Ombudsman also found that the evaluators' assessment that the Complainant's bid complied with all the mandatory criteria was not unreasonable. As the Complainant was the only bidder to submit a responsive bid, the Complainant's bid should have been recommended for contract award.

## Issue 2 – Were the Department’s requirements divided unnecessarily to avoid trade agreement thresholds (i.e. contract splitting)?

96. The Complainant suggested that the Department improperly divided requirements for the services of a host photographer for the G7 Summit into multiple contracts. To support this claim, the Complainant pointed to a screenshot of 24 sets of photographs posted on the official website of the G7 Summit and to the additional requirement for a photographer to cover the Gender Equality Advisory Council meeting. According to the Complainant, each of the 24 sets of photographs was evidence of a separate contract for photography services awarded by the Department for the G7 Summit.
97. In its response to OPO, the Department indicated it only awarded two contracts for photography services for the G7 Summit. The first being the contract issued to a photographer who captured the May 2017 public announcement that the G7 Summit would be held in Charlevoix, Quebec (in the amount of \$525), and the second being the contract awarded to the Successful Supplier. The Department also stated that its employees took all other photographs posted on the official website of the G7 Summit.

### Analysis

#### Applicable Policy

98. Section 10.6.16 of the TBCP states that “[c]ontracting authorities shall not structure a procurement, select a valuation method, or divide procurement requirements in order to avoid the obligations of the *North American Free Trade Agreement*, the *World Trade Organization – Agreement on Government Procurement* and the *Agreement on Internal Trade*.” Such actions, designed to avoid the obligations of the trade agreements, are commonly referred to as “contract splitting.”
99. The TBCP defines contract splitting as the “the practice of unnecessarily dividing an aggregate requirement into a number of smaller contracts, thereby avoiding controls on the duration of assignments or contract approval authorities.”

#### Assessment of Allegation

100. OPO reviewed each of the 24 sets of photographs to determine if they provided any evidence the Department improperly divided an aggregate requirement of photography services for the G7 Summit into a number of smaller contracts.
101. The Department asserted that all photographs posted on the official website of the G7 Summit were either taken by the Successful Supplier, the photographer who covered the May 2017 public announcement, or departmental staff.

102. OPO reviewed the 24 sets of photographs and found that 14 were taken at events held during the G7 Summit from June 7 to 9, 2018. All but one of these 14 events were included in the contract originally awarded to the Successful Supplier. The one event not included in the original contract was the Gender Equality Advisory Council meeting. However, the need for photography services for the Gender Equality Advisory Council meeting did not arise until after the contract with the Successful Supplier had been awarded. These additional photography services were also provided by the Successful Supplier, who invoiced the Department in the amount of \$10,818 for these services.
103. The terms of Solicitation 2 stated that “[t]he information in the Annex ‘A’ Statement of Work...is not a guarantee of the actual work that will be required. Some elements may be reduced or added for the actual G7 Summit.” Therefore, adding the additional photography services required for the Gender Equality Advisory Council meeting (which was a related event taking place during the G7 Summit) to the original contract was consistent with the Statement of Work.
104. The remaining 10 (out of 24) sets of photographs were not photographs taken during the G7 Summit itself, but rather, at events leading up to the G7 Summit.
105. The Department also issued a contract valued at \$525 on May 25, 2017, for photography services to cover the public announcement that the G7 Summit would be held in Charlevoix, Quebec in June 2018.
106. The Procurement Ombudsman found there was insufficient evidence to support the Complainant’s allegation that the 24 sets of photographs available on the G7 Summit official website were separate contracts and not taken by either the Successful Supplier (as part of the contract in question), the photographer who covered the May 2017 public announcement (in the amount \$525), or departmental staff.

## Finding 2

107. The Procurement Ombudsman found there was insufficient evidence to support the Complainant’s allegation that contract splitting had occurred.

## CONCLUSION

108. The Procurement Ombudsman found merit in one of the two issues raised by the Complainant.
109. The Procurement Ombudsman found that the evaluators’ assessment that the Successful Supplier’s had complied with mandatory criteria M.1, M.2 and sub-criterion

M.3.2, was unreasonable. Therefore, the Department awarded the contract to a non-responsive bidder.

110. The evaluators also assessed the Complainant's bid to be responsive, and the Procurement Ombudsman did not find this to be unreasonable. As the Complainant's bid was the only responsive bid, it should have been recommended for contract award.

111. Regarding the allegation of contract splitting, the Procurement Ombudsman found there was insufficient evidence to support the Complainant's allegation that contract splitting had occurred.

## COMPENSATION

112. In order to recommend the payment of compensation to the Complainant, Subsection 13(2) of the Regulations requires the following:

If a competitive process was held, the complainant must have submitted a bid in respect of the contract to which the complaint relates, unless it was prevented from doing so because of the actions of the contracting department.

113. As a competitive process was held and the Complainant submitted a bid, the Procurement Ombudsman may recommend payment of compensation in accordance with Section 13 of the Regulations.

## RECOMMENDATION

114. In accordance with Paragraph 13(1)(a)(ii) of the Regulations, the Procurement Ombudsman recommends the Department pay compensation to the Complainant in an amount equal to 10% of the value of the contract awarded. The Procurement Ombudsman recommends the Department pay \$8,335 to the Complainant.

## OTHER OBSERVATIONS

115. As per Subsection 12(1) of the Regulations, the Procurement Ombudsman is required to consider any relevant factors related to the procurement process in question when conducting a review of a complaint.

116. OPO identified the additional issues noted below.

## Other Observation 1 – Bid Enhancement

117. Section 10.8.7(b) of the TBCP specifies when it is permissible for a Department to seek clarification from a bidder after bid closing. It states that:

“Bids or proposals that respond to the mandatory requirements but contain a minor aberration may be considered if, in the opinion of the contracting authority’s management...the presence of that aberration, its removal by negotiation, or its clarification with the bidder could not reasonably be considered prejudicial to the other bidders.”

118. The CITT has established the difference between seeking clarification from a bidder and bid repair. As explained in the CITT’s decision in *Stenotran Services Inc. v. Department of Public Works and Government Services*, “[bid repair] is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the bid closing date. By contrast, a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.”

119. In addition, the CITT clearly states how bid repair impacts the transparency of the solicitation process in its decision in *Bell Mobility v. Department of Public Works and Government Services*. “The Tribunal is of the view that, if bidders were allowed to correct their bids in a substantive way, this would introduce an element of doubt in the supplier community as to the transparency of the competitive bidding process.”

120. “The rule against bid repair also applies to bid enhancement. Even where its bid is compliant, a bidder is generally not permitted to materially change or improve its tender after the submission deadline<sup>4</sup>.”

121. Point-rated criterion 2.3 required potential bidders to submit a portfolio of photographs for each photographer. Each photograph had to include metadata such as the name, type of event, date and site of the photo. Partial points were awarded if the portfolio of photographs was provided without metadata. Full points were awarded if the metadata for each photograph was included.

122. On April 29, 2018, after bid closing, the Department requested clarification from both bidders as to whether their portfolios included metadata. The Department stated that the evaluators could not access the metadata, and asked the bidders “to please contact us by Monday, April 30, at 2:00 PM (Ottawa time), to confirm if this information is missing. If there is no answer by Monday, April 30, at 2:00 PM, we will evaluate this criterion of your proposal without the data.” [Translation]

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<sup>4</sup> Emanuelli, Paul, *Government Procurement 4th Edition*, page 561.

123. The Complainant responded on April 29, 2018, and confirmed that the metadata was included in its original bid submission. It referred the Department to three software tools that could be used to view the information and provided three screenshots to demonstrate that the metadata had been included with the photographs at bid submission.
124. On April 30, 2018, the Successful Supplier told the Department that the metadata had been completed for the portfolios of five of the eight photographers and that the “identification, date and location have been put in the folder names and in the comments for each photo. We are in the process of finalizing the last three photographers...” [Translation] Later that day, the Successful Supplier indicated the vast majority of information had been corrected before 2:00 PM.
125. There is evidence to support that the Department changed the scores for point-rated criteria for both the Complainant and the Successful Supplier based on the responses to the clarification request. Both bids were initially awarded partial points and later, full points. In an internal email exchange, the Department stated that they would “adjust the mark accordingly” after it was confirmed that the metadata was included in the portfolio of photographs for both bidders.
126. The Procurement Ombudsman found that the Department left itself open to the perception of wrongful bid enhancement by allowing the Successful Supplier to improve its bid after bid closing. The Department accepted new information and proceeded to increase the points allocated to the Successful Supplier. Although the Department also increased the points allocated to the Complainant, this constituted a legitimate clarification as the metadata was already included in the Complainant’s original bid prior to bid closing.

## Other Observation 2 – Discrepancies in the Solicitation Documents

127. Included in Section 4.1.3 of the TBCP is the requirement that “[w]henver practical, an equal opportunity must be provided for all firms and individuals to compete, provided that they have, in the judgment of the contracting authority, the technical, financial and managerial competence to discharge the contract and meet, where appropriate, the objectives established by overall national policies or as required under the *North American Free Trade Agreement*, the *World Trade Organization – Agreement on Government Procurement*, and the *Agreement on Internal Trade*.”
128. OPO reviewed key sections of Solicitation 2 and identified numerous discrepancies between the English and French versions of the document. Discrepancies were found in all five sections reviewed:
  - Part 1: General Information;

- Part 4: Evaluation Procedures and Basis of Selection;
- Annex A: Statement of Work;
- Annex B: Basis of Payment; and,
- Annex E: Mandatory and Rated Requirements.

129. For example, the national security exception was invoked in the General Information section of one version of Solicitation 2, whereas the other version made no mention of this exception. One version also indicated the requirement was limited to Canadian goods and/or services, whereas the other version did not.

130. Further discrepancies were found in regard to the Statement of Work. For example, one version of Solicitation 2 made reference to two media centers, whereas the other version listed only one. Moreover, one version indicated the Spousal Program event would take place from June 7 to 9, 2018, whereas the other version indicated it would take place from June 8 to 9, 2018. While the Department did indicate in the Statement of Work that “[t]he English version of the Annex A is the original,” this does not address the nature and frequency of the discrepancies found throughout Solicitation 2 and their possible impact on potential bidders.

131. The numerous discrepancies compromise the fairness of the procurement process as potential bidders did not have access to the same information to inform the development of their bid. Failing to treat potential bidders equally places the fairness of the procurement process at risk.

### Other Observation 3 – Deleted Records

132. Section 12.3.1 of the TBCP requires that procurement files “be established and structured to facilitate management oversight with a complete audit trail that contains contracting details related to relevant communications and decisions including the identification of involved officials and contracting approval authorities.”

133. Further, the CITT’s ruling in *Hewlett-Packard (Canada) Ltd* underscored that “the maintenance of complete documentation for each procurement is fundamental to preserving the integrity and transparency of the procurement system.”

134. When OPO requested the Department provide all records pertaining to the award of the contract, the Department did not respond with a complete set of records. Certain records pertaining to Solicitation 2 were not included in the Department’s response to OPO.

135. For example, the Department provided records indicating it received four questions from potential bidders during the Solicitation 2 bidding period, three of which were posed by the Complainant. However, the Department did not provide all four responses

to OPO – it only provided the response to one of the four questions, which was sent to the Complainant by email. It was the Complainant, through its own record submission, who provided OPO with two other missing responses not included in the Department's submission of records. OPO never received a response to the fourth question, which was raised by the Successful Supplier.

136. OPO requested records from the Department twice – once at the outset of the review, and then a second time, when it became apparent to OPO that the Department had not provided a full set of records regarding Solicitation 2. In its response to OPO's second request, the Department acknowledged it had deleted records of correspondence that included questions and answers between the Department and potential bidders. In the Procurement Ombudsman's opinion, this deletion is inconsistent with the requirements of the TBCP.

#### Other Observation 4 – Lack of Proactive Disclosure

137. Section 5.1.6 of the TBCP states that "Deputy heads are required to publicly disclose quarterly, within one month after the close of each quarter, contracts entered into or amendments valued at over \$10,000."
138. The requirement to publicly disclose this information is a measure implemented by the Government of Canada to "strengthen public sector management by enhancing transparency and oversight of public resources in the federal government." The information, which is readily available via the Open Government portal, allows Canadians to better hold the Government to account.
139. In keeping with the principle of transparency, the G7 Summit Management Office stated on its official website that "[p]roactive disclosure of information related to Canada's 2018 G7 Presidency and Summit in Charlevoix, including financial, human resources and operations information, will be made available on the Global Affairs Canada website."
140. OPO reviewed contracting information posted on the Open Government portal and the Department's website. As of October 31, 2018, the contract awarded on May 14, 2018, to the Successful Supplier, valued at \$83,350, had not been publicly disclosed by the Department as required.
141. Public disclosure of contracts, such as the one awarded to the Successful Supplier, is an important component of the Government's commitment to transparency. In failing to publicly disclose the award of this contract, the Department limited Canadians' access to information and, by extension, their ability to hold the Government accountable for its actions.

## Other Observation 5 – Undisclosed Evaluation Methodology

142. With regard to assessment and award criteria, Section 10.3.1 of the TBCP states that “[a]ssessment and award criteria must be spelled out in the solicitation document.”
143. Section 10.7.27 of the TBCP further states that “[c]ompeting firms should be told the measurement criteria and the weighting assigned to them. [...] [T]he [evaluation] factors and their weighting must be established beforehand and adhered to strictly. [...] Fairness to all prospective contractors and transparency in the award process are imperative.”
144. According to Section 4.2 of Solicitation 2, the selection of the winning bidder was based on the highest responsive combined rating of technical merit and price. The ratio was 70% for the technical merit and 30% for the price.
145. To establish the pricing score, each responsive bid was prorated against the lowest evaluated price and the ratio of 30% using the following formula:
- $$\text{Price points} = \text{lowest price offer}/\text{offeror's price} \times 30$$
146. Section 4.1.2 of Solicitation 2 stated that “[t]he price of the proposal will be evaluated...as detailed under Annex B: Basis of Payment.” The modified Annex B: Basis of Payment required that bidders provide a “cost per period” for each half day (5 hours), full day (10 hours), and overtime at an hourly rate for the aggregate number of resources for each category. However, Annex B: Basis of Payment did not provide any information on *how* the Department would use this information to calculate the price proposed by the bidder.
147. To determine the proposed price of each bidder, the Department added the cost per period for the aggregate number of resources for each category of resource for the half day, full day, and hourly overtime rates. Using this calculation formula, the price of the Successful Supplier was \$49,515 and the price of the Complainant was \$53,315. However, the bidders were not told in advance how the individual rates were to be converted into an overall price/score. If the bidders had known in advance how the price of the bid would be calculated, they may have submitted different rates, which could have resulted in a different price/score.
148. The Department determined the results of the financial evaluation by employing a method of calculation that was not included in the solicitation. The TBCP requires that assessment criteria be established beforehand so that bidders can prepare an informed bid. Evaluation methodology should be included in the solicitation to allow bidders to understand how their bid inputs will be used to calculate a score.