Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2014-015 and PR-2014-020

CGI Information Systems and Management Consultants Inc.

v.

Canada Post Corporation and Innovapost Inc.

Determination issued
Thursday, October 9, 2014

Reasons issued
Friday, October 24, 2014

Corrigenda issued
Monday, November 17, 2014

Canada

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IN THE MATTER OF complaints filed by CGI Information Systems and Management Consultants Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a decision to combine the complaint cases as a single proceeding, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*.

BETWEEN

CGI INFORMATION SYSTEMS AND MANAGEMENT CONSULTANTS INC. **Complainant**

AND

CANADA POST CORPORATION AND INNOVAPOST INC. **Government Institutions**

DETERMINATION

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Canada Post Corporation, whether conducting procurements on its own behalf or through Innovapost Inc., develop and implement procedures that ensure that complete documentation is maintained regarding such procurements, as required by Article 1017(1)(p) of the *North American Free Trade Agreement*.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards CGI Information Systems and Management Consultants Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Canada Post Corporation or Innovapost Inc. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,700. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Jean Bédard
Jean Bédard
Presiding Member

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

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 11, 2014
Tribunal Member:	Jean Bédard, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija Alexandra Pietrzak
Procurement Case Officer:	Josée B. Leblanc
Acting Senior Registrar Officer:	Haley Raynor
Registrar Officer:	Ekaterina Pavlova
Complainant:	CGI Information Systems and Management Consultants Inc.
Counsel for the Complainant:	Paul Conlin R. Benjamin Mills Anne-Marie Oatway William Pellerin Linden Dales
Government Institutions:	Canada Post Corporation and Innovapost Inc.
Counsel for the Government Institutions:	Nicholas McHaffie Justine Whitehead
Intervener:	Wipro Technologies Canada Ltd.
Counsel for the Intervener:	Martin G. Masse Jonathan O'Hara Kyle Lambert

WITNESSES:

Richard Chartrand
Vice-President, Consulting Services
CGI Information Systems and Management Consultants Inc.

David Wright
Senior Executive Consultant
CGI Information Systems and Management Consultants Inc.

Maya Walker
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STATEMENT OF REASONS

INTRODUCTION

1. This inquiry concerns a Request for Proposal (Solicitation No. 2012-SDL-006) (the RFP) issued by Innovapost Inc., a subsidiary of Canada Post Corporation (together, Canada Post), on behalf of the Canada Post Group of Companies, for the provision of data centre services. It deals with the second and third complaints[1] in regard to this RFP, filed on May 27 (File No. PR-2014-015) and July 10, 2014 (File No. PR-2014-020), by CGI Information Systems and Management Consultants Inc. (CGI) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[2]

2. CGI alleged that Canada Post breached Articles 1013(1) and 1015(4) of the *North American Free Trade Agreement*[3] by conducting an unreasonable and biased evaluation of CGI's proposal and breached Article 1017(1)(p) by destroying documents relating to the RFP.

3. As remedies, CGI requested that Canada Post cancel the contract awarded under the RFP and issue a new solicitation that conforms to the requirements of *NAFTA* and other applicable trade agreements and that it compensate CGI for lost profit and lost opportunity in the period between contract award and re-issuance of the solicitation by Canada Post. In the alternative, if the solicitation is not re-issued, CGI requested compensation for lost profit or lost opportunity and, in the further alternative, its bid preparation costs. Additionally, CGI requested that Canada Post adopt procedures that ensure that complete documentation is maintained for procurements in accordance with Article 1017(1)(p) and any other relief that the Tribunal deems appropriate. CGI also requested its litigation costs.

4. Both complaints were accepted for inquiry, having met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[4]

5. Wipro Technologies Canada Ltd. (Wipro), the contract awardee in this solicitation, was granted intervener status, on motion, in both complaints.

6. Because both complaints involved the same RFP and interrelated issues and facts, the Tribunal combined the two proceedings on August 22, 2014.

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1. The first complaint filed by CGI regarding the RFP was dealt with in File No. PR-2014-006. The Tribunal issued its determination on August 27, 2014.
2. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
4. S.O.R./93-602 [*Regulations*].

7. The parties filed extensive written submissions with the Tribunal.[5]

8. Furthermore, as contemplated by subrule 105(6) of the *Canadian International Trade Tribunal Rules*,[6] the Tribunal decided to hold a one-day hearing to clarify relevant material facts and to hear argument, and so informed the parties on July 29, 2014.

9. A public hearing was held on September 11, 2014, in Ottawa, Ontario. The Tribunal heard evidence from six witnesses. CGI called two witnesses: Mr. Richard Chartrand, Vice-President, Consulting Services, CGI, and Mr. David Wright, Senior Executive Consultant, CGI. Canada Post called Ms. Maya Walker, who holds the position of Director, Procurement, at Canada Post Corporation and who was "cross-posted" to Innovapost Inc., as Director, Sourcing Management, for the purposes of the solicitation in issue;[7] Mr. Jim Bezanson, Director, IT Infrastructure, and Project Lead, Innovapost Inc.; and Mr. Rick Wilson, Associate, BDO Consulting, who was retained to act as fairness monitor in this solicitation. Finally, Wipro called Mr. Xavier S. Diniz, Director of Sales – Canada, Wipro, to testify on its behalf.

10. Due to the fact that much of the information on the record was designated confidential in accordance with section 46 of the *CITT Act* and rule 15 of the *Rules*, parts of the testimonies and oral arguments were heard *in camera* in order to ensure parties' right to be fully heard by the Tribunal.

PROCUREMENT PROCESS

RFP and Evaluation

11. As part of a multi-year information technology transformation initiative aimed at achieving operational efficiencies in the delivery of some of its services, Innovapost Inc., on behalf of the Canada Post Group of Companies, initiated three separate solicitations, including this RFP.

12. The goal of the solicitation in issue was to allow Innovapost Inc. to enter into a market-based contract with a vendor of data centre services. Data centre services refer to the technology and facility-related components and activities required to support a data centre, which itself is an environment providing processing, storage, networking, management and distribution of data to an organization, in this case, the Canada Post Group of Companies.[8]

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5. The written submissions include CGI's complaint, filed on May 27, 2014, Exhibit PR-2014-015-01, Vol. 1, and Exhibit PR-2014-015-01A (protected), Vol. 2; Canada Post's Government Institution Report (GIR), filed on June 30, 2014, Exhibit PR-2014-015-25A, Vol. 1E, and Exhibit PR-2014-015-25B (protected), Vol. 2K; Wipro's comments on the complaint and GIR, filed on July 14, 2014, Exhibit PR-2014-015-41, Vol. 1G, and Exhibit PR-2014-015-41A (protected), Vol. 2R; CGI's comments on the GIR and Wipro's comments, filed on July 18, 2014, Exhibit PR-2014-015-46, Vol. 1G, and Exhibit PR-2014-015-46A (protected), Vol. 2S; Canada Post's additional reply submissions, filed on July 25, 2014, Exhibit PR-2014-015-48B, Vol. 1G, and Exhibit PR-2014-015-48A (protected), Vol. 2S; CGI's reply to Canada Post's additional reply submissions, filed on August 1, 2014, Exhibit PR-2014-015-58, Vol. 1H, and Exhibit PR-2014-015-58A (protected), Vol. 2S; CGI's complaint filed on July 10, 2014, Exhibit PR-2014-020-01, Vol. 1, and Exhibit PR-2014-020-01A (protected), Vol. 2; Canada Post's GIR, filed on August 11, 2014, Exhibit PR-2014-020-15, Vol. 1A, and Exhibit PR-2014-020-15A (protected), Vol. 2A; Wipro's comments on the complaint and GIR, filed on August 21 2014, Exhibit PR-2014-020-21, Vol. 1B, and Exhibit PR-2014-020-21A (protected), Vol. 2C; CGI's comments on the GIR and Wipro's comments, filed on August 27, 2014, Exhibit PR-20014-020-23, Vol. 1B; Canada Post's comments on its revised position, filed on September 8, 2014, Exhibit PR-2014-020-27, Vol. 1C.
6. S.O.R./91-499 [*Rules*].
7. *Transcript of Public Hearing*, 11 September 2014, at 44-45.
8. Exhibit PR-2014-015-25A at paras. 8-13, Vol. 1E.

13. The RFP was issued on December 3, 2012.

14. The RFP consisted of two "Phases", each divided into several sequential evaluation stages. CGI successfully completed Phase 1 of the RFP, which is not in issue in this proceeding, and thus qualified for the second Phase of the RFP.

15. On June 7, 2013, the "Phase 2 Selection Requirements and Information Package" (Phase 2 SRIP) was distributed to CGI and other qualified suppliers, inviting them to submit technical proposals, financial proposals and to give oral presentations. The technical proposal (i.e. the written technical proposal and the oral presentation together) was worth 58 out of 100 possible points; the financial proposal was worth 42 out of 100 possible points.

16. Stage 7 of the evaluation plan established by the Phase 2 SRIP concerned the evaluation of the technical proposals against mandatory and rated requirements. Stage 8 aimed to evaluate bidders' oral presentations and provided for an opportunity for site visits, which, however, were not scored. Suppliers that achieved an overall score of at least 70 percent at Stages 7 and 8 were further short-listed at Stage 9. At Stage 10, the financial proposals of those short-listed suppliers were evaluated. The contract was awarded on the basis of the best total score.

17. Stages 7 and 8 of the evaluation plan each involved a different set of evaluation criteria, as published in the Phase 2 SRIP and/or supplemented in accordance with it.

18. The evaluators assessed all the technical proposals at Stage 7 of the evaluation plan using an evaluation grid that included 15 different rating guides pertaining to different aspects of the Phase 2 SRIP. The evaluators were also provided with a rating scale with defined values to guide their attribution of scores along the scale.

19. The evaluators first made their own assessments of each proposal, and the group of evaluators then met in order to determine consensus scores. Given the highly technical and complex nature of the RFP, the evaluation team was composed of four evaluators who participated in the evaluation of all aspects of the technical proposals, as well as several subject matter experts who participated only in the evaluation of aspects relating to their respective areas of expertise.

20. Another evaluation team then evaluated the bidders' oral presentations at Stage 8 of the evaluation plan. As contemplated in the RFP, the oral presentations were based on questions and evaluation criteria that were distributed to the suppliers a few days in advance and also included other questions that were not disclosed in advance.

21. As provided in the RFP, Canada Post retained the services of a private consultant, Mr. Wilson, to act as a third party fairness commissioner throughout this procurement process.[9] Mr. Wilson personally (or on a few occasions substituted by a colleague) attended all phases of the procurement process, from RFP development to the debriefings. At the end of the process, he issued a report to Canada Post stating that, in his professional opinion, this procurement process was conducted "... in a fair, open and transparent manner."[10]

9. *Ibid.* at paras. 62-67; Exhibit PR-2014-015-25A, tab 2, exhibit 1, section 1.2, Vol. 1E.
10. Exhibit PR-2014-015-25A at para. 66, Vol. 1E.

Contract Award and Debriefings

22. On October 21, 2013, Canada Post notified CGI that it had not been selected for contract award.[11] It also informed CGI that debriefings could be requested after the public notification of the award of a contract.

23. The contract was awarded to Wipro on December 6, 2013, and the award was published on December 13, 2013.[12] CGI requested a debriefing on the same day.

24. A first debriefing took place on January 15, 2014. It was conducted by Ms. Walker, the contracting authority for the RFP, and Mr. Bezanson, an evaluator who participated at every stage of the Phase 2 SRIP evaluation process. The debriefing consisted of Ms. Walker and Mr. Bezanson reading from speaking notes. In sum, CGI was told that it failed to achieve maximum points under several criteria of the technical evaluation at Stages 7 and 8 of the evaluation plan and was given examples of areas of CGI's proposal that were perceived as strong and areas for improvement, but not its specific scoring. As CGI did not reach the minimum 70 percent score after Stages 7 and 8, its financial proposal was not evaluated.[13]

25. CGI considered the first debriefing insufficient and requested a second debriefing, to which Canada Post agreed. It took place on March 31, 2014. At this second meeting, Ms. Walker and Mr. Bezanson provided further feedback, again on the basis of prepared speaking notes, consisting of additional details as to the areas of CGI's technical proposal and oral presentation that had failed to receive maximum points, as well as some information on the relevant characteristics and advantages of Wipro's proposal. Canada Post also provided a document with a high-level breakdown of CGI's technical proposal scores, but not the detailed evaluation plan used by the evaluators (i.e. the evaluation guides and rating scale), nor any of CGI's specific scores per criterion. On April 9, 2014, Canada Post provided copies of the speaking notes used by Ms. Walker and Mr. Bezanson at the second debriefing.[14]

CGI's Objection and Complaints

26. On April 14, 2014, CGI filed its first complaint regarding this RFP, which was accepted for inquiry as File No. PR-2014-006. In that complaint, CGI alleged that the debriefing that it obtained was below the standard of disclosure required by Article 1015(6) of *NAFTA*. CGI also alleged that Canada Post departed from the published evaluation plan in certain specific ways.

27. Also on April 14, 2014, CGI sent a letter to Canada Post in which it stated that, due to Canada Post failing to disclose all relevant information, CGI still did not understand why its bid was not selected. CGI also objected on the basis that Canada Post's evaluation of its bid appeared to be in breach of *NAFTA*.[15]

28. On May 15, 2014, CGI inquired whether Canada Post would be taking any action with respect to its objection.[16] It received a negative reply on the same day.[17] Canada Post further expressed that it

11. Exhibit PR-2014-015-01, exhibit 9, Vol. 1.
12. *Ibid.*, exhibit 7.
13. Exhibit PR-2014-015-25B (protected), tab 2, exhibits Q, R, Vol. 2K.
14. *Ibid.*, exhibits S, T.
15. Exhibit PR-2014-015-01, exhibit 5, Vol. 1.
16. *Ibid.*, exhibit 15.
17. Exhibit PR-2014-015-01, exhibit 25, Vol. 1.

"... categorically reject[s] the appropriateness and effectiveness ..."[18] of the purported objection of April 14, 2014, as a means to extend the time for filing another complaint to the Tribunal.

29. As a result, on May 27, 2014, CGI filed its second complaint with the Tribunal in which it made various allegations that Canada Post had conducted an unreasonable and biased evaluation. This complaint was accepted for inquiry on June 2, 2014, as Tribunal File No. PR-2014-015.

30. CGI's complaints included motions requesting the production of certain documents relating to the scoring and evaluation of CGI's bid and, on June 24, 2014, after receiving submissions from both parties, the Tribunal granted the motions in part and ordered Canada Post to produce identified documents.[19]

31. On June 30, 2014, Canada Post filed its GIR along with several documents required by the Tribunal's order, but not the scoring sheets and notes of the individual evaluators. Canada Post explained that these had been destroyed in accordance with Canada Post's procurement policy.[20]

32. On July 10, 2014, CGI filed a third complaint in respect of this solicitation, alleging that, by destroying the evaluators' individual scoring sheets, Canada Post had breached its obligations under Article 1017(1)(p) of *NAFTA*. On July 15, 2014, the Tribunal informed the parties that it had accepted the new complaint for inquiry, as File No. PR-2014-020; as indicated earlier, the proceedings in File Nos. PR-2014-015 and PR-2014-020 were combined.

PRELIMINARY MATTER REGARDING THE "DESIGNATED CONTRACT" UNDER NAFTA

33. The parties agreed that *NAFTA* applies to this solicitation and that the Tribunal has jurisdiction to inquire into the complaint.

34. For the reasons set out in the Tribunal's determination in File No. PR-2014-006,[21] the Tribunal is satisfied that this solicitation was in respect of a "designated contract" under *NAFTA* and subsection 30.11(1) of the *CITT Act*. Accordingly, the Tribunal has jurisdiction to inquire into this complaint.

PRELIMINARY MATTER REGARDING THE TIMELINESS OF THE COMPLAINT IN FILE NO. PR-2014-015

35. As stated above, on April 14, 2014, 10 working days after meeting with Canada Post for the second debriefing and on the same day that it filed its first complaint regarding this solicitation (File No. PR-2014-006), CGI sent Canada Post a letter outlining various problems that it saw with the procurement process and with its particular evaluation (the objection letter).[22]

36. In particular, CGI re-iterated in the objection letter that it was provided insufficient information at the debriefing on March 31, 2014, in order to understand why its bid was not selected. It objected that it had not been provided all the information requested in earlier communications with Canada Post, which was crucial to understanding the reasons why its bid was not selected on a requirement-by-requirement basis, and requested that Canada Post promptly remedy this situation.

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18. *Ibid.*
19. Exhibit PR-2014-015-018, Vol. 1D.
20. Exhibit PR-2014-015-025, Vol. 1E.
21. At paras. 23-31.
22. Exhibit PR-2014-015-01, exhibit 5, Vol. 1.

37. CGI also expressed its position that the evaluation was "deeply flawed". In particular, it stated that, from a review of the debriefing information that it had been provided, "CGI's concern . . . is that, in addition to failing to assess CGI's proposal in accordance with the rated requirements in an objective and fair manner, Canada Post has utilized subjective, non-disclosed and improper criteria"[23] and that it considered that Canada Post's failure to explain exactly how CGI failed to meet the rated requirements justified its concern.

38. CGI further added that its bid, including the written technical proposal, and the oral presentation met all the requirements and should have been awarded full points and that, in any event, the low scores awarded to CGI were not justified by the information provided at the debriefing. CGI added that the evaluation of subsections 5.2.1, 5.2.2, 5.2.3, 5.3 at Stage 7 of the evaluation plan, as well as the evaluation of the oral presentation, was not in keeping with the requirements of Chapter Ten of *NAFTA*.

39. CGI concluded by stating its view that the ". . . evaluators did not apply themselves in evaluating CGI's bid, have ignored vital information provided in CGI's bid, have wrongly interpreted the scope of the requirements that were to be taken into consideration with respect to the Phase 2 evaluations, have based their evaluation on undisclosed criteria and/or have otherwise not conducted the evaluation in a procedurally fair way."[24] The Tribunal notes that these words track the test usually applied by the Tribunal in procurement reviews to determine whether an evaluation is unreasonable and reviewable.[25] They are not merely a "litany".

40. Canada Post argued that the objection letter was not sufficient to constitute a valid objection and that, therefore, the bias and evaluation aspects of the complaint were not filed on a timely basis. In essence, Canada Post argued that it was not sufficient for the objection letter to object to almost everything about a procurement process. It also pointed out that the objection letter made no mention of bias. In other words, in Canada Post's view, the objection letter sent by CGI was so broad that it was devoid of meaning, which did not then enable Canada Post to respond in a meaningful way. It argued that an objection letter is not intended to act simply as a placeholder to extend the time that a bidder has for filing a complaint with the Tribunal. As such, since CGI had knowledge of all its grounds of complaint on March 31, 2014, or earlier, its complaint filed on May 27, 2014, was time barred.

41. Canada Post added that, even accepting that CGI's objection was appropriate, the complaint was still late, because CGI knew or should have known well before May 15, 2014, that Canada Post would not conduct a re-evaluation, re-issue the solicitation or cancel Wipro's contract.

42. Wipro largely echoed Canada Post's arguments on timeliness.

43. CGI supported the timeliness of its complaint by arguing that the objection letter was sufficiently precise in terms of setting out the areas of the process and of the evaluation with which it took issue. It submitted that an objection letter is not required to state every specific ground of complaint with the same level of detail as is required of a complaint filed with the Tribunal and that there is no indication in *NAFTA* or in the regulatory scheme that the standard applied to complaints ought also to be applied to objection letters. Moreover, CGI proposed that the level of detail that can be expected in an objection letter is informed by the level of detail provided to the bidder by the government institution as part of the debriefing

23. *Ibid.*
24. *Ibid.*
25. See, for example, *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel Human Resources*] at para. 33.

process. In this case, according to CGI, it could not have provided any greater level of specificity in its objection letter because it did not fully understand, after the debriefing, why its proposal failed to receive full marks on particular evaluated sections. CGI urged the Tribunal not to define the content of an objection letter in an overly formalistic way. Finally, CGI submitted that it was only denied relief on May 15, 2014, when Canada Post responded negatively to its request for a response on its objection.

44. In order to determine this issue, the Tribunal must look to subsection 6(2) of the *Regulations* and consider the content of the objection letter and when CGI knew or reasonably should have known that Canada Post would not provide relief.

45. Where no objection has been raised, a bidder has 10 working days from the date on which the basis of its complaint became known or reasonably should have become known in order to file its complaint with the Tribunal, pursuant to subsection 6(1) of the *Regulations*. However, where a bidder has made an objection to the government institution, the bidder has 10 working days from the date on which relief is denied by that government institution in order to file its complaint. Subsection 6(2) provides as follows:

> A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

46. The term "objection" is not defined in the *Regulations*, nor do the *Regulations* prescribe the form or the content of an objection.

47. In *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,[26] the Federal Court of Appeal considered the role of the objection process in the procurement context and described it as an ". . . informal procedure for settling complaints . . . ."[27] The Federal Court of Appeal also noted that, in order for this informal procedure to be effective, an objection must be described with ". . . sufficient specificity as to enable the Department to deal with it."[28]

48. Nonetheless, the Tribunal and, indeed, the Federal Court of Appeal have been reluctant to prescribe the form or the particular content of objection letters. In fact, the Federal Court of Appeal, in *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*,[29] stated that ". . . the Tribunal should not be formalistic in determining what constitutes an objection . . . ."[30] Accordingly, there is no "one size fits all approach" to objections and, indeed, the specific content of an objection letter may vary depending on the particular context.

49. The question currently before the Tribunal is, in essence, a factual issue, namely, whether the objection letter sent by CGI and received by Canada Post contained sufficient specificity to enable Canada Post to deal with CGI's concerns.

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26. 2000 CanLII 16572 (FCA) [*Cougar Aviation*]. See, also, *Enterasys Networks of Canada Ltd.* (1 September 2010), PR-2010-053 to PR-2010-055 (CITT) at para. 6.
27. *Cougar Aviation* at para. 74.
28. *Ibid.*
29. 2005 FCA 177 (CanLII) [*Flag Connection*].
30. *Flag Connection* at para. 9.

50. By way of preliminary comment before analyzing the content of the objection letter, the Tribunal is of the view that Canada Post is quite right that the objection process is not intended to act merely as a placeholder to extend the time frames for filing a complaint with the Tribunal. Rather, as indicated in *Cougar Aviation*, the objection process is intended as an informal procedure for the settling of disputes between the parties, without the intervention of the Tribunal, unless and until such time as the complainant is denied relief by the government institution. Were it otherwise, the Tribunal might become needlessly bogged down with complaints that could be rectified by way of further discussion between the parties.

51. However, Canada Post's argument that the objection letter lacks details and thus ought to be considered insufficient for the purposes of subsection 6(2) of the *Regulations* fails to appreciate the unique context of this particular case. While it was certainly incumbent on CGI to provide Canada Post with a meaningful objection, it is somewhat disingenuous for Canada Post to take issue with the level of detail in the objection letter, when it was precisely Canada Post that had kept CGI in the dark by refusing to disclose a meaningful explanation for CGI's evaluation. In this respect, it should be noted that this was a complex and highly technical procurement, to which bidders devoted a significant amount of time and resources. Recalling that the objection process is intended to trigger an informal dispute settlement mechanism between the parties, the Tribunal would expect Canada Post to take a more engaged approach in addressing CGI's concerns; this could have included, for example, providing CGI with greater information so that it could more fully appreciate how and why its proposal did not achieve the score that it expected. Accordingly, the Tribunal is of the view that not only the objection letter but also the exchanges that precede and follow any such objection must be meaningful in order for the informal dispute resolution process to work effectively.

52. Furthermore, the Tribunal in its recent determination in File No. PR-2014-006, referring to *Ecosfera v. Department of the Environment*,[31] reaffirmed that one of the purposes of the obligation under Article 1015(6) of *NAFTA*, particularly in regard to the reasons for not selecting a tender, ". . . is to provide transparency as to the reasons for not selecting the proposal, while respecting the confidential nature of the content of all bidders' proposals. *This requirement enables the unsuccessful bidder to determine, if need be, the nature of its rights in view of the requirements set out in NAFTA*"[32] [emphasis added]. The Tribunal has already determined in File No. PR-2014-006, involving the same procurement that is the subject matter of this inquiry, that the debriefing provided to CGI in connection with this procurement was inadequate. The Tribunal cannot ignore these findings in its analysis of the content of the objection letter in this case. The quality of the post-bid debriefing is an additional factor that should be taken into consideration when assessing the content of an objection letter. This is particularly true in situations where the quality of the debriefing has been the subject matter of a complaint to the Tribunal and the bidder has been successful in that regard. This additional factor also informs the Tribunal's consideration of the content of the objection letter.

53. On the facts of this particular case and for the reasons that follow, the Tribunal is of the view that the letter provided by CGI to Canada Post was sufficiently detailed to alert Canada Post to CGI's concerns about its evaluation and the process. That said, the Tribunal wishes to emphasize that its decision on this objection letter should not be construed to mean that objection letters drafted in broad terms will always be sufficient for the purposes of subsection 6(2) of the *Regulations*. Whether or not an objection letter is sufficiently precise will depend on all the facts and circumstances in a given case and, thus, must be assessed on a case-by-case basis.

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31. (11 July 2007), PR-2007-004 (CITT) [*Ecosfera*].
32. *Ecosfera* at para. 32.

54. It is quite clear that CGI took issue with how its proposal was evaluated on subsections 5.2.1, 5.2.2, 5.2.3 and 5.3 at Stage 7 of the evaluation plan, as well as with the evaluation of the oral presentation at Stage 8. In this regard, Canada Post pointed out in argument that this list contains every section of the rated technical evaluation and submitted that it is not enough for a bidder to object to everything in a wholesale manner. While the Tribunal would agree that such all-encompassing statements may not, depending on the circumstances, always be sufficient to enable the government institution to deal with an objection, this is yet another circumstance in which the Tribunal is of the view that it is important to underline that only high-level scoring information and limited details were provided to CGI prior to its objection letter. At that stage, CGI was unable to determine, in a meaningful manner, the nature of its rights in view of the requirements set out in *NAFTA*. The objection letter quite clearly expressed CGI's concern that it was not being provided all the relevant information that would enable it to understand how its proposal was evaluated and that the limited information provided did not justify its low scores. CGI also specifically noted that it was concerned that the evaluation was conducted on "subjective, non-disclosed and improper criteria." CGI identified the sections of the technical evaluation to which its concerns related. In fact, the content of the objection letter is in line with the testimony of Mr. Chartrand, who testified at the hearing that, following the debriefings, CGI was still unable to reconcile its scores with the provided information and did not know how the evaluation was in fact done.[33]

55. Given the circumstances, the Tribunal is of the view that this aspect of the objection letter is sufficiently detailed to enable Canada Post to deal with it. While the information provided to CGI at the debriefing identified various bases upon which CGI's points were not maximized in the evaluation of its proposal, it provides no indication of how many points were lost and why or how those lost points factored into the overall scoring of CGI's technical proposal. Although CGI did later file its complaint in File No. PR-2014-015 on the basis of specific bits of information revealed at the debriefing of March 31, 2014, it is clear in the objection letter and the complaint that its concerns were not limited to those specific issues, but rather related to what it viewed as an overall flawed evaluation process—the full specifics of which remained a secret to CGI. Had CGI been provided with more accurate and more complete information at the informal stages of the dispute resolution process, it may have been able to object in narrower terms.

56. The final portion of the objection letter that the Tribunal wishes to address is the statement that has been referred to as the "litany" and reads as follows:

> . . . Canada Post evaluators did not apply themselves in evaluating CGI's bid, have ignored vital information provided in CGI's bid, have wrongly interpreted the scope of the requirements that were to be taken into consideration with respect to the Phase 2 evaluations, have based their evaluation on undisclosed criteria and/or have otherwise not conducted the evaluation in a procedurally fair way.[34]

57. In this regard, it is worth noting that the parties in these proceedings are both sophisticated commercial parties and that the objection letter was sent from CGI's legal department to Canada Post's legal department. As noted above, the words used by CGI were taken from Tribunal case law and should have been familiar to lawyers involved in matters related to public procurement.

58. In the Tribunal's view and in this particular case, this was enough to signal to Canada Post that CGI had serious concerns about the evaluation process as a whole.

59. In particular, while a general reference to procedural fairness in an objection would not in all cases signal to the government institution that the bidder has concerns about potential bias or reasonable

33. *Transcript of Public Hearing*, 11 September 2014, at 22-23, 27-28.
34. Exhibit PR-214-015-01, exhibit 5, Vol. 1.

apprehension of bias, in this case, CGI had also asked, in a previous letter, a number of targeted questions about who was involved in the evaluation of its bid.[35] Among other things, CGI requested the following information:

> (a) Identify the evaluators who evaluated CGI's proposal
>
> (b) Were the same evaluators used to evaluate all proposals?
>
> (c) Was an evaluation team used to evaluate CGI's proposal?
>
> (d) Was there a requirement of unanimity among the evaluators as to who would be the selected bidders and who would not?
>
> (e) If unanimity was not a requirement for selection, what process was used to reconcile differences of opinion among the evaluators?
>
> (f) What were the credentials of each of the evaluators?
>
> (i) Did they have expertise in this area?
>
> (ii) What type of expertise?
>
> (g) Are any of the evaluators employees of Innovapost or [Canada Post Corporation] or outside consultants?
>
> (h) Did any have any past employment or any other involvement at any time with the winning bidder or its partners?
>
> (i) Were there persons at Innovapost or [Canada Post Corporation] other than the evaluators who were involved in the selection of the winning bid?

60. Leaving aside the issues of the merits of CGI's allegations and whether this information was required to be provided to CGI, the Tribunal is of the view that there was enough information in the objection letter, understood in context, to signal to Canada Post that CGI was concerned about who was evaluating its proposal and whether the judgement of those individuals may have been influenced by factors other than the information contained in CGI's proposal.

61. Further, from a practical perspective, making a bold allegation of bias on the part of Canada Post at the stage of the objection letter would likely not have been conducive to an informal resolution of the dispute, which, as highlighted earlier, is the primary purpose of the objection process.

62. In essence, while CGI could not be overly specific in the circumstances of this case, the content of the objection letter and the context was enough to suggest to Canada Post that CGI had worries about a serious flaw in the process, including suspicions that improper considerations may have entered the evaluation process. Accordingly, the Tribunal finds that the letter of April 14, 2014, was sufficient to constitute a valid objection.

63. Finally, Canada Post's argument that CGI's complaint was filed outside of the time frame imposed by subsection 6(2) of the *Regulations* because CGI in fact knew that Canada Post did not intend to grant any relief, or should have known so before the express denial of relief on May 15, 2014, is not supported by the evidence. Mr. Chartrand testified that, when CGI filed the objection letter, it expected that Canada Post would provide the requested information, because such information is typically provided immediately by government institutions in procurements covered by *NAFTA*. Furthermore, he testified that CGI did not know whether Canada Post would re-issue the solicitation or otherwise react in light of the objection to the

35. *Ibid.*, exhibit 12.

evaluation process.[36] The Tribunal finds nothing unreasonable in the expectation that Canada Post may engage with CGI through the objection process, despite the fact that CGI had already filed its first complaint with the Tribunal.[37] Nor does the Tribunal find unreasonable in the circumstances the one-month period that CGI gave Canada Post to come back with a response to its objection, before inquiring about its status and, thus, eliciting an express denial of relief from Canada Post on May 15, 2014. Accordingly, the Tribunal finds that CGI was not, at that time, in a position where it "reasonably should have known" that Canada Post would not provide relief.

64. Indeed, the Tribunal does not find unreasonable CGI's expectation that its objection would receive *some* response; instead, it finds Canada Post's failure to provide *any* response to be unreasonable. CGI's objection, by its nature, contents and express terms, invited an answer. If Canada Post had no intention of dealing with the objection, or even if it was unclear on its purport, the reasonable course of action, in keeping with the dynamics and objectives of the procurement regime, would have been to respond as appropriate, instead of effectively ignoring CGI's objection letter only to later argue that CGI filed its complaint late, having misinterpreted Canada Post's silence.

65. As such, the Tribunal finds that the complaint in File No. PR-2014-015 was timely.

ANALYSIS

66. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, in this case, *NAFTA*.

67. The following breaches of *NAFTA* are alleged in this case:

- Whether the destruction of individual scoring sheets used in this solicitation was a breach of Article 1017(1)(p) of *NAFTA*
- Whether Canada Post's evaluation complied with Articles 1013(1) and 1014(4) of *NAFTA*
    - Whether Canada Post used a rating scale inconsistent with the published RFP
    - Whether the evaluators had undisclosed preferences for specific characteristics
    - Whether CGI's proposal was scored consistent with the RFP

68. The Tribunal will examine each of these questions in turn. However, before doing so, the Tribunal will examine an evidentiary matter raised by CGI, namely, whether Canada Post's destruction of individual scoring sheets amounted to spoliation of evidence and, accordingly, whether adverse inferences should be drawn as to the contents of the destroyed evidence.

36. *Transcript of Public Hearing*, 11 September 2014, at 23, 29.
37. As pointed out by counsel for CGI, CGI was required to file its first complaint in File No. PR-2014-006 on April 14, 2014, in order to comply with the limitation periods applicable to the issues raised therein.

Whether the Destruction of Individual Scoring Sheets Amounted to Spoliation

69. CGI submitted that Canada Post's destruction of the individual scoring sheets met the test of the evidentiary doctrine of spoliation, which allows a rebuttable presumption to be drawn that destroyed evidence would not have assisted the party that destroyed it, if it is established that that party disposed of the evidence to affect ongoing or contemplated litigation. As such, CGI submitted that, in examining its grounds of complaint, the Tribunal should apply this rule and infer that the content of the individual evaluators' score sheets would have been unfavourable to Canada Post.[38]

70. CGI argued that the circumstances surrounding the destruction of documents were such that the only reasonable inference is that the documents were disposed of in order to destroy dissenting opinion and, thus, affect contemplated litigation. It underscored that, even though the first complaint regarding the RFP was commenced some five to six months after the documents were discarded, Canada Post knew that *NAFTA* applied to the solicitation and that all *NAFTA* procurements are potentially subject to a complaint. It further argued that the timing of the destruction was strategic, as Canada Post discarded the documents before bidders could even request a debriefing and, as such, before they had any reason to request the documents in question.[39] CGI also pointed to the fact that Canada Post has not been forthcoming about the fact that the scoring sheets had been destroyed.[40]

71. Canada Post denied that the pre-conditions for spoliation were met, as the evidence does not support a finding that the destruction of documents occurred when litigation was ongoing or contemplated or with the intent to affect the litigation. In the alternative, it submitted that any presumption that the destroyed scoring sheets would have been unfavourable to Canada Post has been rebutted by other facts.[41]

72. The parties agree that the leading case on spoliation is the Alberta Court of Appeal's decision in *McDougall v. Black & Decker Canada Inc.*,[42] where the Alberta Court of Appeal described the rule as follows:

> . . . Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.[43]

38. Exhibit PR-2014-015-46 at paras. 89-116, Vol. 1G; *Transcript of Public Hearing*, 11 September 2014, at 124-31; Exhibit PR-2014-015-58 at paras. 44-48, Vol. 1H.
39. *Transcript of Public Hearing*, 11 September 2014, at 127-29.
40. *Ibid.* at 130. Exhibit PR-2014-015-46 at paras. 95-116, Vol. 1G; *Transcript of Public Hearing*, 11 September 2014, at 124-31; Exhibit PR-2014-015-58 at paras. 44-48, Vol. 1H.
41. Exhibit PR-2014-015-48B at paras. 85-96, Vol. 1G; *Transcript of Public Hearing*, 11 September 2014, at 143-47.
42. 2008 ABCA 353 (CanLII) [*McDougall*].
43. *McDougall* at para. 18.

73. The Alberta Court of Appeal made clear that both the questions of whether spoliation has occurred and, if it has, what remedy should ensue are questions that require considering all the particular facts of the case.[44]

74. The Tribunal will therefore determine whether CGI has shown, on the balance of probabilities, that the pre-conditions for spoliation are met, specifically, that Canada Post destroyed the relevant evidence intentionally, while litigation was contemplated, and that it is reasonable to infer in the circumstances that it did so in order to affect the litigation.[45] If the answer is affirmative, the Tribunal would be justified to draw a rebuttable presumption that the destroyed evidence would have been unfavourable to Canada Post.

Evidence

75. As stated at the outset, on October 21, 2013, CGI learned that it had not been selected for contract award and, following Canada Post's instructions,[46] it requested a debriefing on December 13, 2013, when the award of the contract to Wipro was made public.[47] The initial debriefing was held on January 15, 2014, which is the first time that CGI found out that it had failed to reach the 70 percent threshold for its technical proposal and oral presentation.

76. According to the evidence, CGI specifically requested the individual evaluators' scoring sheets, along with other documents, for the first time on March 11, 2014. As is known, Canada Post refused to provide any written documents,[48] and CGI reiterated its request in further letters and in its complaints to the Tribunal, including in its request for an order for the production of documents relevant to the grounds of complaint. Canada Post contested that motion on the basis that the relevance of the various requested documents, including the individual scoring sheets, was not established.[49]

77. On June 30, 2014, further to the Tribunal's order for the production of documents, Canada Post indicated, for the first time, that the individual scoring sheets had not been kept.[50] At the same time, it produced the "RFP Procurement Evaluator Guide",[51] marked February 2013. The section called "Official Consensus Scoring" provides as follows:

> Where applicable, the Sourcing Management Contracting Authority will facilitate a consensus session for evaluators to agree on a consensus score and rationale for each rated requirement . . . .
>
> The general rationale for the consensus score is documented. The reason why a Rated Requirement has not received maximum points may be recorded as well [as] factors that make up a score and any risks they have agreed may be documented. These will constitute the official evaluation record.

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44. This transpires from the Alberta Court of Appeal's direction that the issue of whether spoliation has occurred and what remedy should ensue are questions to be assessed by the trial judge *on all the facts*, whereas pre-trial relief on the basis of spoliation would only be available in exceptional cases. See *McDougall* at para. 29.
45. The authorities are clear that the party invoking spoliation bears the onus of showing, on the balance of probabilities, that the factual underpinnings giving rise to the rule are met. See *McDougall* at para. 18; *Nova Growth Corp. et al v. Andrzej Roman Kepinski et al.*, 2014 ONSC 2763 (CanLII) at paras. 295-96; *Stilwell v. World Kitchen Inc., et al.*, 2013 ONSC 3354 (CanLII) at paras. 57-60; *Gutbir v. University Health Network*, 2010 ONSC 6752 (CanLII0 at paras. 13-14.
46. Exhibit PR-2014-015-01, exhibit 9, Vol. 1.
47. *Ibid.*
48. Apart from, eventually, Ms. Walker's and Mr. Bezanson's speaking notes for the March 31, 2014, debriefing and a document with a high-level breakdown of CGI's scores provided at the second debriefing.
49. Exhibit PR-2014-015-10 at 4-5, Vol. 1D.
50. Exhibit PR-2014-015-25, Vol. 1E.
51. Exhibit PR-2014-015-25A, tab 2, exhibit F, Vol. 1E.

> Any other records containing Proposal notes or any peripheral or transitory evaluation notes must be disposed.
>
> In the event that the evaluation approach is not complex or does not require a team approach the applicable individual evaluation information that resulted in the final scoring will be kept in the applicable procurement file.[52]

78. Following another motion by CGI, Canada Post provided some details of the destruction of the individual scoring sheets. It reiterated that the individual evaluation notes and scoring sheets for the technical proposals at Stage 7 of the evaluation plan and the evaluation of all bidders' oral presentations at Stage 8 were discarded in accordance with its procurement policy. It also stated that there is no formal policy as to how or when this task should occur. Ms. Walker completed it "when she had available time", which she thought would have been after Wipro was selected but before a contract was signed, approximately on a date in early- to mid-November 2013.[53] Canada Post also stated that, immediately upon becoming aware of CGI's first complaint regarding this RFP, on April 15, 2014, in-house legal counsel advised the document custodians of their obligation to protect documents from destruction.

79. The destruction of evidence was also explored at the hearing. In examination by counsel for Canada Post, Ms. Walker testified that the policy had been in place since she joined Canada Post (that is, since 2006) and, to her knowledge, prior to that. The February 2013 date on the document reflected the date of an update to the document.[54] Ms. Walker testified that, prior to the Tribunal's determination in File No. PR-2014-006, she did not know that this policy was contrary to any *NAFTA* obligations and that she has spoken about the policy to others at Canada Post who were also unaware of any inconsistency.[55]

80. Ms. Walker confirmed that she applied the policy in this case. She described her role as follows:

> . . . my role is to also create the file and put the information together as to how the procurement went.
>
> When I do find time, usually it's after the evaluations are complete, I would do the administrative task of disposing of any transitory information.[56]

81. Ms. Walker thought that she undertook the task at some time between the end of November and December 2013. In cross-examination, she stated that she also disposed of extra copies of bidders' proposals and any other transitory notes that did not form part of the final record.[57] It was not suggested that such other notes were relevant to the evaluation.

82. When asked by counsel for CGI to explain why individual evaluation scoring sheets were discarded while much larger documents (such as original proposals and copies) were preserved, Ms. Walker answered that size or space was not a consideration, but rather that it was considered that ". . . at the end of the day, [the] consensus documents are the final evaluation record.[58]

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52. *Ibid.*
53. Exhibit PR-2014-015-039, Vol. 1G.
54. *Transcript of Public Hearing*, 11 September 2014, at 53.
55. *Ibid.* at 54.
56. *Ibid.* at 54-55.
57. *Ibid.* at 91.
58. *Ibid.* at 92-93.

83. Indeed, throughout the cross-examination, Ms. Walker testified that the individual scoring sheets were destroyed because they were considered transitory records.[59] When counsel for CGI asked her whether Canada Post's view or her view pursuant to the policy was that the "transitory documents" singled out for destruction were in fact those individual evaluation documents that contained views different from the consensus, Ms. Walker answered as follows: "[s]ome different, some the same; that would make it into the final consensus scoring."[60] It was also put to Ms. Walker that the policy as written allows the individual evaluators' notes to be preserved "[i]n the event that the evaluation approach is not complex *or* does not require a team approach . . ." [emphasis added], on which basis Ms. Walker was asked whether Canada Post's destruction policy specifically singles out for destruction documents in complex procurements only (whether or not they are based on consensus), which are more likely to contain conflicting opinions. Ms. Walker repeatedly answered that the intent of the policy is to preserve the final evaluation record, which is the consensus, in cases where a consensus process is used, and the individual evaluations in cases where no group approach is used. Ms. Walker acknowledged that this may not be expressly stated by the written policy.[61] In re-examination by counsel for Canada Post, she later clarified that, in complex procurements, Canada Post adopts a consensus evaluation approach.[62]

84. Ms. Walker testified that no complaint was filed by CGI, nor was one expected at the time when she discarded the individual scoring sheets. She further testified that she understands that ". . . with any procurement, there is a potential for any proponent to put a [complaint] in front of the Tribunal"[63] but that there was no particular potential for litigation in this case.

85. Ms. Walker confirmed that in-house legal counsel requested all documents to be preserved as soon as the first complaint was filed by CGI.[64] She also testified that Canada Post is contemplating how to change its policy and practice to better meet its obligations further to the Tribunal's recommendation in File No. PR-2014-006.[65]

86. Mr. Wilson testified that, in his view, the policy of disposing of individual score sheets did not affect the fairness of the procurement process.[66] Mr. Wilson confirmed that he does not refer to *NAFTA* in his monitoring role, but rather to principles of fairness.[67]

Analysis Regarding Spoliation

87. The Tribunal finds that spoliation has not been established on a balance of probabilities. There is no question that the documents were destroyed intentionally and not as a result of accident or oversight and that they are relevant, in the sense that they relate to the grounds of complaint raised by CGI. However, the Tribunal finds no evidence on which it could find that the destruction occurred at a time when litigation was contemplated or could reasonably infer that Canada Post intended to affect such litigation.

88. The simple fact that Canada Post was aware that procurement challenges by unsuccessful bidders are possible in procurements covered by the trade agreements is not sufficient to establish that it adopted and

59. *Ibid.* at 93.
60. *Ibid.* at 94.
61. *Ibid.* at 81-84.
62. *Ibid.* at 100.
63. *Ibid.* at 55.
64. *Ibid.* at 55-56.
65. *Ibid.* at 56.
66. *Ibid.* at 56-57.
67. *Ibid.* at 71-72, 91.

carried out this policy in contemplation of procurement challenges in general, or this one in particular, and much less to establish that it thereby aimed to affect any such challenge.

89. Indeed, the specific evidence on the record contradicts CGI's argument. Ms. Walker testified that no challenge by CGI was expected. In addition, Ms. Walker, who was acting as the contracting authority in this case, provided a tenable explanation regarding the reason behind the destruction of documents, one which has nothing to do with an intentional attempt to influence contemplated litigation. Ms. Walker consistently testified that the intent of the policy was to "clean up" the procurement file of transient records superseded by the final consensus evaluation and that she viewed this as a purely administrative task. This is consistent with the language of the "policy" itself, which speaks of the disposal of "peripheral or transitory records", and its context in a section of the "RFP Procurement Evaluator Guide" that explains that the consensus evaluation constitutes the "official record". While Canada Post's destruction of documents was based on a view that has now been found to be inconsistent with its *NAFTA* obligations, as will be further discussed below, there is no reason to believe that it was an intentional attempt to influence litigation.

90. In this regard, the Tribunal recognizes that Ms. Walker was not involved in the development or adoption of the impugned policy and that she only testified to her own understanding of it, as the person tasked with applying it in this case and other affected procurements. However, having regard to Ms. Walker's consistent and uncontradicted testimony about the purpose of the policy, as well as her testimony that, at the time, neither she nor apparently anyone else at Canada Post questioned the policy, the Tribunal finds no basis to conclude that, at an institutional level, the policy was meant to serve a more reprehensible purpose unbeknownst to Ms. Walker or other employees of Canada Post.

91. Moreover, the fact that Canada Post did not disclose what happened to the scoring sheets at the earliest opportunity is insufficient in the circumstances to establish spoliation. The Tribunal links this tardiness to Canada Post's less than desirable stance on transparency, namely, its restrictive view of the transparency owed to bidders as part of a *NAFTA* debriefing, which was addressed by the Tribunal in File No. PR-2014-006 and is also addressed in the context of these complaints. Nevertheless, however important transparency may be in the procurement context, between a lack of transparency and bad faith (in the form of a deliberate attempt, at the level of institutional policy, to influence any potential litigation), nothing in the evidence establishes that the line has been crossed in this case.

92. As such, the record does not support a finding that Canada Post destroyed relevant evidence in order to affect expected litigation. Accordingly, no presumption can arise as a matter of law that the contents of the destroyed scoring sheets would have been unfavourable to Canada Post.

Whether the Destruction of Individual Scoring Sheets Used in this Solicitation was a Breach of Article 1017(1)(p) of *NAFTA*

93. As stated above, on July 10, 2014, CGI filed another complaint regarding this solicitation, alleging that the destruction of the evaluators' individual scoring sheets by Canada Post was a violation of Article 1017(1)(p) of *NAFTA*.

94. While Canada Post initially contested this second complaint, on September 8, 2014, Canada Post wrote to inform the Tribunal as follows:

> . . . [Canada Post] will be implementing processes to ensure that individual scoring sheets of evaluators in the context of a consensus evaluation will be maintained for the appropriate time periods.[68]

To that end, Canada Post withdrew its submissions insofar as they related to the preservation of individual evaluator's score sheets pursuant to 1017(1)(p) of *NAFTA*.

95. In light of the foregoing, the Tribunal need not provide its analysis of the ground of complaint at issue in File No. PR-2014-020. However, the Tribunal wishes to reiterate that the proper retention of documents is an integral part of a fair procurement process. While the Tribunal acknowledges that evaluators' individual score sheets will not necessarily be relevant for every ground of complaint brought before the Tribunal, they nonetheless comprise an important component of the record of the solicitation process that must be retained in accordance with the requirements of *NAFTA*. As the Tribunal has explained in previous cases, individual scoring sheets constitute a check that may allow verifying that the procurement was conducted in compliance with *NAFTA*, and they may provide unsuccessful bidders more insight into the evaluation process and so support their confidence that the procurement was carried out with integrity.[69]

96. Since the individual scoring sheets are missing in this case, the Tribunal will need to assess how their loss impacts the integrity of this procurement and, in particular, the Tribunal's ability to verify whether the evaluation was conducted reasonably.[70] In other words, the question becomes whether Canada Post has nevertheless provided sufficient evidence for the Tribunal to meaningfully carry out its verification task and be satisfied that the evaluation in this case has been conducted reasonably.

Whether Canada Post's Evaluation Complied With Articles 1013(1) and 1014(4) of *NAFTA*

97. CGI alleged that the evaluation of bids carried out in this case breached the requirements of *NAFTA* in several ways. Specifically, CGI alleged that the rating scale used by the evaluators was inconsistent with the terms of the RFP, that the evaluators had preferences for certain characteristics over others, which had not been disclosed in the RFP, and that they evaluated several specific aspects of CGI's proposal unreasonably, including because the evaluation was tainted by improper considerations.

98. *NAFTA* requires that a procuring entity provide to potential suppliers all information necessary to permit them to submit responsive tenders, including the criteria for awarding the contract.[71] It also stipulates that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and requires that procuring entities award contracts in accordance with the criteria and

68. Exhibit PR-2014-020-027 at 1, Vol. 1C.
69. See, for example, File No. PR-2014-006 at paras. 62-65; *Hewlett-Packard (Canada) Ltd.* (21 February 2002), PR-2001-030 and PR-2014-040 (CITT) at 26-27 (reversed on other grounds in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 [CanLII] [*IBM Canada*]).
70. By analogy, see *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) [*Almon*] at paras. 47-49.
71. Article 1013(1) of *NAFTA* provides as follows: "Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders . . . . The documentation shall also include: . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . ."

essential requirements specified in the tender documentation.[72] *NAFTA* prohibits all forms of discrimination in tendering procedures.[73]

99. It is well established that a procuring entity will meet these obligations when it conducts a reasonable evaluation consistent with the terms of the RFP. As it has stated in the past, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria, the Tribunal will generally not substitute its judgement for that of the evaluators.[74]

100. The Tribunal has examined CGI's allegations under this heading and, for the reasons that follow, finds that they are not valid.

Whether the Evaluators Applied a Rating Scale Inconsistent With the Published RFP

101. In filing its GIR, Canada Post provided the evaluation materials used by the evaluators, including a rating scale with defined values used in order to create consistency in the evaluators' rating of bids.[75]

102. CGI argued that the values on that rating scale were in fact defined in a way inconsistent with the basis of evaluation announced in the published tender documents. Pursuant to the RFP, a proposal would be evaluated on ". . . the extent to which it *meets* . . ."[76] [emphasis added] the requirements. CGI argued that the same idea was reproduced in a number of other places in the tender documents.[77] As such, according to CGI, a rating scale that reserved maximum points for proposals that not only met but also *exceeded* the requirements fundamentally changed the nature of the evaluation. CGI further argued that the rating scale was ambiguous. CGI argued that this was unfair to bidders that would have developed their bids expecting a different method of evaluation based on the RFP, especially in a context where the financial proposal score also carried a heavy weight in the overall evaluation. Indeed, in its final oral submissions, CGI identified this aspect of the complaint as the key to understanding why the evaluation was fundamentally flawed.[78]

103. Canada Post argued that the rating scale was in keeping with the RFP. In all kinds of evaluations, rating scales that range from "below expectations" to "meets expectations" to "exceeds expectations" are common; thus, it is not surprising that Canada Post adopted a similar rating scale. Furthermore, CGI's argument interprets the basis of evaluation published in the RFP too narrowly, giving a semantic meaning to the word "meet" while ignoring the words that precede it (i.e. "*the extent to which* it meets" [emphasis added]). Canada Post argued that, on the contrary, it was clear on the face of the RFP that evaluating the

72. Articles 1015(4)(a) and (d) of *NAFTA* provide as follows: "An entity shall award contracts in accordance with the following: (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . . ."
73. Article 1008(1) of *NAFTA* provides that "[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a non-discriminatory manner; and (b) consistent with this Article and Articles 1009 through 1016."
74. See, for example, *Excel Human Resources* at para. 33; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*] at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at 10.
75. See Exhibit PR-2014-015-25B (protected), tab 2, exhibit B, Vol. 2K.
76. Exhibit PR-2014-015-01A (protected) at 36, Vol. 2.
77. CGI referred specifically to section B.1 of the Attachment B, Statement of Requirements, as well as to Questions and answers nos. 56, 57, 159 and 173. See Exhibit PR-2014-015-01A (protected), exhibit 1, annex 2, at 114, Vol. 2D; Exhibit PR-2014-015-01A (protected), exhibit 1, annex 1, at 193-201, Vol. 2.
78. *Transcript of Public Hearing*, 11 September 2014, at 118.

extent to which a proposal met the requirements would imply some judgment and a range of outcomes above or below the level of acceptable. It was also clear that the RFP insisted on detail and substantiation. On the other hand, nothing in the RFP suggested that simply asserting that the proposal met the minimum technical requirements would merit full marks. As such, using a rating scale that rewards suppliers for exceeding expectations does not change the nature of the evaluation.

104. Wipro submitted that the rating scale was not inconsistent with the published tender documents, as the necessary implication of a point rating system in an RFP is that a better bid would get a better score. To the extent that this was unclear to CGI, it should have requested clarifications from Canada Post at the time at which it read the tender documents, such that it is now too late for any argument about the clarity of the evaluation criteria in the RFP.[79]

105. There is no question that the rating scale itself was not disclosed in the RFP. However, as put by counsel for CGI,[80] the relevant question is whether it caused unfairness to bidders because they could not have expected from reading the tender documents that they would be evaluated in the manner set out in the rating scale.[81]

106. Subsection 3.2.2 of the Phase 2 SRIP informed bidders that their technical proposals would be "... evaluated on the extent to which it meets the Phase 2 Rated Requirements."[82] Furthermore, the same section also instructed that their technical proposals "... should contain detailed responses and reference to any attached substantiating documentation ...", which responses "... should be clear, direct and grouped together following the information/instructions provided in Section 5.0".[83]

107. Section 5.0 of the Phase 2 SRIP provided further specifics of the evaluation of different aspects of the proposals. Section 5.0 started by noting that bidders should "... submit a detailed Proposal that answers each of the Rated Criteria ..." and that "... the ability to follow instructions in the RFP Proposal is considered indicative of the [bidder's] ability to deliver the requested services."[84] The instruction to provide detailed, clear and substantiated responses was further repeated in section 5.0, as well as under each of the remaining subsections of section 5.0 which addressed specific aspects of the proposals.[85] The latter subsections also specifically outlined a non-exhaustive list of the type of information that bidders should include in their responses.[86]

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79. *Ibid.* at 156-59.
80. *Transcript of In Camera Hearing*, 11 September 2014, at 128-29.
81. Indeed, the Federal Court of Appeal has held that, while an RFP must identify all major evaluation criteria, it is not required to identify all aspects of each criterion which might be taken into account in the evaluation, provided the unidentified aspects are reasonably related to, or encompassed by, the express criterion. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 FCR 292, 2001 FCA 241 (CanLII) at para. 43. However, where the undisclosed criteria constitute a significant departure from the published criteria, the evaluation is unfair and unreasonable. *MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.* (6 March 2000), PR-99-034 (CITT) at 19-20; *Seprotech Systems Inc. v. Peacock Inc.*, 2003 FCA 71 (CanLII) at para. 32.
82. Exhibit PR-2014-015-25A at para. 147, Vol. 1E; Exhibit PR-2014-015-25B (protected), tab 1, exhibit A, subsection 3.2.2, Vol. 2K.
83. *Ibid.*
84. Exhibit PR-2014-015-25A at para. 149, Vol. 1E; Exhibit PR-2014-015-25B (protected), tab 1, exhibit A, section 5.0, Vol. 2K.
85. Exhibit PR-2014-015-25B (protected), tab 1, exhibit A, section 5.0, subsections 5.2.2, 5.2.3, Vol. 2K.
86. *Ibid.*

108. Finally, each subsection under section 5.0 of the Phase 2 SRIP identified and defined its own rated criteria, while the specific technical performance requirements were set out in several annexes.

109. According to the testimony of witnesses for all parties, it was well understood by all that Canada Post was looking for high-quality technical solutions, which Mr. Chartrand himself qualified as "best in breed",[87] although, as in any procurement where price is an important component, these solutions would also need to be competitive on price. Indeed, the RFP expressly outlined, among its strategic objectives, aligning the Canada Post Group of Companies with, and benefiting from, industry leading IT practices, as well as achieving efficiencies.[88]

110. It was also well understood among all participants that at least two considerations would enter into the evaluation of bids: the proposed technology and the description, explanation and substantiation of that technology provided in the bid.[89]

111. Mr. Bezanson's explanations in the *in camera* session, as confirmed by Mr. Wilson's testimony, satisfy the Tribunal that there was in fact only one evaluation criterion under which bids were evaluated on whether they exceeded the criteria *from the technology perspective* and that this is how the rating scale was interpreted and applied to all bids.[90] The Tribunal finds that this explanation can be supported on the basis of the words of the rating scale, although it is not explicit therein. Mr. Bezanson's testimony has been consistent and his credibility has not been challenged.

112. In this respect, the Tribunal recognizes that it does not have the testimony of the individual evaluators other than Mr. Bezanson, nor of course their scoring sheets; as such, there is little evidence to establish how those individual evaluators applied the rating scale on their own and on what considerations they made up their minds about a given score. However, while it would have been important to preserve the individual scoring sheets to allow for such verification, the Tribunal is satisfied that the information regarding the individual evaluators' use of the rating scale in their initial, individual evaluations is not determinative of the final evaluation outcome in this particular case. The evidence shows that any use of the rating scale by a single evaluator, inconsistent with what Mr. Bezanson described, would have been debated and discussed by the group of evaluators.

113. Given that the evidence shows that the initial assessments and rationale that a particular evaluator had made for each score regarding aspects of a bid may have evolved significantly as a result of the group discussion,[91] the Tribunal is satisfied that the prevailing consensus scores would have been based on the use of the rating scale described by Mr. Bezanson. Mr. Bezanson testified that the evaluation team evaluated every aspect of each bid on a requirement-by-requirement basis. The discussion was initiated on the basis of each evaluator reading out all their considerations for a particular evaluation. For each criterion, a different evaluator initiated the discussion, in order to ensure that no one evaluator had a disproportionate influence on the discussion and that all evaluators participated fully and freely.[92] The group discussion was continued until a unanimous decision on a specific score was reached.[93] Indeed, Mr. Bezanson specifically testified to

87. *Transcript of Public Hearing*, 11 September 2014, at 10, 57-59, 103-104.
88. Exhibit PR-2014-015-25A, tab 2, exhibit A, subsection 1.4.1, Vol. 1E.
89. *Transcript of In Camera Hearing*, 11 September 2014, at 37-39; *Transcript of Public Hearing*, 11 September 2014, at 15-16, 104-105.
90. *Transcript of In Camera Hearing*, 11 September 2014, at 39-40; 44-47; 70-71.
91. *Transcript of Public Hearing*, 11 September 2014, at 61-63, 86-87; *Transcript of In Camera Hearing*, 11 September 2014, at 55-57, 92-97.
92. *Transcript of Public Hearing*, 11 September 2014, at 61-62.
93. *Ibid.* at 62.

the importance of the rating scale in arriving at the consensus scores, under Mr. Wilson's and Ms. Walker's monitoring of its consistent use.[94]

114. Furthermore, the explanation offered by Mr. Bezanson as to how bids were evaluated from the technological perspective reflects the express terms of the RFP.[95] In this regard, while Mr. Chartrand offered an alternative interpretation regarding the scope of application of the particular criterion in question,[96] that restrictive interpretation is not supported by the express words and structure of the relevant section in the RFP. Further, to the extent that CGI considered that the words of the criterion imparted a different meaning, this was an ambiguity about which CGI would have needed to seek clarifications from Canada Post at the outset, as CGI's interpretation of the words of the criterion is clearly inconsistent with the way in which the RFP set out the applicable evaluation criteria.

115. CGI underlined however that the rating scale also evaluated bids on a scale going up to "exceed" in other respects, which were not identified in the RFP, and that this was unfair because, going into the bid, CGI expected to get maximum points (or scores in a high range) if it matched the technical requirements of the solicitation.[97]

116. Mr. Bezanson's explanation about how the rating scale was applied was that, for those evaluation criteria where the requirements could not be exceeded from the technological perspective per the RFP, the categorization along the scale and the differentiation between an insufficient, good, very good or excellent bid depended on the level of explanation, detail and substantiation regarding the solution that bidders had included in their bids.[98]

117. As such, in more specific terms, CGI's argument was that the statement in the RFP that bids would be evaluated on "... the extent to which [they] *meet* ..." [emphasis added] the requirements was misleading, as bids could in fact not achieve maximum points for meeting the technical requirements, but needed to include additional detail and explanations substantiating their proposed solutions in order to do so.[99] In other words, CGI argued that bidders could not reasonably expect that, in order to achieve maximum scores, they would need to be as responsive and detailed as possible on how they proposed to meet the technical requirements rather than simply meet the requirements.[100]

118. The Tribunal does not accept CGI's argument.

119. The RFP repeatedly instructed bidders that detail and substantiation should be included, providing examples of the types of information that should form part of bidders' responses, while indicating that those examples were not exhaustive. It repeatedly required demonstration and evidence, including in the definition of the rated criteria for the various sections of the RFP.[101]

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94. *Transcript of In Camera Hearing*, 11 September 2014, at 35, 46.
95. Exhibit PR-2014-015-25B (protected), tab 1, exhibit A, subparagraph 5.2.2.2(1)(b), Vol. 2K.
96. *Transcript of In Camera Hearing*, 11 September 2014, at 18-24.
97. See, for example, *Transcript of Public Hearing*, 11 September 2014, at 33; *Transcript of In Camera Hearing*, 11 September 2014, at 112-15.
98. *Transcript of In Camera Hearing*, 11 September 2014, at 35-41, 69-80.
99. *Ibid.* at 113-15.
100. *Ibid.* at 72-74, 112-16.
101. Section 5.0, subsections 5.2.2, 5.2.2.1, 5.2.2.2, 5.2.3, 5.2.3.2, 5.3 of the Phase 2 SRIP.

120. Moreover, bidders were specifically advised that the ability to follow the instructions of the RFP would be considered indicative of their ability to deliver the requested services.[102]

121. Furthermore, the evaluation of the extent to which a bid meets the requirements is quite clearly a *rated* evaluation in a competitive procurement process. This, in itself, implies an assessment based on some kind of professional judgment and resultant ranking as to the degree to which a bid meets the requirements and, in addition, the RFP underscored the rated nature of the evaluation by stating expressly that a proposal would be evaluated on the "*. . . extent to which* it meets . . ." the rated requirements [emphasis added]; the words "extent to which" are key, as they necessarily implied some kind of rated assessment.

122. In this context, the Tribunal finds that the RFP signalled to the bidders that Canada Post would evaluate the extent to which a bid meets the requirements and that it would do so in part on the demonstration and evidence provided to show exactly how and why the bid would meet the requirements and the stated evaluation criteria.

123. As such, the Tribunal also finds that the reasonable and necessary implication that the bidders should have drawn in the context of a competitive RFP was that the better they substantiated their solutions and showed how they meet the requirements, the better they were likely to score. Indeed, CGI's own evidence confirms that CGI *knew* that a better bid, both in terms of technology components and in terms of detail and substantiation, would get better scores.[103] Similarly, Wipro understood that the more comprehensive and detailed the response, the more points it would likely get.[104]

124. As a consequence, the Tribunal finds no basis to conclude that a rating scale that rewarded proposals that demonstrated exceptionally well how and on what basis they agreed to meet the requirements more than proposals that did so to a lesser degree fundamentally changed the basis of evaluation announced in the RFP. While CGI's evidence was that it expected to get *higher scores* than it did for matching the technical requirements of the solicitation and the type of effort that it put forward,[105] nothing in the RFP indicated that maximum points—or close to maximum—would be awarded to a bid for meeting the technical requirements set out by Canada Post, without regard to the quality of the demonstration and evidence in support thereof. Nor does the word "meets" in this context imply that Canada Post would award the same score for a good demonstration of how a bid proposed to meet the requirements as for an excellent one. This finding is in no way changed by the fact that the RFP imposed a minimum 70 percent pass threshold for the technical part of the evaluation. In fact, the evidence suggests that CGI's assumptions about the organization of the rating scale were made on the basis of prior experience in other procurement processes and the rating scales typically used in such cases.[106] However, each procurement must be considered on its own.

125. In the Tribunal's view, while the basis of evaluation announced in the RFP was sufficiently broad to be translated into different variations of rating scales, importantly, the rating scale that Canada Post chose to use is entirely consistent with what was indicated in the RFP.

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102. Exhibit PR-2014-015-25A at para. 149, Vol. 1E. Exhibit PR-2014-015-25B (protected), tab 1, exhibit A, section 5.0, Vol. 2K.
103. *Transcript of Public Hearing*, 11 September 2014, at 20; *Transcript of In Camera Hearing*, 11 September 2014, at 17-18.
104. *Transcript of Public Hearing*, 11 September 2014, at 105, 113-14.
105. *Ibid.* at 16, 32-33, 40.
106. *Ibid.* at 40; *Transcript of In Camera Hearing*, 11 September 2014, at 6, 15-16, 25-28.

126. In this regard, it appears that CGI may have made a decision at some point in the procurement process not to seek further details regarding how points would be allocated in this evaluation, because Canada Post had refused to provide further information regarding its scoring methodology in response to various questions from bidders.[107] However, where bidders consider that they lack sufficient indications in order to submit competitive bids, the procurement regime under *NAFTA* and the *CITT Act* requires them to react within the strict time frames established by section 6 of the *Regulations*, including by bringing a complaint to the Tribunal within 10 working days of when a government institution refuses to provide a satisfactory answer. In its seminal case *IBM Canada*, the Federal Court of Appeal underlined the functional importance of the limitation periods inherent in the procurement regime as follows:

> [20] . . . potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. The whole procurement process, as is illustrated by the Question and Answer method which ensures that potential suppliers equally know at all times what conditions have to be met, is meant to be as open as it is meant to be expeditious. It is focussed on achieving finality of contracts in the best possible time
>
> [21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

127. As such, the Tribunal finds that the rating scale applied by Canada Post did not depart from the basis of evaluation in the published tender documents. The Tribunal therefore finds that this ground of complaint is not valid.

Whether the Proposals Were Evaluated on Undisclosed Preferences for Specific Characteristics

128. CGI also alleged that Canada Post evaluated the bids on the basis of whether they included certain preferred characteristics that had not been disclosed in the tender documents.[108]

129. This argument was based on a column in the evaluators' scoring sheets that identified certain "characteristics of an excellent response" for each evaluated criterion. The scoring sheets specified that the identified characteristics were a non-exhaustive list of examples.[109]

130. Canada Post submitted that it should not be penalized for taking this additional step to increase objectivity and consistency in the inherently subjective task of the evaluators. The identified characteristics were drawn from and could be matched to the requirements. Further, these were not criteria *per se*, as the bidders could very well demonstrate an excellent response by providing characteristics other than the ones identified, and there is no indication that the evaluators "preferred" the identified characteristics.[110]

131. As Ms. Walker and Mr. Bezanson explained in the *in camera* hearing, some of the identified characteristics directly reproduced requirements from the RFP. However, other identified characteristics did

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107. *Transcript of Public Hearing*, 11 September 2014, at 40; *Transcript of In Camera Hearing*, 11 September 2014, at 26-28.
108. Exhibit PR-2014-015-46A (protected) at paras. 53-79, Vol. 2S; Exhibit PR-2014-015-58A (protected) at paras. 27-32, Vol. 2S.
109. Exhibit PR-2014-015-48 at para. 16, Vol. 1G; Exhibit PR-2014-015-25B, tab 2, exhibit B, Vol. 2K.
110. Exhibit PR-2014-015-48 at paras. 16-24, Vol. 1G; Exhibit PR-2014-015-48A (protected) at paras. 16-24, Vol. 2S; *Transcript of Public Hearing*, 11 September 2014, at 148-49.

not specifically track the RFP language. Mr. Bezanson explained that these had been developed by the subject-matter experts as guidelines for the other evaluators to help in evaluating particular criteria.[111]

132. Mr. Bezanson testified that, even if such other characteristics were not expressly identified in the RFP, technical people, including the bidders, would know that such characteristics were being sought out by the RFP.[112] He was not cross-examined on this point, nor did CGI proffer any evidence to the contrary.

133. Most importantly, however, the Tribunal finds that overall, and as concerns specifically the final consensus evaluation, the identified characteristics of an excellent response were not used as evaluation criteria. Mr. Bezanson specifically confirmed that bidders did not have to include the specific characteristics to maximize their points,[113] which is consistent with how they are presented on the scoring sheets themselves.

134. In this regard, in light of Mr. Bezanson's evidence that the identified characteristics were developed in order to guide some of the evaluators who were less familiar with a particular technical aspect, the Tribunal notes that there is a possibility that some of those evaluators indeed adhered too closely to the identified characteristics when evaluating such an aspect of a proposal, perhaps because they may have been unable to identify other different, but equally "excellent", characteristics in a bid. By doing so, such evaluators would effectively have fettered their discretion in evaluating a particular criterion, contrary to the express requirements of the RFP. Of course, there is no documentary or testimonial evidence on the record that could indicate the manner in which the individual evaluators, apart from Mr. Bezanson, proceeded.

135. Nevertheless, even assuming that this has indeed occurred, the Tribunal is satisfied that any such inappropriate fettering of discretion would have been weeded out at the consensus stage. Once again, as stated earlier, the consensus stage was the final and most important part of the evaluation, at which the evaluators engaged in deep discussions, criterion by criterion, requiring all the individual evaluators to read out loud all their reasons for a particular score. As such, at this stage, the Tribunal is satisfied that there would have been opportunity for other evaluators to underline one of their colleague's disproportionate reliance on a specific characteristic of an excellent response. Significantly, the Tribunal understands that this would also have been an opportunity for the subject-matter expert on the particular evaluated aspect to help, if necessary, the other evaluators identify *other* equally excellent characteristics in a bid. As such, the Tribunal finds, on the balance of probabilities, that the identified characteristics of an excellent response did not play any determinative part in the overall evaluation.

136. On the basis of the evidence, the Tribunal finds that the identified characteristics of an excellent response were not applied as undisclosed evaluation criteria or preferences. Accordingly, the Tribunal finds that this ground of complaint is not valid.

Whether the Scores Assigned to CGI's Technical Proposal Were in Accordance With the RFP

137. CGI's complaint in File No. PR-2014-015 was made as a result of CGI's impression that the information provided to it by Canada Post in the debriefings disclosed a pattern of misapplication and misinterpretation of evaluation criteria that resulted in unjustifiably low scores for its bid.[114] In its complaint, CGI identified specific areas in which it considered that the evaluation criteria had been misinterpreted or

111. *Transcript of In Camera Hearing*, 11 September 2014, at 52-54.
112. *Ibid.* at 53-54.
113. *Ibid.* at 54.
114. See, for example, Exhibit PR-2014-015-01 at para. 14, Vol. 1; *Transcript of Public Hearing*, 11 September 2014, at 117.

misapplied, or that its proposal had been evaluated unreasonably or even not at all. CGI also alleged that what it called "pervasive errors" may have been the result of Canada Post adopting a policy to move its IT services away from CGI.

138. Under the previous headings, the Tribunal has found that the rating scale and the characteristics of an excellent response were not undisclosed criteria or were not applied as such. Nevertheless, to address CGI's remaining contentions, the Tribunal must assess whether the procurement process reveals any bias or a reasonable apprehension of bias, and whether CGI's technical proposal and oral presentation were evaluated reasonably.

139. The Tribunal finds that there is no evidence on the record whatsoever that could support a finding of bias or of a reasonable apprehension of bias. CGI alleged that various circumstances had coloured the results of the evaluation of CGI's proposal and that Canada Post had adopted a policy against using CGI as its information technology provider. Canada Post has denied the existence of any bias, whether on the part of individual evaluators or at an institutional level. No documentary evidence capable of supporting a finding that such a policy existed was filed, and Canada Post's witnesses testified to the contrary.[115] They were not cross-examined on this point.

140. As various evaluation documents became available to CGI during this inquiry, its contentions of bias or reasonable apprehension of bias focused on allegations that the consensus scores attributed to CGI disclosed prejudice against it. CGI remarked that there was a downward trend in CGI's consensus scoring and an upward trend in Wipro's consensus scoring, when compared to the mathematical averages of individual scores for each criterion and argued that this was evidence of prejudice.

141. Canada Post submitted that an assumption that consensus scores will generally reflect the average scores assigned by individual evaluators fails to reflect the object, purposes and results of a consensus scoring regime. Canada Post argued that the final consensus score was based upon the agreement of all team members, as a result of a robust discussion of the preliminary scores and the strengths and weaknesses of the proposal. This may result in a consensus score that is higher or lower than the calculated average of the preliminary individual scores. The fact that CGI's scores tended to be lower after the consensus process and that other bidders' scores tended to be higher was not reflective of any prejudice against CGI or in favour of other bidders, and the Tribunal finds accordingly.

142. While the Tribunal recognizes that certain trends in consensus scoring versus individual scoring are not conclusive evidence of bias or even reasonable apprehension of bias, a noticeable downward or upward pattern between the average, or median, individual scores and the consensus scores may nevertheless raise suspicions.[116] Indeed, given Canada Post's very restrictive approach to debriefing, its destruction of documents and its overall lack of transparency, it is not surprising that CGI would be somewhat suspicious of the evaluation results.

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115. *Transcript of Public Hearing*, 11 September 2014, at 65-67.

116. In *TPG Technology Consulting Ltd. v. Canada*, 2014 FC 933 (CanLII), issued by the Federal Court on October 2, 2014, the Federal Court found that a similar fact pattern existed in that case. At paragraph 116, Zinn J. stated as follows: "While I agree with the Crown that the average or mean of the scores given individually is not determinative, it is informative". At paragraph 151, Zinn J. added as follows: "The basis for suspecting unfairness in the evaluation - deviation from the median individual scores - is not a sufficient basis for demonstrating unfairness."

143. In order to determine whether a reasonable apprehension of bias exists, the Tribunal considers the test of an informed person:

> [W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly.[117]

144. In this case, after reviewing both parties' submissions and the evidence, the Tribunal is of the view that the test for reasonable apprehension of bias has not been met. Canada Post has provided a reasonable explanation for the apparent trends. On the basis of the lengthy and consistent evidence of Canada Post's witnesses as to the manner in which the consensus evaluation unfolded,[118] the Tribunal is satisfied that the consensus scores were indeed determined through thorough discussions on the technical merit of each bid, rather than through the improper influence of prejudice against CGI or favouritism towards another bidder. In this regard, although it may have been helpful to have the individual worksheets of evaluators in order to assess this issue fully, the Tribunal recognizes that these were in effect the starting point for further substantive discussions and extensive debates in this case; as such, it is reasonable that these further discussions and the scores that result from them will not always reflect the averages, or medians for that matter, of individual scores.

145. Accordingly, the Tribunal finds that the variance between the individual scores and consensus scores is not indicative of prejudice against CGI and that an informed person would find no appearance of bias.

146. This leaves CGI's allegations that its technical proposal and its oral presentation were evaluated unreasonably in respect of specific technical requirements.

147. As pointed out by Canada Post, CGI is essentially requesting the Tribunal to re-evaluate the content of its bid.

148. The Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. In *Excel Human Resources*,[119] the Tribunal confirmed that it ". . . will interfere only with an evaluation that is *unreasonable*" and will substitute its judgment for that of the evaluators ". . . only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way."

149. Moreover, in *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc. v. Department of Public Works and Government Services*,[120] the Tribunal indicated that a government entity's evaluation ". . . will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling."[121]

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117. *Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT) at 12.
118. *Transcript of Public Hearing*, 11 September 2014, at 60-65; *Transcript of In Camera Hearing*, 11 September 2014, at 55-57, 92-97.
119. At para. 33.
120. (5 November 2008), PR-2008-023 (CITT) [*BMT*].
121. *BMT* at para. 25; see, also, *Northern Lights*.

150. Another well-established principle in Tribunal jurisprudence is that, while evaluators must evaluate the contents of the bid diligently, bidders bear the onus of demonstrating, in their proposals, how they meet the published requirements and evaluation criteria.[122]

151. In the GIR and its additional submissions based on the new issues raised in CGI's comments on the GIR, Canada Post provided explanations for why CGI did not obtain full marks on the various aspects with which CGI took issue, namely, subsections 5.2.1, 5.2.2, 5.2.3, 5.3.1 and 5.3.2 with their various subcomponents evaluated at Stage 7 of the evaluation plan, as well as the oral presentation evaluated at Stage 8.

152. In many circumstances, deductions resulted from a lack of details or explanations in CGI's technical proposal; this appears to be the main reason for which CGI lost points in many instances, including, at times, because it failed to follow the RFP instructions to match, with each requirement, all the sections of its bid that addressed such requirements. In many other instances, CGI took issue with the interpretation or application of specific technical criteria; however, in all cases, Canada Post provided reasonable explanations, such that there is no basis to conclude that the evaluators wrongly interpreted any of the criteria and requirements. In several places, CGI argued that its proposal had been judged more harshly than Wipro's proposal, even though they included similar information; however, it seems that Wipro's proposal in fact included more information or that, in other cases, reasonable explanations were provided for the different evaluations. Reasonable explanations were also provided in support of the assessment of CGI's oral presentation. Overall, the Tribunal finds that the assessments made were within the evaluators' discretion; indeed, they were based on sometimes "heated debates" between professionals.[123] Accordingly, the Tribunal finds no basis to interfere with the duly exercised professional judgment of the evaluators.

153. After considering the arguments of the parties and reviewing the evidence, the Tribunal is satisfied that tenable explanations have been provided by Canada Post in regard to all the various sections where CGI alleged that it should have obtained higher scores. Therefore, this ground of complaint is not valid.

REMEDY AND COSTS

Remedy

154. CGI's complaint is valid in part. Specifically, Canada Post breached Article 1017(1)(p) of *NAFTA* by destroying evaluation documents relevant to this procurement process.

155. Therefore, the Tribunal must consider the appropriate remedy, pursuant to subsections 30.15(2) and (3) of the *CITT Act*.

156. At the hearing, CGI submitted that the appropriate remedy would be to recommend that Canada Post issue a new solicitation and that the contract be cancelled at an appropriate time, taking into account Canada Post's operational requirements. CGI submitted that both the destruction of documents and the use of undisclosed criteria are significant systemic issues that, in this case, have negatively affected the integrity of the public procurement system and the public's confidence in that system. CGI added, in its written submissions, that Canada Post should compensate CGI for lost profit and lost opportunity for the period between contract award and re-issuance of the solicitation by Canada Post. In the alternative, CGI requested

122. *High Criteria Inc. v. Department of Public Works and Government Services* (16 April 2014), PR-2013-039 (CITT) at para. 9; *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at para. 67.

123. *Transcript of In Camera Hearing*, 11 September 2014, at 97.

compensation for lost profit or lost opportunity and, in the further alternative, its bid preparation costs.[124] Additionally, CGI requested that Canada Post adopt procedures that ensure that complete documentation is maintained for procurements in accordance with Article 1017(1)(p) of *NAFTA* and any other relief that the Tribunal deems appropriate.

157. Canada Post admitted that there has been a breach of Article 1017(1)(p) of *NAFTA* and submitted that it is already reviewing its policies. It submitted that the only remedy should be behavioural, as that breach had no impact on the evaluation. Furthermore, Canada Post argued that, even in the event that the Tribunal found valid any of the grounds of complaint concerning the evaluation itself, there should be no remedy that impacts the contract in place with Wipro, as there was no bad faith and no impact overall on the integrity of the procurement system or on the outcome of the evaluation as a whole; furthermore, it added that a cancellation of Wipro's contract would have significant financial, structural and personal implications. It further argued that compensation to CGI would be inappropriate in the circumstances.

158. Wipro submitted that the Tribunal should recommend no relief that would disrupt the contract in place, because the contract is too far along, a re-evaluation or re-solicitation would be costly due to the size of this procurement process, none of CGI's grounds of complaint would likely have affected the outcome overall and a compelling public interest exists in allowing the contract to continue.

159. In recommending an appropriate remedy under subsection 30.15(3) of the *CITT Act*, the Tribunal must consider all the circumstances relevant to the procurement in question, including (1) the seriousness of the deficiencies found by the Tribunal, (2) the degree to which CGI and other interested parties were prejudiced, (3) the degree to which the integrity and efficiency of the competitive procurement system were prejudiced, (4) whether the parties acted in good faith and (5) the extent to which the contract was performed.

160. The Tribunal agrees with CGI that the destruction of documents relevant to the evaluation in a procurement process is serious due to its impact on the integrity and efficiency of the competitive procurement system. The destruction of relevant documents causes bidders and the public to view the whole procurement process with suspicion; however, confidence in that system is imperative, as it increases participation in the procurement system and increases the chances of the government getting quality goods and services at minimum expense.[125] This inquiry is a case in point that the loss of part of the evaluation record creates additional difficulties, both procedural and substantive, in the Tribunal's inquiry into a complaint. Although it was not the case here for reasons explained earlier, the loss of relevant documents and information can potentially prevent the procuring entity from reasonably justifying its decisions and the Tribunal from determining what has transpired in the procurement process; as such, the loss of pertinent documents and information can result in a procurement process being found unreasonable, even if it had otherwise been carried out in compliance with all applicable standards. Needless to say, this creates unnecessary inefficiencies, additional delays and extra costs of all kinds to the government, the bidders and, ultimately, the taxpayers.

161. In this case, CGI was prejudiced by Canada Post's breach with respect to the destroyed evaluation documents in several ways. Canada Post's breach surely raised further suspicions about this procurement process from CGI's perspective, in a context where Canada Post's lack of transparency, in terms of its refusal to disclose pertinent information in debriefing, had already given it cause for concern. Had complete information regarding the evaluation and the reasons for deducting points been available to CGI at the

124. Exhibit PR-2014-015-46 at para. 252, Vol. 1G.
125. *Almon* at para. 23.

debriefing, CGI may have found the explanation more persuasive and may have avoided part of its complaint. Instead, CGI had to incur additional expenses due to the substantive and procedural complications occasioned by the fact that the individual scoring sheets were unavailable, notably as it had to bring an additional complaint when this fact came to light.

162. However, the breach of Article 1017(1)(p) of *NAFTA*, which occurred after the award of the contract, could have had no impact on CGI's ability to participate in the procurement process or its capacity to be awarded the contract. In addition, because other evidence on the record was sufficient to satisfy the Tribunal that the evaluation was nevertheless carried out in a reasonable fashion in compliance with *NAFTA*, the identified breach is inconsequential to the outcome of the solicitation process and the resulting contract award.

163. The Tribunal is satisfied that all parties involved acted in good faith. In particular, the evidence indicates that the evaluators and other individuals involved in this procurement process approached it in good faith.

164. In addition, the evidence indicates that significant expenses have already been incurred by Wipro in order to set up the data centre, and a significant amount of work has been done by Wipro and Canada Post employees and representatives.[126] In the circumstances, a transition to a different supplier would also be complex and costly, as much of the work effected thus far would need to be re-started.[127] Furthermore, the evidence indicates that Canada Post faces upcoming deadlines which, if missed, could have significant impacts on its operations and business.[128] Finally, the Tribunal has considered the evidence on the confidential record regarding the terms of Wipro's contract, as well as the modalities and consequences of a termination of the contract.[129]

165. On balance, the Tribunal finds that the appropriate remedy in the circumstances is one that ensures that Canada Post changes its practices in future procurements, but one that does not disturb or delay the contract awarded to Wipro. Indeed, the Tribunal does not consider that fairness or the general public's interest in the integrity and efficiency of the competitive procurement system requires recommending a remedy that would put in question the contract awarded to Wipro, because, as explained, the breach identified did not affect CGI's ability to compete in this procurement process and be awarded the contract, and there is a significant public interest in the continuation of the contract. Recommending a more sweeping remedy, like re-tendering, would in the circumstances have a greater negative impact on the integrity and efficiency of the procurement system than the prejudice that has already been occasioned. For similar reasons, the Tribunal will not award CGI its bid preparation costs pursuant to subsection 30.15(4) of the *CITT Act* or compensation for lost profit or loss of opportunity.

166. As such, the Tribunal recommends that Canada Post Corporation, whether conducting procurements on its own behalf or through Innovapost Inc., change its policies and practices regarding the preservation of documents related to a procurement process so that they are consistent with the requirements of Article 1017(1)(p) of *NAFTA*, as it has already indicated that it would do.

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126. *Transcript of Public Hearing*, 11 September 2014, at 106-12; *Transcript of In Camera Hearing*, 11 September 2014, at 7-11, 103-106.
127. *Transcript of Public Hearing*, 11 September 2014, at 109-10; Exhibit PR-2014-015-41 at paras. 51-82, Vol. 1G; Exhibit PR-2014-015-41A (protected) at paras. 51-82, tab 1, Vol. 2R.
128. *Transcript of Public Hearing*, 11 September 2014, at 97-98. *Transcript of In Camera Hearing*, 11 September 2014, at 66-69.
129. *Transcript of In Camera Hearing*, 11 September 2014, at 106-109.

Costs

167. CGI requested its litigation costs. Canada Post requested its costs in responding to the complaint should it be dismissed, but submitted that if the complaint is found to be valid in part, each party should bear its own costs. Wipro did not request costs.

168. In light of the fact that the complaint is valid in part, but also taking into account the fact that the procedural and substantive complexity in this inquiry was, in the Tribunal's view, attributable in good part to the lack of transparency demonstrated by Canada Post, particularly in its handling of the debriefing provided to CGI and its failure to maintain complete records, the Tribunal has decided to award CGI its reasonable costs incurred in the Tribunal's process, which costs are to be paid by Canada Post Corporation or Innovapost Inc.

169. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. In this regard, the solicitation in issue concerned a complex service project involving many evaluated requirements. The complaint involved several issues touching on different aspects of the procurement process and several requirements under *NAFTA*. Further, the proceeding itself involved many motions and requests, the filing of additional submissions and evidence beyond the normal scope of the proceedings, a hearing and a 135-day time frame. Therefore, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and the preliminary indication of the amount of the cost award is $4,700.

DETERMINATION OF THE TRIBUNAL

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

171. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that Canada Post Corporation, whether conducting procurements on its own behalf or through Innovapost Inc., develop and implement procedures that ensure that complete documentation is maintained regarding such procurements, as required by Article 1017(1)(p) of *NAFTA*.

172. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards CGI its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Canada Post Corporation or Innovapost Inc. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,700. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Jean Bédard

Jean Bédard
Presiding Member

IN THE MATTER OF complaints filed by CGI Information Systems and Management Consultants Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a decision to combine the complaint cases as a single proceeding, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*.

BETWEEN

CGI INFORMATION SYSTEMS AND MANAGEMENT CONSULTANTS INC.	**Complainant**

AND

CANADA POST CORPORATION AND INNOVAPOST INC.	**Government Institutions**

CORRIGENDA

The second bullet of paragraph 67 should have read as follows:

Whether Canada Post's evaluation complied with Articles 1013(1) and 1015(4) of *NAFTA*

The heading of paragraph 97 should have read as follows:

Whether Canada Post's Evaluation Complied With Articles 1013(1) and 1015(4) of *NAFTA*

Jean Bédard
Jean Bédard
Presiding Member